



In the Matter of:

PAUL A. MILLER,

ARB CASE NO. 05-111

COMPLAINANT,

ALJ CASE NO. 05-STA-020

v.

DATE: August 30, 2007

BASIC DRILLING COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul A. Miller, *pro se*, Las Vegas, Nevada

For the Respondent:

Mark Harambasic, *pro se*, Apache Junction, Arizona

ORDER OF REMAND

Paul A. Miller filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2007),¹ and its implementing regulations at 29 C.F.R. Part 1978

¹ The STAA has been amended since Miller filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

(2006). Miller alleged that his employer, Basic Drilling Company (Basic), violated the STAA when it terminated his employment on September 9, 2003.

A Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing Miller's complaint as untimely filed. This case is before the Administrative Review Board (ARB) pursuant to the STAA's automatic review procedure. 29 C.F.R. § 1978.109(a). Because the ALJ committed legal error, we vacate his recommended decision and remand for further proceedings.

BACKGROUND

Miller began work for Basic as a truck driver on June 25, 2003, and was fired on September 9, 2003, after refusing to drive a truck he considered unsafe. Miller filed a complaint on September 16, 2004, with the San Francisco regional office of DOL's Occupational Safety and Health Administration (OSHA). He stated in his complaint that after being fired in September 2003, he contacted the Arizona Department of Occupational Safety and Health (ADOSH) and left a message for a Clarence Mason detailing his situation. He also called the Arizona Department of Public Safety, and was told the matter would be looked into and a return call made.

OSHA denied Miller's claim as untimely. Miller requested a hearing, and on March 4, 2005, the ALJ issued a "Notice of Assignment and Deadline for Filing Motions Based on the Statute of Limitations."

In response to the Notice, Miller submitted a March 11, 2005 letter to the ALJ stating that he talked with Clarence Mason at ADOSH for 15 minutes on September 15, 2003. Miller stated that Mason took his name and telephone number and said he would get back to Miller. He also asserted that he called the "regular OSHA number at (800) 356-4674, the Arizona Department of Transportation (ADOT), and the state public safety department. Miller added that he had called "all of these agencies" between the hours of 9:00 a.m. and 12:00 p.m. "whenever I could get through" on the first Monday of every month since October of 2003, but no one ever returned his calls or contacted him by mail. Miller stated that in August 2004 an ADOT spokesman told him to file a complaint with the San Francisco OSHA office (which he did on September 16, 2004). Finally, Miller reported that he had been in regular contact with a staff member in a Congressman's office in Mesa, Arizona since October 2004.

Basic's vice-president, Mark Harambasic, disputed Miller's statement that he had been fired for refusing to drive an unsafe truck and requested that Miller's complaint be dismissed as untimely filed in a response by letter to the ALJ's Notice. Miller did not respond to Harambasic's letter. On June 7, 2005, the ALJ dismissed Miller's complaint as untimely filed.

JURISDICTION AND STANDARD OF REVIEW

By authority of 49 U.S.C.A. § 31105(b)(2)(C), the Secretary of Labor has delegated her jurisdiction to decide this matter to the Administrative Review Board (ARB). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2004).

In reviewing the ALJ's conclusions of law, the ARB, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 2004). Therefore, we review the ALJ's conclusions of law de novo. *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-022, 029, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

Employees alleging employer retaliation in violation of the STAA must file their complaints within 180 days after the alleged violation occurred. 49 U.S.C.A. § 31105(b)(1). The STAA's implementing regulations provide that complaints must be filed with DOL's OSHA.² No particular form of complaint is required, 29 C.F.R. § 1978.102(b),³ but the complaint should be filed with the OSHA Area Director responsible for enforcement actions in the area where the employee resides. 29 C.F.R. § 1978.102(c). Nonetheless, filing with any OSHA officer or employee is sufficient, as long as the complaint is filed within 180 days of the alleged STAA violation. 29 C.F.R. § 1978.102(d)(1).

The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 148; ALJ No. 02-STA-050, slip op. at 4 (ARB Mar. 31, 2006).

² The regulations define OSHA as the Occupational Safety and Health Administration in the Department of Labor. 29 C.F.R. § 1989.101(f).

³ *Accord Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37 (Dec. 31, 2002)(although the complainant did not file a written complaint with OSHA, he nevertheless filed a timely complainant when he visited the OSHA office in person to file a complaint, the OSHA representative memorialized his complaint in written notes and entered identifying information in a logbook, and the notes the OSHA representative took along with other records at the office sufficiently identified the essential nature of the complaint and the identity of the parties). *See also Farrar v. Roadway Express* ARB No. 06-003, ALJ No. 2005-STA-046, slip op. at 8 (ARB Apr. 25, 2007).

Because a major purpose of the 180-day period is to allow the Secretary to decline to entertain complaints that have become stale, complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely. 29 C.F.R. § 1978.102(d)(2). The regulation provides for extenuating circumstances that will justify tolling of the 180-day period, such as when the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action or when the discrimination is in the nature of a continuing violation. 29 C.F.R. § 1978.102(d)(3). However, the filing of a complaint seeking remedies other than those available under the STAA with another agency does not justify tolling of the 180-day period. *Id.* See also *Hillis*, slip op. at 4-7.

In this case, the ALJ indicated that Miller made a verbal complaint to ADOSH within the 180-day limitations period. However, he found that Miller's contacts with ADOSH and ADOT could not satisfy the 180-day limitations requirement because neither agency's employees were OSHA employees. R. D. & O. at 2. The ALJ took official notice that the "regular OSHA number" that Miller claimed to have called was in fact a toll-free number for the National Institute for Occupational Safety and Health (NIOSH). He determined that because NIOSH was not part of OSHA, Miller's calls could not meet the 180-day requirement. Finally, the ALJ found that Miller's contact with the congressman's office occurred more than a year after the alleged STAA violation and therefore could not meet the filing limitation. R. D. & O. at 2-3.

While the ALJ concluded that Miller's complaint was untimely filed, he did not specifically address the equitable tolling factors. This constitutes legal error, requiring remand. See *Hillis*, slip op. at 7-9 (ARB applied equitable tolling factors and tolled the time between when the complainant filed in the wrong forum and the time he was told it was the wrong forum but, ultimately, *Hillis* failed to file with the proper agency, OSHA, in a timely manner once he had notice that he was in the wrong forum).

As a general matter, in determining whether equity requires the tolling of a statute of limitations, the ARB is guided by the principles that courts have applied to cases with statutorily-mandated filing deadlines. *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 05-ERA-014, slip op. at 4 (Feb. 28, 2007). Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

See *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981) (citations omitted).

In *Hillis*, the ARB explained that, with respect to raising a claim in the wrong forum, the phrase "filing with another agency" in section 1978.102(d)(3) refers to

complaints filed “regarding the same general subject with another agency,” i.e., the pursuit of alternative remedies with agencies having jurisdiction to award relief under statutes other than the STAA.” Slip op. at 6. The ARB thus held that the regulation’s reference to “filing with another agency” did not preclude equitable tolling when a complainant has filed a STAA complaint in the wrong forum. Slip op. at 7.

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of demonstrating the existence of circumstances supporting tolling. *Herchak v. America W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003), citing *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). The complainant must prove that he mistakenly “filed” the precise statutory claim in issue in the wrong forum, but within the filing period. *Immanuel v. Wyoming Concrete Indus., Inc.*, 95-WPC-003, slip op. at 3 (ARB May 28, 1997). Further, courts ““have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”” *Herchak*, slip op. at 4-5.

In this case, Miller stated in his complaint that he left a message for Clarence Mason of ADOSH and “detailed” the situation regarding his firing in September 2003. Miller also stated that he contacted the state public safety department and was told that the matter would be looked into and he would receive a return call. Miller added: “As I know how slow the government works, I have been waiting until I called your office,” (referring to his August 2004 telephone call to the OSHA office in San Francisco).

Further, Miller asserted in his March 11, 2004 letter that he talked with Mason, who took his name and telephone number and said he would get back to him. Miller added that during his monthly telephone calls to the state agencies he was told that a representative would be contacting him but he never got a response. He complained that he had “received the run around since the beginning.” It appears that he was not told that he was in the wrong forum until September 14, 2004.

Given that there was no hearing and that Miller’s factual assertions regarding his complaint are thus undisputed, we must remand this case for the ALJ to consider whether Miller’s contacts with the state agencies constitute filing a claim in the wrong forum, and if so, whether equitable tolling is applicable. *See Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 02-AIR-008, slip op. at 16 (ARB Jan. 31, 2006) (ALJ’s errors regarding retroactive application of AIR 21, actionable adverse actions, standards establishing a hostile work environment, and misapplication of parties’ burdens of proof required remand).

CONCLUSION

The ALJ failed to consider whether Miller was entitled to equitable tolling in failing to file his STAA complaint within 180 days of the alleged adverse action.

Therefore, without expressing any opinion on the timeliness of Miller's complaint or the application of equitable tolling principles, we **VACATE** the ALJ's decision and **REMAND** this case for further proceedings consistent with this Order.

SO ORDERED.

M. CYNTHIA DOUGLASS
Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge