In the Matter of:

REX EUBANKS,

COMPLAINANT,

v.

A.M. EXPRESS, INC.,

RESPONDENT.

ARB CASE NO. 08-138

ALJ CASE NO. 2008-STA-040

DATE: September 24, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:
Patrick Barton, *President of A.M. Express*, Escanaba, Michigan

FINAL DECISION AND ORDER

Rex Eubanks filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on March 7, 2008. He alleged that his employer, A.M. Express, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,[1] when A.M. Express engaged in continuous blacklisting. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a

[1] 49 U.S.C.A. § 31105 (West 2008).

vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Eubanks' complaint as untimely filed. We affirm.

BACKGROUND

Eubanks worked for A.M. Express, a commercial motor carrier engaged in transporting products on the highways.[2] He alleged that he complained about deficiencies relating to the safety of his truck such as a sleeper berth not suitable for sleeping, an exhaust leak, an unsecured hood, bald tires, poor wheel alignment, unsecure doors, and worn brake shoes.[3] On or about March 7, 2008, Eubanks filed an OSHA complaint, alleging that because of his safety complaints the Respondent retaliated against him by engaging in retaliatory blacklisting.[4] An OSHA Investigator concluded that Eubanks did not timely file the complaint and, therefore, recommended that his claim be dismissed.[5] On April 29, 2008, Eubanks requested a hearing before an ALJ.[6] Eubanks alleged that A.M. Express terminated his employment on or about March 14, 2007.[7] Eubanks' complaint does not allege that A.M. Express discriminated against him when it terminated his employment, but instead rests solely on the alleged adverse action of blacklisting.

On May 14, 2008, Eubanks filed a Declaration of Rex Eubanks and Complainant's Brief Concerning Timeliness of Complaint wherein he explained that after A.M. Express discharged him, he had trouble finding work, which led him to suspect that he was being blacklisted. Eubanks explained that a DAC report is an employment record maintained by a consumer reporting agency on commercial truck drivers and that he had authorized all of his prospective employers to access his DAC report. Eubanks requested a copy of his DAC Report and in early August of 2007 he received a copy of it. The report indicated that A.M. Express reported to the consumer reporting agency that he had had a late pick up and delivery. Eubanks stated that he had never been late for a pick up or delivery except when he could not meet a schedule without violating the hours-of-service regulations. He maintains prospective employers viewed this information about a late pick up and delivery and that it has caused him to be unable to obtain

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2 OSHA Final Investigation Report, March 26, 2008.

3 S*ee* OSHA Final Investigation Report, March 26, 2008; Declaration of Rex Eubanks, May 14, 2008.

4 OSHA Final Investigation Report, March 26, 2008.

5 *Id.*

6 *See* 29 C.F.R. § 1978.105(a) (2006).

7 *Id.*

employment. Finally, Eubanks stated that this false information is still in his DAC report at this time.

On May 29, 2008, the ALJ issued an Order to Show Cause why the claim should not be dismissed as untimely because it was filed more than 180 days after the alleged violations occurred. The Order indicated that this matter would be dismissed (or, alternatively, summary judgment would be granted in the Respondent's favor) absent a showing of good cause why it should not be dismissed or summary judgment should not be granted. Neither party responded to the Order to Show Cause.

On September 23, 2008, the ALJ issued her Recommended Decision and Order Dismissing Claim as Untimely (R. D. & O.) because neither party had shown good cause for the matter to proceed and because the record showed that the action should be dismissed as untimely. The ALJ further found that there was no issue of material fact and that the Respondent was entitled to judgment or summary decision as a matter of law. Accordingly, the ALJ dismissed Eubanks' complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) her authority to issue final agency decisions under the STAA.[8] The Board automatically reviews an ALJ's recommended STAA decision.[9] The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[10]

Here, the ALJ evaluated Eubanks' complaint both under her Order to Show Cause and, alternatively, under summary judgment procedures. Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.[11] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[12] Therefore, the Board reviews the ALJ's conclusions of law de novo.[13]

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[8] Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

[9] 29 C.F.R. § 1978.109(c)(1).

[10] 29 C.F.R. § 1978.109(c).

[11] 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[12] 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

We review an ALJ's recommended grant of summary decision de novo.[14] That is, the standard the ALJ applies also governs our review. The standard for granting summary decision is essentially the same as that found at Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue of material fact. We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[15] The determination of whether facts are material is based on the substantive law upon which each claim is based.[16] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[17]

Although the Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order, neither party has done so.

THE LEGAL STANDARDS

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[18]

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13 *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

14 *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008). The ALJ properly converted the motion to dismiss to a motion for summary decision, 29 C.F.R. § 18.40 (2008), because he considered evidence contained outside of the pleadings. Recommended Decision and Order (R. D. & O.) at 2.

15 *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

17 *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

18 49 U.S.C.A. § 31105(a)(1).

Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA not later than 180 days after the alleged violation occurred.[19] The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling principles.[20]

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.[21] A STAA 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.[22] The regulation also provides that "[t]he pendency of a grievance-arbitration proceeding[]" or "filing with another agency" are examples that do not justify tolling of the 180-day period.[23]

DISCUSSION

It is undisputed that Eubanks did not file his complaint until March 7, 2008, which was almost one year after A.M. Express terminated his employment on or about March 14, 2007. Additionally, he filed approximately seven months or 210 days after he received the DAC Report from USIS Commercial Services that he alleged showed that the Respondent had blacklisted him. Accordingly, Eubanks' complaint is untimely as to each of the alleged adverse actions. We must therefore determine whether Eubanks is entitled to equitable tolling of the filing period.

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.[24] Accordingly, the Board has recognized three situations when tolling is proper:

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[19] 49 U.S.C.A. § 31105(b)(1).

[20] *See, e.g.*, *Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 3 (ARB Aug. 30, 2007).

[21] 29 C.F.R. § 1978.102(d)(2).

[22] 29 C.F.R. § 1978.102(d)(3).

[23] *Id.*

[24] *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (ARB Feb. 28, 2007).

> (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.[25]

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.[26] Furthermore, ignorance of the law is generally not a factor that can warrant equitable tolling.[27]

Eubanks has not asserted that any of the above situations apply; rather, he argued to the ALJ that he has been "continuously blacklisted" and that he is currently being blacklisted because the DAC Report, wrongly reflecting that he had a late pick up and delivery, is still accessible to prospective employers at this time.[28]

While the STAA regulations permit tolling the 180-day limitations period under certain circumstances, we agree with the ALJ that it is not permitted in this situation. As the ALJ found, Eubanks knew by at least August 15, 2007, that his DAC report contained information about him that he believed was false, was supplied by A.M. Express, and constituted blacklisting. Assuming all facts in the light most favorable to Eubanks, he had 180 days from the time when he discovered that A.M. Express had supplied allegedly false information for inclusion in the DAC report to file his STAA claim because this was when he received "final, definitive, and unequivocal notice" of an adverse employment action by the Respondent.[29] Rather than file within this time period however, he waited approximately 210 days before submitting his complaint.

Thus, none of the three situations recognized in *School District of Allentown* is applicable in this case, i.e., A.M. Express did not mislead Eubanks in regard to the time limitations for filing a petition for review, Eubanks was not prevented from filing the petition by some extraordinary event, and he did not file the petition in the wrong forum.

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[25] *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

[26] *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).

[27] *Hemingway v. Northeast. Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 4-5 (ARB Aug. 31, 2000).

[28] Complainant's Brief Concerning Timeliness of Complaint at 2-6.

[29] *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-035, slip op. at 5 (ARB Dec. 16, 2005).

Additionally, there is no continuous violation because Eubanks alleged that A.M. Express performed only one adverse action—the act of providing false information about him for the DAC report. That the DAC report is still accessible as maintained by the consumer reporting agency does not create a continuous violation by A.M. Express. As explained by the ALJ in her R. D. & O., "the last discriminatory act alleged occurred outside of the limitations period, and [the] Complainant's attempt to rely upon potential present effects from that past violation is of no avail." Although the three reasons to find equitable tolling is appropriate are not necessarily exclusive, Eubanks' allegations are insufficient to support a waiver of the time limit for filing in this case.[30]

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined all of the evidence of record. After viewing the evidence and drawing inferences in the light most favorable to Eubanks, the ALJ found that here was no question of material fact regarding the timeliness of Eubanks' complaint and dismissed the complaint as untimely. Since the record contains no evidence that Eubanks filed an STAA complaint within 180 days of the alleged adverse actions and does not support the application of waiver, equitable tolling, or estoppel, the ALJ properly dismissed Eubanks' claim. Thus, we **AFFIRM** her Recommended Decision and Order and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

[30] *Accord Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, Order Accepting Petition for Review and Establishing Briefing Schedule, slip op. at 4 (ARB Nov. 8, 1999).