In the Matter of:

ROMEO EDMUND, **ARB CASE NO. 09-034**

COMPLAINANT, **ALJ CASE NO. 2009-STA-003**

v. **DATE: November 19, 2009**

METROPOLITAN TRANSIT AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Romeo Edmund filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on September 8, 2008. He alleged that his employer, the Metropolitan Transit Authority (MTA), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,[1] when MTA engaged in retaliatory actions against him and eventually discharged him on April 16, 2007. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Edmund's complaint as untimely filed. We affirm.

BACKGROUND

Edmund drove a bus for MTA, a commercial motor carrier engaged in transporting products on the highways.[2] He alleged that MTA wanted to get rid of him to cover up security

[1] 49 U.S.C.A. § 31105 (Thomson/West 2007).

[2] Edmund's Complaint, at 1, September 8, 2008.

breaches it had made and injuries he had sustained due to an armed robbery that occurred on his bus while he was the driver.[3] On September 8, 2008, Edmund filed an OSHA complaint, alleging that the Respondent retaliated against him, harassed him, reassigned him, took his personal leave, discriminated against him, demoted him, and ultimately terminated his employment.[4] An OSHA Investigator concluded that Edmund did not timely file the complaint and, therefore, dismissed it.[5] Edmund objected to the Secretary's Findings and requested a hearing before an ALJ.[6]

The ALJ issued an Order to Show Cause why the complaint should not be dismissed as untimely because Edmund filed it more than 180 days after the alleged violations occurred. The Order indicated that failure to submit a response within 30 days would be deemed an acknowledgment as to the accuracy of the date Edmund alleged he was discharged and the date he filed his complaint and would result in dismissal of his complaint as untimely filed. The ALJ issued an Amended Order to Show Cause allowing Edmund 30 days from the amended order to respond. In a letter titled "Order to Show Cause," Edmund stated that he was entitled to equitable principles and that there had been extenuating circumstances and a continuing violation. In a separate document titled "Order to Show Cause," Edmund stated that the Equal Employment Opportunity Commission (EEOC) issued him a right to sue letter on August 24, 2007, and that his Title VII claim was filed within 90 days from that date.[7]

The ALJ issued a Recommended Decision and Order Dismissing Claim as Untimely (R. D. & O.) because he concluded that an EEOC charge cannot toll the STAA's statute of limitations and found that nothing in Edmund's response supported a continuing violation theory. Therefore, the ALJ found that the Edmund did not timely file his complaint and he recommended that it be dismissed.

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

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[3] Edmund's Complaint, at 3, Sept. 8, 2008.

[4] *Id.* at 1.

[5] Secretary's Findings, at 1, Sept. 15, 2008.

[6] *See* 29 C.F.R. § 1978.105(a) (2009).

[7] Edmund also wrote to the ALJ in a letter dated November 11, 2008, that did not address the timeliness issue requested in the Order to Show Cause, but instead requested subpoenas and attached exhibits in support of this request.

[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).

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]

The Board reviews an ALJ's recommended grant of summary judgment de novo.[11] The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.[12] Thus, pursuant to 29 C.F.R. § 18.40(d) (2009), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[13]

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.[14] Although the ALJ noted that the parties were permitted to file briefs with the ARB within 30 days of the R. D. & O., neither party submitted a brief.[15]

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

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9 29 C.F.R. § 1978.109(c)(1).

10 29 C.F.R. § 1978.109(c).

11 *Farrar v. Roadway Express*, ARB No. 06-003, ALJ No. 2005-STA-046, slip op. at 6 (ARB Apr. 25, 2007) (ARB reviews summary decisions under § 31105 of STAA de novo).

12 *White v. J.B. Hunt Transp., Inc.*, ARB No. 06-063, ALJ No. 2005-STA-065, slip op. at 3 (ARB May 30, 2008).

13 *Id.*

14 *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).

15 29 C.F.R. § 1978.109(c)(2).

because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[16]

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.[17] Nevertheless, 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.[18] 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.[19] We have interpreted the phrase "filing with another agency" as filing complaints "'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."[20] We therefore have concluded that this provision does not preclude us from tolling the limitations period when a complainant has filed a STAA complaint in the wrong forum.[21]

DISCUSSION

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.[22] It is undisputed that Edmund did not file his complaint until September 8, 2008, which was over one year after MTA terminated his employment on or about April 16, 2007. Accordingly, Edmund's complaint is untimely as to each of the alleged adverse actions. However, the STAA limitations period is not jurisdictional and therefore is subject to equitable modification.[23]

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16 49 U.S.C.A. § 31105(a)(1).

17 29 C.F.R. § 1978.102(d)(2).

18 29 C.F.R. § 1978.102(d)(3).

19 *Id.*

20 *Hillis v. Knochel Bros., Inc.*, ARB No. 03-136, ALJ No. 2002-STA-050, slip op. at 6 (ARB Mar. 31, 2006).

21 *Id.* at 7.

22 49 U.S.C.A. § 31105(b)(1).

23 *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).

But the Supreme Court has noted that equitable relief from limitations periods is "typically extended ... only sparingly."[24] In determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School District of Allentown v. Marshall.*[25] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[26] the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[27]

Although Edmund's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[28] Furthermore, ignorance of the law is generally not a factor that can warrant equitable modification.[29]

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[24] *Irwin v. Veterans Admin.*, 498 U.S. 89, 96 (1990).

[25] *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981).

[26] 15 U.S.C.A. § 2622 (West 2004).

[27] *School Dist. of Allentown*, 657 F.2d at 20 (internal quotations omitted). This case arises in the Fifth Circuit, in which the court has distinguished between equitable tolling and equitable estoppel as grounds for tolling limitations periods. *Rhodes. v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878-79 (5th Cir. 1991). In *Rhodes*, the court wrote that equitable tolling "'focuses on the plaintiff's excusable ignorance of the employer's discriminatory act'" and equitable estoppel "'examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights.'" *Id.* at 878-79 (quoting *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986), *but see Ramirez v. San Antonio*, 312 F.3d 178, 184 (5th Cir. 2002) (stating that equitable tolling applies only when an employer's affirmative acts mislead the employee), *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 391 (5th Cir. 2002) (stating that equitable estoppel does not hinge on misconduct of the defendant, but on "whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period."). The *Rhodes* articulation appears to be the rule most consistently followed by the Fifth Circuit and in any event Edmund has not argued that equitable estoppel is applicable to this case.

[28] *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

[29] *Accord Wakefield v. R.R. Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast. Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 4-5 (ARB Aug. 31, 2000); *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005).

Edmund argued to the ALJ that the ALJ should equitably toll the limitations period because there had been "extenuating circumstances and [a] continuing violation."[30] However, he did not describe the extenuating circumstances or explain his theory that there had been a continuing violation. In another document titled "Order to Show Cause," Edmund stated that a Title VII claim he had brought before the EEOC had been filed within the 180-day limitations period and that it had been filed within 90 days of his Notification of Right to Sue from the EEOC. In this complaint, Edmund alleged that MTA discriminated against him and eventually terminated his employment based on his race and color. He also claimed that he was "discharged especially after he was shot at, in the bus, while at work." In a letter which was presumably sent to the ALJ, Edmund stated that MTA fired him because he was late for work on April 16, 2007, the day of his termination.

We agree with the ALJ that equitable tolling is not warranted here. As discussed by the ALJ, whatever EEOC charge Edmund may have filed based on his race is unrelated to the STAA. There is nothing in the record to suggest that Edmund filed the precise statutory claim in the wrong forum. Neither is there anything in the record to suggest that any of the alleged adverse actions continuted past the date of termination, April 16, 2007. Edmund had 180 days from his termination to file his STAA complaint because this was the date on which MTA gave him "final, definitive, and unequivocal notice" of his last alleged adverse employment action.[31] Rather than file within this time period however, he waited almost a year and a half before submitting his complaint.

Thus, none of the three situations recognized in *School District of Allentown* is applicable, i.e., MTA did not mislead Edmund in regard to the time limitations for filing a petition for review, Edmund was not prevented from filing the petition by some extraordinary event, and he did not file the petition in the wrong forum. Although the three *Allentown* situations are not necessarily exclusive, Edmund's allegations are insufficient to support a waiver of the time limit for filing in this case.[32]

CONCLUSION

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined all of the evidence of record and considered the parties' arguments. The ALJ found that the 180-day statute of limitations barred Edmund's complaint and dismissed the complaint as untimely. Since the record contains no evidence that Edmund filed a STAA complaint within 180 days of

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[30] Complainant's letter titled "Order to Show Cause," Nov. 11, 2008.

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

[32] *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).

the alleged adverse actions and since Edmund has failed to raise a question of material fact regarding the applicability of equitable tolling, the ALJ properly dismissed Edmund's claim. Thus, we **AFFIRM** his Recommended Decision and Order and **DISMISS** the complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge