



In the Matter of:

EDDIE R. WYATT,

ARB CASE NO. 11-039

COMPLAINANT,

ALJ CASE NO. 2010-STA-069

v.

DATE: September 21, 2012

J.B. HUNT TRANSPORT, INC.,

RESPONDENT,

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Eddie R. Wyatt, *pro se*, Chicago, Illinois.

For the Respondents:

Charles W. Reynolds, Esq., *Dover Dixon Horne PLLC*, Little Rock, Arkansas.

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) (STAA), and its implementing regulations at 29 C.F.R. Part 1978 (July 27, 2012). On July 12, 2010, Complainant Wyatt filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that J.B. Hunt Transport, Inc. (J.B. Hunt) terminated his employment and placed a bad mark on his driving record because he did not want to violate the Federal Motor Carrier Safety Regulations. *See* ALJ Ex. 1. OSHA dismissed the claim as untimely, and Wyatt requested a hearing before an Administrative Law Judge (ALJ). On motion for summary decision, the ALJ dismissed Wyatt's complaint as untimely because it was not filed within one

hundred eighty days of the date of the alleged adverse employment actions, and Wyatt has appealed this decision. We affirm.

BACKGROUND

The essential facts pertaining to the timeliness of Wyatt's STAA complaint are undisputed and taken from pleadings, affidavits, and exhibits filed with the ALJ. As the original complaint filed with OSHA lacked detail, the ALJ also considered the "other documents in the record filed by Complainant, one of which is a Complaint he filed with the United States Equal Employment Opportunity Commission (EEOC)" dated October 12, 2007. Decision and Order (D. & O.) at 1. The EEOC complaint contained the same set of essential facts. *See* ALJ Ex. 2.

Wyatt began working as a tractor-truck driver for J.B. Hunt in July 2005. On March 23, 2007, he asked for medical leave to deal with his alcohol abuse problem. Wyatt's leave request was approved, and on April 7, 2007, he enrolled in intensive out-patient substance abuse treatment at the Chicago Lakeshore Hospital Substance Abuse Program. On April 11, Wyatt drank wine while enrolled in the treatment program. His consumption of alcohol was discovered as a result of a breathalyzer test administered by counselors at the program. Wyatt was discharged from the program, and J.B. Hunt terminated his employment on May 1, 2007.¹ On April 21, 2009, Wyatt became aware of false information on his driver's report. *See* ALJ Dec. at 2, citing ALJ Ex. 3-4.

Wyatt filed a complaint with OSHA on July 12, 2010, alleging that "he was terminated and had a bad mark placed on his driving record in reprisal for not wanting to violate the FMCSR." ALJ Ex. 1. OSHA dismissed the complaint as untimely. Wyatt objected to the Secretary's findings and requested a hearing with the Office of Administrative Law Judges. On March 17, 2011, the ALJ entered an order granting summary decision in favor of the Respondent, and dismissed the complaint as untimely.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

¹ Wyatt brought an action in federal district court alleging that his discharge violated 42 U.S.C. § 1983, 49 C.F.R. § 382.121, and the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.* based on his disability of alcoholism. The district court dismissed all of Wyatt's claims by Order dated March 12, 2009. *Wyatt v. J.B. Hunt Transp., Inc.*, No. 4:08CV1501 JMM, 2009 WL 652723 (E.D. Ark. Mar. 12, 2009). Wyatt appealed to the court of appeals, which affirmed the district court's decision in all respects on February 25, 2010. *See Wyatt v. J.B. Hunt Transp., Inc.*, 366 Fed. Appx. 718, 2010 WL 653132 (8th Cir. 2010).

The Board reviews an ALJ's grant of summary decision *de novo*. *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011); *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011). The standard for granting summary decision under 29 C.F.R. § 18.40(d) (2012) is patterned after that for Fed. R. Civ. P. 56, the rule governing summary judgment in the federal court. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 3 (ARB Dec. 30, 2005). Under 29 C.F.R. § 18.40(d), an ALJ's grant of summary decision will be affirmed where it is determined upon *de novo* review that 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 the moving party is entitled to prevail as a matter of law. *See generally Flor v. United States Dep't of Energy*, No. 1993-TSC-001, slip op. at 10 (Sec'y Dec. 9, 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

Wyatt is pro se. "We construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003); *see also Martin v. Akzo Nobel Chems., Inc.*, ARB No. 02-031, ALJ No. 2001-CAA-016, slip op. at 2 n.2 (ARB July 31, 2003) (liberally construing pro se litigant's only filing to the ARB, a copy of the same post-hearing brief submitted to the ALJ, as a brief "asserting that the ALJ's conclusions of law were erroneous").

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. 49 U.S.C.A. § 31105(b)(1). 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. § 1978.103(d). Wyatt filed his complaint with OSHA on July 12, 2010 –1,167 days after his termination on May 1, 2007, and 447 days after he learned of the negative references on his driver report on April 21, 2009. Wyatt's complaint is thus untimely.

The limitations periods are not jurisdictional and are subject to waiver, estoppel, and equitable tolling principles. *See* 29 C.F.R. § 1978.103(d); *see also, e.g., Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 3 (ARB Aug. 30, 2007); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128; ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30 2001). 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 Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, the court of

appeals articulated three principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; and (3) when “the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Allentown*, 657 F.2d at 20 (internal quotations omitted). In *Hyman*, the Board recognized a fourth equitable principle, i.e., “where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 4 (ARB Mar. 31, 2010)(quoting *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978)). Wyatt bears the burden of justifying the application of equitable modification principles. *Accord Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

Equitable tolling is not warranted here. Wyatt did not argue to the ALJ or to the Board that equitable modification principles should apply. Moreover, the ALJ was correct that no equitable modification principles apply here. There is no showing that J.B. Hunt actively misled Wyatt regarding his cause of action, that he has in some extraordinary way been prevented from filing his action, or that he raised his claim in the wrong forum. While Wyatt filed a complaint with the Equal Employment Opportunity Commission, it cannot constitute “the precise statutory claim in issue” because it was based on discrimination due to a disability, which is not covered by the STAA.

CONCLUSION

The ALJ’s decision is **AFFIRMED**, and the complaint is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge