



In the Matter of:

DARYL O'BARR,

ARB CASE NO. 13-012

COMPLAINANT,

ALJ CASE NO. 2012-STA-027

v.

DATE: November 29, 2012

**BUILDERS TRANSPORTATION
CO., LLC,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Daryl E. O'Barr, *pro se*, Hoover, Alabama

For the Respondent:

**David M. Rudolph, Esq.; Bourland, Heflin, Alvarez, Minor & Matthews, PLC;
Memphis, Tennessee**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; and E. Cooper Brown,
*Deputy Chief Administrative Appeals Judge***

FINAL DECISION AND ORDER DISMISSING APPEAL

The Complainant, Daryl E. O'Barr, filed a complaint alleging that the Respondent retaliated against him in violation of the employee protection provisions of the Surface

Transportation Assistance Act of 1982 (STAA), as amended.¹ On September 17, 2012, a Department of Labor Administrative Law Judge (ALJ) issued a Final Decision and Order Dismissing Complaint (D. & O.), in which he dismissed O’Barr’s complaint because he found that O’Barr failed to prove by a preponderance of evidence that his protected activity was a contributing factor in the Respondent’s decision to terminate his employment.

The Secretary of Labor has delegated her authority to issue final agency decisions under the STAA to the Administrative Review Board.² To perfect a timely appeal from an administrative law judge’s decision, a party must file a petition for review with the Board within 14 days of the date on which the judge issued his decision.³

O’Barr filed a petition for review, which was dated October 17, 2012, and which he stated was served on October 22, 2012. The Board received its copy on October 31, 2012. Under the regulations, the petition for review was to be filed no later than October 1, 2012. Thus O’Barr filed his petition for review more than 14 days from the date on which the ALJ issued his D. & O.

The STAA’s limitations period is not jurisdictional and therefore is subject to equitable modification.⁴ Because O’Barr, as the party seeking tolling, bears the burden of justifying the application of equitable tolling principles,⁵ we ordered him to show cause, why the petition should not be dismissed as untimely. We permitted Builders Transportation Co. to file a reply to O’Barr’s response. Because O’Barr has failed to establish a basis for equitable modification of the limitations period for filing an appeal with the Board, we dismiss his appeal.

¹ 49 U.S.C.A. § 31105(a) (Thomson/West 2012). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2012).

² Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012), 29 C.F.R. § 1978.110(a), 77 Fed. Reg. 44121-01 (July 27, 2012).

³ See 29 C.F.R. § 1978.110(a). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing.

⁴ *Accord Carvajal v. Stevens Transp., Inc.*, ARB No. 12-083, ALJ No. 2012-STA-019, slip op. at 2 (ARB Sept. 12, 2012); *Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

⁵ *Accord 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).

DISCUSSION

In determining whether the Board should toll a statute of limitations, we have recognized four 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; when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁶ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to O'Barr's claim.⁷ But, the Supreme Court has noted that equitable relief from limitations periods is "typically extended . . . only sparingly."⁸ Further, the Board, like the courts, has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."⁹

O'Barr did not specifically cite to any of the three recognized bases for tolling established by Board precedent. Instead he states:

The [ALJ] signed an Order to Dismiss on Friday, September 14th, 2012 and post marked it on a Pitney-Bowes in office machine on September 17th, 2012 and received in my hand on Tuesday, September 25th, 2012. Eleven days after signing the order. [Sic]. This gave only three days to respond to [the ALJ's] order. Giving this pro Se an extremely short and impossible time for this pro Se to respond in a timely manor [sic].^[10]

The STAA's regulations provide that to be timely a petition for review of an administrative law judge's STAA decision must be filed within 14 days of the date of the decision.¹¹ Generally the date on which the judge signs the decision and the date on which it is issued are the same. In this case however, the ALJ signed the decision on

⁶ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3-4 (ARB Jan. 28, 2011).

⁷ *Id.* at 4.

⁸ *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

⁹ *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).

¹⁰ Complainant's Response to Order to Show Cause at 2.

¹¹ 29 C.F.R. § 1978.110(a).

September 14, 2012, and it was issued on September 17, 2012. The Board uses the date that the decision was issued to commence the 14-day period. Therefore, while the Board understands O'Barr's confusion as to the date his petition for review was due, it was, in fact, due on October 1, not September 28, 2012.

Nevertheless, O'Barr failed to exercise due diligence to preserve his legal rights. Incorrectly believing that his petition for review was due on September 28, 2012, O'Barr neither filed the petition nor requested an enlargement of time to file it a later date. He did not even file it within 14 days of the date he received it. Instead, he ignored the limitations period and filed his petition for review (a title page plus 4 pages of text) three weeks after it was due and his only justification was that, as a pro se complainant, he did not have sufficient time to file it by its due date. Pro se complainants routinely timely file petitions for review from administrative law judges' decisions or request additional time in which to do so. We find O'Barr's excuse for his failure to do either insufficient to toll the limitations period.

Accordingly, O'Barr has failed to show cause for tolling the limitations period, and his appeal is **DISMISSED** as untimely.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge