



In the Matter of:

**EDWARD A. SLAVIN, JR.,**

**ARB CASE NO. 06-059**

**COMPLAINANT,**

**ALJ CASE NO. 05-CAA-11**

**v.**

**DATE: April 24, 2006**

**DEAN DENNIS J. AIGNER,**

**RESPONDENT.**

### **FINAL DECISION AND ORDER**

The Complainant, Edward A. Slavin, filed a complaint alleging that the Respondent, Dean Dennis J. Aigner, retaliated against him in violation of the whistleblower protection provisions of the Clean Air Act,<sup>1</sup> the Comprehensive Environmental Response, Compensation and Liability Act,<sup>2</sup> the Federal Water Pollution Control Act,<sup>3</sup> the Safe Drinking Water Act,<sup>4</sup> the Solid Waste Disposal Act,<sup>5</sup> and the Toxic Substances Control Act,<sup>6</sup> (the environmental acts) and their implementing regulations.<sup>7</sup> On January 19, 2006, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order - Motion to Dismiss (R. D. & O.) granting Aigner's motion to dismiss Slavin's complaint.

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<sup>1</sup> 42 U.S.C.A. § 7622 (West 2003).

<sup>2</sup> 42 U.S.C.A. § 9610 (West 2005).

<sup>3</sup> 33 U.S.C.A. § 1367 (West 2001).

<sup>4</sup> 42 U.S.C.A. § 300(j)-9(i) (West 2003).

<sup>5</sup> 42 U.S.C.A. § 6971 (West 2003).

<sup>6</sup> 15 U.S.C.A. § 2622 (West 1998).

<sup>7</sup> 29 C.F.R. Part 24 (2005).

Slavin filed an untimely appeal of the ALJ's R. D. & O. with the Administrative Review Board.<sup>8</sup> The issue before the Board is whether we should dismiss Slavin's appeal because he failed to respond to the Board's Order to Show Cause why the Board should not dismiss his untimely appeal. Because Slavin has failed to respond to the Board's order and therefore has failed to demonstrate why the Board should accept his untimely appeal, we dismiss his appeal.

## BACKGROUND

Slavin filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Dean of the University of California Santa Barbara's Bren School of Environmental Science and Management,<sup>9</sup> retaliated against him in violation of the environmental acts' whistleblower protection provisions when he did not hire Slavin for a job for which he had applied.<sup>10</sup>

In response to the Respondent's motion to dismiss for lack of jurisdiction, the ALJ issued his R. D. & O. The ALJ found that because the Respondent, in his personal capacity, would not have been Slavin's employer had he hired him to fill the position that Slavin sought, "[the Respondent] is not subject to the employee protection provisions of the statutes invoked in this case."<sup>11</sup> Included in the R. D. & O. granting the Respondent's Motion to Dismiss was a "Notice of Appeal Rights" that provided:

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<sup>8</sup> The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the environmental acts to the Administrative Review Board. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. §§ 24.1, 24.8.

<sup>9</sup> The Respondent is no longer Dean of the Bren School.

<sup>10</sup> R. D. & O. at 1. The environmental acts' whistleblower protection provisions prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, i.e., taking adverse action, because the employee has notified the employer of an alleged violation of the Act, has commenced any proceeding under the Act, has testified in any such proceeding or has assisted or participated in any such proceeding. See 29 C.F.R. § 24.2. To prevail on a complaint of unlawful discrimination under these environmental whistleblower statutes, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because he or she engaged in protected activity *Powers v. Tennessee Dep't of Env't & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16, slip op. at 2 (ARB Aug. 16, 2005); *Jenkins v. United States Env't'l Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 16-17 (ARB Feb. 28, 2003).

<sup>11</sup> R. D. & O. at 6.

To appeal, you must file a Petition for Review . . . that is received by the Administrative Review Board . . . within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. . . . If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).<sup>12]</sup>

This Notice summarizes the relevant regulation that provides:

Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a petition for review with the Administrative Review Board . . . . , which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge . . . .<sup>13</sup>

Pursuant to this regulation, Slavin's petition for review was due at the Administrative Review Board no later than February 2, 2006. But the Board did not receive the petition for review until February 10, 2006. Accordingly, the Board ordered Slavin to show cause no later than March 7, 2006, why the R. D. & O. did not become the Secretary's final decision and order when the Board did not receive a petition for review by February 2, 2006, and permitted the Respondent to reply to Slavin's response. The Show Cause Order cautioned Slavin, "Should the Complainant fail to timely file a response to this order, the Board may dismiss this appeal without further notice." Slavin failed to file a response to the Show Cause Order. On March 21, 2006, the Respondent filed a letter requesting the Board to dismiss Slavin's appeal because of his failure to respond to the Board's Order.

## DISCUSSION

The regulation establishing a ten-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes.<sup>14</sup> Because

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<sup>12</sup> R. D. & O. at 9.

<sup>13</sup> 29 C.F.R. § 24.8(a).

<sup>14</sup> 29 C.F.R. § 24.1. *Accord Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 3 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999).

this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.<sup>15</sup>

The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case.<sup>16</sup> Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.<sup>[17]</sup>

But the Board has not determined that these categories are exclusive.<sup>18</sup> A petitioner's inability to satisfy one of these elements is not necessarily fatal to his or her claim but courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."<sup>19</sup>

Slavin bears the burden of justifying the application of equitable tolling principles.<sup>20</sup> In this case Slavin has failed to carry his burden because by failing to respond to the Board's Show Cause Order, he has provided no justification for his failure to timely file his appeal. Slavin is a practiced litigator before this Board and, from

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<sup>15</sup> *Gutierrez*, slip op. at 3; *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999).

<sup>16</sup> *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

<sup>17</sup> *Gutierrez*, slip op. at 3-4.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *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). See also *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984)(pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

<sup>20</sup> *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

personal experience, knows only too well the consequence of failing to respond to the Board's Show Cause Orders.<sup>21</sup>

Accordingly, because the R. D. & O. became the Secretary's final order when Slavin failed to timely appeal it and finding no grounds for tolling the time for filing a petition for review with the Board, we **DISMISS** this appeal.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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<sup>21</sup> See e.g., *Anderson v. United States Env'tl. Prot. Agency*, ARB No. 04-072, ALJ No. 2004-ERA-15 (ARB June 10, 2004); *Blodgett v. Tennessee Dep't of Env't. & Conservation*, ARB No. 03-043, ALJ 03-CAA-7 (ARB Mar. 19, 2004); *Gass v. Lockheed Martin Energy Systems, Inc.*, ARB No 03-093, ALJ No. 00-CAA-22 (ARB Jan. 29, 2004); *In re: Daniel Somerson*, ARB No. 03-068, ALJ Nos. 2002-STA-14, 2003-STA-11 (ARB Oct. 21, 2003).