



In the Matter of:

OLIVER WILLIAMSON,

ARB CASE NO. 07-071

COMPLAINANT,

ALJ CASE NO. 2006-ERA-30

DATE: June 28, 2007

v.

**WASHINGTON SAVANNAH RIVER
COMPANY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

Oliver Williamson, *pro se*, Jackson, South Carolina

FINAL DECISION AND ORDER

BACKGROUND

The Complainant, Oliver Williamson, filed a complaint alleging that the Respondent, Washington Savannah River Company, retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act (ERA)¹, and its implementing regulations.² On April 3, 2007, a Department of Labor Administrative Law Judge, (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he

¹ 42 U.S.C.A. § 5851 (West 2003).

² 29 C.F.R. Part 24 (2006).

recommended that Williamson's claim be dismissed. The R. D. & O. included this "Notice of Appeal Rights:"

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. . . .^{3]}

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 laws judge⁴

Pursuant to this regulation, Williamson's petition for review was due at the Administrative Review Board no later than April 17, 2007. But the Board did not receive the petition for review until April 25, 2007. In a letter faxed to the Board on April 30, 2007, Washington Savannah averred that Williamson's petition for review was untimely because the Board had not received it by April 13th and requested that the Board deny Williamson's appeal.⁵ Accordingly, we ordered Williamson to show cause 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 April 17, 2007. We also offered Washington Savannah River the opportunity to file a reply to Williamson's response to this order. The Board received Williamson's response on May 31, 2007, but received no reply from Washington Savannah.

³ R. D. & O. at 15 (emphasis added).

⁴ 29 C.F.R. § 24.8(a).

⁵ Washington Savannah's statement that the petition for review was due no later than April 13th is incorrect. The Board must receive the petition for review within ten **business** days, not ten **calendar** days of the date on which the ALJ issues the R. D. & O. 29 C.F.R. § 24.8(a).

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.⁶ Therefore, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.⁷

The Board is guided by the principles of equitable tolling in determining whether to relax the limitations period in a particular case.⁸ 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.⁹

But the Board has not determined that these categories are exclusive.¹⁰ Williamson's inability to satisfy one of these elements is not necessarily fatal to his 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."¹¹ Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that

⁶ 29 C.F.R. § 24.1. *Accord Hemingway v. Northeast Utils.*, 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).

⁷ *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).

⁸ *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

⁹ *Gutierrez*, slip op. at 3-4.

¹⁰ *Id.* at 3.

¹¹ *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).

might justify such tolling, “[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.”¹²

Williamson bears the burden of justifying the application of equitable tolling principles.¹³ Ignorance of the law will generally not support a finding of entitlement to equitable tolling.¹⁴

In response to the Order to Show Cause, Williamson stated, “the 10 day limit is not enough time for someone representing ones [sic] self to get off work or have someone send the mail to those required. I had to arrange [for] someone [to] send the mail for me as I have with this mail.”

While the Board would certainly agree that the ten-business-day limitations period is short, pro se complainants, proceeding diligently, routinely invoke this Board’s review by timely filing petitions for review. Thus, we do not find that Williamson’s rationale for his failure to timely file his petition for review is sufficient to justify tolling the limitations period in this case. Consequently, because Williamson failed to timely file his petition and did not demonstrate that he exercised due diligence in preserving his legal rights, we **DISMISS** his petition for review.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

¹² *Baldwin County Welcome Ctr.*, 446 U.S. at 152.

¹³ *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

¹⁴ *Accord Wakefield v. Railroad Ret. Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway*, slip op. at 4-5.