



In the Matter of:

WARREN HIGGINS,

ARB CASE NO. 05-143

COMPLAINANT,

ALJ CASE NO. 2005-SDW-7

v.

DATE: September 29, 2006

GLEN RAVEN MILLS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Erin F. Dunnuck, Esq., *Dungan & Associates*, Asheville, North Carolina

For the Respondent:

J. Christopher Jackson, Esq, *Kilpatrick Stockton LLP*, Raleigh, North Carolina

FINAL DECISION AND ORDER

The Complainant, Warren Higgins, has filed a complaint alleging that the Respondent, Glen Raven Mills, Inc., terminated his employment in violation of the whistleblower protection provisions of several environmental protection statutes¹ and their implementing regulations² when he refused to accept the job of Environmental Director because he believed Glen Raven expected him to ignore previously filed falsified environmental reports to the North Carolina Department of Environment and Natural Resources (NCDENR) and to falsify such reports in the future. A Department of

¹ *I.e.*, the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001), the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (West 2003), and the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 2003).

² 29 C.F.R. Part 24 (2006).

Labor Administrative Law Judge found that Higgins had failed to file a timely complaint and had raised no question of fact regarding his entitlement to tolling of the limitations period. Presented to the Administrative Review Board for determination is the question whether we should find that the time limitations for filing his complaint should be tolled given that Higgins allegedly was represented by “severely ineffective” counsel. Finding, as discussed below, that Higgins, as a matter of law, has failed to proffer grounds sufficient to toll the limitations period, we agree with the ALJ’s recommendation that we dismiss Higgins’s complaint.

BACKGROUND

Warren Higgins was employed by Glen Raven Mills for twenty-five years.³ Higgins held the position of Plant Engineer in April 2004 when Glen Raven informed him that it had assigned him the additional responsibilities of environmental reporting and record keeping.⁴ Higgins reviewed Glen Raven’s environmental records and he concluded that his new duties would require him to falsify reports and cover up previous violations.⁵ After consulting with an attorney, David Craft, Higgins allegedly informed Glen Raven that he would not disobey the environmental regulations and threatened to report Glen Raven’s violations.⁶ Consequently, Higgins avers, Glen Raven terminated his employment on July 2, 2004.⁷

Higgins contacted Craft the same day that Glen Raven terminated his employment.⁸ Craft subsequently contacted the NCDENR and faxed information regarding the allegedly falsified reports to them on July 7, 2004.⁹ Higgins regularly contacted Craft regarding the progress of his case.¹⁰ Higgins eventually asked Craft if it would be appropriate to file a complaint with the North Carolina Department of Labor (NCDOL).¹¹ Craft agreed that it would be a good idea but suggested that it would be

³ Recommended Decision and Order Granting Respondent’s Motion to Dismiss (R. D. & O.) at 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

cheaper if Higgins contacted the agency himself.¹² Higgins alleges that Craft never informed him that he should file a complaint with a federal agency rather than with a state agency or that the complaint must be filed within 30 days.¹³

Higgins called NCDOL on July 28, 2004, and “explained his situation.”¹⁴ A NCDOL employee wrote Higgins’s name on a “Complaint Log” with the notation “OSH→” and sent him a complaint form. Higgins completed the form, signed and dated it on August 6, 2004, and returned it to NCDOL.¹⁵

Higgins found communication with Craft increasingly more difficult.¹⁶ The NCDOL dismissed Higgins’s complaint on August 19, 2004, and forwarded Higgins’s complaint to the United States Department of Labor.¹⁷ An Occupational Safety and Health (OSHA) investigator contacted Higgins.¹⁸ Higgins referred the investigator to Craft because Craft was handling his case.¹⁹ The investigator attempted to contact Craft, but Craft would not return his calls.²⁰ Eventually the investigator again contacted Higgins and informed him for the first time about the thirty day limitations period for filing a complaint under the federal environmental whistleblower protection statutes.²¹ He also wrote to Craft and informed him of the limitations period.²² Higgins requested a progress report from Craft in October 2004 and when Craft failed to respond, Higgins fired him and obtained new counsel.²³

¹² *Id.*

¹³ Affidavit of Warren Higgins (Aff.).

¹⁴ *Id.*

¹⁵ *Id.*; R. D. & O. at 2.

¹⁶ Aff. at 2.

¹⁷ *Id.*; R. D. & O. at 2.

¹⁸ Aff. at 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* Pursuant to 29 C.F.R. § 24.3(b), “any complaint shall be filed within 30 days after the occurrence of the alleged violation.”

²² Aff. at 2.

²³ *Id.* Although Higgins attests in his affidavit that he obtained new counsel in November 2005, since he signed the affidavit in May 2005, it appears that “2005” is a

Higgins filed a written complaint with OSHA on February 11, 2005.²⁴ OSHA issued a determination on March 15, 2005, finding that Higgins did not timely file his complaint.²⁵ Higgins requested a hearing before a Department of Labor Administrative Law Judge.²⁶

The ALJ initially determined that the complaint Higgins filed with the NCDOL on August 6, 2004, should be used as “the date for purposes of considering timeliness in this matter.”²⁷ Because 35 days elapsed between the termination of Higgins’s employment and the filing of this complaint, the ALJ found that the complaint was untimely.²⁸ Therefore the ALJ issued an order requiring Higgins to show cause as to why his complaint should not be dismissed because it was untimely.²⁹ Both Higgins and Glen Raven responded to the order and because Glen Raven sought dismissal of the complaint, the ALJ treated the reply as a motion for summary decision and ordered a further response from Higgins.³⁰

The ALJ subsequently issued an Order denying the motion for summary decision because Higgins had alleged that Craft had contacted NCDENR on July 7, 2004, and had submitted nine pages of information by facsimile, which Higgins asserted contained information regarding alleged falsified reports.³¹ Higgins had not yet been able to obtain a copy of the facsimiles but the ALJ concluded that his allegations regarding their contents were sufficient to raise a genuine issue of material fact as to “whether the Fax sent to NCDENR could invoke equitable tolling of Complainant’s complaint, as it reasonably could have mistakenly raised Complainant’s precise statutory claim in the wrong forum.”³²

typographical error, and he actually obtained new counsel in November 2004.

²⁴ R. D. & O. at 2.

²⁵ *Id.*

²⁶ *See* 29 C.F.R. § 24.4(d)(3).

²⁷ R. D. & O. at 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Order Requiring Further Response at 2.

³¹ Order and Notice of Telephone Conference at 6.

³² *Id.*

Higgins's new counsel obtained copies of the facsimiles Craft sent to the NCDENR on July 7, 2004, and submitted them to the ALJ.³³ The ALJ informed the parties that he would reconsider the issue of summary decision in light of the availability of the facsimiles.³⁴ In response, Higgins submitted a Memorandum in Opposition to Summary Dismissal and Glen Raven submitted a Response in Support of Summary Dismissal.³⁵

The ALJ initially found that the facsimiles of the allegedly falsified reports were not sufficient to constitute a precise statutory claim filed in the wrong forum because even if Higgins's allegation that the facsimiles evidence violations of environmental laws were true,

the Fax still does not constitute a valid complaint because it fails to detail any act or omission that is believed to constitute a violation. Specifically, the Fax lacks either a direct or an inferential allegation concerning a material element of a whistleblower complaint: that the Respondent discriminated against Complainant with respect to the compensation, terms, conditions, or privileges of employment.[³⁶]

The ALJ also found that Higgins had alleged no facts that would support a finding that Glen Raven mislead him respecting his cause of action.³⁷ Finally, the ALJ concluded that, as a matter of law, neither Craft's failure to inform Higgins that he was required to file a claim under the federal whistleblower statutes within thirty days, nor Higgins's own ignorance of this fact were sufficient to invoke equitable tolling.³⁸ Accordingly, the ALJ granted Glen Raven's Motion for Summary Decision and dismissed Higgins's complaint with prejudice.³⁹

³³ R. D. & O. at 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 5.

³⁷ *Id.* at 6.

³⁸ *Id.* at 6-7.

³⁹ *Id.* at 7.

Higgins filed a timely petition for review with the Administrative Review Board.⁴⁰ In response to the Board's Notice of Appeal and Order Establishing Briefing Schedule, Higgins filed an Initial Brief and Glen Raven filed a Reply Brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board to review an ALJ's recommended decision in cases arising under the environmental whistleblower statutes under which Higgins brought his complaint and to issue the final agency decision.⁴¹ We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.⁴² The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.⁴³ Accordingly summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.⁴⁴ A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action."⁴⁵

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.⁴⁶ "To prevail on a motion for summary judgment, the

⁴⁰ See 29 C.F.R. § 24.8.

⁴¹ See 29 C.F.R. § 24.8. See also Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

⁴² 29 C.F.R. § 18.40 (2006).

⁴³ Fed. R. Civ. P. 56.

⁴⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁴⁵ *Bobreski v. United States EPA*, No. 02-0732(RMU), 2003 WL 22246796, at *3 (D.D.C. Sept. 30, 2003).

⁴⁶ *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (ARB Dec. 13, 2002).

moving party must show that the nonmoving party ‘fail[ed] to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.’⁴⁷ Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”⁴⁸

Furthermore, a party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.”⁴⁹ We agree with the ALJ that Higgins has failed to establish that there is a genuine issue of fact for hearing on the timeliness of his complaint or the applicability of the equitable tolling doctrine.

DISCUSSION

The regulations describing the time limitations and place of filing and contents of a complaint under the environmental whistleblower statutes at issue here provide in pertinent part:

(b) Time of filing. (1) . . . any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint filed by mail shall be deemed filed as of the date of mailing. . . .

(c) Form of complaint. No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation.

(d) Place of filing. A complaint may be filed in person or by mail at the nearest local office of the Occupational Safety and Health Administration, listed in most telephone directories under U.S. Government, Department of Labor. A complaint may also be filed with the Office of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor, Washington, D.C. 20210.⁵⁰

⁴⁷ *Bobreski*, at *3 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

⁴⁸ *Bobreski*, at *3.

⁴⁹ 29 C.F.R. § 18.40(c). See *Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 4-6 (Sec’y July 17, 1995).

⁵⁰ 29 C.F.R. § 24.3 (b)(1), (c), (d).

Higgins filed a complaint on January 25, 2005, that complied with the form and place of filing specified in these regulations. But the complaint was not timely because Glen Raven terminated Higgins's employment on July 2, 2004, more than thirty days prior to the date on which Higgins filed his written complaint with OSHA.

Higgins argues in his Initial Brief,

Since the Administrative Law Judge determined that the fax of June 7, 2004 was not a valid complaint and that Higgins' Complaint was not considered filed on July 28, 2004, the day of the written notation of the conversation between Higgins and the NCDOL employee, the Administrative Review Board should invoke the Doctrine of Equitable tolling.^[51]

In determining whether the Board should toll a statute of limitations, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall*.⁵² In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,⁵³ 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."⁵⁴

Higgins bears the burden of justifying the application of equitable modification principles.⁵⁵ Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling, especially in a case in which a party is represented by counsel.⁵⁶

⁵¹ Initial Brief (I.B.) at 5.

⁵² 657 F.2d 16, 19-21 (3d Cir. 1981). See e.g., *Ilgenfritz v. United States Coast Guard Acad.*, ARB No. 99-066, ALJ No. 99-WPC-3 (ARB Aug. 28, 2001); *Hall v. E. G. & G. Defense Materials*, ARB No. 98-076, ALJ No. 97-SDW-9 (ARB Sept. 30, 1998).

⁵³ 15 U.S.C.A. § 2622 (West 2004).

⁵⁴ *Allentown*, 657 F.2d at 20 (internal quotations omitted).

⁵⁵ *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

⁵⁶ *Accord Wakefield v. Railroad Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at

Although the Board's reliance on the *Allentown* factors is well-established⁵⁷ and the ALJ relied on *Allentown* in dismissing Higgins's complaint, Higgins did not cite to *Allentown*, nor specifically discuss the *Allentown* factors in his brief urging the Board to toll the limitations period. Interpreting Higgins's brief in light of the *Allentown* factors, Higgins does not contend that Glen Raven actively misled him regarding the cause of his action. Higgins argued unsuccessfully to the ALJ that he raised the precise statutory claim in issue in the wrong forum. However, Higgins has chosen not to pursue this argument before the Board.⁵⁸ Accordingly, we need not address it.⁵⁹

In essence, Higgins argues that his original counsel's "severely ineffective assistance" was an extraordinary factor that precluded him from timely filing his brief. In considering whether attorney error constitutes an extraordinary factor for tolling purposes, the Board has consistently held that it does not because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."⁶⁰ Higgins has neither addressed the Board's precedent nor cited to any case law whatsoever in support of his argument that under the facts of this case as alleged, he should not be held accountable for his counsel's failure to timely file his complaint. Accordingly, we hold that as a matter of law he has failed to establish that he is entitled to equitable tolling of the limitations period.

Finally, we note that even if we had accepted Higgins's argument that he was entitled to equitable tolling in this case, "[i]n tolling statutes of limitations, courts have

4-5 (ARB Aug. 31, 2000).

⁵⁷ See n.52 *supra*.

⁵⁸ See I.B. at 4.

⁵⁹ *Accord Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32, slip op. at 12 (ARB Jan. 31, 2006); *Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 15 (ARB Apr. 23, 2003); *White v. Osage Tribal Council*, ARB No. 00-078, ALJ No. 95-SDW-1, slip op. at 3 (ARB Apr. 8, 2003); *Development Res., Inc.*, ARB No. 02-046, slip op. at 5 (Apr. 11, 2002).

⁶⁰ *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002). *Accord Blodgett v. Tennessee Dep't of Env't & Conservation*, ARB No. 03-043, ALJ No. 03-CAA-7, slip op. at 2-3 (ARB Mar. 19, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 03-SOX-024, slip op. at 4, (ARB Jan. 13, 2004); *Herchak v. America W. Airlines, Inc.*, ARB No. 03-057; ALJ No. 02-AIR-12 slip op. at 6 (ARB May 14, 2003); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 99-ERA-015 (ARB Aug. 31, 2000). The Supreme Court did note in *Link v. Wabash R. R. Co.* however, that "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. 626, 634 n.10 (1962).

typically assumed that the event that ‘tolls’ the statute simply stops the clock until the occurrence of a later event that permits that statute to resume running.”⁶¹ In this case, the event that would have permitted the clock to resume running would have occurred at the latest when Department of Labor employee, Ray Levitt, informed Higgins in August 2004 of the 30-day limitations period to file his complaint with OSHA. But Higgins has not alleged that he timely filed any complaint satisfying the requirements of 29 C.F.R. § 24.3 (b)(1), (c), (d), once the 30-day clock resumed running. Thus, even if the limitations period had been tolled, Higgins has failed to allege an element essential to the successful resolution of his case.

CONCLUSION

Because Higgins failed to establish a genuine issue of fact regarding the applicability of equitable tolling to the limitations period for filing his complaint, the ALJ properly found that Glen Raven Mills was entitled to summary dismissal of Higgins’s complaint. Accordingly we accept the ALJ’s recommended decision, and we **DISMISS** Higgins’s complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁶¹ *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001). *Accord Hillis v. Knochel Bros., Brothers, Inc.*, ARB Nos. 03-136, 04-081, 04-148, ALJ No. 2002-STA-50, slip op. at 8 (ARB Mar. 31, 2006)(limitations period was tolled only during those days when the complainants were unaware that they had filed the petition for review in the wrong forum). *Cf. Secretary of Labor v. Urban Labs., Inc. and Gerald G. Burke*, Nos. 81-SCA-1325, 81-SCA-1394, 84-SCA-31 (B.S.C.A. May 20, 1986)(BSCA rejects respondents’ contention that the limitations period for filing its appeal should be tolled because they were not given notice of their debarment where respondents failed to file petition within 40 days of receiving actual notice of the debarment).