



**In the Matter of:**

**STEPHEN P. DURHAM,**

**ARB CASE NO. 06-038**

**COMPLAINANT,**

**ALJ CASE NO. 2006-CAA-1**

**v.**

**DATE: February 27, 2006**

**TENNESSEE VALLEY AUTHORITY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***Stephen P. Durham, pro se, South Pittsburg, Tennessee***

***For the Respondent:***

***Brent R. Marquand, Senior Litigation Attorney, Tennessee Valley Authority, Knoxville, Tennessee***

**FINAL DECISION AND ORDER**

The Complainant, Stephen P. Durham, filed a complaint alleging that the Respondent, Tennessee Valley Authority (TVA), retaliated against him in violation of the whistleblower protection provisions of the Clean Air Act<sup>1</sup> and its implementing regulations.<sup>2</sup> On December 16, 2005, a Department of Labor Administrative Law Judge, (ALJ) issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.). Durham filed an untimely petition for review with the Administrative Review Board. Thus, the Board must determine whether Durham has established grounds for tolling the limitations period. Finding that Durham failed to

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<sup>1</sup> 42 U.S.C.A. § 7622 (West 1995).

<sup>2</sup> 29 C.F.R. Part 24 (2005).

exercise due diligence when he failed to take sufficient measures to assure the Board timely received his petition for review, we find that he has failed to establish grounds for tolling the limitations period.

## BACKGROUND

On July 30, 2005, Durham filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, TVA, retaliated against him in violation of the CAA's whistleblower protection provisions.<sup>3</sup> OSHA investigated the complaint and determined that the evidence did not support a finding in Durham's favor. Durham requested a hearing before a Department of Labor Administrative Law Judge.<sup>4</sup>

In response to TVA's motion for summary judgment, the ALJ issued his R. D. & O. The ALJ found that TVA was entitled to summary decision because the undisputed facts established that Durham had not filed a timely complaint, was not entitled to tolling of the limitations period and had not engaged in protected activity.<sup>5</sup> Included in the R. D. & O. granting TVA's summary judgment motion was a "Notice of Appeal Rights" that provided:

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

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<sup>3</sup> R. D. & O. at 1. The CAA's whistleblower protection provision prohibits 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 (2005). 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>4</sup> See 29 C.F.R. § 24.4(d)(3).

<sup>5</sup> R. D. & O. at 3-6.

of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).<sup>[6]</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>7</sup>

Pursuant to this regulation, Durham’s petition for review was due at the Board no later than January 3, 2006. But the Board did not receive the petition for review until January 10, 2006. Accordingly, the Board ordered Durham to show cause no later than January 25, 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 January 3, 2006, and permitted TVA to reply to Durham’s response. Durham filed a timely response to the show cause order and TVA filed a reply to Durham’s response. Durham also filed a Request to Amend Complaint to include “civil rights violations, and violations under the Sarbanes-Oxley Act,”<sup>8</sup> a Request for Discovery and a Complainant’s Reply.

## 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>9</sup> Because 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>10</sup>

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<sup>6</sup> *Id.* at 7.

<sup>7</sup> 29 C.F.R. § 24.8(a).

<sup>8</sup> Request to Amend Complaint at 2.

<sup>9</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).

<sup>10</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).

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>11</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>[12]</sup>

But the Board has not determined that these categories are exclusive.<sup>13</sup> Durham'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."<sup>14</sup>

Durham bears the burden of justifying the application of equitable tolling principles.<sup>15</sup> Ignorance of the law will generally not support a finding of entitlement to equitable tolling.<sup>16</sup>

Durham asserts that pursuant to 29 C.F.R. § 1614.604(b), (d)<sup>17</sup> and Federal Rule of Civil Procedure 5(b)(2)(B),<sup>18</sup> he timely filed his petition. But neither of these provisions is applicable to the filing of a petition for review under the CAA. The ALJ

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<sup>11</sup> *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

<sup>12</sup> *Gutierrez*, slip op. at 3-4.

<sup>13</sup> *Id.* at 3.

<sup>14</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>15</sup> 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).

<sup>16</sup> *Minkina v. Affiliated Physician's Group*, ARB No. 05-074, 2005-SOX-19, slip op. at 5 (ARB July 29, 2005).

<sup>17</sup> C. R. at 2.

<sup>18</sup> Complainant's Reply at 1.

unequivocally notified Durham in his R. D. & O of the requirements of the applicable regulation, 29 C.F.R. § 24.8(a).<sup>19</sup> This regulation states that the Board must **receive** the petition for review within ten business days of the date on which **the ALJ issued** the R. D. & O. of which the petitioner seeks review. Therefore, neither the date on which Durham received the R. D. & O., nor the date on which he mailed his petition for review is relevant to the determination whether he timely filed his petition for review. Because Durham did not file his petition for review within ten business days of the date of the R. D. & O., he did not timely file his petition.

Durham does not contend that any of the three recognized bases for tolling the limitations period apply to this case. Instead, Durham argues that he “made every reasonable effort to ensure his review was received by the Court before the ten (10) day deadline by mailing his application for review on December 26, 2005 a full six (6) business days before the deadline.”<sup>20</sup> We disagree. Durham did not mail his petition for review six business days prior to its due date; both December 26, 2005 and January 2, 2006, were official government holidays. Furthermore, Durham could have acted with greater diligence by either sending the petition by facsimile<sup>21</sup> or by express mail, as he mailed his response to the Show Cause Order.

Accordingly, finding that Durham did not timely file the petition and finding no grounds justifying equitable tolling of the limitations period, we **DISMISS** his petition for review.<sup>22</sup>

**SO ORDERED.**

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

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

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<sup>19</sup> R. D. & O. at 6.

<sup>20</sup> Complainant’s Reply to Show Cause (C. R.) at 2.

<sup>21</sup> *Herchak v. American West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-12, slip op. at 6 (ARB May 14, 2003). *Cf. Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d at 405 (party who unsuccessfully argued that she was entitled to equitable tolling because her filing was delayed due to overseas mail, failed to explain why she could not have used telephone or facsimile). Durham alleges that the Office of Administrative Law Judges prohibits service by facsimile, but the Board has no such rule and the Board’s facsimile number is prominently displayed on its website for “facsimile filings.” See <http://www.dol.gov/arb/contact.htm>.

<sup>22</sup> Given our disposition of this case, it is unnecessary for us to rule on Durham’s Request for Discovery and Request to Amend His Complaint.