In the Matter of:

MARK ANTHONY SMITH, **ARB CASE NO. 09-127**

COMPLAINANT, **ALJ CASE NO. 2009-STA-045**

v. **DATE: July 22, 2010**

CES ENVIRONMENTAL SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****, Wayne C. Beyer,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER

The Complainant, Mark Anthony Smith, filed a retaliation complaint under the employee protection provisions of the Surface Transportation Act of 1982, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009) (STAA) and the Toxic Substances Control Act of 1986, 15 U.S.C.A. § 2622 (Thomson Reuters 2009) (TSCA).[1] A Department of Labor (DOL) Administrative Law Judge (ALJ) recommended that Smith's complaint be dismissed because it was untimely. We affirm the ALJ's decision and dismiss Smith's complaint.

[1] The STAA's interpretive regulations are found at 29 C.F.R. Part 1978 (2009) and the TSCA's interpretive regulations are found at 29 C.F.R. Part 24 (2009). Smith did not file a petition asking the Board to review the ALJ's finding that his TSCA complaint was untimely. *See* 29 C.F.R. § 24.110(a). However, we note that the ALJ's Notice of Review attached to his R. D. & O. informed the parties that the case would be automatically forwarded to the Board for review. He did not include a statement of the appeal rights under the TSCA. Accordingly, in light of Smith's pro se status, we will consider the ALJ's decision resolving Smith's TSCA complaint as well.

BACKGROUND

Smith worked for CES Environmental Services, Inc. (CES), a commercial motor carrier engaged in transporting products on the highways. Occupational Safety and Health Administration (OSHA) Findings at 1. On March 6, 2008, Smith filed "written complaints of numerous health and safety violations at CES." Complainant's Objections and Request for a Hearing.[2] On July 1, 2008, he filed a Charge of Discrimination against CES with the United States Equal Employment Opportunity Commission alleging employment discrimination because of his race and in violation of Title VII. Recommended Decision and Order Granting Summary Decision and Cancelling Formal Hearing (R. D. & O.) at 4.

Smith alleged that CES terminated his employment on July 16, 2008, in violation of the STAA and the TSCA for making health and safety complaints. *Id.* On or about February 3, 2009, Smith filed an OSHA complaint. *Id.* An OSHA Investigator concluded that Smith did not timely file the complaint and, therefore, recommended that his claim be dismissed. *Id.* Smith objected and requested a hearing before an ALJ.

CES filed a motion for summary judgment arguing that Smith's complaint was untimely filed, that Smith absorbed significant time arguing his position to the EEOC and the Texas Workforce Commission, and that Smith was terminated for excessive personal phone use. On July 6, 2009, the ALJ issued an Order to Show Cause advising Smith that he was entitled to file a response opposing CES's motion, that the ALJ could dismiss the action if Smith did not file a response, that Smith must identify all facts stated by CES with which he disagreed and set forth his version of the facts by offering affidavits or by filing sworn statements, and that Smith was entitled to file an opposing brief. Smith filed a response stating that he had met all of the deadlines and requirements that were necessary. He did not address the timeliness of his complaint.

On August 4, 2009, the ALJ issued his R. D. & O. in which he granted summary judgment because Smith did not produce any evidence that he timely filed his complaints and did not establish that he was entitled to equitable modification. Accordingly, the ALJ dismissed Smith's complaint.

Although the Board issued an order reminding the parties of their right to file briefs in support of or in opposition to the ALJ's R. D. & O. and granted an extension of time for Smith to file his brief, neither party filed a brief.

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[2] It appears that Smith reported these violations pursuant to the employee protection provisions of Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C.A. § 660(c) (West 2010). The Administrative Review Board does not have jurisdiction to hear appeals under this provision. *Culligan v. American Heavy Lifting*, ARB No. 03-046, ALJ Nos. 2000-CAA-020, 2001-CAA-009, 2001-CAA-011, slip op. at 7 (ARB June 30, 2004).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board automatically reviews an ALJ's recommended STAA decision. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

We review a recommended decision granting summary decision de novo. *Hardy v. Mail Contractors of America,* ARB No. 03-07, 2002-STA-022, slip op. at 2 (ARB Jan. 30, 2004). The standard for granting summary decision in our cases is set out at 29 C.F.R. § 18.40 and is essentially the same standard governing summary judgment in the federal courts. Fed. R. Civ. P. 56. Summary decision is appropriate if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and a party is entitled to summary decision. 29 C.F.R. § 18.40(c). The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). 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." *Bobreski v. U.S. EPA,* 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

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. *Lee v. Schneider Nat'l, Inc.,* ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.,* ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002). "To prevail on a motion for summary judgment, the 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.'" *Bobreski,* 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Bobreski,* 284 F. Supp. 2d at 73.

When a motion for summary decision is made the party opposing the motion may not rest upon mere allegations or denials of such pleading. 29 C.F.R. § 18.40(c). Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing. *Id.*

Smith is acting pro se. As we have stated previously, "[w]e construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Trachman v. Orkin Exterminating Co. Inc.,* ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003); *see also Martin v. Akzo Nobel Chems., Inc.,* ARB No. 02-031, ALJ No. 2001-CAA-016, slip op. at 2 n.2 (ARB July 31, 2003) (liberally construing pro se litigant's only filing to the ARB, a copy of the same post-hearing

brief submitted to the ALJ, as a brief "asserting that the ALJ's conclusions of law were erroneous").

DISCUSSION

Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA not later than 180 days after the alleged violation occurred. 49 U.S.C.A. § 31105(b)(1). Because a major purpose of the 180-day period is to allow the Secretary to decline to entertain complaints that have become stale, complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely. 29 C.F.R. § 1978.102(d)(2). A STAA regulation provides for extenuating circumstances that will justify tolling of the 180-day period, such as when the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action or when the discrimination is in the nature of a continuing violation. 29 C.F.R. § 1978.102(d)(3). The regulation also provides that "[t]he pendency of a grievance-arbitration proceeding[]" or "filing with another agency" are examples that do not justify tolling of the 180-day period. *Id. But see Hillis v. Knochel Bros. Inc.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 6-7 (ARB Mar. 31, 2006)(the phrase "filing with another agency" in 29 C.F.R. § 1978.102(d)(3) does not preclude [the Board] from tolling the limitations period when a complainant has filed a STAA complaint in the wrong forum).

A TSCA whistleblower complaint must be filed with OSHA within 30 days after the alleged violation. 15 U.S.C.A. § 2622(b)(1).

It is undisputed that Smith did not file his complaint until February 3, 2009, which was 202 days after CES terminated his employment on July 16, 2008. Accordingly, Smith's complaint is untimely. Nevertheless, the limitations periods are not jurisdictional and therefore are subject to waiver, estoppel, and equitable tolling principles. *See, e.g., Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 3 (ARB Aug. 30, 2007); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128; ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30 2001); *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 12 (ARB Feb. 28, 2003). *Accord Zipes v. TWA*, 455 U.S. 385 (1982) ("a technical reading [of a filing provision of Title VII] would be particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." (internal quotations omitted)).

In determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, 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." *Allentown*, 657 F.2d at 20 (internal quotations omitted). However, as the ARB has noted, the court in *Allentown* expressly

left open the possibility that other situations might also give rise to equitable estoppel.[3] *See Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 4 (ARB Aug. 31, 2005) (three categories identified in *Allentown* not exclusive).

Although Smith's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'" *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). Furthermore, ignorance of the law is generally not a factor that warrants equitable modification. *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005).

Smith bears the burden of justifying the application of equitable modification principles. *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). But Smith did not argue to the ALJ or to the Board that equitable modification principles should apply. In any event, we agree with the ALJ's analysis that no equitable modification principles apply to Smith's claim. Smith has not shown that CES actively misled him regarding the cause of action, that he has in some extraordinary way been prevented from filing his action, or that he "raised the precise statutory claim in issue but has done so in the wrong forum." He has also failed to show any other grounds for equitable modification. We note that while Smith filed a complaint with the Equal Employment Opportunity Commission, it cannot constitute "the precise statutory claim in issue" because it was based on racial discrimination, which is not covered by the STAA or the TSCA. Furthermore both his OSHA 11(c) and EEOC complaints were filed before CES terminated his employment, so he could not have filed a complaint based on retaliatory discharge before the discharge took place.

CONCLUSION

We agree with the ALJ that Smith has failed to timely file his STAA and TSCA complaints and has failed to demonstrate that equitable modification principles should apply. Accordingly, we **DISMISS** his complaint as untimely.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[3] "We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate." *Allentown*, 657 F.2d at 20.