



In the Matter of:

MICHELLE M. COOK,

ARB CASE NO. 06-036

COMPLAINANT,

ALJ CASE NO. 2005-CER-1

v.

DATE: February 22, 2006

**U.S. ENVIRONMENTAL PROTECTION
AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Adam J. Conti, LLC, Atlanta, Georgia

For the Respondent:

***Robin B. Allen, Associate Regional Counsel, United States Environmental
Protection Agency, Atlanta, Georgia***

FINAL DECISION AND ORDER

The Complainant, Michelle M. Cook, filed a complaint alleging that the Respondent, United States Environmental Protection Agency, retaliated against her in violation of the whistleblower protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹ and its implementing regulations.² On December 19, 2005, a Department of Labor

¹ 42 U.S.C.A. § 9610 (West 1995).

² 29 C.F.R. Part 24 (2005).

Administrative Law Judge, (ALJ) issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. & O.). Cook filed an untimely petition for review with the Administrative Review Board. Thus, the Board must determine whether Cook has established grounds for tolling the limitations period. Finding that Cook failed to exercise due diligence when her counsel failed to either confirm the Board's facsimile number prior to the date on which the petition was due or to fax the petition the day it was due to the facsimile number listed on the Board's website, we find that she has failed to establish grounds for tolling the limitations period.

BACKGROUND

In early February 2005, Cook filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, United States Environmental Protection Agency (Region 4, Atlanta) retaliated against her in violation of the CERCLA's whistleblower protection provisions.³ OSHA investigated the complaint and determined that it was not timely filed and that the evidence did not support a finding in Cook's favor on the merits.⁴ Cook requested a hearing before a Department of Labor Administrative Law Judge.⁵

In response to EPA's Motion for Summary Judgment, the Administrative Law Judge (ALJ) issued his R. D. & O. The ALJ found that Cook had failed to establish a prima facie case because she did not proffer sufficient evidence to support an inference that she timely filed her complaint, that she was entitled to tolling of the limitations period, that she suffered an adverse action or that EPA had created a hostile work environment.⁶ Included in the R. D. & O. granting the EPA's Motion for Summary Decision was a "Notice of Appeal Rights" that provided:

³ R. D. & O. at 1. CERCLA'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).

⁴ R. D. & O. at 1.

⁵ See 29 C.F.R. § 24.4(d)(3).

⁶ R. D. & O. at 3-9.

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).^[7]

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 judge⁸

Pursuant to this regulation, Cook's petition for review was due at the Administrative Review Board no later than January 4, 2006. But the Board did not receive the petition for review until January 5, 2006. Accordingly, the Board ordered Cook 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 4, 2006, and permitted EPA to reply to Cook's response. Cook filed a timely response to the show cause order and EPA filed a reply to Cook's response. Cook filed an unauthorized response to EPA's response and EPA moved to strike Cook's unauthorized response.

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.⁹ Because this procedural regulation does not confer important procedural benefits upon individuals or

⁷ *Id.* at 9.

⁸ 29 C.F.R. § 24.8(a) (2005).

⁹ 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).

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.¹⁰

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.¹¹ 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.^[12]

But the Board has not determined that these categories are exclusive.¹³ Cook's inability to satisfy one of these elements is not necessarily fatal to 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."¹⁴ 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 might justify such tolling, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."¹⁵

Cook bears the burden of justifying the application of equitable tolling principles.¹⁶ Ignorance of the law will generally not support a finding of entitlement to

¹⁰ *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).

¹¹ *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

¹² *Gutierrez*, slip op. at 3-4.

¹³ *Id.* at 3.

¹⁴ *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).

¹⁵ *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

¹⁶ *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).

equitable tolling, especially in a case in which a party is represented by counsel.¹⁷

Cook “readily concedes” that none of the three recognized tolling grounds apply to her case.¹⁸ In defense of her failure to timely file she argues that she did not approve the filing of the petition for review until the afternoon of the day it was due because she was hesitant to proceed with the litigation given the financial expense of the litigation and the strain on her finances.¹⁹ Although Cook’s counsel located the Board’s facsimile number on its website, counsel decided not to fax the petition for review on the day it was due because they “were unsure as to whether this was the correct fax number, and were unable to verify whether the number was correct by telephone.”²⁰ Instead, counsel sent the petition by FedEx, knowing that it would not be delivered, at the earliest, until the day after it was due.²¹

Regardless of whatever obstacles there were to filing the petition before January 4, once Cook gave her approval, her counsel’s failure to fax the petition on the day it was due is simply inexplicable. The fax number on the Board’s website is indeed the correct number, and Cook offers no explanation whatsoever for her counsel’s stated suspicion that the number on the Board’s website was incorrect. Had Cook faxed the petition to the wrong office, she would have at least had an argument that she had timely filed the precise claim in the wrong forum; Cook’s decision to send it by FedEx knowing it would be delivered a day late leaves her with no viable defense whatsoever. Cook and her counsel were well aware that the time for filing was short. Diligent counsel, knowing that time was of the essence and allegedly mistrustful of the information listed on government websites, would surely not have waited until the afternoon of the day the petition was due to attempt to confirm that the fax number was correct. Cook’s rationalization for her failure to fax the petition simply makes no sense and most certainly does not demonstrate that she diligently attempted to protect her rights.

Furthermore, while we recognize that Cook is not personally responsible for her counsel’s failure to fax the petition, as the Board held in *Dumaw v. International Brotherhood of Teamsters, Local 690*,²²

¹⁷ *Accord Wakefield v. Railroad Retirement Board*, 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 4-5.

¹⁸ Complainant’s Response to Order to Show Cause at 3.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.*

²² ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (Aug. 27, 2002).

Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec’y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have “notice of all fact, notice of which can be charged upon the attorney.”

Link v. Wabash Railroad Company, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).²³

Accordingly, finding that Cook did not timely file the petition and finding no grounds justifying equitable tolling of the limitations period, we **DISMISS** her petition for review.²⁴

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

²³ The Court did note, however, “[I]f 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.” *Link*, 370 U.S. at 634 n.10.

²⁴ Given our disposition of this case, it is unnecessary for us to rule on EPA’s Motion to strike Cook’s unauthorized response.