



Issue Date: 30 April 2019

Case No.: 2019-AIR-00008

In the Matter of

ANDRE ROUNDTREE

KENDALL GREEN

ANDRE FIELDS

Complainants

v.

AMERICAN AIRLINES/US AIRWAYS

Respondent

DECISION AND ORDER OF DISMISSAL

The above-captioned matter arises under the employee protection provisions under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (“AIR21” or “the Act”)¹ and its implementing regulations.² It has been referred to the Office of Administrative Law Judges (“OALJ”) for further adjudication.

Procedural Background

According to a letter dated February 14, 2019 to the OALJ Chief Administrative Law Judge (“ALJ”) from their current counsel, attorney Karin M. Gunter, Andre Fields, Kendall Green, and Andre Roundtree (collectively referred to herein as “Complainants”) filed a complaint under the Act with the United States Department of Labor, Occupational Safety and Health Administration (“OSHA”) on May 11, 2017 against U.S. Airways (American Airlines) (“Respondent”).³ The May 11, 2017 OSHA complaint alleged that, in violation of the Act, Complainants had been threatened with disciplinary action in April 2017 because their filing prior complaints with OSHA and the Federal Aviation Administration.

Enclosed with that February 14, 2019 letter is a copy of a letter dated December 1, 2017 to “Mildenberg Law Firm, 1735 Market Street, Suite 3750, Philadelphia, PA 19103, ATTN: Brian Mildenberg, Esq.” from OSHA. This letter from OSHA states that the investigation of the May 11, 2017 complaint had been completed. It also outlines the Secretary’s Findings that the

¹ 49 U.S.C.A. § 42121.

² 29 C.F.R. Part 1979.

³ According to correspondence from Ms. Gunter to the OSHA Assistant Regional Administrator, Whistleblower Protection Program dated January 31, 2019 which is included with her February 14, 2019 as Exhibit A, there was a fourth complainant, David Smith, in the May 11, 2017 whom she does *not* represent. This correspondence from Ms. Gunter resulted in the docketing of this case before the OALJ.

matter was required to be “dismissed due to a lack of cooperation” because the Complainants had failed, through counsel, to respond to information requests.

In her February 14, 2019 letter to the OALJ Chief ALJ, Ms. Gunter states that she “seeks to revive the [May 11, 2017 complaint], since the Complainants neither were notified by counsel Mildenberg of the Secretary’s Findings nor made aware of his lack of cooperation in this matter.”

By letter dated February 26, 2019 from Respondent’s counsel, Jennifer M. Evans, Director and Senior Attorney, Respondent maintains that the Act does not provide any “mechanism” for “revival” as Complainants’ counsel seeks. The February 26, 2019 letter notes the Act and its implementing regulations require objections to the Secretary’s findings be filed within 30 days of their receipt, citing 29 C.F.R. 1979.106(a). The letter further states that, in the absence of such objections, the Secretary’s findings become final and non-reviewable, citing 29 C.F.R. §1979.106(b)(2).

A Notice of Assignment and Order to Show Cause (“Notice and Order”) was issued in this matter on March 20, 2019, informing the parties of the undersigned’s assignment to this case and direct Complainants to show cause as to why this matter should not be dismissed as untimely raised before the OALJ. The Notice and Order directed Complainants’ response to be submitted within 15 days of its receipt and Respondent’s reply (if any) to be submitted within 10 days of receipt of Complainants’ response.

A letter dated April 4, 2019 and received on April 8, 2019 from Complainants’ counsel constitutes Complainants’ Response to the March 20, 2019 Notice and Order. A letter dated April 12, 2019 and received on April 17, 2019 from Respondent’s counsel constitutes Respondent’s reply to Complainant’s Response. By facsimile transmission dated and received on April 15, 2019, Complainants’ counsel submitted a surreply to Respondent’s reply.⁴

Time Limits for Filing Under AIR21

Pursuant to AIR 21, when a complaint is filed under the employee protection provision, the Secretary of Labor must conduct an investigation and notify the complainant and the person identified in the complaint of the Secretary’s findings within sixty (60) days after receipt of the complaint. 49 U.S.C. § 42121 (b)(2)(A).

AIR 21 further provides that, “either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record.” 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1979.106(a). The party who desires review “must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order[.]” *Id.* If no objections are timely filed, then the “findings or preliminary order...shall become the final decision of the Secretary, not subject to judicial review.” *Id.*

⁴ The Notice and Order did not provide permission to submit this surreply: Complainants applied for such permission within the surreply itself. Upon due consideration, such permission is granted and Complainants’ surreply has been considered.

Equitable Tolling

The time limitation provisions in statutes like the AIR21 may not be jurisdictional, in the sense that a failure to file a complaint or file objections to the Secretary's Findings within the prescribed period is an absolute bar to administrative action, but rather, those time limitation provisions are analogous to statutes of limitation. Therefore, the time limitation provision in the Act may be tolled (suspended) by equitable consideration. *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984); *School District of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Coke v. General Adjustment Bureau, Inc.*, 654 F.2d 584 (5th Cir. 1981). The *Allentown* court warns that the restrictions on equitable tolling must be *scrupulously observed*; the tolling exception is not an open invitation to disregard limitation periods simply because they bar what may be an otherwise meritorious cause. *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991).

In determining if a statute of limitations for whistleblower claims should be tolled, the Administrative Review Board ("ARB") has recognized four principal and nonexclusive "situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012) (citations omitted).

A complainant's inability to satisfy one of these elements is not necessarily fatal to their claim. Courts, however, "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). See also *Baldwin County Welcome Ctr. v. Brown*, 466 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).

The undersigned may consider if there is an absence of prejudice to the other party in determining whether to toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling. However, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. at 152.

Here Complainants bear the burden of justifying the application of equitable tolling principles. See *Wilson, supra*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling); see also *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993). Ignorance of the law will generally not support a finding of entitlement to equitable tolling. *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.

The Parties' Positions

Complainants' Response

In their Response to the March 20, 2019 Notice and Order, Complainants generally adopted and incorporated by reference the procedural background to this case as outlined in the Notice and Order. Complainants also acknowledge that their then-counsel Mildenberg failed to file "any objections, timely or otherwise, on their behalf to the Secretary's Findings in this matter." Response at 2.

Complainants argue that equitable tolling principles should apply in this matter. Specifically, Complainants contend that (1) equitable tolling applies due to extraordinary circumstances, (2) prior counsel Mildenberg precluded their pursuing the subject whistleblower complaint under AIR21 by abandoning and misleading them, and (3) prior counsel Mildenberg had an inappropriate relationship with Respondent's outside counsel. Included as support for Complainants' Response are the following documents:

- Exhibit 1 – Civil Docket Report, The Philadelphia Courts Civil Docket Access, depicting the March 23, 2017 filing of a civil action in a case captioned *Smith, et. Al v. American Airlines*, noting Brian Mildenberg as attorney for plaintiff, and indicating the matter was dismissed with prejudice via order entered on June 1, 2017.
- Affidavit Statement of Andre Roundtree dated April 3, 2019 with Exhibits A-1 through A-3 attached.
- Affidavit Statement of Andre Fields dated April 3, 2019 with Exhibits A-1 through A-3 attached.
- Affidavit Statement of Kendall Green dated April 3, 2019 with Exhibits A-1 through A-13 attached.

Respondent's Reply

In its Reply to Complainants' Response, Respondent contends that attorney error or neglect on the part of Complainants' prior counsel fails to constitute 'extraordinary circumstances' which would allow equitable tolling of the applicable time limits for objection to OSHA's dismissal of the instant complaint. Respondent further contends that Complainants failed to demonstrate the requisite diligence which must proceed the application of equitable tolling principles, citing Complainants' cessation of their inquiries to their prior counsel in August of 2017 about the status of this complaint. Respondent also maintains that Complainants' allegations of an inappropriate relationship between their prior counsel and Respondent's outside counsel constitute "specious assertions" which "should play no role in the ALJ's equitable tolling calculus." Respondent's Reply at 3.

Complainants' Surreply

In their Surreply, Complainants note that the four principal situations identified by the Administrative Review Board ("ARB" or "Board") in which equitable modification of a time limit would apply are not exclusive. Complainants further contend that while attorney error

generally does not constitute extraordinary circumstances warranting equitable tolling, in their case, it does. Specifically, Complainants' provided their affidavits statements and supporting exhibits to demonstrate the ineffectiveness of their prior counsel. Finally, Complainants "maintain their position" as asserted in their Response, that prior counsel Mildenberg failed to act on their behalf because of an "inappropriate relationship between himself and outside counsel for Respondent." Complainant's Surreply at 3.

Discussion

As noted in *Madison v. Kenco Logistics*, ARB No. 18-018, ALJ No. 2016-FDA-00004, slip op. at 3 (ARB Feb. 15, 2018), a case cited in Complainants' Surreply, "[t]he Board has consistently held that 'equitable tolling is generally not appropriate when a complainant is represented by counsel because counsel is "'presumptively aware of whatever legal recourse may be available to [his or her] client.'" Moreover, another consistent holding of the Board is that attorney error does not constitute an extraordinary circumstances which allow for equitable tolling because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys.'" *Id.* (quoting *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-00007, slip op. at 9 (ARB Sept. 29, 2006).

Credit is given to Complainants' assertion that their prior counsel repeatedly failed to respond to their multiple inquiries via telephone and email about the status of their whistleblower complaint before OSHA during the period after the filing of that complaint on May 11, 2017 through August 11, 2017. *See* Complainants' Response, Affidavits of Roundtree, Fields and Green, attached.

Complainants argue here that their prior counsel's actions were so egregious as to constitute ineffective counsel. They further argue that such ineffective counsel would constitute 'extraordinary circumstances' justifying equitable tolling of the applicable time limits for objecting to OSHA's dismissal of their complaint at issue. Complainants' Response cites *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-00007 (ARB Sept. 29, 2006) to support the argument that the Board has recognized that ineffective counsel could indeed constitute such an extraordinary circumstance. *Higgins*, however, reiterates the Board's consistently-held position that attorney error does not constitute such circumstance because clients are deemed accountable for the actions of their chosen counsel.⁵ *Higgins*, ARB No. 05-143, slip op. at 9. Complainants here have addressed Board precedent and cited case law in their Response to the Notice and Order. The Board precedent cited in Complainants' Surreply, however, does not support Complainants' position that ineffective counsel should constitute

⁵ The Board in *Higgins* cites the following in further support of this principle: *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 Board also noted the United States Supreme Court's holding in *Link v. Wabash R. Co.*, 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).

extraordinary circumstances, and the case law cited pertains to criminal matters.⁶ So, as the Board did in *Higgins*, the undersigned is compelled to conclude Complainants “neither addressed the Board’s precedent nor cited to any case law whatsoever in support of [their] argument that *under the facts of this case as alleged*, [they] should not be held accountable for” their prior counsel’s failure to timely object to OSHA’s dismissal of their complaint and request a hearing before the OALJ. *Id.* (Emphasis added).

Furthermore, the Board in *Kenco* stated that “‘extraordinary circumstances’ is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing.” *Kenco*, ARB No. 18-018, slip op. at 3. Here, as Respondent notes in its Reply, the affidavits submitted in support of Complainants’ Response indicate that Complainants stopped contacting their prior counsel about the status of the subject whistleblower complaint in August 2017 – more than three months *before* OSHA dismissed that complaint in December 2017.

Again, credit is given to Complainants’ assertion that their prior counsel repeatedly failed to respond to their multiple inquiries via telephone and email about the status of their whistleblower complaint before OSHA during the period after the filing of that complaint on May 11, 2017 through August 11, 2017.⁷ *See* Complainants’ Response (Affidavit Statements of Roundtree, Fields and Green). However, the undersigned finds Complainants’ exercise of diligence in the face of their prior counsel’s non-responsiveness could have resulted in the timely filing of an objection to OSHA’s dismissal of their complaint. Based on their own affidavit statements, it appears Complainants failed to inquire about or pursue their whistleblower complaint before OSHA under AIR21 during the period from August 2017 until their current counsel contacted OSHA about the status of that complaint in January 2019 – an unexplained delay of approximately 18 months.

Finally, Complainants offer the contention that their prior counsel had an ‘inappropriate relationship’ with Respondent’s outside counsel. This contention is based on the purported failure of their prior counsel to respond to questioning at a meeting about the status of other employment discrimination litigation Complainants were pursuing against Respondents, as well as their prior counsel’s arranging with that outside counsel for Respondent’s employees alleging racial discrimination in their employment to be interviewed by Respondent. *See* Complainants’ Response (Green Affidavit Statement at ¶¶ 27 – 36). Complainants have proffered subjective belief and conclusory assertion of an improper relationship between their prior counsel and Respondent’s outside counsel regarding their other employment discrimination litigation against

⁶ Specifically, Complainants’ Response cites to *Holland v. Florida*, 560 U.S. 631, 645-646 (2010) (one-year statute of limitations on petitions for federal habeas relief by state prisoners deemed subject to equitable tolling; case remanded for lower court to determine if conduct of state prisoner’s attorney in failing to provide prisoner with information that he had requested so that he could monitor case, and in failing to communicate with prisoner over period of years, etc. rose to level of “extraordinary circumstance,” of kind sufficient to permit equitable tolling of one-year statute) and *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001) (evidentiary hearing was warranted with respect to federal habeas petitioner’s equitable tolling claim, where petitioner, who originally filed petition pro se, presented evidence of ongoing periods of mental incompetency and also alleged that his counsel in state post-conviction proceedings effectively abandoned him and prevented him from filing his habeas petition on time).

⁷ *See* Complainant’s Response (Green Affidavit Statement, Exhibits “A-2” to “A-13,” attached).

Respondent. Such belief and assertion are insufficient to establish they were “in some extraordinary way” precluded from timely filing their objection to OSHA’s dismissal of their complaint as to justify equitable modification of the applicable time limits in this matter.

Conclusion

Because Complainants have failed (1) to timely file their objection to OSHA’s dismissal of their complaint on December 1, 2017 and (2) to establish grounds for equitable tolling of the time limits to file such an objection, this case must be dismissed before the OALJ.

ORDER

Complainants’ objections to OSHA’s complaint dismissal dated December 1, 2017 is DISMISSED with prejudice as untimely filed.

SO ORDERED.

LYSTRA A. HARRIS

Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service

(eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).