



In the Matter of:

CARL B. BEDWELL, SR.,

ARB CASE NO. 09-094

COMPLAINANT,

ALJ CASE NO. 2009-STA-029

v.

DATE: August 27, 2009

SPIRIT MILLER NE, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondent:

Carol C. Barnett, Esq., *Polsinelli Shughart, PC*, St. Joseph, Missouri

FINAL DECISION AND ORDER

Carl Bedwell filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on September 12, 2008. He alleged that his employer, Spirit Miller NE, LLC, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,¹ when Spirit Miller terminated his employment on August 12, 2008, after he reported insurance fraud to insurance carriers and Spirit Miller. The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Bedwell's complaint as untimely filed. We affirm.

¹ 49 U.S.C.A. § 31105 (West 2008).

BACKGROUND

Spirit Miller, a commercial motor carrier engaged in transporting products on the highways via commercial motor vehicle, hired Bedwell as an independent contractor-driver to haul new tractor trailers to their destinations.² Bedwell alleged that he was discharged by Spirit Miller on or about August 12, 2008.³ Bedwell's last day of employment with Spirit Miller was on or about December 31, 2005.⁴

On or about September 12, 2008, Bedwell filed a complaint with OSHA, alleging that the Respondent discharged him in retaliation for reporting insurance fraud.⁵ OSHA concluded that Bedwell had not timely filed the complaint, that Bedwell's allegation that Spirit Miller had threatened him in a telephone call on August 12, 2008 was not supported by the evidence, and that reporting insurance fraud is not a protected activity under 49 U.S.C. § 31105. Thus, OSHA dismissed the complaint.⁶ Bedwell objected to the OSHA Administrator's findings and requested a hearing before an ALJ. Spirit Miller responded to Bedwell's objection, stating that his request for a hearing should be denied because Bedwell did not file his complaint in a timely manner, he was not an employee under the STAA near or at the time the charge was filed, and because he had not complied with appropriate regulatory procedures. The ALJ issued an Order to Show Cause why the claim should not be dismissed as untimely since Bedwell had not worked for Spirit Miller since December 31, 2005.

Bedwell responded to the ALJ's show cause order, stating that the date of December 31, 2005, was a moot issue due to an event that occurred on October 30, 2008. Bedwell stated that on that date, he received notice of Internal Revenue Service (IRS) case determination No. 62702, as did Parent Company Administrator Howard L. Miller. Bedwell asserted that his response satisfied the ALJ's Show Cause Order.

On May 12, 2009, the ALJ issued his Recommended Decision and Order Dismissing Complaint as Untimely because Bedwell's reliance on an the filing of an IRS claim as the basis for tolling the limitations period was unavailing. The ALJ noted that the pursuit of an alternative

² See OSHA Administrator's Findings, Feb. 24, 2009, at 1.

³ Whistleblower Screening Form completed by Bedwell on Sept. 12, 2008.

⁴ See OSHA Administrator's Findings, note 2.

⁵ Whistleblower Screening Form, note 3.

⁶ OSHA Administrator's Findings, note 2.

remedy with another agency does not toll the STAA's 180-day requirement.⁷ Accordingly, the ALJ dismissed Bedwell's complaint.

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.⁸ The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.⁹ The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."¹⁰

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.¹¹ In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"¹² Therefore, the Board reviews the ALJ's conclusions of law *de novo*.¹³

The Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order. Spirit Miller submitted a brief, but Bedwell did not.

The Legal Standards

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay,

⁷ Recommended Decision and Order Dismissing Complaint as Untimely (R. D. & O.) at 2.

⁸ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

⁹ 29 C.F.R. § 1978.109(c)(1) (2008).

¹⁰ 29 C.F.R. § 1978.109(c).

¹¹ 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

¹² 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

¹³ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

terms, or privileges of employment” because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order;” who “refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;” or who “refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.”¹⁴

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.¹⁵ The STAA limitations period is not jurisdictional and therefore is subject to equitable tolling.¹⁶

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.¹⁷ The 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.¹⁸ But filing a complaint which does not seek remedies under the STAA with an agency other than the Department of Labor does not justify tolling the 180-day period.¹⁹

DISCUSSION

It is undisputed that Bedwell did not file his complaint until September 12, 2008, which was almost three years after Spirit Miller terminated his employment on or about December 31, 2005. Accordingly, Bedwell’s complaint is untimely. We must therefore determine whether Bedwell is entitled to equitable tolling of the filing period.

As a general matter, in determining whether equity requires the tolling of a statute of limitations, the ARB is guided by the principles that courts have applied to cases with statutorily-

¹⁴ 49 U.S.C.A. § 31105(a)(1).

¹⁵ 49 U.S.C.A. § 31105(b)(1).

¹⁶ *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).

¹⁷ 29 C.F.R. § 1978.102(d)(2).

¹⁸ 29 C.F.R. § 1978.102(d)(3).

¹⁹ *Id.* *See also 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).

mandated filing deadlines.²⁰ Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.^[21]

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.²²

Bedwell stated that on October 30, 2008 he received notice of IRS case determination No. 62702, which he believes is sufficient reason to allow his claim even though it was filed outside of the 180-day filing period. There is no evidence that the first or second situation as set out above are implicated in this case. Bedwell's argument falls most closely under the third equitable tolling situation described. However, that situation requires that he have mistakenly filed an STAA complaint in the wrong forum not later than 180 days after his last date of employment of December 31, 2005.

As earlier noted, an STAA regulation permits tolling the 180-day limitations period under certain circumstances, but not when the complainant files a non-STAA complaint with an agency other than the Labor Department.²³ Thus, if Bedwell had timely filed "the precise statutory claim in the wrong forum," he could have established his entitlement to tolling of the limitations period. The record contains no evidence that Bedwell filed an STAA complaint with the IRS however. Neither is there evidence that he filed his claim with the IRS within the 180-day filing period. Therefore, he did not file the precise statutory claim within the filing period and his actions do not justify tolling the 180-day limitations period.

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined the evidence each party submitted. After viewing the evidence and drawing inferences in the light most favorable to Bedwell, the ALJ dismissed Bedwell's complaint. Since the record contains no evidence that Bedwell filed an STAA complaint within 180 days of the alleged adverse

²⁰ *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (ARB Feb. 28, 2007).

²¹ *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

²² *Herchak v. America W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003), citing *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

²³ *See* 29 CFR § 1978.102(d)(3).

actions and does not support permitting equitable tolling, the ALJ properly dismissed Bedwell's complaint. Thus, we **AFFIRM** his Recommended Decision and Order and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge