



**Issue Date: 19 July 2006**

**CASE NO.: 2006-AIR-00010**

*IN THE MATTER OF:*

**MARCUS D. HILL,  
Complainant,**

**v.**

**AMERICAN AIRLINES,  
Respondent.**

**DECISION AND ORDER**

*Granting Respondent's Motion to Dismiss*

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"). This statutory provision, in part, prohibits an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or to the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

This claim was brought by the Complainant, Marcus Hill, against the Respondent, American Airlines, alleging that he was discharged in violation of the Act. This matter is before me on an appeal from the finding of the Occupational Health and Safety Administration ("OSHA") that the Complainant's claim was time-barred.

**Background and Procedural History**

The Complainant was employed by the Respondent as the head of an engineering team in 2005 when he was terminated by the Respondent, allegedly for falsifying an expense report. Resp't Mot. to Dismiss at Exhibit B. In 2005, the Complainant was placed on suspension with pay pending an investigation by the Respondent. Resp't Mot. to Dismiss at Exhibit B. The Complainant retained counsel at this time.

On June 3, 2005, the Complainant was given a letter by Managing Director Harry Demarest informing him that his “employment relationship with [the Respondent] will end on June 3, 2005.” Resp’t Mot. to Dismiss at Exhibit A. The letter also stated that the Complainant could sign and return an attached “Agreement and General Release” if he wished “to resign in lieu of termination.” Resp’t Mot. to Dismiss at Exhibit A.

The attached Agreement stated that “[r]esignation in lieu of termination will be made available to you by [the Respondent] provided you agree to the terms of this Agreement and General Release.” Resp’t Mot. to Dismiss at Exhibit C. The Agreement also stated that, if it was agreed to:

Your last day worked will be June 3, 2005. You will remain on personal Leave of Absence through August 20, 2005.

On August 20, 2005, you will be placed on a Personal Leave of Absence until August 21, 2005, you will retire with all applicable retiree benefits and privileges then in effect.

Resp’t Mot. to Dismiss at Exhibit C. This change of termination dates would have allowed the Complainant to attain the age of 50 for purposes of his retirement benefits. Resp’t Mot. to Dismiss at Exhibit B. In exchange, the Complainant had to agree to release the Respondent from any claims arising out of his employment or his termination. Resp’t Mot. to Dismiss at Exhibit C. The Complainant had 21 days to consider the offer and make a decision. Resp’t Mot. to Dismiss at Exhibit C.

The Claimant consulted with his counsel about the Agreement who then began communication with the Respondent about it. Resp’t Mot. to Dismiss at Exhibit B. Throughout June and July 2005, this dialogue continued as various details of the proposed Agreement were discussed and negotiated. Resp’t Mot. to Dismiss at Exhibit B. Among the verbal agreements reached was an agreement that the Complainant could have more than the specified 21 days to consider the Agreement offer. Resp’t Mot. to Dismiss at Exhibit B.

In late August the communication between counsel for the Complainant and the Respondent broke down, and the Respondent stopped responding to letters or phone calls from counsel for the Complainant. Resp’t Mot. to Dismiss at Exhibit B. After failing to receive any response from the Respondent by October 15, 2005, the Complainant elected to file a complaint under the Act with OSHA. Resp’t Mot. to Dismiss at Exhibit B.

He ultimately filed a complaint dated November 22, 2005. Resp’t Mot. to Dismiss at Exhibit B. This complaint states in its first paragraph that “[the Complainant] was terminated by [the Respondent] on June 3, 2005.” Resp’t Mot. to Dismiss at Exhibit B. The complaint then acknowledges that:

We are aware that the Whistleblower Complaint statues [sic] require this complaint to be made no less than sixty (60) days following the discriminatory act, in this case, [the Complainant's] termination of employment.

Resp't Mot. to Dismiss at Exhibit B. The complaint then elaborates the "equitable considerations" that the Complainant believed justified commencing the applicable "sixty" day period on a later date than the date of his actual termination, which the Complaint again states to have been June 3, 2005. Resp't Mot. to Dismiss at Exhibit B.

On January 27, 2006, OSHA sent a notification to the Complainant of the results of their investigation of his complaint. Resp't Mot. to Dismiss at Exhibit G. Their investigation concluded that the Complainant had been given "notice of his discharge on June 3, 2005 which initiated the 90 day filing period for filing a complaint under the Act." Resp't Mot. to Dismiss at Exhibit G. In February 2006, the Complainant appealed OSHA's findings, and the case was subsequently assigned to me.

On March 31, 2006 a pre-hearing conference call was held to discuss procedural matters in the case. At that time, the Respondent maintained that there was an issue as to the timeliness of the Complainant's complaint that might be dispositive. The parties agreed, therefore, to allow the Respondent to file a dispositive motion related to the timeliness issue by May 24, 2006, to file any response briefs by June 15, 2006, and to file any reply briefs by June 26, 2006. I agreed to provide the parties with a decision on this issue by July 27, 2006.

On May 23, 2006, the Respondent filed a Motion to Dismiss. On June 15, 2006 the Complainant filed a response brief, and on June 23, 2006, the Respondent filed a reply brief.

### **The Respondent's Motion to Dismiss**

The Respondent's Motion to dismiss was accompanied by seven attached exhibits, including copies of the termination letter it provided to the Complainant, the Agreement it offered to the Complainant, the Complainant's OSHA complaint, OSHA's decision letter, two of the letters sent by the Complainant's counsel, and an affidavit from the counsel handling the ongoing discussions for the Respondent. Because the motion calls for reliance upon materials beyond just the pleadings themselves, it must be treated as a motion for summary decision under 29 C.F.R. §§ 18.40 and 18.41 instead of as a motion to dismiss. See **Fullington v. AVSEC Services, LLC**, ARB No. 04-019, slip op. at 8 (Oct. 26, 2005). Consequently, I will treat the Respondent's Motion to Dismiss as a motion for summary decision on the potentially dispositive issue of timeliness.

## Standards for Summary Decision

Motions for summary decision in proceedings before an administrative law judge in the Department of Labor are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Under those sections, an administrative law judge may grant a party's motion for summary decision when "there is no genuine issue as to any material fact and that party is entitled to summary decision." 29 C.F.R. § 18.40(d). This standard is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56. *Hasan v. Burns and Roe Enterprises*, ARB No. 00-080, slip op. at 6 (Jan. 30, 2001).

If the moving party can establish that there is no genuine issue of material fact and that they are entitled to summary decision, the burden is shifted to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman v. General Electric Co.*, ARB No. 03-029, slip op. at 4 (May 28, 2004). The non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings to carry this burden, but rather, must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the non-moving party fails to meet this burden as to any of the required elements of his case, all other factual issues become immaterial and there can be no genuine issue of material fact. *Id.*, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

## Discussion

The issue I must determine is whether the complaint filed with OSHA by the Complainant was timely under the Act and its implementing regulations. The Act provides:

(1) FILING AND NOTIFICATION. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination.

29 U.S.C. § 42121(b)(1). The applicable implementing regulations provide:

Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

29 C.F.R. § 1979.103(d). Thus, it is clear that the critical questions are: (1) what was the date on which the alleged violation of the Act occurred (i.e., when the discriminatory decision had been both made and communicated to the Complainant) and (2) did the Complainant file his complaint within 90 days of that date.

Turning to the first question, I find that the date on which the alleged violation of the Act occurred was June 3, 2005. It is beyond any doubt that, by this date, the Respondent had made the “discriminatory decision” to end the Complainant’s employment and that, on this date, that decision was “communicated to the complainant.” 29 C.F.R. § 1979.103(d). That communication was made in a letter informing the Complainant unequivocally that his “employment relationship with [the Respondent] will end on June 3, 2005.” Resp’t Mot. to Dismiss at Exhibit A. The Complainant even acknowledged in his complaint to OSHA that this was the relevant date. Resp’t Mot. to Dismiss at Exhibit B. Any ongoing discussion about the exact terms of the end of that employment relationship does not change the fact that the Respondent clearly communicated its allegedly discriminatory decision to end the relationship to the Complainant on that date. Thus, June 3, 2005 precisely satisfies the definition provided by 29 C.F.R. § 1979.103(d) and is the date on which the alleged violation of the Act occurred for the purposes of determining timeliness.

Turning to the second question, I find that the Complainant did not file his complaint within 90 days of the date on which the alleged violation of the Act occurred. The applicable implementing regulations provide that “[t]he date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.” 29 C.F.R. § 1979.103(d). In this case, it is undisputed that the Complainant filed his complaint with OSHA by mail on November 22, 2005. Resp’t Mot. to Dismiss at Exhibit B. November 22, 2005 is 173 days after the date on which the alleged violation of the Act occurred on June 3, 2005, and it is 83 days after the 90 day statute of limitations expired on September 1, 2005.<sup>1</sup> Thus, it is clear that the Complainant’s complaint was not timely filed.

Even when a complaint under the Act is not timely filed, however, there are certain circumstances under which it may be allowed to proceed regardless of its tardiness. Because the 90 day statute of limitations applicable to complaints under the Act is not a jurisdictional limitation, it can be subject to equitable tolling. **Ferguson v. Boeing Co.**, ARB No. 04-084, slip op. at 10 (Dec. 29, 2005). The Administrative Review Board (“ARB”) has identified three “limited conditions” under which equitable tolling may occur:

- 1) if the respondent has actively misled the complainant concerning his cause of action, 2) if the complainant has been in some extraordinary way

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<sup>1</sup> See <http://www.timeanddate.com>; specifically, <http://www.timeanddate.com/date/dateadd.html> for the calculation of the expiration of the 90 day deadline and <http://www.timeanddate.com/date/duration.html> for the calculation of the number of days between the various dates.

been prevented from asserting his rights, or 3) if the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

*Id.* at 7, n. 44, citing **Halpern v. XL Capital, Ltd.**, ARB No. 04-120, slip op. at 4 (Aug. 31, 2005).

In this case, there is no claim or evidence to support a claim either that the Complainant “has been in some extraordinary way prevented from asserting his rights” or that he “raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.” *Id.* The only arguments for equitable tolling made by the Complainant are: (1) that he was “actively misled by Respondent,” (2) that he “should not be penalized because he and his attorney engaged in ‘good faith’ settlement discussions with Respondent,” and (3) that equitable tolling is appropriate because there was “no ‘surprise’ to Respondent” or other prejudice caused by the lateness of his complaint. Com. Resp. to Mot. to Dismiss at 1, 7 & 9.

Turning to the first of these arguments, the Complainant has offered absolutely no evidence that the Respondent took any steps that could be characterized as actively misleading him. The Complainant has offered no documentary evidence or affidavits of any kind, while the Respondent’s attorney responsible for the ongoing discussions has offered an uncontested affidavit recounting her specific actions and attesting to her good faith and lack of any intention to deceive or delay. The Complainant offers only the statement in his brief that the suggestion in the Respondent’s proposed Agreement that the Complainant consult with an attorney and a tax consultant before signing the proposed agreement indicates that the Respondent was willing “to accept questions and counter-proposals.” Com. Resp. to Mot. to Dismiss at 7-8.

It is debatable that the Respondent’s suggestion indicates any willingness to entertain counter-proposals, but even if it does, it still would not constitute evidence of any attempt to actively mislead the complainant concerning his cause of action. In fact, the Respondent’s offered Agreement is evidence of precisely the opposite: good faith. First, the letter accompanying the Agreement is unequivocal in its termination of the Complainant’s employment relationship with the Respondent. Second, the offered Agreement clearly states that it requires the Complainant to release any claims against the Respondent stemming from his employment or his termination, and it advises him to consult an attorney before he agrees to release whatever claims he might have. There is no way such a document can be construed as an attempt to mislead the Complainant about the fact that he might have some cause of action against the Respondent.

Moreover, the Complainant admits in his response brief that he and his attorney both “believed Respondent’s actions to be reprehensible and unlawfully motivated” by June 7, 2005. Com. Resp. to Mot. to Dismiss at 9. Thus, even if the Respondent’s offered Agreement could somehow be construed as an attempt to mislead, the Complainant has admitted that it was unsuccessful and that he was, in fact, not misled. He and his attorney both believed his termination to be “unlawfully motivated” within 4

days of its occurrence, leaving them with no explanation for why his complaint was 83 days late.

Turning to the Complainant's second argument for equitable tolling, the fact that "he and his attorney engaged in 'good faith' settlement discussions with Respondent" does not constitute grounds for equitably tolling the statute of limitations. In addition to not falling into any of the three narrow conditions deemed acceptable by the ARB, such negotiations about specifics of a termination, like its effective date or its classification as termination or resignation, have been specifically rejected as grounds for equitable tolling. See e.g., *Rollins v. American Airlines, Inc.*, 2004-AIR-00009, slip op. at 3-4 (Jul. 1, 2004), citing *Kang v. Department of Veterans Affairs Med. Center*, 1992-ERA-00031 (Sec'y Feb. 14, 1994) (holding that the triggering date for filing was not tolled, after notice of termination had been issued, by either the delayed effective date of termination or conversations regarding the possibility of allowing resignation or extending the date of termination).

Turning to the Complainant's third argument for equitable tolling, it is irrelevant that there has been no surprise and that evidence has not been lost, memories have not faded, and witnesses have not disappeared, because the ARB has made it clear that the presence or absence of prejudice to a respondent is only a consideration once a complainant has shown that some grounds to justify the application of equitable tolling exist. See *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, slip op. at 5 (Dec. 30, 2005), citing *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152. The absence of prejudice is not itself an adequate justification for the application of equitable tolling. *Id.* It is not equitable that the Respondent should be penalized because the Complainant and his attorney have "failed to exercise due diligence in preserving his legal rights." *Id.* at 5 (internal quotation marks omitted), quoting *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

### Conclusion

To summarize, considering all of the evidence in the light most favorable to the Complainant, I find that the Respondent has established that there is no genuine issue of material fact with regard to the timeliness of the Complainant's complaint and that, consequently, the Respondent is entitled to summary decision of the issue of timeliness. Specifically, I find that the date on which the 90 day statute of limitations began to run was June 3, 2005 when the Complainant was clearly notified of the allegedly discriminatory decision made by the Respondent, that the Complainant's complaint was filed on November 22, 2005, 83 days after the date on which the 90 day statute of limitations expired, and finally, that no grounds exist in this case to justify equitably tolling the 90 day statute of limitations.

## ORDER

The Respondent's Motion for Dismissal is hereby GRANTED and the claim for relief of the Complainant, MARCUS D. HILL, is hereby DISMISSED.

A

WILLIAM S. COLWELL  
Administrative Law Judge

Washington, D.C.  
WSC:MAWV

**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, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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 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