

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 March 2006

CASE NO.: 2006-AIR-00008

In the Matter of

VINCENT MANCINELLI

Complainant

v.

EASTERN AIR CENTER, INC.

Respondent

Appearances:

Vincent Mancinelli, Bourne, Massachusetts, *pro se*

Bahig Bishay, Agent for Service (Eastern Air Center, Inc.),
Norwood Massachusetts, for the Respondent

Before: Daniel F. Sutton,
Administrative Law Judge

**DECISION AND ORDER DISMISSING RESPONDENT'S OBJECTIONS
TO THE SECRETARY'S FINDINGS AND PRELIMINARY ORDER**

I. Statement of the Case

On October 14, 2005, Vincent Mancinelli (the Complainant) filed a complaint with the Regional Administrator of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, alleging that the Eastern Air Center, Inc. (the Respondent) terminated his employment as a pilot in command on October 11, 2005, in violation of the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (the Act), 49 U.S.C. § 42121. OSHA investigated the complaint and found that the evidence established that the Respondent violated the Act's employee protection provisions by terminating the Complainant's employment because he raised air safety concerns. On May, 16, 2005, the

Regional Administrator issued a notification of the Secretary of Labor's Findings and Preliminary Order pursuant to 49 U.S.C. § 42121(b)(2)(A). The preliminary order did not provide for reinstatement but directed the Respondent to pay the Complainant back pay and compensatory damages and to take other remedial actions. The Regional Administrator's notification advised the Complainant and Respondent that any objections to the Secretary's findings and preliminary order must be filed with the Chief Administrative Law Judge (CALJ) within 30 days of receipt of the Secretary's findings and preliminary order. The Respondent wrote to the OSHA Regional Administrator on June 6, 2005, disputing the Secretary's findings and preliminary order and requesting that the Regional Administrator forward the Respondent's letter to the Federal Aviation Administration and the CALJ. The Respondent never filed an objection or request for hearing with the office of the CALJ, which eventually received the Respondent's June 6, 2005 letter on September 8, 2005 after it was forwarded from OSHA by letter dated August 31, 2005.

In light of the foregoing, the Respondent was ordered to show cause why its June 6, 2005 letter should not be dismissed as an untimely objection to the Secretary's findings and preliminary order. The Respondent responded by asserting that its filing of the June 6, 2005 letter with OSHA constituted a timely objection. For the reasons outlined below, I conclude that the Respondent's objections were not timely filed within the Act's 30-day limitation period and that it has not established grounds for tolling the limitation period. Accordingly, the Respondent's objections must be dismissed.

II. Findings of Fact and Conclusions of Law

The Secretary of Labor is required to investigate complaints alleging violations of the Act's employee protection provisions and to notify the interested parties in writing of the Secretary's findings. 49 U.S.C. § 42121(b)(2)(A). Regarding review of such findings, the Act provides that "[n]ot later than 30 days after the date of notification of findings under this paragraph, 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." *Id.* 49 U.S.C. § 42121(b)(2)(A). The regulations implementing the Act further require that "[o]bjections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001." 29 C.F.R. § 1979.106(a) (2002). The OSHA Regional Administrator's May 16, 2005 letter which notified the Respondent of the Secretary's findings stated,

Respondent and Complainant have 30 days from receipt of these Findings and Preliminary Order to file objections and request a hearing on the record, or they will become final and not subject to court review. **Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street N.W., Suite 400, Washington, D.C. 20001** and with the Regional Administrator, Marthe B. Kent, U.S. Department of Labor-OSHA, Room E-340 JFK Federal Building, Boston, MA 02203.

Findings at 4 (emphasis added). The May 16, 2005 notification further stated that "[u]nless a request for appeal is received by the Administrative Law Judge within the 30 day period, this notice of determination will become the Final Order of the Secretary of Labor. *Id.* See also 49

U.S.C. § 42121(b)(2)(A) which provides that “[i]f a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.”

In its June 6, 2005 letter to the OSHA Regional Administrator, the Respondent stated that “[p]ursuant to the 30-day response period mentioned in your letter, as well as our right to object to your Findings and Preliminary Order, the following represents limited response at this time.” Respondent’s June 6, 2005 Letter at 1. The letter then challenged the Secretary’s Findings on several points and, in the penultimate paragraph on the second page, stated,

We note that you have previously copied certain FAA personnel as well as The Chief Administrative Law Judge. Since we are not privy to the contact information, or the specific identity, we are requesting that you forward a complete copy of this package to those authorities so that our response can be reviewed by those to whom you directed your Findings.

Id. at 2. By letter dated August 31, 2005, OSHA forwarded the Respondent’s June 6, 2005 letter to the Chief Docket Clerk at the Office of Administrative Law Judges which received the letter on September 8, 2005. In the August 31, 2005 letter, OSHA stated,

On June 6, 2005 Eastern Air Center, Inc. filed an appeal with OSHA’s Regional Office but did not file in the Office of Administrative Law Judges, as required by 29 C.F.R. 1979.106(a). In its objection, Eastern asked OSHA to forward the appeal to the “authorities” because Eastern did not have the necessary contact information for the ALJ. Contrary to Eastern’s statement, the OSHA finding clearly specified that any appeal had to be filed in the Office of Administrative Law Judges with 30 days of receipt, and provided the address (please see enclosed Finding). OSHA did not forward the appeal to the Office of Administrative Law Judges.

Before OSHA attempts to enforce its Findings and Preliminary order as final under 29 C.F.R. 1976.106(b)(2), these documents are now presented for your review and consideration.

August 31, 2005 OSHA Letter.

The Office of Administrative Law Judges issued a Notice of Docketing and Order to Show Cause on February 13, 2006. As discussed above, the Respondent was ordered to show cause why its objections should not be dismissed as untimely in light of the fact that they were not filed with the CALJ within the Act’s 30-day limitation period. The Respondent timely answered the order, asserting that it had filed its objections within 20 days from the date of the Secretary’s findings and preliminary order, and it attached a copy of its June 6, 2005 letter to OSHA. The Respondent further stated that it had been contacted on August 10, 2005 by the OSHA investigator who inquired as to whether the Respondent had filed objections within the 30-day limitation period and that it provided the investigator with a copy of the June 6, 2005 letter, thus confirming that it has timely filed its objections. In view of this response, a second order was issued on February 28, 2006, allowing the Secretary and any other interested party 15 days to address whether the Respondent’s June 16, 2005 letter to OSHA should be considered as a timely objection and request for formal hearing pursuant to 49 U.S.C. §

42121(b)(2)(A) and 29 C.F.R. § 1979.106(a). The Complainant responded, urging dismissal of the Respondent's objections as untimely and enforcement of the Secretary's Findings and Preliminary Order. The Secretary has not responded.

Case law developed under the Act establishes that the time limits for filing a complaint, filing a request for hearing and filing a petition for review of an administrative law judge's decision are "not jurisdictional and may, therefore, be subject to equitable tolling." *Ferguson v. Boeing Co.*, ARB Case No. 04-084, ALJ No. 2004-AIR-5, USDOL/OALJ Reporter (PDF) at 10 (ARB Dec. 29, 2005) (90-day limitation period established by section 42121(b)(1) of the Act for filing a complaint) (*Ferguson*); *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-12, USDOL/OALJ Reporter (HTML) at 4 (ARB May 14, 2003) (15-day period established by 29 C.F.R. § 1979.110(a) for filing a petition for review with the Administrative Review Board) (*Herchak*), *petit. for rev. denied sub nom Herchak v. U.S. Department of Labor*, 125 Fed.Appx. 102 (9th Cir. 2004); *Swint v. Net Jets Aviation, Inc.*, ALJ No. 2003-AIR-26, USDOL/OALJ Reporter (HTML) at 6-7 (ALJ July 9, 2003) (30-day period established by section 42121(b)(2)(a) of the Act for filing a request for hearing), *appealed dismissed on basis of settlement*, ARB No. 03-124, ALJ No. 2003-AIR-26 (ARB Nov. 25, 2003). The Administrative Review Board has recognized three situations in which tolling may be warranted:

- (1) when the defendant has actively misled the plaintiff respecting the cause of action;
- (2) when 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.

Stoneking v. Avbase Aviation, ARB NO. 03-101, ALJ NO. 2002-AIR-7, USDOL/OALJ Reporter (HTML) at 2 (ARB July 29, 2003). The burden is on the Respondent to justify application of equitable tolling to save its objections; *Ferguson* at 11; and the Board has emphasized that courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Herchak* at 5, quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) and citing *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).

The Respondent has not alleged that it was actively misled regarding the process for objecting to the Secretary's findings and preliminary order or that was in some extraordinary way prevented from asserting its rights. It does contend that it filed its objections in the wrong forum, a circumstance that the Board has recognized as sufficient to warrant application of equitable tolling principles. See *Shelton v. Oak Ridge National Laboratories et al.*, 2001 WL 328129*3-4 (ARB Mar. 30, 2001) (applying equitable tolling where the respondent employer mistakenly filed its request for hearing with the wrong office). In *Shelton*, which arose from a complaint of employment discrimination under the employee protection provisions of several Federal environmental statutes, one of the respondent employers filed its request for hearing with the Administrator of the Department of Labor's Wage and Hour Division which had investigated the complaint and issued preliminary findings on behalf of the Secretary. The respondent did not file its request with the Chief Administrative Law Judge, and the error was not discovered until a

month later when the respondent's attorney contacted the office of the CALJ. The complainant then moved for entry of a default judgment against the respondent which the CALJ denied after noting that the complainant herself was aware of the respondent's request for hearing and that she too mistakenly believed that the request for hearing had been properly filed with the CALJ. *Shelton v. Oak Ridge National Laboratories et al.*, ALJ No. 95-CAA-19, USDOL/OALJ Reporter (HTML) (ALJ Ord. Aug. 2, 1995). The CALJ applied equitable tolling to find the respondent's request for hearing timely, stating,

The facts in this case demonstrate an appropriate circumstance to excuse a delay in notifying this office of an appeal. Respondents timely notified every relevant party to this proceeding that it appealed the Administrator's decision except this office. Thus, the parties had an opportunity to prepare and respond to this appeal. Complainant herself took the opportunity to respond to Respondents' appeal by cross appealing certain portions of the Administrator's determination.

It is worth noting that I am well aware of the purpose in expediting these cases. Complainant properly points out that cases are dismissed regularly for a party's failure to timely appeal an Administrator's decision. However, those cases involve situations where no appeal has been filed with any party or decision making body. In other words, those parties have not made a showing of mistake, inadvertence, excusable neglect or any other showing to excuse an untimely appeal. Ward, *supra*. In the instant case, every party knew full well of Respondents' intentions and proceeded with this matter as if the appeal was, in fact, filed with this office. Respondents simply made a clerical mistake that affected nothing but the initial processing of the case in this office. Thus, the facts in this case are distinguishable from other cases where no evidence has been provided to excuse an untimely appeal.

Moreover, Complainant has provided no evidence that she has been prejudiced by the delay caused by Respondents' error. Without such evidence, I am compelled to deny Complainant's request for Default Judgment given the facts and circumstances of this case.

Id. at 2. On appeal, the Board affirmed the CALJ's application of equitable tolling, noting that the complainant had not alleged that the respondent's defective filing prejudiced her ability to present evidence and that "all parties had proceeded under the assumption that the request had been filed with the OALJ and it was only later that anyone discovered that the filing was defective." 2001 WL 328129*4.

The facts of the instant case are materially different from *Shelton*. There is no evidence that either the Complainant or OSHA operated under the assumption that the Respondent had filed timely objections, and the Complainant filed no cross-objections to the Secretary's findings and preliminary order. There also is no evidence that the Respondent ever contacted the CALJ or OSHA to whether its June 6, 2005 letter had been received, and the defective attempt to file objections did not come to light until the OSHA investigator contacted the Respondent on August 10, 2005. In my view, the Respondent's unexplained failure to file its objections with the CALJ despite the clear instructions set forth in OSHA's May 16, 2005 notification letter, and its failure to take any further action to preserve its rights until after it was contacted by the OSHA investigator, demonstrate a lack of due diligence which precludes invocation of equitable

relief. While the Complainant has not alleged that any prejudice other than delay resulted from the Respondent's error, the absence of prejudice to another party is not "an independent basis for invoking the [equitable tolling] doctrine and sanctioning deviations from established procedures." *Herchak* at 5, quoting *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

III. Order

Based on the foregoing findings and conclusions, the Respondent's objections are **DISMISSED**, and Secretary's preliminary order of May 16, 2005 shall be deemed a final order that is not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A).

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

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 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).