U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 October 2008

CASE NO.: 2008-AIR-00010

***In the Matter of*:**

STEVEN L. BASIC,
Complainant,

v.

SPIRIT AEROSYSTEMS, INC.,
Respondent,

DECISION AND ORDER DISMISSING COMPLAINT

BACKGROUND

This case involves a complaint filed against the "Boeing Company, now divested to the Respondent, Spirit AeroSystems, Inc." ("AERO"), on November 9, 2007, by *Pro* Se Complainant, Steven L. Basic, under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. §42121.

The complaint (dated November 6, 2007, but not received until November 9, 2007) alleges that the "two companies" had not removed their "blacklisting" of the Complainant as of the date of the complaint. Essentially, the Complainant relates that while he worked at Boeing, in the spring of 1999, he found a "critical area on the crown fuselage panel on the Boeing 737-700 where a set of satellite holes were placed too close to the cutout for an anti-collision light, thereby causing an unseen stress concentration factor." The Complainant alleges that eventually Boeing accepted one of his recommended modifications to remedy this defect in 1999.

The Complainant also alleges that in the spring of 2000, he was "demoted" from "Principal Engineer" to "Lead Engineer" due to his activities under "AIR21." He then describes increasing "stress" resulting in a minor stroke in November 2000 and then a more serious stroke

in the summer of 2002. The Complainant was originally terminated for misconduct on September 10, 2004, but was later allowed to "retire" from Boeing in 2004.

Most significantly with regard to the "AIR21" complaint, the complainant alleges that the Respondent fabricated data about the Complainant's past employment record and hindered his current employment opportunities based on "blacklisting" with PreScreen America.

The complaint was investigated by the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor ("DOL"). Following an investigation into the allegation, the Secretary of Labor, acting through the Regional Administrator for OSHA, dismissed the complaint as "untimely" on May 12, 2008. Specifically, the Secretary found that several years separated the alleged "protected activity" from the alleged adverse actions and that a preponderance of the evidence failed to establish a nexus between the events.

The Secretary's decision stated that the Complainant had thirty (30) days from the receipt of the Findings to request a hearing and/or file any objections. Complainant filed objections to the findings and requested a *de novo* hearing before an Administrative Law Judge by letter dated May 22, 2008 and filed in the Office of Administrative Law Judges on May 28, 2008, and which was timely filed.

Complainant is acting *pro se* in this matter and the undersigned has taken into consideration that Complainant is <u>not an attorney</u> and provided him significantly more latitude than would be given any attorney.

MOTION FOR SUMMARY DECISION

Respondent has filed a Motion for Summary Decision. Respondent also asks for the award of reasonable attorney's fees, pursuant to 29 C.F.R. § 1979.109(b). That aspect of the motion pertaining to attorney's fees will be addressed in a separate section below.

A decision on the Motion for Summary Decision is not necessary in this case since I have determined that it is more appropriate to dismiss the claim as untimely filed.

ORDER DISMISSING CLAIM AS UNTIMELY FILED

"Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d. 532 (1980); *Prybys v. Seminole Tribe of Florida*. 95 CAA 15 (ARB Nov. 27, 1996). A whistleblower complaint alleging discrimination under AIR 21 must be

filed with the Secretary of Labor within ninety days of the alleged adverse action. 49 U.S.C. §42121(b)(1); 29 C.F.R. §1979.103(d). The ninety day period begins "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. §1979.103(d); *Ford v. Northwest Airlines, Inc.*, 2002-AIR-00021 at p. 5 (ALJ Oct. 18, 2002).

Complainant did not file this complaint until November 9, 2007 - over two years after the alleged discriminatory act, by his own admissions (Complaint pps.5 & 6), and well outside of the time limitations imposed by the statute of ninety (90) days.

Although 29 C.F.R. Part 18, Rules for Practice and Procedure for Administrative Hearings, does not address a motion to dismiss, 29 C.F.R. §18.1(a) provides that in situations not addressed in part 18, the Federal Rules of Civil Procedure are applicable. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief may be granted. Although the Rule refers to such dismissal on the motion of a party, it has been uniformly held that a Court may dismiss a complaint for failure to state a claim upon which relief may be granted when it is patently obvious that the complainant could not prevail on the facts alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mizra*, 869 F. Supp. 1031 (W.D.N.Y. 1994); *Johnson v. Baskerville*, 568 F.Supp. 853 (E.D.Va. 1983). Such a conclusion is not a decision on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant's allegations are true, he has stated a cause of action upon which relief can be granted.

Assuming *arguendo* that the Complainant's allegations are true in this case, I find that he failed to file a timely complaint, and has failed to show that he is entitled to relief from his untimeliness.

In deciding this issue, I have considered the Complainant's Response to the Respondent's Motion as it might apply to a dismissal for untimeliness and find it wanting. I have also reviewed the additional correspondence that Complainant has filed since his Response was filed and find that these additional documents contribute nothing to improve the Complainant's position with regards to the issue of timeliness.

I have also considered the "continuing violation" and "equitable tolling" doctrines as they might apply to his case. These doctrines are not in any way applicable to the facts of this case

and are not supported by any viable evidence. Therefore, I find no "equitable tolling" of the statute.

Based on the foregoing, this claim is **HEREBY DISMISSED.**

RESPONDENT'S MOTION FOR ATTORNEY'S FEES

Respondent moved for the award of attorney's fees against the Complainant because he "had no reasonable basis for filing a complaint against Spirit in the first place and had even less support for maintaining this action through an administrative appeal." Respondent's Motion, p. 14.

I have considered Employer's argument for fees, the status of the Complainant as a *pro se* litigant, and the voluminous materials submitted by the Complainant, and do not find that this matter was brought in bad faith, nor do I find it to be frivolous. 29 C.F.R. §1979.109(b).

WHEREFORE: Respondent's motion for attorney's fees is **HEREBY DENIED**.

IT IS SO ORDERED.

A

ROBERT B. RAE
Administrative Law Judge

Washington, D.C.

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. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or email 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).