



Issue Date: 03 November 2005

CASE NO.: 2005-AIR-0018

In the Matter of

SCOTT SMITH,
Complainant

v.

DIAMOND DETECTIVE AGENCY, INC.,
Respondent

ORDER DISMISSING COMPLAINT

This case arises under the employee protection provision of Section 519 of the Wendell A. Ford Aviation and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. §42121 (“Air 21” or “Act”). This statutory provision prohibits an air carrier from discharging or otherwise discriminating against an employee with respect to compensation, terms, or privileges of employment because the employee provided to the employer or Federal Government information related 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.

On September 28, 2005, I ordered the Complainant to show cause by October 21, 2005, why his complaint should not be dismissed for failure to file a complaint within 90 days of his termination by Respondent. Complainant failed to respond to the order to show cause.

FINDINGS OF FACT AND CONCLUSION OF LAW

1. According to the original complaint filed by Mr. Smith by e-mail on April 20, 2005, he was discriminatorily fired from his job in May 2002. In his e-mail, Mr. Smith stated “the reason why I’m filing late is because I’m unaware that OSHA would handle this.” A subsequent letter dated May 9, 2004 stated “the main reason why I filed late is because I’m disabled and suffer from depression and anxiety which causes me to be unable to focus and concentrate. Therefore, I filed late because of my disability.”

2. Under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR), a complainant must file his complaint no later than 90 days after the violation occurs. *See* 49 U.S.C. §42121(b)(1); 29 C.F.R. §199.103(d).
3. The principles of equitable tolling are generally applicable to whistleblower cases. The general principle mandating strict construction of filing periods in whistleblower cases will apply, unless a complainant can demonstrate the right to avail him or herself to the principle of equitable tolling. *Howlett v. Northeast Utilities Company*, ARB No. 99-044, ALJ 1999-ERA-1 (ARB Mar. 13, 2001). There are three specific instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases. First, equitable tolling will apply where the employer actively concealed or misled the employee. *English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988); *See School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981), *Hill v. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995). Second, equitable tolling will apply where the employee was prevented from asserting his right in some extraordinary way. *See Smith v. American President Lines, Ltd.* 571 F.2d 102, 109 (2nd Cir. 1978); *Crosier v. Westinghouse Hanford Co.*, 1992-CAA-3 (Sec’y, January 12, 1994). Third, equitable tolling will apply where the complainant raised the precise statutory claim in the wrong forum. *City of Allentown*, 657 F.2d at 20. *See also Gutierrez v. Regents of the University of California*, ARB 99-166, ALJ No. 1998-ERA-19 (ARB Nov. 8, 1999).
4. Complainant’s first assertion that he was “unaware that OSHA would handle this” fails to meet any of the criteria of equitable tolling. Moreover, Claimant’s ignorance of legal rights or failure to seek legal advice does not toll a statute of limitations.
5. Complainant’s second assertion that a disability from depression and anxiety caused the late filing also fails to meet any of the criteria of equitable tolling. A complainant seeking to toll the employee protection provision time limit due to ill health must show legal incapacity. *See e.g. Ellis v. Ray A. Schoppert Trucking*, 1992-STA-28, slip op at 5 (Sec’y Sept. 23, 1992). Complainant’s mere assertion falls woefully short of showing legal incapacity.

Accordingly, Complainant has failed to show cause why his complaint should not be dismissed. IT IS ORDERED that the above-captioned complaint is DISMISSED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/dlh

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) days of the date of the 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© and 1979.110(a) and (b).