



**Issue Date: 14 October 2009**

Case No.: 2009-AIR-21

In the Matter of:

Thomas Barnes,  
Complainant

v.

American Airlines, Inc.,  
Respondent

**ORDER OF DISMISSAL**

This proceeding arises under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21), 49 U.S.C. Section 42121. The U.S. Department of Labor issued the Secretary's Findings on a complaint filed by Thomas Barnes, who requested a hearing on these findings.

On August 27, 2009, I issued an Order advising the parties that I would consider the timeliness of the Complainant's complaint as a preliminary matter, and directing them to submit written briefs no later than September 25, 2009, addressing the issue of the timeliness of the Complainant's claim, with any supporting documentary evidence. On September 29, 2009, counsel for the Complainant filed a written brief and supporting documentation;<sup>1</sup> on September 25, 2009, counsel for the Respondent filed a written brief and supporting documentation. On October 2, 2009, counsel for the Respondent filed a reply to the Complainant's brief.

**Background**

Based on the parties' submissions, the following facts are not in dispute. The Complainant is employed as a commercial pilot by American Airlines, Inc. On September 21, 2007, the Complainant met with his base manager, Captain John Jirschele, regarding the Complainant's frequent use of paid sick leave. At that time, the Complainant was warned that future claims for paid sick leave could lead to a request for medical documentation. After the Complainant took paid sick leave in November and December 2007, Captain Jirschele sent him a letter requiring that he submit medical documentation to substantiate that the absences were due to illness or injury, and justified sick pay.

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<sup>1</sup> I have considered the Complainant's brief despite the fact that it was not timely filed, and the Complainant did not submit a request to file it out of time.

Captain Tom Hynes, a manager with Respondent, sent a letter to the Complainant on February 28, 2008, scheduling a meeting regarding the Complainant's failure to submit documentation. This meeting occurred on March 5, 2008, and was attended by Captain Jirschele, the Complainant, and representatives of the Airline Pilots Association (APA), including the Complainant's counsel in this matter, Ms. Tricia Kennedy, Esq. During the meeting, which was transcribed, the Complainant explained that he thought he had documented his sick leave by meeting with the Respondent's nurse, Ms. Marsha Reekie, to explain the reasons for his absences. Captain Jirschele advised the Complainant that he had not documented his sick leave, and that the Respondent would recoup the unsubstantiated sick pay, in the amount of \$4,675.60, and issue a written advisory warning that future failures to substantiate sick leave could result in discipline.

By telefax and also by certified mail, the Complainant submitted his complaint to OSHA in a letter that was dated June 3, 2008.<sup>2</sup> However, the telefax copy from OSHA's files reflects that it was sent from Ms. Kennedy's office at 3:29 p.m. on June 4, 2008; the postmark on the certified mail envelope is June 4, 2008.

The Secretary determined that the Complainant's complaint was not timely filed, noting that on March 5, 2008, Captain Jirschele informed the Complainant that the Respondent was reclaiming \$4,675.60 from his pay for unsubstantiated sick leave usage. The Complainant filed his complaint on June 4, 2008. The Secretary indicated that equitable tolling of the statutory filing period was reviewed and discussed with the Complainant, and the Secretary concluded that tolling was not applicable. Thus, the complaint was dismissed.

## DISCUSSION

The purpose of summary judgment is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995); *Harris v. Todd Shipyards Corp.*, 28 BRBS 254 (1994). An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact, and that a party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d). "When a motion for summary decision is made and supported as provided in this section [by affidavit], a party opposing the motion may not rest upon mere allegations or denials of such pleadings. Such response must set forth specific facts showing that there is a genuine issue of material fact for hearing." 29 C.F.R. § 18.40(c). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

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<sup>2</sup> In the Complainant's Objections to OSHA Findings and Order and Request for Hearing, Ms. Kennedy, on behalf of the Complainant, stated that "On June 3, 2008, Complainant timely filed an AIR21 complaint with the OSHA Area Office in Indianapolis, Indiana," and attached the Complainant's letter dated June 3, 2008; she did not include a copy of the telefax transmission or the postmarked envelope. However, in the Brief she submitted on the Complainant's behalf, Ms. Kennedy stated that "On June 4, 2008, Captain Barnes filed his AIR21 complaint with OSHA."

Pursuant to AIR 21, a complaint filed under the employee protection provision must be filed not later than 90 days after the date on which the violation occurs. 49 U.S.C. 42121(b)(1). 29 C.F.R. 1979.103(d). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. 29 C.F.R. 1979.103(d). The date which commences the limitations period is the date when the discriminatory decision has been both made and communicated to the complainant. Thus, it is when the employee is aware or reasonably should be aware of the employer's decision. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1990); *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001).

Moreover, "[t]he filing period commences on the date that Complainant is informed of the challenged employment decision rather than at the time the effects of the decision were ultimately felt." *Ballentine v. Tennessee Valley Authority*, 1991-ERA-23, (Sec. Final Dec. and Order of Dismissal, Sept. 23, 1992); *citing Howard v. Tennessee Valley Authority*, 1990-ERA-24, (Sec. Final Dec. and Order of Dismissal, July 3, 1991), slip op. at 2-3, *aff'd sub nom. Howard v. U.S. Department of Labor*, 959 F.2d 234 (6th Cir. 1992).

Under AIR 21, failure to file within the limitations period warrants dismissal of the complaint. *See Swint v. Net Jets Aviation Inc.*, 2003-AIR-26 (ALJ July 9, 2003) (respondent's motion to dismiss claim granted based on complainant's failure to file hearing request and objections within 30 days of OSHA's findings).

In this case, the date which commenced the 90-day period was March 5, 2008, the date the Complainant was notified by Captain Jirschele that his sick leave would be recouped, and he would be issued an advisory letter. This decision was clearly communicated to the Complainant during the meeting on March 5, 2008. It is not March 6, 2008, the date that Captain Jirschele issued the advisory letter, or the date that the Complainant actually received the letter; it is March 5, 2008, the date the decision was communicated to the Complainant. Thus, Complainant had 90 days from March 5, 2008 to file his complaint, which was June 3, 2008; his filing on June 4, 2008 was not timely.

In his brief, the Complainant claims that although Captain Jirschele "suggested" that he "may" dock the Complainant's pay, the matter was still in the "investigatory mode" as of March 5, 2008, the date of the hearing, and on March 6, 2008, Captain Jirschele "announced" his decision to dock the Complainant's sick pay in a written advisory. The Complainant argues that Captain Jirschele's statements in the hearing were not sufficient to give rise to an adverse action, while the March 6 letter, stating that the Respondent "shall" dock his pay, setting forth the amount of money in question, the date the Respondent would take the money, and proffering the Complainant the option to send in payment rather than having it docked from a future paycheck, clearly and unequivocally announced the adverse action the Respondent had decided upon. According to the Complainant, the 90 day clock did not begin to run until he received the March 6 written advisory, and thus his complaint was timely filed.

The Complainant cites to a decision by Administrative Law Judge Pamela L. Wood in support of his argument that the March 5 hearing was "too premature" to serve as a basis for adverse action, because the "investigation" was still ongoing. *Majali v. Airtran Airlines*, 2003

AIR 45 (ALJ Aug. 10, 2004). Unfortunately, Judge Wood's decision had nothing to do with any issues of timeliness of the alleged adverse action. That case involved the complainant's claim that he was constructively discharged, which Judge Wood determined was not an adverse action, because she concluded, based on all of the factual circumstances, that the complainant's belief that he was constructively discharged was unreasonable. It provides no guidance for this particular fact situation.

I have closely examined the transcript of the March 5, 2008 hearing, and I find that during that hearing, Captain Jirschele clearly and unequivocally communicated to the Complainant his decision to recoup the unsubstantiated sick pay, and to issue the advisory letter. This is also supported by Captain Jirschele's sworn statement submitted with the Respondent's brief.

The hearing transcript reflects that the Complainant attempted to explain how he tried to document his sick leave, by meeting with Ms. Reekie, the Respondent's nurse, and submitting the required form. Although he did not claim that Ms. Reekie told him that she considered his sick leave to be substantiated, the transcript suggests that the Complainant was under the impression that he did not have to do anything further. It is also clear from the transcript that Ms. Kennedy questioned the existence of a written policy setting out the parameters for verifying sick leave, and whether the Complainant could be required to do so.

But as Captain Jirschele stated, these were "institutional issues," that could be debated at another level, and he was there to address the Complainant's specific sick leave situation. He advised the Complainant that Ms. Reekie reported that he did not substantiate his illness, and that the "crux of the problem" was that the Complainant did not have a medical opinion to substantiate his illness. There was also discussion about how the Complainant should handle this situation in the future, and Captain Jirschele advised him that, unless he was told otherwise, he needed to substantiate a sick absence anytime it occurred.

After these discussions, the following exchange took place:

MS KENNEDY: Now, is there going to be any kind of – are you going to take any pay from him, make any entry in his personnel file in connection with the use of this sick time at issue here?

CAPTAIN JIRSCHELE: Now, once again, he is a Miami crewmember, but I'm Tom's designate in this. My intention is this: To issue – and I imagine you've read the Section 21 material, Tom.

My intention is to issue a first step advisory. That's our normal process for someone who does not substantiate the sick time. And I do intend to take the – to reverse the sick times that you were out, the end of November and beginning of December.

That was two three-day trips, which I believe the total is about 33 hours of flying time. I'll let someone else figure that out. So we will restore the time to your sick bank and reverse the pay for the sick time that you were paid for those.

MS. KENNEDY: Okay. And do you have – are you going to issue him a letter in that regard?

CAPTAIN JIRSICHELE: Yes. That's my intent to do so, but I do not have a letter to issue to you today. But that's my intent is to issue a first advisory letter.

And just so you understand, that does become – I don't consider taking the money back for sick time a disciplinary issue. But this first step advisory letter is – we're effectively saying to you that you really do need to comply with this the next time, whatever it takes to substantiate that to AA medical's satisfaction. If not, there could be further discipline.

MS. KENNEDY: And can you – when do you expect to start to recoup his pay for that sick time at issue?

CAPTAIN JIRSICHELE: If you'd like, I can find out or somebody from Miami can find out. We will – we will take that out in portions, and that will be – there is probably some latitude there to negotiate how that's done.

I certainly don't intend for this to be a huge financial hardship all of a sudden for you. So we'll get something worked out. It will be taken out in portions. So we'll work it out form there.

Transcript at 22-23.

There was then more discussion of the policy, and the section of the collective bargaining agreement that the Respondent relied on, with Captain Jirschele again stating that the discussion was an institutional issue that should probably be argued at a higher level. Ms. Kennedy complained that the policy was misleading, and that it was “fundamentally unfair” to take the Complainant's pay, and that the requirement that he participate in the hearing was a violation of the collective bargaining agreement.

I find that the transcript reflects that Captain Jirschele clearly and unequivocally advised the Complainant that the Respondent had concluded that his sick leave for November and December 2007 had not been substantiated, and that the Respondent would recoup that sick leave from his pay, and issue an advisory letter. It does not even suggest that there was any further “investigation” of this issue to be undertaken, or that Captain Jirschele had not yet made up his mind, or needed further approval for recouping the Complainant's sick pay. He announced his decision several times, and although he did not indicate the exact amount that would be recouped from the Complainant, he clearly notified him that the paid sick leave he received in November and December 2007 would be recouped. The letter that was sent the following day, March 6, 2008, formally documented this decision.

The Complainant has submitted his affidavit, stating that he understood the purpose of the March 5, 2008 hearing to be to investigate his use of paid sick time, and provide him an opportunity to tell his side of the story. He stated that at the conclusion of the hearing, he was

under the impression that Captain Jirschele was going to confer with Marsha Reekie about his situation, and then the Company would what action to take regarding his sick pay.

The Complainant also submitted an affidavit from Mr. William Young, who attended the March 5, 2008 hearing, and also stated that he understood the purpose of the hearing to be to investigate the Complainant's use of sick time, and give him the opportunity to tell his side of the story. Mr. Young also stated that at the conclusion of the hearing, he was under the impression that Captain Jirschele was going to confer with Ms. Reekie, and then decide what action the Respondent would take about his sick pay.

Assuming the truth of these statements, I find that this "impression" was not reasonable, and is clearly contradicted by the hearing transcript. Nothing in the transcript even suggests that Captain Jirschele planned to consult further with Ms. Reekie, or that Captain Jirschele had not made up his mind what to do about the sick pay.

The Complainant has not relied on the principles of equitable tolling apply in this case, and I find that equitable tolling is not applicable. Thus, the three specific instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases do not apply to the undisputed facts of this claim. *See, English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988); *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) (employer actively concealed or misled employee); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978); *Crosier v. Westinghouse Hanford Company*, 1992-CAA-3 (Sec'y, January 12, 1994) (employee was prevented from asserting his right in some extraordinary way); *City of Allentown*, 657 F.2d at 20; *Gutierrez v. Regents of the University of California*, 1998-ERA-19 (ARB, November 8, 1999) (complainant raised precise statutory claim in wrong forum).

On March 5, 2008, the Complainant was given final and unequivocal notification that his sick leave would be recouped, and that he would be issued an advisory letter. The fact that the letter was sent the following day, with the specific details of how the Respondent would recover this sick leave, did not delay the commencement of the running of the statute of limitations. There is no evidence that the conduct of the Respondent warrants equitable tolling of the statute of limitations.

## **CONCLUSION**

For all of the foregoing reasons, I find that the Complainant failed to file a claim of discrimination under the AIR21 Act within 90 days from the date of the alleged violation, and that the doctrine of equitable tolling is not applicable in this case. Thus, the Complainant's claim under the AIR21 Act is time-barred.

## **ORDER**

Accordingly, IT IS HEREBY ORDERED that the Complainant's claim is dismissed

SO ORDERED.

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LINDA S. CHAPMAN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. 1979.109(c) and 1979.110(a) and (b).