



Issue Date: 31 March 2010

In the Matter of

THOMAS A. BOHN,
Complainant,
v.
JETBLUE AIRWAYS, INC.,
Respondent.

Case No. 2009 AIR 00023

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Summary Decision Dismissing Complaint

This case involves a complaint filed on June 10, 2009, by *pro se* Complainant, Thomas Bohn against his former employer, Respondent, JetBlue Airways, Inc. Complainant alleged that he was fired from his job as a flight attendant in violation of the employee protection provisions of Section 519 of the Wendell H. Ford Aviation and Reform Act for the 21st Century, 49 U.S.C. § 42121 (AIR 21) because he reported airplane safety and security issues to management. Respondent, in turn, insisted that it terminated Complainant for excessive absenteeism. Following an investigation, OSHA dismissed the complaint on July 1, 2009, on the ground that it was filed more than 90 days after the date of Complainant's discharge.

On August 7, 2009, Complainant filed his objections to OSHA's findings and requested a hearing. JetBlue, thereafter, filed a Motion to Dismiss or In The Alternative For Summary Decision arguing that Bohn's complaint should be dismissed as untimely filed under 29 U.S.C. § 42121(b)(1) and the regulations promulgated and published by the Department of Labor at 29 C.F.R. § 1979.103(d) to implement the Act.

The procedural rules governing consideration of Motions for Summary Decision provide the party opposing the motion 10 days to file a response, *see*, 29 C.F.R. § 18.40(a); however, Complainant failed to respond. Accordingly, he was provided the required Hooker Notice on February 5, 2010. *See*, Hooker v. Westinghouse Savannah River Co., 2001-ERA-16, (ARB August 26, 2004), and Galinsky v. Bank of America, Corp., 2007-SOX-076, (ARB January 13, 2010). On February 26, 2010, the last day on which a timely response to the Hooker Notice could be filed, Complainant called Office of Administrative Law Judges staff personnel to advise, *ex parte*, that the power in his home went out and that he could not type his reply to the Respondent's motion to dismiss since he did not have access to his computer system. He stated that he wanted to file a request for an extension since his response was due that day. He was advised that he must either fax his request for an extension to file his response or mail it, and he responded he would mail the request that evening.

Under the applicable rules published at 29 C.F.R. §18.4(c) and (c) (3), five days, excluding Saturday and Sunday, are added to a prescribed deadline when documents are filed by mail. The prescribed deadline for Complainant's response to the Hooker Notice was Friday,

February 26, 2010. Excluding Saturday and Sunday, his response or extension request, if mailed, was due by Friday, March 5, 2010. To date neither a request for an extension of time to respond nor a response to the Hooker Notice has been filed with the OALJ Docket Office, and there is no indication that Complainant has communicated with opposing counsel who would be entitled to respond to any request Complainant might file. It thus appears that Complainant decided not to file a request for extension or a response to Employer's motion. Since he has, however, been afforded a full opportunity to address Employer's motion, it is appropriate to consider the merits of Employer's request for summary decision.

Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. Section 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See, Gillilan v. Tennessee Valley Authority*, 91-ERA-31, at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1, at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Held v. Held*, 137 F.3d 998, 999 (7th Cir. 1998). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, (1962); *Rogers v. Peabody Coal Co.*, 342 F.2d 749 (6th Cir. 1965).

When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wild-life*, 504 U.S. 555, 112 Sup. Ct. 2130 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Lahoti v. Brown & Root*, 90-ERA-3 (Sec'y Oct. 26, 1992) (summary decision available regarding the issue of timeliness); *Williams v. Lockheed Martin Corp.*, 1998-ERA-40, 42 (Sept. 29, 2000). Evidence submitted by a party opposing summary decision must then be considered in light of its content or substance rather than the form of its submission. *Winskunas v. Birnbaum*, 23 F.3d 1264 (7th Cir. 1994). Considering the foregoing principles, and for reasons set forth below, summary decision will be entered dismissing the complaint.¹

¹ While the regulations do not specifically provide for summary decision or dismissal on the issue of timeliness, appropriately filed motions may be entertained pursuant to the regulations at 29 C.F.R. Part 18 (1992). 29 C.F.R. §§ 18.1, 1940, 18.41. *See, e.g., Howard v. TVA*, 90-ERA-24 (Sec'y July 3, 1991); *Eisner v. United States Environmental Protection Agency*, 90-SDW-2 (Sec'y Dec. 8, 1992); *see, Lahoti, supra; Williams, supra; See also, Swint v. Net Jets Aviation Inc.*, 2003-AIR-26 (ALJ July 9, 2003).

Timeliness of Complaint

It appears that the following facts are undisputed. During the first week in September, 2008, Complainant was suspended without pay from his job as a flight attendant for violating a Final Progressive Guidance Action involving his attendance. On September 22, 2008, he contacted OSHA and was informed of his rights as a whistleblower. OSHA advised him of the procedures for filing an AIR 21 complaint, including the 90-day statutory filing deadline. Complainant acknowledged receipt of OSHA's materials and stated that he declined to file a complaint at that time.

By letter dated November 3, 2008, Complainant was notified that his employment with JetBlue was terminated effective November 4, 2008, for violation of company policy regarding his attendance at work. The letter also notified Bohn of JetBlue's: "post-termination review process that may be requested by any terminated crew member." Bohn acknowledged receiving the notice of termination on November 7, 2008, and, subsequently, on December 3, 2008, he requested JetBlue's People Resource Office to conduct a post-termination review. On March 13, 2009, Complainant was advised that the post-termination review was complete and the decision regarding his termination would not be disturbed. Thereafter, on June 10, 2009, Bohn filed his AIR 21 complaint with OSHA.

Based upon the foregoing facts, OSHA determined that Complainant was fired on November 7, 2008, and filed his complaint on June 10, 2009. As a consequence, OSHA concluded that the: "complaint was not filed within the statutory timeframe and there are no extenuating circumstances to warrant tolling."

90-Day Deadline

Section 42121(b)(1) of 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. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

The regulations implementing AIR 21 similarly provide at Section 1979.103(d):

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. The 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.

Respondent notes that Complainant waited over 215 days after becoming aware of his discharge on November 7, 2008, before filing his complaint, and, therefore, his complaint must be dismissed as a matter of law. The question in this proceeding, however, is whether the 90-day period for filing a complaint commenced on November 7, 2008, when Complainant received the letter notifying him that he was terminated or March 13, 2009, when he received notice that his post-termination review was complete. If the violation occurred on November 7, 2008, Bohn's complaint, as OSHA concluded, was untimely filed. If the violation occurred on March 13, 2009, when Bohn received notice the post-termination review would not result in a change in his status as a terminated employee, the complaint filed on June 10, 2009, 87 days later, would be timely filed.

Unequivocal Notice of Adverse Action

The limitations period within which a whistleblower must file a complaint begins on the date the alleged discriminatory decision is communicated to the employee. Thus, the clock begins to run when the employee becomes aware or reasonably should be aware of the employer's decision, not when the employee realizes the effects of the decision. *See, Delaware State College v. Ricks*, 449 U.S. 250, (1990); *Chardon v. Fernandez*, 454 US 6, 102 S Ct 28, 70 LEd2d 6 (1981); *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, (6th Cir. 2001); *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001); *Devine v. Blue Star Enterprises, Inc.*, 2004-ERA-10 (ARB Aug. 31, 2006); *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); *Devine v. Blue Star Enterprises, Inc.*, 2004-ERA-10 (ARB Aug. 31, 2006); *Swenk v. Exelon Generation Co.*, 2003-ERA-30 (ARB Apr. 28, 2005); *Howard v. Tennessee Valley Auth.*, 90-ERA-24 (Sec'y July 3, 1991); *Nunn v. Duke Power Co.*, 84-ERA-27 (Sec'y July 30, 1987). *Rainey v. Wayne State University*, 89-ERA-8 (Sec'y May 9, 1991); *Ray v. Tennessee Valley Authority*, 88-ERA-14 (Sec'y Jan. 25, 1991); *Riden v. Tennessee Valley Authority*, 89-ERA-49 (ALJ Feb. 9, 1990), aff'd, (Sec'y July 18, 1990); *Bonanno v. Northeast Nuclear Energy Co.*, 92- ERA-40 and 41 (Sec'y Aug. 25, 1993); *Hadden v. Georgia Power Co.*, 89-ERA-21 (Sec'y Feb. 9, 1994); *see also, McGough v. United States Navy, ROIC*, 86-ERA-18 (Sec'y June 30, 1988); *Billings v. Tennessee Valley Authority*, 86-ERA-38 (Sec'y June 28, 1990).

In *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988) the court ruled that the administrative filing period starts on the date that the employee is given definite notice of the challenged employment decision, rather than the time the effects of the decision are ultimately felt. *See, also, Billings v. Tennessee Valley Authority*, 86-ERA-38 (Sec'y June 28, 1990), aff'd without opinion, 923 F.2d 854 (6th Cir. 1991). Definite notice, moreover, has generally been

construed as notice which is unequivocal. Eisner v. United States Environmental Protection Agency, 90-SDW-2 (Sec'y Dec. 8, 1992); Tracy v. Consolidated Edison Co. of New York, Inc., 89-CAA-1 (Sec'y July 8, 1992); Corbett v. Energy East Corp., 2006-SOX-65, (ARB Dec. 31, 2008). As the Board explained in Sneed v. Radio One, Inc., 2007-SOX-018 (ARB August 28, 2008): “‘Unequivocal’ notice means communication that is not ambiguous, i.e., free of misleading possibilities.” *See also*, Larry v. The Detroit Edison Co., 1986-ERA-032, slip op. at 14 (Sec'y June 28, 1991). *Cf.* Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1141 (6th Cir. 1994).

Applying the foregoing principles to the November 3, 2008, termination letter, it is abundantly clear that Respondent advised Complainant that his termination was effective as of November 4, 2008, and Complainant received actual notice of the decision on November 7, 2008, when he received the letter. The notice advised Complainant that he was being terminated and provided an unequivocal, specific date on which the adverse action took effect. I find nothing ambiguous about it. Upon receiving letter, Complainant could not reasonably avoid concluding that the decision had been made to fire him.

Final Notice of Adverse Action

In addition to an unambiguous communication, the courts and the Board have determined that only a “final” notice of adverse action triggers the commencement of the statutory filing deadline. It is clear that Complainant received notice on November 7, 2008, that he was terminated as of November 4, 2008; however, the question is whether the finality of the notice was compromised by the provision in the notification letter which offered a post-termination review, and, therefore, held out the possibility that Complainant could be reinstated. Respondent argues that its internal appeal procedure does not lessen the finality of the termination notice or constitute an “extenuating circumstance” which would toll the statute of limitations. Resp. Motion at 5-6. In support of its assertion, Respondent cites Logalbo v. American Airlines, 2008 AIR 1 (ALJ Jan. 10, 2008; Wintrich v. American Airlines, 2004 AIR 1 (ALJ, Dec. 30, 2003; and Snyder v. Wyeth Pharmaceuticals, 2008 SOX 55 (ARB April 30, 2009).

The Board and the courts have defined what constitutes “unequivocal final notice” in several decisions. In Sneed v. Radio One, Inc., 2007-SOX-018 (ARB August 28, 2008), the Board explained: “‘Final’ and ‘definitive’ notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. *See also*, Larry v. The Detroit Edison Co., 1986-ERA-032, slip op. at 14 (Sec'y June 28, 1991). *Cf.* Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1141 (6th Cir. 1994). It is equally clear, however, that the existence of a collateral grievance or internal review process does not vitiate the finality of a definitive, unequivocal termination notice.²

Post-Termination Review

In Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), for example, the Court considered a final notice in the context of a grievance procedure. In Electrical Workers, an employee filed an “unfair action” grievance pursuant to procedures in a collective-bargaining

² In Sneed, the Board determined that the termination decision was final and unequivocal notwithstanding continued collateral discussions about a severance package and a consulting agreement.

agreement based upon an allegation that her termination constituted a discriminatory firing. She thereafter filed a claim with the EEOC 108 days after her termination but 84 days after her grievance was denied. EEOC and the employee argued that "[u]se of the grievance resolution process is not an 'appeal' of a 'final' decision, but is a method of obtaining the judgment of higher management on whether the employee should be retained." Id. at fn. 4. In rejecting this argument, the Supreme Court noted that no further "formalized" final determination by management was required before the discharge would have been considered final, and the employee would receive no pay unless the grievance procedures resulted in her reinstatement. Id. at fn. 5. Under such circumstances, the Court concluded that the existence and utilization of grievance procedures neither postponed the date on which the allegedly discriminatory action took place nor tolled the running of the limitations period.

While Electrical Workers v. Robbins & Myers, Inc., considered finality and tolling issues in the context of a collective-bargaining agreement, Delaware State College v. Ricks, 449 U.S. 250 (1980), addressed these issues in the context of a situation in which an employer apparently offered an internal procedure to review adverse tenure actions. In Ricks, the Employee received notice from a Faculty Committee on Promotions and Tenure in February, 1973, that he would not receive a tenured position in the education department. The tenure committee agreed, however, to reconsider its decision the following year. Upon reconsideration, in February, 1974, the committee adhered to its earlier recommendation. The following month, the Faculty Senate voted to support the tenure committee's negative recommendation. On March 13, 1974, the College Board of Trustees voted to deny tenure, and Ricks sought review by the Board's Educational Policy Committee, which in May, 1974, held a hearing and took the matter under submission. On June 26, 1974, the Board officially notified Ricks that he would be offered a 1-year "terminal" contract. Ricks pursued a grievance, and on September 12, 1974, the Board of Trustees notified Ricks that it denied his grievance.

The EEOC argued that the limitation period did not commence until September 12, 1974, when the Board notified Ricks that his grievance had been denied. The EEOC reasoned that the Trustees' initial decision was only an expression of intent that did not become final until the grievance was denied, because the June 26, 1974 letter explicitly held out the possibility that tenure would be granted if the Board sustained a grievance. Id. at fn. 2. EEOC reasoned further that even if the Board's first decision expressed its official position, it could be argued that the pendency of the grievance should toll the running of the limitations periods.

The Court rejected both finality and the tolling arguments. It found that, although the Board indicated a willingness to change its prior decision if the grievance was found to be meritorious, the Court observed that: "... entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made." Id. at 262.

Thus, it appears that the invocation of a formal procedure to review an adverse employment action, whether implemented pursuant to a collective bargaining agreement as in Electrical Workers or adopted as a matter of internal personnel management procedure, as in Ricks, does not vitiate the finality of the adverse decision or toll the running of the statute of

limitations.³ Here as in Electrical Workers and Ricks, the post-termination review was offered as a formal collateral review process. It could result in a reversal of the termination decision, but it was not an interim step that “influenced the decision before it was made.” Indeed, Bohn was actually terminated before the review process was invoked. As in Electrical Workers, unless the post-termination review resulted in his reinstatement, he would have been entitled to no pay for the period during his termination was under review. Nor is there any indication that, had the post-termination review mechanism not been utilized, any sort of “formalized” final determination by management was required before his discharge would have been considered final. He had been terminated more than a month before the post-termination review actually commenced. Like the grievance procedure in Ricks, the post-termination review process in this instance, by its nature, was “a remedy for a prior decision, not an opportunity to influence that decision before it is made.” Ricks at 262.⁴ (emphasis added).

Now, it may be argued that English v. Whitfield, 858 F.2d 957 (1998), suggests that the availability of a post-termination review or appeal process, once invoked, necessarily renders all pre-review adverse decisions non-final. In English, the employee was notified on May 15, 1984, that (1) she was permanently removed from her workplace and barred from working in controlled areas, (2) her probationary period was reduced from twelve to six months, (3) her temporary assignment was reduced to 90 days at current salary, during which time she could search for and bid on available positions elsewhere in the facility for which she was qualified, and (4) if she had not secured a suitable permanent position by the end of her temporary assignment, she would be involuntarily placed on lack of suitable work status--essentially placed on layoff. The employee was eventually laid off at the expiration of her temporary assignment. The court concluded that the statute of limitations commenced with the original notice because: “The only uncertainty in the notice related to a possibility of avoidance of the consequences of the decision by means unrelated to its revocation or reexamination by the employer.” The Court reasoned that the possibility that the effect(s) of a challenged decision might be avoided by such

³ In Rezac v. Roadway Express, Inc., 85-STA-4 (Sec’y June 5, 1985), Complainant contended that his STAA whistleblower complaint was timely where it was not filed within 180 days of his firing, but within 180 days of the decision of a grievance panel. As in Electrical Workers, it was undisputed that the discharge was not suspended during the grievance procedure. The Secretary found no statutory language or legislative history to indicate that the limitations period should be tolled during the pendency of a grievance procedure, and noted that no tolling is consistent with the holdings of Federal courts under other employee discrimination statutes. See, International Union of Electrical, Radio and Machine Workers, 429 U.S. 229 (1976) (Title VII); Roddy v. Shong, 33 FEP Cases 1399 (N.D. Ohio 1983). In Swenk v. Exelon Generation Co., 2003-ERA-30 (ARB Apr. 28, 2005), the ARB found that there was no tolling based on the possibility that a complainant could take an appeal of the denial of access.

⁴ The situation here is thus readily distinguishable from the Board’s recent decision in Snyder v. Wyeth Pharmaceuticals, 2008-SOX-55 (ARB Apr. 30, 2009). In Snyder, the Complainant had been suspended with pay pending an investigation. While suspended, the Director of HR informed the Complainant that the HR Director would entertain evidence addressing, *inter alia*, why the Complainant thought the termination was not justified. Complainant responded, and several months later, the Complainant was informed that an investigation had not substantiated his claims and that the decision to terminate would stand. The suspension was then converted to a discharge. The Board reasoned that the initial adverse action was not a final action, and thus it distinguished Ricks. The ARB found that Ricks was premised on “collateral” review of an employment decision, and that the HR Director’s letter: “carried none of the indicia of a formal collateral procedure to remedy a final decision. Instead, it injected an element of ambiguity into the transaction and an opportunity for further action, discussion, or change. Thus, the letter did not constitute final, definitive, and unequivocal notice of the termination of Snyder’s employment sufficient to commence the running of the limitations period.” In contrast, like Ricks and Electrical Workers, and unlike Snyder, JetBlue’s post-termination review procedure was clearly “collateral” to the termination decision which had already been made and implemented before the post-termination review was sought. See also, Swenk, *supra*.

means, does not render the decision equivocal for the purposes here at issue, at least where, as here, the effect can be avoided without negating the alleged discriminatory decision itself.⁵

The court in English noted that: “There was no intimation in [the adverse action notice] that the decision was subject to further appeal, review, or revocation, either in whole or in part,” and it has been suggested that this passage is as an indication that if an appeal were available in Whitfield the court would have deemed the original adverse actions non-final or equivocal.⁶ Yet, that issue was not specifically before the court in Whitfield, since, as the Court observed, no appeal or grievance procedure was involved the case. Consequently, the quoted language from English would appear to be dicta. In contrast, the Supreme Court in Ricks specifically addressed the issue. The Supreme Court clearly and unequivocally ruled that an adverse employment action may be deemed final and unequivocal and commence the running of a statute of limitations notwithstanding an on-going collateral grievance or appeal process which may re-examine and could reverse or revoke the original action. Indeed, the Court explicitly ruled that the limitation period commenced running on June 26, 1974, although the denial-of-tenure decision was still under review until September 12, 1974, when: “the Board notified Ricks that his grievance had been denied.” Indeed, the Court in Ricks reasoned that a collateral appeal or grievance procedure does not toll the statute, in part, because, as previously noted, it is: “a remedy for a prior decision, not an opportunity to influence that decision before it is made.” Ricks at 262.

For all of the foregoing reasons, I find and conclude that no genuine issue of material fact exists with respect to the date of Complainant’s termination. I conclude that he received unequivocal, final notification of the adverse employment action on November 7, 2008.

⁵ In Pearson v. Macon-Bibb County Hosp. Auth., 952 F.2d 1274, 1279-80 (11th Cir. 1992), the employer gave the complainant the option to resign, transfer, or be terminated. After the complainant unsuccessfully attempted to find work elsewhere or to transfer to another department, she took an extended leave, and thereafter, the employer terminated her employment. The complainant argued that the limitations period began to run when her employment was terminated, not when she was offered the three options. The court held that the equivocal character of the adverse employment options did not deprive that decision of its status as the operative, final act.

⁶ See, Wagerle v. The Hospital of The University of Pennsylvania, Department of Physiology And Pediatrics, 93-ERA-1 (Sec’y. March 17, 1995) (no appeal or grievance process offered). In contrast, in numerous cases in which collateral appeal or grievance processes were actually before an appellate tribunal, the Supreme Court, the Secretary, and the Board have rejected as a basis for tolling the limitation period the possibility that a discriminatory employment decision may be reversed or revoked by appeal, a grievance, or other proceeding that could return the matter to the pre-decision status quo. See, Electrical workers, *supra*, Ricks, *supra*; Chardon, *supra*; see also, Snyder, *supra*; Rezac v. Roadway Express, Inc., 85-STA-4 (Sec’y June 5, 1985) (time limit ran from date of firing not date of decision of a grievance panel where complainant’s discharge was not suspended during the grievance procedure), citing, International Union of Electrical, Radio and Machine Workers, 429 U.S. 229 (1976) and Roddy v. Shong, 33 FEP Cases 1399 (N.D. Ohio 1983) (Rehabilitation Act of 1973, 29 U.S.C. § 793; Vietnam Era Veteran’s Readjustment Assistance Act of 1974, 38 U.S.C. § 2012); Kelly v. Flav-O-Rich, Inc., 90-STA-14 (Sec’y May 22, 1991), (pendency of state employment security commission case did not toll the STAA limitation period); Ellis v. Ray A. Schoppert Trucking, 92-STA-28 (Sec’y Sept. 23, 1992) (the time limit began to run on the day the complainant was discharged rather than the day an unemployment referee ruled that the complainant was discharged for failing to work); Swenk, *supra* (possibility of internal appeal does not toll the statute).

Equitable Tolling

I further find and conclude that the principles of equitable tolling are not applicable in this situation. Many factors may be considered in determining whether equitable tolling is appropriate, including:

1. whether the plaintiff lacked actual notice of the filing requirements;
2. whether the plaintiff lacked constructive notice, i.e., his attorney should have known;
3. the diligence with which the plaintiff pursued his rights;
4. whether there would be prejudice to the defendant if the statute were tolled; and
5. the reasonableness of the plaintiff remaining ignorant of his rights.
6. The defendant has actively misled the plaintiff respecting the cause of action;
7. The plaintiff has, in some extraordinary way, been prevented from asserting his rights; or
8. The plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *See, Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991) (per curiam); *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981).

None of these criteria apply to the undisputed facts of this claim. *See, English*, supra; *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); *Gutierrez v. Regents of the University of California*, 1998-ERA-19 (ARB, November 8, 1999) (complainant raised precise statutory claim in wrong forum).

Finally, this complaint arises within the jurisdiction of the Eleventh Circuit, and, accordingly, the Court's decision in *Pearson v. Macon-Bibb County Hosp. Auth.*, supra, is especially instructive. In *Pearson*, the notice included several options including a transfer option. The Court, citing *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559 (11th Cir.1987) (per curiam), concluded that the ambiguity created by the options the employee was given could arguably merit an equitable tolling. Unlike *Pearson* and *Cocke*, however, JetBlue terminated Bohn without offering to find him another job, in contrast with *Cocke*, or affording him an option to find a position to which he might transfer, in contrast with *Pearson*. Thus the facts here are more closely analogous to *Ricks* and *Electrical Workers* which expressly rejected the notion that a collateral post-decision review process warrants equitable tolling of a statute of limitations in this type of case.⁷

⁷ While the ARB and the Secretary have declined to invoke equitable tolling when notices of adverse action include job transfer or alternative employment possibilities, *See, e.g., Rollins v. American Airlines, Inc.*, 2004-AIR-9 (ARB Apr. 3, 2007) and *Wagerle v. The Hosp. of the Univ. of Pa.*, 1993-ERA-1, (Sec'y Mar. 17, 1995), the effect of such options are not at issue in this proceeding, and, accordingly, the viability of administrative precedents such as *Rollins* and *Wagerle* in the Eleventh Circuit in light of *Pearson* need not here be resolved.

As OSHA indicated, there are no “extenuating circumstances” which justify tolling. To the contrary, the Supreme Court has specifically rejected arguments urging application of equitable tolling under circumstances in which a collateral review procedure is invoked after a final, unequivocal notice of adverse action has been communicated the employee. Electrical Workers, *supra*; Ricks, *supra*.

Therefore, for all of the foregoing reasons, I find that no material disputed issue of fact exists for hearing and that Respondent is entitled to summary decision as a matter of law. Accordingly;

ORDER

IT IS ORDERED that Respondent’s Motion to Dismiss or In The Alternative For Summary Decision be, and it hereby is, granted, and;

IT IS FURTHER ORDERED that the complaint filed by Thomas A. Bohn be, and it hereby is, dismissed.

A

Stuart A. Levin
Administrative Law Judge

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 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).

