



Issue Date: 31 March 2010

CASE NO. 2009-AIR-00027

In the Matter of:

BEHZAD RAJABI,
Complainant,

vs.

PSA AIRLINES, INC.,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 *et seq.* Complainant filed a complaint under AIR21 with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) on August 31, 2009 (Complaint). It alleges that he was terminated in retaliation for complaining to Respondent about training deficiencies, filing a complaint with the Equal Employment Opportunity Commission (EEOC), and because of his Iranian ethnicity. Complaint at 2. On September 3, 2009, the Regional Administrator of OSHA dismissed the complaint as untimely (OSHA Findings).

On September 15, 2009, Complainant appealed the OSHA determination and requested a *de novo* hearing before the Office of Administrative Law Judges (OALJ) of the Department of Labor (Comp. Hrng. Req.). This case was assigned to me on September 25, 2009. On October 14, 2009, I issued a Notice of Docketing and Assignment and Order Setting Forth Briefing Schedule As To Threshold Issue, to determine the timeliness of the complaint.

On November 6, 2009, Respondent filed a timely motion to dismiss and request for sanctions (Resp. Motion). It argues that the complaint was filed more than 16 months after Complainant's termination, well beyond the end of AIR 21's 90 day filing period. Resp. Motion at 5. Also, Respondent argues that the complaint is frivolous because Complainant admitted his knowledge of the termination date and because OSHA determined the complaint to be untimely. *Id.* at 6. Therefore, Respondent argues, Complainant is subject to sanctions. *Id.* Complainant filed a response (Comp. Resp.) dated November 23, 2009 which argues that the filing period did not begin to run until a union grievance had been decided. Comp. Resp. at 3. In response to Respondent's request for sanctions, Complainant asserted that his claim was brought in good faith. *Id.* Respondent filed a reply to response (Resp. Reply) on December 1, 2009 which reiterated Respondent's arguments.

SUMMARY OF DECISION

Complainant's complaint was not timely and is hereby dismissed. A complaint under the AIR 21 employee protection provision must be filed not later than 90 days after the date on which the violation occurs. 29 U.S.C. § 42121 (b)(1). Complainant's complaint was filed more than 16 months after his termination. The filing limitations periods commenced at the time the adverse employment decision was made and communicated to the employee, not when his union grievance was decided. In addition, Complainant has not demonstrated that the running of the filing period should be equitably tolled.

Respondent is not entitled to sanctions. Respondent has not met its burden to demonstrate that the complaint was frivolous or brought in bad faith.

BACKGROUND

Complainant Behzad Rajabi worked as a first officer for Respondent from April 2004 until his employment was terminated on April 14, 2008. Complaint, p. 2; Resp. Motion, p. 2. In September and October 2007, Complainant attempted to upgrade to a captain position.¹ Complaint, p. 2. The PSA Airlines Pilots System Board of Adjustment,² which upheld Complainant's termination under his collective bargaining agreement, explains that to upgrade "a pilot must complete ground and simulator training, be recommended for a type ride, and satisfactorily complete the type ride." *In re Rajabi Termination*, Grievance No. 23-08, slip op. at 5 (PSA Airlines Pilot System Board of Adjustment June 9, 2009). According to the Board, Complainant's simulator performance was twice deemed inadequate. *Id.* He was not recommended for a type ride and failed to upgrade. *Id.* According to the System Board, Complainant initially declined an offer to requalify as a first officer. *Id.* at 6. He accepted a month later, requalified, and "was returned to the right seat." *Id.*

Complainant alleges that he received inadequate training and unfair evaluation, and was subsequently placed on one month suspension without pay. Complaint, p. 2. According to Complainant, he filed a grievance under his collective bargaining agreement. *Id.* Complainant adds that the grievance was denied because of "expired timelines," and because he was determined to have not been suspended, but was placed on unpaid status for leaving training unqualified. *Id.* at 3.

¹ Upgrading to captain requires a pilot to "complete ground and simulator training, be recommended for a type ride, and satisfactorily complete the type ride. See Resp. Motion, Ex. D, Atch. 1.

² A Pilot System Board of Adjustment is an arbitration board created by an agreement between an air carrier and a union to resolve a range of disputes, including those involving the disciplining of employees. See 45 U.S.C. § 185; *International Association of Machinists v. Central Airlines*, 372 U.S. 682, 685-89, *Whitaker v. American Airlines, Inc.*, 285 F.3d 940, 943-44 (11th Cir. 2002). Such boards consist of a carrier representative, a union representative, and a neutral. 45 U.S.C. § 153 Second, 181, 182, 185.

According to Complainant, he filed a complaint alleging national origin discrimination with the U.S. Equal Employment Opportunity Commission on March 11, 2008.³ *Id.*

In March and April 2008, Complainant made a second attempt to upgrade to captain. Complaint, p. 3; *In re Rajabi Termination*, slip op. at 6. He successfully completed ground training and was recommended for a type ride. *In re Rajabi Termination*, slip op. at 6. Complainant, however, failed his first type ride on April 6, 2008, and a second on April 10, 2008. Complaint, pp. 3-4; *In re Rajabi Termination*, slip op. at 6-7. According to the System Board, Complainant's union contract provides that "[a] pilot who fails to qualify on his second attempt may be dealt with at Company discretion." *In re Rajabi Termination*, slip op. at 7. By letter dated April 14, 2008, Complainant was advised that his employment was terminated. Resp. Motion, Ex. D, Atch. 1.

Claimant states that he filed a complaint on May 14, 2008 with the Federal Aviation Administration's (FAA) Office of Civil Rights, and on May 15, 2008 with the FAA Aviation Hotline. Complaint, p. 4. According to Complainant, "The resultant investigation was not found in my favor." *Id.*

Complainant's union appealed his discharge under its collective bargaining agreement with Respondent. Resp. Motion, Ex. D, Atch 2. The appeal culminated in a hearing before a three-person System Board of Adjustment on December 17-18, 2008, in Dayton, Ohio. *In re Rajabi Termination*, slip op. at 1. In an Opinion and Award dated June 9, 2009, the Board concluded that the termination was not arbitrary, capricious, or discriminatory and therefore did not violate Complainant's contractual rights.⁴ *Id.* at 21-22.

ANALYSIS

AIR 21 protects employees of air carriers from retaliation for having disclosed information to their employer or to the government concerning "any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. . . ." 49 U.S.C. § 42121. If a respondent demonstrates that an AIR 21 complainant did not file a timely complaint with the Occupational Safety and Health Administration the complaint is time-barred and should be dismissed. *See, e.g., Sassman v. United Airlines*, ARB No. 05-077, ALJ No. 05-AIR-004, slip op. at 6-7 (ARB Sept. 28, 2007); *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-9, slip op. at 2-4. (ARB Apr. 3, 2007).

I. AIR 21 FILING PERIOD

A complaint under the AIR21 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). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of

³ The record does not contain the outcome of the EEOC complaint.

⁴ The union representative on the Board dissented. *In re Rajabi Termination*, slip op. at 22.

filing. 29 C.F.R. § 1979.103(d). The date which commences the filing period is the date when the allegedly discriminatory decision has been both made and communicated to the complainant, even if the effects of the decision do not occur until later. *Del. State College v. Ricks*, 449 U.S. 250, 258 (1980)(citing *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) (the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful); *Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001) (explaining that the filing period commences when the employee is aware or reasonably should be aware of the employer's decision).

Complainant received his termination notice on April 14, 2008. See Resp. Motion, Ex. 1. Accordingly, Complainant should have filed his whistleblower complaint with OSHA by July 13, 2008. However, the complaint was not filed with OSHA until August 31, 2009, more than 16 months after Complainant received his termination notice.

Complainant's argument that the filing period did not begin until the conclusion of his grievance is incorrect. It is well established that the filing of a grievance does not operate to toll the limitations period for filing a complaint under the whistleblower statutes. See, e.g., *Greenwald v. City of North Miami Beach, Florida*, 587 F.2d 779 (5th Cir. 1979); *Jenkins v. U.S. Env. Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003); *Prybys v. Seminole Tribe of Fla.*, ARB No. 96-064, ALJ No. 1995-CAA-015, slip op. at 4-6 (ARB Nov. 22, 1996); c.f., *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-40 (1976) (holding that pursuit of grievance does not toll running of filing period for Title VII discrimination complaint). In addition, the Administrative Review Board has explained that the pursuit of a grievance after a termination does not act as a continuation of the adverse employment action. See *Hamilton v. CSX Transportation*, ALJ No. 2008-FRS-00001, slip op. at 3-4 (ALJ February 26, 2008). Thus, Complainant's filing period began to run on April 14, 2008 when he received notice that his employment would be terminated.

II. EQUITABLE TOLLING OF THE FILING PERIOD

Filing periods in whistleblower cases will be strictly applied unless a complainant can demonstrate that the principle of equitable tolling should apply. *Howlett v. Northeast Utilities Company*, 1999-ERA-1 (ALJ December 28, 1998). There are three specific instances where equity will toll the running of a filing period in a whistleblower case:

- (1) where the Respondent has actively concealed or misled the employee,
- (2) where the employee was prevented from asserting his right in some extraordinary way, and
- (3) where the complainant raised the precise statutory claim in the wrong forum.

Patino v. Birken Manufacturing Company, ARB No. 09-054, ALJ No. 2005-AIR-023, slip op. at 3 (ARB Nov. 24, 2009).

Complainant alleges that he spoke to Mr. Dale Boyd, an OSHA employee, about filing a complaint, and that he understood from those conversations that the filing period “would start from the time that I received the final result from the arbitration hearing.” Comp. Resp. at 3. Complainant does not, however, explain the substance of those conversations which led him to form this understanding. Complainant also alleges that he consulted with lawyers “off the record” who told him he “needed to exhaust all internal avenues before [he] could file further complaints with other agencies.”

The record is devoid of evidence that Respondent actively concealed or misled the Complainant. Complainant does not identify the attorneys who he says advised him to exhaust all internal avenues nor does he identify who they worked for. Neither does he provide any evidence, beyond his own assertion that such conversations occurred. Thus, there is no evidence that any of these attorneys were employed by or represented Respondent.

Additionally, Complainant was not prevented from asserting his right in some extraordinary way. Nothing in the record indicates that Complainant was extraordinarily prevented from asserting his right to file a whistleblower complaint. The ARB has held that severe depression can extraordinarily prevent one from asserting his rights when the illness actually interferes with a complainant’s ability to manage his affairs, understand his legal rights, and act on them, or when the sufferer has been adjudged incompetent or was institutionalized during the filing period. *Hall v. EG&G Defense Materials, Inc.*, ARB No. 98-076; ALJ No. 1997-SDW-9, slip op. at 2-3 (ARB Sept. 30, 1998). In addition, the Secretary has tolled on this basis where a complaint was untimely filed due to the mental incompetence of a complainant’s attorney. *Gillilian v. TVA*, 91-ERA-31/34 (Sec’y Aug. 28, 1995). Here, at most, Complainant relied on faulty advice.⁵ Such reliance does not extraordinarily interfere with a complainant’s ability to understand and assert his rights in the way that his mental incompetence or that of his attorney would. Additionally, the ARB has explained that ignorance of the law generally does not support a finding of entitlement to equitable tolling. *Higgins v. Glen Raven Mills*, ARB No. 05-143, ALJ No. 2005-SDW-007, Slip Op. at 8 (ARB Sept. 29, 2006).

Finally, Complainant did not raise the precise statutory claim in the wrong forum. “Precise statutory claim” is narrowly construed. The claim filed in another forum must indicate an intent to pursue an AIR 21 complaint. *Turgeon v. The Nordam Group*, ARB No. 04-005, ALJ No. 2003-AIR-41, slip op. at 3-4 (ARB Nov. 22, 2004). Nothing in the record indicates that either Complainant’s grievance or his EEOC complaint evinced an intent to pursue an AIR 21 complaint.

⁵ While Complainant explains the conclusion he formed, he does not convey the substance of what Mr. Boyd said to him. Thus, the record contains no basis for determining whether anything Mr. Boyd said prevented Complainant from asserting his right to file a whistleblower claim.

III. SANCTIONS

The AIR 21 whistleblower provision provides that an employer is entitled to a reasonable attorney's fee not exceeding \$1000 when a complaint "is frivolous or has been brought in bad faith." 49 U.S.C.A. § 42121(b)(3)(C). Respondent argues that Complainant's appeal to the OALJ is frivolous because Complainant knew both his termination date and the date he filed his complaint, and because the OSHA Findings concluded that his complaint was untimely. Resp. Motion at 6-7. Respondent does not allege that the complaint was brought in bad faith, and I find that neither Complainant's complaint nor his request for hearing was frivolous.⁶ Therefore, Respondent's request for sanctions is denied.

A complaint is frivolous if it lacks an arguable or rational basis in law or fact. *Allison v. Delta Air Lines*, ARB No. 03-150, ALJ No. 2003-AIR-014, slip op. at 6 (ARB Sept. 30, 2004). The ARB has explained further that sanctions are not in order where a complainant maintained "a firm and sincere belief that he had been the victim of a retaliatory termination." *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 3. (ARB Jan 30, 2004).

I find that Complainant formed a firm and sincere belief that he suffered retaliation. His submissions explain the basis for his complaint. Complainant provided detailed statements alleging inadequate training and unfair checkrides and upgrade tests. Comp. Resp. at 3-4. Complainant's belief of retaliation is also based on his filing of an incident report to OSHA regarding air safety and a captain he flew with. *Id.* at 4.

Additionally, although Complainant relied on a misplaced notion about when the filing period began to run, his argument that the grievance procedure tolls the running of the period is an arguable and rational basis for maintaining his action. A complaint lacks an arguable basis in law if it is based on "an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Allison*, slip op. at 6. The argument that certain events toll the running of a filing period is not a meritless legal theory. When such a theory fails, frivolous complaint sanctions are not appropriate. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 420-21 (1978) (explaining that frivolous complaint sanctions under Title VII "deter the bringing of lawsuits without foundation, . . . discourage frivolous lawsuits, and. . . diminish the likelihood of unjustified suits being brought."). Rather, the sanction for a faulty, though not meritless, legal argument is an unfavorable decision by the tribunal.

⁶ Nothing in the language of the AIR 21 whistleblower protection indicates that the frivolous complaint sanction provision applies to requests for hearing before OALJ. The subsection containing the provision is titled "Frivolous complaints". 49 U.S.C.A. § 42121(b)(3)(C). The provision itself states that it applies when a *complaint* is frivolous or brought in bad faith. 49 U.S.C.A. § 42121(b)(3)(C). Because, however, it is clear that neither Complainant's complaint nor his request for hearing is frivolous, I need not decide whether the sanction provision applies to requests for hearing.

CONCLUSION

Complainant's complaint to OSHA was not timely filed and the record does not support the equitable tolling of the filing deadline. In addition, Respondent has not carried its burden to demonstrate that Complainant's complaint was frivolous. Accordingly, the complaint is **DISMISSED** and the request for sanction is **DENIED**.

A

ANNE BEYTIN TORKINGTON
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).