



Issue Date: 17 March 2010

Case No.: 2010-AIR-10

In the Matter of:

Benjamin Selig,
Complainant

v.

Aurora Flight Sciences,
Respondent

CORRECTED RECOMMENDED ORDER OF DISMISSAL¹

This proceeding arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). The pertinent provisions of AIR 21 prohibit the discharge of an employee or discrimination against an employee with respect to compensation, terms, conditions, or privileges of employment in retaliation for the employee engaging in certain protected activity. The U.S. Department of Labor issued the Secretary’s Findings on a complaint filed by Benjamin Selig, who requested a hearing on these findings.

On January 22, 2010, I issued an Order advising the parties that I would consider the timeliness of the Complainant’s complaint as a preliminary matter, before addressing the merits of the Complainant’s Complaint. On February 12, 2010, the Complainant filed his arguments addressing the timeliness of his claim.² On February 16, 2010, the Respondent filed its Memorandum of Law in Support of its Opposition to Claimant’s Objection.

Background

The Complainant was employed as a Propulsion Technician and A&P Mechanic by the Respondent. In his complaint, Mr. Selig alleged that he was discharged by the Respondent because he provided information to the Respondent and to the Federal Aviation Administration (FAA) about unauthorized maintenance and recordkeeping practices by Respondent’s employees. In his complaint, Mr. Selig stated that he was placed on temporary furlough on April 24, 2009, and on June 22, 2009, he received a letter notifying him that he was to be terminated

¹ The Recommended Order of Dismissal I issued on February 25, 2010, I inadvertently listed “Batesville Services” as a Respondent. The only Respondent in this matter is Aurora Flight Sciences.

² Although Mr. Selig was represented by counsel in the proceedings before the Secretary, he is now proceeding *pro se*.

effective June 26, 2009; he filed his complaint with the Occupational Safety and Health Administration on September 23, 2009.³

The Respondent has provided a sworn declaration by Evelyn Russell, the Respondent's Human Resources Manager. Ms. Russell stated that on Friday, June 19, 2009, she left a voice mail message for Mr. Selig, asking him to return her call. Mr. Selig did so later that day, and she informed him that, due to economic reasons, the Respondent was unable to recall the furloughed employees, and that the Respondent was going forward with his termination, effective June 26, 2009. She also advised Mr. Selig that he would receive a letter with additional information regarding his benefits. Ms. Russell stated that Mr. Selig's termination letter was sent on Monday, June 22, 2009, by Federal Express, and was delivered to Mr. Selig's residence on June 23, 2009 at 1:21 p.m.

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).

Under the AIR 21 Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation. The regulations at 29 C.F.R. § 1979.103 provide that a complaint for discrimination must be filed within 90 days of "when the discriminatory decision has been both made and communicated to the Complainant." It is the date that the employer communicates to the employee its intent to implement an adverse employment decision that marks the occurrence of a violation, rather than the date the employee experiences the consequences of that decision.

In this case, the statute of limitations began to run, at the earliest, when Ms. Russell informed Mr. Selig by telephone that he would not be recalled from furlough, and that his employment was terminated, and at the latest, when the Complainant received the letter from the Respondent advising him that his employment was terminated.⁴ In his complaint, Mr. Selig stated that on June 22, 2009, he received a letter terminating his employment effective June 26, 2009. Counsel for Respondent noted that this letter, which is dated June 22, 2009, was actually delivered to Mr. Selig by Federal Express on June 23, 2009.

³ As discussed further below, Mr. Selig's complaint was received on September 24, 2009.

⁴ Ms. Russell's sworn affidavit establishes that Mr. Selig was advised of his termination on September 19, 2009. Mr. Selig has not disputed that this conversation took place.

Mr. Selig's claim was submitted to the Department of Labor by Federal Express, on September 23, 2009, and it was received on September 24, 2009. Title 29 C.F.R. Section 1979.103(d) provides that

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.

Using the date of June 19, 2009, when Ms. Russell informed Mr. Selig by telephone that his employment was terminated, the 90-day period for filing a complaint ended on September 17, 2009. Using the date of June 23, 2009, when the termination letter was delivered to Mr. Selig, the 90-day period ended on September 21, 2009. Either way, Mr. Selig's complaint, which was filed on September 24, 2009, is untimely.⁵

In his written argument, Mr. Selig refers to an e-mail dated August 28, 2009, which shows "equitable tolling." However, Mr. Selig has presented no facts or argument to suggest that he should be allowed to proceed in this matter under the doctrine of equitable tolling. This doctrine does not depend on any wrongdoing by the respondent, but instead focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of her complaint. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). This doctrine extends the statute of limitations until the complainant can gather information needed to articulate a claim.

Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting her rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981), citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978). Courts have held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987 ERA 53 (Sec'y, Sept. 29, 1989).

With respect to the first basis for tolling the statute, Mr. Selig has not alleged, nor do the undisputed facts establish, that Respondent misled him in any way regarding his cause of action under the AIR 21 Act. There is no evidence that Respondent's employees ever did or said anything to dissuade the Complainant from initiating legal action of any kind in connection with his termination.⁶ Nor has the Complainant established that there were any extraordinary circumstances that may have prevented him from timely asserting his rights under the AIR 21 Act.

⁵ Mr. Selig's claim would also be untimely even using the September 23, 2009 date of the complaint.

⁶ Indeed, the copy of the e-mail communication that Mr. Selig attached reflects that when the law firm that ultimately represented him in filing his claim inquired about coverage for Mr. Selig, a "potential client," they were advised that the "Plan" entitled him to a free half hour of consultation.

For all of the foregoing reasons, I find that the Complainant failed to file a claim of discrimination under the AIR 21 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 AIR 21 Act is time-barred.

ORDER

Accordingly, IT IS HEREBY ORDERED that the Complainant's complaint under the AIR 21 Act is dismissed.

SO ORDERED.

A

LINDA S. CHAPMAN
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 the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). 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. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(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. The Petition must also be served on 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.

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. § 1980.109(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

