



**Issue Date: 14 January 2011**

OALJ Case No.: 2011-AIR-00001

*In the Matter of:*

MICHAEL P. DRISCOLL,  
*Complainant,*

v.

SPIRIT AIRLINES,  
*Respondent.*

**DECISION AND ORDER DISMISSING CLAIM**

On October 8, 2010, I issued a Notice of Docketing and Order to Show Cause why this matter should not be dismissed for failure of Complainant to timely request a hearing before the Office of Administrative Law Judges.

On December 7, 2010, upon discovering that Respondent had not been served with my October 8, 2010, Order, I issued a second order extending the response time. In the December 7, 2010, Order, I also directed the parties to address the following issue: if I were to find that Complainant has timely requested a formal hearing before me based on his objections to the Secretary's June 18, 2010, findings, why should I not then dismiss the claim for the reason set forth in the Secretary's findings, i.e., failure to file a timely complaint pursuant to 49 U.S.C. § 42121 (b)(1) which states:

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 . . . .

**Background**

On January 7, 2004, Complainant was terminated from his employment as a pilot for Respondent, Spirit Airlines. On December 12, 2004, Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") pursuant to the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century ("AIR 21" or "the Act"), 49 U.S.C. § 42121, asserting that he had been terminated

in retaliation for reporting an aviation safety issue. On January 7, 2005, OSHA issued a preliminary order, dismissing the complaint as untimely. Complainant appealed the dismissal of his complaint on January 18, 2005, but then withdrew his appeal on March 10, 2005. Accordingly, OSHA's preliminary order became a final order, not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A).

On or about March 28, 2007, Complainant contacted OSHA, asserting misconduct by the investigator in his prior complaint, and requesting that the complaint be reopened to investigate the alleged misconduct. On April 14, 2007, Complainant sent an electronic mail to OSHA, rejecting its response to his request to reopen his claim, and asserting that "a formal legal response will follow up to and including the U.S. Supreme Court."

Between February 28, 2009 and April 28, 2009, Complainant wrote to President Obama and Senator Levin raising similar issues to those asserted before OSHA. In January, 2010, Complainant contacted OSHA via its e-correspondence program and inquired as to whether he should file an AIR 21 complaint. OSHA attempted to contact Complainant regarding the filing requirements for AIR 21 complaints.

On February 12, 2010, Complainant faxed documents to the Boston OSHA Regional Office alleging illegal activities by various organizations to include Respondent, and stating that he wanted the allegations investigated and sent to an Administrative Law Judge. The Boston Regional Office forwarded the correspondence to the Chicago Regional Office. After various attempts and communications between the Chicago Regional Office and Complainant, on April 27, 2010, Complainant faxed a complaint to the Chicago OSHA Regional Office asserting that he had been constructively discharged by Spirit Airlines on or about January 7, 2004 for engaging in protected activity, i.e., reporting safety violations.

On June 18, 2010, the Secretary of the Department of Labor, acting through her agent, the Regional Administrator for the OSHA, Region V (Chicago), issued findings *inter alia* that Complainant's complaint was not timely. Complainant was informed that he had 30 days from the receipt of the findings to file objections and request a hearing before an Administrative Law Judge.

#### **Timeliness of Request for Formal Hearing before an Administrative Law Judge**

On July 13, 2010, my office received a packet of documents from Complainant relating to his AIR 21 complaint. The packet which I received did not contain a request for a hearing. On October 1, 2010, I received a request for a formal hearing from Complainant. Accordingly, on October 8, 2010, I issued the aforementioned Order to Show Cause why I should not dismiss this matter for failure to timely request a hearing.

On October 28, 2010, I received a response from Complainant stating that the packet which was received by my office on July 13, 2010, contained a letter, dated July 8, 2010, requesting a formal hearing. Complainant asserted that the same packet had been sent to all of the "parties" in the case, i.e., the OSHA Regional Administrator and Area Director, and that calls to those offices confirmed that they had, in fact received the July 8, 2010, request for formal hearing. I

note that the Regional Administrator and Area Director are not parties in this case, and that Spirit Airlines is, in fact, the other party in this case. Complainant did not send a copy of the request for formal hearing to Respondent. Complainant asserts that because the other “parties” received notice of his objection letter and request for formal hearing, they were not prejudiced. Complainant does not explain why a copy was not sent to Respondent or why Respondent was not prejudiced.

On January 7, 2011, I received a supplemental response from Complainant, again asserting that, because all the “parties” received his July 8, 2010, objection letter, no prejudice has been shown, and this matter should go forward for a hearing before an Administrative Law Judge.

On January 10, 2011, I received Respondent’s response to my Order to Show Cause. Respondent asserts *inter alia*, that Complainant failed to file his objections or request for a formal hearing with either the Administrative Law Judge or with Respondent, and that equitable tolling does not apply. Respondent did not explain how it had been prejudiced by receiving untimely notice of Complainant’s request for a formal hearing.

Based on Complainant’s representation that two other federal offices, i.e., the OSHA Office of the Regional Director and Area Director have telephonically confirmed that they received Complainant’s July 8, 2010, request for a formal hearing, I accept that the letter was in fact in existence at that time that my office received the July 13, 2010, packet of documents from Complainant. As I do not personally open my correspondence, I cannot definitively state that the packet received by the Office of Administrative Law Judges did not contain the letter in question. Therefore, I will accept that, at a minimum, Complainant made a good faith attempt to file a timely request with my office. Respondent has not explained how it was prejudiced by failure to receive Complainant’s formal request within 30 days from the OSHA decision, and no prejudice is apparent. Accordingly, I find that Complainant’s request for a formal hearing is timely.

#### **Respondent’s Motion for Summary Decision**

In my December 7, 2010, Order, I directed the parties to address whether (assuming I found Complainant’s request for formal hearing to be timely) I should dismiss the claim for the reason set forth in the Secretary’s findings, i.e., failure to file a timely complaint pursuant to 49 U.S.C. § 42121 (b)(1). Both parties have done so, and Respondent has made a Motion for Summary Decision and such further relief, including but not limited to attorney’s fees.

A decision on Respondent’s Motion for Summary Decision is not necessary in this case since I have determined that it is more appropriate to dismiss the claim as untimely filed.

#### **Order Dismissing Claim as Untimely Filed**

“Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d. 532 (1980); *Prybys v. Seminole Tribe of Florida*. 95 CAA 15 (ARB Nov. 27, 1996). A whistleblower complaint alleging discrimination under AIR 21 must be filed with the Secretary of Labor within ninety days of the alleged adverse action. 49 U.S.C.

§42121(b)(1); 29 C.F.R. §1979.103(d). The ninety day period begins “when the discriminatory decision has been both made and communicated to the complainant.” 29 C.F.R. §1979.103(d); *Ford v. Northwest Airlines, Inc.*, 2002-AIR-00021 at p. 5 (ALJ Oct. 18, 2002).

Complainant did not file his first complaint until December 4, 2004, almost 11 months after the alleged January 7, 2004, retaliatory discharge, and well outside of the time limitations imposed by the statute of ninety (90) days. The Secretary’s January 7, 2005, preliminary order, dismissing the claim as untimely, became a final order not subject to judicial review when a hearing was not requested in a timely manner. Despite the final nature of the order, Complainant filed a second claim on April 27, 2010, asserting once again that Respondent had engaged in a retaliatory discharge on January 7, 2004. The Secretary dismissed the second claim in an order dated June 18, 2010, on the grounds that it was untimely.

Although 29 C.F.R. Part 18, Rules for Practice and Procedure for Administrative Hearings, does not address a motion to dismiss, 29 C.F.R. §18.1(a) provides that in situations not addressed in part 18, the Federal Rules of Civil Procedure are applicable. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief may be granted. Although the Rule refers to such dismissal on the motion of a party, it has been uniformly held that a Court may dismiss a complaint for failure to state a claim upon which relief may be granted when it is patently obvious that the complainant could not prevail on the facts alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mizra*, 869 F. Supp. 1031 (W.D.N.Y. 1994); *Johnson v. Baskerville*, 568 F.Supp. 853 (E.D.Va. 1983). Such a conclusion is not a decision on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant’s allegations are true, he has stated a cause of action upon which relief can be granted.

Assuming *arguendo* that the Complainant’s allegations are true in this case, I find that he failed to file a timely complaint, and has failed to show that he is entitled to relief from his untimeliness.

In deciding this issue, I have considered Complainant’s responses to my October 8 and December 7, 2010, orders. I am not convinced by Complainant’s argument that the filing deadline set forth in 49 U.S.C. § 42121 (b)(1), is permissive rather than mandatory in nature. I disagree with Complainant’s assertion that a “plain reading” of the language in this section indicates that it is totally discretionary with the Complainant whether and when to file a complaint, and Complainant has not set forth any authority supporting his interpretation.

I have also considered the “continuing violation” and “equitable tolling” doctrines as they might apply to his case. These doctrines are not in any way applicable to the facts of this case and are not supported by any viable evidence. Therefore, I find no “equitable tolling” of the statute.

Based on the foregoing, this claim is **HEREBY DISMISSED**.

**Respondent’s Motion For Attorney’s Fees**

Respondent has moved for the award of attorney's fees against Complainant without setting forth any basis therefor. I have considered the materials submitted by Complainant in this matter and do not find that the claim was brought in bad faith, nor do I find it to be frivolous. 29 C.F.R. §1979.109(b).

**WHEREFORE:** Respondent's motion for attorney's fees is **HEREBY DENIED**.

**IT IS SO ORDERED.**

**A**

CHRISTINE L. KIRBY  
Administrative Law Judge

Washington, D.C.