



Issue Date: 14 January 2013

ARB Case No.: 11-067

ALJ Case No.: 2011-AIR-00009

In the Matter of:

JOHN J. WOODS,

Complainant,

v.

BOEING – SOUTH CAROLINA,

Respondent.

DECISION AND ORDER ON REMAND

By final Decision and Order (FD&O) by the Administrative Review Board (ARB), dated December 12, 2012, the above-captioned case was remanded to the Presiding Judge.

The ARB remanded the case to the Presiding Judge “so that he can address whether a blacklisting claim was pending before him and then decide the next appropriate steps.”¹ The ARB affirmed all other issues decided by the Presiding Judge.

On September 21, 2010, Complainant was terminated for failure to improve his performance based on a thirty (30) day Performance Improvement Plan (PIP). Complainant filed an AIR-21 complaint with OSHA on March 10, 2011.

The Presiding Judge has previously ruled the Complaint was not filed within the requisite ninety (90) day filing period in effect at that time and Complainant did not show that he was entitled to equitable tolling of the filing period. This applied to all the protected activity alleged by Complainant prior to his termination. This was affirmed by the ARB. A review of the numerous submissions arguably shows that Complainant has raised the issue of blackballing by Respondent and the Presiding Judge should have addressed this issue.

¹ The ARB noted that the evidence that Complainant made such a complaint is not entirely clear.

Complainant first submits he is entitled to equitable tolling of the filing deadline due to blackballing by Respondent for not re-hiring him after his termination date. However, the Supreme Court of the United States has clearly stated that equitable tolling does not apply to discrete discriminatory or retaliatory acts such as blacklisting. Such claims must be filed within the statutory filing period after each specific act. See National Railroad Passenger Corporation v. Morgan, 536 U.S. 101,102 (2002). Consequently, equitable tolling is inapposite.

Next, Complainant submits that subsequent to his termination, he has applied for numerous jobs with Respondent and not been re-hired. In Burnham v. Amoco Container Co., 755 F.2d 893 (1985), that U.S. Court of Appeals for the Eleventh Circuit that a failure to re-hire subsequent to an alleged discriminatory firing, absent a new and discrete act of discrimination in the refusal to re-hire itself, cannot resurrect the old discriminatory act. Complainant has failed to allege or show such a discrete act of discrimination. Accordingly, Complainant has still failed to raise any genuine issue of material fact related to the allegation of blacklisting other than speculation.

Therefore, **IT IS ORDERED** that Respondent is still entitled to Summary Decision in this case.

SO ORDERED.

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS,JR/jcb
Newport News, VA

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).