



Issue Date: 07 July 2011

Case No.: 2011-AIR-00009

In the Matter of:

JOHN J. WOODS,
Complainant,

v.

BOEING - SOUTH CAROLINA,
Respondent.

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
AND DISMISSING COMPLAINT**

This case arises under the Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”), 49 U.S.C.A. 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 John J. Woods, who requested a hearing on these findings.

By motion dated June 23, 2011, Respondent, Boeing-South Carolina, requests a summary judgment and dismissal of the complaint. Respondent submits that the complaint is time barred because Complainant failed to file his complaint within the ninety (90) day filing requirement of 29 C.F.R. 1979.103(d). Respondent submits that Complainant was terminated by Respondent on September 21, 2010. However, Complainant failed to file his AIR 21 complaint until March 10, 2011, almost six months after the alleged adverse action (termination) took place.

Complainant filed his response in opposition under cover letter dated July 5, 2011.

Background

On or about September 21, 2009, Complainant was hired by Respondent as a manufacturing engineer for Composite Materials Repair. Complainant submits that his formal complaints concerning air craft quality concerns (alleged protected activity) began on July 13,

2010. In mid-August 2010, Respondent placed Complainant on a 30-day Performance Improvement Plan (PIP) for a period of 30 days and was informed that he must improve his performance or he would be terminated. After he was placed on the PIP, Complainant filed complaints of harassment and discrimination with Respondent's EEO and Ethics Office. On September 21, 2010, Complainant was terminated for failure to improve performance as set forth in the PIP (alleged adverse action). On December 10, 2010, Complainant was informed by the EEO and Ethics Office that the investigation did not find evidence to support his discrimination or harassment complaints. On March 10, 2011, Complainant filed his AIR 21 complaint with OSHA.

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 when he was informed that his employment was terminated on September 21, 2010. That was the date he was clearly aware of the alleged adverse action. His awareness was not somehow deferred until some months later when the EEO and Ethics Office informed him that his non-AIR 21 complaints were denied. He had already been terminated for almost three months by then.

Complainant argues that even if his AIR 21 complaint was not timely filed, he should be entitled to equitable tolling because he was somehow misled to believe that the collateral non-AIR 21 related EEO and Ethics complaints deferred the need to file a timely AIR 21 complaint. Complainant offers nothing in support of this assertion other than mere speculation.

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).

There is no evidence 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 Complainant from initiating legal action of any kind in connection with his termination. Nor has Complainant established that there were any extraordinary circumstances that may have prevented him from timely asserting his rights under the AIR 21 Act.

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 Respondent’s motion is GRANTED and Complainant’s complaint under the AIR 21 ACT is dismissed.

SO ORDERED.

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DANIEL A. SARNO, JR.

District Chief Administrative Law Judge

DAS,JR/ccb
Newport News, Virginia

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). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. 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).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).