



**Issue Date: 29 June 2012**

Case No.: 2012-AIR-0003

In the Matter of:

CHRISTOPHER KRUSE,

Complainant,

v.

AIR METHODS CORPORATION,

Respondent.

**ORDER GRANTING SUMMARY DECISION**

*Factual and Procedural Background*

This proceeding arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, (“AIR21”), 49 U.S.C. § 42121, and the implementing regulations at 29 C.F.R. Part 1979, published at 67 Fed. Reg. 15454 (April 1, 2002), and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 C.F.R. Part 18A.

In this case Christopher Kruse (“Complainant”) filed an AIR21 complaint with the Occupational Safety and Health Administration (“OSHA”) on January 10, 2011, alleging that his protected activities led to his termination and post-termination blacklisting by Air Methods Corporation (“Respondent”). The complaint was registered by OSHA as Number 359128. OSHA conducted an investigation of the allegations contained in the complaint.

On October 26, 2011, the Secretary of Labor, through her agent, the OSHA Regional Administrator of Region V, issued findings determining that the Complainant’s alleged protected actions were not a factor in his termination and that his assertions of blacklisting were unsubstantiated. The Secretary, therefore, dismissed the complaint. The parties, including Complainant’s counsel Phillip Steans, were sent copies of these findings via certified mail. The certified mail package was received by Complainant’s counsel on October 27, 2011. (Respondent’s Exhibit E).

In correspondence to the U.S. Department of Labor’s Office of Administrative Law Judges (“OALJ”), received on December 16, 2011, Complainant’s counsel objected to the Secretary’s findings and dismissal of the complaint. Counsel specifically noted that “Mr. Kruse had previously directed the undersigned to file a timely appeal, and it is through error of counsel only that the 30 day time period was not complied with.”

On January 25, 2012, the undersigned issued a Notice of Assignment and Intent to Schedule a Telephone Conference with the parties. On March 8, 2012, a scheduling conference call was held, and on April 16, 2012, the undersigned issued a Scheduling Order. This Order provided the parties with “30 days from the date of this Order to file their initial dispositive motions and ...an additional 30 days to file...replies.

On May 15, 2012, the Respondent filed a Motion for Summary Judgment, asserting that Complainant’s “Objection to and Request for Hearing of the U.S. Secretary of Labor’s Findings was untimely under 49 U.S.C. §42121(b)(2)(A), 29 C.F.R. §§ 1979.106(a), and (b)(1)(2).” (Respondent’s Brief at 1).<sup>1</sup> No reply was received from the Complainant during the period set out in the Scheduling Order. On June 18, 2012, staff from the undersigned’s office contacted the Complainant’s counsel to see if there was a response to the Motion forthcoming, and were informed that there was not. On June 22, 2012, the parties submitted a Stipulation and Order of Dismissal with Prejudice.

### *Discussion*

An administrative law judge may enter a summary decision for either party on an issue if the pleadings, affidavits, material 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 summary decision.<sup>2</sup> When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon mere allegations or denials of the pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.<sup>3</sup>

Pursuant to AIR 21, when a complaint is filed under the employee protection provision, the Secretary of Labor must conduct an investigation and notify the complainant and the person identified in the complaint of the Secretary's findings within sixty (60) days after receipt of the complaint. 49 U.S.C. § 42121 (b)(2)(A). The Secretary, by and through the OSHA's Region V office, satisfied this requirement.

AIR 21 further provides that, "either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record." 49 U.S.C. § 42121(b)(2)(A) (2002); 29 C.F.R. § 1979.106(a) (2003). The party who desires review "must file objections and a request

---

<sup>1</sup> The Respondent correctly captioned this motion as one for summary judgment rather than a motion to dismiss, as the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges do not expressly provide for the dismissal of a claim. But Federal Rule of Civil Procedure 12(b) may properly be applied when a party, in effect, moves for dismissal. 29 C.F.R. § 18.1(a); *High v. Lockheed Martin Energy Sys.*, ARB No. 97-109, ALJ No. 1997-CAA-3, slip op. at 3 (ARB Nov. 13, 1997). If matters outside the pleadings are considered by the court, the motion must be treated as one for summary decision and all parties must be given a reasonable opportunity to present material relevant to the motion. Fed. R. Civ. P. 12(d); *Flor v. U.S. Dept. of Energy*, ALJ No. 93-TSC-0001, slip op. at 9 (Sec’y Dec. 9, 1994). Here, the Respondent has relied on documents outside of the pleadings in support of its motion (*i.e.* the certificate of receipt of the findings at Exhibit E of its Motion). Complainant’s Counsel had, but did not avail himself of, the opportunity to present evidence on the issue.

<sup>2</sup> 17 29 C.F.R. §18.40(d) (2004).

<sup>3</sup> 29 C.F.R. §18.40(c) (2004).

for a hearing on the record within 30 days of receipt of the findings and preliminary order." *Id.* If no objections are timely filed, then the "findings or preliminary order, . . . , shall become the final decision of the Secretary, not subject to judicial review." *Id.*<sup>4</sup>

Complainant received OSHA's findings dismissing the complaint on October 27, 2011. Therefore, Complainant's objections had to have been filed on or before November 26, 2011.<sup>5</sup> Pursuant to the AIR regulations, the date of filing is determined by the date of postmark. 29 C.F.R. § 1979.106(a). Here, Complainant's objection and request for hearing was postmarked December 16, 2011, fifty (50) calendar days from the date upon which Complainant received OSHA's findings. Because Complainant's objection was not filed within 30 days of receipt of the Secretary's findings, the Secretary's findings became a final order.

Furthermore, Complainant has failed to respond to the Respondent's Motion for Summary Judgment and to offer, if applicable, a rationale for affording Complainant an equitable tolling of the deadline to submit objections to the Secretary's findings. *See Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001) (recognizing that the time limit for filing a request for a hearing is not a jurisdictional prerequisite, and is subject to the principles of equitable tolling).

### ORDER

Since the Complainant failed to file a request for a hearing on the record within the time limit proscribed under the Act, and nothing in the record mitigates this omission, the Respondent's Motion for Summary Judgment is granted and the Secretary's findings of October 26, 2011, are, by operation of law, a Final Order. Therefore, the Respondent's Motion for Summary Judgment is **GRANTED** the case is **DISMISSED**, and the parties' submitted "Stipulation and Order of Dismissal with Prejudice" is moot.

A

PETER B. SILVAIN, JR.  
Administrative Law Judge

---

<sup>4</sup> *See also, Bodine v. Int'l. Total Servs.*, 2001-AIR-4 (ALJ Nov. 20, 2001)(Secretary's findings and order became final "upon operation of law" when a complainant filed its objection 40 days after issuance of Secretary's findings and order); *Staskelunas v. Ne. Utils. Co.*, 1998-ERA-8 (ARB May 4, 1998)(affirmed ALJ decision to dismiss case for Complainant's failure to file timely request for a hearing and failure to respond to an order).

<sup>5</sup> It should be noted that November 26, 2011, falls on a Saturday, but as Complainant's objections were 50 calendar days after OSHA's service of the adverse findings, neither the due date falling on a weekend or the applicability of additional time for mailing pursuant to 29 C.F.R. § 18.4(c)(3) are relevant to the underlying timeliness determination.

**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 30 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 10 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 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).

