



Issue Date: 02 May 2014

Case Number: 2014-AIR-00011

In the Matter of:

SHEENA JONES,

Complainant

v.

UNITED AIRLINES, INC.,

Respondent

ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121, *et seq.*, and its implementing regulations found at 29 C.F.R. § 1979.

I. BACKGROUND

Complainant Sheena Jones (“Jones” or “Complainant”) worked as a flight attendant for Respondent United Airlines, Inc. (“United” or “Respondent”). Based on the limited record before me, it appears that Jones was working on a cross-country flight from Dulles International Airport in Washington, D.C. to San Francisco International Airport on August 18, 2012. During the flight, Jones became engaged in a heated disagreement about proper safety procedures with members of the flight crew, including the First Officer and Captain. These procedures involved the proper way for the flight crew to use the restrooms during flight. Jones was subsequently removed from service pending a decision by United.

United issued Jones an Amended Letter of Charge on October 25, 2012.¹ United then conducted a hearing into the charges brought against Jones on November 15, 2012.

On November 29, 2012, Dean Whittaker, Director of Inflight for United, informed Jones “that her employment had been terminated.” Complainant’s Response to Show Cause Order (“CR”) 2. The letter provided a brief overview of United’s factual findings surrounding the incident, and it faulted Jones for the safety problems that arose. Whittaker concluded by saying:

¹ There is no indication in the record when United sent the original Letter of Charge.

After consideration of all information presented and a complete review of your work history, it is my decision to terminate your employment with United Airlines effective with the date of this letter.

Since you are no longer entitled to any employee travel benefits, you are directed to return the following Company property to your Supervisor on receipt of this letter: CJA card, all Company property including your badges, Flight Attendant Operations Manual, Inflight garments, any active parking permit and flashlight.

In the event, [sic] that you are dissatisfied with this decision as rendered, a written appeal under the provisions of Sec 26.A.4 of the Agreement may be made within thirty (30) days to the United Airlines System Board of Adjustment.

CR 8-9.

Jones appealed United's decision to the United Airlines System Board of Adjustment ("BOA") on December 12, 2012. *Id.* at 6. In August of 2013, United attempted to mediate the case before the BOA, but Jones refused. *Id.* at 11. On November 27, 2013, the parties filed their briefs, and a final decision by the BOA is pending. *Id.* at 10.

On December 17, 2013, Jones filed a complaint with the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, alleging violations of AIR21. On January 10, 2014, OSHA issued a letter to Jones stating that her complaint was untimely filed. Specifically, OSHA found that more than 90 days had elapsed from the date she was discharged (November 29, 2012) to the date she filed her OSHA complaint (December 17, 2013). OSHA therefore dismissed her complaint.

On February 11, 2014, Jones filed a letter with the Office of Administrative Law Judges ("OALJ" or "Office"), U.S. Department of Labor, wherein she appealed OSHA's dismissal of her complaint. The case was duly docketed, and on February 18, 2014, I issued a Notice of Docketing and Order to Show Cause. Therein, I ordered the parties to file briefs addressing the question of whether the Complainant's AIR21 complaint was timely filed with OSHA, *i.e.*, within 90 days after the alleged AIR21 violation occurred.

Respondent filed its Response to my Order to Show Cause on March 14, 2014. That same day, Complainant requested additional time to file her brief. I granted Complainant's request for an extension on March 27, 2014, and allowed both parties to submit their briefs no later than April 25, 2014. Respondent filed an Amended Response to my Order to Show Cause on March 25, 2014. Complainant filed her Response to my Order to Show Cause on April 28, 2014.

II. LAW

AIR21 prohibits a covered air carrier from discriminating against an employee for, *inter alia*, providing information regarding a violation of a federal law or regulation to his or her employer. 49 U.S.C. § 42121(a)(1). If a covered air carrier discriminates against its employee

for engaging in protected activity, the employee must file an action with OSHA “not later than 90 days after the date on which the violations occurs.” 49 U.S.C. § 42121(b)(1); *see* 29 C.F.R. § 1979.103(d). The filing period begins “when the discriminatory decision has been both made and communicated to the complainant.” 29 C.F.R. § 1979.103(d). That is, the 90-day period begins when complainant receives “final, definitive, and unequivocal notice” of an adverse action. *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-9, at 2-3 (ARB Apr. 3, 2007) (citing *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 3 (ARB Aug. 31, 2005)). A notice is “final” if it leaves “no further chance for action, discussion, or change.” *Rollins*, ARB No. 04-140, at 3. And notice is “unequivocal” when the employer’s communication is unambiguous or “free of misleading possibilities.” *Ibid.*

III. DISCUSSION

Complainant argues that her OSHA complaint was timely filed. She asserts that her employment is covered by the collective bargaining agreement between her union, the Association of Flight Attendants, and United. CR 3. The collective bargaining agreement allows her to appeal United’s decision to terminate her. *Ibid.* As the BOA has not rendered a final decision on her appeal, she argues that there has not been a “final, definitive, and unequivocal” employment action. *Ibid.* Therefore, her OSHA complaint was timely filed.

Complainant’s argument however has been rejected in Federal and administrative court decisions. In *Delaware State College v. Ricks*, the U.S. Supreme Court held that the statute of limitations period begins on the date “the employer’s decision is made” and that “the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the [statute of] limitations period.” 449 U.S. 250, 258 (1980) (internal citations omitted). In *Ricks*, the plaintiff professor was denied tenure by the College Board of Trustees at Delaware State College on March 13, 1974. *Id.* at 252. The plaintiff immediately appealed to the school’s grievance committee. *Ibid.* On June 26, 1974, while the grievance committee’s decision was still pending, the defendant college offered the plaintiff a 1-year contract and said that his employment would end on June 30, 1975. *Id.* at 253. On September 12, 1974, the grievance committee issued its decision denying the plaintiff’s appeal. *Id.* at 254. The plaintiff thereafter filed an appeal with the Equal Employment Opportunity Commission (“EEOC”) on April 4, 1975. *Ibid.* The question for the *Ricks* court to decide was whether plaintiff filed his EEOC complaint within the 180-day statute of limitations period.

The *Ricks* court held that the statute of limitations period commenced “at the time the tenure decision was made and communicated to Ricks.” *Id.* at 258. In so holding, the *Ricks* court rejected the argument that the filing period did not begin to run until the grievance committee issued its decision on September 12, 1974. The Court wrote:

First, it could be contended that the Trustees’ initial decision was only an expression of intent that did not become final until the grievance was denied. In support of this argument, the EEOC notes that the June 26 letter explicitly held out to Ricks the possibility that he would receive tenure if the Board sustained his grievance. [. . .] Second, even if the Board’s first decision expressed its official

position, it could be argued that the pendency of the grievance should toll the running of the limitations periods.

We do not find either argument to be persuasive. As to the former, we think that the Board of Trustees had made clear well before September 12 that it had formally rejected Ricks' tenure bid. The June 26 letter itself characterized that as the Board's "official position." [. . .] It is apparent, of course, that the Board in the June 26 letter indicated a willingness to change its prior decision if Ricks' grievance were found to be meritorious. But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.

As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. [. . .] The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made.

Id. at 261 (italics in original).

In this case, Whittaker similarly made clear to Jones that United was making a final decision in her case in his letter dated November 29, 2012. Whittaker was clear that United came to a conclusion in Jones' case as shown in the letter's title: "Letter of Charge Conference Decision." CR 8. Additionally, the letter made factual findings. It informed Jones that she was responsible for compromising flight safety. It told her that all of the evidence was considered. And Whittaker concluded, "it is my decision to terminate your employment with United Airlines effective with the date of this letter." *Id.* at 9. Whittaker's statements in the letter "made clear" that United was making its final decision to terminate Jones.

As the *Ricks* court found, the decision was final regardless of the fact that the company provided an avenue for appeal. The Letter of Charge Conference Decision stated: "In the event, [*sic*] that you are dissatisfied with this decision as rendered, a written appeal under the provisions of Sec 26.A.4 of the Agreement may be made within thirty (30) days to the United Airlines Systems Board of Adjustment." CR 9. However, the availability of an appeal does not undermine the decision's final or unequivocal nature. Nothing in the Letter of Charge Conference Decision indicated that United's decision is tentative. The BOA review, as was the grievance committee's review in *Ricks*, is "a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.* at 261 (italics in original). United merely provided a voluntary option for review of its already-made final decision. Therefore, the statute of limitations period in this case was not tolled until such time as the BOA renders its determination.

Finally, the Administrative Review Board ("ARB") has addressed the same issue under AIR21 in *Barrett v. Shuttle Am./Republic Airways*, ARB No. 12-075, ALJ No. 2012-AIR-10

(ARB Feb. 28, 2014). The ARB held, *inter alia*, that the fact that complainant's union failed to promptly pursue her appeal under a collective bargaining agreement did not constitute a proper basis to equitably toll the statute of limitations under AIR21. *Id.* at 5. Citing *Ricks*, the ARB stated that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period." *Ibid.* "Nothing precluded Barrett from filing a complaint with OSHA before she filed a grievance or while the grievance was pending." *Id.* at 6. So too here. Complainant received Respondent's final decision to terminate her on November 29, 2012. CR 8. She was aware of United's decision at that point and had 90 days to file her complaint with OSHA. She did not avail herself of that opportunity, and her OSHA complaint was therefore filed outside the statute of limitation period.

IV. CONCLUSION

For the foregoing reasons, Complainant's complaint is **DISMISSED**.

SO ORDERED.

STEPHEN L. PURCELL
Chief 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 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).