



Issue Date: 13 May 2014

Case Number: 2014-AIR-00011

In the Matter of:

SHEENA JONES,

Complainant

v.

UNITED AIRLINES, INC.,

Respondent

ORDER DENYING RECONSIDERATION

I. BACKGROUND

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.

On February 11, 2014, Complainant Sheena Jones (“Jones” or “Complainant”) filed a letter with the Office of Administrative Law Judges (“OALJ” or “Office”), U.S. Department of Labor, wherein she appealed the Occupational Safety and Health Administration’s (“OSHA”) dismissal of her complaint.¹ 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 Complainant’s AIR21 complaint was timely filed with OSHA, *i.e.*, within 90 days after the alleged AIR21 violation occurred.

Respondent United Airlines (“United” or “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

¹ Complainant’s OSHA complaint was filed December 17, 2013.

Response to my Order to Show Cause on April 25, 2014. Complainant filed her Response to my Order to Show Cause on April 28, 2014.

I issued an Order of Dismissal on May 2, 2014, wherein I found that Complainant's OSHA complaint was not timely filed. This case was therefore dismissed.

On May 6, 2014, I received a letter from Jones dated April 30, 2014. The letter purportedly rebutted Respondent's Amended Response to my Order to Show Cause. The postage date on Jones' envelope showed May 2, 2014 – the same day I issued my Order of Dismissal.

II. DISCUSSION

A. Untimely Reply Brief

Complainant's Reply Brief was filed late, and therefore I may disregard the arguments made therein. The OALJ Rules of Practice and Procedure states: "Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges. However, when documents are filed by mail, five (5) days shall be added to the prescribed period." 29 C.F.R. § 18.4(c).

In my March 27, 2014 Order granting a filing extension, I ordered both parties to file their briefs no later than April 25, 2014. As Complainant and Respondent chose to file their briefs by mail, they were allowed five additional days after April 25 for OALJ to receive them. Thus, the actual deadline for filing their reply briefs was April 30, 2014.

Complainant's Reply Brief was filed late. OALJ did not receive Complainant's Reply Brief until May 6, 2014. On that basis alone, I may disregard Complainant's Reply.

B. Reconsideration of my May 2, 2014 Order of Dismissal

I am fully aware that Complainant is representing herself *pro se* in this matter, and her lack of legal training combined with the technical requirements of OALJ's procedural rules should not necessarily be a bar to consider her arguments. As such, I will consider the

arguments made by Complainant in her Reply Brief and treat Complainant's submission as a request for reconsideration.²

1. Complainant's Arguments

Complainant argues that United's November 29, 2012 letter did not amount to "final, definitive, and unequivocal" notice of an adverse action. Complainant's Reply Brief ("CRB") 2; *see Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-9, at 2-3 (ARB Apr. 3, 2007) (internal citations omitted). Complainant argues that after she received United's letter, her Union President, Ken Diaz, approached her on August 8, 2013 "to go to mediation." CRB 2. Michael Hickey, her Union's attorney, approached her on August 14, 2013 "to go to mediation." *Ibid.* Then, on October 7, 2013, United offered Complainant the possibility "of retirement and medical benefits but no travel benefits." *Id.* at 2. Complainant states that she made a counter-offer that same day, and on October 8, 2013, Respondent rejected Complainant's counter-offer. *Id.* at 2-3. Complainant thus argues that October 8, 2013 is the date on which the filing period begins to run because it is the day she received final and unequivocal notice of United's adverse action against her. *Id.* at 3.

2. 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 the complainant receives "final, definitive, and unequivocal notice" of an adverse action. *Rollins v. Am. Airlines, Inc.*, *supra*, ARB No. 04-140, at 2-3. 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.*

² The Administrative Review Board has found that an adjudicative body generally has inherent jurisdiction to reconsider its decisions. *Henrich v Ecolabs*, ARB Case No. 05-030 (5/30/2007) (Sarbanes-Oxley Act). According to the Board, jurisdictional authority for reconsideration exists so long as the statute at issue and its implementing regulations do not limit jurisdiction, and so long as reconsideration would not "interfere with, delay or otherwise adversely affect accomplishment of the Act's . . . purposes and goals." *Id.*, quoting *Macktal v. Brown & Root, Inc.*, ARB Case Nos. 98-112 and 122A (11/20/1998). I find nothing in the AIR21 statute or its implementing regulations that would preclude reconsideration here.

3. *Analysis*

In my Order of Dismissal on May 2, 2014, I was well aware of the mediation process between Complainant and Respondent that occurred after United sent its November 29, 2012 “Letter of Charge Conference Decision.” *See* Order of Dismissal (“OD”) at 2 (May 2, 2014). However, I found that United’s November 29, 2012 letter was still a “final, definitive, and unequivocal notice” of its decision to terminate Jones. *Id.* at 4. United’s letter, *inter alia*, stated, “it is my decision to terminate your employment with United Airlines effective with the date of this letter.” *Id.* at 2. United “made clear” that it was making its final decision to terminate Jones in that letter. *Id.* at 4.

The fact that United and Jones continued to undergo mediation and appeal through the United Airlines Systems Board of Adjustment (“BOA”) does not undermine the finality of United’s decision. The mediation and BOA processes were “a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made. *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) (italics in original). Thus, the statute of limitations period was not tolled until the mediation and/or BOA processes were completed. Rather, the statute of limitations period began to run the date Jones received United’s November 29, 2012 Letter of Charge Conference Decision. As Complainant filed her OSHA complainant well over 90 days from November 29, 2012, her OSHA complainant was filed untimely.

III. ORDER

Based on the foregoing, Complainant’s request for reconsideration is **HEREBY DENIED**.

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).