



Issue Date: 17 January 2014

CASE NO.: 2014-AIR-00009

In the Matter of:

SUSAN L. UDVARI,
Complainant

v.

US AIRWAYS, INC.,
Respondent¹

DECISION AND ORDER OF DISMISSAL

I. Procedural History

On November 2, 2011, Susan L. Udvari (“complainant”) initiated a claim against U.S. Airways, Inc. under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR21”). Complainant alleged that she was disciplined with a Letter of Warning issued August 5, 2011, in retaliation for filing a safety report with the Federal Aviation Administration (“FAA”) in 2010. The Secretary found that a preponderance of the evidence indicated that complainant’s protected activity was not a contributing factor in the adverse action taken against her and accordingly dismissed the complaint on August 6, 2012.² The Secretary’s summary indicated that respondent acknowledged complainant’s protected activity, but disciplined her following four separate incidents of unprofessional conduct.³ The complainant, proceeding *pro se*, sent a letter to the Office of Administrative Law Judges (“OALJ”) on December 10, 2013, filing objections to the Secretary’s findings and alleging facts that could constitute a new claim. (Hereinafter “OALJ Complainant Letter”).

¹ Though captioned as respondent, US Airways, Inc. was not served by complainant, nor did it have an opportunity to respond.

² 29 CFR § 1979.105(a) notes that the Assistant Secretary must issue findings within sixty days from the date upon which the complainant files the complaint. Here, findings were issued 278 days after the filing. Nothing in the record indicates any reason for the delay.

³ The alleged conduct involved (1) disregarding instructions from a Captain – the same pilot involved in complainant’s FAA report – regarding morning transportation van times on May 1, 2011; (2) a complaint from a Customer Service Supervisor who alleged that complainant yelled in an unprofessional manner at a vendor, and then the Supervisor in the presence of the vendor, on July 21, 2011; (3) a complaint from a hotel manager that complainant was rude to a hotel van driver on July 21, 2011; and (4) a passenger complaint in which the complainant’s demeanor and response to the passenger required the intervention of the pilot and resulted in a 30-minute flight delay on July 22, 2011.

II. Objections to the Secretary's Findings

A. Timeliness

Part 1979 of Title 29 of the Code of Federal Regulations provides the procedures for handling discrimination complaints under AIR 21. In particular, section 1979.106(a) provides that a complainant must file any objections and/or request a hearing before an administrative law judge ("ALJ") within 30 days of receipt of the Secretary's findings. If no timely objection is filed with respect to the findings, then those findings "shall become the final decision of the Secretary, not subject to judicial review." 29 C.F.R. § 1979.106(b)(2). Like most rules, this one is subject to an important exception. Prescriptive limitation periods such as this one are subject to the common law doctrine of equitable tolling. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 102 (2002) (applying equitable tolling to Title VII discrimination and retaliation claims); see also *Trechak v. Am. Airlines, Inc.*, 2003-AIR-5 (ALJ Aug. 8, 2003) (analyzing equitable tolling for AIR 21 claim).

When a tribunal tolls a limitation period, it temporarily suspends or stops that period, and provides the complainant an opportunity to present her claim notwithstanding the statutorily prescribed limitation. In effect, the tribunal looks beyond the statutory text, as equity may require, in order to invoke a broader and more encompassing principle of fairness. However, the standard for applying the tolling doctrine is "a high one" and restrictions thereto are "scrupulously observed." *Trechak*, 2003-AIR-5, slip op. at 8, quoting *Williams v. Army & Air Force Exchange Serv.*, 830 F.2d 27, 30 (3rd Cir. 1987). As observed by the Supreme Court, "Federal courts have typically extended equitable relief [with respect to timeliness issues] only sparingly." *Irwin v. Veterans Administration*, 498 U.S. 89, 96 (1990).

I am guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, -15, slip op. at 4 (ARB Aug. 2000); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2 (ARB Nov. 1999).

In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. §§ 2622(b) (1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. The court recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting her rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted).

A complainant's inability to demonstrate that one of these situations applies to her claim does not necessarily preclude her entitlement to equitable tolling. Courts, however, "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). See also *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (*pro se* party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

Complainant bears the burden of justifying the application of equitable tolling principles. See *Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling); see also *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993). Ignorance of the law will generally not support a finding of entitlement to equitable tolling. *Wakefield v. R.R. Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000). For the reasons that follow, complainant has not satisfied her burden of justifying the application of the equitable tolling principles.

1. Active Misleading

A complainant alleging equitable tolling may present evidence that the respondent "affirmatively sought to mislead the charging party." *Villasenor v. Lockheed Aircraft Corp.*, 640 F.2d 207, 208 (9th Cir. 1981) (emphasis added). In her letter to the OALJ, complainant notes that she was unable to file an objection within 30 days because "US Airways management was doing everything to delay the grievance meeting in regards to the Letter of Warning cited by the Secretary's Findings." OALJ Complainant Letter ¶ 1. Complainant appears to indicate in her letter that she was awaiting the outcome of the grievance meeting before deciding to file any objection to the Secretary's findings.⁴ OALJ Complainant Letter ¶ 1.

The outcome of the grievance meeting was favorable to complainant. The agreement notes that the Letter of Warning – issued for a continued pattern of unprofessional and uncooperative behavior, and failure to follow procedures which contributed to an inadvertent slide deployment on July 28, 2011 – will be permanently removed from complainant's personnel file and all notations will be expunged from complainant's record. OALJ Complainant Letter, Attachment 1. This agreement is dated December 12, 2012.

Nothing alleged in complainant's letter to OALJ indicates that US Airways in any way affirmatively sought to mislead the complainant from objecting to the Secretary's findings. For example, complainant has not alleged that US Airways told complainant that she could not object to the Secretary's findings until her grievance was resolved. Nor has complainant alleged that any supervisor or manager told her that she was not permitted to object for other reasons. Even if complainant believed that she had to wait for the outcome of her grievance meeting, the agreement which followed that meeting is dated December 12, 2012, nearly a year prior to her present objection to the Secretary's findings before me, which is dated December 10, 2013.

⁴ Complainant's letter explains that the Letter of Warning was removed from her file and expunged from her record and that, on this basis, she is "requesting that this case be reopen[ed]." OALJ Complainant Letter ¶ 1.

2. Extraordinary Circumstances

Equitable tolling may apply if complainant shows that she has in some extraordinary way been prevented from asserting her rights. *Marshall*, 657 F.2d at 18. There have been instances where equitable tolling has applied under circumstances where the complainant was suffering from a mental disability. *Beister v. Midwest Health Services*, 77 F.3d 1264, 1268 (10th Cir. 1996); *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996); *Stoll v. Runyun*, 165 F.3d 1238, 1242 (9th Cir. 1999). Nothing alleged in complainant's letter to OALJ indicates that she was suffering from a mental disability or was otherwise prevented from asserting her rights in some extraordinary way.

3. Incorrect Forum

Equitable tolling may apply when the complainant has mistakenly raised the claim in the wrong forum. *Marshall*, 657 F.2d at 20. Complainant's initial claim was correctly filed with OSHA pursuant to § 1979.103(c).

Lastly, it is well settled that pleadings of *pro se* litigants should be judged more liberally than those drafted by experienced counsel. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). In *Brown* however, the Supreme Court found that a *pro se* litigant who was informed of a due date, but nevertheless filed six days late, was not entitled to equitable tolling. *Brown*, 446 U.S. at 151. In the instance case, the Secretary's findings instructed the complaint to file any objection to OALJ within 30 days.⁵ Complainant filed her objections nearly 1.5 years later and nearly 1 year following the outcome of her grievance hearing. Claimant notes that she was unaware that she could "request the case to be reopened" until she spoke to an FAA representative. OALJ Complainant Letter ¶ 1. However, unawareness generally does not support a finding of entitlement to equitable tolling. *Hemingway*, ARB No. 00-074, slip op. at 4-5. *Wakefield*, 131 F.3d at 970.

For these reasons, I find that the complainant has not established that she is entitled to equitable tolling.

B. Summary Judgment

A trial court may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim. 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1357 at 593 (1969); *Cummings v. USA Truck, Inc.*, 2003-STA-47 (ALJ Jan. 9, 2004) (dismissing a whistleblower claim *sua sponte* for failure to state a claim pursuant to 29 C.F.R. 18.1(a) and F.R.C.P. 12(b)(6)). If a party produces outside evidence in addition to its pleadings, then an ALJ's determination is tantamount to a decision for summary judgment. *Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, ALJ No. 95-CAA-15, slip op. 3 (ARB Nov. 27, 1996); 29 C.F.R. 18.40(d). Section 18.40(d) is derived from Rule 56 of the Rules of Civil Procedure and

⁵ The August 6, 2012, findings include the following paragraph: "Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review."

provides for summary decision if no material facts are in dispute and the court, acting of its own initiative, finds against the party as a matter of law.⁶ See *Prybys*, ARB No. 96-064, slip op. at 3.

In the instant case, only facts pertinent to the timeliness question are relevant to the summary judgment determination. “In deciding whether a genuine issue of fact exists regarding the timeliness question, the evidence and any factual inferences to be drawn from that evidence must be viewed in the light most favorable to [complainant].” *Id.*, slip op. at 3.⁷

Here, the Secretary dismissed the complaint on August 6, 2012. The limitations period provides 30 days from complainant’s receipt of the findings to file an objection with OALJ. 29 C.F.R. § 1979.106(a). OALJ received complainant’s objections on December 16, 2013. The period between dismissal and objection is nearly 1.5 years. As a result, complainant’s objection “facially shows noncompliance with the limitations period.” *Oshiver*, 38 F.3d at 1384 n.1. In addition, and as discussed above, equitable tolling does not apply. Pursuant to § 18.40(d), I therefore will rule against complainant’s objections to the Secretary’s findings as a matter of law.⁸

III. New Claim

Complainant’s initial claim filed with OSHA alleged that her submission of an FAA report contributed to adverse action taken against her, i.e. receipt of a Letter of Warning. Complainant’s December 16, 2013, letter to OALJ states additional facts that may be construed as constituting a new claim. Complainant alleges that she experienced the following adverse actions:

- (1) US Airways initiated an investigation on January 12, 2013, for complainant’s alleged engagement in unprofessional conduct;
- (2) US Airways initiated a second investigation sometime before March 15, 2013, for complainant’s alleged email of threatening statements regarding US Airways CEO Doug Parker and incitement of work action; and
- (3) US Airways terminated complainant March 15, 2013.

OALJ Complainant Letter ¶ 3.

⁶ A party may defeat a motion for summary judgment, or a summary judgment by a court acting of its own initiative, by “showing that there is a genuine issue of fact” that could affect the outcome of her dispute. 29 C.F.R. § 18.40(c); see *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 4 (ARB Sept. 30, 2005). The complainant therefore has an opportunity, pursuant to § 18.40, to avoid judgment against her by alleging other facts that could impact a court’s decision. If within 21 days of the date of this Order the complainant alleges such facts, her case shall be reconsidered.

⁷ See *Gilligan v. Tennessee Valley Authority*, Case Nos. 91-ERA-31, -34, Sec. Dec., Aug. 28, 1995, slip op. at 5; *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994).

⁸ Should complainant submit additional facts in support of inapplicability of the limitations period, I shall reconsider the decision to rule against complainant. For example, complainant may offer facts in support of equitable tolling by alleging that US Airways affirmatively misled her from filing her objection. As already mentioned, affirmative misleading may take the form of supervisors or managers actively communicating to complainant her inability to file an objection until her grievance is resolved. In addition, complainant may allege facts in support of an extraordinary event that prevented her from filing her objection.

Moreover, it appears that claimant engaged in protected activity by filing the initial OSHA complaint on November 2, 2011, and that US Airways, at the very least, became aware of the complaint upon service of the Secretary's August 6, 2012, findings.

However, the last potentially discriminatory act alleged by complainant occurred on March 15, 2013, when complainant was terminated. Section 1979.103(d) requires complainant to file her claim with OSHA within 90 days after a discriminatory decision has been made and communicated to the complainant. As a result, complainant's new claim falls outside the limitations period. Because complainant's new claim falls outside the statutorily prescribed limitations period, and because she has not alleged any facts indicating entitlement to equitable tolling related to this claim, it will be summarily adjudged against her.⁹ See [Ford v. Northwest Airlines, Inc.](#), 2002-AIR-21 (ALJ Oct. 18, 2002) (dismissing a new claim, even though it was filed with OALJ, because it fell outside the 90-day limitations period).

IV. Conclusion

Complainant's objection and new claim were filed beyond the limitations periods set forth in AIR21. Complainant has not met her burden to demonstrate that she is entitled to equitable tolling. As a result, the objection and new claim will be adjudged against complainant unless further facts, such as the ones suggested above, are alleged for reconsideration.

ORDER

Based on the foregoing, complainant's objections to the Secretary's findings and her new claim are **DISMISSED** as a matter of law insofar as complainant is facially unable to show compliance with the limitations period of AIR21 and is unable to meet her burden of demonstrating entitlement to equitable tolling.

If, within 21 days of the date of this Order, complainant alleges additional facts that could affect the summary decision related to her objections or to her new claim, her case shall be reconsidered.

RICHARD A. MORGAN
Administrative Law Judge

⁹ As mentioned above, a party may defeat summary judgment by "showing that there is a genuine issue of fact" that could affect the outcome of her dispute. 29 C.F.R. § 18.40(c). If within 21 days of the date of this Order the complainant alleges such facts, her claim shall be reconsidered. For example, she may allege that other adverse action was taken against her within the 90-day limitations period, or that she was actively misled by US Airways from filing her claim.

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).