



**Issue Date: 25 August 2015**

Case Nos.: 2015-AIR-00014  
2015-AIR-00022

In the Matters of

**HERMAN TELLIS**  
Complainant

v.

**ALASKA AIRLINES, INC.**  
Respondent

**DECISION AND ORDER**  
**GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

Procedural History

This matter involves a dispute concerning alleged violations by the Respondent, Alaska Airlines, Inc., (“Alaska”) of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (“AIR 21” or “the Act”), 49 U.S.C. § 42121 (2000). The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are located at 29 C.F.R. Part 1979. Complainant has elected to proceed *pro se*, and is not currently represented by counsel.

On October 27, 2014 and December 31, 2014, Complainant filed complaints of retaliation with the Occupational Safety and Health Administration (hereinafter “OSHA”) under the Act asserting Respondent:

- Denied him employee benefits;
- Failed to comply with prior settlement agreements; and
- Subjected him to “discriminatory employee checkout,” including failure to return tools and other personal items.<sup>1</sup>

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<sup>1</sup> Despite this Tribunal’s Order, and Respondent’s repeated requests, Complainant has not provided copies of his original complaint to OSHA on this issue. Therefore, his allegations are gleaned from OSHA’s denial letter dated January 7, 2015. Despite Respondent’s request, this Tribunal declines to impose sanctions against this *pro se* Complainant due to his inaction.

On January 7, 2015, OSHA dismissed this complaint and Complainant appealed.

On February 24, 2015, this Tribunal issued a Notice of Assignment and Conference Call regarding Complainant's complaint No. 2015-AIR-00014.

On April 13, 2015, this Tribunal issued a Notice of Hearing and Pre-hearing Order regarding Complainant's complaint No. 2015-AIR-00014.

On April 15, 2015, Complainant filed a separate allegation of retaliation against Respondent asserting its failure to comply with terms of a settlement agreement entered into on or about November 5, 2013. On April 17, 2015, OSHA dismissed this complaint as untimely and Complainant appealed.

On May 19, 2015, this Tribunal issued a Notice of Assignment and Conference call regarding Complainant's complaint No. 2015-AIR-00022.

On June 29, 2015, this Tribunal issued an "Order of Consolidation and Notice of Hearing." This Order consolidated Complainant's two complaints (2015-AIR-00014 and 2015-AIR-00022) that are presently before this Tribunal for adjudication. It also placed the parties on notice that the "Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges" set forth at 29 C.F.R. Part 18<sup>2</sup> apply to these proceedings.

On July 28, 2015, Respondent filed a Motion for Summary Decision.

On August 10, 2015, Complainant filed a Motion to Enlarge the deadline for filing a response to Respondent's Motion for Summary Decision.

On August 12, 2015, this Tribunal issued an Order, in part, enlarging the Complainant's response time to respond to Respondent's Motion for Summary Decision; and, in part, putting the Complainant on notice regarding the meaning and importance of summary decision on the future viability of his Complaints.

On August 18, 2015, this Tribunal timely received Complainant's response to Respondent's Motion for Summary Decision.

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<sup>2</sup> On May 19, 2015, United States Department of Labor published a Final Rule implementing the revised Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. *See* Final Rule, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 80 FED. REG. 28,767 (May 19, 2015) (hereafter "New Rules"), as amended at 80 FED. REG. 37539 (July 1, 2015) [ministerial corrections]. The effective date and compliance date for these revised rules is June 18, 2015. 80 FED. REG. at 28,768. The published Final Rule is accessible at the following websites: <https://www.federalregister.gov/articles/2015/05/19/2015-11586/rules-of-practice-and-procedure-for-administrative-hearings-before-the-office-of-administrative-law>.

## Facts Alleged

The record before me is comprised of the following documents:<sup>3</sup>

- Complainant's February 6, 2015 Request for Hearing regarding OSHA case number 0-1960-15-006 and January 7, 2015 Secretary's Findings letter;<sup>4</sup>
- Complainant's April 30, 2015 Request for Hearing regarding OSHA case number 0-1960-15-049 and April 17, 2015 Secretary's Findings letter and Whistleblower Application;<sup>5</sup>
- Respondent's March 9, 2015 response to this Tribunal's February 24, 2015 Notice of Assignment and Conference Call, including documents served on Respondent in light of Complainant's complaints to OSHA;
- Complainant's March 12, 2015 response to this Tribunal's February 24, 2015 Notice of Assignment and Conference Call;
- Complainant's March 16, 2015 communication to this Tribunal providing communications between Complainant and OSHA regarding closed complaint No. 0-1960-13-051;<sup>6</sup>
- Complainant's May 26, 2015 communication to OSHA asking to receive copies of documents related to closed complaint No. 0-1960-13-051;
- Respondent's June 8, 2015 communication to this Tribunal enclosing exhibits A through D;<sup>7</sup>
- Complainant's July 23, 2015 communication to Respondent enclosing documents requested through Discovery;<sup>8</sup>
- Respondent's July 24, 2015 Motion for Summary Decision;<sup>9</sup>

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<sup>3</sup> This Tribunal has reviewed all of the evidence of record, including documents that may not be specifically listed below.

<sup>4</sup> Corresponding to OALJ No. 2015-AIR-00014. This document also includes Complainant's OSHA complaint No. 0-1960-13-051.

<sup>5</sup> Corresponding to OALJ No. 2015-AIR-00022.

<sup>6</sup> OSHA Case No. 0-1960-13-051 refers to a closed OSHA matter involving the Parties and is not present for adjudication before this Tribunal. However, the settlement of OSHA No. 0-1960-13-051 underlies Complainant's complaints at issue in the current litigation.

<sup>7</sup> Exhibit A is Complainant's email to OSHA enclosing the settlement agreement related to Complainant's OSHA complaint No. 0-1960-13-51; Exhibit B is OSHA's January 24, 2014 acceptance of the proposed settlement agreement related to Complainant's OSHA complaint No. 0-1960-13-051. Exhibits C and D are the Secretary's Findings letters concerning OSHA case Nos. 0-1960-15-006 and 0-1960-15-049, respectively.

<sup>8</sup> These include: (1) the settlement and release agreement entered into between the parties concerning Complainant's OSHA complaint No. 0-1960-13-051; (2) Complainant's February 8, 2013 resignation letter; (3) a November 5, 2013 amendment to the confidential settlement and release agreement; (4) Complainant's October 24, 2014 complaint letter to OSHA alleging retaliation in connection with settlement of OSHA complaint No. 0-1960-13-051; (5) Complainant's February 17, 2015 letter to OSHA regarding OSHA No. 0-1960-15-006; and (6) Complainant's April 15, 2015 letter to OSHA alleging a "new" retaliation charge based on evidence Complainant allegedly became aware of on February 3, 2015.

<sup>9</sup> Respondent's Motion included a number of documents, such as: (1) a "general timeline" of events as Exhibit A; (2) a Declaration and Exhibits A through M from Lawton Penn, a partner at Davis Write

- A letter from Respondent’s counsel dated July 31, 2015 discussing documents received from Complainant after issuance of Respondent’s Motion for Summary Decision; and
- Complainant’s August 18, 2015 Response to Respondent’s Motion for Summary Decision.<sup>10</sup>

Respondent’s Motion for Summary Decision

Respondent’s Motion for Summary Decision rested on three main allegations. First, Complainant’s complaints are time barred by the statute of limitations at 29 C.F.R. § 1979.103(d).<sup>11</sup> Second, Complainant cannot prove a prima facie case, under the Act. Third, in defiance of this Tribunal’s orders, Complainant did not provide Respondent with copies of his written complaints to OSHA; and, therefore, deprived Respondent of a “full and fair opportunity to prepare and present a defense in this case.”

In support of its arguments, the Respondent proffered three affidavits, summarized as follows.

Declaration of Lawton Penn<sup>12</sup>

Lawton Penn is a partner at Davis Wright Tremaine LLP, attorneys of record for Respondent in the instant matter. Penn recalled having numerous conversations with Dan Delue, then counsel for Complainant, regarding Complainant’s toolbox. On July 24, 2014, Penn responded to Delue’s email requesting an update on Complainant’s toolbox. Penn told Delue that UPS would not ship the toolbox without certifying its contents and Penn asked for Delue’s permission to review the contents before shipping. Alternatively, Penn told Delue that Complainant could pick up the toolbox at Respondent’s facility in Kent, Washington. Complainant did not respond to Respondent’s offers; however, Delue asked Penn not to ship the toolbox to his office. On August 21 and August 28, 2014, Complainant sent letters to numerous Alaska employees. On September 4, 2014, Penn told Delue that he had made arrangements to deliver the toolbox via Federal Express. Delue then told Penn that Complainant had terminated Delue as his counsel. On September 11, 2014, Delue told Penn that he had been rehired and Delue attached a “demand to produce” letter from Complainant, wherein Tellis “demanded that his toolbox be sent to the ‘Airport North FedEx’ facility for pick up.”

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Tremaine LLP; (3) a Declaration and Exhibit from Andrea Carino; and (4) a Declaration and Exhibits 1 through 12 from Scott Lautman, a Human Resources Manager at Alaska.

<sup>10</sup> *Complainant’s Response* included the following documents: (1) an excerpt from OSHA’s “Whistleblower Instruction Manual, Ch.6, II”; (2) endnotes, ostensibly, from *Coke v. General Adjustment Bureau*, 640 F.2d 584 (5th Cir. 1981); (3) the “Declaration of Kelvin V. Darrough in Opposition to Respondent’s Motion for Summary Decision;” (4) a USA Today article from 2002 titled “Lawsuits Claim Alaska Airlines Punished Whistleblowers;” and (5) the “Declaration of Herman Charles Tellis Opposing Motion for Summary Decision.”

<sup>11</sup> See 49 U.S.C. § 42121(b)(1).

<sup>12</sup> Hereinafter “Penn’s Declaration.”

Declaration of Scott Lautman<sup>13</sup>

Scott Lautman is a Human Resource Manager at Alaska Airlines. Lautman has worked for Alaska since 1985 and was manager of Employee Relations at Alaska for ten years and has been a manager in Alaska's Human Resources department since 2005. Lautman averred that he has firsthand knowledge of Complainant's employment with Alaska. Alaska hired Complainant in 1990 as an Aircraft Technician. Complainant was represented by the Aircraft Mechanics Fraternal Association and served as shop representative at one point. On January 16, 2013, Complainant left work to attend to union business and allegedly did not thereafter return to work. As a result, Alaska initiated an investigation of Complainant for wage theft. Complainant then requested a "buyout/retirement package." Complainant offered to resign, and Alaska agreed. Complainant signed a resignation letter on February 8, 2013. Also on February 8, 2013, the parties entered into a settlement agreement, "which resolved any and all claims arising out of [Complainant's] employment with Alaska, whether known or unknown" – including Complainant's claim against Respondent for alleged violations of the Age Discrimination in Employment Act (hereinafter "ADEA") – for which Complainant received \$80,000; placement on administrative leave until May 8, 2013, during which time he was to receive normal pay and benefits; and eight one-way travel vouchers. Complainant then left the premises without collecting his toolbox, tools or other personal belongings.

On February 13, 2013, Complainant revoked the February 8, 2013 agreement. Complainant asked for \$240,000 to settle; Alaska declined. Complainant then filed his first AIR 21 Complaint, No. 0-1960-13-051, averring that he was terminated in retaliation for filing a safety report with the Federal Aviation Administration (hereinafter "FAA") in August 2012. Complainant also initiated grievances with his labor union. A System Board of Adjustment hearing took place on November 5, 2013. On that date, the Parties settled Complainant's first AIR 21 complaint. On November 11, 2013, Complainant attempted to revoke the settlement, but only was able to revoke the ADEA component. On January 24, 2014, OSHA closed its investigation of Complainant's initial AIR 21 complaint (OSHA No. 0-1960-13-051) because it found that the terms of the settlement were "fair, adequate and reasonable." Alaska signed another settlement of Complainant's ADEA claim on June 3, 2014.

Alaska claimed that it had first received notice of Complainant's OSHA claim, No. 0-1960-15-006,<sup>14</sup> on January 7, 2015; the date when OSHA dismissed that claim. Similarly, Alaska claimed it had first received notice of Complainant's OSHA claim, No. 0-1960-15-049,<sup>15</sup> on April 17, 2015; the date when OSHA dismissed that claim.

Declaration of Andrea R. Carino<sup>16</sup>

Andrea Carino is a paralegal at Davis Wright Tremaine, LLP, attorneys of record for Alaska. Carino's declaration enclosed "excerpts of the transcript from the November 5, 2013 hearing before the AMFA System Board of Adjustment in the case entitled, *Aircraft Mechanics*

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<sup>13</sup> Hereinafter "Lautman's Declaration."

<sup>14</sup> Corresponding to OALJ No. 2015-AIR-00014.

<sup>15</sup> Corresponding to OALJ No. 2015-AIR-00022.

<sup>16</sup> Hereinafter "Carino's Declaration."

*Fraternal Association, Local 14 and Tellis and Alaska Airlines, Nos. 300031, 300032, 300032(a), 300033.*”

Correspondence from John Hodges-Howell, dated July 31, 2015<sup>17</sup>

John Hodges-Howell is the attorney of record for Alaska in the instant matter. He wrote this Tribunal on July 31, 2015 – the close of discovery – and copied Complainant on his correspondence. Hodges-Howell averred that his firm received a “last minute production of a collection of unauthenticated emails” from Complainant. Hodges-Howell argued that the communications were not responsive to his discovery request to obtain Complainant’s original OSHA complaints. For example, Complainant’s communications to OSHA are dated October 24, 2014<sup>18</sup> and February 17, 2015;<sup>19</sup> when Complainant filed his complaints on October 27, 2014 and December 31, 2014, respectively. Only Complainant’s third communication (an April 15, 2015 email to OSHA) was dated the same date as one of the Complainant’s complaints<sup>20</sup> to OSHA, which comprise the instant litigation.

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<sup>17</sup> This Tribunal never accorded Respondent leave to supplement its Motion for Summary Decision. Therefore, although this Tribunal will consider the documents attached to Mr. Hodges-Howell’s July 31, 2015 correspondence, it will not consider the substance of his argument. To do otherwise would provide Respondent the opportunity to proffer cumulative support for its dispositive motion.

<sup>18</sup> Respondent attached as Exhibit A, a poorly photocopied version of Complainant’s October 24, 2014 letter to OSHA. The legible parts indicate that Complainant discussed his Complaint with OSHA, No. 0-1960-13-051, which is not part of the instant litigation. Complainant averred that Respondent “engaged in discrimination retaliation [sic] and failed substantially to comply with the terms of the OSHA agreement.” Respondent allegedly imposed a “discriminatory checkout policy” which included not providing him access to his personal belongings and toolbox. Complainant stated that “since 5 Nov. [2013,] [Respondent] has moved to deliver my tools to my residence” and that Complainant “vigorously protested . . . .” Respondent also allegedly denied health, flight and employee status benefits to Complainant.

<sup>19</sup> Respondent attached as Exhibit B Complainant’s February 17, 2015 letter to OSHA employee Steve Gossman, regarding Complainant’s Complaint with OSHA No. 0-1960-15-006, which corresponds with OALJ Case No. 2015-AIR-00014. There, Complainant averred that on February 3, 2015, he first discovered that OSHA “made its decision to approve settlement without considering the entire record, namely the 8 Feb. 2013 Confidential Settlement and Release Agreement.” Complainant noted that although the November 5, 2013 settlement agreement made reference to the February 8, 2013 agreement, it was “nowhere to be found” in the documents OSHA provided to Complainant regarding the settlement of his Complaint No. 0-1960-13-051. OSHA’s January 24, 2014 settlement approval letter only indicated that it had reviewed two documents: (1) “Standard OSHA Settlement Agreement;” and (2) Amendment to Confidential Settlement and Release Agreement.” The February 8, 2013 Confidential Settlement Agreement was allegedly not included in the documents OSHA reviewed. “If considered, it more likely than not would have negatively impacted [Respondent].”

<sup>20</sup> On further review, this letter corresponded to OSHA No. 0-1960-15-049 (OALJ Case No. 2015-AIR-00022). Complainant’s April 15, 2015 letter to Steve Gossman regarded an undisclosed letter to Complainant dated April 10, 2015. No such letter appears in the record. Nevertheless, in his April 15, 2015 email to OSHA, Complainant clarified his allegations, as follows: “I allege that [Respondent] engaged in retaliation in violation of the [November 5, 2013 agreement] by misrepresenting that it had provided a material document, the February 8, 2013 agreement for OSHA’s review when in fact it had not. [Respondent’s] failure in turn deceived OSHA and prejudiced my ability to receive a fair, adequate, reasonable settlement in the public interest.”

## Complainant's Response to Respondent's Motion for Summary Decision<sup>21</sup>

Complainant's response to Respondent's Motion for Summary Decision rested on three main points. First, Complainant averred that Alaska did not send to OSHA the three documents comprising the settlement agreement that the parties reached on November 5, 2013, because "Respondent did not want to risk OSHA requiring that Respondent pay complainant front pay." *Complainant's Response* at 3. Second, Complainant argued that his OSHA complaint was not time barred due to the principles of equitable tolling and equitable estoppel. *Id.* at 5-8. Finally, Complainant raised the "unclean hands doctrine" to argue that this Tribunal should not exercise its sanction power to dismiss Complainant's claims; rather, Respondent's motion does not comply with the rules and so "should be thrown out." *Complainant's Response* at 9.

In support of his arguments, the Complainant proffered two affidavits, summarized as follows.

### Declaration of Kelvin V. Darrough<sup>22</sup>

Kelvin Darrough was an employee for Alaska from January 2001 to June 2008. There, Darrough worked as an Aircraft Mechanic and was promoted to a Maintenance Analyst. Darrough discussed his relationship with Complainant. Although Darrough "was happy to have my employment at Alaska," he complained of a "hostile" working environment, especially toward African Americans. Darrough now works as a Lead Aircraft Mechanic for Boeing Aircraft Company.

### Declaration of Herman Charles Tellis<sup>23</sup>

Complainant discussed a number of issues in his Declaration. I summarize these issues as follows:

- On January 15, 2013, Complainant averred that he called his supervisor to tell him that he had "a meeting at corporate (with legal)" and would not be in to work before or after the meeting.
- On January 16, 2013 – the day Respondent alleged that Complainant left work early and engaged in wage theft – Complainant informed his supervisor that he would be working in his capacity as Shop Representative in the morning, because Complainant was tasked with representing a union member at a hearing around 10:30 AM. Complainant then attended a union "LEC grievance-funding meeting," and later attended lunch. Complainant averred that he went back to work after lunch.
- In May of 2009, Complainant filed an "'internal' employee complaint, alleging discrimination," because he did not receive an award at work. This award was given to everyone – exclusive of Complainant – who had worked on a certain project in 2009.

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<sup>21</sup> Hereinafter "*Complainant's Response*."

<sup>22</sup> Hereinafter "Darrough's Declaration." Attached to Darrough's Declaration was a USA Today article from November 18, 2002. This Tribunal will not consider the contents of this document, because it lacks proper foundation and because it is irrelevant to the instant litigation.

<sup>23</sup> Hereinafter "Tellis's Declaration."

Consequential to his complaint, Complainant's Managing Director "assured me that things would be taken care of . . . ."

- Complainant suffered a concussion in November of 2010 and was off work for over three months. Complainant averred that he forgot about his complaint due to his concussion.
- In August of 2012, Complainant acted in his capacity as shop representative for his union and filed an Aviation Safety Action Plan ("ASAP"), which is a type of safety complaint. Complainant was concerned about Alaska's towing policies, which he felt "were flawed."
- In April of 2012, Complainant had a conversation with another shop representative. There, the two discussed the result of his complaint related to the May 2009 award. Complainant had forgotten his "internal" employee complaint, but based on this conversation his recollection was "refreshed." As a result, Complainant had a meeting with "Human Resources, Lea Hanson."
- Complainant averred that, due to his internal complaint and his ASAP complaint, "[Alaska] decided to present facts as if I left work early. [Alaska] clearly retaliated against me, a Whistleblower."
- Complainant stated that in his twenty-three years of employment for Alaska, he had been terminated five times, and reinstated four times. Complainant averred that each firing occurred when he was a member of a "protected class" or that each firing related to "protected activity." "Experience has taught me that advancement for African Americans at [Alaska] is extremely challenging."
- Complainant complained of the effects of this disparate treatment, including loss of seniority, lost income, and lost enjoyment of his work. "I was wrongfully denied the opportunity to complete my career at [Alaska]."
- Regarding claim No. 2015-AIR-00022, Complainant first learned that Alaska "only sent . . . two (2) documents to OSHA" when he was preparing to bring his AIR 21 complaint "around February of 2013."<sup>24</sup> Complainant noted that, on January 24, 2014 Steven Gossman wrote "having reviewed both agreements . . . ." Complainant averred that OSHA did not know there were three documents. "It is quite possible that OSHA would have been concerned about the lack of front pay because of its own regulations requiring a return to employment or discrete and separate provision for front pay."
- Complainant argued that Alaska's "refusal to send all of the three (3) settlement agreements to OSHA is consistent with the treatment I have experienced with [Alaska]. It is consistent with how [Alaska] treated me to deny me the right to return and at the same time failed to send a document that were [sic] integral to a fair, equitable, AIR 21 settlement where reinstatement was not an option under the AIR 21 release."
- Complainant maintained that he had misplaced his original OSHA complaints, and that OSHA was "duty bound" to provide such documents. Thus, Complainant argued that he was not in defiance of this Tribunal's order to produce such documents to the Respondents.

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<sup>24</sup> Claimant likely meant February of **2015**. See Respondent's July 31, 2015 letter to this Tribunal, Exhibit C (Claimant's April 15, 2015 email to OSHA). OSHA's April 17, 2015 dismissal of this Claim stated that Complainant first learned of this alleged discriminatory act on February 3, **2015**. However, this likely represents a typo, as February of **2013** is when the OSHA settlement agreement was entered into. See *Lautman's Declaration*, Exhibit 12.

- Finally, regarding his toolbox, Complainant was concerned with “how long it took before Alaska sent my tools to my residence” and claimed that “one of my toolboxes was missing in the tools ultimately sent.” Complainant also alleged that he lost an entire toolbox, containing \$4,000 worth of tools.

### Legal Standard

The purpose of summary decision is to dispose of actions in which the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *See* 29 C.F.R. § 18.72 (2015) (emphasis added); *see also* Federal Rule of Civil Procedure 56(c).<sup>25</sup> An issue is genuine if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *See Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001), citing *Anderson*, 477 U.S. at 248. If no issues are present, the moving party is entitled to a judgment as a matter of law. 29 C.F.R. § 18.72 (“The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion.”).

The burden of proof in a motion for summary decision is borne by the party bringing the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because the burden is on the moving party, the evidence presented is construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it. *See id.* A non-moving party may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *See Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *See Galloway v. United States*, 319 U.S. 372, 395 (1943).

### Whistleblower Protections Provision of AIR 21

The Act provides whistleblower protection for employees of air carriers or their contractors or subcontractors who provide information relating to violations or alleged violations of any order, regulation, or standard of the FAA or of any other provision of federal law relating

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<sup>25</sup> 29 C.F.R. § 18.10(a) (2015) states that “The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

to air carrier safety. To be protected, the information must have been provided to the employer or to the federal government.

Within ninety days of an allegedly adverse personnel action, a complainant may file a complaint with the regional administrator of OSHA. OSHA, in turn, performs a gatekeeper role by initially assessing whether the complainant has made out a prima facie showing that his engaging in protected activity was a contributing factor in the adverse personnel action. Such a prima facie showing consists of evidence that: (1) the complainant engaged in protected activity; (2) the employer knew or suspected, actually or constructively, that the complainant was engaged in protected activity; (3) the complainant was subjected to adverse action; and (4) the evidence is sufficient to raise a reasonable inference that the protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. §§ 1979.104(b)(1-2). If the complaint and interviews of the complainant satisfy these criteria, then OSHA will conduct an investigation. 49 U.S.C. § 42121(b)(2)(B)(i). Otherwise, OSHA “shall” dismiss the complaint and “shall” not conduct an investigation. *Id.* A party may object to OSHA’s decision, whether based on an investigation or not, and request a hearing before an administrative law judge. 29 C.F.R. § 1979.106.

Here, even when viewed in a light most favorable to Complainant, the record shows: (1) that Complainant’s appeals were untimely; and (2) no prima facie violations of the Act occurred.<sup>26</sup> The evidence of record – as well as operative law – supports these conclusions, as discussed below.

#### I. Whether Complainant timely filed his appeals.

An AIR21 complaint must be filed with the Secretary of Labor (OSHA) within ninety days of the alleged retaliation. 49 U.S.C. § 42121(b); 29 C.F.R. § 1979.103(d). The regulations clarify that the alleged violation occurs “when the discriminatory decision has been both made and communicated to the Complainant.” 29 C.F.R. § 1979.103(d).

In his response to Respondent’s Motion for Summary Decision, Complainant did not argue that his complaints were timely filed. Rather, Complainant invoked the related principles of equitable tolling and equitable estoppel to assert that this Tribunal should excuse his untimely filings. *See Complainant’s Response*, at 5-8.

Equitable tolling is a principle by which a court excuses a plaintiff’s delay in filing an otherwise untimely complaint. *See Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). “If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.” *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000), *overruled on other grounds by Socop-Gonzalez v. INS*, 272

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<sup>26</sup> Complainant is correct that a matter of deference is owed to *pro se* litigants. This Tribunal also takes Complainant at his word that he had misplaced some papers relating to his OSHA complaints. *See Tellis’s Declaration* at 6. Accordingly, this Order will not focus on Respondent’s arguments that this Tribunal should exercise its sanctions power to dismiss Complainant’s complaints.

F.3d 1176, 1194-96 (9th Cir. 2001) (en banc). In the discrimination context, equitable tolling may serve to excuse a plaintiff's ignorance of the existence of a claim. See *In re. Michael S. Jenkins v. CSX Transportation, Inc.*, ARB Case No. 13-029, \*5 (ARB 15 May 2014). Whether a particular case or controversy warrants an application of equitable tolling is a factual determination: "Equitable tolling may be applied if, **despite all due diligence**, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria*, 202 F. 3d at 1178 (emphasis added); see also *White v. Boston (In re White)*, 104 B.R. 951, 956-58 (S.D. Ind. 1989).

Equitable estoppel, on the other hand, "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit . . . ." *Santa Maria*, 202 F. 3d at 1176. An invocation of equitable estoppel is only warranted when "the defendant takes **active steps** to prevent the plaintiff from suing in time." *Id.* (emphasis added) (citing to *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)). In the discrimination context, equitable estoppel is warranted when a defendant has concealed or misrepresented facts necessary to file a discrimination claim. See *Coppinger-Martin v. Solis*, 627 F.3d 745, 751 (9th Cir. 2010); see also *Santa Maria*, 202 F.3d at 1177; *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1977) (finding in dicta that "cases may arise where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights."). "Equitable estoppel is also sometimes referred to as 'fraudulent concealment.'" *Santa Maria*, 202 F. 3d at 1176.

Furthermore, to invoke equitable estoppel, Complainant must show that Respondent's act of fraudulent concealment was separate and distinct from the alleged wrongdoing on which Complainant's complaint is grounded. See *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006).<sup>27</sup> Otherwise, Complainant is in danger of merging "the substantive wrong with the tolling doctrine." *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1052 (9th Cir. 2008) (citing to *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990)). Such an assertion is prohibited, because it would eliminate the Respondent's statute of limitations defense altogether: a right afforded to Respondent under AIR 21's organic statute (49 U.S.C. § 42121(b)); and implementing regulations (29 C.F.R. § 1979.103(d)). To preserve this right, Complainant must "point to . . . some active conduct by the [Respondent]" other than his alleged discriminatory act that prevented the timely filing of his AIR 21 claims. *Guerrero*, 442 F. 3d at 706.

For the following reasons – even when viewed in a light most favorable to the Complainant – the record demonstrates that Complainant filed both claims (Nos. 2015-AIR-00014 and 2015-AIR-00022) outside the limitations period; and that the related principles of equitable tolling and equitable estoppel do not apply.

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<sup>27</sup> A hypothetical example of this principle is as follows: a fictional complainant blew the whistle on a safety issue and became a protected employee; the fictional employer fired the complainant; the employer then made repeated statements to the fictional complainant that his job would be restored; in the meantime, complainant's ninety-day window to file an AIR 21 claim had expired.

A. Complainant's Complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006) is time barred.

Discussion

In its Motion for Summary Decision, Respondent argued that Complainant's complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006) is time barred, because Alaska had been trying to return his tools to him since November of 2013, when the Parties settled Claimant's initial AIR 21 complaint (OSHA No. 0-1960-13-051).<sup>28</sup> By contrast, Respondent argued, Complainant did not file his Complaint until October 27, 2014, well outside of the ninety-day limitations period.

In its June 8, 2015 response to this Tribunal's Notice of Assignment and Conference Call, Respondent included as Exhibit C OSHA's January 7, 2015 letter to Complainant dismissing Complaint with OSHA No. 0-1960-15-006), because, *inter alia*, it was untimely filed. OSHA summarized Complainant's complaint as follows:

Your complaints were filed with this office on October 27, 2014 and December 31, 2014, and allege that you were denied employee benefits, that Respondent failed to comply with settlement agreements entered into with you, including an OSHA settlement agreement that you signed on November 5, 2013, and that you were subjected to 'discriminatory employee checkout.'

Specifically, Complainant complained about the treatment of his tools and personal belongings. Although Complainant averred, *inter alia*,<sup>29</sup> that he received an incomplete set of tools on November 11, 2014; "your October 24, 2014 letter indicated that Respondent has been attempting to return your tools to you since November 5, 2013" and that Complainant had "vigorously protested" the return of such tools. Complainant claimed that he was aware of the alleged adverse employment action – the toolbox issue – "no later than February 2014" which was "well outside of the [ninety] day statute of limitations."

OSHA continued that, "The only issue arguably within the statute of limitations is your contention that Respondent's effort to return your tools and other personal items (the 'discriminatory employee checkout' claim) to you was somehow retaliatory." OSHA disagreed that this action was retaliatory in nature. Addressing the Complainant, OSHA stated, "a valid

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<sup>28</sup> Respondent proffered the Declaration of Lawton Penn, which stated that "[b]etween July and November 2014, I had many email and phone conversations with Dan Delue, counsel for [Complainant] regarding [Complainant's] toolbox . . ." The earliest such communication of record occurred in an email between Delue and Penn, dated July 24, 2014. See Penn's Declaration, Exhibit A; see also *id.*, Exhibit G (enclosing email dated September 4, 2014 from Delue to Penn, who said: "[Complainant] informs me that I am to communicate **again** that I have no authority to receive [Complainant's tools] on his behalf); *id.* (emphasis added) (Delue's use of the word "again" is important here, because it signals that Complainant had previously discussed this issue with Delue); Exhibit K (enclosing email dated September 16, 2014 from Delue to Penn: "With regards to tools, [Complainant] said to simply refer to: 'Seattle EEOC office, Reference case #551-2013-01596.'")

<sup>29</sup> Complainant's OSHA Complaint No. 0-1960-15-006.

adverse employment action” does not arise “where you are primarily responsible for the delay.” Respondent observed in its Motion for Summary Decision that the Respondent knew of the toolbox issue at least by May 13, 2014, when the parties entered into the “Second ADEA agreement;” which stated that “Alaska agrees to deliver [complainant’s] tool box to his home using a delivery service.” *See* Lautman’s Declaration, Exhibit 10, Paragraph 7.

In his Declaration, Complainant responded with three points. First, Complainant was concerned with “how long it took before Alaska sent my tools to my residence.” Second was an allegation that “one of my toolboxes was missing in the tools ultimately sent.” Finally, the tools became an “afterthought” and Complainant blamed his attorney for part of the delay. Complainant claimed that Alaska was nonresponsive to his requests to have his toolbox returned. *See* Tellis’s Declaration at 6.

### Conclusion

Complainant’s complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006) is time barred. Even when construed in a light most favorable to the Complainant, the record before this Tribunal comports with OSHA’s finding that Complainant knew of the issue concerning his tools by at least May 13, 2014. This was the date that the Parties settled Complainant’s ADEA claim. *See* Lautman’s Declaration, Exhibit 10, Paragraph 10 (“Alaska agrees to deliver Mr. Tellis’s tool box to his home using a delivery service.”). Furthermore, in his October 24, 2014 letter, Complainant told OSHA that on November 5, 2013 “[Alaska] has moved to deliver my tools...[sic] to my residence;” and that Complainant had “vigorously protested” such an arrangement.<sup>30</sup> *See* Exhibit “4” of Complainant’s July 23, 2015 letter enclosing Discovery. Absent the application of either equitable tolling or equitable estoppel, Complainant cannot sustain his burden to show that complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006) is not time barred. Such equitable principles are not applicable here for the following reasons.

Equitable tolling does not apply to Complainant’s allegations regarding his tools, because Complainant cannot assert that he did not know of the existence of his complaint against Respondent over his toolbox until after the limitations period had expired. For all of the above reasons, the record demonstrates that Complainant was aware of the toolbox issue well before the closing of the limitations period. Equitable tolling therefore does not excuse Complainant’s “ignorance of the existence of a claim,” *In re: Jenkins*, ARB at \*5, because the record shows that Complainant had at least constructive notice of the toolbox issue since November 5, 2013<sup>31</sup> (and certainly by July 24, 2014<sup>32</sup>); if not actual notice on May 13, 2014, when he signed the second ADEA agreement with term “Alaska agrees to deliver [complainant’s] tool box to his home

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<sup>30</sup> The record also shows that the Parties discussed the toolbox issue throughout the summer of 2014. The first such piece of evidence is an email from Penn to Delue dated July 24, 2011, which was more than ninety-days before Complainant filed his OSHA complaint No. 0-1960-15-006 (OALJ No. 2015-AIR-0014) on October 27, 2014.

<sup>31</sup> Similarly, Complainant should have known of any non-payment of benefits issue shortly after he signed of the second ADEA agreement on May 13, 2014.

<sup>32</sup> Penn’s Declaration, Exhibit A (email between Respondent’s and Complainant’s then counsel concerning return of his tools). According to Mr. Penn’s affidavit, this email was in response to Delue requesting an update on Tellis’ tools. This demonstrates knowledge of this issue prior to this date.

using a delivery service.” See Lautman’s Declaration, Exhibit 10. For the foregoing reasons, the Complainant is unable to invoke the principle of equitable tolling.

Finally, equitable estoppel does not apply here, because there is no indication – outside of Complainant’s bare assertions – that Respondent made “active steps” to prevent Complainant from filing complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006). In fact, the record shows that Respondent made numerous attempts to rectify the toolbox issue, altogether. See, e.g., Penn’s Declaration, Exhibits A and B. Moreover, Complainant’s fraudulent concealment argument contains the implied allegation that Respondent willfully and maliciously prolonged the toolbox issue past the statute of limitations deadline. Yet, the toolbox issue is the very alleged adverse action that underlies Complainant’s complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006). It is not a separate action. Thus, the record does not meet Complainant’s burden to demonstrate an essential element of the equitable estoppel argument: to “point to . . . some active conduct by the [Respondent]” other than the alleged discriminatory act that prevented the timely filing of his AIR 21 claims. *Guerrero*, 442 F. 3d at 706. For all of the above reasons, the principle of equitable estoppel does not apply to Complainant’s complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006).

When the evidence of record is examined in a light most favorable to the non-moving party, Complainant’s complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006) is untimely. The record demonstrates, giving Complainant all reasonable inferences, that he had constructive notice as of at least May 13, 2014.<sup>33</sup> Moreover, in November of 2013, Complainant himself had averred that Respondent attempted to deliver his tools but he had “vigorously protested.” For the foregoing reasons, Complainant’s complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006) is time barred.

B. Complaint’s Complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) is time barred.

#### Discussion

In its Motion for Summary Decision, Respondent also argued that Complainant’s complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) is time barred, because Complainant had notice of the alleged discriminatory activity in February of 2013; however, he did not file his complaint until April 15, 2015. See Respondent’s June 8, 2015 response to this Tribunal’s Notice of Assignment and Conference Call, Exhibit D.

In its June 8, 2015 response to this Tribunal’s Notice of Assignment and Conference Call, Respondent included as Exhibit D OSHA’s April 17, 2015 letter to Complainant dismissing his

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<sup>33</sup> The “Second ADEA agreement” entered into between the Parties on May 13, 2014, which contained the term “Alaska agrees to deliver Mr. Tellis’s tool box to his home using a delivery service.” See Lautman’s Declaration, Exhibit 10, Paragraph 7. Additionally, even if one was to find that Complainant was not on notice at this point, he clearly was on notice by July 24, 2014, when his counsel addressed the issue with Respondent’s counsel. Even if one was to accept the July 24, 2014 date, the Complainant’s filing is still untimely. See Penn Declaration, Exhibit A.

April 15, 2015 Complaint, No. 2015-AIR-00022 (OSHA No. 0-1960-15-049). OSHA summarized Complainant's complaint as follows:

Complainant argues that there are grounds for granting equitable tolling because on February 3, 2015, he first discovered that Respondent did not provide to OSHA a copy of the original private settlement dated February 8, 2013. Complaint alleges that if OSHA had been provided with such agreement he would have received additional compensation.

OSHA's summary pairs reasonably well with Complainant's email to OSHA's Steve Gossman, dated April 15, 2015. *See* Respondent's July 31, 2015 letter to this Tribunal, Exhibit C. There Complainant alleged that Respondent had "engaged in retaliation and violated terms of agreement [sic] stemming from case #0-1960-13-051."

Specifically, Complainant averred that OSHA only reviewed two documents relating to the settlement of case #0-1960-13-051, which occurred on November 5, 2013: (1) standard OSHA Settlement Agreement; and (2) Amendment to Confidential Settlement and Release Agreement. However, Complainant stated, Respondent never provided OSHA with a third document entered into between the parties that day, which was the February 8, 2013 Confidential Settlement and Release Agreement.

Complainant hypothesized that Respondent "was motivated to misrepresent to OSHA in an attempt to ensure that the settlement was unfair, inadequate, and unreasonable, not in the public interest;" and believed his complaint was within the limitations period because it was based on "newly discovered information found on February 3, 2015 on close methodical examination of the record, i.e. chain of events." *See* Respondent's July 31, 2015 letter to this Tribunal, Exhibit C (Complainant's email to OSHA's Steve Gossman, dated April 15, 2015).

OSHA dismissed Complainant's complaint two days after its receipt, primarily because it was not timely filed. OSHA declined to apply equitable tolling, because:

Complainant knew the terms of the agreement he signed on February 8, 2013, over two years before he filed this complaint . . . . If Complainant did not believe the terms of his settlement with Respondent were fair, adequate or reasonable he would have never voluntarily agreed to settle his initial AIR-21 complaint in November 2013.

OSHA felt that whether it was aware of the third agreement – or whether Respondent did not share it, as alleged – was "immaterial to the question of equitable tolling." Accordingly, OSHA dismissed Complainant's complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049). Respondent agreed, and stated that Complainant knew of the missing settlement document when he reviewed OSHA's January 24, 2014 settlement approval letter, which was well beyond the ninety-day period for Complainant to timely file his claim.

Complainant argued that February 3, 2015 should establish the beginning date of the limitations period, because that was the "first time that I learned about it, after slowly and

carefully noticing the reference on an OSHA document to having reviewed ‘both documents.’” Tellis’ Declaration at 4, Paragraph 14. In the alternative, Complainant argued that this Tribunal should apply the principles of equitable tolling and equitable estoppel. Complainant explicated on the theory of his complaint, as follows:

When I contacted OSHA within days thereafter,<sup>34</sup> it was the first time that OSHA would have been concerned about the lack of front pay because of its own regulations requiring return to employment or discrete and separate provision for front pay. In fact, this is a duty OSHA owed a person in my position under the circumstances.

Tellis’s Declaration, at 5, Paragraph 14.

### Conclusion

OSHA was correct to dismiss Complainant’s complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049). Even when viewed in a light most favorable to the non-moving party, Complainant is unable to show that he did not have at least constructive notice that OSHA did not have the opportunity to review all three documents entered into between the Parties on November 5, 2013.

Implicit within Complainant’s argument is that he did not read or otherwise understand OSHA’s January 24, 2014 settlement of Complainant’s complaint No. 0-1960-13-051.<sup>35</sup> It is axiomatic that “[h]e who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms.” *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411, 415-16, 125 N.E. 814, 816 (1920). Thus, Complainant had constructive notice that OSHA only reviewed two of the November 5, 2013 agreements. Without more – such as evidence of fraud or other willful conduct on Respondent’s part – Complainant’s complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) lies outside of the limitations period.

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<sup>34</sup> Complainant filed his OSHA complaint on April 15, 2015; seventy-one days after Complainant allegedly learned of the allegedly discriminatory action.

<sup>35</sup> Furthermore, OSHA’s January 24, 2014 letter merely memorialized the agreement entered into between the parties on November 5, 2013. At no point in the instant litigation has Complainant averred that he did not assent to that agreement or that Respondent fraudulently induced him to enter into that agreement. Complainant’s argument cannot rest on the alleged actions of the Respondent, because Complainant consented to the terms of the agreement. Finally, OSHA’s January 24, 2014 letter merely “closed the investigation of the above-reference complaint.” Complainant’s argument must fail, because the record shows no evidence that even if OSHA had not closed the investigation into complaint No. 0-1960-13-051 that it would have any reason to find that the agreement was anything but “fair, adequate, and reasonable.” For example, the record is silent as to whether the contents of the allegedly missing document – the February 8, 2013 Confidential Settlement and Release Agreement – would (1) induce OSHA not to further its investigation; and (2) find that the November 5, 2013 agreement was not “fair, adequate, and reasonable.” Without evidence connecting those conclusions to Respondent’s allegedly adverse action of not providing OSHA with the February 8, 2013 Confidential Settlement and Release Agreement, Complainant’s argument on appeal must fail.

Moreover, the doctrines of equitable tolling and equitable estoppel do not apply to Complainant's complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) for the following reasons. Equitable tolling does not apply, because Complainant averred, essentially, that he did not attempt to uncover the potential claim "despite all due diligence." *Santa Maria*, 202 F. 3d at 1178. After all, Complainant is presumed to have read and understood OSHA's January 24, 2014 agreement. Finally, equitable estoppel does not apply here because Complainant has proffered no evidence – aside from his own conjecture – that Respondent had ever taken "active steps to prevent the [complainant] from suing in time." *Santa Maria*, 202 F. 3d at 1176. In other words, absent evidence of Respondent's volitional and fraudulent concealment to OSHA of the February 8, 2013 Confidential Settlement and Release Agreement, Complainant is unable to invoke the doctrine of equitable estoppel.<sup>36</sup> Complainant has proffered no such evidence. Accordingly, equitable estoppel does not apply to Complainant's complaint.

For the foregoing reasons, Complainant's complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) is time barred. Complainant presumptively knew that OSHA only reviewed two of the three documents entered into between the Parties on November 5, 2013. Absent proof of Respondent's fraud on OSHA – or at the very least an affidavit that such proof is likely to arise at hearing – Complainant is unable to invoke the related principles of equitable tolling and equitable estoppel. Thus, Complainant's complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) is time barred.

## II. Whether Complainant is able to prove a prima facie case under the Act.

The Act states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee, *inter alia*, "provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal Law . . . ." 29 C.F.R. § 1979.102(b).

In order to establish a prima facie case under the Act the complainant must show:

- 1) The employee engaged in a protected activity or conduct;
- 2) The named person knew, actually or constructively, that the employee engaged in the protected activity;
- 3) The employee suffered an unfavorable personnel action; **and**
- 4) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

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<sup>36</sup> Finally, assuming *arguendo* that Complainant has shown Respondent's fraudulent concealment, Complainant has failed to prove that such an action was separate and distinct from the discriminatory actions that Respondent allegedly took. *See Guerrero*, 442 F. 3d at 706. Here, Complainant has argued that the Respondent's failure to provide OSHA with all three documents was both the discriminatory act *and* the fraudulent action that he relied upon to his detriment. Complainant's conflation of the alleged discriminatory act and Respondent's alleged fraudulent concealment renders the principle of equitable estoppel inapplicable to Complainant's complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049).

29 C.F.R. § 1979.104(b)(1) (emphasis added). In regard to the interpretation of the contributing factor requirement, in *Taylor v. Express One International*, ALJ No. 2001-AIR-0002 (15 Feb. 2002), *aff'd* by *Taylor v. Express One International*, ARB No. 02-054 (23 Aug. 2007), the administrative law judge adopted the definition in *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1), as follows:

*The words contributing factor...mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing caselaw, which requires a whistleblower to prove that his protected activity was a significant, motivating, substantial, or predominant factor in a personnel action in order to overturn that action.*

Emphasis added.

For the following reasons – even when viewed in a light most favorable to the Complainant – the record shows that Complainant is unable to prove a prima facie case under the Act.

A. Complainant is Unable to Show a Prima Facie Case in Complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006).

Discussion

In its Motion for Summary Decision, Respondent argued that Complainant has failed to prove a prima facie case in complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006). Specifically, Respondent first averred that Complainant did not allege that he was involved in any whistleblowing activity or other protected activity. Second, Respondent claimed that Complainant has failed to show an adverse employment action.

In its June 8, 2015 response to this Tribunal's Notice of Assignment and Conference Call, Respondent included as Exhibit C OSHA's January 7, 2015 letter to Complainant dismissing his Complaint, in part, because he did not demonstrate a "valid adverse employment action." OSHA summarized the evidence it reviewed as follow:

Specifically, your December 31, 2014 fax suggests that you received an incomplete set of your tools on November 11, 2014. However, your October 24, 2014 letter indicates that Respondent has been attempting to return your tools to you since November 5, 2013. You indicate that since November 2013, you've 'vigorously protested' Respondent's attempt[s] to deliver tools to your home, that Respondent then tried to provide those tools to your attorney, who rejected them, and finally that Respondent sent those tools to a cargo facility, from which you refused to pick up those same tools. More recently, you asked Respondent to Fed Ex your tools to you, which Respondent did.

OSHA dismissed Complainant's complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006), in part, saying that "While a failure to return your tools and personal items to you in a timely manner might have constituted a valid adverse employment action, it does not where you are primarily responsible for the delay."

In his Declaration, Complainant responded that he had told his attorney "a number of times" that he wanted to inspect his tools and personal items before Respondent shipped them to him. *See* Tellis's Declaration at 6. Complainant also recalled that he had filed an internal complaint "alleging discrimination" in May of 2009 and filed an ASAP in August of 2012.

### Conclusion

Regarding complaint No. 2015-AIR-00014 (OSHA No. 0-1960-15-006), the record shows that Complainant is unable to show a prima facie retaliation claim under the Act. Assuming *arguendo* that the record shows that Complainant engaged in protected activity, and that Respondent knew about the protected activity; the record is silent as to the connection between Complainant's protected activity and Respondent's alleged discriminatory action. For example, there is no evidence, circumstantial or otherwise, that Respondent took adverse actions against Complainant over his toolbox<sup>37</sup> because of Complainant's alleged protected activity. To the contrary, the record shows that Complainant engaged in volitional behavior to extend and to protract the process of Respondent returning his toolbox. For example, after signing his resignation and other settlement papers on November 5, 2013, Complainant left work without taking his tools. *See* Exhibit "4" to Complainant's July 23, 2015 letter to Respondent's counsel. Complainant also "vigorously protested"<sup>38</sup> Respondent's repeated attempts to provide Complainant's tools to him.<sup>39</sup> A Complainant cannot successfully claim retaliation by not receiving his personal property timely when the evidence establishes that Complainant did not cooperate with Employer's efforts to return this very property.

Accordingly, Complainant is unable to show that his alleged protected activity was a contributing factor in Respondent's alleged adverse employment action. Because the record demonstrates no nexus between Complainant's alleged protected activity and Respondent's alleged adverse action, Complainant is unable to demonstrate a prima facie case, under the Act.

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<sup>37</sup> Or even created a "discriminatory employee checkout policy," as Complainant avowed to OSHA on October 24, 2014. *See* Exhibit "4" to Complainant's July 23, 2015 letter to Respondent's counsel.

<sup>38</sup> *Id.*

<sup>39</sup> Although Complainant alleged that he "rescheduled" checkout, there is no indication that he followed through on such rescheduling. *See id.* Indeed, Complainant did not receive his tools until November 6, 2014: a year and a day since Complainant signed his resignation papers. *See* Penn's Declaration, Exhibit M.

B. Complainant is Unable to Show a Prima Facie Case in Complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049).

Discussion

In its Motion for Summary Decision, Respondent argued that Complainant is unable to show a prima facie case in complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049). Specifically, Respondent argued that Complainant is unable to demonstrate that Respondent retaliated against him.

In its June 8, 2015 response to this Tribunal's Notice of Assignment and Conference Call, Respondent included as Exhibit D OSHA's April 17, 2015 letter to Complainant dismissing his April 15, 2015 Complaint, No. 2015-AIR-00022 (OSHA No. 0-1960-15-049). There, OSHA dismissed Complainant's complaint, stating "If Complainant did not believe the terms of his settlement with Respondent were fair, adequate, or reasonable he would have never voluntarily agreed to settle his initial AIR-21 complaint in November 2013."

In response, Complainant posited that:

When I contacted OSHA within days [after he discovered that Respondent had allegedly only provided two of the three agreements entered into between the Parties on November 5, 2013], it was the first time that OSHA knew that there was a third document. It is quite possible that OSHA would have been concerned about the lack of front pay because of its own regulations requiring return to employment or discrete and separate provision for front pay. In fact, this is a duty OSHA owed a person in my position under the circumstances.

Tellis's Declaration at 5, Paragraph 14. Complainant's complaint was that Respondent had allegedly retaliated against him by "misrepresenting that it had provided" the February 8, 2013 settlement agreement "when in fact it had not." See Respondent's July 31, 2015 letter to this Tribunal, Exhibit C (Complainant's email to OSHA's Steve Gossman, dated April 15, 2015).

Conclusion

Regarding complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049), the record shows that Complainant is unable to show a prima facie retaliation claim under the Act. Assuming *arguendo* that the record shows that Complainant engaged in protected activity, and that Respondent knew about the protected activity; the record is once again silent as to the connection between Complainant's protected activity and Respondent's alleged adverse action. For example, there is no evidence, circumstantial or otherwise, that Respondent purposefully withheld any documents when it allegedly proffered to OSHA only two of the three agreements the Parties entered into on November 5, 2013. Without more, Complainant's bare speculation that Respondent's discriminatory action occurred is not enough to survive summary decision. See *Galloway v. United States*, 319 U.S. 372, 395 (1943) ("Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the

party whose case is attacked.”); *see also Sebastian Int'l, Inc. v. Russolillo*, 2005 U.S. Dist. LEXIS 45828, \*29 (C.D. Cal. Feb. 22, 2005) (“[A]lthough the Court must make all reasonable inferences in favor of [a] non-moving party for purposes of summary judgment, ‘mere speculation, intuition or guessing’ does not constitute a valid inference and is insufficient to allow the non-moving party to survive summary judgment.”), quoting *Poppell v. City of San Diego*, 149 F.3d 951, 954 (9th Cir. 1998). Because the allegations underlying Complainant’s complaint No. 2015-AIR-00022 (OSHA No. 0-1960-15-049) are purely speculative, the record is unable to support Complainant’s burden of demonstrating a prima facie case under the Act.

### **ORDER**

When viewing the record in a light most favorable to Complainant, both of his complaints (2015-AIR-00014 and 2015-AIR-00022) are untimely and do not support a finding of a prima facie case, under the Act. Accordingly, Summary Decision is appropriate, and Respondent’s Motion for Summary Decision is **GRANTED**.

Complainant’s complaint is hereby **DISMISSED**. The hearing scheduled for September 9, 2015 is hereby **CANCELLED**.

SO ORDERED

**SCOTT R. MORRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

**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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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). 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).