



Issue Date: 10 June 2015

CASE NO.: 2015-AIR-00012

In the Matter of:

MARTIN VENTRESS,
Complainant,

v.

HAWAII AVIATION CONTRACT SERVICES, INC., and
JAPAN AIRLINES,
Respondents.

ORDER DISMISSING MATTER

On February 2, 2015, this Office received a request for hearing from Martin Ventress (“Complainant”) filed under the whistleblower protections of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121, and the implementing regulations set forth at 29 C.F.R. Part 1979, Subpart B. Complainant’s request for hearing (“Complaint”) was based upon the Occupational Safety and Health Administration’s (“OSHA”) January 2, 2015, denial of his whistleblower complaint.

Complainant initially filed the whistleblower complaint that gives rise to the current matter with the Federal Aviation Administration (“FAA”), which forwarded the complaint to OSHA on September 14, 2014. In its January 2, 2015, denial order, OSHA noted that Complainant alleged that he had been terminated on or about December 1, 2002, or February 18, 2003, and dismissed the complaint because it was not filed within 90 days of the alleged adverse actions. OSHA Ruling at 1. Because the Complaint to this Office on its face appeared to be time barred, I issued an Order to Show Cause (“OSC”) on March 19, 2015, directing Complainant to show cause why his matter should not be dismissed as time barred.¹

On March 30, 2015, Complainant filed an 11 page response, with eight attached exhibits (“Response”). Japan Airlines (“JAL”) filed a timely reply (“JAL Reply”) on April 9, 2015, which was 10 pages long, with 12 exhibits and included a declaration from attorney Steven Egedal, who represents JAL, and the procedural history of the matter through arbitration and the

¹ I originally issued the OSC on March 3, 2015, and reissued it on March 19. Complainant failed to include proof of service in the original response to the OSC, and it was returned to him to re-serve and provide proof that Respondents were served with the same documents.

federal courts.² Hawaii Aviation Contract Services, Inc. (“HACS”) did not file a reply. On May 21, 2015, OSHA submitted a document, marked as Exhibit ALJX-1, regarding AIR21 complaints previously filed by Complainant at OSHA. For purposes of ruling upon the dismissal of this matter, I admit Exhibit ALJX-1 and the filings, declarations and attachments from both parties into evidence.

Having read and considered the information in the file and the documents filed by the parties, I hereby dismiss the Complainant’s AIR21 Complaint in its entirety as time barred.

Complainant’s Whistleblower Complaint

In his Complaint, Complainant alleged that he was constructively terminated by JAL in March 2002 because he reported that a pilot named Jeff Bicknell was allegedly flying with brain cancer. Compl. at 1. Complainant said that a U.S. Court of Appeals determined that JAL was his employer at that time. *Id.* Further, Complainant alleged that between 2002 and 2004, he submitted complaints to the Departments of Labor and Transportation, OSHA, and the FAA, and that due to OSHA’s failure to investigate his claims at that time, he filed a civil lawsuit for wrongful termination and harassment against both Respondents in U.S. District Court. Compl. at 1-2. Complainant stated that the District Court dismissed his case three times and that he appealed the dismissals to the Ninth Circuit Court of Appeals. Compl. at 2. After the final Ninth Circuit ruling in 2014, Complainant said he reissued his complaint to Senators Barbara Boxer and Diane Feinstein, as well as the Equal Employment Opportunity Commission and Internal Revenue Service. *Id.*

According to OSHA records, Complainant filed four AIR 21 complaints with OSHA, including the current matter. OSHA dismissed the other three matters filed by Complainant as follows: 1) filed May 29, 2002, against JAL, dismissed September 27, 2002, for lack of jurisdiction since JAL is a foreign carrier; 2) filed May 29, 2002, against HACS, dismissed September 27, 2002 for lack of jurisdiction; and 3) filed September 29, 2003, dismissed October 20, 2003, no reason given. On May 22, 2015, I gave the parties notice that I intended to take official notice of the OSHA records and allowed them the opportunity to be heard. No responses were received. Accordingly, I take official notice of the OSHA records pursuant to 29 C.F.R. § 18.201.

Response to OSC--Work Background and Procedural History

Complainant began working for HACS in October 1992 as a flight engineer. Resp. at 2, 3; JAL Reply Ex. 5, 6. HACS is an independent corporation that contracts with JAL, a foreign air carrier incorporated under the laws of Japan, to provide flight crews for JAL flights. Resp. at 2; JAL Reply Ex. 6. Initially, HACS contracted with JALways, which was a subsidiary of JAL; later, after bankruptcy and restructuring, JALways became part of JAL. Resp. at 2, 3.

² *Ventress v. Japan Airlines*, 486 F.3d 1111 (9th Cir. 2007)(Ventress I); *Ventress v. Japan Airlines*, 603 F.3d 676 (9th Cir. 2010)(Ventress II); *Ventress v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014)(Ventress III), *cert. den.* 135 S.Ct. 164 (2014).

On June 17, 2001, Complainant was a “deadhead” crew member on a JAL flight from Thailand to Japan when he allegedly observed Mr. Bicknell, a flight crew captain, appearing to be ill and incapacitated during the flight. JAL Reply at Ex. 6, at p. 3. While working as a flight engineer on a separate June 20, 2001, flight from Honolulu to Japan, Complainant allegedly observed Mr. Bicknell, who was a pilot on the same flight, was ill and apparently medically unable to do his job. JAL Reply at Ex. 6, at p. 3-4. Mr. Bicknell later succumbed to brain cancer. JAL Reply at Ex. 2, at p. 3. According to Complainant, he discussed the situation with a different captain on the same flight, but nothing was done. Other than talking to the other flight captain, Complainant took no action until he wrote letters on December 26 and 28, 2001, notifying HACS and JAL about the safety issues he had observed in June 2011. JAL Reply at Ex. 6, at p. 4-5. Complainant also sent the same letter to 25 agencies, including the DOL, FAA and the National Transportation Safety Board. *Id.* at 5.

Complainant alleged that HACS and JAL determined he was unfit to fly in September 2001 and November 2001, respectively, prior to Complainant sending his December 2001 written complaint about safety violations. Resp. at 7; JAL Reply Ex. 6. According to Complainant, he was placed on FMLA leave without pay on March 26, 2002, and his attorney at that time told him he was constructively discharged as of that date. Resp. at 7. HACS terminated his employment on February 18, 2003. Resp. at 7. Complainant said he was aware of the AIR21 procedures in 2002 and sent OSHA a complaint in May 2002, which was acknowledged in writing by OSHA in June 2002. Resp. at 7, Ex. A. Complainant also sent a letter to the FAA dated February 22, 2002, noting that he had received a response letter from OSHA stating that it turned the matter over to FAA for investigation. JAL Reply Ex. 7. Complainant sought counsel and filed a civil suit against JAL and HACS in December 2002, alleging retaliation under the California labor code, constructive discharge, and intentional and negligent infliction of emotion distress. JAL Reply Ex. 6. OSHA records confirm that Complainant had submitted whistleblower complaints to OSHA under AIR21 in 2002 and 2003 consistent with the information Complainant noted in his current Complaint and Response. *See* ALJX-1.

Complainant noted in his Response that he contacted the State of Hawaii OSHA about his termination in 2005, but was allegedly told the matter should be pursued with the U.S. Department of Transportation or FAA. Response at 8, Ex. A.

Complainant and HACS went to arbitration hearing on August 6, 2007, and the Arbitrator issued a written ruling denying Complainant any relief on November 20, 2007. JAL Reply Ex. 2. According to the Arbitrator’s decision, which denied Complainant any relief, all complaints filed by Complainant to state, federal, local and Japanese agencies had been denied. JAL Reply Ex. 2, at 7. The allegations at issue in the arbitration concerned Complainant’s termination by HACS and his contention that it was in retaliation for reporting safety violations regarding Mr. Bicknell in June 2001. JAL Reply Ex. 2, at 3. The alleged safety violations are the same as those at issue in this matter. The Arbitrator ultimately concluded that Complainant’s reporting of alleged safety violations was not a substantial or motivating factor in either HACS or JAL’s decision to terminate him, and that Complainant failed to carry his burden of proof to show that his whistleblowing of alleged safety violations caused his termination. JAL Reply Ex. 2, at 10.

Legal Standard

AIR21 provides “employee protection from discrimination by air carriers or contractors or subcontractors of air carriers because the employee has engaged in protected activity pertaining to a violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.” 29 C.F.R. § 1979.100(a). Under AIR21:

Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

29 C.F.R. § 1979.103(d). “Any party who desires review, including judicial review, of the findings and preliminary order, . . . must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of §1979.105.” 29 C.F.R. § 1979.106(a). “If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order . . . shall become the final decision of the Secretary, not subject to judicial review.” 29 C.F.R. § 1979.106(b)(2).

The limitations period in AIR21 is not jurisdictional, and is therefore subject to equitable modification. *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009, slip op. at 4 (ARB Dec. 10, 2012); *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011). The party seeking equitable tolling bears the burden of justifying the application of equitable modification principles. *Woods*, ARB No. 11-067, slip op. at 4 (citing *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995)). However, equitable relief from limitations periods is “typically extended . . . only sparingly.” *Woods*, ARB No. 11-067, slip op. at 4 (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990)). The ARB has recognized four principal situations where equitable modification may apply, but the list is not exclusive and failure to satisfy one prong is not necessarily fatal to the claim. *Woods*, ARB No. 11-067, slip op. at 4; *Selig*, ARB No. 10-72, slip op. at 3-4. Those situations are:

(1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.

Woods, ARB No. 11-067, slip op. at 5; *Selig*, ARB No. 10-72, slip op. at 4. Furthermore, the Secretary has recognized, that courts “generally have held that unless the employer has acted deliberately to deceive, mislead or coerce the employee into not filing a claim in a timely manner, equitable estoppel will not apply.” *Woods*, ARB No. 11-067, slip op. at 5, citing *Tracy v. Consolidated Edison Co.*, No. 1989-CAA-001, slip op. at 5 (Sec’y July 8, 1992).

Analysis and Legal Conclusions

Here, the overwhelming evidence demonstrates that Complainant has filed AIR21 whistleblower complaints involving the same allegations on three prior occasions with OSHA. He did not appeal the adverse rulings by OSHA, but instead, while represented by counsel, pursued his claims in state and federal court. He participated in an arbitration involving the same allegations in 2007. I find that Complainant has previously submitted these same allegations under AIR21 for investigation to OSHA in 2002 and 2003 and did not appeal the adverse findings at that time, and the determination by OSHA to dismiss and close those matters became the final order of the Secretary. 29 C.F.R. § 1979.106(b)(2).

Further, I find that Claimant has not established any basis for equitable tolling of any statutory period in this matter. There is no evidence that Respondents in any manner interfered with his ability to pursue his AIR21 complaints, or misled him in any manner. There is also no evidence that he timely filed the matters, but in the wrong forum. In fact, he filed claims at OSHA three times in 2002 and 2003 on these same allegations. The complaint currently before this Office was not filed at OSHA, but at FAA and forwarded to OSHA. Complainant is making a last ditch effort to resurrect claims that have been fully litigated and rejected over the years.

In his Response to the OSC, Complainant included much of the same information contained in the Complaint and argued that he should be granted relief from the statute of limitations under Federal Rule of Civil Procedure 60(b)(6) and (d)(1) and (3). Resp. at 1, 2. He also asserted that the delay in filing the Complaint was due in part to fraud committed by JAL. *Id.* Complaint made a request to the District Court to re-open his case based upon fraud and under Rule 60, which the District Court denied. JAL Reply Ex. 11, 12. Under Rule 60(b)(6), the court may relieve a party from a final judgment, order, or proceeding for any reason that justifies relief. Fed.R.Civ.P. 60(b)(6). Rule 60(d) does not limit a court's power to (1) entertain an independent action to relieve a party from a judgment, order, or proceeding or (3) set aside a judgment for fraud on the court. Fed.R.Civ.P. 60(d)(1) & (3).

Other than making a general assertion that he should be granted relief under Rule 60, Complainant offered no evidence that he would be entitled to relief under this rule before me. I have entered no order from which to grant Complainant relief under Rule 60. To the extent he is asking for relief from a ruling by the Ninth Circuit or District Court, I have no jurisdiction to even consider such a ruling. Furthermore, this forum is not the place to rehash and re-litigate complaints that were fully addressed and ruled upon by federal courts. Complainant particularly seems fixated on re-examining the issue of whether JAL was the rightful employer, an issue which was addressed in arbitration and before the District Court and Ninth Circuit. Complainant has not provided any credible information from which to grant any relief under Rule 60.

JAL made three primary arguments in reply to the OSC: JAL was not Complainant's employer; AIR21 does not apply to JAL because it is a foreign airline incorporated under the laws of Japan and does not meet the air carrier definition under AIR21; and the statute of limitations on the whistleblower complaint expired many years ago and Complainant has not justified application of any equitable tolling. Because I agree that the statute of limitations has expired and equitable tolling is not applicable, I do not reach the two other contentions raised by JAL.

The litigation in this matter has been vigorously pursued and exhausted through OSHA, the FAA, arbitration, and the federal court system, including three appeals to the Ninth Circuit and a writ of certiorari petition to the U.S. Supreme Court. Complainant has not made any persuasive argument that he is exempt from the statute of limitations in this matter or that the statute should be equitably tolled in his favor. Complainant had an opportunity to litigate his AIR21 complaint back in 2002 and 2003 and to appeal the adverse determinations, but did not do so. He has not shown any reason now, nearly 14 years after his alleged observations of unsafe flying, to reset the clock and begin anew with allegations that were submitted for evaluation in 2002 and 2003.

Complainant's allegations under AIR21 related to his employment and termination during the time period June 2001 to March 2003 are time-barred. Accordingly, Complainant's request for a de novo hearing is denied. The matter is dismissed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, 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

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).