



**Issue Date: 19 May 2016**

Case No.: 2016-AIR-00017

In the Matter of

**ADAM TOOMBS**

Complainant

v.

**JET SELECT, LLC**

Respondent

### **ORDER DISMISSING CLAIM**

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.<sup>1</sup> Implementing regulations are at 29 CFR Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003). Per 49 U.S.C. § 42121(b)(2)(A), and implemented by 29 CFR § 1979.100(b), the hearing in this matter is to commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties.

#### **Procedural History**

On November 28, 2015,<sup>2</sup> the Complainant filed a complaint alleging discrimination by the Respondent because of his whistleblowing activities. In the complaint, Complainant alleges that he was wrongfully terminated in May 2015.

On February 12, 2016, the Occupational Safety and Health Administrations (hereafter OSHA) issued its findings. OSHA found that the Respondent was an air carrier within the meaning of 49 U.S.C. §§ 42121 and 40102(a)(2), and that the Complainant was an employee within the meaning of § 42121 and covered by AIR 21. However, OSHA also found that the complaint was untimely and that Complainant failed to cooperate in its investigation.<sup>3</sup> Accordingly, Complainant's complaint was dismissed.

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<sup>1</sup> Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121.

<sup>2</sup> The OSHA letter also references his filing on November 30, 2015. As the date November 28, 2015 is more favorable to the Complainant for purposes of this motion, this Tribunal will assume the early date is the correct date.

<sup>3</sup> The OSHA letter provided by Complainant in his appeal to the Office of Administrative Law Judges notes that on three occasions the investigator attempted to contact Complainant, Complainant was eventually contacted and stated that he was too busy at that time and would provide additional information but never did.

On March 14, 2016, Complainant mailed a letter to the Office of Administrative Law Judges. This letter was considered an appeal of the OSHA findings and the matter was referred to this Tribunal for adjudication.

On March 28, 2016, this Tribunal issued a Notice of Assignment and Conference Call, notifying the parties that a teleconference would occur April 22, 2016 at 11:00 a.m. In this Notice, the parties were specifically directed to inform this Tribunal whether the Complainant's complaint to OSHA was timely and whether the Complainant's appeal to the Office of Administrative Law Judges was timely filed. Complainant did not respond to this Notice.

On April 11, 2016, Respondent's counsel replied, asserting that Complainant's complaint was not timely filed with OSHA. Respondent further asserted that Complainant resigned from the company on March 30, 2015 and did not file his complaint until November 28, 2015, well after the 90 day period set forth in 29 C.F.R. § 1979.103(d).

Respondent participated in the April 22, 2016 teleconference was held, but Complainant did not enter an appearance. During this teleconference, this Tribunal informed Respondent that, because it has raised the issue of timeliness of the complaint in its April 11, 2016 correspondence, the parties would be given until May 20, 2016 to formally brief the issue. Additionally, this Tribunal advised that it would consider issuing an Order to Show Cause why this matter should not be dismissed for abandonment or failure to comply with this Tribunal's directives.

By Order issued April 26, 2016, this Tribunal directed Complainant to show cause as to why this matter should not be dismissed as untimely per 29 C.F.R. §§ 18.12(b)(7) and 18.70(c). This Tribunal advised that Complainant's failure to respond to that order in a timely manner would be interpreted as Complainant having no objection to this Tribunal dismissing the matter as untimely. Moreover, this Tribunal ordered Complainant to show cause as to why he failed to attend the scheduled April 22, 2016 teleconference as required by 29 C.F.R. § 18.44(c). This Tribunal cautioned that failure to appear without good cause is grounds for dismissing the proceeding or for the entering of a decision and order without further proceedings. 29 C.F.R. § 18.21(c). This Tribunal further cautioned Complainant that failure to respond to that Order would be interpreted as Complainant having had no good cause for his failure to appear at the April 22, 2016 teleconference. This Tribunal directed Complainant to respond to the April 26, 2016 Order by May 13, 2016.

To date, Complainant has failed to respond to the April 26, 2016 Order. As detailed in that Order, Complainant's failure to respond is construed as him having no objection to this Tribunal dismissing the matter as untimely and also that he had no good cause for his failure to appear for the April 22, 2016 teleconference.

Accordingly, Complainant's claim is dismissed as untimely and is also dismissed for Complainant's failure to comply with 29 C.F.R. §§ 18.21(c), 18.44(c) and 18.57(b).

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).