



**Issue Date: 03 February 2020**

Case No.: 2019-AIR-00025

In the Matter of

**MARTEL DANTZLER**  
Complainant

v.

**CHAMPLAIN ENTERPRISE, LLC**  
**d/b/a COMMUTAIR**  
Employer

**ORDER GRANTING EMPLOYER’S MOTION FOR SUMMARY DECISION**

This matter involves a dispute concerning alleged violations by the Respondent, Champlain Enterprise, LLC d/b/a/ Commutair 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 as a self-represented litigant.

On June 26, 2019 Complainant filed a complaint of retaliation with the Occupational Safety and Health Administration (hereinafter “OSHA”) under the Act asserting that a plane captain with Respondent denied his request to eject a disruptive passenger, that he filed a union grievance and EEOC complaint afterward, and, in response, Respondent suspended him without pay on July 1, 2018 and fired him on August 8, 2018.

On July 11, 2019, OSHA dismissed the complaint and Complainant appealed.

On October 24, 2019, the undersigned issued a Notice of Hearing and Pre-Hearing Order.

On December 5, 2019, the undersigned held a conference call with the parties.

On January 2, 2020, this office received Respondent’s Motion for Summary Decision. Complainant did not submit any response.

**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>1</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 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 decision because the factual dispute must be material. See Anderson, 477 U.S. at 248. If no issues are present, the moving party is entitled to a judgement as a matter of law. 29 C.F.R. § 18.72 (“The judge shall grant summary decision if the movant shows 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 adjudicator construes the evidence presented 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.; Employers Ins. of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98, 101–02 (6th Cir. 1995).<sup>2</sup> A non-moving party may not rest upon mere allegations or denials in his pleadings, but must set forth 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 Wausau, 69 F.3d at 101. 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).

To be timely, a complainant must file an AIR 21 complaint within ninety days of the date on which the alleged violation occurred; *i.e.*, when the discriminatory decision was both made and communicated to the complainant. 29 C.F.R. § 1979.103(d); McAllister v. Lee County Board of County Commissioners, ARB No. 15-011, ALJ No. 2013-AIR-8 (ARB May 6, 2015). This ninety-day period begins to run the day that an employee receives “a final, definitive, and unequivocal notice” of an adverse employment action. Peters v. American Eagle Airlines, Inc., ARB No. 08-126, ALJ No. 2007-AIR-14 (ARB Sept. 28, 2010) (citing Swenk v. Exelon Generation Co., ARB No. 04-028, ALJ No. 2003-ERA-030, slip op. at 4 (ARB Apr. 28, 2005)); Rollins v. American Airlines, Inc., ARB No. 04-140, ALJ Case No. 2004-AIR-9 (Apr. 3, 2007). “The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date.” Peters, slip op. at 5. It is the date that a complainant discovers that he has been injured by a discriminatory act—not the consequences of that act—that starts the ninety-day period in which an AIR 21 complaint must be filed. Id.

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<sup>1</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.

<sup>2</sup> As the alleged AIR violation occurred in the state of Ohio (Respondent is located in Ohio and the alleged violation was termination), the law of the U.S. Court of Appeals for the Sixth Circuit applies. See 29 C.F.R. § 1979.112.

In addition, “[n]o particular form of complaint is required, **except that a complaint must be in writing** and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” 29 C.F.R. § 1979.103(b) (emphasis added).

Respondent asserts in its Motion for Summary Decision that Complainant alleged that Respondent terminated him on August 8, 2018, and thus, his filing of the Complaint on June 26, 2019 is untimely, as Complainant did not file it within the ninety-day statutory filing period under AIR21 and that no circumstances permit for equitable tolling of the complaint. Complainant has not submitted response to Respondent’s Motion for Summary Judgement.

Complainant, in his complaint, avers that Respondent suspended him without pay on July 1, 2018, and fired him on August 8, 2018. An OSHA investigator dated the complaint as filed on June 26, 2019. over ten months later. This is well outside the ninety-day statutory filing period. Additionally, Complainant has made no assertions that there are circumstances that permit equitable tolling of the complaint. Accordingly, the undersigned finds that Complainant untimely filed his complaint.

### **ORDER**

When viewing the record in a light most favorable to Complainant, his complaint is untimely. Accordingly, Summary Decision is appropriate, and Respondent’s Motion for Summary Decision is **GRANTED**.

Complainant’s complaint is hereby **DISMISSED**. The hearing scheduled for April 15, 2020 is hereby **CANCELLED**.

**SO ORDERED.**

**THERESA C. TIMLIN**  
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).