

U.S. Department of Labor

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Issue Date: 16 May 2019

CASE NO.: 2019-AIR-00007

In the Matter of:

RANDALL (TODD) PAULK,
Complainant,

v.

SPIRIT AIRLINES,
Respondent.

Appearances: Randall (Todd) Paulk
 self-represented

 Peter J. Petesch, Esq.
 Little Mendelson, PC
 for Respondent Spirit Airlines

Before: Steven B. Berlin
 Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This claim arises under the employee protection (“whistleblower”) provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”) and its implementing regulations. *See* 49 U.S.C. § 42121; 29 C.F.R. Part 1979. Respondent moves to dismiss, or alternatively, for summary decision. It asserts that Complainant failed to file his administrative complaint with the Occupational Safety & Health Administration within the applicable 90-day limitations period and that the claim is therefore barred.

I issued an order to Complainant to show cause why the motion should not be granted. I explained what Respondent was contending; what was required for an opposition; that, if the motion was granted, I would dismiss the claim without a hearing; that, if Complainant could show adequate proof, his claim might survive the motion based on equitable tolling or estoppel; and that Complainant has a right to retain counsel. I *sua sponte* extended Complainant’s time to file an opposition by about two weeks, and I let him know that, if he needed additional time, he could request it. I warned Complainant that, if he failed to file a timely and sufficient opposition to the motion, I might well grant the motion and dismiss the case.

Complainant filed an opposition well-before the deadline. He asserted that he was entitled to equitable tolling. I notified Complainant that, if he had other arguments, he could still file them at any time before the deadline for his opposition. I also notified him that he likely needed to file more specific documentation to show he was entitled to equitable tolling. For example, he likely needed to file copies of the complaints he filed with other government agencies if I was to be able to determine whether those other complaints triggered equitable tolling. Complainant filed additional documentation, but he did not raise any new arguments beyond equitable tolling. Respondent filed a reply.¹

As the time for Complainant to file any further opposition has run, I proceed to decide the motion. I will find that Complainant's filing of an administrative complaint was untimely, that Complainant has not shown a sufficient basis equitable modification of the limitations period, and that Complainant's claim is foreclosed for failure to file a timely administrative complaint with the Occupational Safety & Health Administration. I will therefore dismiss the complaint.

Facts²

Facts going to timely filing. The alleged adverse action that Complainant pleads is that Respondent constructively discharged him on September 13, 2018.³ Respondent's Exhibit (R.Ex.) A at Part 3. Complainant states that he informed Respondent on that date that he viewed himself as having been constructively discharged. Complainant thus knew of the alleged adverse action on September 13, 2018, when he notified Respondent that it had happened. The OSHA filing deadline ran 90 days later, on Wednesday, December 12, 2018.⁴

Complainant filed an online administrative complaint with the Occupational Safety & Health Administration on December 26, 2018. He alleged that the constructive discharge was retaliation in violation of AIR 21. *Id.* at Part 1. By the time Complainant filed the OSHA complaint, 104 days had passed after the alleged discharge.

Facts going to equitable tolling. Complainant contends that equitable tolling applies because he timely filed his complaint with government agencies other than OSHA. Complainant cites complaints he filed with the California Division of Labor Standards Enforcement (DLSE) and the Nevada Equal Rights Commission (NERC). He states that the Nevada agency cross-filed his complaint with the U.S. Equal Employment Opportunity Commission (EEOC). Complainant

¹ The applicable rules on pre-hearing motions allow the filing of an opening brief and an opposition; no other brief may be filed with the ALJ directs otherwise. *See* 29 C.F.R. § 18.33(d). In the interest of justice, I allowed Complainant to file a second brief and additional evidence. I also allowed Respondent to file a reply.

² I accept for purposes of this motion the allegations in Complainant's complaint. For facts beyond the complaint, I view the record in the light most favorable to Complainant, not making credibility determinations, and drawing all reasonable inferences in Complainant's favor. Accordingly, the facts stated in the text are for purposes of this Order only.

³ Complainant alleged that Respondent threatened to terminate the employment, and he "instead accepted constructive discharge." *Id.*

⁴ I take official notice of the calendar, showing that December 12, 2018, was a Wednesday. Had the deadline fallen on a Saturday, Sunday, or holiday, an adjustment would have been required. But it fell on an ordinary workday.

also directly filed some information with the EEOC, but I will find that what he filed fell short of a complaint (or charge of discrimination). I turn to the particulars of the earlier-filed complaints.

California Division of Labor Standards Enforcement. Complainant states that he filed a “witness complaint” with DLSE on September 7, 2018, and a “claimant complaint” with DLSE on December 13, 2018.⁵ As to the September 7, 2018 filing, Complainant did not provide a copy of anything he filed on or about that date. In his later DLSE filing (December 13, 2018), he states of the earlier filing on September 7, 2018, that it was a “wage claim.” C.Br.Ex. D, “Retaliation Complaint” at 1.

Wage claims at the DLSE include claims alleging a failure to pay the minimum wage or the agreed wage over the minimum, overtime, sick leave available under company policy, time for rest- or meal-breaks, or the required reimbursement of expenses the employee incurs for the employer. Wage claims also include allegations that the employer took illegal deductions from pay, paid wages with a check with insufficient funds, or failed to provide the employee with access to her payroll (or personnel) records.

Nothing about any of the possible wages claims that Complainant could have raised suggests anything about AIR 21. Especially given that the alleged retaliatory discharge did not occur until September 13, 2018, which was six days *after* Complainant filed this DLSE complaint, I find no basis to infer that Complainant’s filing with the DLSE on September 7, 2018 concerned retaliation for any AIR 21 protected activity.⁶

As to the December 13, 2018 DLSE filing, Complainant has submitted two documents that he signed, dated, and apparently filed on that date.⁷ C Notice Ex. D. The documents are: (1) a DLSE “Initial Report or Claim,” and (2) excerpts from a DLSE “Retaliation Complaint.” *Id.* In both documents, Complainant states that his employer is “OSM Aviation.”⁸ There is no mention of Spirit Airlines on either document.

The “Retaliation Complaint” alleges a “wrongful termination/constructive discharge.” Complainant indicates by checking a box that he had previously filed a DLSE complaint⁹ against his employer, in which he alleged retaliation for complaining about health and safety conditions. But he gave December 13, 2018 as the date of filing that previous complaint; that is the same

⁵ Complainant’s Brief in Opposition (C.Br.) at 2 (stating the copy is true and full and that he filed it with DLSE).

⁶ A complainant’s failure to submit a copy of an alleged complaint or a detailed description of it can support an adverse inference that the complaint did not meet the qualifications for an AIR 21 retaliation complaint. *McAllister v. Lee Cty. Bd. of Cty. Comm’rs.*, ARB No. 15-011, ALJ No. 2013-AIR-8, slip op. at 7 (ARB May 6, 2015).

⁷ Complainant states in his brief that he also filed these documents with the DLSE on December 13, 2018. “Motion of Equitable Tolling (filed Apr. 5, 2019) at 1.

⁸ C.Br.Ex. D, “Initial Report” at 1; “Retaliation Complaint” at 1.

⁹ The form refers to a complaint filed with the “Labor Commissioner.” The California “Labor Commissioner” is synonymous with the DLSE.

date as he was completing this current DLSE form. Apparently, he meant this form to be for retaliation for his current health and safety complaints.¹⁰

The California DLSE is authorized to process complaints of retaliation for making complaints about workplace health and safety conditions. *See* Cal. Labor Code § 6310. I find that the “Retaliation Complaint” that Complainant filed with the California Division of Labor Standards Enforcement on December 13, 2018, raised a general allegation against OSM Aviation that a discharge from employment on September 13, 2018 was in retaliation for a health- or safety-related complaint that Complainant had raised. I also find that December 13, 2018 is 91 days after the alleged discharge on September 13, 2018.¹¹

Nevada Equal Rights Commission (and cross-filing with EEOC). Complainant filed a charge of discrimination with the Nevada Equal Rights Commission on November 27, 2018. C.Br. at 2 (stating the copy is true and correct and that he filed it with NERC), and C.Br.Ex. B. The charge form includes language allowing NERC to cross-file with the U.S. Equal Employment Opportunity Commission, and Complainant signed the form to allow the cross-filing.¹² I will infer that the cross-filing occurred under routine NERC procedures.

Complainant checks boxes on the NERC charge form to indicate that he is alleging that Respondent discriminated against him based on disability and that it retaliated against him. *Id.* at 1. The charge form also provides a section in which the charging party may provide “the particulars” of the allegations. Complainant wrote:

I have been employed by Spirit Airlines Inc., since on or about January 29, 2011, most recently as a Flight Attendant. In or around February 2017, I informed management regarding my medical condition and need for a reasonable accommodation. On or about September 13, 2018, I was discharged.

¹⁰ A question on the form asked if Complainant had made “a health and safety related retaliation complaint against your employer with a government agency.” Complainant completed the question by stating that he had made such a complaint with the EEOC on November 6, 2018.

¹¹ Complainant submitted with the DLSE “Retaliation Complaint” a document he signed on December 13, 2018, entitled “Cal-OSHA Release.” The document authorizes DLSE and Cal-OSHA to share their files on Complainant’s complaints. *See* C Notice Ex. D. Complainant apparently contends that this amounted to filing his DLSE complaint with Cal-OSHA. *See id.*, Social Security “Request for Hearing by Administrative Law Judge.”

“Cal-OSHA’s” formal name is the California “Division of Occupational Safety and Health.” It is a California state agency aimed at protecting the health and safety of California workers. It is unaffiliated with the U.S. Department of Labor. OSHA is a federal agency that is part of the U.S. Department of Labor; it is entirely distinct from Cal-OSHA.

Moreover, nothing on the “Release” Complainant submitted states that the DLSE would cross-file Complainant’s complaint with Cal-OSHA. The form does no more than to authorize the two agencies to disclose to one another the contents of the files they have on Complainant’s complaint.

In any event, Complainant’s argument that he met his timely filing requirements in this manner fails for the same reasons as does his DLSE complaint. *See* Discussion in the text, *infra*.

¹² The EEOC has “work-sharing” agreements with many state anti-discrimination agencies. Under the agreements, when EEOC or the state agency receives a charge of discrimination, it cross-files the charge with the other agency. That way, only one of the two agencies needs to investigate and process the charge.

I believe I was discriminated against because of my disability, and retaliated against for engaging in protected activity, in violation of the Americans with Disabilities Act of 1990, as amended.

C.Br.Ex. B at 1. Complainant thus explicitly states that he is asserting a claim for retaliation for his protected activity *under the Americans with Disabilities Act*. There is no mention of age discrimination, retaliation for making safety-related complaints, or any other form of discrimination or retaliation in the administrative complaint (“charge of discrimination”).

Complainant also submitted with his opposition to the current motion a hard copy of what appears to be a computerized “NERC Intake Inquiry Form.” It appears that portions of the submitted copy are incomplete because the computerized original included drop-down boxes that needed to be scrolled to read all of what Complainant wrote. But, as I read the copy Complainant submitted, I believe I have enough sense of what Complainant wrote to draw a reasonable inference, and I proceed on that basis.

In the intake form, Complainant alleges (by checking boxes in Section E) discrimination based on disability and age as well as retaliation in the form of a constructive discharge. *Id.* at 3-4. He answers additional questions in Section J of the form on pages 5 to 6 of the exhibit. In the following paragraph, the printed form contained the underlined language; Complainant wrote the remaining language:

I was hired by company Spirit Airlines on or about 01/11/2011 as a Flight Attendant. While employed there, I was subject to harassment, retaliation, intimidation and discrimination based upon my age, my disability injury in the workplace and my whistle blowing safety activities with my former union position as an AFA Health and Safety Chair. This includes my testifying to the FAA in regards to safety issues. I was illegally threatened with termination charges by the airline on 9/13/18 and was subjected to a Constructive Discharge effectively terminating my 34 year Flight [text ends]

C.Br.Ex. B at 5-6, Section J, box 1.

When asked what Respondent *stated* as its reasons for its actions, he answered that the Company said the steps it had taken were because Complainant had violated “a non compete work clause for supplemental employment.” *Id.*, Section J, box 2. Asked why he *believed* Respondent actually treated him as it did, Complainant answered:

I left my [union] position at AFA with Spirit and refused to take or support an AFA position at Norwegian. Shortly after this, AFA Norwegian placed a hit on me and gave Spirit the info about my supplemental work with hopes they would somehow find a way to use it to terminate me. They used this info as an excuse to terminate my career. When this was really based on discrimination about my disability they caused and my whistle blower activities on safety [text ends]

Id., Section J, box 3. Finally, Complainant wrote:

The company has taken a hostile, retaliatory and combative tone since the FAA Hearing Testimony. This only worsened after my cardiac disability on 3/26/17. It then worsened when I left the AFA Union at Spirit and refused to help the AFA Union at Norwegian. They placed a hit on me to have me removed. This was their way of trying to get rid of me since they had no other path since I was a model employee otherwise. The Constructive [text ends]

Id., Section J, box 4.

I find that Complainant's statements in the "NERC Intake Inquiry Form" did not change the gravamen of his complaint to the Nevada Equal Rights Commission. Complainant explicitly and unambiguously alleged in his NERC charge of discrimination that his employer discriminated against him based on disability and retaliated against him, not for safety complaints, but for pursuing his rights under the Americans with Disabilities Act. These allegations are consistent with the authority and responsibility of both the Nevada Equal Rights Commission and the EEOC. Both receive complaints of employment discrimination and may investigate and bring suit to address discrimination based on protected factors such as race, age, religion, sex, sexual orientation, disability, and the like.¹³ Both also investigate and enforce prohibitions of employer retaliation against those who assert their rights under the anti-discrimination laws. Neither has authority to investigate, determine, litigate, or remedy violations of AIR 21.

The Intake Inquiry Form is a distinct and separate document; it is not the charge of discrimination. It asks the charging party to supply a variety of additional information that could be of use to the agency when it determines whether the charge is within its jurisdiction, whether the charge is timely, what investigation is appropriate, and how to notify the employer of the charge.

Here, Complainant supplied answers to the questions NERC posed on the Intake Inquiry Form. While he mentions retaliation for reporting safety concerns, he does not suggest that he is amending or expanding his charge of discrimination. His answers to the questions NERC asked included allegations about Norwegian Air, Complainant's union, a "hit" against him for disclosing to Spirit Airlines that he was working a second job, age discrimination, and also retaliation for making safety-related complaints and testifying at the FAA. I cannot reasonably infer from these answers that Complainant was somehow amending his charge of discrimination to add at least two more parties and assert several new theories of recovery. The information Complainant gives does no more than answer the questions that NERC asked. Certainly there is no indication that NERC read the Intake Form as adding new parties and claims.

¹³ I take official notice of the NERC website, which is at detr.state.nv.us/nerc.htm. It states: "The Nevada Equal Rights Commission (NERC) oversees the state's Equal Employment Opportunity program, handling employment discrimination complaints relating to: race, national origin, color, creed/religion, sex, sexual orientation, age (40 and over), disability, genetic information, and gender identity or expression. NERC works with the federal Equal Employment Opportunity Commission to investigate and bring suit for complaints of discrimination. NERC also has jurisdiction in Nevada to investigate allegations of discrimination in housing and places of public accommodations." The website provides access to an online complaint form.

There is a second a separate problem with the Intake Form. Complainant offers no evidence of when he submitted it to NERC. Even if the Intake Form was a complaint, it could not establish a timely filing absent proof of when it was filed.

Direct filing with EEOC. Complainant also directly submitted to the EEOC an “Inquiry Information” form on October 23, 2018. C.Br.Ex. C. The form is not a charge of discrimination or any other form of complaint; rather, it is the first step in an employee’s determination whether to file a charge.¹⁴ The “Inquiry Information” notes that Complainant made an appointment for an in-person interview to occur on March 18, 2019. Appointments of this kind are the next step in the pre-charge process. (*See* fn. 14.) The form advises that the “approximate deadline for filing a charge” is July 10, 2019. This advice would be pointless if Complainant had already filed a charge of discrimination.

In the “Inquiry Information,” Complainant states that his reason for contacting the EEOC is disability discrimination and retaliation for complaining to his employer “about job discrimination.” He does not mention anything on the form about activity that AIR 21 protects or retaliation for such activity.

Along with the “Inquiry Information” form, Complainant submitted with his opposition a document entitled, “EEOC Employment Constructive Discharge/Wrongful Termination Statement.” The document appears to be exactly what its title implies: facts he alleges to support a contention that his conditions of employment were intolerable and amounted to a constructive discharge. Nothing about this document suggests that Complainant intended it—or the EEOC treated it—as a charge of discrimination. I cannot reasonably infer that this is anything more than what it expressly states that it is.¹⁵ In addition, nothing on the document shows when the document was submitted to the EEOC.

What Complainant submitted directly to the EEOC was not a charge of discrimination or any kind of administrative complaint. It therefore is irrelevant to Complainant’s theory of equitable tolling, which requires him to show that he timely filed the precise complaint with a government agency other than OSHA. The difference is substantial: EEOC notifies employers whom a charging party has named in a charge of discrimination (complaint). That gives the employer an opportunity to file a position statement and to prepare its defenses; it meets the purposes of the limitations period. But EEOC does not notify an employer when it receives mere “inquiry information” and not a charge of discrimination (*i.e.*, a complaint).

¹⁴ I take official notice of the EEOC website. In a frequently asked questions section, the EEOC addresses the question: “If I submit an online inquiry, does that mean I filed a charge of discrimination?” (*See* <https://publicportal.eeoc.gov/Portal/Faq.aspx>.) The answer is: “No. An inquiry is typically your first contact with the EEOC regarding your concerns about potential employment discrimination, which is followed by an interview with EEOC staff. Submitting an inquiry is the first step to determine whether you want to proceed with filing a formal charge of discrimination. A charge of discrimination is a signed statement asserting that an organization engaged in employment discrimination. It requests EEOC to take remedial action. The laws enforced by EEOC, except for the Equal Pay Act, require you to file a charge before you can file a lawsuit for unlawful discrimination. There are strict time limits for filing a charge.” *Id.*

¹⁵ The document is unsigned; an EEOC charge of discrimination must be a signed statement. *See* fn. 14.

Filing of the OSHA complaint. Complainant filed an online whistleblower complaint with OSHA on December 26, 2018. C.Br.Ex. A. He alleged that Respondent threatened suspension and termination, harassed and intimidated him, and constructively discharged him on September 13, 2018. *Id.* at 1. He alleged that Spirit took these actions because he filed safety reports with the FAA on behalf of himself and others and because of his activity with a “non-union committee group” of flight attendants. *Id.* at 3.

This is the second time Complainant filed a complaint with OSHA in which he alleged that Spirit Airlines violated his rights under AIR 21’s whistleblower protection provision. He filed an earlier complaint on January 9, 2016, and amended it on May 24, 2016.¹⁶ OSHA found that Complainant timely filed this earlier complaint, but OSHA decided against Complainant on the merits in “Secretary’s Findings” issued on September 15, 2017. R.Ex. C.¹⁷

Discussion

Motions to dismiss. “A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” 29 C.F.R. § 18.70(c). This motion based on untimeliness falls under the express provisions of the rule. To the extent that I go beyond the pleadings, I decide the motion as if on summary decision. *See* 29 C.F.R. § 18.72.¹⁸

I. Complainant’s Filing Of An OSHA Complaint Was Untimely.

Statutes of limitations:

Promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

¹⁶ OSHA complaint number 9-0050-16-015.

¹⁷ *Advice Complainant received from attorneys.* Complainant asserts that it was on the advice of counsel that he filed the AIR 21 complaint with OSHA on December 26, 2017. He provides evidence that he did not receive the advice of an attorney about filing an OSHA complaint until that date. When a complainant has the advice of counsel about where and when to file a complaint, it can affect the availability of equitable modification of the limitations period. But, as Complainant did not have that advice until the exact day he filed an OSHA complaint, the legal advice he received does not reduce or otherwise affect any entitlement he might have to equitable modification.

¹⁸ I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.72. A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

Burnett v. New York Cent. RR Co., 380 U.S. 424, 428 (1965), quoted in *Ferguson v. Boeing Co.*, ARB No. 04-084 (Dec. 29, 2005).

In AIR 21, Congress required that any complaint be filed with the Secretary of Labor no later than 90 days after the date of the violation. *See* 49 U.S.C. § 42121(b)(1). The Secretary's implementing regulations follow the 90-day filing requirement. As to where to file the administrative complaint, the regulations specify that: "The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee." 29 C.F.R. § 1979.103(d).

Thus, to be timely, the complaint must be filed within 90 days of the complainant's knowledge of the employer's final, definitive, unequivocal decision to take adverse action.¹⁹ The complaint must be filed with the Secretary of Labor, not an official of some other agency. The Secretary of Labor has delegated the authority to accept complaints to, preferably the OSHA Area Director where the employee resides or worked, but also to any OSHA officer or employee.

Complainant argues that his filings with other agencies are sufficient because, according to Complainant, a Federal Aviation Administration webpage states that an AIR 21 complaint may be filed at any OSHA office, and again according to Complainant, the California DLSE "cross-filed" his DLSE complaint with Cal-OSHA. *See* C Notice Ex. A. Complainant misstates the relevant facts and misplaces his reliance on the FAA webpage.

The FAA webpage is entitled, "Protection of Employees Who Provide Air Safety Information." *Id.* It is addressed to, among others, air carrier employees such as Complainant. It states the following:

You are protected against discrimination for providing information to your employer or to the federal government relating to: violations of any order, regulation, or standard of the Federal Aviation Administration or any other provision of federal law relating to air carrier safety.

File complaints of discrimination with any U.S. Department of Labor, Occupational Safety & Health Administration Office, within 90 days of the discrimination – and – notify any FAA, Flight Standards District Office of safety violations.

Id.

Complainant argues that he met this requirement by filing with the California Division of Labor Standards Enforcement and the Nevada Equal Rights Commission. He states that this suffices because he filed "with a Dept of Labor agency." The argument fails for multiple reasons.

¹⁹ *See Udofot v. NASA/Goddard Space Center*, ARB No. 10-027 (Dec. 20, 2011) (Clean Air Act).

First, the FAA webpage does not create legal rights. It is not a statute or regulation and cannot alter the language of AIR 21 or the Secretary of Labor's implementing regulations. It is not even a publication of the Department of Labor, to which Congress delegated the administrative enforcement of AIR 21.

Second, the DLSE and NERC are not agencies of the U.S. Department of Labor. The DLSE is a California state agency, and the NERC is a Nevada state agency. Thus, neither is, as Complainant contends, U.S. Department of Labor agencies.

Third, the FAA website does not state, as Complainant argues, that the complaint may be filed with "any U.S. Department of Labor agency"; the word "agency" is not there. The language on the website states that the complaint may be filed with: "any U.S. Department of Labor, Occupational Safety & Health Administration Office." Thus, even if the FAA webpage's statement had the force of law, which it does not, the only agency with which an AIR 21 complaint may be filed is OSHA, an agency within the U.S. Department of Labor. Here, Complainant neither filed with OSHA nor with any other agency of the U.S. Department of Labor.²⁰

Thus, Complainant's filing of the administrative complaint was timely only if he filed it with OSHA no later than 90 days after the constructive discharge. The discharge occurred when Complainant announced it to Respondent. That occurred on September 13, 2018. To be timely, Complainant needed to file his OSHA complaint on or before December 12, 2018, which was 90 days later. Complainant filed his OSHA complaint online. Electronic filing is effective on the date received. *See* 29 C.F.R. § 1979(d). That could not be earlier than December 26, 2018, the date Complainant completed the online form. December 26, 2018 is 104 days after the date of alleged constructive discharge. Complainant therefore failed to file a timely OSHA complaint.

II. Complainant Failed To Show A Basis For Equitable Modification of the Limitations Period.

Unlike a number of other employee protection ("whistleblower") statutes, neither the AIR 21 statute nor its implementing regulations expressly provides for equitable modification of the limitations period. But "AIR 21's limitations period is not jurisdictional, and therefore it is subject to equitable modification." *Woods v. Boeing-South Carolina*, ARB No. 11-067 (Dec. 19, 2012), slip op. at 8.

"Generally, in determining whether equity requires the tolling of a statute of limitations, the ARB follows the principles that courts have applied to cases with statutorily-mandated filing deadlines." *McAllister v. Lee Cty. Bd. of Cty. Comm'rs.*, ARB No. 15-011, ALJ No. 2013-AIR-

²⁰ As discussed above, there is no evidence that the California DLSE cross-filed Complainant's complaint with Cal-OSHA. Complainant gave DLSE and Cal-OSHA a release to allow the two agencies to exchange their files on Complainant's complaints. This is unlike the EEOC's work-sharing agreements with state agencies that allows for the cross-filing that Complainant requested on his NERC charge of discrimination. There is no evidence that Complainant filed any complaint (either directly or through cross-filing) with Cal-OSHA or any other state OSHA. But, even if there was a cross-filing with Cal-OSHA, that is a California state agency, not—as is required—the Occupational Safety & Health Administration, which is an agency within the U.S. Department of Labor.

8, slip op. at 5 (ARB May 6, 2015). “Because Congress, not the courts or an administrative agency, was entrusted with the responsibility to determine the statutory time limitations, the restrictions on equitable tolling must be ‘scrupulously observed.’” *Ferguson v. Boeing Co.*, ARB No. 04-084 (Dec. 29, 2005), slip op. at 10, citing *School Dist. v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981).

“Federal courts have typically extended equitable relief only sparingly.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). Equitable tolling is not available for “a garden variety claim of excusable neglect.” *Id.*

To be entitled to equitable tolling, a complainant must act diligently, and the untimeliness of the filing must result from circumstances beyond his control Moreover, the ARB has held that ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground establishing entitlement to equitable tolling.

Tardy v. Delta Air Lines, ARB No. 16-077 (Oct. 5, 2017), slip op. at 2 (citations omitted). “When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.” *Id.* (citation omitted).

A. Equitable Modification Is Unavailable Because Complainant Knew or Should Have Known of the OSHA Filing Requirement, and He Failed to File with OSHA Timely.

Complainant filed an earlier AIR 21 retaliation claim against Spirit Airlines. He filed it timely with OSHA. This demonstrates that, on this second AIR 21 retaliation claim, he knew how to perfect the AIR 21 claim but instead chose to raise other claims at various other agencies. This is not the diligence required for equitable relief. *See Tardy*. For this reason standing alone, equitable modification of the limitations period is unavailable. I also reach this result for the following alternative and independent reasons.

B. Complainant Failed to Show that He Filed the Precise Same Statutory Claim Timely but in the Wrong Forum.

The ARB has articulated four instances in which tolling may be proper:

- (1) the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights,
- (3) the complainant has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum, or
- (4) the employer’s own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights.

Tardy, at 2, citing *Selig v. Aurora Flight Sci.*, ARB No. 10-072, slip op. at 4 (Jan. 28, 2011); *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). Here, Complainant asserts the third of the four possibilities: that he raised the precise AIR 21 claim at issue but mistakenly did so in the wrong forum.²¹

The Supreme Court's jurisprudence on this third method of raising equitable modification demonstrates that the claim filed in the wrong forum must, as the ARB stated in *Tardy*, be *precisely* the claim ultimately filed late in the correct forum. In *Burnett v. New York Cent. RR Co.*, *supra*, 380 U.S. 429-30, the plaintiff filed a Federal Employee Liability Act (FELA)²² claim timely in state court, the state court dismissed for improper venue, and the plaintiff then refiled the same FELA claim in federal court. The Supreme Court held that the filing of the FELA claim in the wrong forum (state court) tolled the limitations period on the filing of the precise same FELA claim in the right forum (federal court). This was because the earlier filing of the same claim timely in state court put the defendant on notice that the plaintiff was pursuing the claim and that the defendant must prepare to defend; that timely met the purpose of the limitations period.

But the Court reached a different result when the two claims, although based on the same facts, allowed different remedies and thus were not precisely the same. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 461, 465-66 (1975). In *Johnson*, a plaintiff filed a timely charge of discrimination under Title VII with the EEOC and later filed an untimely complaint alleging the same facts under the 1866 Civil Rights Act, 42 U.S.C. § 1981. The Court held that, though the factual allegations were the same, the plaintiff slept on his rights to the "separate, distinct, and independent" remedies under section 1981. As the plaintiff's rights were not "coterminous" under the two statutes, equitable modification of the limitations period was not permitted.

The Court distinguished *Burnett* because, there, the plaintiff's filings in the two courts "involved exactly the same cause of action." 421 U.S. at 467. As the Court stated: "This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect [*i.e.* surprise after evidence has been lost, memories have faded, and witnesses have disappeared.]" *Id.*

Applying *Johnson*, the ARB has rejected equitable modification of a limitations period on facts strikingly similar to those in the present case. *See Udofot v. NASA/Goddard Space Ctr.*, ARB No. 10-027 (Dec. 20, 2011). In *Udofot*, the complainant's employer (NASA) terminated the employment and notified the complainant that he could appeal to NASA's Equal Opportunity Office (EO) or the Merit Systems Protection Board (MSPB). The complainant filed a complaint with NASA's Equal Opportunity Office, alleging age, disability, and national origin discrimination. He added that:

²¹ Some bases for equitable modification of the limitations period are technically "equitable estoppel." The fourth basis enumerated above is one of these. Complainant, however, relies on the third basis, which technically is "equitable tolling."

²² FELA affords remedies to railroad workers injured on the job.

He was further discriminated against when he was targeted and victimized for speaking out (*whistle blowing*), disclosing of gross mismanagement of funds related to the government, gross waste, harassment of potential witness, harassment for political affiliation, and *disclosure of what he believed to be reasonably dangerous [sic] to human health and safety*.

Udofot, at 2 (emphasis added).²³ The complainant also filed complaints with the MSPB, the U.S. Office of Special Counsel, and the Inspector General. *Id.* at 3. The Office of Special Counsel conducted two investigations, one for whistleblower retaliation. When the complainant filed an untimely OSHA complaint under the Clean Air Act, an ALJ rejected his argument for equitable modification and dismissed the claim.

The ARB affirmed. It relied on *Johnson's* holding that only where there is “complete identity of the causes of action” will “courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period.” Thus, even when the facts of two claims are the same, if the claims are not “coextensive,” including having the same remedies, equitable relief from the limitations period cannot be considered. *Id.* After reviewing ARB precedent in other whistleblower cases,²⁴ the Board further held:

Although Udofot’s work-safety complaints with other entities involve activity that may be relevant to a [Clean Air Act whistleblower] claim, his claims filed with the EEOC and MSPB were clearly intended to address other statutes, and thus the filing of those claims does not constitute the filing of the precise statutory claim filed in the wrong forum that would warrant equitable modification of the CAA timeliness requirement.

Id.

I turn to the various filings that Complainant made with agencies other than OSHA.

Nevada discrimination complaint (cross-filed with EEOC). As discussed above, Complainant’s NERC charge of discrimination expressly and unambiguously alleges discrimination based on disability and retaliation for exercising his rights under the Americans with Disabilities Act. The charge of discrimination is silent as to any other discrimination or retaliatory action. It says nothing about reporting air safety concerns or anything else that AIR 21 protects. In the “Intake Inquiry Form,” Complainant does no more than answer the questions that NERC asked. The answers range broadly and include statements about Norwegian Air and Complainant’s union as

²³ On the quoted claim, an EO counselor advised the complainant that this was outside the EO Office’s jurisdiction and that he should pursue it at MSPB.

²⁴ The ARB cited *Ferguson v. Boeing Co.*, ARB No. 04-084 (Dec. 29, 2005) (suspended employee’s complaint of waste, fraud, and abuse was insufficient to put Boeing on notice of an AIR 21 claim and thus equitable tolling was unavailable because it was not the precise statutory claim in the wrong forum); and *Lewis v. McKenzie Tank Lines, Inc.*, (Sec’y Nov. 24, 1992) (when complainant alleged in an EEOC charge that his termination was age discrimination because he was fired for refusing to drive an unsafe truck when a younger employer was not fired for the same conduct, the Secretary held that this was not an STAA claim and therefore not the precise claim mistakenly raised in the wrong forum).

well as a list of potentially wrongful conduct in which they and Spirit Airlines allegedly engaged. These statements, however, are not an amendment to the charge of discrimination; they are answers that NERC can use when designing an investigation, determining damages, and for other purposes. Complainant was seeking relief from NERC (and the EEOC through cross-filing) for disability discrimination and retaliation for asserting rights under the Americans with Disabilities Act and nothing more. The claim is not identical to the AIR 21 claim that Complainant ultimately filed with OSHA. This is far closer to *Johnson* than to *Burnett*, and it is much the same as *Udofot, Ferguson, and Lewis*. It therefore is not sufficient to invoke equitable modification of the limitations period.²⁵

Complainant misplaces his reliance on the Tenth Circuit's decision in *Turgeon v. ARB*, 446 F.3d 1052 (10th Cir. 2006). At the outset, the Ninth Circuit is controlling in this Nevada-based case. But, more to the point, is that the *Turgeon* court held that the AIR 21 complainant's initial filing of a state court wrongful discharge case, by operation of law, must be construed as precisely an AIR 21 complaint. This was because the complainant pleaded facts and asserted a theory of recovery covered by AIR 21, and AIR 21 "completely preempts" state law on the matters it covers. 446 F.3d at 1060-61. As the court stated: "A completely preempted claim 'becomes a federal claim and can be the basis for removal jurisdiction.' '[A] state law claim is only 'completely preempted' under *Taylor* if it can be recharacterized as a claim under [federal law]." 446 F.3d at 1061. Thus, the claim that the *Turgeon* plaintiff ultimately filed with OSHA as a matter of law was precisely the same federal AIR 21 claim that he filed in the state court. *Id.* The case before me presents no issues of complete federal preemption or any preemption.

Taylor v. Express One Int'l, Inc., ALJ No. 2001-AIR-00002 (ALJ Feb. 15, 2002), cited by Complainant, also is unavailing. There, an ALJ held that, when the complainant timely filed a complaint with the FAA, alleging a discriminatory discharge because of making safety reports, equitable tolling applied. That was because the OSHA complaint alleged the precise same theory. And, again, as this is an ALJ decision, it is not controlling.

Finally, Complainant cites a memo that a Deputy Assistant Secretary issued at OSHA concerning whistleblower complaints initially filed with agencies other than OSHA. C.Br.Ex. F. The memo is consistent with the analysis above. As the Deputy Assistant Secretary states:

When an employee mistakenly files a timely retaliation complaint relating to a whistleblower statute enforced by OSHA with another agency that does not have the authority to grant relief, and OSHA receives the complaint from the other agency or the complainant after the filing period has expired under the relevant whistleblower statute, it may consider the complaint timely-filed under equitable tolling principles.

Id. at 1 (footnotes omitted).²⁶ The Deputy Assistant Secretary is referring to the *identical* complaint; otherwise, OSHA could not receive it from the other agency where it was filed. A

²⁵ When Complainant filed his earlier AIR 21 complaint with OSHA, he amended that complaint. This shows that he knows how to amend an administrative complaint if that is his intent.

²⁶ The memo cites, as an example, filing an AIR 21 complaint with the FAA.

complaint that is identical meets the requirement that it be precisely the same. And, again, a Deputy Assistant Secretary's guidance to OSHA employees is not binding authority.

DLSE and Cal-OSHA. I dispose rapidly of Complainant's DLSE complaint (along with any Cal-OSHA complaint that DLSE might have cross-filed). First, Complainant names OSM Aviation as his employer. He never mentions Spirit Airlines. This cannot be the precise same claim as he is asserting here because it involves a different employer and not Respondent. Nothing about this complaint would meet the purpose of the limitations period because the agencies would not notify Spirit Airlines and thus give it an opportunity to prepare its defenses. Second, Complainant did not file the DLSE complaint until 91 days after the alleged constructive discharge. Even if the filing of the DLSE complaint tolled the filing deadline at OSHA, it came too late: the limitations period in AIR 21 ran on the 90th day after the alleged constructive discharge.

Separate filing with the EEOC. As discussed above, Complainant's separate filing with the EEOC was not an administrative complaint. An administrative complaint at the EEOC is entitled, "Charge of Discrimination," and is designated as EEOC Form 5. Of course, a charging party could file a complaint in some other format, but that is not what Complainant did. He did no more than submit information to the EEOC and ask for an appointment to discuss his case. What he filed did not initiate case processing and investigation at EEOC. That is important because the EEOC's process at that point would have included notice of the claim to the employer. Far from the precise complaint Complainant ultimately filed with OSHA, what Complainant filed at EEOC was not a complaint at all. Nothing about it would result in notice to Spirit Airlines that Complainant was pursuing any claim against it, not to mention an AIR 21 retaliation claim.

Conclusion and Order

Complainant failed to file a timely complaint with OSHA. I must "scrupulously observe" the restrictions on application of equitable modification of the limitations period, recognizing that equitable modification is extended only "sparingly" and not for "garden variety" excusable neglect. The burden is on Complainant to make an adequate showing.

Complainant failed to do that for two reasons. First, because he had earlier filed an AIR 21 complaint at OSHA, he knew or should have known what he needed to do; his failure to comply shows a lack of diligence. Second, contrary to his contention, he did not timely file the precise statutory claim with the wrong agency.

Accordingly, I conclude that Respondent Spirit Airlines is entitled to a dismissal or

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summary decision favorable to it. Complainant's complaint is therefore DENIED and DISMISSED. Complainant shall take nothing by reason of his complaint.

SO ORDERED.

STEVEN B. BERLIN
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).