



Issue Date: 03 September 2020

CASE NO.: 2020-AIR-00010

In the Matter of:

ROBERT BAKER,
Complainant,

v.

THE BOEING COMPANY,
Respondent.

ORDER GRANTING MOTION FOR SUMMARY DECISION and DISMISSING COMPLAINT

This case arises under the employee-protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42141 as implemented by federal regulations set forth in 29 C.F.R. Part 1979. Complainant Robert Baker (“Mr. Baker” or “Complainant”) filed a complaint under AIR21, alleging that he suffered certain adverse personnel actions as acts of retaliation for having raised safety concerns with Respondent The Boeing Company (“Respondent” or “Boeing”).

On August 17, 2020, Boeing filed a motion for summary decision, arguing that Mr. Baker’s AIR21 complaint was untimely because he filed it more than 90 days (indeed, more than two years) after his employment with Boeing ended. Complainant filed a timely response. For the reasons set forth below, I find and conclude that the AIR21 complaint was untimely filed, and that there is no basis to find equitable tolling of the filing period. Respondent’s motion will be granted, and the complaint will be dismissed.

Legal Standards

Under the rules of practice and procedure governing this matter, an administrative law judge “shall” enter summary decision in favor of a party “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a). In assessing whether there is a genuine dispute as to any material fact, the Court must resolve any ambiguities and factual inferences in favor of the non-moving party. *Cobb v. FedEx Corp. Serv.*, ARB No. 16-030, ALJ No. 2010-AIR-024, slip op.

at 4 (Sept. 29, 2017)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255(1986)).

AIR21 and its implementing regulations require a complainant to file a complaint with the Occupational Safety and Health Administration “[w]ithin 90 days after an alleged violation of [the Act]....” 49 U.S.C. § 42121(b)(1), 29 C.F.R. § 1979.103(d). The violation occurs “when the discriminatory decision has been 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). The time limitation of the regulation is not jurisdictional, and the time may be extended by equitable tolling. *Ferguson v. Boeing*, ARB No. 04-084, ALJ No. 2004-AIR-5, slip op. at 19 (ARB Dec. 29, 2005). The ARB has recognized three situations in which it will accept an untimely petition: (1) if the respondent has actively misled the complainant concerning his cause of action, (2) if the complainant has been in some extraordinary way prevented from asserting his rights, or (3) if the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 4 (ARB Aug. 31, 2005).

Undisputed Facts

Mr. Baker was employed by Boeing from 2012 until no later than January 1, 2018.¹ [Motion for Summary Decision, Schultz declaration, Exhibit E, ¶ 18.]

Complaint Under the Americans with Disabilities Act

On August 17, 2017, Mr. Baker filed a charge with the Equal Employment Opportunity Commission, alleging that Boeing discriminated against him on the basis of disability in violation of the Americans with Disabilities Act when it failed to engage in an interactive process with him to accommodate a medical condition, and when it notified him that he would be laid off in the near future. [Schultz decl., Ex. A; Opposition, Exs. A and B.] On the form used by Complainant to file his EEOC charge, he alleged discrimination on the basis of disability, and did not allege discrimination in the form of retaliation. [*Id.*] In the narrative portion of the charge, Mr. Baker described his attempts to obtain a position at Boeing that would accommodate his medical condition; he stated that he had applied for 20-30 positions and received only one callback. [*Id.*] He further stated that he was denied reasonable accommodation by Boeing’s failure to transfer him to another position, and its failure to give him assistance in finding another job. [*Id.*] Mr. Baker alleged that Boeing had failed to engage in the ADA’s interactive process to provide him with reasonable accommodation for his disability, and that he had been informed on June 21, 2017 that he would be laid off on August 25, 2017. [*Id.*] Nowhere on the charge form did Mr. Baker allege that he had made any safety-related

¹ Mr. Baker was informed in June of 2017 that he would be laid off effective August 25, 2017. It is unclear what transpired between August 25 and December 31, 2017, but there is no dispute that Mr. Baker was no longer employed by Boeing as of January 1, 2018.

disclosures or complaints to Boeing before he was informed that he was being laid off. Instead, his description of events was related to his belief that his disability was the reason for the adverse personnel action. [*Id.*]

When Mr. Baker filed his EEOC charge on August 17, 2017, he completed an intake questionnaire on which he indicated that the basis of his complaint was discrimination based on age, disability, and retaliation; however, the boxes for age and retaliation were crossed out. [Schultz decl., Ex. A.] On pages attached to the intake questionnaire (hereafter “addendum”), Mr. Baker gave his reasons for his belief that Boeing discriminated against him and why he thought Boeing’s actions were discriminatory. [*Id.*] At no point in his statement did he allege that he had made any safety-related disclosures or complaints to Boeing before he was informed that he was being laid off. Instead, his description of events was related to his belief that his disability was the reason for the adverse personnel action.

On June 13, 2018, the EEOC informed Mr. Baker that his complaint was dismissed, and advised him of his right to file suit in U.S. District Court. [Schultz decl., Ex. B.] Mr. Baker filed his complaint in the District of South Carolina on September 18, 2018. [Schultz decl., Ex. C.] Complainant, representing himself, filed a form complaint alleging employment discrimination in violation of the Americans with Disabilities Act, and described the discriminatory conduct as a failure to accommodate his disability. [*Id.*] The complaint did not allege that he had made any safety-related disclosures or complaints to Boeing before he was informed that he was being laid off, or before his employment with Boeing ended.

Shortly thereafter, Mr. Baker obtained counsel, who entered an appearance in the district court action and filed a First Amended Complaint (“FAC”). [Schultz decl., Exs. D and E.] The factual allegations set forth in paragraphs 18-29 of the FAC all relate to disability discrimination under the ADA, and none alleges that Mr. Baker had made any safety-related disclosures or complaints to Boeing before he was subjected to adverse personnel actions. Likewise, all three counts of the FAC allege disability discrimination in violation of the ADA, without referring to any safety-related disclosures or complaints made by Mr. Baker.

Complaint Under AIR21

By letter dated December 16, 2019, Mr. Baker, through counsel, filed a complaint of retaliation under AIR21 with OSHA and with the Federal Aviation Administration. [Schultz decl., Ex. F.] He alleged that Boeing failed to conduct on-the-job training for fabricators of certain Boeing 787 components, and that failure contributed to Boeing’s failure to ensure that they were performing their manufacturing duties properly and safely. [*Id.*] In the complaint, Mr. Baker alleged that he had made numerous internal complaints regarding Boeing’s failure to implement OJT, and that those complaints led to his retaliatory transfer from one position to another, a retaliatory leave of absence, and a retaliatory termination. [*Id.*]

On April 8, 2020, OSHA dismissed Mr. Baker's complaint as untimely, determining that Complainant had been laid off on August 25, 2017, and that his OSHA complaint had been filed more than 90 days later. [Schultz decl., Ex. G.] The agency considered Complainant's arguments regarding equitable tolling and rejected them. [*Id.*] Complainant timely filed his objections to the Secretary's Findings and a request for a hearing before an administrative law judge.

Discussion

Mr. Baker's employment with Boeing ended no later than January 1, 2018. He filed an AIR21 complaint on December 16, 2019, which was almost two years after his employment ended. An AIR21 complaint must be filed within 90 days of the alleged violation, and the last violation alleged by Complainant was the termination of his employment. The AIR21 complaint was filed more than 700 days after that date, and is therefore untimely on its face.

As discussed above, however, the 90-day limitations period for filing an AIR21 complaint is not jurisdictional, but is subject to equitable tolling. The Administrative Review Board has identified several grounds for equitable tolling, including: (1) when the respondent has actively misled the complainant concerning his cause of action, (2) when the complainant has been in some extraordinary way prevented from asserting his rights, or (3) when the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Complainant relies on the last of those grounds to urge that equitable tolling applies here, suggesting that both an internal ethical complaint and the EEOC charge show that he raised his AIR21 claim timely, but in the wrong forum.

Internal Ethical Complaint

Complainant argues that he raised his concerns about Boeing's failure to establish an OJT program in an ethical complaint within Boeing, and that Boeing did nothing more than refer it to human resources. He claims that Boeing took no action on the complaint. For at least two reasons, Mr. Baker's argument fails.

First, Complainant provided no evidence in support of his suggestion that he made such a complaint to Boeing. There is no affidavit or declaration saying that he did, and there is no document showing what he alleged if he did make the complaint. He has failed to demonstrate by submitting evidence that the internal ethics complaint constituted "information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety...." 49 U.S.C. § 42121(a), 29 C.F.R. § 1979.102(b). The burden is on Complainant to show that he is entitled to equitable tolling. *Tardy v. Delta Air Lines*, ARB No. 16-077, ALJ No. 2015-AIR-026, slip op. at 3 n. 10 (ARB Oct. 5, 2017), citing *Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-060, slip op. at 5 (ARB Sept. 30, 2010). Because he has failed to provide evidence supporting his argument, he cannot rely on the internal ethical complaint as grounds for equitable tolling.

Second, assuming that Mr. Baker did make such a complaint internally, the evidence does not show when he did so. In context, it appears that he made the complaint while he was still employed at Boeing, but there is no way to say whether he did so before or after any of the adverse employment actions he alleges Boeing took. Again, in the absence of relevant evidence, his reliance on the ethical complaint to as grounds for equitable tolling is unavailing.

EEOC Complaint

Mr. Baker argues that the EEOC charge he filed in August of 2017 raised the precise statutory claim at issue here, but in the wrong forum. A close review of the charge, the intake form submitted with the charge, and the addendum to the intake forum convince me that it did not.

Complainant makes much of the fact that he checked the box labeled “retaliation” on the intake form when he filed the charge. But the facts are not so clear. The box is indeed checked, as are the boxes for “age” and “disability.” But the checked boxes for “age” and “retaliation” are crossed out, while the box for “disability” and the word “disability” itself are circled. The clear implication is that the allegations of discrimination based on age and retaliation were not a part of the EEOC charge, but only the claim based on discrimination on the basis of disability was.

Second, assuming that retaliation was intended to be part of the charge, there is nothing to suggest that the alleged retaliation was for complaints related to aviation safety. The ADA prohibits retaliation for opposing any act or practice made unlawful by the ADA, so it is equally likely that the reference to retaliation was intended to refer to retaliation in response to Mr. Baker’s request for reasonable accommodation from Boeing.

Third, and most important, nothing in the EEOC charge, intake form, or addendum to the intake form suggests that Mr. Baker alleged retaliation for raising concerns related to aviation safety. All of the factual allegations relate to Boeing’s alleged failure to make a reasonable accommodation for Complainant’s medical condition, and its failure to engage in an interactive process to find a reasonable accommodation. There is no reference in any of the EEOC documents to Mr. Baker’s belief that Boeing failed to establish an OJT program as required by FAA regulations. It cannot be said, then, that Mr. Baker’s EEOC charge raised the precise statutory claim – retaliation under AIR21 – in the wrong forum.

Complainant argues that the EEOC charge should be broadly construed to include AIR21 retaliation because he is a non-lawyer without assistance of counsel. He cites *Seay v. Tennessee Valley Authority*, 340 F.Supp.2d 844 (E.D. Tenn. 2004) for the proposition that under these circumstances, the EEOC charge should be “liberally and broadly construed to encompass all claims reasonably expected to grow out of the EEOC investigation of the charge made....” *Id.* at 849. But *Seay* does not reach so far. In that case, the employer moved to dismiss the

judicial complaint for failure of the plaintiff to exhaust administrative remedies because he did not request compensatory damages in his EEOC charge. The court reasoned that because the plaintiff had filed the EEOC charge, the EEOC investigation would foreseeably lead to an evaluation of damages, and the plaintiff was excused, in light of his *pro se* status, from his initial failure to allege compensatory damages. *Seay* does not stand for the proposition that simply making an EEOC charge relieves a complainant of the requirement to make separate complaints to other agencies for matters outside EEOC's jurisdiction.

Other Basis for Equitable Tolling

Complainant argues that the time limitations on the OSHA complaint are subject to equitable tolling in this case because, at the time he made his EEOC charge, he was facing catastrophic financial, medical, and personal consequences of Boeing's actions. Under some circumstances, medical conditions can form a basis for equitable tolling. For example, in *Woods v. Boeing-South Carolina*, ARB No. 11-067, OALJ No. 2011-AIR-009 (ARB Dec. 10, 2012), the ARB held that a psychiatric condition that prevented a complainant from asserting his rights under AIR21 could do so. But in that case, the complainant's condition did not do so: in spite of his psychiatric illness, the complainant was able to manage his own affairs and to engage in normal activities of everyday living, so his mental impairment did not prevent him from asserting his rights under AIR21. The Board held that in order to establish entitlement to equitable tolling, a complainant with a mental impairment must show (1) he is mentally incompetent; and (2) his mental incompetence was the cause of the failure to timely file (by preventing petitioner from being capable of managing his affairs or understanding his legal rights and acting on them). *Woods*, ARB No. 11-067, slip op. at 10-11. And the Board held that such a complainant must make "a particularly strong showing" to warrant equitable tolling on the basis of mental impairment.

In this case, Mr. Baker has not alleged the existence of a mental impairment. By analogy to *Woods*, however, he must show that the financial, medical, and personal consequences of Boeing's actions were the cause of his failure to file a timely complaint by preventing him from being capable of managing his affairs or understanding his legal rights and acting on them. He has not made such a showing; instead, he has merely asserted, again without evidence, that he was suffering catastrophic effects from Boeing's actions. He has not described what they were, and has not argued that because of them he could not file a timely complaint. What little evidence there is, is to the contrary: he successfully filed a timely and detailed EEOC charge,² engaged an attorney to assist in his federal-court complaint based on the ADA, and participated in that lawsuit for another six months before filing the current AIR21 complaint with OSHA. I conclude that

² Granted, Mr. Baker filed his EEOC charge before his employment with Boeing ended, but there is nothing in the evidence or in his argument to suggest that his financial, medical, or personal consequences were any different after his employment ended from what they were a few months earlier.

Complainant has made no showing, let alone a “particularly strong” one, that the consequences of Boeing’s actions form a basis for equitable tolling.

Conclusion

Because Mr. Baker’s internal ethics complaint and his EEOC charge did not demonstrate that he filed the precise statutory claim at issue here – retaliation under AIR21 – but did so in the wrong forum, they do not form a basis for equitable tolling of the 90-day statute of limitations for filing an AIR21 complaint with OSHA. And as Complainant’s other arguments in favor of equitable tolling are unavailing as well, I conclude that he is not entitled to equitable tolling of the 90-day limitation period for filing a complaint with OSHA under AIR21.

In summary: the last adverse employment action occurred no later than January 1, 2018. Mr. Baker’s AIR21 complaint was filed almost two years later, long past the 90-day limitations period. There is no basis for equitable tolling of the limitations period.

ORDER

For the reasons set forth above, IT IS ORDERED that Respondent The Boeing Company’s motion for summary decision is GRANTED, and the complaint in this matter is DISMISSED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

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).