



Issue Date: 31 August 2020

CASE NO. 2020-AIR-6

In The Matter Of

BARBARA J. PARKER,
Pro-Se Complainant

v.

SOUTHWEST AIR LINES, CO.,
Respondent.

ORDER ON MOTION TO DISMISS

This matter involves a complaint under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)¹ and the regulations pursuant thereto.²

BACKGROUND

Complainant alleges that Respondent terminated her on 2 Sep 19 in retaliation for her having engaged in protected activity. She filed a complaint with the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) on 11 Feb 20. OSHA issued a decision dismissing the complaint as untimely on 13 Feb 20. Complainant filed her objection and requested a hearing. Following an initial conference call, I directed Complainant to file a Bill of Particulars listing each alleged protected activity and corresponding adverse action.

Her Bill of Particulars alleges that she complained to her supervisors about incorrect and false luggage data being entered on aircraft weight and balance documents. She also alleged a variety of adverse actions, culminating in her termination on 3 Sep 19. Respondent filed a Motion to Dismiss the complaint as untimely. Complainant filed her opposition and Respondent filed a reply.

¹ 49 U.S.C. § 42121 *et seq.*

² 29 C.F.R. Part 1979.

APPLICABLE LAW

AIR21 provides:

- (a) [n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-
- (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government 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 under this subtitle or any other law of the United States[.]³

To state a viable whistleblower claim under AIR21, a complainant must show she engaged in protected activity under Section 42121(a), her employer was aware of the protected activity, she suffered unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable action.⁴ She must also file her complaint within 90 days of the adverse action.⁵

Generally, in determining whether equity warrants tolling of a statute of limitations, there are four instances in which equitable 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.⁶

The regulations incorporate by reference procedural rules for hearings conducted under the Act. "Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."⁷ Those rules provide that the "Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or

³ 49 U.S.C. § 42121(a)(1).

⁴ See e.g. *Allen v. Administrative Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008); *Davis v. United Airlines, Inc.*, 2001-AIR-5 (ALJ July 25, 2002).

⁵ 49 U.S.C. § 42121(b).

⁶ *Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 4 (ARB Jan. 28, 2011). See *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

⁷ 29 C.F.R. § 1980.107(a).

controlled by these rules, or by any statute, executive order or regulation.”⁸ Those rules in turn allow for a dismissal of a complaint if, even if all of the allegations in it are accepted as true, it still fails to state a claim on which relief may be granted.⁹

DISCUSSION

Respondent moves for dismissal, noting that Complainant filed her OSHA complaint more than 70 days after the applicable deadline. Complainant concedes in her opposition that she intentionally prolonged the filing of her complaint for 162 days after her termination. She argues that she is entitled to equitable tolling because (1) she was in an extraordinary way prevented from asserting her rights and (2) Respondent’s acts or omissions lulled her into foregoing prompt attempts to vindicate her rights.

She alleges in support of her arguments that:

- Respondent withheld documents from her.
- Her attempts to obtain documents from the Houston Airport through the FOIA were delayed because of the unethical relationship between the Houston Airport and Respondent.
- Those documents confirm that Respondent made false allegations against her and defamed her name and character.

Even assuming all of her factual allegations to be true, Complainant has failed to establish any grounds that would entitle her to equitable tolling. She clearly believed she had been terminated in violation of the Act as of 2 Sep 19, but waited five months before she filed a Complaint with OSHA. She explains that she waited until she could obtain certain documents. Even if Respondent refused to provide those documents, there is no allegation that it did anything to request, encourage, or even suggest that she delay filing any complaint. Her OSHA filing required no supporting documents and any difficulties in obtaining documents did not prevent her in any way from complying with the statutory deadline. Her complaint to OSHA was untimely, equitable tolling does not apply, and her complaint fails to state a claim upon which relief can be granted.

⁸ 29 C.F.R. § 10.

⁹ 29 C.F.R. §70; Fed. R. Civ. P. 12(b)(6).

ORDER

The complaint is dismissed.

ORDERED this 31st day of August, 2020 at in Covington, Louisiana.

PATRICK M. ROSENOW
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).