In the Matter of:

BRIAN M. TURGEAU, **ARB CASE NO. 04-005**

COMPLAINANT, **ALJ CASE NO. 2003-AIR-00041**

v. **DATE: November 22, 2004**

THE NORDAM GROUP,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Randall D. Huggins, Esq., Jonathan E. Shook, Esq., *Shook, Huggins & Johnson, P.C., Tulsa, Oklahoma*

For the Respondents:
Stephen L. Andrew, Esq., D. Kevin Ikenberry, Esq., *Stephen L. Andrew & Associates, Tulsa, Oklahoma*

FINAL DECISION AND ORDER

This case arises under Section 519 (the employee protection provision) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2003). Regulations implementing Section 519 appear at 29 C.F.R. Part 1979 (2003). On October 3, 2003, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) finding that a complaint filed by Brian M. Turgeau pursuant to AIR 21 was untimely. We affirm the R. D. & O and dismiss the complaint.

BACKGROUND

The record fully supports the ALJ's factual and procedural history set forth at pages 1-4 of the R. D. & O. To summarize, The Nordam Group is a Federal Aviation Administration certified air repair station and manufacturer of aircraft parts. In 1999

Nordam hired Turgeau as a Manufacturer-B. Complaint at 2. Nordam discharged Turgeau from employment on or about September 27, 2002. On November 22, 2002, Turgeau filed a Petition against Nordam pursuant to the Oklahoma Aeronautics Commission Act, OKLA STAT. Tit. 3, § 81 et seq., in the District Court of Tulsa County, State of Oklahoma. Complainant's Initial Brief, Exhibit D. Nordam removed the case to the United States District Court for the Northern District of Oklahoma, which dismissed the Petition on April 8, 2003, on the basis that AIR 21 preempted the state law cause of action. On April 17, 2003, Turgeau filed an AIR 21 complaint with the Occupational Safety and Health Administration (OSHA). OSHA found that the complaint was untimely, whereupon Turgeau requested a hearing before an ALJ.

On September 8, 2003, Nordam filed a Motion for Summary Judgment requesting the ALJ to dismiss Turgeau's OSHA complaint on the ground that it was not filed within 90 days of Turgeau's discharge. On October 3, 2003, the ALJ issued an R. D. & O. recommending that the complaint be dismissed on the same ground, adding that Turgeau was not entitled to equitable tolling of the limitations period because his initial complaint brought under Oklahoma state law did not request relief pursuant to AIR 21.

ISSUE PRESENTED

Is Nordam entitled to summary decision as a matter of law because there is no genuine issue of material fact regarding whether Turgeau's complaint was untimely filed and the time to file is not tolled under equitable principles?

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under AIR 21. *See* 29 C.F.R. § 1979.110 (2004). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The ARB reviews an ALJ's recommended grant of summary decision de novo. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *Flor v. United States Dep't of Energy*, ALJ No. 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth

specific facts on each issue upon which he would bear the ultimate burden of proof. *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e). If the non-moving party fails to establish an element essential to his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

DISCUSSION

Employees alleging employer retaliation in violation of AIR 21 must file their complaints with OSHA within 90 days after the alleged violation occurred. 49 U.S.C.A. § 42121(b)(1)(West 2003);[1] 29 C.F.R. § 1979.103(d)(2004).[2] The AIR 21 limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-12 (ARB May 14, 2003).

In determining whether equitable principles require the tolling of a statute of limitations such as that contained in AIR 21, the Board has been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 2004), the court articulated three principal situations in which equitable tolling may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; and (3) when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Allentown*, 657 F.2d at 20 (internal quotations omitted). *See, e.g., Tierney*

[1] "Filing and notification. A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination."

[2] "Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination."

v. Sun-Re Cheese, Inc., ARB No. 00-052, ALJ No. 2002-STA-00012 (ARB Mar. 22, 2001).

Turgeau filed his complaint with OSHA on April 17, 2003, more than six months after Nordam terminated his employment. This is well beyond the 90-day statutory deadline for filing an AIR 21 complaint. But in his response to Nordam's Motion for Summary Judgment, Turgeau argued that the limitations period should be equitably tolled:

> [a]lthough filed in state court, Turgeau's Petition raised the identical claim at issue here, i.e., that he was fired from employment with Nordam for reporting matters of FAA compliance and safety. Clearly, Turgeau was 'actively' pursuing his judicial remedies when he filed his initial state court pleading within the statutory period set out in AIR21. Further, it is plain that in his state court action, Turgeau asserted the precise statutory claim as raised here but in the wrong forum.

Complainant's Response Brief in Opposition to Respondent's Motion for Summary Judgment at 9.

We do not agree with Turgeau's contention that he asserted an AIR 21 claim in his state court Petition. That Petition consists of two claims against Nordam. The first claim is entitled "Wrongful Termination in Violation of the Public Policy of Oklahoma" and contends that Nordam violated OKLA STAT. Tit. 3, § 81 et seq. The second claim is entitled "Failure to Pay Wages" and contends that Nordam violated OKLA STAT. Tit. 40, § 165.1. In each claim, Turgeau alleges that Nordam violated specific state statutes. Neither claim contains any indication that Turgeau intended to pursue a complaint against Nordam pursuant to AIR 21, a federal law with different requirements of pleading and proof. We therefore conclude that Turgeau did not raise before the Oklahoma court the "precise statutory claim" at issue in this case.

Having found that Turgeau did not file the precise statutory claim in state court, we briefly consider whether either of the other bases for equitable tolling would apply. First, Turgeau has not claimed, nor has he shown, that he was in some extraordinary way prevented from filing his OSHA complaint. Second, Nordam did not, during the statutory limitations period, mislead Turgeau regarding his right to file a complaint pursuant to AIR 21. Finally, the doctrine of equitable tolling is generally inapplicable where a plaintiff is represented by counsel. *Lawrence v. City of Andalusia Waste Water Treatment Facility*, 95-WPC-6 (ARB Sept. 23, 1996); *Kent v. Barton Protective Services*, No. 84-WPC-2, slip op. at 11-12 (Sec'y Sept. 28, 1990), *aff'd, Kent v. United States Dep't of Labor*, 946 F.2d 904 (11th Cir. 1991). Turgeau was represented by counsel from the time he filed his Petition in Oklahoma state court through his appeal to this Board. Once he consulted an attorney, he had "access to a means of acquiring knowledge of his rights and responsibilities," thereby precluding application of equitable tolling

considerations. *Smith v. American President-Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). We therefore conclude that the limitations period governing Turgeau's complaint should not be equitably tolled.

CONCLUSION

We have thoroughly examined the record and find that there are no genuine issues of material fact in dispute. We conclude that Nordam is entitled to summary decision as a matter of law and **DISMISS** Turgeau's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge