



**In the Matter of**

**VINCENT MANCINELLI,**

**ARB CASE NO. 06-085**

**COMPLAINANT,**

**ALJ CASE NO. 2006-SOX-008**

**DATE: February 29, 2008**

**v.**

**EASTERN AIR CENTER, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Vincent Mancinelli, *pro se*, Bourne, Massachusetts**

*For the Respondent:*

**Bahig Bishay, *Agent for Service*, Norwood, Massachusetts**

### **FINAL DECISION AND ORDER**

On October 14, 2004, Vincent Mancinelli filed a complaint with the Regional Administrator of the Occupational Safety and Health Administration (OSHA), United States Department of Labor, alleging that the Eastern Air Center, Inc., terminated his employment in violation of the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (the Act), 49 U.S.C.A. § 42121 (West 2008). OSHA investigated the complaint and found that the evidence established that the Respondent violated the Act's employee protection provisions by terminating the Complainant's employment because he raised air safety concerns. On May, 16, 2005, the Regional Administrator issued a notification of the Secretary of Labor's Findings and Preliminary Order pursuant to 49 U.S.C.A. § 42121(b)(2)(A). The preliminary order did not provide for reinstatement but directed the Respondent to pay the Complainant back pay and compensatory damages and to take other remedial actions.

On March 30, 2006, an Administrative Law Judge (ALJ) dismissed Eastern's objections to OSHA's findings and preliminary order. Eastern timely petitioned for review of the ALJ's order of dismissal. For the following reasons we affirm.

### BACKGROUND

The Act allows the employer or the employee 30 days in which to file objections to OSHA findings and preliminary order and to request a hearing:

[n]ot later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record.

49 U.S.C.A. § 42121(b)(2)(A). The regulations implementing the Act further provide that, "[o]bjections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001." 29 C.F.R. § 1979.106(a) (2007). The OSHA Regional Administrator's May 16, 2005 letter, which notified Eastern of the Secretary's finding and preliminary order stated:

Respondent and Complainant have 30 days from receipt of these Findings and Preliminary Order to file objections and request a hearing on the record, or they will become final and not subject to court review. **Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street N.W., Suite 400, Washington, D.C. 20001** and with the Regional Administrator, Marthe B. Kent, U.S. Department of Labor – OSHA, Room E-340 JFK Federal Building, Boston, MA 02203.

Findings at 4 (emphasis added).

Within the 30-day period, Eastern sent a letter (dated June 6, 2005) to the OSHA Regional Administrator in Boston. In this letter Eastern objected to the Secretary's finding that the company terminated Mancinelli's employment because he raised air safety concerns. Eastern did not, however, request a hearing. Nor did Eastern file objections or a request for a hearing with the Chief Administrative Law Judge (CALJ). Instead, Eastern asked the Regional Administrator to forward a copy of its June 6 letter to the CALJ:

We note that you have previously copied certain FAA personnel as well as the Chief Administrative Law Judge. Since we are not privy to the contact information, or the

specific identity, we are requesting that you forward a complete copy of this package to those authorities so that our response can be reviewed by those to whom you directed your Findings.

June 6, 2005 Letter at 2.

In due course, the Regional Administrator forwarded a copy of Eastern's June 6 correspondence to the Chief Docket Clerk at the Office of Administrative Law Judges, where it was received on September 8, 2005. In her cover letter, the Regional Administrator noted that Eastern had requested her to file its objections with the CALJ even though the notice of Findings and Preliminary Order in Eastern's possession provided the CALJ's address.

The Office of Administrative Law Judges assigned the case to an ALJ, who promptly issued a Notice of Docketing and Order to Show Cause why Eastern's objections should not be dismissed as untimely in light of the fact that they were not filed with the CALJ within the Act's 30-day limitation period.

In response to the Show Cause Order, Eastern stated as follows:

Contrary to this Honorable Court's mistaken impression that EAC failed to submit its objection (hereafter the "objection") within 30-days [sic] from the date of the initial Finding and Preliminary Order, EAC in fact submitted its Objection on June 6, 2005 (twenty days from the date of the Findings and Preliminary Order dated May 16, 2005).

Moreover, on August 10, 2005, Mr. Anthony C. Maida, representing the U.S. Department of Labor, contacted EAC to ascertain whether or not EAC did in fact file said Objection within the 30-days [sic] requested, and EAC confirmed that it did, indeed.

Annexed hereto are true and accurate copies of EAC's Response dated June 6, 2005; EAC's faxed package to Mr. Maida; and the Certified Mail Return Receipt of the original package.

WHEREFORE, EAC respectfully requests this Honorable Court to correct its records accordingly, and to vacate any pending proceedings relative to same.

Respondent's Response to Notice of Docketing and Order to Show Cause.

Notwithstanding the absence of any substantive argument in Eastern's Response, the ALJ considered whether, under relevant legal precedent, Eastern might be entitled to tolling of the limitations period. The ALJ concluded that Eastern's unexplained failure to follow the clear instructions in OSHA's notification letter and its failure to take any further action to preserve its rights until after it was contacted by the OSHA investigator demonstrated a "lack of due diligence which precludes invocation of equitable relief." Accordingly he dismissed Eastern's objections and ruled that the Secretary's preliminary order of May 16, 2005, constituted a final order not subject to judicial review. D. & O. at 6.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary has jurisdiction to review the ALJ's recommended decision. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to the Administrative Review Board (ARB) her authority to review cases under, inter alia, AIR 21. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

The ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). This means that if substantial evidence on the record considered as a whole supports the ALJ's findings of fact, they shall be conclusive. We review conclusions of law de novo. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

### **DISCUSSION**

On appeal, Eastern does not assert that the D. & O. contains any error of law or reflects any mistake concerning the information that OSHA provided to Eastern or any of Eastern's actions. Instead, Eastern argues – for first time on review – that it showed sufficient diligence to warrant equitable tolling of the limitations period. Specifically, Eastern argues that sending its objections to the Regional Administrator within the 30-day time period and “allow[ing] Kent [the Regional Administrator] another 10-days [sic] to forward the 12-page package to the appropriate addresses” showed due diligence on its part. Br. at 5.

We will not consider arguments a party did not but could have presented to the ALJ. *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 7 (ARB Sept. 29, 2006). Our function is to review ALJ recommended decisions for error; it is not to provide litigants with a forum where they can retry their cases with new theories. Below, Eastern chose not to make an argument for equitable tolling but instead to treat the timeliness issue as if a mere clerical error were involved. Thus, Eastern forfeited its right to make a tolling argument on review. In any event, Eastern does not cite, nor do we know of any legal basis, allowing a party to unilaterally transfer its duty to comply with written procedural requirements from itself to the Regional Administrator.

Eastern also argues, again for the first time on review, that Mancinelli's whistleblower complaint is barred by res judicata based on a state law judgment issued on April 11, 2005. *Id.* at 7-9. Again, Eastern could have but failed to make this argument below and has thereby waived it.

Even if Eastern had not waived this argument, we would not consider it due to lack of supporting argument. *Davis v. United Airlines, Inc.*, ARB Nos. 02-105, 02-088, 03-037, ALJ Nos. 2001-AIR-005, 2002-AIR-005, 02-AIR-006, slip op. at 4 (ARB Apr. 26, 2006) ("Conclusory and unsupported assertions are not a basis for relief on review."). Eastern asserts that the state case and this case have "sufficient identity" to bar adjudication of Mancinelli's AIR 21 whistleblower complaint without identifying even one aspect of the state proceeding that is identical to the instant proceeding. Thus, Eastern has not provided the Board with any basis for applying res judicata principles to this case.

Accordingly, we **DENY** Eastern's petition for review, **AFFIRM** the Decision and Order below, and **DIRECT** Eastern Air Center, Inc., to comply with the Secretary's Preliminary Order of May 16, 2005.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**