U.S. Department of Labor

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Issue Date: 17 July 2007

CASE NO. 2007-AIR-00005

In the Matter of:

LAURA KOSCKI,
Complainant,

vs.

RAINBOW AIR ACADEMY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121 *et seq.*

On March 23, 2007, I issued a notice of docketing and assignment, and order setting forth discovery and briefing schedule as to threshold issues. In the March 23, 2007 order, I noted that there appears to be a threshold issue as to whether the complaint in this case was timely filed, and that it is necessary to decide that threshold issue before proceeding to the merits. I set a briefing schedule in which a motion to dismiss or for summary decision was to be filed by June 1, 2007 on the specific and narrow issue of timely filing of the complaint.

On March 26, 2007, Complainant submitted a letter ("Complainant's letter" or "CL") with accompanying exhibits ("CX"), in which she addressed the issue of the timely filing of her complaint by detailing a series of complaints filed by herself and others with various state and local agencies from September 2005 through February 2006.

On June 12, 2007, I issued an order to show cause why Complainant's complaint should not be dismissed. In the June 12, 2007 order, I noted that Respondent had not filed a motion to dismiss or for summary decision, but that I have the inherent power to dismiss a complaint for failure to state a claim upon which relief can be granted. *See Lotspeich v. Starke Memorial Hospital*, 2005-SOX-14 (ALJ Mar. 3, 2005); *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union*,2004-AIR-19 (ALJ May 7, 2004); *Cummings v. USA Truck, Inc.*, 2003-STA-47 (ALJ Jan. 9, 2004). I also found that Complainant had failed to allege any facts in her March 26, 2007 submission that excuse the untimely filing of her complaint.

On June 25, 2007, Complainant submitted a letter ("Complainant's response" or "CR") in which she addressed the issue of the timely filing of her complaint. Complainant declared that the pilots at Rainbow Air should be considered collectively because they all engaged in protected

activity, were retaliated against, and were subjected to a hostile work environment. CR at 1-2. Complainant also asserted that she had sent an e-mail on September 2, 2005 to fellow pilot Deniece de Priester in support of Ms. de Priester filing a complaint with the State of California Division of Occupational Safety and Health ("DOSH"). CR at 1. Complainant stresses that this e-mail was forwarded to OSHA on or around September 2, 2005, and that the e-mail meets AIR21's statute of limitations.

ISSUE

Should Complainant's AIR21 complaint be dismissed for failure to file within the 90-day statute of limitations?

SUMMARY OF DECISION

Complainant is unable to show that the doctrine of equitable tolling applies to her untimely complaint with the Department of Labor. Therefore, the complaint is barred by the 90-day statute of limitations set forth in AIR21 at 49 U.S.C. § 42121(b) and must be dismissed with prejudice.

FACTUAL BACKGROUND

It is undisputed that Complainant terminated her agreement with Respondent on October 17, 2005. CX E. Complainant admits that this date was the last possible point at which Respondent could have violated AIR21 with respect to Complainant. CR at 1.

On September 2, 2005, Complainant sent an e-mail to Deniece de Priester in support of Ms. de Priester's August 25, 2005 complaint with DOSH. CX C. Complainant alleges that Ms. de Priester forwarded this e-mail to the Occupational Health and Safety Administration ("OSHA") on or around September 2, 2005, and that Complainant herself faxed a copy to OSHA as well. CR at 1. In the e-mail, Complainant voiced her safety concerns regarding Respondent's flight program and stated that she had personally witnessed retaliation and abuse. CX C. It is unclear from the e-mail whether Complainant was retaliated against, or had witnessed retaliatory acts against flight instructors. It is also not clear what acts of retaliation Complainant is referencing, and what these retaliatory acts were in response to.

On September 15, 2006, DOSH sent a letter to Deniece de Priester informing her that her August 25, 2005 complaint did not fall under the jurisdiction of DOSH.

On or before October 19, 2005, Complainant filed a pre-complaint questionnaire with the U.S. Equal Employment Opportunity Commission ("EEOC"). CX D. Complainant failed to provide a copy of her pre-complaint questionnaire.

On November 2, 2005, Complainant filed a complaint with the California Department of Consumer Affairs, Bureau for Private Postsecondary and Vocational Education ("DCA"). CX G. Complainant failed to provide a copy of this complaint.

On February 27, 2006, Complainant filed an AIR21 complaint with OSHA, 133 days after she terminated her agreement with Respondent. CR at 1.

ANALYSIS

The AIR21 statute provides, "A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of [AIR21] 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." 49 U.S.C. § 42121(b). Thus, Complainant was required to file her AIR21 claim with the Department of Labor within 90 days of a violation by Respondent. The last possible date of a violation is October 17, 2005, when Complainant left Respondent. Accordingly, Complainant was required to file her complaint with the Department of Labor on or before January 15, 2006. Complainant's complaint was not filed until February 27, 2006, and therefore is untimely.

Untimely filing of a complaint may be excused in some circumstances where the complainant timely files a complaint raising the precise statutory claim in the wrong forum. For this form of equitable tolling to apply, the complainant must show that she filed an AIR21 whistleblower retaliation claim, but merely did so with the wrong government agency. The "precise statutory claim in the wrong forum" form of equitable tolling has two requirements: (1) that the claim filed in the wrong forum must have been filed within the time limits that would have applied had the complaint been filed in the correct forum, and (2) that the plaintiff must have used the same statutory foundation when filing both the original claim and the subsequently filed claim. *Turgeau v. The Nordam Group, Inc.*, 2003-AIR-41 (ALJ Oct. 30, 2003)(citing *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981)). The complainant bears the burden of justifying the application of equitable tolling. *Ferguson v. Boeing Co.*, ARB No. 04-084, at 11 (ARB Dec. 29, 2005).

Complainant's September 2, 2005 E-mail

Complainant argues that her September 2, 2005 e-mail to Deniece de Priester qualifies as filing an AIR21 claim with the Department of Labor within the statute of limitations. CR at 1. Complainant claims that Ms. de Priester forwarded the e-mail to OSHA and that Complainant herself faxed the e-mail to OSHA on or around September 2, 2005. CR at 1.

First, Complainant has not satisfied the first requirement for equitable tolling. Complainant does not provide any evidence that she faxed the September 2, 2005 e-mail to OSHA. Complainant also does not support her assertion that Deniece de Priester forwarded Complainant's e-mail to OSHA. Complainant submitted a copy of the e-mail, which only shows that Ms. de Priester forwarded the message to another personal e-mail address. CX C. The e-mail address does not appear to be a governmental address, and Complainant does not provide any reason to believe that it belongs to a governmental worker within OSHA. The forwarded e-mail is not addressed to anyone at OSHA, or anyone at all, and it includes no other text besides Complainant's e-mail.

Second, Complainant has not satisfied the second requirement for equitable tolling. Even if OSHA did receive Complainant's e-mail, the absence of a file on Complainant or any investigation around that time suggests that OSHA did not regard the e-mail as a complaint. This would not be surprising as the purpose of Complainant's e-mail was to support de Priester's complaint, not file Complainant's own complaint. This is evidenced by the title of the e-mail which states "Your letter was incredible and to the point, here[']s my letter for you as a witness." CX C. The e-mail is also written in the form of a letter to Ms. de Priester, not OSHA.

Lastly, Complainant argues that her claim should be considered collectively with Deniece de Priester's August 25, 2005 complaint. CR at 2. She claims that the pilots at Rainbow Air Academy collectively engaged in protected activity and were retaliated against. However, Complainant's name is not mentioned anywhere in Deniece de Priester's August 25, 2005 complaint. There is nothing to indicate in the text of de Priester's complaint that the action was brought on behalf of Complainant as well as Ms. de Priester. Complainant filed her own separate claim on February 27, 2006. Complainant may not attach her name to Ms. de Priester's August 25, 2005 complaint simply for the sake of circumventing AIR21's statute of limitations.

For all of the reasons above, Complainant has failed to show that her September 2, 2005 e-mail satisfies the statute of limitations for filing a complaint with OSHA.

Complainant's EEOC and DCA Claims

However, Complainant has satisfied the first requirement for equitable tolling in that she filed complaints with two other government agencies within the time limits required by AIR21. Complainant filed a pre-complaint questionnaire with the U.S. Equal Employment Opportunity Commission ("EEOC") on or before October 19, 2005, and she filed a complaint with the California Department of Consumer Affairs, Bureau for Private Postsecondary and Vocational Education ("DCA") on or before November 2, 2005. CX D, CX G.

Yet, Complainant has failed to show that she has satisfied the second requirement for equitable tolling. Complainant must at least show that her complaints to these other agencies were about employment-related retaliation as a result of her raising safety concerns. *Garn v. Benchmark Technologies,* 88-ERA-21 (Sec'y Sept. 25, 1990); *Grover v. Houston Lighting & Power,* 93-ERA-4 (Sec'y Mar. 16, 1995); *Hannel v. Midwest Industries, Inc.*, 85-TSC-3 (ALJ Sept. 27, 1985). However, even a complaint that specifically references an adverse action, such as suspension or termination, that occurred as a result of protected activity, such as complaining about safety concerns, may be insufficiently precise or similar to indicate that the complainant was asserting a complaint under AIR21. *Ferguson,* at 13-14 (relying on *Lewis v. McKenzie Tank Lines, Inc.*, 92 STA 20 (Nov. 24, 1992). Similarly, complaints filed under state statutes do not state the same precise statutory claim because they do not demonstrate an intent to pursue a complaint under AIR21. *Turgeau v. The Nordam Group,* ARB No. 04-005, (ARB Nov. 22, 2004).[1]

[1] This case was reversed by the Tenth Circuit in *Turgeau v. Administrative Review Board, USDOL*, No. 05-9503 (10th Cir. Apr. 27, 2006). However, the instant case arises in the Ninth Circuit, and consequently, the authority from the Tenth Circuit is not binding. In addition, the Tenth Circuit based its decision on the fact that AIR21 completely preempted the state claim, and consequently, the state claim was effectively an AIR21 complaint. Thus,

Here, Complainant has submitted responses from EEOC and DCA indicating that her complaints were received and/or dismissed, but she has submitted no evidence of the substance of her complaints to these agencies. Thus, it is impossible to determine whether Complainant used the same statutory foundation when filing her EEOC and DCA complaints as she did when filing her complaint with the Department of Labor.

Lastly, even if Complainant could show that she asserted an AIR21 claim in her prior complaints to the other agencies, she did not timely file with the Department of Labor upon learning that she had filed in the wrong forum. A complainant has no more than 30 days within which to file her whistleblower complaint with OSHA after a state agency dismisses her claim. *Immanuel v. The Railway Market*, ARB No. 04-062. 2002-CAA-20 (ARB Dec. 30, 2005)(citing *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965) and *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983)). Here, the DCA dismissed Complainant's complaint on November 2, 2005.[2] Thus, Complainant should have filed her complaint with the Department of Labor on or before December 3, 2005. Complainant did not file her complaint with the Department of Labor until February 27, 2006, and it is therefore untimely.

CONCLUSION

Complainant is unable to show that the doctrine of equitable tolling applies to her untimely complaint with the Department of Labor. Therefore, the complaint is barred by the 90-day statute of limitations set forth in the AIR21 at 49 U.S.C. § 42121(b) and must be dismissed with prejudice.

ORDER

For the reasons stated above, Complainant's complaint is hereby DISMISSED with prejudice for untimely filing.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

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the complainant had stated the precise statutory claim in the wrong forum and was entitled to equitable tolling. The facts presented here do not indicate that Complainant's prior complaints were rejected because of preemption.

[2] With regard to Complainant's EEOC pre-complaint questionnaire, there is no evidence that Complainant ever filed a formal complaint with the EEOC or that it was dismissed. Complainant has only provided a letter from the EEOC acknowledging the receipt of her pre-complaint questionnaire. CX D.