In the Matter of:

DARRELL ROLLINS,

COMPLAINANT,

v.

AMERICAN AIRLINES, INC.,

RESPONDENT.

ARB CASE NO. 04-140

ALJ CASE NO. 2004-AIR-9

REISSUED: April 3, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Charles C. Vaught, Esq, *Armstrong & Lowe, P.C.*, Tulsa, Oklahoma

For the Respondent:
Donn C. Meindertsma, Esq., Matthew A. Houtsma, Esq.; *Winston & Strawn LLP*, Washington, D.C.

FINAL DECISION AND ORDER

Darrell Rollins filed a whistleblower complaint alleging that his employer, American Airlines, Inc. (American), violated the employee protection provisions of the Sarbanes-Oxley Act of 2002 (SOX)[1] and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)[2] when American terminated his employment as a supervisor at American's aircraft maintenance base in Tulsa, Oklahoma, because he engaged in activity

[1] 18 U.S.C.A. § 1514A (West Supp. 2005).

[2] 49 U.S.C.A. § 42121(a) (West Supp. 2005).

that SOX and AIR 21 protect.[3] American filed a "Motion for Summary Dismissal," contending that Rollins's complaint should be dismissed because he did not timely file it. Rollins responded. In a Decision and Order Granting Respondent's Motion for Summary Dismissal (D. & O.), a Department of Labor Administrative Law Judge (ALJ) recommended that we grant American's motion. Rollins appealed. We grant American's motion for summary dismissal and deny Rollins's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under AIR 21 and SOX.[4] The ALJ treated American's "Motion for Summary Dismissal" as a motion for summary decision pursuant to the applicable rules of procedure governing whistleblower cases.[5] We review a decision granting summary decision de novo, i.e., under the same standard ALJs employ. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." Viewing the evidence in the light most favorable to, and drawing all inferences in favor of the nonmoving party, we must determine the existence of any genuine issues of material fact.

DISCUSSION

AIR 21 and SOX both require that a complainant file a complaint not later than 90 days after the date on which the employer took the alleged retaliatory action.[6] The 90-day period begins to run on the date that the complainant receives a "final, definitive, and

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[3] The SOX protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of the federal mail, wire, radio, TV, bank, and securities fraud statutes (18 U.S.C.A. §§ 1341, 1343, 1344, and 1348) any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A (a). The legal burdens of proof set forth in 49 U.S.C.A. § 42121(b), the employee protection provisions AIR 21, govern SOX actions. 18 U.S.C.A. § 1514A(b)(2)(C).

AIR 21 protects employees who provide information to a covered employer or a Federal agency relating to alleged violations of the orders, regulations, or standards of the Federal Aviation Administration relating to air carrier safety or any provision of Federal law relating to air carrier safety. 49 U.S.C.A. § 42121 (a).

[4] Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. §§ 1980.110(a), 1979.110(a).

[5] *See* 29 C.F.R. §§ 18.40, 18.41 (2006).

[6] 49 U.S.C.A. § 42121(b)(1); 18 U.S.C.A. § 1514A(b)(2)(D).

unequivocal notice" of an adverse employment decision.[7] "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities.[8] Furthermore, the limitations period begins to run when the employer communicates to the employee its "final, definitive, and unequivocal" intent to implement an adverse employment decision, rather than on the date on which the employee experiences the consequences of that decision.[9]

On October 17, 2002, American issued Rollins a Career Decision Day (CDD) Advisory letter. The CDD Advisory offered Rollins his choice of the following: (1) sign a Letter of Commitment agreeing to comply with American's rules and regulations, including satisfactory work performance and personal conduct, and accept reassignment to another unit as a production supervisor; (2) voluntarily resign with transitional benefits and agree not to exercise any grievance rights; or (3) accept termination of employment with grievance options. Complainant's Brief, Exhibit A. Rollins informed American on October 22, 2002, that he would not agree to any of the options offered in the CDD Advisory. On that same date Rollins received a Final Advisory letter from Oliver Martins, American's Managing Director. That letter stated: "On Tuesday, October 22, 2002, you advised me that you would not accept any of the options offered to you. As this is your decision, you are hereby terminated from your employment with American Airlines effective immediately." Complainant's Brief, Exhibit C. On January 17, 2003, Rollins filed his whistleblower complaint. The only adverse action that Rollins alleges in his complaint is the termination. The parties do not dispute the facts that American issued Rollins the CDD Advisory letter on October 17, 2002; Rollins received the Final Advisory letter on October 22, 2002; and he filed the complaint on January 17, 2003.

The ALJ found that the 90-day limitation period began to run on October 22, 2002, when Rollins received the Final Advisory letter. Therefore, since Rollins filed a complaint on January 17, 2003, less than 90 days after receiving the Final Advisory, the ALJ concluded that Rollins's complaint was timely. American argues that the October 17 CDD Advisory letter triggered the limitations period and that, therefore, the complaint was not timely filed. Rollins argues, however, that the limitations period did not begin to run until October 22, 2002, when he informed American that he would not resign or accept transfer to another position in the plant, and American terminated his employment. Complainant's Brief at 13.

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[7] *See, e.g., Halpern v. XL Capital, Ltd.,* ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 3 (ARB Aug. 31, 2005).

[8] *Id.*

[9] *See Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

We find that the October 17 CDD Advisory, presenting the alternatives of reassignment, voluntary resignation, and involuntary termination, provided final and unequivocal notice to Rollins that American had decided to terminate his employment. Therefore, because American communicated its intent to implement the alleged adverse action of which Rollins complains, i.e., the termination of employment, on October 17, this date marks the occurrence of the alleged violation, rather than October 22, the date on which Rollins ultimately experienced the consequences of American's action. Accordingly, it was on this date that the 90-day opportunity to file a complaint began.[10] Consistent with *English* and *Wagerle*, the possibility that Rollins could have avoided the effects of the CDD Advisory by resigning voluntarily or accepting employment in another division does not negate the effect of the CDD Advisory's notification of American's intention to terminate Rollins's employment. Since Rollins failed to file his complaint within 90 days of the October 17 CDD Advisory, his complaint was untimely.[11]

CONCLUSION

Rollins has failed to demonstrate any genuine question of material fact relevant to the issue whether his complaint was timely filed. We therefore **GRANT** summary dismissal for American and **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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[10] *See English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988*), rev'd on other grounds*, 496 U.S. 72 (1990) (possibility of avoiding effects of an adverse decision does not render the decision equivocal where decision itself is not negated); *see also Wagerle v. The Hosp. of the Univ. of Pa.*, No. 93-ERA-1, slip op. at 3-6 (Sec'y Mar. 17, 1995) (statute of limitations begins to run on date complainant receives a "final and unequivocal" notice of the alleged adverse actions rather than at the time complainant ultimately experiences the effects of the actions.).

[11] For the first time on appeal, Rollins argues that he filed a timely oral complaint on December 16, 2002. Under our well-established precedent, we decline to consider an argument that a party raises for the first time on appeal. *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, slip op. at 7 (ARB Sept. 29, 2006).