U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 10 January 2008

CASE NO.: 2008-AIR-1

IN THE MATTER OF

SALVATORE LOGALBO, JR.

Complainant

v.

AMERICAN AIRLINES, INC.

Respondent

DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION

This proceeding arises under the employee protective provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (herein AIR 21), 49 U.S.C. § 42121, et seq., Public Law 106-181, Title V § 519 and the regulations thereunder at 29 C.F.R. Part 24.

On November 20, 2007, Respondent American Airlines (AA) filed a "Motion for Summary Dismissal" asserting that there is no genuine issue as to any material fact and that Respondent is entitled to a decision as a matter of law. More specifically, based on its submission, Respondent asserts Claimant has failed to timely file the instant complaint and therefore this proceeding should be dismissed in that it is barred by the statute of limitations.

On November 20, 2007, an Order issued to Complainant to show cause by December 10, 2007, why Respondents' motion should not be granted.

On December 10, 2007, Complainant filed an opposition to Respondent's motion. Complainant does not dispute the timing of the filings. However, Complainant contends that he must receive final, definitive, and unequivocal notice of action to trigger the running of the 90-day time period to file an AIR 21 complaint with OSHA. Specifically, Complainant avers he received final, definitive, and unequivocal notice of adverse action during the week of May 21, 2007, as opposed to the April 11, 2007 date asserted by Respondent in its motion. Further, Complainant argues his complaint was timely filed under the principles of equitable tolling.

Background

Complainant was hired by Respondent in 1992 and is currently a First Officer of the 737. As a commercial pilot, Complainant is required to comply with Federal Aviation Regulations (FAR). The details center around two trips for which Complainant was scheduled—one trip commencing on April 9-10, 2007, as well as a second trip beginning April 11 and terminating on April 13, 2007.

Accepting Complainant's version of the pertinent facts, on April 8, 2007, Complainant went to bed with a medium grade sinus problem that deteriorated through the night and interrupted his sleep. Complainant was scheduled to sign in for a flight the morning of April 9, 2007. The morning of April 9, Complainant awoke to a call from AA Crew Tracking inquiring why Complainant had not signed in for the scheduled trip. Complainant explained that he was sick and unfit to fly.

On April 11, 2007, Complainant received a written message from his supervisor, Chief Pilot Brian Fields, seeking an explanation as to why he went on the sick list for the April 9 trip. Complainant spoke with Chief Pilot Fields "soon after" and conveyed to him that he had informed AA Crew Tracking and AA Crew Schedules that he was sick and unfit to fly the morning of April 9. Chief Pilot Fields advised Complainant that he would do the following: (1) code the April 9-10 trip in question in a manner such that Complainant **would not be paid** and the time would be credited such that Complainant **would not be able to make up the lost pay**; (2) place a permanent entry in Complainant's personnel file; and (3) expressed to Complainant the need to inform the company in a timely manner of any illness.

A memo from Captain Fields to Complainant, dated April 17, 2007, advised Complainant that a Pilot Employment History (PEH) entry had been made in his personal file. The memo explained that the entry "is a permanent part of your personal file and does not constitute discipline or a step in the disciplinary procedure." The memo further stated the entry was available for inspection in the flight office during normal business hours and, as a matter of recourse in response to such entry, Complainant could provide a written rebuttal which would be attached and become part of the employment history.

On April 20, 2007, Complainant wrote Chief Pilot Fields an e-mail asking him to reconsider his position of Complainant's absence with a missed trip designation; a response from Chief Pilot Fields stated he would consider Complainant's request. Two weeks later, he saw Chief Pilot Fields in Tampa, Florida, and inquired as to his e-mail request; Chief Pilot Fields informed Complainant that the request was still on his desk and that he would discuss it with a fellow Chief Pilot. The week of May 21, 2007, Chief Pilot Fields advised Complainant that, after conferring with his fellow Chief Pilot, the decision was that Respondent would not rescind the punishment.

Complainant filed a complaint, dated and post-marked July 26, 2007, with the OSHA Regional Office in Atlanta, Georgia. His position was that Respondent's punishment was finalized the week of May 21, 2007, and requested that the Department of Labor and OSHA act on his behalf to see that his pay for April 9-10 was returned and the permanent entry in his personal file was removed.

On August 29, 2007, the Regional Administrator issued findings on the matter. Complainant was found to have been informed of adverse action on April 11, 2007, and, therefore, his complaint was dismissed due to it being filed untimely.

Complainant appealed to the Office of Administrative Law Judges, seeking the Court to: (1) declare that Complainant timely filed his AIR 21 complaint; (2) order Respondent to make Complainant whole by providing back pay for the time period in question, with interest and benefits; (3) direct Respondent to remove the permanent entry relating to the events in Complainant's personnel file and other Company files; (4) declare that Respondent pressured Complainant to violate FAR 61.53 and retaliated against him when he complied with FAR 61.53; (5) order Respondent to institute and carry out policies, practices, and programs that comply with FAR 61.53 that

eradicate the effect of its past/present unlawful practices; (6) award punitive damages against Respondent for its continuing pattern of reckless disregard for FAA regulations; and (7) such other relief as the Court deems necessary and proper.

DISCUSSION

A. Summary Decision

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d)(2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 1999-STA-21 (ARB Nov. 30, 1999)(under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No. 1993-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 1991-ERA-31 and 1991-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. However, such evidence must consist of more than the mere pleadings themselves. Id. at 324. Affidavits must be made on personal knowledge, set forth such facts as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. F.R.C.P. 56 (e).

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v. U.S. Department of Energy, Case No. 1998-CAA-10 (ALJ Sept. 28, 1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 1995-WPC-6 (ALJ Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. 18.40(c).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 1987-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. at 587.

Accordingly, in order to withstand Respondents' Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett v. Niagara Mohawk Power Co., Case No. 1986-ERA-2, 4 (Sec'y July 9, 1986). Timely filing or meeting requirements to toll the statutory time limit is an essential requirement.

B. Timeliness / Equitable Tolling

1. The Filing Period

The applicable statutory period in which an employee alleging retaliation in violation of AIR 21 must file a complaint is **ninety days** after the alleged violation occurred and was communicated to Complainant.[1]

[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

The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the respondent's employment decision. "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. Rollins v. American Airlines, Inc., ARB No. 04-140, Case No. 2004-AIR-9, slip op. @ 2-3 (ARB Apr. 3, 2007). The United States Supreme Court has held that the proper focus is on the time of the discriminatory act, not on the point at which the consequences of the act became painful. Chardon v. Fernandez, 454 U.S. 6, 9, 102 S. Ct. 28 (1981); Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498 (1980). The subsequent entertaining of a grievance by respondent does not suggest that the earlier decision was in any respect tentative, even if respondent expresses willingness to change its prior decision if the grievance is found to be meritorious. Id. at 261.

In the instant matter, Complainant was informed by Chief Pilot Fields on April 11, 2007, that he would: (1) code the April 9-10 trip in question in a manner that Complainant was not paid but the time would be credited so that Complainant would not be able to make up the lost pay; (2) place a permanent entry in Complainant's personnel file regarding the event; and (3) expressed to Complainant that he needed to inform Respondent in a timely manner of any illness. Complainant filed a complaint with OSHA on July 26, 2007. This filing was outside of the ninety day statutory period which tolled on July 11, 2007.

Complainant asserts that there was no adverse action taken against him in April 2007 and that he did not receive final, definitive, and unequivocal notice of an adverse action until the week of May 21, 2007, when Chief Pilot Fields informed him that Respondent would not change its position regarding the coding of the trip. By affidavit, Complainant stated that in May he was paid for work performed in April, and his May 25, 2007 paycheck did not include pay for his April 9-10 trip.

---

complaint with the Secretary of Labor alleging such discharge or discrimination." 49 U.S.C. § 42121(b)(1).

"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). . ." 29 C.F. R. § 1980.103 (d).

Complainant contends that Chief Pilot Fields' April 11, 2007 request for an explanation as to the reason for Complainant's absence on April 9, 2007, did not constitute a final, definitive, and unequivocal notice, and that the April 17 PEH entry establishes there was no adverse action taken against him in April 2007 due to the fact that the entry stated it did not constitute discipline or a step in the disciplinary procedure. While it is true that the written message from Chief Pilot Fields requesting an explanation did not constitute final, definitive, and unequivocal notice to Complainant, Complainant fails to address the subsequent conversation with Chief Pilot Fields "soon after," in which Chief Pilot Fields advised him that he would do the following: (1) code the April 9-10 trip in question in a manner such that Complainant would not be paid and the time would be credited such that Complainant would not be able to make up the lost pay; (2) place a permanent entry in Complainant's personnel file; and (3) expressed to Complainant the need to inform the company in a timely manner of any illness. Such communication did constitute final and unequivocal notice of Respondent's employment decision; the fact that the subsequent PEH entry stated the entry did not constitute discipline or a step in the disciplinary procedure does not render the original April 11 communication any less final or unequivocal.

While it is true that Chief Pilot Fields responded to Complainant's April 20, 2007 e-mail by stating he would consider Complainant's request for a reconsideration of the employment decision, the law is settled in this regard. The fact of subsequent negotiation "does not suggest that the earlier decision was in any respect tentative." Ricks, 449 U.S. at 261. Therefore, the possibility of a later reversal of Respondents' decision regarding the coding of the trip does not negate the finality of the adverse job action itself.

Further, Complainant's assertion that his November 25, 2007 HI 10 record, which appears to indicate the April 9-10 trip was coded as "sick" rather than "unpaid sick," establishes notice of the adverse action was ambiguous fails. Such a coding would not, standing alone, render the April 11 communication ambiguous, especially considering Complainant's own affidavit stating he was not paid for the April 9-10 trip. Accordingly, I find that Complainant was given final and unequivocal notice of

Respondent's employment decision on April 11, 2007, which constituted the commencement of Complainant's filing period. Consequently, I find and conclude that Complainant failed to file his complaint with the Department of Labor in a timely manner.

2. Equitable Tolling

Courts have held that time limitation provisions in like statutes are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather analogous to statutes of limitation and thus may be tolled by equitable consideration. Donovan v. Hakner, Foreman & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984); School District of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981); Coke v. General Adjustment Bureau, Inc., 654 F.2d 584 (5th Cir. 1981). The Allentown court warns, however, that the restrictions on equitable tolling must be **scrupulously observed**; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may be an otherwise meritorious cause. Rose v. Dole, 945 F.2d 1331, 1336 (6th Cir. 1991).

In Allentown, the court, relying on Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978), which interpreted Supreme Court precedent, observed that tolling might be appropriate (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Allentown, 657 F.2d at 19-20; see also Prybys v. Seminole Tribe of Florida, Case No. 1995-CAA-15 (ARB Nov. 27, 1996); see also Halpern v. XL Capital, Ltd., Case No. 2004-SOX-54 (ARB August 31, 2005).

Complainant cites two circumstances which he contends support an equitable tolling of the ninety-day time limit: (1) he was misled by Respondent; and (2) he was prevented from asserting his right due to an extraordinary circumstance.

Complainant contends Respondent misled him by issuing the PEH entry without reference to a reduction in pay; by coding the April 9-10 trip as "sick" in his HI 10 record but also coding the trip in a way that prohibited Complainant from making up his time; and by the response to Complainant's April 20 e-mail in which Chief Pilot Fields stated he would consider Complainant's

request for reconsideration. In analyzing whether or not Respondent "actively misled" Complainant, the proper focus is on the actions of the Respondent and not solely on an interpretation of those actions by Complainant. This is both a subjective and objective inquiry. Thus, to meet this standard for equitable tolling, Respondent must have acted or communicated in such a way as to be objectively misleading. Additionally, Complainant must have subjectively held a reasonable belief, based on the misleading conduct by Respondent, and have acted upon that belief.

Here, none of the actions cited by Complainant rise to the level sufficient to establish Complainant was actively misled by Respondent. Neither the PEH entry nor the HI 10 record establish Respondent was not adhering to the course of action articulated to Complainant by Chief Pilot Fields on April 11, 2007, and that Respondent was attempting to actively mislead Complainant. Further, it was Chief Pilot Fields' prerogative to reconsider his decision, and the communication to Complainant that he would reconsider his decision is no indication, standing alone, of any attempt to actively mislead Complainant. Accordingly, Complainant has offered insufficient proof in support of his argument that he was actively misled by Respondent. Consequently, I find and conclude that Complainant was not actively misled and, therefore, equitable tolling of his complaint is not warranted under this requirement.

Complainant also avers equitable tolling is appropriate because he was prevented from asserting his right due to an extraordinary circumstance. More specifically, he contends his sinus surgery of June 27, 2007, rendered him unable to take care of his personal business for a number of weeks—he called in sick to Respondent from June 23, 2007 to July 28, 2007, and was on pain medication for several weeks thereafter—and the statute should be tolled to account for his medical condition. While it is noted that the performing surgeon, Dr. Steven L. Bello, indicated the surgery was more extensive than originally anticipated, I find and conclude equitable tolling is not warranted under this requirement since there is no medical opinion that Complainant's medical hardship totally prevented him from asserting his rights. The "extraordinary circumstances" exception is premised on affirmative action/misconduct by Respondent which prevents Complainant from timely filing a complaint. Complainant has failed to demonstrate reliance on any conduct or action by Respondent which would conform to the extraordinary circumstances exception or support equitable tolling.

In light of the evidence presented and based on the foregoing jurisprudence, I find that the circumstances which Complainant cites as bases for equitable tolling are not persuasive. Consequently, I conclude that Complainant is not entitled to equitable tolling and it is recommended that Respondent's Motion for Summary Decision be **GRANTED.**

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion for Summary Decision be, and it is, **GRANTED.**

IT IS FURTHER ORDERED, in view of the foregoing, that the formal hearing scheduled for February 12, 2008, in Fort Meyers, Florida, is hereby cancelled.

ORDERED this 10th day of January, 2008, at Covington, Louisiana.

A

LEE J. ROMERO, JR.
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 the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(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. The Petition must also be served on 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.

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. § 1980.109(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).