



Issue Date: 22 May 2007

CASE NO: 2007-SOX-36

IN THE MATTER OF

**JAMES G. UBINGER,
Complainant**

v.

**CAE INTERNATIONAL
dba EMIRATES-CAE FLIGHT TRAINING,
Respondent**

**DECISION AND ORDER DISMISSING
THE COMPLAINT AND CANCELLING HEARING**

Background

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. By letter dated January 23, 2007, Complainant filed his complaint under the Act with OSHA alleging that he engaged in protected activity which resulted in his termination on March 31, 2006. In OSHA's determination dated March 7, 2007, OSHA ruled that Complainant's claim was untimely, the Respondent is not a covered employer and that Complainant's work assignment was not in the United States. Complainant appealed OSHA's determination, and the matter is now before the Office of Administrative Law Judges set for formal hearing on June 12, 2007. In his appeal, Complainant seeks a "waiver" and alleges he had no knowledge of "SOX 806."

Concerned over whether this office enjoyed jurisdiction, on May 3, 2007, a Sua Sponte Order to Show Cause issued requiring Complainant to show cause why his complaint should be considered timely under the Act. To this Order, Complainant, with the aid of his wife, filed a response on May 14, 2007, conceding

his untimely filing but seeking a “waiver.” Respondent also replied, but urged dismissal.

Contentions of Complainant

Complainant’s response starts with the second sentence stating “I was untimely in filing my OSHA complaint.” Complainant’s response, coupled with his original complaint, sets out he was a flight instructor and an air carrier examiner for Respondent in Dubai, United Arab Emirates, when he became concerned over copyright violations as well as the inadequate training or procedures used which did not meet standards and Respondent’s failure to obtain FAA required fingerprints and identification for the issuance of licenses to alien pilots. He communicated his concerns to Respondent, and he was terminated on March 31, 2006. Thereafter, Complainant had discussions with FAA and the FBI. He did not file his complaint with OSHA until January 23, 2007, but feels that his concerns are of such gravity that any time requirements under the Act should be waived. Aside from his written statement, Complainant filed the following items:

1. Speech given by Richard Fairfax to Homeland Security, outlining need for one year to investigate OSHA cases on their behave.
2. H.R. 985 Whistleblower Protection Enhancement Act of 2007. Introduced into the House on February 12, 2007.
3. HR. 1269 Rail and Public Transportation Security Act of 2007 (introduced in House).
4. National Strategy for Aviation Security March 6, 2007, stating need for more security for aviation.
5. Invoices of lawyers turned to for help.
6. Personal letter explaining medical injury incurred by James Ubinger on November 14, 2006.
7. FAA 8710.3E: Section 1.,2.,3.,4.
8. Department of Labor: MOU between FAA and OSHA.

9. Title 49: Transportation PART 1552, subpart B Flight School Awareness.
10. Flight School Security Awareness Certificate.
11. Title 49: Transportation PART 1552, subpart A.
12. TSA: 49 CAR Part 1552.
13. Whistleblower Protection Program (Air Carrier).

Discussion and Findings

29 C.F.R. § 1980.103 provides that a complaint for discrimination must be filed within 90 days of “when the discriminatory decision has been both made and communicated to the Complainant.” In other words, the Complainant’s date of awareness is the commencement date for the filing of a complaint. *See* in this regard *Marc Halpern v. XL Capital, LTD*, ARB Case No. 04-120 (Aug. 31, 2005).

In his response, Complainant concedes his complaint was untimely. Consequently, based on this unrefuted evidence, I find that Complainant became aware of the decision to alter his employment more than 90 days from the time that he mailed his complaint and that unless tolled Complainant’s complaint was untimely.

Turning next to the issue of tolling, in *Halpern, supra.*, the Board recognized three instances when such relief might be granted: 1) when the Respondent mislead the Complainant concerning the filing of his complaint; 2) the Complainant was in some way extraordinarily prevented from filing his claim or 3) Complainant raised the issue in the wrong forum.

In this instance, I conclude that Complainant has provided no legitimate excuse for not filing a timely complaint. The argument he has made does not constitute extraordinary circumstances warranting tolling of the limitations¹.

¹ Complainant’s concerns are made to sound serious and perhaps the subject for another agency’s inquiry, but that does not bestow jurisdiction under this whistleblower retaliation act.

ORDER

IT IS HEREBY ORDERED that Complainant's complaint is **DISMISSED** as untimely and the hearing scheduled in this matter for June 12, 2007, in Fort Worth, Texas, is **CANCELLED**.

So ORDERED this 22nd day of May, 2007, in Covington, Louisiana.

A

C. RICHARD AVERY
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).

