



In the Matter of:

ANTHONY L. WILLIAMS,

ARB CASE NO. 08-063

COMPLAINANT,

ALJ CASE NO. 2008-AIR-003

v.

DATE: September 21, 2009

UNITED AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Anthony L. Williams, *pro se*, Oakland, California

For the Respondent:

Michael Mankes, Esq., *Little Mendelson, P.C.*, Boston, Massachusetts

FINAL DECISION AND ORDER

Anthony L. Williams filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his former employer, United Airlines, Inc., violated the employee protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)¹ when it terminated his employment on May 8, 2003. A Labor Department Administrative Law Judge (ALJ) recommended that the complaint be dismissed. We affirm.

¹ 49 U.S.C.A. § 2121 (West 2008). Regulations that implement AIR 21 are found at 29 C.F.R. Part 1979 (2006).

BACKGROUND

The following facts are uncontested. Williams began working for United as an airline mechanic in 1989.² In July 2002, Williams wrote letters to the Federal Aviation Administration and a United vice president alleging that after he refused to falsify information relating to airline safety, his supervisor falsified the information.³ Then, on May 8, 2003, United terminated Williams because earlier that day he had been in an altercation with a union representative.⁴ Williams says that United fired him because of his letters about the false information.

On September 8, 2004, Williams filed a complaint against United in the United States District Court for the Northern District Court of California alleging several causes of action, including an AIR 21 complaint claiming retaliation for protected activity.⁵ The District Court granted United's motion for summary judgment and dismissed William's complaint.⁶ On appeal, the Ninth Circuit affirmed the dismissal on other grounds.⁷ The Ninth Circuit concluded that Williams failed to exhaust administrative remedies because he did not file his complaint with OSHA before filing in District Court.

Thereafter, on September 17, 2007, Williams pursued his administrative remedies by filing his AIR 21 complaint with OSHA. OSHA dismissed his complaint as untimely, and Williams filed objections with the Office of Administrative Law Judges. The ALJ assigned to the case issued a show cause order why the case should not be dismissed because the complaint was not timely filed. Both parties responded to the ALJ's show cause order. Based on the responses, the ALJ concluded that Williams did not file his OSHA complaint within AIR 21's 90-day limitations period and that he had not presented reasons why the limitations period should be tolled. He therefore recommended that the complaint be dismissed. Williams appealed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board (ARB or the Board).⁸ In cases arising under AIR 21, the ARB

² United ALJ Resp. to Show Cause, Tab 2, at 3 (Williams Sept. 8, 2004 Dist. Ct. Compl.).

³ United ALJ Resp. to Show Cause, Tab 2, at 5 (Williams Sept. 8, 2004 Dist. Ct. Compl.).

⁴ United ALJ Resp. to Show Cause, Tab 2, at 11-12 (Williams Sept. 8, 2004 Dist. Ct. Compl.).

⁵ 49 U.S.C.A. § 42121 (2003).

⁶ United ALJ Resp. to Show Cause, Tab 3 (District Court slip opinion).

⁷ *Williams v. United Airlines*, 500 F.3d 1019 (9th Cir. 2007).

⁸ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110(a).

reviews the ALJ's findings of fact under the substantial evidence standard. We review the ALJ's legal conclusions de novo.⁹

DISCUSSION

AIR 21 has a 90-day statute of limitations.¹⁰ United terminated Williams on May 8, 2003. Williams did not file his complaint with OSHA until September 17, 2007, over four years after his termination. The ALJ therefore correctly concluded that Williams did not file his OSHA complaint within 90 days of his termination.

The 90-day limitation period for filing an AIR 21 complaint is not jurisdictional and may, therefore, be subject to equitable tolling.¹¹ Like the ALJ, in determining whether to toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. of City of Allentown v. Marshall*.¹² In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,¹³ the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.¹⁴ We find that the ALJ properly applied the three part *Allentown* test.

The ALJ first noted that Williams did not argue that United had misled him, thus the first *Allentown* rationale for tolling did not apply.

⁹ 29 C.F.R. § 1979.110(b); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

¹⁰ 49 U.S.C.A. § 42121(b)(1); *see also* 29 C.F.R. § 1979.103(d) (“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), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee’s behalf, a complaint alleging such discrimination.”).

¹¹ *Ferguson v. Boeing Co.*, ARB No. 04-084, ALJ No. 2004-AIR-005, slip op. at 10 (ARB Dec. 29, 2005).

¹² 657 F.2d 16 (3d Cir. 1981). *See e.g., Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 3 (ARB Nov. 8, 1999).

¹³ 15 U.S.C.A. § 2622 (West 2004).

¹⁴ *Allentown*, 657 F.2d at 20 (internal quotations omitted).

Under the second *Allentown* rationale, that extraordinary circumstances prevented a timely filing, Williams argued that United's bankruptcy case protected United against his claim and that lawyers informed him that the bankruptcy meant that he would not be able to collect money on his claim. The ALJ found nothing "exceptional" about doubts as to one's ability to collect a judgment. And though the Bankruptcy Code does automatically stay proceedings concerning claims arising before the bankruptcy is filed, the ALJ found that Williams's claim arose after United's December 9, 2002 filing, and since the Bankruptcy Code does not protect debtors from claims arising after the bankruptcy filing, the automatic stay did not prevent Williams from filing on time. Finally, citing *Irwin v. Dept. of Veterans Affairs*,¹⁵ the ALJ correctly rejected Williams's contention that erroneous legal advice prevented him from timely filing.

Finally, Williams did not present the ALJ with evidence that the third *Allentown* rationale should apply. He argued that when he filed an AIR 21 complaint in the District Court, he mistakenly filed his AIR 21 claim in the wrong forum. But for this equitable tolling principle to apply, a complainant like Williams must show that he filed in the wrong forum but within the limitations period.¹⁶ Since Williams filed the AIR 21 claim in the District Court on September 8, 2004, more than 90 days after his May 8, 2003 termination, the ALJ properly did not apply the third *Allentown* rationale.

Williams argues that we should apply 29 C.F.R. § 1979.114, an AIR 21 regulation that permits the Board, in "special circumstances," to "waive any rule or issue any orders that justice or the administration of the Act requires." Along with the ALJ, we have already examined whether extraordinary circumstances exist that would justify tolling the 90-day limitations period. We will not apply this regulation because Williams has not shown that additional circumstances justify waiving or modifying the limitations period.

For the reasons stated, Williams's complaint is **DENIED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

¹⁵ 498 U.S. 89, 96 (1990).

¹⁶ *Allentown*, 657 F.2d at 20.