



In the Matter of:

MARK PETERS,

ARB CASE NO. 08-126

COMPLAINANT,

ALJ CASE NO. 2007-AIR-014

v.

DATE: September 28, 2010

AMERICAN EAGLE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mark Peters, G. Stanley Cramb, Esq., *Cramb & Marling, L.L.P.*, Bedford, Texas¹

For the Respondents:

Donn C. Meindertma, Esq., *Conner & Winters, L.L.P.*, Washington, District of Columbia

Before: Wayne C. Beyer, *Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Mark Peters filed a complaint with the United States Department of Labor (DOL) alleging that his employer, American Eagle Airlines, Inc., violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act). 49 U.S.C.A. § 42121 (Thomson/West 2007).² Eagle filed a motion for summary decision seeking dismissal of the complaint. *See* 29 C.F.R. §

¹ As of July 12, 2010, Attorney Cramb withdrew as Peters' counsel.

² Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2009).

18.40(a) (2010). A DOL Administrative Law Judge (ALJ) dismissed Peters' complaint as untimely filed. We affirm.

BACKGROUND

The undisputed material facts are as follows. Mark Peters was a pilot for Eagle based in Fort Worth, Texas, until 2000 when he moved to American Airlines. American furloughed him in 2004 and he returned to Eagle under the union's "flowback" provision.³ On July 21, 2006, Peters failed a line check. His remedial training on July 27 was unsatisfactory. Peters took two 90-day personal leaves of absence without pay. Complainant's Exhibits⁴ (CX) A at 1-5, B, and 8-9.

On February 2, 2007, Peters wrote to Eagle that "today marks my first day back" after the extended unpaid leave. Peters complained to Eagle managers that his July 2006 line check violated flight training protocols and jeopardized the safety of the passengers. CX E. Subsequently, Eagle told Peters that it would investigate his allegations and ordered him to report for training on March 7, 2007. CX F.

Peters' affidavit attached to his memorandum in opposition to Eagle's motion stated that he had received on February 10 an overpayment notification informing him that he would have to pay back the \$1,184.68 in wages he had been paid since February 2. CX A at 5-6. On February 12 he discovered that Eagle had ordered a "retroactive stoppage in [his] pay." *Id.* at 6. Peters stated that on March 5 he received an undated letter from Eagle advising him that his personal leave of absence had been retroactively extended from February 2 "as a courtesy" in light of his safety complaint and that his leave would expire on March 6. *Id.*, CX F. In an events timeline attached to his initial and amended complaints, Peters suggested that this "courtesy" was actually an attempt to retroactively extract pay he had received from February 2 to March 6. CX L.

On March 7, 2007, Peters did not attend training but informed Eagle that he "was forced to tender his resignation, under duress," with an effective date of March 12 so that he could obtain private medical insurance prior to his departure. CX G. Subsequently, Peters withdrew his March 7 resignation because he realized that he had failed to give two weeks' written notice as required by company policy. On March 10, he submitted a second resignation effective March 26, 2007. CX H. On March 19, 2007, Eagle informed Peters that in view of his announced resignation and failure to fulfill any of the

³ A flowback pilot is one who was working for Eagle during the furlough from American under the terms of the collective bargaining agreement between the airlines and the Air Line Pilots Association. The arrangement led to some employee dissension because a flowback pilot from American had seniority over an incumbent Eagle pilot. Peters' Deposition at 17, 28-29.

⁴ These lettered and numbered documents are attached to Peters' Memorandum in Opposition to Respondent's Motion for Summary Judgment.

duties of his pilot position, his resignation was processed effective March 16, 2007. CX I.

Peters filed a complaint on June 15, 2007, alleging that in retaliation for attempting to correct safety deficiencies Eagle had forced him to resign under duress. CX L. OSHA denied his complaint as untimely on July 17, 2007, and Peters requested a hearing before an ALJ. Prior to the hearing, Eagle filed a motion for summary decision on the grounds that Peters' complaint was untimely filed. The ALJ granted the motion and dismissed Peters' complaint. He appealed to the Administrative Review Board (ARB).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board (ARB). *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110.

The ARB reviews an ALJ's decision granting summary decision de novo. *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005). The same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003).

An ALJ may issue a summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. 29 C.F.R § 18.40(d). Accordingly, the ARB will affirm an ALJ's recommended granting of summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Fullington v. AVSEC Servs., L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 8 (ARB Oct. 26, 2005) (citations omitted).

DISCUSSION

The ALJ articulated the standard for granting summary decision and noted that the parties did not dispute that the effective date of Peters' complaint to OSHA was June 15, 2007. Decision and Order at 3. The ALJ assumed that Peters' resignation was a constructive discharge and therefore an adverse action, which occurred on March 7, "just as it would have had the adverse action been an unequivocal notice" that Eagle had fired him. *Id.* at 4. The ALJ found that Peters' March 10 letter "in no way" changed the fact that he had been constructively discharged on March 7. The ALJ therefore concluded

that Peters' June 15 complaint to OSHA was untimely as to the adverse action of constructive discharge on March 7. *Id.*

AIR 21 provides that “[no] air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment,” 49 U.S.C.A. § 42121(a), because the employee has engaged in certain protected activities.

Employees alleging employer retaliation in violation of AIR 21 must file their complaints with OSHA no later than 90 days after the alleged adverse action occurred. 49 U.S.C.A. § 42121(b)(1). The 90-day period begins to run from the day that “a final, definitive, and unequivocal notice” of an adverse employment action is conveyed to the employee. *Swenk v. Exelon Generation Co.*, ARB No. 04-028, ALJ No. 2003-ERA-030, slip op. at 4 (ARB Apr. 28, 2005).

Initially, for purposes of a motion for summary decision, we believe that the ALJ properly accepted as true that Peters' March 7, 2007 resignation “under duress” was a constructive discharge and therefore an adverse action. R. D. & O. at 4. When assessing the timeliness of the filing of a constructive discharge claim, the ARB has held that the date on which the employee resigns is the trigger date for a limitations period. *Nathaniel v. Westinghouse Hanford Co.*, ALJ No. 1991-SWD-002, slip op. at 11 (Sec’y Feb. 1, 1995).

We see no reason to depart from that precedent. *See Flaherty v. Metromail Corp.*, 235 F.3d 133, 138 (2d Cir. 2000) (the trigger date for the limitations period in a constructive discharge case is the date that the employee gives notice of resignation). Whether we accept Peters' initial resignation on March 7, 2010, or his second resignation on March 10 as the appropriate constructive discharge date, Peters' June 15 complaint to OSHA was filed more than 90 days thereafter. We thus turn our attention to the Peters' arguments as to why his complaint should nevertheless be deemed timely filed.

Peters argues on appeal that the ALJ erred in dismissing his complaint because genuine issues of material fact exist. One issue, according to Peters, is whether Eagle's efforts from March 7 through March 20 to collect the salary paid to Smith during his unpaid leave of absence in February constituted the last discrete adverse action that would toll the limitations period. Complainant's Brief at 2-4.

We reject this argument. First, Peters admitted that he had received a written repayment demand from Eagle on February 10. Second, he stated that he had learned on February 12 that Eagle had ordered a retroactive pay stoppage. Third, he was informed by letter on March 5 that Eagle had extended his unpaid leave from February 2 through March 6 as a courtesy. Finally, Peters did not consider this extension a courtesy but noted in his complaint that it could be viewed as an attempt by Eagle to extract from him the pay he had received during that period of unpaid leave.

Thus, Peters by his own admission was on notice prior to his March 7 resignation that Eagle would try to recoup from him the wages improperly paid during his unpaid leave. Peters did not file a complaint within 90 days of March 5 when he knew that Eagle intended to seek recoupment of improperly-paid wages. Thus, on the facts of this case, any subsequent attempts by Eagle to recoup these wages does not extend the 90-day limitations period. Accordingly, Peters' argument fails.

Peters cites *Patton-Davis v. Tennessee Valley Authority*, ALJ No. 1990-ERA-061 (Sec'y Feb. 22, 1994) in support of his argument that Eagle's attempt to collect improperly-paid wages extended the 90-day limitations period until March 20, 2007. Complainant's Brief at 7. That case states otherwise: "The ALJ correctly found that Complainant's receipt of her notice of termination by reduction in force on March 6, 1990, triggered commencement of the thirty-day filing period under the ERA. The case law and the prior decisions of the Secretary support the conclusion that the April 30 effective date of termination is not the date the alleged violation occurred but rather the date the consequences of the adverse action are ultimately felt." The Secretary concluded that, based on the March 6 date, the complaint was untimely filed.

Peters also argues that Eagle's acceptance of his resignation on March 19 was the triggering event for the limitations period and that therefore his complaint was timely filed. Peters claims that his initial resignation was rescinded and that Eagle considered him an active employee until it accepted his resignation on March 19. Complainant's Brief at 6-7.

The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date. The focus is on the time of the alleged discriminatory act, not on the point at which "the *consequences* of the act become painful." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). That date is either March 7 or March 10 when Peters communicated unequivocally to Eagle that he was resigning under duress. Subsequent actions such as Peters' changing the effective date of his resignation to March 26 or Eagle's "processing" of the resignation effective March 16 cannot extend the limitations period on the facts of this case.

Whether or not Eagle considered him to be an employee beyond the date of his resignation or when Eagle accepted the resignation is immaterial. As the ARB held in *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 34 (ARB Apr. 30, 2001), the date a complainant discovers that he has been injured is the date the claim accrues. Peters was well aware of the loss of his position because he stated that he was resigning under duress on both March 7 and March 10.

CONCLUSION

Peters did not timely file his complaint and has failed to demonstrate any genuine question of material fact relevant to whether his complaint was timely filed. Therefore,

Eagle is entitled to summary decision as a matter of law. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Peters' complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge