



In the Matter of:

STEVEN L. BASIC,

ARB CASE NO. 09-015

COMPLAINANT,

ALJ CASE NO. 2008-AIR-010

v.

DATE: October 21, 2010

SPIRIT AEROSYSTEMS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Steven L. Basic, pro se, Wichita, Kansas

For the Respondents:

Forrest T. Rhodes, Jr., Esq., Foulston Siefkin, L.L.P., Wichita, Kansas

Before: Paul M. Igasaki, Chief Administrative Appeals Judge, Luis A. Corchado, Administrative Appeals Judge, and Joanne Royce, Administrative Appeals Judge

FINAL DECISION AND ORDER

Steven L. Basic filed a complaint with the United States Department of Labor (DOL) alleging that his employer, Spirit AeroSystems, 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).¹ Spirit filed a motion for summary decision seeking dismissal of the complaint. See 29 C.F.R. § 18.40(a) (2010). A DOL Administrative Law Judge (ALJ) dismissed Basic's complaint as untimely filed. We affirm.

¹ Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2009).

BACKGROUND

We accept as true the following facts.² Basic worked for the Boeing Company as a stress analysis engineer at its Wichita, Kansas, operation until he was fired on September 10, 2004. In June 2005, Boeing sold the company to Spirit, which supplies commercial airplane assemblies and components. Many of Boeing's employees accepted jobs with Spirit, including Gary J. Cassatt, the managing engineer who had fired Basic.

In September 2005, Basic obtained an engineer's job with the Northrop/Grumman Corporation through a placement agency. As a necessary reference, Basic provided to Northrop/Grumman the name of his former manager, Cassatt, who:

immediately placed on the "Prescreen America," [sic] (a computer data system of potential employees) the following Blacklisting Comment [sic], that is still there. Steven Basic was discharged due to insubordination from the Boeing Co.

Basic's Complaint at 5.

Consequently, Basic alleged that the Northrop job was "denied" to him and "many other job opportunities were affected since then (Autumn of 2005) until now." Complaint at 6. The agency sent a September 8, 2005 e-mail to Basic, informing him that Northrop had officially rescinded its offer because a background check showed that he was separated from Boeing for insubordination.

On November 9, 2007, Basic filed a complaint with DOL's Occupational Safety and Health Administration (OSHA), because of the lost opportunity with Northrop and allegedly other lost employment. When Basic filed his complaint, he obviously knew that a Prescreen America posting existed in 2005, and that such posting generally asserted that Boeing discharged him for insubordination. Spirit has argued that Basic knew of the Prescreen America posting since 2005. Basic does not deny knowing of the Prescreen America posting since 2005; instead, he argues that he did not know the exact written content of the Prescreen America statement until 2008. Complainant's Brief at 2-3, 17-18.

OSHA denied Basic's complaint as untimely on May 12, 2008, and he requested a hearing before an ALJ. Prior to the hearing, Spirit filed a motion for summary decision

² The facts are taken from Basic's initial complaint and documents he submitted to the ALJ in support of his complaint.

on the grounds that Basic untimely filed his complaint.³ The ALJ dismissed Basic's complaint as untimely. 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 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). The ARB reviews an ALJ's determinations on procedural issues under an abuse of discretion standard, i.e., whether, in ruling as he did, the administrative law judge abused the discretion vested in him to preside over the proceedings. *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020, -036, slip op. at 8 (ARB June 2, 2006) (citations omitted). The ARB reviews the ALJ's legal conclusions de novo. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

DISCUSSION

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," because the employee has engaged in certain protected activities. 49 U.S.C.A. § 42121(a). The AIR 21 regulations provide that it is a violation for a covered employer to "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has [engaged in protected activity]." 29 C.F.R. § 1979.102(b).

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). 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).

Assuming Basic's allegations to be true, the ALJ found that Basic, by his own admission, did not file his complaint until November 9, 2007, more than two years after the alleged discriminatory action of blacklisting and well outside the 90-day statute of limitations. Decision and Order (D. & O.) at 3. The ALJ concluded that Basic had thus failed to state a claim upon which relief could be granted. *Id.* The ALJ also found that

³ Spirit also sought an award of attorney's fees pursuant to 29 C.F.R. § 1979.109(b) on the grounds that Basic's complaint was frivolous and brought in bad faith. Spirit did not appeal the ALJ's denial of Spirit's request. Thus, we need not consider the issue.

none of the documents Basic submitted in response to Spirit's motion for summary decision and thereafter supported the application of equitable tolling principles. See *Herchak v. America W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003)(complainant bears the burden of justifying the application of equitable tolling). Accordingly, the ALJ dismissed Basic's complaint as time barred. *Id.* at 4.

DOL's Rules of Practice and Procedure for Administrative Hearings before Administrative Law Judges (29 C.F.R. Part 18) provide that the "Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1(a). The Part 18 rules do not contain procedures for motions to dismiss for failure to state a claim upon which relief can be granted; therefore, Fed. R. Civ. P. 12(b)(6) applies. To justify dismissing a case under Rule 12(b)(6), the ALJ must conclude as a matter of law that the complainant would not be entitled to any relief under any set of facts proven in support of the claims pleaded. *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 3 (ARB Mar. 31, 2001).

As noted above, Basic argues on appeal that the ALJ erred in finding his complaint to be untimely filed because the exact wording of the "insubordination" comment on PreScreen America was discovered only during his deposition on July 24, 2008, and that should therefore be the starting point of the 90-day limitations period. Complainant's Brief at 2-5.⁴

We reject this argument. The alleged blacklisting first occurred in September 2005 when the placement agency informed Basic that Northrop/Grumman had rescinded its job offer because a background check showed that he had been fired for insubordination. Basic admitted that he knew after receiving the September 8, 2005 e-mail that Cassatt had provided the insubordination information and that Boeing had not changed the reason for his discharge in September 2004 as the settlement of his grievance had provided.⁵ Thus, Basic had definitive and unequivocal notice of the alleged blacklisting more than two years before he filed a complaint. Accordingly, his November 9, 2007 complaint was untimely filed.

⁴ Many of the documents Basic submitted to the ALJ and much of his brief on appeal discuss the merits of his allegations that Cassatt has slandered him and ruined his reputation. We need not reach the merits because Basic's complaint is time barred.

⁵ Basic grieved his discharge for insubordination and Boeing settled the matter by changing his discharge status to retirement effective September 24, 2004. Spirit stated in a settlement offer dated July 11, 2008, that it would work with Boeing and PreScreen America to correct the posted information referring to insubordination. Basic acknowledged this effort in a July 12, 2008 response to the ALJ.

We accept as true Basic's allegation that the blacklisting affected his employment opportunities after September 2005 to the present, but decline to modify the statutory limitation to permit Basic's complaint to proceed on its merits. It is well settled that the date a complainant discovers that he has been injured is the date the claim accrues. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 37 (ARB Apr. 30, 2001). To permit the consequences or continuing effects of the initial adverse action to revive expired or stale claims would render the filing time periods of whistleblower protection statutes such as AIR 21 a nullity. *Erickson v. U.S. Env'tl Prot. Agency*, ARB No. 03-002, ALJ No. 1999-CAA-002, slip op. at 21 (ARB May 31, 2006).

While Basic claimed that he did not see the PreScreen America printout until July 2008, he admitted that he was aware of the alleged blacklisting starting in September 2005, when Northrop/Grumman rescinded its offer, and continuing during the entire two years that he pursued further employment. The continuing effects of the September 2005 blacklisting during those two years do not permit modification of the 90-day statutory time limit. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos., 2006-SOX-037, -108, 2007-SOX-055, slip op. at 14 (ARB Apr. 30, 2008). Basic did not allege any other discreet acts that created a new claim resulting in a new limitations period. Consequently, all his alleged retaliatory harm stems from the alleged blacklisting that occurred in 2005.

Basic argued but has not alleged a sufficient basis supporting equitable tolling of the statutory limitation.⁶ Basic merely contends that the accrual date should not have commenced until he discovered the exact wording of the Prescreen America statement. However, by his own admission, Basic discovered in 2005 that there was a Prescreen America statement allegedly affecting his future employment opportunities and thus was on notice of his potential claim in 2005. *See Overall*, ARB Nos. 98-111, 98-128, slip op. at 37. Consequently, we affirm the ALJ's conclusion that neither the doctrine of equitable tolling nor the theory of a continuing violation applies. *Cf. Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 09-032, ALJ Nos. 2008-STA-020, -021, slip op. at 5 (ARB June 30, 2010) (remanding case for the ALJ to consider blacklisting claims accruing from the date of complainants' knowledge).

CONCLUSION

Basic did not timely file his complaint and made insufficient allegations supporting the application of equitable tolling principles or a continuing violation theory.

⁶ *See Sassman v. United Airlines*, ARB No. 05-077, ALJ No. 2005-AIR-004, slip op. at 7 (ARB Sept. 28, 2007) (ARB recognizes three situations that will toll a statute of limitations: (1) when the employer has actively misled the complainant regarding his whistleblower rights; (2) when the complainant has in some extraordinary way been prevented from filing a complaint; and (3) when the complainant has filed the complaint in the wrong forum). *See also* n.5.

Therefore, the ALJ properly dismissed his complaint as time barred. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Basic's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge