



In the Matter of:

BENJAMIN L. SELIG,

ARB CASE NO. 10-072

COMPLAINANT,

ALJ CASE NO. 2010-AIR-010

v.

DATE: January 28, 2011

AURORA FLIGHT SCIENCES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Benjamin L. Selig, *pro se*, Ashburn, Virginia

For the Respondent:

Stephen W. Robinson, Esq., *McGuire Woods LLP*, McLean, Virginia

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

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Benjamin Selig filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his former employer, Aurora Flight Sciences (Aurora), violated the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) when it terminated his employment. 49 U.S.C.A. § 42121 (Thomson/West 2007). AIR 21's implementing regulations

are found at 29 C.F.R. Part 1979 (2009). A Labor Department Administrative Law Judge (ALJ) recommended that the complaint be dismissed.¹ We affirm.

BACKGROUND

The following facts are uncontested. Selig worked for Aurora as a Propulsion Technician and A&P Mechanic. C. R. D. & O. at 1. He alleged that he informed Aurora and the Federal Aviation Administration that Aurora's employees engaged in unauthorized maintenance and recordkeeping practices. *Id.* Aurora placed Selig on temporary furlough on April 24, 2009. *Id.* On June 19, 2009, Evelyn Russell, Aurora's Human Resources Manager, spoke to Selig on the telephone and informed him that due to economic reasons Aurora was unable to recall furloughed employees and that he would receive a termination letter in the mail indicating that his employment would be terminated effective June 26, 2009. *Id.* at 2. On June 22, 2009, Aurora sent Selig the termination letter with a June 26, 2009 effective date, and he received the letter on June 23, 2009. *Id.*

On September 23, 2009, Selig sent his AIR 21 complaint claiming retaliation for protected activity to OSHA via Federal Express, and OSHA received it on September 24, 2009. *Id.* at 3. OSHA dismissed his complaint as untimely, and Selig filed objections with the Office of Administrative Law Judges.² See 29 C.F.R. § 1979.106(a). Aurora requested the ALJ to decide the matter on the record because the claim was time-barred. Thus, the ALJ issued an order directing the parties to submit arguments, and any supporting documentary evidence, addressing the issue whether Selig timely filed his complaint. Both parties responded to the ALJ's order. Based on the responses, the ALJ concluded that Selig 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. She therefore recommended that the complaint be dismissed. Selig filed a petition requesting the Administrative Review Board to review the ALJ's C. R. D. & O. See 29 C.F.R. § 1979.110(a).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in AIR 21 cases. 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. § 24.110. AIR 21's implementing regulations provide, "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 24.110(b). The Board reviews the ALJ's legal conclusions de novo.

¹ The ALJ issued a Recommended Order of Dismissal on February 25, 2010, in which she inadvertently listed Batesville Services as a Respondent. The only Respondent in this matter is Aurora Flight Services. Accordingly, the ALJ issued a Corrected Recommended Order of Dismissal (C. R. D. & O.) on March 17, 2010, deleting Batesville Services from the caption.

² Selig was represented by counsel in the OSHA proceedings, but appeared pro se before the ALJ.

Rooks v. Planet Airways, Inc., ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (citing *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)). Neither the Complainant nor the Respondent has disputed the ALJ's factual determinations; the Complainant does dispute the ALJ's application of the facts to the relevant law.

DISCUSSION

Employees alleging employer retaliation in violation of AIR 21's whistleblower protection provisions must file their complaints with OSHA "[w]ithin 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. § 1979.103(d).

The ALJ, citing 29 C.F.R. § 1979.103(d),³ found that because Selig filed his complaint with OSHA by Federal Express, the delivery date was the filing date. C. R. D. & O. at 3. Because the termination date for statute of limitations purposes is considered the date on which the discriminatory decision has been both made and communicated to the complainant, she also found that Aurora terminated Selig's employment on June 19, 2009, the date on which Russell informed him that his employment would be terminated, effective June 26, 2009. *Accord Sneed v. Radio One, Inc.*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008).

Selig argues on appeal that his employment was not terminated until June 26, 2009, the effective date of the termination. This argument fails because under AIR 21, a violation occurs when the discriminatory decision was "made and communicated" to Selig. 29 C.F.R. § 1979.103(d). Aurora had both made the decision to terminate Selig's employment and communicated that decision to him on June 19, 2009, – therefore that is the date any violation occurred and the date after which the 90-day time period began to run. To be timely, Selig's complaint had to be filed on or by September 17, 2009. Therefore, because Selig filed his complaint at the earliest on September 23, 2009, ninety-six days after Aurora terminated his employment, his complaint is untimely.

Nevertheless, AIR 21's limitations period is not jurisdictional, and therefore it is subject to equitable modification. *Williams v. United Airlines, Inc.*, ARB No. 08-063, ALJ No. 2008-AIR-003 (ARB Sept. 21, 2009) (citing *Ferguson v. Boeing Co.*, ARB No. 04-084, ALJ No. 2004-AIR-005, slip op. at 10 (ARB Dec. 29, 2005)). But the Supreme Court has noted that equitable relief from limitations periods is "typically extended . . . only sparingly." *Irwin v.*

³ This regulation provides, "The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt." 29 C.F.R. § 1979.103(d). It is not necessary to determine whether a complaint filed by Federal Express is considered filed when sent or when received, because as the ALJ further found that Selig's complaint would also be untimely even using the date it was sent, September 23, 2009, as the filing date. *See* C. R. D. & O. at 3 n.5. As discussed in the text of our decision, we agree.

Veterans Admin., 498 U.S. 89, 96 (1990). Selig bears the burden of justifying the application of equitable modification principles. *Accord Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d, 402, 404 (5th Cir. 1995)(complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

In determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,⁴ 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.” *Allentown*, 657 F.2d at 20 (internal quotations omitted). The Board has not found these situations to be exclusive. See *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 7-8 (ARB Mar. 31, 2010) (recognizing as an additional basis for equitable estoppel, “where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” (citations omitted)). We find that the ALJ properly determined that equitable modification is not warranted.

The ALJ first noted that Selig neither alleged or established that Aurora misled him, nor was there any evidence that Aurora or its employees ever did or said anything to dissuade Selig from asserting any claims. The ALJ also found that Selig did not establish that any extraordinary circumstances prevented him from timely asserting his rights. Further, Selig did not allege that he filed the precise statutory claim in the wrong forum. We agree with the ALJ that the *Allentown* tolling factors do not apply.

Selig has not alleged that any additional circumstances justify waiving or modifying the limitations period. He averred in his brief that “Aurora has a history of advising employees of their return to work on the last day of previous layoffs,” perhaps in an attempt to argue that he continued to believe that Aurora might return him to work until the effective date of his termination had passed. But once again, this argument ignores the fact that under AIR 21’s implementing regulations, violations occur on the date on which an employer decides to take an adverse action and communicates that decision to the employee. For Selig, this date was June 19, 2009, when Russell told Selig that he “was being dismissed for ‘Economic’ reasons.” Complainant’s Brief at 2. There is no indication in the record that Aurora said or did anything to suggest that its decision was not final. Therefore, equitable modification is not warranted.

⁴ 15 U.S.C.A. § 2622 (Thomson Reuters 2009).

CONCLUSION

We agree with the ALJ that Selig has failed to show good cause for his failure to timely file his AIR 21 complaint or to demonstrate that equitable modification principles should apply. Accordingly, we **DISMISS** his complaint as untimely.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge