



In the Matter of:

JOHN J. WOODS,

ARB CASE NO. 11-067

COMPLAINANT,

ALJ CASE NO. 2011-AIR-009

v.

DATE: December 10, 2012

BOEING-SOUTH CAROLINA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Laura C. Waring, Esq.; *Grimball & Carbaniss, L.L.C.*, Charleston, South Carolina

For the Respondent:

Cherie W. Blackburn, Esq.; *Nexsen Pruet, LLC*, Charleston, South Carolina

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

FINAL DECISION AND ORDER

The Complainant, John J. Woods, filed a complaint alleging that his employer, Boeing-South Carolina, retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century¹ and its implementing regulations.² On July 7, 2011, a Department of Labor

¹ 49 U.S.C.A. § 42121 (Thomson/West 2007)(AIR 21).

Administrative Law Judge (ALJ) concluded in an Order Granting Respondent's Motion for Summary Judgment and Dismissing Complaint (O. D. C.) that Woods "failed to file a claim of discrimination under the AIR 21 Act within 90 days from the date of the alleged violation, and that the doctrine of equitable tolling is not applicable in this case."³ Thus, the ALJ found that Woods's complaint was time-barred, and he granted Boeing's motion for summary judgment. For the following reasons, we affirm the ALJ's O. D. C. granting dismissal based on the untimeliness of Woods's complaint for alleged adverse actions taken up to and including the date of his termination, but remand the case for the ALJ to address Woods's allegations that he filed blacklisting complaints that were allegedly pending before the ALJ.

RESPONDENT'S MOTION TO STRIKE EVIDENCE NOT ON THE RECORD

As an initial matter we consider the Respondent's Motion to Strike Evidence Not on the Record.

As standard procedure, the Administrative Review Board requests the parties before it to submit along with their briefs, "an appendix . . . consisting of relevant excerpts of the record of the proceedings from which the appeal is taken . . ."⁴ Boeing moved the Board to strike seventeen documents from the Complainant's appendix (and references to these items in the Complainant's opening brief) because the documents were not included in the record before the ALJ, when he made his decision.⁵

² 29 C.F.R. Part 1979 (2012).

³ *Woods v. Boeing-South Carolina*, ALJ No. 2011-AIR-009, slip op. at 3 (July 7, 2011).

⁴ *See e.g.*, O. D. C. at 4.

⁵ The Respondent has requested the Board to strike the following documents:

1. AIR21 complaint dated 4/21/11 (contains supplemental text from the AIR21 complaint Woods submitted to the Department of Labor on March 10, 2011);
2. FAA Substantiation Letter dated July 27, 2011;
3. Letter from James Jenkins, Doctor of Medicine-Psychiatry, August 16, 2011;
4. FAA Special Technical Audit of Boeing Commercial Airplane Group;
5. HR Harassment Complaint;
6. Email from Marie L Laczynski to John J. Woods, July 26, 2010;
7. Performance Improvement Plan

Woods conceded that the August 16, 2011 letter from Woods’s physician and the July 27, 2011 FAA substantiation letter were not in the record before the ALJ.⁶ Woods further stated that he assumed that all the documents he submitted “with his complaint on March 10, 2011 and/or supplemental shortly thereafter as exhibits on April 12, 2011 in a binder were presumably within the scope and review of the Secretary and comprise the record on appeal.”⁷ But the proceedings before the ALJ were de novo.⁸ The Assistant Secretary for the Occupational Safety and Health Administration (OSHA) is only required to forward to the ALJ the original complaint and the findings and order.⁹ Thus whatever records were submitted on April 12, 2011, were not included in the record before the ALJ (nor subsequently before the Board).

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8. Reasonable Accommodation and Healthcare Provider Information Form;
 9. Repair Template;
 10. Boeing-South Carolina, PRO 784-Reasonable Accommodation, April 16, 2008;
 11. Boeing-South Carolina, POL 5-Equal Employment Opportunity, February 19, 2010;
 12. Boeing-South Carolina, PRO 3-Ethics and Business Conduct Program, December 18, 2008;
 13. Boeing-South Carolina, POL 2-Ethical Business Conduct, January 26, 2009;
 14. Reasonable Accommodation Request;
 15. Supplemental Candidate Information;
 16. Resume of John J. Woods;
 17. Boeing Applications.

Respondent’s Motion to Strike Evidence Not on the Record at 3-4.

⁶ *Id.* Woods proffered no reason for his failure to obtain the physician’s letter and enter it into the record before the ALJ. In any event, even if the letter had been in the record, for the reasons stated in our discussion of equitable tolling on the basis of medical conditions, *infra* at pp. 10-12, this generalized letter that describes episodes of depression since 2009, but does not even indicate that the doctor knew precisely what the relevant time period for filing the complaint was, would not have been sufficient to raise a genuine issue of material fact concerning whether Woods was entitled to equitable relief. Similarly the July 27, 2011 letter from the Federal Aviation Administration, even if part of the record, would not raise a genuine issue of material fact regarding whether Woods filed a timely complaint or was entitled to equitable tolling.

⁷ Reply to Boeing’s Statement of Facts and Return to Motion to Strike at 1.

⁸ 29 C.F.R. § 1979.107(b).

⁹ 29 C.F.R. § 1979.105(b).

When reviewing AIR21 whistleblower claims, the ARB is an appellate body whose review is generally limited to the record that was before the ALJ when he or she decided the case.¹⁰ But the Board may consider remanding a case to an ALJ to re-open a record where a party establishes that the party has submitted new and material evidence that was not readily available prior to the closing of the record.¹¹ Woods has made no such showing in this case. Most importantly, Woods did not specifically cite to any of this evidence, which he incorrectly believed the ALJ had, in support of any argument opposing the Respondent's contention, in its Motion for Summary Decision, that his complaint based on alleged adverse actions up to and including termination were untimely and that Woods was not entitled to equitable modification of the limitations period. Thus, Boeing's Motion to Strike Evidence Not on the Record (and reference to such records in the Complainant's brief) is **GRANTED**.¹²

BACKGROUND

Boeing-South Carolina hired Woods as a manufacturing engineer for Composite Materials Fabrication on or about September 21, 2009.¹³ For almost one year, Woods worked independently and without significant supervisory oversight of his daily work. In June 2010, Marie Laczynski became Woods's front line manager, and she held a verbal counseling session with Woods regarding completing his work in a timely fashion and e-mail etiquette.¹⁴

Woods filed a "retaliatory harassment" complaint with Boeing's HR Office on July 13, 2010.¹⁵ On July 26, 2010, Woods received his first performance concern e-

¹⁰ See *Pollock v. Continental Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 13, n.94 (ARB Apr. 7, 2010).

¹¹ *Accord* 29 C.F.R. § 18.54(c) ("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.").

¹² As this case was decided on a Motion for Summary Judgment, the ALJ has made no findings of fact. Thus statements included in the "Background" section of this decision are not intended to be fact findings. These statements are based on the uncontested portions of the ALJ's O. D. C. and the parties' uncontested allegations.

¹³ O. D. C. at 1.

¹⁴ Respondent's Response Brief at 3.

¹⁵ O. D. C. at 1-2; Complainant's Initial Brief at 3. There was no copy of this complaint in the record before the ALJ.

mail.¹⁶ In August 2010, Woods submitted his first draft template. On or about August 15, 2010, Boeing placed Woods on a Performance Improvement Plan for a period of 30 days and informed him that he must improve his performance or Boeing would terminate his employment.¹⁷

Woods “made a formal in person complaint to Jeffrey Culp in Boeing’s Ethics Office” on September 14, 2010.¹⁸ On September 21, 2010, Boeing informed Woods that his employment was terminated.¹⁹

Boeing’s EEO and Ethics Office informed Woods by telephone that his harassment complaint was dismissed on December 10, 2010.²⁰ On March 10, 2011, 90 days after receiving the phone call notifying Woods of the dismissal of his harassment complaint, and almost 180 days after receiving notification of his termination, Woods filed an AIR 21 complaint with OSHA.²¹

OSHA issued the Secretary’s Findings denying Woods’s complaint on May 3, 2011. Woods filed a timely request for hearing with the ALJ. Boeing filed a Motion for Summary Dismissal arguing that the ALJ should dismiss Woods’s complaint because he failed to raise a genuine issue of material fact establishing that he timely filed his AIR 21 complaint with OSHA within AIR 21’s 90-day filing requirement.²²

The ALJ concluded that the statute of limitations began to run on September 21, 2010, when Boeing informed Woods that his employment was terminated. The ALJ rejected Woods’s argument that his awareness was deferred until some months later when the EEO and Ethics Office informed him that his “non-AIR 21” complaints were denied because he had already been terminated for almost 3 months by then.²³ The ALJ also dismissed Woods’s argument that he was led to believe that filing his “collateral non-AIR

¹⁶ Complainant’s Initial Brief at 3.

¹⁷ O. D. C. at 2; Complainant’s Initial Brief at 3, Respondent’s Response Brief at 3.

¹⁸ O. D. C. at 2; Complainant’s Initial Brief at 4; Respondent’s Response Brief at 3. This was a verbal complaint. There is no description of this complaint in the ALJ’s record, nor indication that it was reduced to writing.

¹⁹ O. D. C. at 2; Complainant’s Initial Brief at 5, Respondent’s Response Brief at 3.

²⁰ O. D. C. at 2, Complainant’s Initial Brief at 5, Respondent’s Response Brief at 3-4.

²¹ O. D. C. at 2, Complainant’s Initial Brief at 5, Respondent’s Response Brief at 4.

²² Boeing South Carolina’s Motion for Summary Dismissal at 1.

²³ O. D. C. at 2.

21 related EEO and Ethics complaints” deferred the need to file a timely AIR 21 complaint, concluding that “Complainant offers nothing in support of this assertion other than mere speculation.”²⁴

Assessing Woods’s arguments under the *Allentown* equitable tolling standard,²⁵ the ALJ concluded:

There is no evidence that Respondent misled him in any way regarding his cause of action under the AIR 21 Act. There is no evidence that Respondent’s employees ever did or said anything to dissuade Complainant from initiating legal action of any kind in connection with his termination. Nor has Complainant established that there were any extraordinary circumstances that may have prevented him from timely asserting his rights under the AIR 21 Act.^[26]

Accordingly, the ALJ granted Boeing’s Motion for Summary Dismissal. Woods filed a timely petition for review with the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under the SOX and its implementing regulations.²⁷

We review an ALJ’s decision granting summary decision de novo.²⁸ 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 The party opposing a summary decision motion may not rest upon

²⁴ *Id.*

²⁵ *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981).

²⁶ O. D. C. at 3.

²⁷ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

²⁸ *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-014, slip op. at 3 (ARB Sept. 28, 2010).

²⁹ *Id.*; see also 29 C.F.R § 18.40(d).

mere allegations or denials of such pleading.³⁰ Rather, the response must set forth specific facts showing that there is a genuine issue of fact for determination at a hearing.³¹ 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.³²

DISCUSSION

1. The ALJ properly found that Woods failed to raise a genuine issue of material fact regarding whether he timely filed his AIR 21 complaint based on any alleged adverse actions taken up to and including Boeing's termination of his employment

The AIR 21 regulation establishing the limitations period for filing a retaliation complaint with OSHA provides that the complaint must be filed within 90 days after the alleged violation occurs, which is defined as "when the discriminatory decision has been both made and communicated to the complainant." Woods concedes that he was informed of his termination on September 21, 2010.³³ Thus to be timely, Woods would have had to have filed a complaint based on this termination no later than December 20, 2010. Woods filed his complaint with OSHA on March 10, 2011. Thus on its face, Woods's AIR 21 complaint was untimely.

Woods argues that the ALJ incorrectly found that the complaint was untimely on the basis of Woods's termination because AIR 21's protection is not limited to terminations, but also extends to intimidation, threats, restraints, coercion, and blacklisting and cites to a timeline of 20 allegedly "AIR 21-protected events" in which he engaged.³⁴ Of these 20 enumerated events, only three occurred within 90 days of the date on which Woods filed his complaint: 12/10/10 Culp informed Woods over the phone that his case was dismissed, 01/03/11 Boeing COO Borland responded to Woods's September 22 email and 03/10/11 Woods filed AIR 21 Complaint with OSHA/FAA. But

³⁰ 29 C.F.R. § 18.40(c).

³¹ *Id.*

³² *Peters*, ARB No. 08-126, slip op. at 3.

³³ Complainant's Initial Brief at 5.

³⁴ *Id.* at 8-10. The list of "AIR-protected events" did not include any incidents of blacklisting. Woods's blacklisting complaint will be treated separately in a discussion to follow.

Woods failed to allege how any of these “AIR-21 protected events” constituted adverse actions, especially given that Boeing had already terminated Woods’s employment when these events occurred. A broad allegation that Woods was discriminated against “in many other ways” is simply insufficient to establish that a timely complaint was filed in the absence of facts alleged that would show that Boeing took any adverse actions within the 90 days preceding the filing of Woods’s AIR 21 complaint.

2. The ALJ properly found that Woods failed to allege facts that would entitle him to equitable modification of the limitations period

In accordance with well-established Board precedent, AIR 21’s limitations period is not jurisdictional, and therefore it is subject to equitable modification.³⁵ But as Woods recognized,³⁶ the Supreme Court has noted that equitable relief from limitations periods is “typically extended . . . only sparingly.”³⁷ The party seeking to be relieved from the tolling bar bears the burden of justifying the application of equitable modification principles.³⁸

In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.³⁹ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Woods’s claim.⁴⁰

³⁵ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011); *Williams v. United Airlines, Inc.*, ARB No. 08-063, ALJ No. 2008-AIR-003, slip op. at 3 (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)).

³⁶ Complainant’s Initial Brief at 16.

³⁷ *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990).

³⁸ *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).

³⁹ *Selig*, ARB No. 10-72, slip op. at 3-4.

⁴⁰ *Id.* at 4.

Woods argues that Boeing “actively misled Woods throughout his career there” and that “Woods was induced into taking advantage of several internal processes, none of which found in his favor, but all of which culminated in the dismissal of his harassment complaint exactly one day after the 90 day AIR filing period had run.”⁴¹ The Secretary of Labor has ruled in an ERA case that the deadline for filing claims is not tolled when an employee engages in the employer’s internal review proceedings.⁴² Furthermore, the Secretary has recognized, that courts “generally have held that unless the employer has acted deliberately to deceive, mislead or coerce the employee into not filing a claim in a timely manner, equitable estoppel will not apply.”⁴³ Taken at face value, we find Woods’s argument that Boeing misled and induced him falls short of the kind of evidence needed for equitable tolling. First, for equitable tolling, the assertion that Boeing simply provided an EEO and Ethics procedure for harassment claims falls short of the kind of evidence needed to establish that Boeing improperly misled or “induced” Woods to make use of this procedure to his detriment. The fact that the EEO and Ethics Office did not find in Woods’s favor, in and of itself, is also not sufficient for tolling purposes. Further, Woods alleged no facts even suggesting that Boeing attempted to improperly induce, much less coerce, Woods into forgoing the filing of an AIR 21 complaint. Woods has alleged no facts establishing that Boeing is in any way responsible for the fact that Woods convinced himself that he was certain to prevail and so chose, of his own free will, not to file an AIR 21 complaint. And Woods’s statement that Boeing dismissed his harassment complaint one day after the filing period had run is incorrect. The 90-day limitations period began on September 21, 2010, and ended on December 20, 2010. Boeing informed Woods that it had denied his harassment complaint on December 10, 2010. Thus Woods had ten days, not one, to file his AIR 21 complaint after Boeing informed him that it had denied his harassment complaint.

Woods also points to a January 3, 2011 e-mail from Mathew Borland, Boeing’s Chief Operating Officer, as evidence that Woods received confusing and misleading communications concerning his employment status. In this e-mail Borland states, “I kept this in my follow-up file. Are there issues that need my support?” But this e-mail was dated more than 90 days after the termination date and 23 days after the December 10 notification to Woods that his harassment complaint had been denied (the date on which even Woods concedes the limitations period would have begun to run), so the e-mail fails to raise any issue of material fact regarding whether this alleged miscommunication mislead or confused Woods (although it does suggest some confusion on the part of

⁴¹ Complainant’s Initial Brief at 17.

⁴² *Ackison v. Detroit Edison Co.*, No. 1990-ERA-038, slip op. at 2 (Sec’y Aug. 2, 1990)(the Secretary also found that there was nothing in the record to justify equitable tolling).

⁴³ *Tracy v. Consolidated Edison Co.*, No. 1989-CAA-001, slip op. at 5 (Sec’y July 8, 1992).

Borland). Further Woods conceded that he understood that Boeing terminated his employment on September 21, 2010, thus there was no confusion as to this salient fact.

We also reject Woods's argument that he filed the precise complaint in the wrong forum. Initially we note that there is no copy of the July 13, 2010 written complaint or precise description of the September 14, 2010 oral complaint in the record. Further neither of these complaints could have been the precise complaint based on the termination of Woods's employment because Boeing had not yet terminated his employment when Woods filed these complaints. In addition, other than Woods's unsupported assertions, Woods has pointed to no evidence of record to support his contention. Further, the Board has held that even if a complainant has alleged elements and facts in an EEO complaint, which likely overlapped with those found in his whistleblower complaint, this overlap was not sufficient to establish that the complainant attempted to file the precise complaint under a whistleblower statute with the EEO.⁴⁴ Accordingly, we agree with the ALJ that Woods has failed to allege a genuine issue of material fact that he attempted to file an AIR 21 whistleblower complaint with Boeing's EEO and Ethics Office.

Woods also argues that the ALJ erred by failing to rule on the unlikely possibility of prejudice to the Respondent.⁴⁵ But while an absence of prejudice to the non-moving party will be considered in determining whether to toll the limitations period if such tolling is otherwise justified, such a factor is not relevant in determining whether Woods presented a sufficient justification for doing so in the first instance.⁴⁶ Whether or not the Respondent has been prejudiced by Woods's untimely filing, Woods has not demonstrated one of the four grounds upon which to justify equitable tolling or any other proper ground.

In addition, Woods argues that the "ALJ overlooked an extraordinary set of disabilities which worked against Woods and which were exacerbated by Boeing's

⁴⁴ *Udofot v. NASA/Goddard Space Center*, ARB No. 10-027, ALJ No. 2009-CAA-007, slip op. at 6 (ARB Dec. 20, 2011), citing *Johnson v. Roadway Express, Inc.*, 421 U.S. 454, 467, n.14 (1975) ("Only where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period."); *Lewis v. McKenzie Tank Lines, Inc.*, ALJ No. 1992-STA-020 (Sec'y Nov. 24, 1992) (Even though the complainant's EEOC complaint referenced a protected activity . . . and an adverse action . . ., the Secretary held that the complainant had not filed his STAA complaint in the wrong forum.).

⁴⁵ Complainant's Initial Brief at 21.

⁴⁶ *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ 2006-ERA-001, slip op. at 7-8 (ARB Nov. 17, 2010), citing *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).

toleration of his harassment.”⁴⁷ The Board has recognized that mental incapacity could qualify for tolling as an extraordinary reason that the petitioning party was prevented from filing, but the party must make a particularly strong showing.⁴⁸ Further, the Board has adopted the traditional rule that mental illness tolls the limitations period only if the illness in fact prevents the petitioning party from managing his affairs and thus from understanding his legal rights and acting upon them.⁴⁹

In *Hall v. E.G.&G.*, in response to the respondent’s motion to dismiss on timeliness grounds, the complainant introduced a report by a psychiatrist who had treated him for approximately 18 months and who had diagnosed him as suffering from major depression. But nothing in the psychiatrist’s report indicated that the complainant was not capable of handling his affairs or understanding his legal rights. The complainant also submitted an affidavit attached to his Opposition to Respondent’s Motion to Dismiss in which he stated that at the time of his termination from employment he was “suffering from a particularly difficult time of depression and was unable to do anything beyond [his] basic needs.”⁵⁰ But the Board found the affidavit insufficient to create a genuine issue of fact because it did not assert that the complainant was unable to understand his legal rights or was incapable of filing a complaint with the Department of Labor.⁵¹ Further the Board noted that other evidence in the record indicated that the complainant was capable of understanding and addressing his legal rights during the filing period.

Similarly, Woods does not point to any material fact question raised by his response to the Motion to Dismiss adequately addressing this issue. He stated in his response that he was an ADA-protected individual and had requested ADA accommodations for ADD, OCD, and Dysthmia [sic] (Depression), and argued that an administrative bar here would prevent an ADA-protected individual from exercising rights.”⁵² First, Woods’s claim that his disability prevented him from filing a claim 90 days after his termination contradicts his first argument that he did not file because Boeing deliberately lulled him into not filing. Moreover, Woods’s response cites to no evidence or even alleges that he was so disabled by these or any other conditions that he was unable to manage his affairs and thus did not understand his legal rights or was

⁴⁷ Complainant’s Initial Brief at 23.

⁴⁸ *Hall v. E.G.&G. Defense Materials, Inc.*, ARB No. 98-076, ALJ No. 1997-SDW-009, slip op. at 2 (ARB Sept. 30, 1998).

⁴⁹ *Id. citing Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996).

⁵⁰ *Hall*, ARB No. 98-076, slip op. at 3.

⁵¹ *Id.*

⁵² Complainant’s Response to Boeing South Carolina’s Motion for Summary Dismissal at 7.

unable to act upon them. To the contrary, Woods cites to eight e-mails that he sent to Culp within 90 days of the date on which Boeing terminated his employment concerning the status of the EEO/Ethics investigation and his entitlement to alternative dispute resolution.⁵³ Woods also claims to have applied to more than 100 jobs following his termination.⁵⁴ And, Woods argued to the Board that “[S]ubstantial evidence proves that [Woods] actively pursued his remedy by filing his AIR 21 claim within the 90 day period following the adverse decision by Boeing dismissing his safety complaint [ten days of which fell within the limitations period]. . . . Here, where numerous complaints were made and pursued, it cannot be said the Complainant sat on his rights.”⁵⁵

Finally, Woods cites to no precedent holding that having the status of an ADA-protected individual is in and of itself sufficient to establish entitlement to equitable tolling of the limitations period. Accordingly, we hold that the ALJ correctly determined that Woods failed to raise a genuine issue of material fact regarding his entitlement to equitable tolling of the limitations period on any claims of adverse action up to and including Boeing’s termination of his employment.

3. The ALJ should have addressed Woods’s claim that he made timely blacklisting complaints

Woods argues that the ALJ erred when he failed to address his complaint that Boeing blacklisted him following its termination of his employment. The ALJ did not address the issue whether Woods made a complaint of blacklisting and we agree with Woods that he should have addressed this issue. The evidence that Woods actually made such a complaint is not entirely clear. The Secretary’s May 3, 2011 Findings state,

Complainant states that since his discharge he has applied for 49 different positions at Boeing SC but has not been invited to any interviews and has received numerous notices of non-selection. Complainant contends that these post-discharge adverse actions should toll the limitations period of the instant complaint. In support of his contention, Complainant cites *Section 1v, (A)* of the OSHA Whistleblower Investigations Manual, which states, “If the discrimination is of a continuing nature,

⁵³ Complainant’s Initial Brief at 9.

⁵⁴ *Id.* at 25. In his response to Boeing’s motion for summary dismissal, Woods claims to have applied for “roughly 220 jobs since his termination.” Complainant’s Response to Boeing South Carolina’s Motion for Summary Dismissal at 8. When he filed his OSHA complaint, he alleged that he had applied for 49 positions.

⁵⁵ *Id.* at 22.

such as harassment or blacklisting, the time period begins when the last act of discrimination occurs.”

Woods, in his response to Boeing’s motion for summary dismissal responded, “Mr. Woods propounds that he has submitted resumes for roughly 200 jobs since his termination, the most recent being 06/02/2011, and although Boeing denies that it has engaged in hostility, it is a blacklisting that cannot be ignored.” Whether Woods filed a separate complaint for blacklisting or merely intended to rely on blacklisting as grounds for tolling the limitations on a continuing violation theory, or whether his intentions make any difference in resolving the blacklisting allegation, in any event are questions that the ALJ should have addressed in the first instance. Therefore, it is appropriate to remand the case to the ALJ so that he can address whether a blacklisting claim was pending before him and then decide the next appropriate steps.

CONCLUSION

Because the ALJ correctly determined that Woods failed to allege any genuine issues of material fact regarding whether he filed a timely AIR 21 complaint or was entitled to tolling of the limitations for any alleged adverse actions up to and including Boeing’s termination of his employment, we **AFFIRM** his decision dismissing Woods’s complaint based upon any such adverse actions. Because the ALJ failed to address the issue whether Woods filed a blacklisting complaint, we **REMAND** this case for the ALJ to resolve that limited issue, and if he finds that such complaint was filed, to adjudicate such complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge