



In the Matter of:

SANDRA BARRETT,

ARB CASE NO. 12-075

COMPLAINANT,

ALJ CASE NO. 2012-AIR-010

v.

DATE: February 28, 2014

**SHUTTLE AMERICA/
REPUBLIC AIRWAYS,**

RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Sandra Barrett, *pro se*, Riverdale, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Sandra Barrett filed a complaint against her employer, Shuttle America/Republic Airways, under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act) and its implementing regulations.¹ She alleged that Shuttle America disciplined her in violation of the Act. The Department of Labor's (DOL) Occupational Safety and Health Administration

¹ 49 U.S.C.A. § 42121 (Thomson/West 2013); 29 C.F.R. Part 1979 (2013).

(OSHA) dismissed Barrett's complaint as untimely, and she requested a hearing before an Administrative Law Judge (ALJ). On May 31, 2012, prior to a hearing, the ALJ dismissed the complaint as untimely. Barrett appealed to the Administrative Review Board (ARB).² We affirm.

BACKGROUND

Sandra Barrett, a flight attendant for Shuttle America since 2006, submitted an "irregularity" report on October 25, 2010, to her in-flight manager, Donna Bandy-White, about the behavior of Captain John Wick on Flight 7634 from Chicago to Austin, Texas. Barrett also called the whistleblower hotline noting that "something seem[ed] wrong" about Captain Wick's behavior.

On October 30, 2010, Shuttle America suspended Barrett for three days with pay and issued her a written final warning due to "poor customer relations, aggressive and threatening behavior toward fellow crew members, and complete lack of respect for the authority of the pilot in charge." On November 2, Barrett returned to work. After receiving an official copy of the disciplinary notice on December 6, 2010, Barrett filed a grievance. The grievance hearing was held on February 11, 2011, the company denied the grievance on March 10, 2011, and the union declined to appeal the denial.

Barrett filed a complaint against Shuttle America on March 4, 2011, alleging that the company suspended her from October 30 to November 2, 2010, in retaliation for reporting pilot safety concerns to management. OSHA investigated and dismissed the complaint on February 23, 2012, because it was not filed within 90 days of the suspension and final warning. Barrett then requested a hearing before an ALJ.

The ALJ issued an order on May 16, 2012, requiring Barrett to show cause why her March 4, 2011 complaint should not be dismissed as untimely. The order informed Barrett that AIR 21 required that a complaint be filed within 90 days of the adverse employment action.³

In a May 25, 2012 letter to the ALJ, Barrett asserted that her supervisor had "purposely delayed" sending her a certified copy of the suspension notice so that she could not file her complaint on time. She stated that Shuttle America managers "knew the proper process and procedure" but did not inform her. Barrett explained that the

² No representative of Shuttle America participated in proceedings before the ALJ or responded to this appeal before the Administrative Review Board.

³ 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.").

“union’s non-help with the grievance took another 2-3 months.” She added that after she learned that her grievance was denied, she “turned to outside help” and was advised to file a complaint with OSHA.

The ALJ determined that Barrett’s decision to pursue a union grievance under the collective bargaining agreement, and any delay by the union in providing assistance in the grievance process did not provide grounds for equitable tolling of the 90-day deadline for filing an AIR 21 complaint.⁴ He also rejected Barrett’s claims that her supervisor “held out” on her and thus delayed the filing of her complaint. Finally, the ALJ determined that Shuttle America had no obligation to inform Barrett of a potential cause of action under “known or unknown statutes” or the deadline for action under those statutes.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in AIR 21 cases.⁵ The ARB reviews the ALJ’s legal conclusions de novo.⁶

DISCUSSION

Barrett does not dispute that she filed her complaint outside AIR 21’s 90-day limitations period, which began on October 30, 2010, when Shuttle America suspended her. Because Barrett filed her complaint beyond the 90-day deadline, we address whether the deadline for filing can be equitably modified.⁷

Generally, in determining whether equity requires the tolling of a statute of limitations, the ARB follows the principles that courts have applied to cases with

⁴ *Barrett v. Shuttle America*, ALJ No. 2012-AIR-010 (May 31, 2012).

⁵ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

⁶ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

⁷ Equitable modification consists of equitable tolling, which focuses on the employee’s excusable ignorance of an employer’s discriminatory actions, and equitable estoppel, which examines the employer’s conduct and the extent to which the employee has been induced to refrain from exercising her rights. *Udofot v. NASA Goddard Space Ctr.*, ARB No. 10-027, ALJ No. 2009-CAA-007, slip op. at 4-5 (ARB Dec. 20, 2011). *See also Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010).

statutorily-mandated filing deadlines.⁸ The ARB has articulated four instances in which tolling may be proper:

- (1) the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his rights,
- (3) the complainant has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum, or
- (4) the employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights.^[9]

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.¹⁰ Further, ignorance of the law does not generally support a finding of entitlement to equitable tolling.¹¹

Barrett does not assert that she filed a complaint in the wrong forum by mistake. Nor does she contend that Shuttle America actively misled her about filing an AIR 21 complaint or lulled her into foregoing vindication of her rights. Rather, she argues that Shuttle America and Bandy-White did not give her the official notice of her suspension and final written warning until December 6, 2010, which delayed the filing of her complaint. She contends that she is entitled to equitable tolling on the ground that she was prevented in some extraordinary way from asserting her rights.

The 90-day filing period begins to run on the date that the complainant receives a "final, definitive, and unequivocal notice of the adverse employment action."¹² Final

⁸ *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (ARB Feb. 28, 2007).

⁹ *Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 4 (ARB Jan. 28, 2011); *Hyman v. KD Res.*, ARB No. 09-076, slip op. at 7-8. *See School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

¹⁰ *Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-060, slip op. at 5 (ARB Sept. 30, 2010).

¹¹ *Cooley v. Hyannis Air Serv.*, ARB No. 09-126, ALJ No. 2005-AIR-014, slip op. at 5 (ARB Dec. 10, 2009); *Edmund v. Metro. Transit Auth.*, ARB No. 09-034, ALJ No. 2009-STA-003, slip op. at 5 (ARB Nov. 19, 2009).

¹² *Rollins v. Am. Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 3 (ARB Apr. 3, 2007)(re-issued).

and definitive notice means communication that is decisive or conclusive, leaving no room for further action, discussion, or change. Unequivocal means unambiguous.¹³

Barrett acknowledged in her initial complaint to OSHA on March 4, 2011, that Bandy-White notified her of the three-day suspension on October 30, 2010.¹⁴ She also admitted that she participated in a telephone conference call on that date with Bandy-White and a union representative and learned of her suspension and warning.¹⁵ Thus, Barrett received definitive and unequivocal notice of Shuttle America's adverse action in ample time to file a timely complaint.

In response to the ALJ's show-cause order, Barrett claimed that Bandy-White "purposely withheld documents" until it was past time for timely filing, "maybe because she was quite knowledgeable of the time-span for filing."¹⁶ However, the whistleblower provision of AIR 21 does not require that Shuttle America notify Barrett of her right to file an OSHA complaint in the context of disciplinary matters.¹⁷ Even if Bandy-White had procrastinated in sending the letter, there is no evidence that she did so to prevent Barrett from filing an AIR 21 complaint. Nor does the record contain any evidence of an extraordinary event that prevented Barrett from filing her complaint with OSHA.

Barrett further argues that the union caused the late filing of her OSHA complaint by failing to pursue her grievance promptly under the collective-bargaining agreement. The U.S. Supreme Court has addressed whether participation in a grievance process tolled the commencement of a statute-of-limitations period. In *Delaware State Coll. v. Ricks*, the Court reaffirmed its prior holding that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods."¹⁸ As the Court noted, pursuing a grievance about an employer's adverse action does not suggest that the decision itself was tentative. The grievance

¹³ *Id.* See also *Kaufman v. U.S. Envir. Prot. Agency*, ARB No. 10-018, ALJ No. 2002-CAA-022, slip op. at 3 (ARB No. 30, 2011).

¹⁴ The complaint is a form completed by an OSHA representative.

¹⁵ Complainant's Appendix at 16 (Barrett's Nov. 12, 2010 letter to Bandy-White). See *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 23 (2d Cir. 1985) (limitations period "starts running on the date an employee receives definite notice of" an adverse action, and "[t]he notice may be oral.").

¹⁶ Complainant's May 25, 2012 letter to the ALJ .

¹⁷ See, e.g., *Udofot*, ARB No. 10-027, slip op. at 6 (ARB stating that "NASA was not obligated to inform [complainant] of all his potential causes of action against NASA.").

¹⁸ 449 U.S. 250, 258 (1980). See *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent).

procedure by its very nature is a remedy for a prior decision, not an opportunity to influence that decision.¹⁹ Nothing precluded Barrett from filing a complaint with OSHA before she filed a grievance or while the grievance was pending.

Mindful of our obligation to “construe complaints and papers filed by pro se litigants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude,”²⁰ we must conclude that Barrett simply failed to show cause why her complaint should not be dismissed as untimely.

CONCLUSION

We agree with the ALJ that Barrett failed to show good cause for her failure to file her AIR 21 complaint within the limitations period or to meet her burden of proof to demonstrate that equitable modification principles should apply. Accordingly, we **DISMISS** her complaint as untimely.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁹ *Snyder v. Wyeth Pharm.*, ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 8 ARB Apr. 30, 2009)(citing *Ricks*, 449 U.S. at 260-61).

²⁰ *Walum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 7 (ARB Sept. 11, 2011) (internal citations omitted).