In the Matter of:

JOHN J. WOODS, **ARB CASE NO. 13-035**

COMPLAINANT, **ALJ CASE NO. 2011-AIR-009**

v. **DATE: March 20, 2014**

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. and Michael P. Scott, 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 Administrative Review Board issued a decision and order of remand in this case arising under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] on December 10, 2012.[2] In

[1] 49 U.S.C.A. § 42121 (Thomson/West 2007)(AIR 21). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2013). The Secretary of Labor has delegated authority to issue final decisions in AIR 21 cases to the Administrative Review Board. 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. § 1979.110(a).

that decision, the Board held that a Department of Labor Administrative Law Judge (ALJ) properly found that Complainant John J. 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 Respondent Boeing-South Carolina took, up to and including, Boeing's termination of his employment. The Board also held that the ALJ properly found that Woods failed to allege facts that would entitle him to equitable modification of the limitations period. But the Board concluded that the ALJ should have addressed Woods's claim that he made timely blacklisting complaints. Specifically, the Board wrote, "Whether Woods filed a separate complaint for blacklisting or merely intended to rely on blacklisting as grounds for tolling the limitation 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."[3] Accordingly, the Board remanded the case to the ALJ to decide the limited issue whether Woods filed a blacklisting complaint and, if so, to adjudicate such complaint.[4]

AIR 21 provides that no air carrier or an air carrier's contractor or subcontractor may discharge an employee or otherwise discriminate against an employee with respect to his or her compensation or the terms, conditions, or privileges of employment because the employee engaged in protected activity as defined by the Act.[5] AIR 21's implementing regulations provide that it is a violation of AIR 21 for an air carrier or an air carrier's contractor or subcontractor to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee because he or she has engaged in protected activity.[6] The regulations expressly identify "blacklisting" as an independent basis for asserting a whistleblower claim, but the regulations left the term undefined. The Board has discussed this term under other whistleblower statutes and generally stated that "[b]lacklisting occurs when an individual or a group of individuals

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2 *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB D. & O. I).

3 ARB D. & O. I at 12. A continuing violation is not strictly speaking a ground for tolling. Instead, a continuing violation forestalls the commencement of the limitations period for as long as the continuing violation is ongoing. *Garn v. Benchmark Techs.*, No. 1988-ERA-021, slip op. at 7 (Sec'y Sept. 25, 1990). Further, the retaliatory acts of discharge and blacklisting in this case are separate and discrete acts, which cannot be considered together as constituting one continuing violation. The relevant cases have generally held that the doctrine of continuing violation does not apply to acts such as discharge, which is a completed, immediate violation. *Id.* at 4.

4 *Id.* at 13.

5 49 U.S.C.A. § 42121(a).

6 29 C.F.R. § 1979.102(b).

acting in concert disseminates damaging information that affirmatively prevents another person from finding employment."[7]

On remand, the ALJ did not specifically find whether Woods had made an independent claim for blacklisting in his initial OSHA complaint. Instead, he found, "A review of the numerous submissions arguably shows that Complainant has raised **the issue** of blackballing by Respondent and the Presiding Judge should have addressed **this issue**."[8]

The ALJ makes two findings. First he states that Woods is not entitled to equitable tolling of the filing deadline due to "blackballing" because the Supreme Court held in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 102 (2002) that equitable tolling does not apply to discrete discriminatory acts such as blacklisting.[9] This finding is a misstatement of the *Morgan* holding. The Court, in fact, held that equitable tolling may apply (although sparingly) to discrete acts such as blacklisting.[10] But the only relevant issue upon remand was whether Woods, in fact, filed such complaint, not the timeliness of any such complaint.[11]

The ALJ also found that Woods's allegation that he applied for numerous jobs and was not hired could not resurrect the filing period **for the termination** citing *Burnham v. Amoco Container Co.*, 755 F.2d 893 (11th Cir. 1985) for the proposition that a failure to re-hire subsequent to an alleged discriminatory firing, absent a new and discrete act of discrimination in the refusal to re-hire itself, cannot resurrect the old discriminatory act. But again the ALJ failed to answer the salient question, whether

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[7] *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 11-021, ALJ Nos. 2008-STA-020, -021, slip op. at 6 (ARB June 28, 2012)(quoting *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, -059; ALJ No. 2001-CAA-018, slip op. at 8-9 (ARB Nov. 28, 2003)(citation omitted)). See also, *Garn*, No. 1988-ERA-021, slip op. at 9 n.3 (Sec'y)(quoting BLACK'S LAW DICTIONARY ("A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate . . . .")).

[8] *Woods v. Boeing-South Carolina*, ALJ No. 2011-AIR-009, slip op. at 1 (Jan. 14, 2013) (emphasis added).

[9] *Id.* at 2.

[10] *Morgan*, 536 U.S. at 113-114.

[11] *Morgan* is relevant to the question whether a blacklisting complaint could extend the filing period for the termination complaint (in the nature of a continuing violation or hostile work place). But the Court held that such activity could not extend the limitations period for discrete acts because the limitation period for discrete acts, like termination, begins when the act occurs and is communicated to the employee. *Id.* at 110.

Woods filed a complaint for blacklisting, which would constitute a new and discrete act of discrimination.

Woods too appears fixated on the question whether allegations of blacklisting can toll the limitations period for his termination complaint. In any event, both before the ALJ and the Board, Woods failed to point to any admissible evidence that he filed a complaint for blacklisting.[12]

In our initial decision, we held 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.[13] Accordingly, given his failure to point to any admissible evidence that he has, to date, filed a blacklisting complaint, we **DISMISS** this case.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[12] In the document entitled "Woods' Return to Motion for Summary Dismissal as Remanded to the Administrative Law Judge," Woods cites to an April 21, 2001 document that he allegedly filed with the Occupational Safety and Health Administration as evidence that "his complaint did address blacklisting, in both the pre-termination sense of being denied alternate positions and promotions, as well at the post-termination job application he submitted to Boeing but was not hired." But even if this document could be construed as making a complaint for post-termination blacklisting, the Board, in granting Boeing's motion to strike in its original decision, held that because Woods failed to introduce this document in the de novo proceedings before the ALJ, the document was not before the ALJ when he made his decision, and accordingly, the Board could not consider it. (In the Board's decision, the document was incorrectly deemed as being dated April 12 rather than April 21.). Complainant has also filed with the Board copies of e-mails, which he states he was not able to previously provide because they were under seal in federal court litigation. But even if these e-mails were properly before us, they are not relevant to the issue whether Woods has filed a complaint based on alleged blacklisting.

[13] ARB D. & O. I at 11-12.