



**IN THE MATTER OF:**

**ARNOLD A. McALLISTER,**

**ARB CASE NO. 15-011**

**COMPLAINANT,**

**ALJ CASE NO. 2013-AIR-008**

**v.**

**DATE: May 6, 2015**

**LEE COUNTY BOARD OF COUNTY  
COMMISSIONERS,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Benjamin H. Yormak, Esq.; *Yormak Employment & Disability Law*, Bonita Springs, Florida**

***For the Respondent:***

**Mark E. Levitt, Esq. and Shannon L. Kelly, Esq.; *Allen, Norton & Blue, P.A.*; Winter Park, Florida**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

Complainant Arnold A. McAllister filed a complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the

21st Century<sup>1</sup> with the Department of Labor's Occupational Safety and Health Administration (OSHA). In the complaint he alleged that Respondent Lee County Board of County Commissioners (LCBCC) terminated his employment by eliminating his position to avoid the appearance of retaliation, after he reported to the Federal Aviation Authority that the director of operations had conducted training that he was not qualified to perform in violation of Federal aviation regulations and that LCBCC engaged in illegal billing for air transport services. A Department of Labor Administrative Law Judge determined that McAllister failed to timely file his complaint and that he had not established grounds for tolling the limitations period. We agree.

## BACKGROUND

LCBCC employed McAllister as a helicopter pilot in the County's Medstar program.<sup>2</sup> McAllister filed a complaint with the Occupational Safety and Health Administration (OSHA) on December 12, 2012, alleging that LCBCC terminated his employment in violation of AIR 21's whistleblower protection provisions. OSHA dismissed the complaint.

McAllister requested a hearing before a Department of Labor Administrative Law Judge (ALJ). In response to the hearing request, the ALJ issued an Order to Show Cause. The ALJ stated in the order that there were three issues that the parties must address to determine whether the case should be dismissed or allowed to proceed to hearing: (1) Whether the complaint was timely, and, if not, whether the limitations period should be equitably tolled, (2) Whether McAllister engaged in protected activity, and (3) Whether LCBCC is an "air carrier" as defined by AIR 21.

On June 6, 2013, the ALJ issued an Order Dismissing Complaint.<sup>3</sup> In the Order, he stated that while LCBCC timely filed its response to the Order to Show Cause, McAllister did not. Nevertheless, the ALJ did not dismiss McAllister's complaint on the grounds that he did not timely respond. Instead, he determined that LCBCC was not an "air carrier" under AIR 21, and dismissed McAllister's complaint on that basis.

McAllister petitioned the Board to review the ALJ's decision.<sup>4</sup> Upon review of

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<sup>1</sup> 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 (2014).

<sup>2</sup> *McAllister v. Lee Cnty. Bd of Cnty Comm'rs*, ALJ No. 2013-AIR-008, slip op. at 2 (Nov. 6, 2014)(Order on Remand).

<sup>3</sup> *McAllister v. Lee Cnty. Bd. of Cnty. Comm'rs*, ALJ No. 2013-AIR-008 (O. D. C.).

<sup>4</sup> The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in AIR 21 cases. *See* Secretary's Order No. 1-2012 (Delegation of Authority and

the record, the Board found a copy of McAllister's response to the ALJ's Order to Show Cause that he appeared to have filed one day late. In the Order to Show Cause, McAllister alleged that LCBCC had held an Air Carrier Certificate during his employment. He attached a copy of the Air Carrier Certificate to his opening brief. Given the potential significance of the Certificate to a case in which the ALJ's decision was based on his finding that LCBCC was not an air carrier, the Board remanded the case to the ALJ with instructions to re-open the record to admit the Air Carrier Certificate.<sup>5</sup> The Board also advised:

The ALJ may then reconsider his initial conclusion that LCBCC is not an air carrier, and in so doing, permit the parties to submit additional evidence or argument, at his discretion. It is also within the ALJ's discretion to consider any other issues that he finds dispositive of this case, with appropriate additional briefing or record development as he finds warranted within his discretion.<sup>[6]</sup>

Upon remand, the ALJ issued an Order for Additional Briefing and Evidence directing the parties to submit additional briefing and evidence on the issue whether

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Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

<sup>5</sup> *McAllister v. Lee Cnty. Bd. of Cnty. Comm'rs.*, ARB No. 13-073, ALJ No. 2013-AIR-008, slip op. at 5 (ARB May 15, 2014). The Board explained:

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. 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. Given McAllister's pro se status and the potentially significant probative value of an FAA Air Carrier Certificate in a case in which the employer is denying that it is in fact, an air carrier, we do not feel that it would be appropriate to consider the issue whether the ALJ properly found that LCBCC was not an air carrier when the ALJ has not had the opportunity to consider the ramifications, if any, of the Air Carrier Certificate that the FAA allegedly issued to LCBCC.

Slip op. at 4-5 (citations omitted).

<sup>6</sup> *Id.* at 5.

McAllister's AIR 21 complaint was timely.<sup>7</sup> Because McAllister alleged that the limitations period for filing his complaint should be tolled based on a complaint he filed with the Federal Aviation Administration (FAA) on November 28, 2012, the ALJ specifically ordered McAllister to "submit a copy of the complaint made to the FAA" and that if he did not have a copy, to submit a declaration or affidavit describing in detail the complaint he made."<sup>8</sup> He also required McAllister to submit a declaration or affidavit specifying the date on which he filed the whistleblower complaint as well as the date on which he learned that the complaint should have been filed with OSHA."<sup>9</sup>

On November 6, 2014, the ALJ issued an Order on Remand Dismissing Complaint in which he determined

Based on Mr. McAllister's submission, I find that he has produced sufficient evidence to show that he engaged in protected activity, and will not dismiss the matter on the grounds that he did not. . . . [H]owever, I find that his complaint was untimely, and that Respondent is not an air carrier under AIR21. Each of those conclusions independently requires dismissal of the complaint.<sup>10</sup>

#### DISCUSSION

To be timely, an AIR 21 complainant must file a complaint within 90 days of the date on which the alleged violation occurred (i.e., when the discriminatory decision was both made and communicated to the complainant).<sup>11</sup> LCBCC argues that it communicated its decision to terminate McAllister's employment to him on August 21, 2012, the date of the letter stating that it had terminated his employment effective immediately, with continued payment of salary until September 3, 2012.<sup>12</sup> McAllister

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<sup>7</sup> Order for Additional Briefing and Evidence at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* The ALJ also directed the parties to submit additional briefing and evidence on the issues whether Respondent is an "air carrier" under AIR 21, including whether it is a "citizen of the United States" and whether it engaged in "air transportation" and whether McAllister engaged in protected activity. *Id.*

<sup>10</sup> Order on Remand at 2.

<sup>11</sup> 29 C.F.R. § 1979.103(d).

<sup>12</sup> Order on Remand at 2.

argues that the date the limitations period began running was September 3rd, the date on which he was last paid. In either case, his OSHA complaint, filed on December 13, 2012, was untimely.<sup>13</sup>

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 statutorily-mandated filing deadlines.<sup>14</sup> 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 or her 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.<sup>[15]</sup>

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.<sup>16</sup>

McAllister argued that he was entitled to tolling based on a letter that he wrote to Linda Chatman at the FAA requesting that she provide certain records to him under FOIA and on an alleged online complaint he filed with the FAA on the same day, November 28, 2012.<sup>17</sup> The ALJ rejected the FOIA letter as an AIR 21 complaint for the following reasons:

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<sup>13</sup> *Id.*

<sup>14</sup> *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (ARB Feb. 28, 2007).

<sup>15</sup> *Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 4 (ARB Jan. 28, 2011). *See School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

<sup>16</sup> *Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-060, slip op. at 5 (ARB Sept. 30, 2010).

<sup>17</sup> Order on Remand at 3. Unfortunately, the ALJ made no finding as to the date McAllister received notice of the termination (i.e., the date on which he received the termination letter or other notice of termination), and it is not clear from the record exactly when LCBCC communicated the decision to terminate McAllister's employment to him.

- McAllister explicitly styled the letter as a FOIA request, not as a complaint of retaliation.
- He stated in the letter that he “will be seeking” whistleblower protection, not that he was seeking whistleblower protection by that letter.
- He stated that he “would like any information as well, on how to report this retaliation against me on the part of Lee County” thus demonstrating that he did not consider the letter to be a complaint of retaliation, or even a report of retaliation and his intent to file such complaint at a future date.
- Chatman was the FAA’s FOIA coordinator and not charged with responsibility for whistleblower complaints.
- The recitation of alleged retaliatory acts was not a complaint of retaliation, but was simply background information in support of his FOIA request—a request made to support a future claim of retaliation.<sup>18</sup>

The ALJ also rejected McAllister’s allegation that he filed an online complaint with the FAA on November 28, 2012. Subsequent to the Board’s remand of the case to the ALJ, he issued an Order for Additional Briefing. This Order specified

In his initial response to my Order to Show Cause,<sup>[1]</sup> Mr. McAllister made reference to a response from the FAA to his Freedom of Information Act request, included in his objections to the Secretary’s Findings after the OSHA investigation. That FAA letter, in turn, referred to a whistleblower complaint filed by Mr. McAllister with the FAA. The FAA letter is some evidence that Mr. McAllister filed a complaint of some kind with the FAA, but does not specify what the complaint was. Mr. McAllister is advised that he must submit a copy of the complaint made to the FAA before November 28, 2012. If he does not have a copy, he must provide a declaration or affidavit describing in detail the complaint he made. He also must submit a declaration or affidavit specifying the date on which he filed the whistleblower complaint as well as the date on

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Nevertheless, the actual date on which McAllister became aware of the termination is relevant only if he established that there was a genuine issue as to a material fact relevant to the question whether he timely filed an AIR complaint in the wrong forum, i.e., with the FAA.

<sup>18</sup> *Id.* at 5.

which he learned that the complaint should have been filed with OSHA.<sup>19</sup>

McAllister did not comply with the ALJ's Order. He provided no copy of the alleged complaint, nor an affidavit describing in detail the complaint he made.<sup>20</sup>

The ALJ determined that since McAllister failed to provide either a copy of the complaint or a precise description of it, he could not determine whether the alleged communication constituted a complaint of AIR 21 whistleblower retaliation. The ALJ noted that it was McAllister's burden to demonstrate that he mistakenly filed an AIR 21 retaliation complaint in the wrong forum, but he had failed to do so because it was as likely that the online complaint was identical to the FOIA letter as it was that it constituted a complaint of AIR 21 retaliation.<sup>21</sup> In his brief to the Board, McAllister failed to establish a genuine issue as to a material fact relevant to the question whether he filed an AIR complaint in the wrong forum, i.e., with the FAA.

As an initial matter, McAllister fails to discuss any Board tolling precedent and how it applies to the facts of this case. He simply disagrees with the ALJ's interpretation of his November 28th letter and states that he had no obligation to provide a copy of the online complaint. He also states that the ALJ ignored his affidavit, but the affidavit simply states that he filed a complaint, without any description of the specifics of the complaint, which would have allowed the ALJ to determine if it was, in fact, an AIR 21 complaint. In essence, McAllister is relying on an ignorance of the law defense and lack of prejudice to Respondent. However, the Board has held that ignorance of the law is not a sufficient basis for granting equitable tolling<sup>22</sup> and that prejudice to the opposing party will only be considered, once the party has established a factor supporting tolling and that it is not by itself an independent ground establishing entitlement to equitable tolling.<sup>23</sup> Further the fact that McAllister failed to submit a copy of the alleged complaint or a detailed description of it, as the ALJ ordered him to do, could support an adverse inference that the complaint did not meet the qualifications for an AIR 21 retaliation complaint.

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<sup>19</sup> Order for Additional Briefing and Evidence at 2 (June 19, 2014)(footnote omitted).

<sup>20</sup> O. R. at 5.

<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> *Moldauer v. Canandaiga Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 6 (ARB Dec. 30, 2005).

<sup>23</sup> *Patino v. Birken Manufacturing Co.*, ARB No. 09-054, ALJ No. 2005-AIR-023, slip op. at 4 (ARB Nov. 24, 2009).

Accordingly, we **AFFIRM** the ALJ's determination that McAllister failed to demonstrate that he filed a timely complaint or that he was entitled to equitable tolling of the limitations period, and we **DISMISS** his complaint as untimely.<sup>24</sup>

**SO ORDERED.**

**PAUL M. IGASAKI**  
Chief Administrative Appeals Judge

**E. COOPER BROWN**  
Deputy Chief Administrative Appeals Judge

**JOANNE ROYCE**  
Administrative Appeals Judge

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<sup>24</sup> Because we affirm the ALJ's decision that McAllister's complaint is untimely, we need not address the alternative ground for the ALJ's finding, i.e., that LCBCC was not a covered AIR 21 employer. *See Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 6 (ARB July 21, 2011).