UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Cherry Hill, New Jersey

Issue Date: 14 November 2024

OALJ Case No.: 2024-AIR-00021
OSHA Case No.: 301036417

In the Matter of

STEPHAN M. LEMELIN
Complainant
v.

DELTA AIRLINES, INC.
Respondent

ORDER DENYING MOTION TO DISMISS AND PARTIALLY GRANTING MOTION TO STRIKE AFFIRMATIVE DEFENSE

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000.[1] The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979. In accordance with the order issued on July 13, 2024, the Tribunal held a pre-hearing telephone conference in this matter on August 29, 2024.

Procedural History

Complainant alleged that Respondent retaliated against him by placing him on paid leave on July 29, 2023, and issuing to him a letter to attend a hearing on August 28, 2023. According to Complainant, he did not consider this to be adverse actions until October 17, 2023, when his supervisor requested a copy of an August 2021 email from Complainant to Respondent's Director of Health Services, wherein he expressed safety concerns regarding administration of non-FDA approved vaccines for pilots.[2] Then on March 22, 2024, a union representative notified Complainant of Respondent's intent to terminate his employment.[3] In June 2024, Respondent issued Complainant a Notice of Intent to Terminate.[4] Resp. Mot. at 5.

[1] Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121. The Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Division V, Title I, § 118, 134 Stat. 1182 (2020), signed into law December 27, 2020, expanded coverage in AIR-21 cases.
[2] Complainant's letter to the Office of Administrative Law Judges (July 17, 2024).
[3] *Id.* at 2.
[4] Apparently, Respondent thereafter issued two additional Letters of Investigation which provided additional detail into the scope of the inquiry. Resp. Mot. at 5.

On May 23, 2024, Complainant filed his OSHA complaint.[5] On June 20, 2024, OSHA, on behalf of the Secretary, found that Complainant's complaint was not timely filed; specifically, he did not file his complaint within 90 days, as required by the Act, following notification of an adverse employment action. Resp. Mot., Ex. B.

On July 17, 2024, Complainant filed a request for hearing with the Office of Administrative Law Judges ("OALJ"). In their request, Complainant argued that OSHA relied upon the wrong dates for the discriminatory action, and Complainant explained that because Respondent acted within the boundaries set by the Pilot Working Agreement ("PWA") and the Airline Pilots Association ("ALPA") until March 22, 2024, he had not considered their actions to be retaliatory. He asserted that the catalyst for this change was Complainant's supervisor's inquiry into Complainant's prior communications with Respondent's Director of Health Services. *See* Complainant's July 17, 2024, Letter to OALJ at 2.

On August 9, 2024, this matter was assigned to the undersigned to adjudicate. On August 12, 2024, this Tribunal issued a Notice of Assignment, Conference Call and Initial Pre-hearing Order. On August 27, 2024, the Tribunal held an initial pre-hearing conference. On September 11, 2024, the Tribunal set February 10, 2025, as the date for the hearing in this matter.

On August 26, 2024, Complainant filed his pleading complaint. In this complaint, he alleged the following five adverse actions taken by Respondent on the following dates:

- On July 29, 2023, when Respondent placed Complainant on administrative leave and required him to attend an investigatory interview; [6], [7]
- On March 22, 2024, when Respondent verbally notified Complainant that it intended to terminate Complainant's employment;
- On May 10, 2024 and May 20, 2024, Respondent issues two Letters of Investigation;
- On May 30, 2024, when Respondent mandated Complainant's attendance at a hearing; and,

[5] In his OSHA complainant, Complainant wrote that the adverse action date was May 20, 2024. *See* OSHA Online Complaint Summary #ECN109117, at 2 (May 23, 2024) contained in Resp. Mot., Ex A.

[6] The Tribunal understands from the complaint that the protected activities alleged were:

- On August 10, 2021; when he communicated his concerns regarding COVID-19 vaccines to Respondent's Chief Health Officer (Dr. Ting);
- On September 23, 2021, when he again communicated via email his concerns to his Chief Pilot;
- On October 17, 2023, when Complainant provided a copy of his August 2021 email to Dr. Ting to Respondent's New York City Regional Director.
- On April 3, 2024, when Complainant had his counsel relay to Respondent that he intended to exercise his rights under the Act.
- On May 23, 2024, when Complainant filed his OSHA complaint
- On July 17, 2024, when Complainant submitted an objection to the Secretary's findings; and
- On August 13, 2024 when Complainant served its initial disclosures to Respondent's counsel.

[7] Being required to participate in an investigation that is a necessary step prior to possible disciplinary action is presumptively adverse. *See Zavaleta v. Alaska Airlines, Inc.,* ARB No. 15-808, ALJ No. 2025-AIR-16 (May 8, 2017). This is especially so when a precursor to the investigation is placement of the employee on leave, albeit paid administrative leave.

- On June 18, 2024, where Respondent notified Complainant to schedule a meeting so it could issue Complainant a Notice of Intent to Terminate, which complainant signed on June 20, 2024.

Respondent terminated Complainant's employment on August 26, 2024.[8] Compl. Mot. to Strike at 2.

On September 9, 2024, Respondent filed its answer to the pleading complaint, which it amended on October 21, 2024.

On September 12, 2024, Respondent filed a Motion to Dismiss. In that motion, Respondent argued that Complainant's claims were time barred, and that there were no grounds for equitable tolling in this case. *See* Resp. Mot. at 3 – 6. On September 30, 2024, Complainant filed its response to the motion to dismiss. In its response, Complainant argued that its alleged adverse actions prior to February 23, 2024 were not time barred because the statute of limitations had not began to run until Respondent provided unequivocal notice of its adverse action in either March or May of 2024. Compl. Rep. at 7. Complainant also asserted that its complaint was sufficient to demonstrate that a continuing violation tied Complainant's claims together.[9] *Id.* at 9. In the alternative, it also argued that its case survived a motion to dismiss when each adverse action was considered discrete, as Respondent opened the door to new claims because each additional adverse action reset the clock for the statutory period to run. *Id* at 12.

Additionally, on September 13, 2024, Complainant filed a Motion to Strike Respondent's Affirmative Defense Relating to Failure to Exhaust Administrative Remedies. In that motion, Complainant argued Respondent incorrectly asserted the affirmative defense that Complainant had failed to exhaust its administrative remedies and requested that this Tribunal find that it need not file an additional complaint with OHSA in order to litigate what it alleges were adverse actions which occurred after the commencement of litigation in this case. Compl. Mot. to Strike at 6 -7. On September 20, 2024, Respondent filed its response to this motion.

On November 4, 2024, the parties filed a Joint Motion for Expedited Consideration of Complainant's Motion to Strike and Respondent's Motion to Dismiss.

Discussion

As an initial matter, Respondent appears to conflate when the ninety day period set forth in the act applies. An AIR21 complaint must be filed with the Secretary of Labor (OSHA) within ninety days of the alleged retaliation. 49 U.S.C. § 42121(b); 29 C.F.R. § 1979.103(d). The Board has adopted this Tribunal's explanation of the standard to be applied:

[8] Complainant alleges the August 26, 2024 termination is a new and separate adverse action subject to the Act. Compl. Mot to Strike, at 2.

[9] Contrary to Complainant's contention, the Board has not endorsed the continuing violation theory of recovery for AIR 21 cases. *See* e.g, *Sassman v. United Airlines*, ARB No. 05-077, ALJ Nos. 2005-AIR-4 (ARB Sept. 28, 2007).

> To be timely, an AIR 21 complaint must be filed 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. 29 C.F.R. § 1979.103(d); *McAllister v. Lee County Board of County Commissioners*, ARB No. 15-011, ALJ No. 2013-AIR-8 (ARB May 6, 2015). This 90-day period begins to run the day that an employee receives "a final, definitive, and unequivocal notice" of an adverse employment action. *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-14 (ARB Sept. 28, 2010) (citing *Swenk v. Exelon Generation Co*., ARB No. 04-028, ALJ No. 2003-ERA030, slip op. at 4 (ARB Apr. 28, 2005)); *Rollins v. American Airlines, Inc.*, ARB No. 04-140, ALJ Case No. 2004-AIR-9 (Apr. 3, 2007). "The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date." *Peters*, slip op. at 5. It is the date that a complainant discovers that he has been injured by a discriminatory act—not the consequences of that act—that starts the 90-day period in which an AIR 21 complaint must be filed. *Id.*

Lempa v. Hawthorne Global Aviation and Heartland Aviation, ARB Case No. 2018-0046 (Jul. 23, 2019), adopting ALJ Case No. 2017-AIR-0008, slip op. at 48 (May 1, 2018).

In other words, the 90-day period in which an AIR 21 complaint must be filed begins when a complainant discovers that their employment has been injured by a discriminatory act, not when they experience the effects of that act. *Id.* In sum, to constitute a timely complaint, a complainant must assert a violation of the Act's whistleblowing provision within 90 days of the Respondent's alleged discriminatory action, or within 90 days of the complainant's knowledge of the alleged discriminatory action, whichever occurs later. 29 C.F.R. § 1979.103(d).

Complainant filed his OSHA complaint on May 23, 2024. Therefore, since there are no allegations of a hostile work environment claim, any adverse actions that occurred prior to February 23, 2024 are time barred for purposes of establishing an element to Complainant's complaint. However, such evidence could be used to explain, for example, pretextual reasons for adverse actions that occurred since February 23, 2024.[10] *See Kinser v. Mesaba Aviation, Inc.,* 2003-AIR-7 (ALJ Feb. 9, 2004) (holding that while claims outside of the statutory period were not

[10] Even though not raised by Complainant, the Tribunal has considered whether equitable tolling applies in this case based on the information currently presented to the Tribunal. 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.

Selig v. Aurora Flight Sci., ARB No. 10-072, ALJ No. 2010-AIR-00010, slip op. at 4 (Jan. 28, 2011). Complainant bears the burden of justifying the application of equitable tolling. *McAllister v. Lee County Board of County Comm.*, ARB Cast No. 15-011, ALJ Case No. 2013- AIR-00008, slip op. at 5 (May 6, 2015); *Udvari v. US Airways, Inc.*, ALJ No. 2014-AIR-9, slip op. at 2 (ALJ Jan. 17, 2014). Here, Complainant has not even argued that equitable tolling applies under these facts. Therefore, a further analysis is not required here.

actionable, they were still probative into the complete picture of the relationship between Complainant and Respondent and therefore relevant evidence pertaining to the timely-filed claims).

Here, there are alleged adverse actions that occurred both prior to and after this date. What remains is the issue of whether all of these adverse actions should be considered as part of the current claim, or whether Complainant would need to file a separate OSHA complaint for these events. After reviewing the record and the relevant case law, the Tribunal finds that it will hear all the allegations in this complaint for the following reasons.

First, the Tribunal is cognizant that AIR 21 proceedings are to be expedited proceedings, and, as such, the pleadings may not always be surgical in nature .[11] Further, the discovery process oftentimes sheds new light on issues, such as evidence of potential pretext in Respondent's stated reasoning for its actions. At least in aviation cases, the vast majority of documentary evidence lies within the hands of Respondent, the very entity accused of committing the adverse acts. Therefore, it is only logical that Respondent also possesses documentation that may either exonerate or implicate itself in regard to its reasoning for the alleged adverse actions in this case. By the very nature of litigation, Complainant initially operates with imperfect information and must be given some latitude to fine tune its complaint during the discovery process. Per 29 C.F.R. § 18.36, an ALJ may allow parties to amend and supplement their filings. In fact, the Board encourages liberal amendments to whistleblower complaints, at least prior to the close of discovery. *See Cobb v. FedEx Corporate Services, Inc.,* ARB No. 12-052, ALJ No. 2010-AIR-24 (Dec. 13, 2013).

The Tribunal finds that Complainant need not first file a complaint with OSHA prior to amending their initial complaint before this Tribunal to add remedies for alleged retaliatory litigation conduct. As it has explained before:

> Such a requirement would not promote judicial economy or the mandate for expeditious processing of these type of cases. If the Tribunal were to require Complainant to file with OSHA prior to amending her complaint, one of two events would likely occur. Either this case would have to be placed in abeyance until OSHA investigated her additional allegations and issued findings that could be consolidated with this matter, or a case involving essentially the same facts would have to be heard by a different ALJ. Neither course of action promotes judicial efficiency. Further, in an AIR 21 case, ALJ's should permit liberal amendment to complaints. *Cobb v. FedEx Corporate Services, Inc.,* ARB No. 12-052, AU No. 2010-AIR-24, slip op. at 4 n. 4. (Dec. 13, 2013); see also *Evans v. US. Envtl. Prot. Agency*, ARB No. 08-059, AU No. 2008-CAA-003, slip op. at 11 (July 31, 2012).

See Petitt v. Delta Air Lines, Inc., 2018-AIR-00041, Order Granting Complainant's Motion to Amend Her Pleading Complaint (January 17, 2019).[12]

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[11] 49 U.S.C. § 42121(b)(2)(A) ("Such hearings shall be conducted expeditiously.").

[12] This decision can be located here: https://oalj.dol.gov/DECISIONS/ALJ/AIR/2018/PETITT_KARLENE_v_DELTA_AIR_LINES_INC_2018AIR00041_(JAN_17_2019)_100932_ORDER_PD.PDF

Here, the issues to be resolved involved the same parties, the same counsel, and, at its core, involve mostly the same alleged protected activity. What is alleged are continuing adverse actions that supposedly have resulted from those protected acts. It makes little sense to require a complainant to continually have to file OSHA complainants for alleged ongoing adverse actions that involved the same alleged protected activity, especially after the Secretary has issued their preliminary findings. In fact, the regulations prohibit the ALJ from remanding the case back to OSHA for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. "Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits." 29 C.F.R. § 1979.109(a). Here, as Complainant has proceeded through an OHSA investigation and has properly objected to the Secretary's findings, there is no question that this Tribunal has jurisdiction.

There is also the question of when certain actions are ripe for inclusion in current litigation. Here, the additional alleged protected activities pertain to the adverse actions that allegedly occurred as part of Complainant's initial complaint. Essentially, Complainant alleges Respondent is retaliating against him for exercising his rights under the Act to file a complaint. There is little doubt that Respondent knew that this matter was going to be litigated by April 3, 2024, for it is on this date Complainant had his counsel relay to Respondent that he intended to exercise his rights under the Act. *See* Compl. Mot. to Strike at 4. So Respondent was on full notice of the potential that further alleged retaliatory acts would be incorporated into the present complaint. Whether Complainant can establish a nexus is a different matter, and it is not the relevant inquiry when determining whether to grant a motion to dismiss.

Under 29 C.F.R. § 18.70(c), "A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness." To defeat Respondent's Motion to Dismiss, Complainant must show: (1) some facts about the protected activity that demonstrate some relatedness to the laws and regulations of AIR 21; (2) some facts about the alleged adverse action that Respondent took against him; (3) a general argument that the alleged adverse action Respondent took is causally related to her protected activity; and (4) a description of the relief that he seeks.

Further, a motion to dismiss challenges the sufficiency of the complainant, not its merits. In *Bell Atl. Corp. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court clarified the pleading standard under which courts are to evaluate a motion to dismiss. When deciding a motion to dismiss, this Tribunal should consider whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp.*, 550 U.S. at 570). The Tribunal must accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from those facts in the non-moving party's favor. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

Considering that Complainant has plead sufficient information to demonstrate some facts

of protected activity,[13] to demonstrate some facts about the alleged adverse actions in this case,[14] plead sufficient information to generally argue that Respondent's actions were casually connected to his subsequent termination, and provided a description of the relief it seeks, the Tribunal finds that it cannot grant Respondent's Motion to Dismiss. Accordingly, Respondent's Motion to Dismiss is **DENIED**.

However, the Tribunal also finds that Complainant is time barred from using adverse actions that occurred prior to February 2024 to prove the element of adverse action and prevail in this complaint. Complainant may use facts surrounding his concern about the COVID vaccine as evidence of motive or pretext for adverse actions that occurred after February 2024, but to meet his burden of proof, he will need to establish by a preponderance of evidence a nexus between his alleged protected activity and any alleged adverse actions that occurred after February 23, 2024. *See e.g., United Air Lines Inc., v. Evans*, 431 U.S. 553, 558 (1977) (finding that acts falling outside the prescriptive period may constitute relevant background evidence where current conduct is at issue). Accordingly, Complainant's Motion to Strike is partially **GRANTED** and Respondent may not avoid litigating this suit by claiming that Complainant failed to exhaust his administrative remedies.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey-District Office

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[13] Complainant's allegations and filing of the complaint in this case are sufficient to demonstrate some facts about the protected activity in this case, including his belief that filing this claim itself was protected activity that later subjected him to a retaliatory termination.

[14] As the record and pleading complaint demonstrate, Complainant sufficiently alleges adverse actions which occurred within the statutory 90 day period and are therefore actionable such as Respondent's Notice of Intent to Terminate.