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Issue Date: 10 December 2003

Case No.: 2003-AIR-12

In the Matter of

Coleen L. Powers,
Complainant

v.

Pinnacle Airlines, Inc.,
Respondent

RECOMMENDED DECISION AND ORDER GRANTING RESPONDENT'S REQUEST FOR SUMMARY JUDGMENT

Procedural History

This proceeding began when the Complainant, Coleen L. Powers, filed a complaint against the Respondent, Pinnacle Airlines, Inc. (Pinnacle), under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 42 U.S.C. Section 42121. The Complainant alleged that she was harassed and intimidated by the Respondent in retaliation for voicing concerns about flight and duty time under the Federal Aviation Regulations (FAR). On December 9, 2002, the Occupational Health and Safety Administration (OSHA) issued its findings after an investigation of the Complainant's allegations. OSHA concluded that the Respondent's actions did not rise to the level of harassment or intimidation, and that there was clear and convincing evidence that whatever actions the Respondent took were for legitimate non-discriminatory reasons. OSHA dismissed the complaint.

The Complainant also charged that the Respondent violated Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act), 18 U.S.C. Section 1514A, in that she had raised concerns about the accuracy of the Respondent's on-time flight records and its fraudulent impact on stockholders. OSHA dismissed this complaint because the Respondent is not a publicly traded company, and the impact on the parent company, Northwest Airlines, was questionable at best. OSHA also noted that even if coverage were established, there was no

evidence that there had been an adverse action or a material effect on stock worth.

The Complainant timely filed objections and a request for a hearing, and the matter was forwarded to the Office of Administrative Law Judges, where it was assigned to me for disposition. On March 5, 2003, I issued an Order dismissing the Complainant's claims under the Sarbanes-Oxley Act, and advising the Complainant that the only Respondent in this proceeding is Pinnacle Airlines, Inc. I also advised the Complainant that there were no environmental whistleblower claims before me, as no such claims had been made in the proceedings below. Subsequently, I issued numerous Orders denying the Complainant's repeated requests for reconsideration, and directing the Complainant to list only Pinnacle Airlines, Inc. as the Respondent in this proceeding. Despite these repeated rulings, the Complainant persists in her claim that she is entitled to relief under the Sarbanes-Oxley Act and the environmental whistleblower statutes, and she has continued to style her pleadings to include a growing list of parties in addition to Pinnacle Airlines, Inc.

On September 23, 2003, the Respondent filed its Motion for Summary Judgment. On October 3, 2003, the Complainant filed, by telefax, her "Sworn Affidavit in Rebuttal and Opposition to Respondents' September 24, 2003 Motion for Summary Judgment Which Must be Denied Due to Their Withholding of Discoverable Information From the Nonmovant; Complainant's Objections, Responses, & Disputed Facts of Respondents' September 25, 2003 Prehearing Submission Statement." The hard copy of this pleading was received on October 6, 2003.

On October 8, 2003, the Complainant filed her "Sworn Affidavit (Exhibit CX-79) of Crewmember, Coleen L. Powers In Rebuttal & Opposition to Respondents' September 24/25, 2003 Motion for Summary Judgment." On October 31, 2003, the Respondent filed, by telefax, its "Reply Brief in Support of its Motion for Summary Judgment."

On November 4, 2003, I issued an Order denying the Complainant's motion to compel responses to discovery served on the Respondent on October 20, 2003. I noted that in my June 3, 2003 Pre-Hearing Order, I directed that discovery would end fourteen days before the hearing, which was scheduled to commence on October 15, 2003. Subsequently, in an Order issued October 7, 2003, I continued the hearing pending resolution of the Respondent's outstanding motion for summary judgment. I did not indicate that discovery was to recommence, nor did the Complainant request leave to re-open discovery. I did, however, grant the Complainant's request for an extension of time for her response to the Respondent's reply brief, until December 5, 2003.

Subsequently, the Complainant filed numerous pleadings urging me to revisit my decision not to re-open the discovery process. Thus, on November 13, 2003, the Complainant filed "Complainant's Concerns of Continuing Court Decisions that show Favorable Prejudice and Favoritism to Corporate Counsel as Evidenced by the Court's November 4, 2003 Order; Concerns of Court Ruling Based on Some Unwritten, Unpublished, 'Leave of Court' Verbiage Suggested by Corporate Counsel in his Oct. 27, 2003 Filing and Motion for Reconsideration of

Court's November 4, 2003 Order Due to Court Error and Failure to Consider Material Facts of Record." On November 20, 2003, the Complainant filed "Complainant's Notice of Filing Evidentiary Exhibit CX-100 (Third Set of Discovery Including Interrogatories & Request for Production of Documents)."

On December 1, 2003, the Complainant filed her "Claimant's Request to the Court to Compare March 26, 2003 & October 7, 2003 Court 'Orders of Continuance'; Motion to the Court to Deem Adverse Inferences Against Named Parties for Failure to Cooperate in Second Set of Discovery; and Motion to Barr Piper Rudnick, LLP and Named Person, Doug Hall from 'Representing' Any Named Persons in any of These Proceedings Based on Their Demonstrated Unethical Conduct." In this pleading, she requested, *inter alia*, that her appeal of an October 29, 2003 OSHA determination[1] be consolidated with this case; that the Respondents be compelled to respond to her second and third discovery requests; and, because she had not received responses to her second and third discovery requests, an extension of time until January 16, 2004 to file a rebuttal brief.

On December 3, 2003, the Complainant filed her "Amendment: Post-Complaint Hostility, Reprisal, & Retaliation by Named Persons' Corporate Attorney, Doug Hall, Piper Rudnick LLP, and Pinnacle Airlines, Inc., d/b/a/ Northwest Airlink, Memphis In-Flight VP and VP of Marketing & Sales, Mr. Phil Reed for Complainant's Pursuit of US DOL OALJ Administrative Consolidated Denovo Hearings in 2003AIR00012 and Ms. Powers' November 15/17, 2003 Appeal on OSHA Case # 4-1760-03-029." This pleading dealt primarily with the Complainant's appeal of the October 29, 2003 finding by OSHA, which the Complainant requested be consolidated with this matter. Additionally, the Complainant again requested an extension of time to file a rebuttal brief, pending receipt of discovery in response to her requests.

Although these pleadings urge that the Court deny the Respondent's request for summary judgment, they deal in main part with the Complainant's dissatisfaction with my ruling that discovery was closed. Indeed, the Complainant ignored this ruling and served yet a third set of discovery requests on the Respondent. For the reasons set out in my November 4, 2003 Order, I decline to reconsider that ruling. The Complainant has been on notice since that date that she was not entitled to any additional discovery. Because the Complainant is not entitled to any additional discovery, there is no need to extend the date for filing of her rebuttal brief; indeed, that date has already been extended once, at the Complainant's request.

On December 5, 2003, the Complainant filed, by telefax, her "Complainant's Partial Rebuttal Brief to Named Persons' Corporate Lawyer-Witness, Mr. Doug Hall's Disputed October

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[1] This matter has been assigned to me as 2004 AIR 6; it has not yet been scheduled for hearing. It has been somewhat difficult to determine exactly what matter the Complainant's various pleadings address, as they contain numerous case numbers in the captions, for FAA, OSHA, ARB, and OALJ matters. They also include a long list of persons and entities that the Complainant has designated as the respondents.

31, 2003 Reply Brief to Ms. Powers' October 3, 2003 Sworn Objections to Corporate Counsels' Unethical *September 23, 2003* Motion for Summary Judgment (MSJ) and Ms. Powers' October 7, 2003 Sworn Affidavit of Material Facts and Disputed Material Facts Supported With Documentary FAA Evidence *Received* September 23, 2003; Mr. Hall's MSJ Must be *Denied In It's Entirety* and an Evidentiary Denovo Hearing on All Whistleblower Claims Must be Held, as Promised by Congress."

In this pleading, as she has previously, the Complainant refers to the Respondent's motion for summary judgment as unethical, unsupported, and in bad faith. She again requests that I "refresh my memory" and reconsider my erroneous and unethical ruling declining to re-open discovery, which demonstrated my favoritism towards Respondent's counsel. With respect to the Respondent's motion, the Claimant again argues that the Respondent's pleadings are "premised on affidavits *filed in bad faith,* they are *significantly* void of credibility, competency, personal observation and knowledge, and they contain no documentary evidence." (December 5, 2003 pleading at 7). The Complainant argues that there are genuine and material issues of fact, and takes issue with the Respondent's characterization of the events that are the subject of this complaint. Again, despite my rulings and repeated admonishments that there were no such claims before me, the Complainant requested a hearing on her Sarbanes-Oxley claim, and her claim under six environmental whistleblower statutes[2], in addition to her AIR 21 claim.[3]

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[2] The Complainant has now identified the Clean Air Act, the Safe Drinking Water Act, the Comprehensive Environmental Liability and Compensation Act, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, and the Toxic Substance and Control Act, although she has not indicated how her activities implicated these statutes.

[3] The Complainant was originally represented by Mr. Edward Slavin. On April 23, 2003, I issued an Order to Show Cause as to why the Complainant's claim should not be dismissed for her failure to cooperate in discovery, and for her conduct in filing inappropriate pleadings with the Court. Shortly thereafter, the Complainant dismissed Mr. Slavin as her counsel, and in an Order dated May 21, 2003, I barred Mr. Slavin from further representing the Complainant in this matter. Unfortunately, the Complainant has continued in the same vein, and her pleadings are replete with insulting and demeaning comments directed toward the Court and counsel for the Respondent. The Respondent has requested several times that I dismiss the Complainant's claim based on her repeated misconduct in ignoring my rulings, her refusal to fully participate in the discovery process, and her insulting allegations to the Respondent and the Court. I denied these requests, indicating that I was willing to allow the Complainant some latitude as a *pro se* Complainant. This latitude has its limits, however, and I note that the Administrative Review Board (ARB) has recently affirmed the inherent powers of an Administrative Law Judge to dismiss a complaint based on a complainant's egregious conduct. *See, Somerson v. Mail Contractors of America,* DOL ARB, Nos. 02-057, 03-055, 11/25/03).

DISCUSSION

Applicable Standard for Summary Judgment

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. Title 29 C.F.R. Section 18.40; Federal Rule of Civil Procedure 56(c).[4] Summary judgment is appropriate when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

The Complainant appears to take the position that summary judgment is appropriate only when there is **no** issue of fact in controversy and that such a motion is not appropriate here because there are facts at issue. Contrary to the Complainant's position, however, I may enter a summary judgment if there is no issue of **material** fact, that is, a fact that has a bearing on resolution of an issue raised by a party or that could affect the outcome in a case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Background

The Complainant, who is a part-time flight attendant for the Respondent, Pinnacle Airlines, Inc., alleges that on May 18, 2002, she was verbally threatened with immediate termination by a dispatcher if she did not continue on duty past fourteen hours. She also alleges that the Respondent falsified crewmember flight times, and aircraft arrival and departure times for flights scheduled on that date.[5]

The Complainant alleges that, in addition to the threat of termination, the Respondent

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[4] Title 29 C.F.R. Part 18 provides that the Federal Rules of Civil Procedure apply to situations not controlled by Part 18 or rules of special application, and that an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for the District Courts.

[5] These allegations were the basis for the Complainant's claim under the Sarbanes-Oxley Act, which was dismissed.

retaliated against her by denying her a contractual meal period on August 10-11, 2002, by demanding that she provide a physician statement after she called in sick on August 22, 2002, and for issuing her a written warning for sick leave misuse.[6]

The Respondent relies on sworn affidavits from its employees, as well as documentary exhibits. The Complainant relies on her sworn affidavit, as well as documentary exhibits.

May 18, 2002 Threat of Termination

The Respondent has provided affidavits from Philip Reed, the Vice President of Marketing for Pinnacle Airlines, who, as the head of the In-Flight Department, has ultimate responsibility for Pinnacle's flight attendants; Christopher Harrington, who was a Dispatch Supervisor for the Respondent on May 18, 2002, and, as the most senior member of management on duty at Systems Operations Control, had the ultimate responsibility for the Respondent's operations on that evening; and Theodore Davies, the Director of Inflight Services for the Respondent, who, on May 18, 2002, was the Base Manager, Inflight, for the Detroit base, and the "duty daddy," the person on call to address issues that arise during operations about flight attendant issues. In his affidavit, Mr. Reed stated that most of the scheduling department's telephone lines automatically record calls in and out, and he had personally reviewed the tapes of the recorded conversations on May 18, 2002, relating to the legality issue raised by the Complainant. The following facts, except where otherwise noted, are derived from their affidavits.

On May 18, 2002, the Complainant's duty day began at 5:40 a.m. in Columbus, Mississippi, and was scheduled to end thirteen hours later, at 6:40 p.m., in Monroe, Louisiana. Her schedule involved a number of short trips. On one of those legs, the flight departed at 1:20 p.m., but was forced to return to the ground at 2:15 p.m. due to a mechanical problem. The flight again departed at 3:45 p.m., after changing aircraft, and arrived in Muscle Shoals, Alabama at 4:40 p.m. The Complainant's flight from Muscle Shoals to Memphis departed at 4:55 p.m. and arrived at 5:55 p.m.[7]

While she was in Memphis, the Complainant brought it to the Respondent's attention that her duty day would exceed fourteen hours, which she believed was in violation of FAR 121.467. According to Mr. Reed, the Respondent encourages flight attendants to raise questions about their legality to fly a particular trip, but if the flight attendant is assured that he or she is legal, the Respondent expects the flight attendant to follow orders and operate the flight. If the flight attendant refuses to do so, it is grounds for discipline up to and including termination.

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[6] These allegations of retaliation were the subject of three amendments to her complaint by Ms. Powers.

[7] Again, the Complainant disputes the flight arrival and departure times, a dispute that is not pertinent to this discussion.

Both parties have referred to a memo authored by Paul Barraco, the Director of Inflight Services, which was sent to all flight attendants on April 30, 2002 (RX 1A). The subject of the memo was "Duty Limitations and Rest Requirements." Mr. Barraco indicated that it was the flight attendant's responsibility to be aware of and abide by the duty limitations and rest requirements in FAR 121.467. He provided the text of the FAR, and requested the flight attendants to review the information in the memo, to sign it indicating their understanding, and to return it by May 15, 2002. The memo stated:

> It is your responsibility to ensure you do not violate any aspect of FAR 121.467. If you are concerned you may violate this FAR by working a flight(s) you must contact the scheduling department immediately. If after doing so you are still concerned, ask to speak to a scheduling supervisor or contact inflight management.

According to Mr. Reed, the Respondent believed that the Complainant was legal to fly, even though her duty day would exceed fourteen hours, because she had been scheduled for a duty day of less than fourteen hours, and her duty day was extended because of circumstances beyond the Respondent's control, i.e., the mechanical delay. The Respondent based this conclusion on an interpretation of FAR 121.467(b)(14), as reflected in the Flight Attendant Manual (FAM) and the collective bargaining agreement (RX 11, 12). According to Mr. Reed, representatives of the FAA have told the Respondent that they consider mechanical problems to be a circumstance beyond the company's control.

Mr. Reed stated that the Complainant discussed her question of legality with schedulers Hines Outlaw and Chandra Joseph, the "duty daddy," Theodore Davies, Chris Harrington, the Dispatch Supervisor, and himself. Based on his review of the tape recordings for that date, he stated that they reflected that the Complainant was told repeatedly that she was legal to fly the trip.

According to Mr. Reed, the first call on that evening was between the Complainant and Mr. Outlaw.[8] The Complainant asked what aircraft would be used for the flight, and when Mr. Outlaw told her, she stated that this would extend her duty day beyond fourteen hours, and she felt that it would be illegal for her to operate the flight. Mr. Outlaw told her that she was legal, because the extension was due to a mechanical delay, and that the flight attendant contract specifically covered the situation. The Complainant did not accept this, and told Mr. Outlaw that she did not believe that is what the FARs provided.

The Complainant next spoke with scheduler Chandra Johnson, who also informed her that she was legal for the trip because she had not been scheduled for fourteen hours, and her duty day was going over fourteen hours due to a maintenance delay. According to Mr. Reed, the Complainant told Ms. Johnson that she disagreed with this interpretation, she did not care what

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[8] The Complainant alleges that the first person she talked to on that evening was Ms. Johnson, not Mr. Outlaw.

the collective bargaining agreement said, and insisted on being provided with the specific FAR. Ms. Johnson read to the Complainant from FAR 121.467(b)(4), which allows a flight attendant to be scheduled for more than sixteen hours if an additional flight attendant over and above the minimum complement is assigned as well. Ms. Johnson told the Complainant that this applied where a flight attendant was scheduled for more than fourteen hours, which the Complainant was not, and she was legal to fly. The Complainant claimed that she had in fact been scheduled for more than fourteen hours.[9]

The Complainant asked Ms. Johnson for a copy of the FAR to review, and told her that she would not agree with Ms. Johnson until she saw it in writing. Ms. Johnson then told the Complainant that she would be given a "missed trip" for refusing the flight. The Complainant replied, "No, I don't think you'd better," and hung up on Ms. Johnson.[10]

Ms. Johnson called Mr. Tony Tries, Respondent's Manager of Crew Resources, who confirmed that the Complainant was legal to fly, and advised Ms. Johnson to call Mr. Davies, the "duty daddy." Ms. Johnson then spoke to Mr. Davies, who confirmed that the Complainant was legal to fly under the FARs because a maintenance delay put her over fourteen hours.

Mr. Davies was able to reach the Complainant, who told him that she was going over fourteen hours due to a mechanical delay. He told her that when things occurred beyond the Respondent's control, such as a mechanical delay, the regulations allowed a flight attendant's duty day to be extended beyond fourteen hours, and thus she was legal for the trip. The Complainant indicated that she would take the trip, but she wanted someone with more authority than Mr. Davies in in-flight to tell her she could do so. She was concerned that she would be disciplined by the Respondent if she took the flight, based on Mr. Barraco's memorandum. Mr. Davies told her that he had written the memorandum for Mr. Barraco, that she was perfectly legal to operate the flight, and she would not get into trouble if she did. He told her to get on the flight, because she was legal.

In the meantime, Ms. Johnson and Mr. Outlaw both called Ms. Lisa Roddy, the Base Manager, In-flight, for Respondent's Minneapolis base, and explained the situation. Ms. Roddy confirmed that the Complainant was legal to fly under FAR 121.467(b)(14).

Mr. Harrington, the Dispatch Supervisor, became aware of the situation, and spoke with Mr. Kenton Collins, the Respondent's Director of System Operations Control, and the supervisor

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[9] The Claimant argues, and the Respondent agrees, that Ms. Johnson cited to the wrong FAR in her conversations with the Complainant.

[10] According to the Claimant, she did not "hang up" on Ms. Johnson.

of the scheduling and dispatch departments. Both agreed that the Complainant was legal to fly.[11] Mr. Harrington had not been able to reach Mr. Barraco about the problem, and Mr. Collins suggested that Mr. Harrington call Mr. Reed, who was Mr. Barraco's supervisor.

Mr. Harrington then received a call from the Complainant. He told her that she was legal for the flight, and that Mr. Collins agreed. The Complainant told him that she did not think she was legal, that she had reviewed FAR 121.467(b)(14), and in her view, it only applied if the delay was due to weather. She told Mr. Harrington that she was not refusing the trip, but insisted on speaking to an in-flight supervisor before she would take the trip. She stated that she knew the contract allowed her duty day to go beyond fourteen hours because of a mechanical delay, but that was not what she thought the FARs said, and she thought that FAR 121.467(b)(14) pertained only to a weather delay.

Mr. Harrington then called Mr. Reed at home, and told him that a flight had been delayed because of a maintenance issue, and the Complainant felt that she was not legal to fly. He explained that he and Mr. Collins had reviewed the circumstances, and believed that the Complainant was fully legal to operate the flight, which was being delayed further by her refusal to take it. He told Mr. Reed that he had told the Complainant that both he and Mr. Collins concluded that she was legal, but she was concerned that she would get into trouble in light of a recent memorandum about flight attendant legality issues. She indicated that as soon as someone from in-flight told her to operate the flight, she would do so. Mr. Reed told Mr. Harrington to tell the Complainant that she should operate the flight. Mr. Harrington provided the number of the crew lounge in Memphis; Mr. Reed indicated that he would call her and tell her she was legal to operate the flight.

When Mr. Reed reached the Complainant, she stated that she felt she was not legal for the trip. He told her that everyone she had spoken to had assured her that she was legal, and he asked her what further assurance she needed. He told her that she should take the trip. Their conversation was interrupted when the Complainant received a call from Mr. Davies

Mr. Reed subsequently spoke with Mr. Harrington, and told him that if the flight had to cancel because the Complainant refused to take it, even though she was legal to fly, she would be terminated. According to Mr. Reed, he made this statement because the Complainant's refusal to take the flight after repeatedly being told by him and other management that she was legal would be a refusal to obey a management directive, and would potentially disrupt the travel plans of approximately 60 passengers at significant expense to the Respondent.

Mr. Harrington then relayed this conversation to the Complainant. He asked her what she intended to do, and if she was going to take the flight. According to Mr. Harrington, the Complainant did not answer the question directly; she said that she was not refusing to take the

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[11] According to Mr. Harrington, the union contract is more restrictive than the FARs, so if the Complainant was legal to fly under the contract, she would be legal under the FARs also.

flight but that she wanted a written guarantee from in-flight that she was legal, so that she would not be disciplined. Mr. Harrington informed her that that was not an issue, because Mr. Reed was telling her to take the flight. He continued to try to get the Complainant to answer whether she would take the flight. The Complainant tried to put him on hold, and again asked him if someone would give her something in writing. Mr. Harrington told her that he did not know anything about that, and she could deal with it later, but he needed to know if she was going to fly. He told her he was not going to get into a "pissing contest" with her, and that it was getting ridiculous, since Mr. Reed had told her to take the flight. She finally agreed to do so.

According to Mr. Reed, her actions caused an additional delay of approximately 45 minutes. Mr. Barraco later gave the Complainant a verbal counsel, an action that is not considered to be a disciplinary action under the collective bargaining agreement, for her delay in obeying crew orders to operate a flight for which she was legal. The written confirmation of this verbal counsel appears at RX 9A. The Complainant argues that this letter is not signed by her, and she disputes the "content, authorship, and validity of the date of generation." (CX 79 at p. 8).

The Complainant takes the position that the flight was delayed because the crew scheduling personnel prematurely released the reserve flight attendants, and not because she refused to take the flight. According to the Complainant, the Respondents were concerned that a delay would affect their city team bonus and "on time" performance reports.

The Complainant states that the FAA does not in fact consider mechanical delays to be beyond the control of the airline. She refers to a March 11, 2003 letter from the FAA to the Respondent, indicating that this issue had been discussed at a meeting on February 24, 2003, and that the FAA did not consider maintenance delays to be beyond the control of the airline. The Complainant's Exhibit 82 reflects that on February 17, 2003, Mr. Edgar C. Fell, the Vice President of Safety and Regulatory Compliance, wrote to the FAA Chief Counsel's office requesting an interpretation of this provision. The Respondent was subsequently informed that its interpretations was incorrect; it was required to correct its Flight Attendant Manual, and to cease allowing Flight Attendants to exceed fourteen hours of duty time due to maintenance delays.

According to the Complainant, there is nothing in writing in any manual, policy statement or otherwise, stating that crewmembers are expected to fly if they are assured that they are legal to fly. The Complainant also asserts that she never "refused" to fly, but complied fully with the directives in the April 30, 2002 memorandum. The Claimant also views the messages left by Respondent on her voicemail, asking her to attend a potential discipline meeting in connection with the incident, as retaliation.

The Complainant also alleged that the Respondent altered and falsified the FAA flight and duty times of her initial flight crew, a complaint she brought to the attention of the FAA. No action was taken by the FAA, as the Complainant was not able to substantiate her claims. These allegations were also the basis for the Complainant's claim under the Sarbanes-Oxley Act, which

was dismissed.

Abuse of Sick Leave

According to Mr. Reed, the Complainant was scheduled to show up at 8:50 p.m. on August 22, 2002, for a trip on August 22-23. At 12:16 p.m. on August 22, eight and a half hours before she was due, the Complainant sent an e-mail to in-flight management asking that she be allowed to drop or switch the trip. She stated that she was "in a critical time frame on a deadline due tomorrow at noon on my former employer[12]," and that she had learned of the deadline only the day before. The Respondent made efforts to accommodate the Complainant, but was unable to do so.[13] About two and a half hours before her report time, the Complainant called in sick. According to the Respondent, this required the cancellation of two flights, affecting over sixty passengers (RX 6).

The Respondent suspected that the Complainant had misused her sick leave by claiming to be ill when she was not, since she had called in sick within hours of requesting a trip swap. The Complainant was informed by voice mail and by certified mail dated August 26, 2002 (RX 6) that she should provide a note from a physician that she was in fact ill. The August 26, 2002 letter from Paul Barraco to the Complainant stated:

> Your email dated August 22, 2002 asking the Company to remove you from flight duty and subsequent sick call provides evidence of alleged sick leave abuse and appropriately supports my request to exercise Section 13.E.1 of the flight attendant Agreement to require you to provide a physician statement.[14]

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[12] The deadline referred to by the Complainant concerned the complaint she had filed against her former employer, the Tennessee Department of Environment and Conservation.

[13] The Complainant takes issue with this statement, arguing that the Respondent did not in fact try to accommodate her request.

[14] As Exhibit 12 to its Motion, the Respondent attached portions of the collective bargaining agreement between the airline and the flight attendants and their union. Section 3 of that agreement deals with "Grievances, Mediation, and System Board," and defines a "contract grievance," a "disciplinary grievance," and sets out the procedures for handling grievances. Section 5 deals with "Scheduling," and states, at B.10.:

> A meal period of at least forty-five (45) minutes will normally be scheduled in a duty day of more than nine (9) hours. No training or other flight attendant related duties will be conducted during the meal period without the flight attendant's consent.

Section 13 of the collective bargaining agreement deals with "Sick Leave," and states at E.:

According to Mr. Reed, the Complainant did not provide the requested documentation, and the Respondent sent her a letter by Federal Express on August 30, 2002, informing her that she needed to attend a meeting about this issue on September 3. The Complainant claimed that she did not receive this letter until September 4, so the Respondent sent her another letter on September 5, again by Federal Express, rescheduling the meeting for September 10. Again, the Complainant claimed that she did not receive the letter in time to attend the meeting, and on September 13, the Respondent sent her a third letter indicating that the meeting would be rescheduled for September 24 or 26, whichever date she chose.

Mr. Reed stated that in correspondence concerning the scheduling of the meeting, the Complainant informed the Respondent that the deadline she referred to was to provide information to the Department of Labor in connection with her complaints against her former employer and the Respondent. She insisted that she was justified in calling in sick because she would have been so stressed about the deadline that her ability to operate the flight safely would have been compromised. According to Mr. Reed, the Respondent does not consider this a valid excuse for calling in sick.[15]

The Complainant argues that a voicemail left by Respondent on her home telephone on September 10, 2002 was threatening, hostile, and harassing. This voicemail demanded that she attend a meeting on September 11, 2002.

In one of her pieces of correspondence with the Respondent on September 5, 2002, the Complainant stated that she would promptly make an appointment with a licensed medical social worker if the Respondent agreed to pay the expenses for such "unlawfully required written documentation." The Complainant stated:

> Whereupon, additional documentation will be generated that documents the FACT that the continued efforts of retaliation to Ms. Powers by employers Pinnacle and TDEC, at times are so significant, that a reasonable person would find so emotionally stressful and incapacitating that no reasonable person could be expected to perform certain employment duties during those specific periods of perceived impacts of employer retaliation and harassment.

The Complainant provided the Respondent with a handwritten note on the letterhead of

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> The Company may require a written physician's statement as to the nature of any illness or injury when: 1. Sick leave abuse is indicated[.]

[15] The Complainant claims that Mr. Barraco concurred with her, that she was in a severe state of emotional distress, and in her judgment was not able to safely operate a flight on that evening.

Mary E. Streete, L.C.S.W., dated September 24, 2002 (RX 7). This letter indicated that Ms. Streete had been seeing the Complainant in individual therapy in the fall of 2001, to help her deal with "litigation stress" in connection with her dismissal by the State of Tennessee. She indicated that on August 21, 2002, the Complainant was suddenly informed that she had to submit a large amount of material by 4:30 p.m. on August 12, 2002 in connection with this litigation. She stated:

> In my professional opinion, Ms. Powers made the appropriate move in requesting to be relieved of her duties as flight attendant on August 22, 2002, as the level of stress and fatigue she would experience as a result of the OSHA deadline would render her at risk to adequately perform her duties, therefore threatening the safety of her passengers. Such stress caused physical and mental fatigue, distractability, and poor judgment.

The Complainant advised the Respondent that she did not believe that it could legally demand a doctor's note, and asked the Respondent if they would pay for the costs incurred in obtaining a doctor's note, but the Respondent did not provide her with an answer. According to the Complainant, she never stated or took the position that she was justified in using sick leave to work on her lawsuits. According to the Complainant, it is "industry standard" for a carrier to pay for a doctor's note that it demands, referring to the Pilot Contract for Piedmont Airlines.

The meeting was held on September 26, 2002, as set out in a letter from Mr. Barraco to the Complainant dated September 27, 2002 (RX 7). Among other things, Mr. Barraco's letter reflects that at the meeting, the Complainant provided a document from a licensed clinical social worker dated September 24, 2002, indicating that the Complainant was suffering from stress due to personal business regarding her previous employer. The letter stated:

> This document does not state that you saw this social worker on or about August 22, 2002, or that the social worker had any basis for assessing whether or to what extent you sere suffering from stress or fatigue on that day.

Handwritten notes, apparently by the Complainant, indicate that this statement was false. The letter reflects that the Complainant took the position that her request to be removed from flight duties, subsequent sick call, and delay in providing medical documentation did not constitute sick leave abuse; handwritten notes indicate that the Complainant did not state this.

The Respondent concluded that the Complainant

> called in sick when you were not ill, but tending to personal matters. That is not a valid use of sick leave. You are therefore being issued this written warning. We expect that you will not repeat this conduct again. Any additional violations of the sick leave policy, or other Company policies, could result in further discipline, up to and including termination. We also expect that in the future you will promptly comply with Company directives to provide information and to attend meetings relating to matters under investigation by this company.

The Complainant stated that as a part-time flight attendant, she does not have the right to accrue sick leave or vacation leave, and thus it is not possible for her to abuse sick leave, as set out in the written warning of September 27, 2002. She also stated that her sick call was well within the two hours notification as set out in the collective bargaining agreement, and company policy.

Denial of Meal Breaks

The Complainant states that she was not provided her required meal break on August 10 and 11, 2002, because of multiple aircraft, gate, and crew swaps, which took up her ground time on these dates. She argues that these gate and aircraft swaps were unnecessary, cruel, and "obviously" in retaliation for a safety complaint that she filed on June 17, 2002.[16] She stated that no other flight attendant had a similar number of swaps on these days, and that the Complainant had never experienced this number of swaps on a duty period.

The Complainant stated:

> Ms. Powers' was DENIED her 45 minute meal break as a result of the retaliation (for the FAA Safety Complaint filed) against her by Flight Operations and Dispatch by the "swapping" of aircraft on every "push" on these dates. It is well known that Dispatch can, by their authority to swap aircrafts, make a crewmember's day reasonable or just plain miserable with all the additional duties and work required when aircraft swaps are imposed. If a crewmember is on the "sh–t" list, that person's schedule is and can be subject to these aircraft swaps which cuts into any "ground time" you may have in that particular duty day. (10-6, para 21).

According to the Complainant, she was swapped by dispatch four times in one duty day (she did not specify which one), making the 45 minute meal break impossible.

Mr. Davies is responsible for administering the collective bargaining agreement between the Respondent and the Union, PACE, and for hearing grievances brought by the Union under the contract. In his affidavit, he stated that Section 5.B.10 of the contract provides that "a meal period of at least forty-five (45) minutes will normally be scheduled in a duty day of more than nine (9) hours." He stated that, because of flight attendant pre-flight and post-flight duties, a ground time of at least 80 minutes was considered to be necessary to allow a flight attendant the 45 minute meal period. According to Mr. Davies, on August 10, the Complainant had 1:35 hours of ground time between the arrival of flight 5791 at 15:35, and the departure of flight 5792 at 17:10. On August 11, she had 1:40 hours of ground time between the arrival of flight 5704 at 0730 and the departure of flight 5705 at 0910. Therefore, the Respondent denied the grievance, and the Union did not appeal the denial to the next step of the grievance process.

The Complainant does not take issue with the Respondent's claim that she had 1:35 and

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[16] This complaint concerned the actions of May 18, 2002.

1:40 hours of ground time, respectively, on August 10 and 11, 2002, more than the 80 minutes ground time required under the collective bargaining agreement. Rather, she argues that there were multiple swaps of flights, aircraft, and crew, which required her to perform extra work during her ground time. Essentially, she argues that the Respondent, in retaliation for her protected activity, engaged in multiple swaps in order to force her to perform extra duties that used up her meal time. Alternatively, or so it appears, she argues that at least 1:30 in ground time is required for a meal break.

DISCUSSION

The jurisprudence developed under existing whistleblower statutes, specifically the Energy Reorganization Act of 1974 ("ERA"), as amended in 1992, the Whistleblower Protection Act ("WPA"), and environmental statutes provide the framework for litigation under AIR21. *See Davis v. United Airlines, Inc.*, 2001-AIR-5 (ALJ July 25, 2002). The burden of proof standards are also identical to those of the environmental cases. The complainant must first establish a prima facie case. 49 U.S.C. § 42121(b)(2)(B)(i). However, even if the complainant establishes a prima facie case, raising an inference that the protected activity was a contributing factor in the adverse action alleged in the complaint, the respondent can still avoid liability by proving with clear and convincing evidence that it would have taken the same adverse action in the absence of the employee's protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii).

To establish a prima facie case, a complainant must show (1) that the complainant engaged in protected activity as defined by the Act, (2) that the employer knew complainant engaged in protected activity, (3) that the complainant suffered an adverse employment action, and (4) a nexus between the alleged adverse action and the protected activity sufficient to raise an inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1979.104(b).

There is no dispute that the Complainant engaged in protected activity of which the Respondent was aware, that is, she raised questions with the Respondent about whether her required flight duties on May 18, 2002, were in violation of the FARs. Twenty-nine C.F.R. § 1979.102(b) prohibits discrimination against an employee because that employee provided the employer or the Federal Government with "information relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration." Discrimination against an employee because that employee has filed "a proceeding relating to any violation or alleged violation of any order, regulation or standard of the FAA" is also prohibited. 29 C.F.R. § 1979.102(b)(2).

However, the Complainant must still establish that she suffered an adverse employment action. The Respondent argues that the allegedly retaliatory actions, that is, the threat of termination and the verbal reprimand, do not rise to the level of adverse employment action. To establish adverse employment action, a complainant must show that the action had some tangible job consequence. *See Shelton v. Oak Ridge National Laboratories*, 1995-CAA-19 (ARB March 30, 2001). Possible tangible job consequences include termination, demotion, decrease in salary,

benefits, responsibilities or title. *Id.*; *see also Oest v. Illinois Dep't of Corrections*, 240 F.3d 605 (7th Cir. 2001).

However, not all adverse employment acts are considered actionable. *See Ilgenfritz, Jr. v. U.S. Coast Guard Academy*, 1999-WPC-3 (ARB August 28, 2001). Employer criticism, while perhaps not flattering or agreeable to the employee, is a necessary and appropriate "feature of the workplace." *Id., citing Davis v. Town of Lake Park,* 245 F.3d 1232 (11th Cir. 2001). Absent a showing of tangible consequences, mere criticism or negative performance evaluations cannot be considered adverse action. *Ilgenfritz, supra*. An "Oral Reminder" is not adverse action without tangible job consequences such as termination, demotion, or decrease in salary. *Shelton, supra,*1995-CAA-19.

In this case, while the Complainant may not be pleased with the actions of Mr. Harrington, who told her that he was not going to engage in a "pissing match" with her, the threat of termination if she refused to take the flight, or the verbal reprimand issued by Mr. Barraco, without tangible job consequences, they are not adverse actions in and of themselves.[17] The Complainant has not alleged that she suffered any tangible job consequences as a result of her protected activity. Indeed, she remains in the employ of the Respondent, and there is no indication that she has been demoted or suffered a decrease in salary.[18]

Nor does the Respondent's request for a doctor's note, the telephone calls and e-mails requesting (or even demanding) that the Complainant attend a meeting regarding her use of sick leave, or the issuance of a written reprimand regarding the Complainant's abuse of sick leave, rise to the level of adverse employment actions. Again, there is no suggestion that the Complainant was demoted or suffered any loss of pay as a result of these actions. Indeed, it appears that the Respondent attempted to pay the Complainant for her sick leave, even though she may not have been entitled to it.[19]

With respect to the meal breaks, the Complainant argues that "the inference of a discriminatory motive is evident in the lack of company compliance to adhere to established policies, procedures and conditions of the CBA." (October 6 Response at p. 8). Yet she does not

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[17] As Mr. Reed noted, the verbal reprimand does not rise to the level of a disciplinary action under the collective bargaining agreement.

[18] The Complainant alleges that she was blacklisted for promotion to other positions because of her protected activity. However, these allegations were not part of her complaint to OSHA in the instant case, and are the subject of a separate complaint that was denied by OSHA, and which the Complainant has appealed to this office (2004 AIR 6).

[19] In this context, it is irrelevant that the Complainant, as a part time employee, was not eligible to be paid for sick leave. The reason that she was requested to provide a physician's note was because the Respondent suspected that she was not actually sick.

take issue with the statements by the Respondent that she had 1:35 and 1:40 hours of ground time on August 10 and 11, respectively. Although the Complainant believes that at least 130 minutes of ground time is required to accommodate a meal break (October 6 Response at p. 10), this is well in excess of the ground time required by the collective bargaining agreement.

Instead of relying on a violation of the terms of the collective bargaining agreement, it appears that the Complainant is instead arguing that the Respondent switched flights and aircraft on these dates for the purpose of keeping the Complainant from taking a lunch break. But other than her bald allegation, the Complainant has alleged no facts that would support a finding that the Respondent changed flights, aircraft, or crew on these dates, or that if it did, that these actions were aimed at the Complainant.

Thus, I find that, even viewing the factual allegations in the light most favorable to the Complainant, she cannot establish an essential element of her claim, that is, that she suffered an adverse employment action by the Respondent.

But even if I were to assume that the Complainant had established that the actions of which she complains constitute "adverse action" under AIR 21, the Complainant has not established that the reasons proffered by the Respondent for its actions were a pretext, and that the true reason underlying these actions was retaliation for her protected activity. In other words, the Complainant has not alleged a nexus between the alleged adverse action and the protected activity sufficient to raise an inference that the protected activity was a contributing factor in the adverse actions.

Thus, the Respondent argues that the Complainant was threatened with termination because she would not accept the unanimous opinions of numerous personnel of Respondent that she was legal to fly under the FAA regulations. Complainant has not alleged any facts that would establish that this belief was based on anything but good faith. While it appears that the Complainant was later vindicated, in that the FAA subsequently informed the Respondent that a mechanical delay was not a situation beyond the carrier's control that justified extending the duty day of a flight attend past fourteen hours (contrary to the position previously taken), and the Respondent was required to correct its manuals, this does not change the fact that as of May 18, 2002, these employees believed (even if incorrectly) that the Complainant was legal to fly at that time.

The Complainant argues that any delay in the flight was caused, not by her actions, but by the fact that the Respondent prematurely released its reserve crew, and thus had no one to take her place if she did not take the flight as scheduled. The Respondent does not take issue with this claim. However, the cause(s) of any delay, or the length of any delay, are immaterial. What is undisputed is that the flight could not take off unless the Complainant boarded as a flight attendant. In this context, the Complainant was given the choice to take the flight, or to be terminated.

In short, the Complainant has not alleged any facts that, if true, would establish that the Respondent's stated reason for threatening her with termination on May 18, 2002, that she had refused to take a scheduled flight despite assurances from numerous management personnel that she was legal to do so, and would not suffer any discipline from the Respondent for doing so, was a pretext, and that in fact she was threatened with termination because she had raised safety concerns.[20]

Nor has the Complainant alleged any facts that would establish that her inappropriate use of sick leave on August 22, 2002 was a pretext, and that the true motivation on Respondent's part for demanding a doctor's note, scheduling disciplinary meetings, and issuing a written warning was to retaliate for Complainant raising a safety concern on May 18, 2002. As Respondent points out, the question of whether the Complainant, as a part-time employee, was entitled to accrue paid sick leave is irrelevant. The Respondent questioned whether the Complainant was legitimately claiming that she was sick, after she had asked to be taken off the schedule, and the Respondent was unable to accommodate her. The Respondent's actions were consistent with the requirements of the collective bargaining agreement.

Finally, even assuming the truth of the Complainant's allegation - that the Respondent switched multiple flights, aircraft, or crew, actions, with the result that she was unable to take a meal break on August 10 and 11, 2002, despite ground time in excess of that required under the collective bargaining agreement - the Complainant has alleged no facts to even suggest that such activities were aimed at her.

CONCLUSION

I have carefully reviewed all of the evidence submitted in connection with the Respondent's motion for summary judgment, and I find that, viewing all of this evidence in the light most favorable to the Complainant, there is no issue of material fact, and thus the Respondent is entitled to summary judgment. Thus, the evidence establishes that the Complainant engaged in protected activity by her complaints about her legality to fly on May 18, 2002. But the evidence, viewed in the light most favorable to the Complainant, does not establish that she suffered any adverse employment action, as that term is used in the whistleblower statutes, or that if she did, that the Respondent's stated motivations were a pretext.

It is important to note that, contrary to the Complainant's belief, there is no violation of any environmental whistleblower statute before this Court. This has been made clear to the

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[20] The Complainant argues that she did not "refuse" to take the flight. Whether she specifically stated that she "refused" to take the flight, however, is immaterial; although she indicated to Mr. Harrington that she would take the flight upon assurances from an in-flight supervisor, she did not agree to do so upon receiving assurances from Mr. Reed, an in-flight supervisor, but demanded written confirmation. It was only after she was threatened with termination that she agreed to take the flight.

Complainant repeatedly, in my March 5, 2003 Order, and in numerous subsequent Orders denying the Complainant's repeated requests for reconsideration. Nor is there a violation of the Sarbanes Oxley Act before me, as I dismissed this claim in my March 5, 2003 Order. Again, despite my numerous Orders denying the Complainant's repeated requests for reconsideration of this decision, the Complainant stubbornly insists that she is entitled to relief under this statute. As there are no such claims before me, I make no determination with respect to the Complainant's allegations.

Finally, as I am dismissing the Complainant's claim on other grounds, it is not necessary to address the Respondent's argument that, other than the claim relating to the threat of termination, this Court does not have jurisdiction over the Complainant's claims because they require interpretation of the airline collective bargaining agreement; and that they are "minor disputes" that are preempted by the Railway Labor Act ("RLA"), 45 U.S.C. Section 151 *et seq*., and that must be resolved through the grievance process.

RECOMMENDED ORDER

It is recommended that the motion of Respondent for summary judgment be GRANTED, and the complaint of Coleen L. Powers against Pinnacle Airlines, Inc., under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century be DISMISSED.

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board.

Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).