

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 March 2006

CASE NO.: 2005-AIR-00027

In the Matter of

TIMOTHY A. CLARK,
Complainant,

v.

AIRBORNE, INC.,
d/b/a FIRST FLIGHT MANAGEMENT, LLC,
Respondent.

Appearances: William R. Palmer, attorney for Complainant
Pamela Doyle Gee, attorney for Respondent

Before: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR21” or “the Act”), as implemented by 29 C.F.R. 1979 (2006). Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, of 29 C.F.R. part 18. 29 C.F.R. § 1979.107.

Complainant, Mr. Clark, was discharged from Respondent on March 5, 2004. On April 26, 2004, Mr. Clark filed a complaint with Occupational Safety and Health, which was dismissed by the Assistant Secretary on July 11, 2005. Complainant appealed and a hearing was held in Elmira, New York on October 25-26, 2005.

ISSUES

1. Was Complainant engaged in activity protected under the Act?
2. Was Complainant subjected to an adverse employment action?

3. If so, has Complainant shown by a preponderance of the evidence that the adverse employment action was due to his protected activity?
4. If Complainant's protected activity is found to have contributed to the adverse action, has Respondent demonstrated by clear and convincing evidence that it would have taken the same action against Complainant even in the absence of the protected activity?

Testimony and Other Relevant Evidence

Timothy Clark

Timothy Clark testified at the hearing held on October 25, 2005 in Elmira, N.Y. Mr. Clark testified that he was promoted to the position of Director of Quality Assurance (“DQA”) at Airborne, Inc. effective September 15, 2003. He received a letter from Kathleen Biggio dated December 12, 2003 detailing the responsibilities of the promotion and advising that he is to now report directly to President John Dow. (T 28-29)¹. As DQA, Mr. Clark was responsible for reviewing all the aircraft and their maintenance, ensuring that records of such maintenance were filed and properly executed, and inspecting the mechanics’ work as needed. (T 34). Mr. Clark testified that at the time of the promotion, Mr. Chuck Letizia, the Director of Maintenance, told him that currently there was no money for pay increases, but that he would be receiving one in the future. (T 95). He later testified that the exact amount of the pay raise was not discussed, but that it would probably be related to the financial condition of the company. (T 180).

Mr. Clark was to report to Mr. Dow. Mr. Clark and Chuck Letizia, Director of Maintenance, were primarily responsible for maintenance. (T 54). Mr. Clark testified that he became concerned with the maintenance records of one plane in particular, an 885 TA Gulfstream located in Palm Beach. (T 64-65). The mechanic who worked on this plane in Palm Beach was Ted Diver. (T 65). Mr. Clark observed a delinquency in maintenance on this aircraft on December 18, 2004. (T 68). He testified that he reported his concerns on three different occasions to Mr. Letizia and Mr. Dow. (T 69). Mr. Clark wrote three memos, dated February 12, 2004, February 18, 2004, and March 5, 2004. (T 79). He also testified that he voiced his concerns over maintenance in general to Mr. Dow, but received no response and was instructed to see Chuck Letizia, the Director of Maintenance, instead. (T 79-80, 166).

The first memo, distributed on February 12, 2004, was addressed to Mr. Letizia, and sent as a copy to several other members of management, including President Dow. (T 85-86, TAC 17). The substance of the memo was that the aircraft in question had over flown an air worthiness directive and was in violation of Federal Aviation regulations, and that a meeting should be held to discuss this violation. Mr. Clark stated that no meeting ever occurred and that there was never any disclosure to the FAA. (T 86-87). He stated that he never had a conversation with Mr. Dow following regarding this memo. (T 165-166). Mr. Clark testified that he left the memo for Mr. Dow in Mr. Dow’s company mailbox, and Mr. Dow therefore may have received it on a later date. (T 164-165).

¹ The following abbreviations are used throughout: “T” refers to the transcript of the hearing, “TAC” refers to Complainant’s exhibits, and “RX” refers to Respondent’s exhibits.

Mr. Clark's second memo, distributed on February 18, 2004, also addressed overdue maintenance, concerning the standby system operational check and the strobe light functional check, and was likewise addressed to Mr. Letizia and copied to various managers, including Mr. Dow. (T 88-89, 92, TAC 12). Mr. Clark testified that these issues were never addressed. He stated that he would know if they had been addressed because he was the person who would file the paper work and update the records. (T 88-89). Mr. Clark testified that he was on vacation the week following this memo. (T 184).

In the same timeframe as these three memos that addressed maintenance, Mr. Clark sent a memo to Mr. Dow requesting a twenty percent pay increase. (RX 1). This written request was made on February 26, 2004. (T 95). Mr. Clark testified that the next day Mr. Dow told him that his job was in jeopardy. (T 96). He also testified that he had no reason to doubt the accuracy of Mr. Dow's December 2003 memo, which addressed the financial situation of the company. Mr. Clark stated that he had no independent knowledge of the company's financial status. (T 185, TAC 0053, 0054).

The same day that Mr. Clark made his request for a raise, the FAA called him and advised him that they were coming to the office on the following Monday for a routine records inspection. (T 96). Mr. Clark testified that during the inspection, which lasted approximately four hours, he was alone with the FAA inspectors, apart from a period of about thirty to forty-five minutes when Mr. Letizia was present. (T 96-97).

Mr. Clark's third memo addressing maintenance issues, distributed on March 5, 2004, was addressed only to Chuck Letizia, because Mr. Clark testified no one else was present that day. (T 90, TAC 2). Later, Mr. Clark admitted that he should have sent this memo to President Dow as well. (T 172). This memo advised that a required maintenance, specifically a strobe light functional check, was thirty days overdue. (T 90, 92). Mr. Clark testified that he delivered this memo to Mr. Letizia's mailbox around 1 p.m. on that day. (T 90-91). Mr. Clark testified that around 2:20 p.m. on the same day, Mr. Letizia and Ms. Biggio came into his office and handed him a letter indicating that he had been laid off. They told him that the company could no longer support his position and that his lay off would be effective immediately. (T 91).

After his termination in March 2004, Mr. Clark was offered contract work by Mr. Letizia. (T 136). Mr. Clark testified that he told Mr. Letizia that he could not give him an answer until he had specific work available for him. (T 136). Mr. Clark also testified that he had told police that he had taken documents belonging to the company. (T 202). Then he testified that he had only made copies of such documents, and did not take the originals. (T 203).

Kathleen Biggio

Kathleen Biggio testified at the hearing held on October 26, 2005. Ms. Biggio is currently the Vice President of Administration at FirstFlight ("Airborne"). In 2004 she was the Vice President of Human Resources and Finance. (T 220). She testified that since 1999, when the timeshare business on the company's planes began to go under, the company has suffered a \$100k-400k loss annually. Between 2001 and 2005, the company lost approximately \$2.5 million. In 2004, President Dow personally subsidized the \$386k loss. (T 224-225). Ms. Biggio testified that by 2003, the company needed to make cuts. She, and other members of

management, had not had a raise since 1999, although some lower level employees continued to receive raises. (T 234-235).

Ms. Biggio testified that the company's situation worsened when it received word that one of its planes was being sold by its owner, which would result in lost revenue for Airborne. (T 236). In January 2004, Airborne learned they were going to lose more business, and decided they needed to lay off some employees. (T 239). The positions of Director of Maintenance and Director of Operations are required by the FAA. (T 240). In 2002, Al Booth, the Director of Maintenance, was looking to retire, and Chuck Letizia slowly stepped into that position. At the same time, Mr. Clark became the Director of Quality Assurance, which is a position under the Director of Maintenance; it is not a position required by the FAA. (T 229-233). Ms. Biggio testified that Airborne decided that its lay offs would include the Director of Quality Assurance position and three pilot positions. (T 240).

On February 26 2004, at the same time that Airborne was deciding whom to lay off, Mr. Clark sent a memo to Mr. Dow, copied to Ms. Biggio, requesting a twenty percent raise. (T 242, RX 1). Ms. Biggio testified that this request definitely impacted her and Mr. Dow's decision about the lay offs:

We're struggling with the fact that we're going to have to let people go that we've worked with for years ... And then, to have him come in and ask for a raise after he had gotten one and all these people hadn't ... John and I discussed it at length that day. The memo was left in our mailboxes ... And I remember reading it and I couldn't even speak. I walked into John's office and I said, you know, I don't know what to do. You know, I don't know how to take this ... Well, we knew we had to pick somebody from maintenance and we felt that if he wasn't going to – we couldn't satisfy his, the level that he felt he needed to be at for raises ... It made more sense that we picked someone who wasn't happy with the situation, rather than take somebody, you know, who was showing up for work every day and not complaining and trying to work as part of the team.

[T 244-246]. The decision to lay off Mr. Clark was made that weekend. (T 245). Ms. Biggio testified that she was unaware of Mr. Clark's memos regarding the Palm Beach aircraft, as she was only involved in the financial side of the business and did not understand maintenance issues. (T 256). Ms. Biggio testified that she began to draft his termination letter that weekend or Monday, prior to the date appearing on the letter when she printed it out on Friday, March 5th. (T 247-248). It was standard practice to terminate employees on a Friday. (T 278).

Chuck Letizia did not learn that Mr. Clark was being laid off until the morning of March 5th. (T 248-249). Ms. Biggio testified that she went into his office, informed him of the decision, and asked him to be present when she told Mr. Clark since Mr. Letizia worked with him. They decided to do it at the end of the day, which is standard practice. (T 249).

John Dow

John Dow testified at the hearing held on October 26, 2005. Mr. Dow has been the President of Airborne, Inc. since its inception in 1987. (T 302). Mr. Dow wrote a letter to his employees in December 2003 reviewing the company's situation at year's end; the letter was optimistic, but indicated there would be an increased workload before the company would realize any revenue. (T 304-305, RX 9).

Mr. Dow testified about receiving a memo from Mr. Clark dated February 26, 2004 in which Mr. Clark requested a twenty percent increase. Mr. Dow indicated that no employee at Airborne ever had such a high raise. (T 305-306). Furthermore, Mr. Dow testified that this request came during a time of financial difficulty for the company, and management was already discussing possible lay offs. (T 306). Mr. Dow told Mr. Clark that not only could they not give him a raise, but they were actually looking to lay off his position. (T 307). Mr. Dow did not remember having conversations with Mr. Clark regarding Mr. Clark's memos about maintenance. (T 308-309).

Chuck Letizia

Chuck Letizia testified at the hearing on October 26, 2005. Mr. Letizia is the Director of Maintenance at FirstFlight/Airborne, where he has been employed since May 1999. (T 316). As the Director of Maintenance, Mr. Letizia is responsible for all the technicians under him and oversees all maintenance; he reports directly to Mr. Dow. (T 318).

Mr. Letizia testified that the records relating to the Palm Beach aircraft that Mr. Clark alleged to have been falsified, were investigated by the company and the FAA and it was determined that they were not falsified. Instead, it was determined that there was a mistake of entry made by Ted Driver, the mechanic in Palm Beach, concerning the plane's fuel pressure switch. The FAA determined that the plane was airworthy. (T 328). Mr. Letizia testified that Mr. Clark's concerns in his memos were addressed:

Q: Okay. You heard Mr. Clark say yesterday he was frustrated by the lack of response from management after his submitted his February 2004 memos?

A: Right.

Q: Wasn't he in fact on vacation that following week?

A: Yes, I believe he was.

Q: To your knowledge, were those complaints in those memos addressed by the FirstFlight organization?

A: Yes, they were.

[T 320].

Mr. Letizia testified that it was common practice that Mr. Clark would leave memos in his mailbox. (T 334). On March 6, 2004, the day after Mr. Clark was laid off, Mr. Letizia testified that he called Mr. Clark to offer him contract work. Mr. Clark turned him down, saying he needed to speak to his lawyer first. (T 334-335).

OVERVIEW OF THE ACT

The Wendell T. Ford Aviation Investment and Reform Act prohibits air carriers or (sub)contractors from discharging or discriminating against an employee because the employee:

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121, 29 C.F.R. 1979.102.

In such a hearing before an Administrative Law Judge, the complainant has the burden of proving by a preponderance of the evidence that:

- (1) he engaged in a protected activity;
- (2) there was an adverse employment action; and
- (3) causation

See 49 USCS § 42121; Peck v. Safe Air International, Inc., ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Once claimant has proven these factors by a preponderance of the evidence, the burden of proof shifts to the respondent employer to show by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of the employee's protected activity. Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Protected Activity

Title 49 U.S.C. Section 42121, as provided above, describes what activities are protected by AIR. Providing information to the employer or federal government about alleged FAA violations is one such protected activity. Here, Complainant Clark asserts that his memos regarding possible FAA violations qualify as a protected activity under the statute. Respondent asserts that because Clark had a duty to report possible violations as part of his job his actions are not a “protected activity.” I find that Complainant’s reporting of alleged FAA violations is a protected activity within the meaning of the statute for the reasons below.

First, one is not precluded from protection under the statute because his position requires that he report safety violations. In Sievers v. Alaska, the ALJ wrote: "For a finding of protected activity, it is sufficient that Complainant carried out his required, safety-related duties: supervising the maintenance of Respondent's aircraft and reporting, repairing, or deferring the repair of any documented defects." Sievers v. Alaska Airlines Inc., 2004-AIR-28, Slip op. at 24. (ALJ May 23, 2005); See also Kinser v. Mesaba Aviation, Inc., 2003-AIR-7 (ALJ Feb. 9, 2004)(finding that complainant’s position as a Quality Control Inspector inherently involved protected activities).

Second, a complainant need not provide (or threaten to provide) information to the FAA; providing information to the employer alone is also protected. 49 U.S.C. § 42121. However, he must reasonably believe in the existence of a violation. Peck, ARB. Case No. 02-028, at 9 (citing Clean Harbors Envntl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998), and Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003)). A potential violation must also be objectively reasonable. In Parshley v. America West Airlines, 2002-AIR-10 (ALJ Aug. 5, 2002), the ALJ reviewed the principles developed in environmental whistleblower cases, and found that a protected activity under AIR 21 similarly has two elements: (1) the complaint must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; (2) the complainant's belief about the purported violation must be objectively reasonable.

Here, Complainant wrote several memos to his superiors at FirstFlight/Airborne, dated February 12, 2004, February 18, 2004, and March 5, 2004. The first memo highlights an overdue Airworthiness Directive on the Gulfstream IV, N885TA, with “**THIS IS IN DIRECT VIOLATION OF FEDERAL AVIATION REGULATIONS AND OUR OPERATING SPECIFICATIONS**” written thereafter. The second memo concerns the same aircraft, again noting overdue maintenance and repeated delinquency in reporting. It again states this is a violation of FAA regulations, and suggests the aircraft be removed from FirstFlight’s certificate. The third memo concerns the same aircraft and states that no maintenance forms had been received on the aircraft since February 18, 2004. It also notes that the records reflect a perfect record for the aircraft, which Complainant felt was “highly unlikely.” He states that the plane’s maintenance is being conducted with “no regard for Federal Aviation Regulations and safety.” Through these memos Complainant voices a genuine concern for the safety and following of FAA standards. Furthermore, Chuck Letizia testified that there was an entry, later investigated

and found to be only a mistake, which made it appear as if there was a violation. Based upon Complainant's testimony, and the evidence of record, I do not doubt that it was both subjectively and objectively reasonable for one to conclude that there was a possible violation of FAA standards.

2. Adverse Employment Action

Adverse employment action includes discharge and other discrimination involving an employee's compensation, terms, conditions or privileges of employment. 49 U.S.C. § 42121(a). Mr. Clark was laid off on March 5, 2004; this constitutes adverse employment action.

3. Causation

The Act states that "No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment *because* the employee ... (engaged in a protected activity)." 49 U.S.C. § 42121(a). The adverse action must have been taken because of the employee's protected activity. This necessarily means that the employer must have known about the protected activity. Bartlik v. TVA, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), aff'd, 73 F.3d 100 (6th Cir. 1996).

Complainant contends that Employer knew of his protected activity because various members of management received his memos. Employer contends that it had no knowledge because it did not know that Complainant was going to report violations to the FAA. However, this misses the mark, as it is the memos themselves that qualify as the protected activity. Since Complainant sent these memos to management, including copying President Dow on two of the memos, I find that there was Employer knowledge of protected activity.

Complainant's burden of proof in showing causation is a "preponderance of the evidence" standard. Complainant relies primarily on the temporal proximity between the memos, particularly the one sent on the day he was laid off, and the adverse employment action. Temporal proximity alone is only enough if there are no other intervening factors. Complainant cites Lebo v. Piedmont-Hawthorne for the proposition that temporal proximity is sufficient to meet the complainant's burden of proof. Lebo v. Piedmont-Hawthorne, 2003-AIR-25 (ALJ Oct. 29, 2003), aff'd ARB Case No. 04-020 (Aug. 30, 2005). However, in Lebo the complainant's evidence consisted of more than just temporal proximity, including inconsistencies in the employer's evidence. Lebo, ARB Case No. 04-020, at 5 (Aug. 30, 2005). Additionally in Lebo, the temporal proximity helped show that the protected activity was a contributing factor to the adverse action because there were no other intervening events.

As the Board described in Tracanna v. Arctic Slope Inspection Service, temporal proximity does not always provide a reasonable inference of discrimination:

Temporal proximity may be sufficient to raise an inference of causation in an whistleblower case. See, e.g., Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first

event (e.g. protected activity) caused the last (e.g. adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action.

Tracanna v. Arctic Slope Inspection Service, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001).

Here, Complainant rests solely on the evidence of temporal proximity, and while addressing Respondent's testimony regarding Mr. Clark's request for a raise, completely dismisses the evidence of financial difficulty occurring right at the time of his request. Additionally, the temporal proximity is actually between the second memo and the date of Complainant's termination, March 5, 2004, because the memo he sent on that date was only given to Chuck Letizia, who was not even aware of Mr. Clark's impending termination. In fact, Mr. Clark testified that he left the memo in Mr. Letizia's mailbox around 1 p.m. that day, *after* Kathleen Biggio had discussed with Mr. Letizia when to notify Mr. Clark of his termination.

Mr. Dow and Ms. Biggio testified that in January 2004 the company was experiencing financial difficulties stemming from the impending sale of one of its Gulfstream IV aircraft. President Dow and VP of HR/Finance Biggio discussed possible lay offs beginning at this time. Ms. Biggio testified that by February it was obvious that employees were going to be laid off. Mr. Clark then requested a raise that the company could not satisfy, and that management found offensive. At that time, Mr. Dow informed Mr. Clark that his job was actually in jeopardy. If the Employer were actually concerned with Mr. Clark reporting violations to the FAA, they most likely would have fired him prior to his meeting the following Monday with the FAA, during which he was alone with the investigator for a majority of the inspection. Furthermore, Complainant admits that Employer offered him contract work the day following his termination; this is not indicative of an employer concerned with an employee reporting to the FAA.

The preponderance of the evidence standard means that the greater weight of the evidence favors one side. "Greater weigh" refers not to the amount of evidence, but to its convincing nature. That means that here Complainant would have to show that the greater weight of the evidence shows that he was terminated due to his protected activity, rather than due to any financial difficulty or for what was viewed as an obscene request for a raise. Even though this is the lesser of burdens for a complainant to meet, I simply do not think that Complainant here has met this burden. Complainant's only real support for his argument is temporal proximity; meanwhile, this is equally matched, if not outweighed, by Respondent's evidence.

Therefore I find that Complainant has not met his burden by the preponderance of the evidence that Employer terminated his employment due to his protected activity. Even assuming, *arguendo*, that he did meet this burden, Respondent's evidence meets the clear and convincing standard to prove it would have terminated Complainant's employment regardless of his

protected activity. I see no pretext in Employer's justification for his termination. Therefore, the burden does not shift to Employer and the analysis ends here. Peck v. Safe Air International, Inc., ARB Case No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

ORDER

I find that Complainant, Timothy Clark, has not met his burden of proof in showing that Respondent terminated him due to his protected activity. Therefore, relief under the Act is **DENIED**.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a). If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§