

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 03 February 2006**

**CASE NO.: 2005-AIR-19**

**IN THE MATTER OF**

**JOHN STIPETICH,  
Complainant**

**v.**

**CONTINENTAL AIRLINES,  
Respondent**

**DECISION AND ORDER**

**Background**

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Public Law 106-181, 49 U.S.C. §42121, (“Act”). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee 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 (“FAA”) or any other provision of Federal law relating to air carrier safety

John Stipetich (“Complainant”) filed a complaint with the Department of Labor against his employer, Continental Airlines (“Respondent”) alleging discrimination against him in violation of the Act in retaliation for his having communicated safety and regulatory concerns to Respondent. On April 28, 2005,

the Regional Administrator for the Occupational Safety and Health Administration, (OSHA), determined Complainant's complaint had no merit. Specifically, OSHA determined Respondent's actions did not adversely affect Complainant. Complainant objected to OSHA's findings, and by letter dated May 10, 2005, filed a request for formal hearing.

This matter was referred to the Office of Administrative Law Judges (OALJ) and assigned to me. Following a telephonic conference with both parties, by agreement this case is set for hearing on February 13, 2006. On January 17, 2006, Respondent filed a Motion for Summary Decision and it is that motion which is the subject of this Decision and Order.

## **I. FACTS ABOUT WHICH THE PARTIES AGREE**

1. Complainant is a pilot and employee of Respondent who is an air carrier defined by the Act.

2. The Office of Administrative Law Judges of the U.S. Department of Labor has jurisdiction of this Complaint.

3. On June 25, 2004, Complainant was the pilot in command of Flight 447 in route from Chicago to Houston when a crack was suspected in the left wing.

4. Complainant declared an emergency and diverted the flight to Tulsa.

5. Once on the ground in Tulsa, a mechanic felt the aircraft was air-worthy and Complainant was instructed to fly the plane to Houston.

6. Prior to that occasion, on April 2, 2004, Complainant had been given a termination warning and two weeks suspension without pay for alleged misconduct on his part.<sup>1</sup>

7. In September 2004, following Complainant's rejection to carry a gun in the cockpit, Complainant visited Transportation Security Administration offices in Houston.

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<sup>1</sup> On appeal this suspension was upheld.

8. In September and October of 2004, Complainant attended training, and on October 15, 2004, Complainant was advised, pursuant to the Collective Bargaining Agreement, that he must report for a fitness for duty evaluation, including a full medical and psychiatric evaluation.

9. This was Complainant's third fitness for duty evaluation since 2001.

10. Ultimately, the result was that Complainant was found fit for duty and returned to work, but on March 14, 2005, Complainant was placed on a termination warning for 18 months and required additional training. He remains on captain's pay status with full seniority.

## **II. FACTS IN CONTENTION**

Throughout his initial complaint as well as pleadings filed before this office, Complainant urges that because of his safety concerns, the most recent being June 25, 2004, that he has been a victim of intimidation, threats, coercion and other discrimination in violation of the Act. As a result, Complainant seeks monetary damages as well as removal of certain material from his personnel file. Respondent, on the other hand, maintains that Complainant was not and cannot demonstrate that he suffered any adverse employment action arising from any protected conduct on his part or that any alleged protected activity on his part was a contributing factor resulting in unfavorable personnel decisions.

## **III. EVIDENCE UPON WHICH RESPONDENT RELIES**

1. In August 2004, Complainant applied for federal approval to carry a gun in the cockpit. He was rejected. On September 30, 2004, Complainant became the subject of a Transportation Security Administration (TSA) memorandum describing Complainant's behavior as a "potential hostile work environment situation." (EX C).

2. By letter dated October 15, 2004, Complainant was advised by Captain Starley that several instances of unprofessional conduct had come to his attention, and Complainant was placed on paid leave of absence pending a medical examiner's determination (EX D).

3. Invoking the fitness for duty provision of the Collective Bargaining Agreement, Complainant was advised of three possible results: return to work with treatment, disqualification for work or disciplinary action (EX E).

4. On November 4, 2004, Dr. Robert W. Elliott, a neurophysiologist, evaluated Complainant (EX F).

5. By way of history, Dr. Elliott noted Complainant had previously undergone a fitness for duty evaluation on November 1, 2001, which resulted in the diagnosis of an adjustment disorder requiring counseling. He also noted a second fitness for duty evaluation was performed on Complainant by Dr. Berry in September of 2003, for altercations Complainant had with FAA and airport security personnel. Complainant was again returned to duty at that time while undergoing counseling.

6. Additionally, Dr. Elliott reported a number of instances for which Complainant had been reprimanded in March of 2004 in which he was placed on two weeks suspension without pay. Also, unprofessional conduct on Complainant's part was described in August of 2004, and though denying his conduct was hostile, Complainant agreed he had gone to the TSA office to get the supervisor's name following his rejection from carrying a firearm in the cockpit of an aircraft.

7. According to Dr. Elliott, Complainant admitted "to his responsibility and involvement in the previous and recent instance."

8. It was Dr. Elliott's impression that Complainant suffered from narcissistic and obsessive-compulsive personality traits, but was fit for duty. He did not believe that Complainant would benefit from further counseling, rather Dr. Elliott opined that Complainant's personality disorders would be better controlled with knowledge that there would be consequences for any inappropriate behavior.

9. Complainant next was seen by Dr. Garrett O'Connor on November 29, 2004 (EX F). Dr. O'Connor had seen both Complainant and his wife on a number of occasions since 2001, when Complainant was first referred for inappropriate behavior. Counseling had been recommended at that time, and a year later Dr. O'Connor had noted improvement in attitude and conduct. However, in March 2004, Complainant admitted to 1) one reading in the cockpit, 2) failing to

wear oxygen mask above a certain altitude, 3) lack of security precautions, 4) refusing a flight attendant's request, 5) discussing his personal employment history with a passenger and 6) telling a passenger to take the train. That behavior had led to a two week suspension without pay.

10. Also, according to Dr. O'Connor additional instances of inappropriate behavior were reported in October of 2004, including the event involving the TSA employees in Houston; and it was these events that had led to Dr. O'Connor's present evaluation.

11. In the latest meeting, Complainant denied hostile or rude behavior with TSA or with anyone else. Unimpressed with Complainant's denials, Dr. O'Connor, who too diagnosed Complainant with narcissistic and obsessive-compulsive personality traits, opined Complainant had regressed "to old methods of thinking and behaving." However, unlike Dr. Elliott, Dr. O'Connor felt Complainant should undergo successful counseling before returning to work. A conclusion he regarded as a "precautionary measure." (EX H).

12. Complainant acknowledged in his deposition that upon meeting with FAA after he initiated this action, that as far as the wing incident was concerned, FAA found he did everything right, as did the mechanic in Tulsa and Continental (EX N).

13. EX P demonstrates that Complainant lost no wages either during his fitness for duty examine or after returning to work.

14. EX O is the Collective Bargaining Agreement which provides "if the company has reasonable cause to question a pilot's ability to safely perform his duties, he may be required to undergo an examination by a doctor of the company's choosing....", and during this time the pilot may also be removed from flight status with pay.

#### **IV. EVIDENCE UPON WHICH COMPLAINANT RELIES**

1. Complainant alleges that Respondent tampered with the fitness of duty process to punish him for safety complaints which he has long made (dating to 1998) as outlined in detail in his deposition. (CX B).

2. Complainant acknowledges that he was given a termination warning letter on April 2, 2004, and suspended without pay for two weeks for 1) reading material in the cockpit, 2) failing to use oxygen mask at a certain altitude, 3) lack of security precautions and 4) comments to passengers (CX D). Such actions, however, Complainant states were common place, and in support he relies on the affidavit of Paul McCarty (CX F).

3. Complainant also agrees while fitness of duty evaluations are provided for in the Collective Bargaining Agreement, there exists no policy for fair, and impartial administration of these evaluations and their over use is in question (CX J).

4. Claimant maintains he is the only pilot he is aware of to undergo three fitness of duty evaluations.

5. That despite concern over the wing, Complainant flew the plane as instructed because he was in fear of retaliation; however, he did file a report of the incident (CX K), but was subsequently told by Captain Jim Starley he should not have landed in Tulsa (CX M).

6. Following the September 30, 2004, complaint of TSA concerning Complainant's behavior, and without investigation, Complainant says he was told to undergo a fitness of duty evaluation, which resulted in Dr. Elliott declaring him to be fit for duty (CX P).

7. Next, Complainant was required to see Dr. O'Connor, but claims that Captain Starley's motivations are revealed in an e-mail of November 29, 2004, wherein Captain Starley writes "the strategy I think is to put the fear of God in him (if that is possible with John) that anymore inappropriate situations will not be tolerated." (CX Q).

8. Correspondence from Dr. O'Connor dated February 21, 2005, reveals that Complainant was then actively engaged in anger management therapy as well as marital counseling (CX S). Dr. O'Connor also wrote, I "explained to Captain Stipetich the extreme importance of his remaining in counseling...until the time of his retirement from Continental Airlines in approximately two years."

9. By letter dated March 11, 2005, (CX T) Complainant was advised by Captain Bowers that Complainant's conduct on September 30, 2004, at the TSA Office was a violation of Captain Starley's warning letter of April 2, 2004 (CX T). As a result Complainant was placed on termination warning for 18 months, required to take training flights and remain in the right seat for 90 days, but with captain's pay protection and full security. Complainant was also strongly advised to continue counseling (CX T).

### **Conclusions of Law**

The employee protection provisions of the Act are set forth at 49 U.S.C. §42121 (passed April 5, 2000). Subsection (a) describes discrimination against airline employees as follows:

No air carrier or contractor 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 (or any person acting pursuant to a request of the employee)

(1) provide, caused to be provided, or is about to provide (with any kind of 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(a).

Under the Act, complainant has an initial burden of proof to make a prima facie case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. When the complainant reaches the hearing stage, the complainant must demonstrate, by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. 49 U.S.C.A. § 4212(b)2)(B)(iv)

If there is no genuine issue as to any material fact, a summary decision may be entered. Such a decision may be based on the absence of any one of the essential elements in a case of this nature. In this instance, I find the Respondent entitled to a summary decision because Complainant has failed to meet his prima facie burden 1) to show he suffered an adverse employment action or 2) to raise an inference any protected activity on his part was the likely reason for an adverse action.

### **Protected Activity**

I do not find that a paid fitness for duty evaluation with no tangible job consequences constitutes an adverse action, particularly where both medical examiners' opinions demonstrate the justification for such an evaluation.

In this instance, Complainant was required, pursuant to his Collective Bargaining Agreement, to undergo a fitness for duty evaluation. As a result he was required to attend counseling and ultimately returned to work. He continued his captain's status for pay purposes and lost no seniority. In other words, no tangible job consequence occurred that can support a finding of an adverse employment action. Therefore, I agree with OSHA that Complainant cannot meet his burden to

show that a paid fitness evaluation constitutes an adverse action, nor do the events that followed which allowed him to retain his captain salary and seniority.

### **Reason for Adverse Action**

As pointed out by Respondent, even assuming that Complainant suffered an adverse action by the requirement of a fitness for duty evaluation, it was his alleged misconduct with TSA in September 2004, not his episode with the wing in June of 2004, that was the cause for Captain Starley's letter of October 15, 2004, requiring a fitness for duty evaluation.

In other words, Complainant's safety concerns of June and Captain Starley's letter of October were separated by the intervening event of September, which standing alone and independently supports Captain Starley's actions. Consequently, no reason exists to infer a causal relationship between the wing incident and the fitness for duty evaluation.<sup>2</sup>

Flight operations and security, particularly since 9/11, have become such that, in my opinion, decisions made by airline employers regarding flight safety are entitled to deference. In this instance, not only is the requirement of a fit for duty evaluation allowed by Collective Bargaining Agreement when a pilot's ability to safely perform comes into question, but based on Complainant's pattern of conduct over time and the opinions of Drs. Elliott and O'Connor, Respondent's concern was justified and resulted in counseling for Complainant. Consequently, one is left to believe the decision requiring a mandatory evaluation was a wise one, both for Complainant as well as the public.

Despite Complainant's assertions he was a victim for making safety concerns, I can find no relationship between the concerns and the requirement that Complainant undergo a fitness for duty evaluation. Additionally, both Drs. Elliott's and O'Connor's reports describe a finding that support Respondent's actions, rather than the allegations of the Complainant. Aside from his allegations, Complainant could point only to Captain Starley's e-mail of November 29, 2004 (CX Q), which, frankly, I view as a result of Dr. Elliott's recommendation that Complainant's inappropriate behavior could only be controlled by the imposition of consequences. Therefore, while summary decisions are not easily granted,

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<sup>2</sup> The termination warning given to Complainant on April 2, 2004, resulting in two weeks suspension of pay, preceded Complainant's June safety concerns by several months.

where the evidence produced in defense thereof is insufficient to support a judgment, I can see no reason for a trial.<sup>3</sup>

## **ORDER**

The issue presented is whether Respondent violated the employee protection provisions of the Act by sending Complainant for a fitness for duty examination. It is my finding that there is no evidence which indicates actions taken against Complainant were either adverse or based on any safety concerns expressed by Complainant. Therefore, Respondent's Motion for Summary Decision is **GRANTED**, the complaint is **DISMISSED**, and Respondent's request for \$1,000.00 attorney fees is **DENIED**. Accordingly, the hearing scheduled for February 13, 2006, in Houston, Texas, is hereby **CANCELLED**.

**So ORDERED** this 3<sup>rd</sup> day of February, 2006, at Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

**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).

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<sup>3</sup> I need not consider Respondent's burden or proof because Complainant has failed to prove his protected activity was a contributing factor to Respondent's actions.

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. §§ 1979.109(c) and 1979.110(a) and (b).