

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 May 2006

Case No.: 2006-AIR-00012

In the matter of:

DAVY MERRITT
Complainant,

v.

PIEDMONT AIRLINES, INC.
Respondent.

**ORDER GRANTING RESPONDENT'S MOTION
FOR SUMMARY DECISION**

This matter is before the Court as a second action brought by Complainant against the Respondent Piedmont Airlines, Inc. Complainant worked as an airline pilot for Piedmont Airlines (formerly Allegheny Airlines). Complainant was terminated on June 6, 2003 and filed for whistleblower protection under AIR21 ("the Act"). Administrative Law Judge Michael Lesniak found for the Complainant and ordered that he be reinstated in a February 8, 2005 Decision and Order. Complainant returned to work for Respondent in March 2005.

Complainant was again terminated by Respondent on August 8, 2005, for what Respondent argues was a failure to return from leave taken pursuant to the Family Medical Leave Act ("FMLA"). Complainant filed a grievance with the Wage and Hour Division of the United States Department of Labor on August 31, 2005, in relation to the August firing under the provision of the FLMA.

Respondent Piedmont filed a Motion for Summary Decision arguing that Complainant failed to file a complaint under AIR21 within the prescribed statute of limitations. Under the Act, a Complainant must file a complaint with the Secretary of Labor not later than 90 days after the date on which a violation occurs. 49 U.S.C.A. 42121(b)(1). Complainant argues that Respondent failed to comply with the previous Order by not reinstating him to the same level and capacity at which he was employed prior to that action. The previous Decision and Order read:

Respondent shall immediately reinstate Captain Merritt to his former position as a pilot, with full seniority (as if his employment had never been terminated).

Merritt v. Allegheny Airlines, Inc., 2004 AIR 00013, p. 28 (ALJ Decision February 8, 2005). Enforcing a previous Order would not be an action before the undersigned.

A summary decision must be read in the best possible light for the non-moving party, here the Complainant. Complainant's Response presents three arguments. First, that he was unjustly fired as relates to the FMLA, 5 U.S.C.A. § 6382; second, that Respondent failed to comply with the February 2005 Order; and third, that there was a new protected activity and new adverse action related to his August 8th firing for which he brings a new AIR21 action.

Complainant's first action is being investigated by Wage an Hour Division, and is not before me so it will not be addressed here. Complainant's second argument, likewise, does not fall under the purview of this Court. Pursuant to 49 U.S.C.A. § 42121(b)(6), the appropriate forum for an Enforcement of an Order is the United States District Court:

(6) Enforcement of order by parties.--

(A) Commencement of action.--A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

[49 U.S.C.A. § 42121(b)(6)]

The only possible action that could ensue here is a second AIR21 case. Complainant arguably addresses a new protected activity in paragraph 3 of his Response, where he stated he filed a complaint to the FAA involving the certification of pilots in the use of fire extinguishers, and paragraph 13, where he states that he reported a violation of a Federal Aviation Regulation and lists subsequent discrimination by Respondent. However, Complainant makes no correlation between these activities and his August 8th firing, and none of these claims have been investigated by the Secretary of Labor. Assuming that he does, the next question is, did Complainant file a complaint with the U.S. Department of Labor within the statute of limitations? The relevant section reads:

(1) Filing and notification.--A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination.

[49 U.S.C.A. 42121(b)(1)]. Complainant submits two pieces of evidence to support his contention that he complied with the statute of limitations. First, emails between Complainant and Wage and Hour Division. In his email to Wage and Hour, Complainant solely addresses his rights under the FMLA, saying "I think that Piedmont Airlines violated my rights under the FMLA by terminating me for using an act of congress to take care of my wife while she was sick." (Complainant's Exhibit A). This allegation under the FMLA is not jurisdictionally before

the undersigned. There is no mention of AIR in this email. The second email attached as Exhibit A is not demonstrative in any way of an AIR 21 violation.

Complainant next argues that the statute of limitations should be tolled due to his phone conversation with Judge Lesniak on October 17, 2005. In this conversation, the parties address the issue of non-compliance with the February 8, 2005 Order. Judge Lesniak explicitly asks Complainant if he is alleging a second, separate violation of AIR:

Judge Lesniak: [T]he letter you wrote me dated October 17, 2005, it says, now that your decision is final, I'm writing to you to ask you to enforce your order, "respondent shall immediately reinstate Captain Merritt to his former position as a pilot with full seniority, as if his employment had never been terminated."

Capt. Merritt: Correct.

Judge Lesniak: That was in my Order. So, you didn't allege in this letter that a new violation had occurred.

Capt. Merritt: Your Honor, I was saying that they didn't reinstate me fully in March, when they put me back to work.

....

Judge Lesniak: ...It says, currently I'm unemployed with Piedmont because I was not allowed to return to work after family medical leave. There is a grievance pending.

Capt. Merritt: Well, the grievance filing, I understand is in grievance court. Why would I bring it up in this court, when I know that the grievance has jurisdiction?

Judge Lesniak: Well, the last part of this is having now been wrongfully terminated I have been unemployed by Mid-Atlantic for two years now. And by that, you mean wrongfully terminated from way back?

Capt. Merritt: Right, your original decision in May or June 6th of 2003. The year 2003.

Judge Lesniak: You're not referring to august '05?

Capt. Merritt: Yeah. All I'm saying is your Order says, in parenthesis, as if never was terminated, and I would be at Mid-Atlantic.

Judge Lesniak: Okay. Again, what your letter is saying, then is, you're asking me to enforce my Order of February and March 2005?

Capt. Merritt: Yes, sir. That's what I'm asking.

Judge Lesniak: You're not alleging that a new act of discrimination occurred?

Capt. Merritt: No. That's in the grievance—I have that in the grievance courts, in the union itself.

Judge Lesniak: All right. And you're aware that if you feel like there's been a second violation of AIR 21, you've got to go, you have to file a complaint, just like you filed the first complaint?

Capt. Merritt: Yes, sir. I understand that.

[Respondent's Exhibit E, pages 13-15].

It is clear from this conversation that Complainant contacted Judge Lesniak to have him enforce his original Order, not to file a new AIR21 complaint. The ensuing conversation that Complainant relies upon to toll the statute of limitations, referred only to this issue of filing for an Enforcement of Order pursuant to 49 U.S.C.A. § 42121(b)(6), not to a new AIR21 complaint. Judge Lesniak explained that an Enforcement of Order would have to be filed with the District Court, and that if there were any problems with the statute of limitations with that complaint, then Complainant's letter and phone conversation with the Judge might toll the statute. (Complainant's Exhibit B, pages 17-18). The Judge was in no way referring to tolling a statute of limitations for a new AIR 21 complaint.

It is clear that Complainant has had two genuine objectives: to enforce the original Order, and/or to file a grievance regarding his leave complaint under FMLA. There was never an intent to file a second AIR 21 complaint, and there are no facts of record supporting a continuing violation of the Act. I cannot find that there was a continuing violation and therefore the statute of limitation applies.

Accordingly, Respondent Piedmont Airlines is entitled to Summary Decision.

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