



**Issue Date: 17 July 2008**

**Case No.: 2007-AIR-14**

**In the Matter of**

**MARK PETERS,  
Complainant**

**v.**

**AMERICAN EAGLE AIRLINE,  
Respondent**

**DECISION AND ORDER ON  
RESPONDENT'S MOTION TO DISMISS**

*Procedural Status*

This matter involves a complaint under the Whistleblower Protection Provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)<sup>1</sup> brought by Complainant against Respondent. On 15 Jun 07, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA). OSHA dismissed the complaint, Complainant objected, and the case was set for a formal hearing to be held on 25 Feb 08. Complainant was ordered to file a complaint specifying each alleged protected activity and adverse action. A continuance to 27 Mar 08 was granted after his initial 7 Dec 07 complaint was found to be too general, Complainant filed a first amended complaint on 12 Dec 07. Following a telephone conference, on 6 Mar 08, the hearing was continued to 25 Jun 08, with discovery closure by 11 Apr 08 and complaint filing by 16 May 08.

On 10 Apr 07, Complainant moved for leave to file a second amended complaint. Respondent filed its opposition to the motion along with its own motion for summary decision. Following a medical emergency for Complainant's counsel the hearing was further continued to 8 Sep 08, with Complainant's response to the motion for summary decision due 16 Jun 08 and discovery to close by 8 Aug 08. Complainant filed his answer to the motion for summary decision on 16 Jun 08.

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<sup>1</sup> 49 USC §42121.

### *Issues and Positions of the Parties*

Respondent moves for summary decision, arguing that there is no genuine issue of material fact that would allow a fact finder to determine that Complainant's initial letter to OSHA was timely, that he engaged in protected activity, that Respondent knew of the protected activity, or that any adverse action was taken against Complainant. Complainant responds to the contrary on each issue.

### *Law*

Parties are allowed to seek a summary decision without a full hearing.<sup>2</sup> They are entitled to a summary decision if:

The pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.<sup>3</sup>

Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.<sup>4</sup>

The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.<sup>5</sup> In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."<sup>6</sup> While all of the evidence must be viewed in the light most favorable to the nonmoving party, the mere existence of some evidence in support of the non-moving party's position is insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party.<sup>7</sup>

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<sup>2</sup> 29 C.F.R. § 18.40.

<sup>3</sup> 29 C.F.R. §§ 18.40(d), 18.41(a).

<sup>4</sup> 29 C.F.R. § 18.40(c).

<sup>5</sup> *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ARB) (Dec. 30, 2005).

<sup>6</sup> *Wise v. E.I. DuPont De Nemours and Co.*, 58 F.3d 193 (5th Cir. 1995).

<sup>7</sup> *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

The Act provides that "[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 ... a complaint with the Secretary of Labor alleging such discharge or discrimination."<sup>8</sup> The violation occurs when the employer communicates to the employee its intent to implement an adverse employment decision, rather than the date the employee experiences the consequences.<sup>9</sup>

### *Discussion*

As there is no dispute that Complainant's OSHA letter was effective on 15 Jun 07, Complainant can only proceed on adverse actions that he alleged in the OSHA letter and that occurred within 90 days of that date. If more than 90 days elapsed between the dates of the adverse actions reported and 15 Jun 07, Complainant's filing was untimely and his complaint is barred. Thus, Complainant can properly cite protected activity that took place on or after 17 Mar 07.

### Factual Background

Based upon the deposition and documents submitted and taking every inference in favor of the non-moving Complainant, the facts appear as follows:

Complainant was a pilot for Respondent from 1998 to 2000, when he became a pilot for American Airlines. When he was furloughed from American in 2004, he was returned to Respondent in accordance with the collective bargaining agreement's flowback provisions. The flowback program caused enmity between Respondent's pilots and the flowback pilots. Following a failed line check flight on 21 Jul 06, Complainant was scheduled for remedial training on 27 Jul 06, which also was graded as unsatisfactory. Rather than risk further unsatisfactory grades and putting his FAA license in jeopardy from what he considered to be an unfair system, Complainant elected to take two 90-day unpaid leaves of absence, hoping that in the meantime, he would be called back to American. The absences expired on 2 Feb 07 and he went back on paid status.

On 2 Feb 07, Complainant delivered a lengthy letter to Respondent detailing allegations of business conduct and company rules, flight safety protocols, and the instructor/check pilot guide. Complainant received a call on 12 Feb 07 to schedule training, but when he informed the training scheduler about his 2 Feb 07 letter and pointed out it complained about the training, he was told to not to come to training until further notice. Also on 12 Feb 07, Respondent ordered a retroactive pay stop.

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<sup>8</sup> 49 USC §42121(b)(1).

<sup>9</sup> *Sassman v. United Airlines*, 2005-AIR-4 (ARB Sept. 28, 2007); *Halpern v. XL Capital, LTD.*, 2004 SOX 54 (ARB) (Aug. 31, 2005), (citing *Overall v. Tennessee Valley Auth.*, 97-ERA-53 (ARB) (Apr. 30, 2001); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

On 5 Mar 07, Respondent sent Complainant a letter informing him (1) it had conducted a preliminary investigation into his concerns and that his selection for the 21 Jul 06 check ride was valid; (2) it would continue to investigate his other complaints; (3) he should report for training on 7 Mar 07;<sup>10</sup> and (4) since he did not report for training on 2 Feb 07, as a matter of courtesy, his unpaid leave was extended to 6 Mar 07.

Complainant considered returning for training, but elected not to. In light of the absence of a satisfactory investigation into his allegations, on 7 Mar 07, Complainant delivered a notice of resignation to Respondent's CEO, saying he had been forced to resign. The letter set an effective date of 12 Mar 07, to allow Complainant to obtain medical insurance. He also gave a similar letter to Respondent's Chief Pilot. Complainant subsequently determined that he was required to give two weeks notice and on 10 Mar 07 sent Respondent's CEO a letter "withdrawing" his previous letter and notifying Respondent that the effective date of his resignation would be 26 Mar 07, two weeks after the expected date of receipt.

On 11 Mar 07, Respondent changed Complainant's status to missed assignment for 7 through 10 Mar 07. On 20 Mar 07, Complainant was informed his resignation was processed effective 16 Mar 07. He was also informed Respondent would seek to recover any wages paid from 1 Feb 07 through Complainant's resignation.

On 15 Jun 07, Complainant filed his complaint with OSHA. It did not specifically allege protected activity or adverse action, but incorporated his 2 Feb 07 letter of complaint to Respondent and an event timeline. The last two relevant items on the timeline referred to a 15 Mar 07 union e-mail unrelated to Complainant's specific case and the 20 Mar 07 notice that his resignation was accepted effective 16 Mar 07.

### Analysis

Assuming for the purposes of this motion that Complainant's resignation was a constructive discharge and therefore an adverse action, it took place on 7 Mar 07, just as it would have had the adverse action been an unequivocal notice from Respondent that it was terminating Complainant with a specific effective date to be determined. Complainant's subsequent "withdrawal" and amendment of the effective date of his resignation was not actually a withdrawal of his resignation and served in no way to change the basic and relevant fact that he had been constructively discharged. It was at most akin to a notification from his employer that a slight change had been made to his effective termination date. Consequently, Complainant's constructive termination was on 7 Mar 07 and his 15 Jun 07 letter to OSHA was untimely as to the adverse action of constructive discharge.

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<sup>10</sup> The collective bargaining agreement called for a minimum notice of 7 days for ground training.

Complainant argues that the notice he received on 20 Mar 07 stating that Respondent had accepted his resignation effective 16 Mar 07 instead of 26 Mar 07 is the triggering event for his 90 time limit. However, Complainant's self serving statements about his subjective feelings and hopes that his twice submitted unequivocal resignation would be rejected and a new investigation ensue is contrary to the 5 Mar 07 notice he received and Respondent's order for him to return to training.

Complainant also suggests that Respondent's attempt to seek back pay is another adverse action. However, Complainant notes in his OSHA timeline that the "courtesy" extension of his leave of absence could actually have been an attempt to recover his pay from 2 Feb 07 through 6 Mar 07. Moreover as early as 12 Feb 07, he was given notice that Respondent was seeking a retroactive pay stop. Thus he was on sufficient notice of those actions well before 90 days prior to his OSHA letter. Finally, his complaint to OSHA raises constructive termination and never mentions back pay issues as an independent adverse action.

In summary, Complainant alleges he was constructively discharged by Respondent's unfair harassment through its evaluation and training system. He first submitted his resignation to Respondent in response to that harassment on 7 Mar 07. None of the subsequent minor changes in effective dates changed that basic fact. His 15 Jun 07 complaint to OSHA for constructive discharge was untimely.<sup>11</sup>

*Recommended Decision and Order*

The complaint is **Dismissed**.

In view of the foregoing, the hearing scheduled on **September 8, 2008 at 9:00 a.m.** as setting one in **Dallas, Texas** is hereby **Cancelled**.

**SO ORDERED** this 17<sup>th</sup> day of July, 2008 in Covington, Louisiana.

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**PATRICK M. ROSENOW**  
**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

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<sup>11</sup> This finding renders the substantive bases of the motion for summary decision and the motion to amend moot.

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, Suite S-5220, 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).