

U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)



Issue Date: 02 April 2009

CASE NO.: 2009-AIR-00006

IN THE MATTER OF

**TERRY WALLUM,
Complainant**

v.

**BELL HELICOPTER TEXTRON, INC.,
Respondent**

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

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. § 42121, et seq.

FINDINGS OF FACT

Complainant, Terry Wallum, filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) on March 17, 2008, alleging Respondent has continued to retaliate against him in reprisal for initiating a previous whistleblower discrimination complaint investigated by OSHA. After an investigation by OSHA, Complainant was notified by letter dated August 25, 2008 that his complaint was being dismissed because a preponderance of the evidence indicated that Complainant's protected activity was not a contributing factor in his suspension. Complainant filed a letter requesting a formal hearing with the Office of Administrative Law Judges on December 17, 2008.

On February 25, 2009, Respondent filed a Motion to Dismiss, asserting that it is not a covered entity under the Act. Specifically, Respondent states that it is engaged in the business of designing, manufacturing, and distributing vertical lift aircraft, primarily helicopters and, as such, it is not an air carrier, contractor, or subcontractor of an air carrier, as those terms are defined under the Act. [Motion p. 1-2].

On March 4, 2008, Complainant filed a response, arguing Respondent does perform certain services or duties under its warranty for both military and commercial aircraft/buyers and, in so doing, engages in the safety-sensitive function of aircraft maintenance. [Reply p. 3].

Complainant does not assert that Respondent is an “air carrier” nor does Complainant assert that the “military and commercial aircraft/buyers” are “air carriers.”

Respondent has established the following facts by affidavit and Complainant has presented no evidence to the contrary.

1. Respondent is engaged in the business of designing, manufacturing and distributing vertical lift aircraft, primarily helicopters.
2. Respondent manufactures and distributes vertical lift aircraft to both commercial and military customers.
3. Respondent does not operate aircraft under FAR Part 135.
4. Respondent does not hold Federal Aviation Act certifications, such as a Part 119 air carrier or commercial operator certification, that would permit the company to provide air transportation for persons or property for compensation or hire.
5. Respondent does not engage in the business of providing air transportation services to the public.
6. Respondent does not engage in the business of transporting passengers, cargo, or mail across state or international lines for compensation.
7. Respondent does not contract with any customer or companies to provide flight crewmember duties; flight attendant duties; flight instruction duties; aircraft dispatcher duties; aircraft maintenance and preventive maintenance duties; ground security duties; aviation screening duties; or air traffic duties.

DISCUSSION OF LAW AND FACTS

Because the Parties have submitted evidence outside the pleadings, the Court will treat the Motion to Dismiss as one for Summary Decision pursuant to 29 CFR § 18.40.

Any party may move with or without supporting affidavits for summary decision on all or part of the proceeding. 29 C.F.R. § 18.40(a) (2004). Summary judgment is granted for either party if the administrative law judge finds “the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” *Id.* Thus, in order for a motion for summary decision to be granted, there must be no disputed material facts and the moving party must be entitled to prevail as a matter of law.

In deciding a motion for summary decision, the court must consider all the material submitted by both parties, drawing all reasonable inferences in a matter most favorable to the non-moving party. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The moving party has the burden of production to prove that the non-moving party cannot make a showing sufficient to establish an essential element of the case. Once the moving party has met its burden of production, the non-moving party must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A court shall render summary judgment when there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds could come to but one conclusion, which is adverse to the party against whom the motion is

made. Lincoln v. Reksten Mgmt., 354 F.3d 262 (4th Cir. 2003); Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (stating the purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact). However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The Act prohibits an air carrier, contractor, or subcontractor of an air carrier from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (1) 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, (2) has 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, (3) testified or is about to testify in such a proceeding, or (4) assisted or participated in such proceeding.¹

By its express language, the Act is limited to employees of an air carrier, contractor, or subcontractor of an air carrier.²

Air Carrier

The regulations implementing AIR 21 state that the definition of “air carrier” under the Federal Aviation Act (FAA), 49 U.S.C. § 40101, *et seq.*, is applicable to the Act.³ The FAA defines “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”⁴ “Air transportation” is further defined as “foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.”⁵

“Foreign air transportation” is “the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft.”⁶ “Interstate air transportation” is “the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft” between one place in a State, territory, or possession of the United States and another.⁷

The case law on whether or not an employer is an air carrier is sparse. Respondent relies on two administrative law judge opinions to support its argument that it is not an air carrier.⁸

¹ 49 U.S.C. § 42121(a)(1)-(4).

² 49 U.S.C. § 42121(a); *see also* Tucker v. Hamilton Sundstrand Corp., 268 F. Supp. 2d 1360, 1365 (S.D. Fla. 2003).

³ Broomfield v. Shared Servs. Aviation & Conocophillips Alaska, Inc., 2004-AIR-00020 (ALJ 2004) (citing Procedures for Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 Fed. Reg. 55, 14101 (March 21, 2003)).

⁴ 49 U.S.C. § 40102(a)(2); *see also* 29 C.F.R. Part 1979.101.

⁵ 49 U.S.C. § 40102(a)(5).

⁶ 49 U.S.C. § 40102(a)(23).

⁷ 49 U.S.C. § 40102(a)(25).

⁸ Marsh v. Erickson Air-Crane, Inc., 2004-AIR-00033 (ALJ 2005) and Broomfield v. Shared Servs. Aviation & Conocophillips Alaska, Inc., 2004-AIR-00020 (ALJ 2004).

The issue before the administrative law judge in Broomfield, whether the respondent provided the transportation of mail by aircraft, is not at issue here, as neither Party has alleged Respondent does or does not transport mail by aircraft. In Marsh, the administrative law judge found that the respondent, which performed specialized work including fire-fighting, logging, construction, and hydroseeding, was an air operator that carried only external loads, and not an air carrier that transports passengers, cargo, or mail.⁹

Respondent states it is in the business of designing, manufacturing, and distributing vertical lift aircraft, primarily helicopters, and as such it cannot be considered an “air carrier” as defined under the Act because it does not engage in the transportation of passengers, cargo, or mail by aircraft. [Motion p. 5, Exhibit A]. I agree with Respondent. Respondent builds helicopters, it does not transport passengers or property for compensation, and there is nothing before the Court to support a finding otherwise.

Contractor

“Contractor” is defined by the Act as “a company that performs safety-sensitive functions by contract for an air carrier.”¹⁰

Looking at the Act’s legislative history, the House of Representatives Report states Section 42121(e) “uses a definition of ‘contractor’ similar to the one found in the drug testing rules at 14 CFR 121, Appendix I.”¹¹ The purpose was to “ensure that employees actually have some expertise in a safety-sensitive position in order to avail themselves of the protections offered by this legislation.”¹² Under 14 C.F.R. Part 121, Appendix I, the safety-sensitive functions include: (1) flight crew membership duties; (2) flight attendant duties; (3) flight instruction duties; (4) aircraft dispatcher duties; (5) aircraft maintenance and preventative maintenance duties; (6) ground security coordinator duties; (7) aviation screening duties; and (8) air traffic control duties.¹³

Respondent argues that while it may sell a product or good to an air carrier, it does not provide any on-going services or perform any safety-sensitive functions for customers. [Motion p. 6]. In addition, Respondent relies on the legislative history of AIR 21 as a showing of Congress’ intent to “limit the scope of the ‘contractor’ category to those entities involved, by contract, in performing duties or services to air carriers, and then it limited coverage further by specifying the eight types of duties that should be considered ‘safety-sensitive functions.’” [Motion p. 9-10].

Complainant responds by arguing Respondent does perform certain services or duties under contract for both military and commercial aircraft/buyers and, in doing so, engages in the safety-sensitive function of aircraft maintenance. [Reply p. 3]. However, Complainant presents no evidence of any contracts to support this argument. The only evidence presented is that

⁹ Marsh v. Erickson Air-Crane, Inc., 2004-AIR-00033, p. 3 (ALJ 2005).

¹⁰ 49 U.S.C. § 42121(e).

¹¹ H.R. REP. NO. 106-167, pt. 1, at 126 (1999).

¹² *Id.*

¹³ 14 C.F.R. Part 121, App. I (2009).

Respondent provides warranty coverage for the products it manufactures and sells. The undisputed evidence establishes that Respondent does not contract with any customer or companies to provide aircraft maintenance.

There is nothing before the Court showing that Respondent contracts with air carriers to perform any of the eight safety-sensitive functions. Although Respondent may provide a warranty for a period of time to a purchaser of its product, the Court finds that this is not the equivalent of contracting with an air carrier to provide aircraft maintenance duties, or any of the other seven safety-sensitive functions.

Conclusion

In sum, Respondent is neither an air carrier nor a contractor or subcontractor of an air carrier within the meaning of AIR21 and therefore Complainant's complaint must be dismissed.

ORDER

Respondent's Motion for Summary Decision is hereby **GRANTED**, and the complaint of Terry Wallum is hereby **DENIED**.

A

**LARRY W. PRICE
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, 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).