

Whistleblower Newsletter Aviation Investment and Reform Act (AIR21)

July 30, 2007

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PROCEDURE BEFORE ARB

ALJ'S CREDIBILITY DETERMINATIONS NOT BASED ON Demeanor; IN AIR21 AND SOX CASES, SUCH DETERMINATIONS ARE REVIEWED UNDER THE SUBSTANTIAL EVIDENCE STANDARD RATHER THAN DE NOVO

In [*Walker v. American Airlines, Inc.*](#), ARB No. 05 028, ALJ No. 2003 AIR 17 (ARB Mar. 30, 2007), the Complainant argued on appeal that the ARB should overturn the ALJ's credibility determinations. According to the Complainant, because the ALJ determination was not demeanor based it should be reviewed de novo. The ARB rejected the argument that de novo was the appropriate standard of review, noting that the caselaw cited by the Complainant was all from environmental whistleblower cases. In contrast, in AIR21 and SOX cases the ARB is required to review an ALJ's fact determinations under the substantial evidence standard. Because the ALJ's credibility determinations were not explicitly based on demeanor, the Board would not afford those determinations the "great deference" that a demeanor based determination would receive. Nonetheless, because they were factual findings, the ARB was required to uphold them if supported by substantial evidence.

PROCEDURE BEFORE THE ARB; SPECIFICITY NECESSARY TO RAISE ASSIGNMENT OF ERROR; WAIVER OF ARGUMENTS RAISED IN PETITION FOR REVIEW BUT NOT DISCUSSED IN APPELLATE BRIEF

The ARB ruled in [*Walker v. American Airlines, Inc.*](#), ARB No. 05 028, ALJ No. 2003 AIR 17 (ARB Mar. 30, 2007), that under the regulations implementing AIR21, a petition for review must specifically identify the findings, conclusions or orders to which exceptions are taken. 29 C.F.R. § 1979.110(a). General assignments of error do not meet this standard. Moreover, the ARB stated that it was disinclined to consider as argument passing references and commentary in the factual summary section of a petition. The ARB also stated that an argument raised in a petition but not discussed in a brief is considered abandoned and thereby waived.

ARB BRIEFING REQUIREMENTS; CONTUMACIOUS REFUSAL TO FILE CONFORMING BRIEF RESULTS IN DISMISSAL OF APPEAL

In [*Powers v. Pinnacle Airlines, Inc.*](#), ARB No. 06 078, ALJ Nos. 2006 AIR 4 and 5 (ARB June 28, 2007), the ARB dismissed the Complainant's appeal because "even after the Board gave Powers explicit instructions concerning the Board's format and page limitation requirements, gave her ample opportunities to file a brief conforming to these requirements and limitations and unambiguously warned her that if she failed to file a conforming brief her appeal would be subject to dismissal without additional order, she nevertheless filed a brief that is not double spaced and exceeds the Board's page limitations." The Complainant had two previous ARB appeals dismissed because she refused to file conforming briefs, both upheld by the Sixth Circuit. The ARB thus found that "there is not the slightest doubt that Powers had

notice that if she refused to file a conforming brief, the Board would dismiss her appeal. Furthermore, in light of these previous dismissals, Powers's intransigent refusal to file a conforming brief could properly be described as nothing less than 'contumacious.'"

TIMELINESS OF COMPLAINT

TIMELINESS OF COMPLAINT; DATE COMPLAINANT WAS PRESENTED WITH "CAREER DECISION DATE" CHOICES RATHER THAN LATER DATE OF TERMINATION IS DATE THAT LIMITATIONS PERIOD BEGINS

In [*Rollins v. American Airlines, Inc.*](#), ARB No. 04 140, ALJ No. 2004 AIR 9 (ARB Apr. 3, 2007), a whistleblower complaint arising under both AIR21 and SOX, the Respondent issued to the Complainant a "Career Decision Day Advisory Letter" providing three choices: (1) commit to comply with the Respondent's rules and regulations (including satisfactory work performance and personal conduct) and accept reassignment, (2) voluntarily resign with transitional benefits and agree not to file a grievance, or (3) accept termination with grievance options. Five days later the Complainant informed the Respondent that he would not agree to any of the options, and on that same day the Complainant was provided a letter of termination. The whistleblower complaint would be timely if measured from the date of the termination letter, but untimely if measured from the date of the advisory letter. The ARB found that advisory letter provided final and unequivocal notice to the Complainant that the Respondent had decided to terminate his employment. The ARB observed that under *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988), *rev'd on other grounds*, 496 U.S. 72 (1990) and *Wagerle v. The Hosp. of the Univ. of Pa.*, 1993 ERA 1, slip op. at 3 6 (Sec'y Mar. 17, 1995), the possibility that the Complainant could have avoided the effects of the advisory letter by resigning voluntarily or accepting employment in another division did not negate the effect of the advisory letter's notification of intent to terminate the Complainant's employment. Thus, the complaint was untimely.

BURDEN OF PROOF AND PRODUCTION

ALJ'S LACK OF PRECISION IN ANALYTICAL FRAMEWORK COMPELLED REMAND

In [*Clemmons v. Ameristar Airways, Inc.*](#), ARB Nos. 05 048, 05 096, ALJ No. 2004 AIR 11 (ARB June 29, 2007), the ARB remanded for additional proceedings where the ALJ made four errors of law in analyzing the Complainant's AIR21 whistleblower complaint. Specifically, the ALJ erred when he (1) appeared to have merged the Respondent's burden of production with its later burden to prove by clear and convincing evidence that it would have taken the adverse action absent protected

activity; (2) held that the Complainant proved a prima facie case by a preponderance of the evidence (rather, once a case has proceeded to hearing, a complainant's burden is to prove by a preponderance of evidence ("demonstrate") that the protected activity was a contributing factor in the alleged adverse action); (3) appeared to have found that a finding of pretext compels a finding of discrimination; and (4) failed to consider whether the Respondent proved that it would have terminated the Complainant absent protected activity. The ARB acknowledged that the ALJ's errors may have been simply imprecision; but that imprecision created uncertainty about the ALJ's findings that compelled a remand.

PROTECTED ACTIVITY

PROTECTED ACTIVITY; UNDER AIR21, THE PROVISION OF INFORMATION ABOUT SAFETY IS PROTECTED ONLY WHEN THE COMPLAINANT ACTUALLY BELIEVES IN THE EXISTENCE OF A VIOLATION

In [*Walker v. American Airlines, Inc.*](#), ARB No. 05 028, ALJ No. 2003 AIR 17 (ARB Mar. 30, 2007), the Complainant, a level 4 maintenance supervisor, made a call to the Respondent's hotline primarily complaining about a change in policy regarding how overtime work would be credited, but also including a statement charging that several higher level supervisors had been intimidating the Complainant into signing off on tasks that had not been completed or were not safe just so they could get the plane out. The Complainant later signed a statement retracting the charge that the supervisors had been intimidating him. Following a hearing, the ALJ found that the Complainant had not had a good faith and reasonable basis for making the allegation about supervisor pressure to sign off on items. The ALJ's finding was largely based on credibility determinations, which the Complainant challenged on appeal, but which the ARB found were supported by substantial evidence. The ARB also affirmed the ALJ's finding that the hotline call was not protected activity because it was not made in good faith. Assuming for purposes of argument that the hotline call implicated safety, the ARB held that the provision of information is protected activity only when the complainant actually believes in the existence of a violation.