



**Issue Date: 20 August 2012**

**CASE NO.: 2004-AIR-00011**

**IN THE MATTER OF**

**THOMAS E. CLEMMONS,  
Complainant**

**v.**

**AMERISTAR AIRWAYS, INC.,**

**and**

**AMERISTAR JET CHARTER, INC.,  
Respondents**

**DECISION AND ORDER ON REMAND**

This case involves Respondents termination of Complainant (Clemmons) on January 20, 2003 allegedly in violation, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121, *et. seq.*, ("AIR21" or "the Act") and the regulations promulgated there under at 29 C.F.R. Part 1979. In part the Act prohibits an air carrier, contractor or sub-contractor 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 provides to the employer or the federal government information about violations or alleged violations of Federal Aviation Administration's (FAA) rules, orders, regulations or standards or any other provision of federal law related to air carrier safety.

Respondents employed Clemmons from September 6, 2002, until his termination on January 20, 2003. On April 14, 2003, Clemmons filed a complaint with the Department of Labor alleging Respondents terminated him for reporting to his supervisors and the Federal Aviation Administration (FAA) Respondents violations of FAA Rules 121 and 125, pertaining to inadequate maintenance of aircraft and working pilots in excess of the maximum permissible duty hours. On January 20, 2004, following an investigation, the Regional Supervisor for the Occupational Safety and Health Administration (OSHA) found Clemmons' complaint to have merit. Respondents disagreed and filed a timely request for a formal hearing pursuant to 49 U.S.C. § 42121(B)(2)(a).

This matter was referred to the Office of Administrative Law Judges for a formal hearing which was held in Dallas, Texas, on July 27-30, and September 21-22, 2004. Following the hearing the undersigned on January 14, 2005 issued a Decision and Order (Order) finding *inter alia* that Respondents had violated the Act when it terminated Clemmons. Thereafter upon appeal, the Administrative Review Board (Board) on June 29, 2007, issued a Decision and Order on Remand finding that the undersigned erred by merging Respondents' burden of production with its burden of proving by clear and convincing evidence that it would have taken the adverse action in terminating Clemmons absent protected activity. The Board also found that the undersigned erred by: (1) not determining whether Clemmons proved by a preponderance of the evidence that his protected activities contributed to his termination; (2) finding that pretext compelled a finding of discrimination; and (3) not considering whether Respondents would have terminated Complainant absent protected activity.

On remand, the undersigned issued a Decision and Order on Remand on February 20, 2008, finding that Respondent had no legitimate reason to terminate Clemmons and that Clemmons established by a preponderance of credible evidence that Respondent discharged him because of his protected activities. Further, Respondent failed to establish by clear and convincing evidence that it would have discharged Clemmons absent his protected activities. In finding as such, the undersigned re-affirmed the previous order contained in the original Decision and Order issued on January 14, 2005.

Respondent appealed to the Board, which affirmed the undersigned's decision on the merits and remedies, including a back pay award of \$37,995.09 plus interest on May 26, 2010. Respondent then appealed to the United States Court of Appeals for the Fifth Circuit. The court affirmed the Board's decision on the merits and its award of back pay, but remanded the case for the undersigned to determine the proper amount of the award.

The court instructed the undersigned to address the question of whether the period of the back pay award, which ran from January 20, 2003, the date of Clemmon's discharge, through July 2004, the date of the hearing, should have ended as of March 28, 2003, the latest date that Respondent was aware of Complainant's insubordinate email. The Fifth Circuit cited *McKennon* for the proposition that "where there is after-acquired evidence of wrongdoing that would have led to the termination on legitimate grounds had the employer known about it," back pay should be limited to the period "from the date of the unlawful discharge to the date the new information was discovered." *Ameristar Airways, Inc. v. Admin. Review Bd., U.S. Dep't of Labor*, 650 F.3d 562, 570 (5th Cir. 2011) *citing McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995).

The Board's Order of Remand (Remand Order) of April 27, 2012, instructs this tribunal to consider if Clemmons's transmittal of the e-mail misconduct was so grave that immediate discharge would have followed in any event. In conducting this inquiry, any extraordinary equitable circumstances affecting the legitimate interests of either party should be considered and if it is concluded that Ameristar would have fired Clemmons upon learning of the e-mail's contents, the award of back pay should be recalculated for the period January 20 until March 28, 2003. The Board has also ordered that a determination be made as to what burden of proof Ameristar has concerning the issue of after-acquired evidence in AIR21 cases.

## I. FACTS

Although the parties are well aware of the background of this case, the following facts are presented as follows:

Clemmons was hired by Ameristar Airways in September 2002. As director of operations, Clemmons was responsible for hiring and scheduling pilots, maintaining pilot training records, and updating manuals and required navigational information (known in industry parlance as “charts”).

Soon after he was hired, Clemmons fielded several pilot complaints about pay and duty-time violations. Under FAA regulations, each flight crew member must be relieved from duty for at least 8 consecutive hours during any 24-hour period. *See* 14 C.F.R. § 125.37. On December 17, Clemmons sent an email to Ameristar president Thomas Wachendorfer, manager Lindon Frazer, and head of dispatch Stacy Muth, notifying them that pilots were being pushed to work beyond the duty-time limits and that this was a violation of FAA regulations.

Clemmons also raised concerns about Ameristar's maintenance log policy, which required pilots to confer with officials at company headquarters before recording any maintenance issues in their logbooks. Clemmons complained to company management that he believed this a violation of federal regulations.

On December 31, Clemmons complained to Muth that Ameristar Airways was sharing another airline's call sign without FAA approval, another violation of federal regulations. Clemmons offered to begin the process of requesting a new call sign for Ameristar flights, but he was instructed by Frazer not to do so. Ameristar was later fined \$123,000 for this violation.

On January 7, Clemmons and his chief pilot, Brent Barker, held a meeting with FAA official Ron Brown. The meeting took place in Clemmons's office at Ameristar headquarters and was made known to Ameristar management. Clemmons and Barker discussed with Brown their concerns about duty-time violations and improper call sign use. Later that month, Frazer recommended to Wachendorfer that Clemmons be terminated; Wachendorfer concurred. Clemmons was officially terminated on January 20, 2003.

Clemmons was charged with keeping charts, pilot records, and manuals up to date. An internal audit of Ameristar's pilot records in November 2002 determined that certain training records were deficient. A follow-up audit in January 2003 found some records still incomplete. Ameristar also received a pilot complaint in mid-December stating that the pilot was “unsure” if his charts were current, although it was later determined that they were. Ameristar further

complains that Clemmons did not complete any updates to its operational manuals before he was terminated.

On January 16, shortly before his termination, Clemmons assisted a pilot with a revenue flight that was scheduled to transport 24 pallets of freight. Clemmons and the pilot were only able to load half the pallets onto the flight because the customer had provided incorrect pallet dimensions. After Wachendorfer intervened and instructed the pilot on how to load the pallets, they were able to successfully load 20 of the 24 pallets onto the plane, eight more than Clemmons and the pilot had previously been able to fit.

Clemmons and Wachendorfer also had disputes over pilot scheduling. Following management's instruction to arrange a "two weeks on and one week off" schedule, Clemmons attempted to prepare pilot schedules with 14 days on and 7 days off. Each of Clemmons's schedules was reviewed and approved by Frazer before the schedules were sent out to the pilots. On January 9, Wachendorfer sent a memo to Clemmons, copying Frazer, stating that the approved schedules were unsatisfactory. After consulting with Muth, Clemmons submitted a revised schedule, which Wachendorfer again rejected. Wachendorfer eventually had Frazer create a substitute schedule with 15 days on and 6 days off.

On January 13, Clemmons sent an email to the pilots explaining that, although he prepared a schedule with 14 days on and 7 days off, he was overruled by Wachendorfer. The email voiced several other complaints about Ameristar management and referred mockingly to Wachendorfer as "Mr. Wackmeoffendorfer." Clemmons told the pilots that he was hoping to leave the company soon, and he offered to support any pilots who wished to quit the company by assisting them with their resignation letters and supporting their unemployment claims. Although Clemmons now acknowledges that this email was insubordinate, unprofessional, and grounds for termination, the record indicates that Ameristar was not aware of the email or its contents until March 28, two months after Clemmons's January 20 termination.

Following his termination Clemmons filed a claim for unemployment benefits from the Texas Workforce Commission; Ameristar contested the claim. In filings submitted to the commission on February 5 and March 31, Ameristar stated that Clemmons was fired for failing to produce the most economical pilot work schedules. In a third filing on April 4, Ameristar again cited problems with pilot scheduling as well as the January 16 freight-loading incident.

Based on the filings, the Commission ordered an award of unemployment benefits. Ameristar appealed. At a hearing on June 30, Ameristar for the first time raised the insubordinate email as a reason for termination. The Commission eventually reversed its earlier award after determining that Clemmons's insubordination rendered him ineligible for unemployment benefits. Clemmons

filed a timely complaint with the Secretary of Labor, alleging he was discharged in violation of AIR21's employee protection provision.

*Ameristar Airways, Inc.*, 650 F.3d at 564-66.

## II. DISCUSSION

### A. Ameristar's Burden of Proof Under AIR21

In addressing whether a preponderance of the evidence or clear and convincing evidence is the correct burden of proof in this case, Ameristar contends that its burden is merely preponderance. Ameristar argues that AIR21 applies a clear and convincing burden of proof only to the merits of a claim and that it is silent as to what burden is required at the remedy phase. *See* 49 U.S.C. § 42121(b)(2)(B)(ii). Additionally, due to the statute's silence on the applicable burden of proof in the remedy phase, the default should be a preponderance of the evidence in this case.

Clemmons argues alternatively, and in agreement with the ARB, that Congress imposed a heavy burden on an employer in the liability phase of mixed motive AIR21 cases by requiring the employer to prove by clear and convincing evidence that it would have discharged the employee in absence of the protected activity. *See* Remand Order at 4 (*citing Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010)). The Board posits it would “seem[] strange that the burden of proof would change in this case where the after-acquired evidence involved in an incident occurring before the termination but merely discovered afterwards; that would result in a windfall to the employer solely because it learned of such information later.” Remand Order at 4-5. I see no reason not to accept the Board's determination that Ameristar's burden of proof is clear and convincing evidence; especially in the absence of a showing of Congress's intent to find otherwise.

### B. After-Acquired Evidence

Analyzing Clemmons's claim under *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S.Ct. 879 (1995), is appropriate in light of the fact that the undersigned found that Ameristar's unlawful motive was the sole basis for Clemmons's firing. The Supreme Court “recognize[d] the duality between the legitimate interests of the employer and the important claims of the employee” stating that “[t]he employee's wrongdoing must be taken into account” in order to ensure that an employer's legitimate concerns aren't ignored. *Id.* at 361, 115 S.Ct. at 886. This includes “the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.” *Id.*

Pursuant to the after-acquired evidence rule in such cases, “[o]nce an employer learns about employee wrongdoing that would lead to a legitimate discharge,” the employer cannot be expected to ignore such information even where the wrongdoing may not have been discovered absent such a suit. *Id.* at 362, 115 S.Ct. at 886. In cases involving the award of back pay, the formulation of the remedy should include a calculation based on the period from the date of unlawful discharge to the date the new information was discovered. However, when an employer seeks to use after-acquired evidence of employee wrongdoing, “it must first establish

that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge.” *Id.* at 362-63, 115 S.Ct. at 886-87. It is not enough for an employer to “establish that it *could* have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so.” *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996).

Critical to the instant case and Ameristar’s ability to use Clemmons’s e-mail to limit the any back pay award are dates that include the latest date that Ameristar could have been made aware of the e-mail and those dates when Ameristar submitted filings to the Texas Workforce Commission (TWC) opposing Clemmons’s claim for unemployment benefits. The record supports the finding that Clemmons’s managers, Frazier and Wachendorfer, did not see the e-mail until March 28, 2003. Important, however, is the fact that Ameristar’s three submissions to the TWC after this discovery (March 31, 2003; April 4, 2003; and June 26, 2003) fail to mention the misconduct Clemmons engaged in by sending the e-mail. Each of these TWC filings cites shifting reasons for Clemmons’s dismissal yet omits what could clearly be seen as a reasonable ground for firing the complainant, the e-mail itself. Ameristar first raised the e-mail before the TWC at a hearing on June 30, 2003.

Furthermore, during the proceedings in front of the TWC, Ameristar was simultaneously responding to Complainant’s OSHA claim. Ameristar’s response to OSHA on May 9, 2003 presents this e-mail as one of the reasons for firing Clemmons. These shifting and contradictory responses by Ameristar with regard to Clemmons’s discharge fail to demonstrate by clear and convincing evidence that Ameristar would have fired Clemmons’ based on the email had it known of it at the time of discharge. Ameristar’s omission of the e-mail in numerous filings before the TWC does not convince me that Respondent would have fired Complainant based on the e-mail in conjunction with its other stated grounds, let alone as the sole reason for discharge.

Ameristar argues that the e-mail, on its face, was intended to cripple or destroy Ameristar and the authority of its president. By Clemmons’s own admission the e-mail was insubordinate, unprofessional, and grounds for termination. Respondent cites *O’Day* for the proposition that the e-mail should be properly considered after-acquired evidence because it is “common sense” that Clemmons would be discharged for sending it. *O’Day*, 79 F.3d at 762. However, the circumstances in *O’Day* differ importantly from the instant case. Most notably, the Ninth Circuit in *O’Day* applied “common sense” to corroborate the affidavit of the employer’s human resources representative and the employer’s written company policy. *Id.* Here, the undersigned has already discredited Frazer’s testimony and Ameristar did not otherwise enter evidence illustrating a company policy prohibiting the conduct included in the email. I am not convinced that Ameristar has shown by clear and convincing evidence that it would have fired Clemmons if it had known of the e-mail at the time he was fired and accordingly, I see no reason to limit Complainant’s award of back pay from the date of his discharge, January 20, 2003, to the date of the e-mail’s discovery, March 28, 2003.

### **III. ORDER**

Based on the foregoing,

**IT IS HEREBY ORDERED** that Respondent, Ameristar Jet Charter, Inc., and Ameristar Airways, Inc. shall pay to Complainant back pay as ordered in the undersigned's original Decision and Order of January 14, 2005.

**SO ORDERED** this 20<sup>th</sup> day of August 2012, at Covington, Louisiana.

**A**

CLEMENT J. KENNINGTON  
Administrative Law Judge