



Issue Date: 14 November 2008

Case No.: 2004-AIR-19

In the Matter of

**Coleen L. Powers,
Complainant**

v.

**Mesaba Airlines,
Mesaba Holdings, Inc.,
Northwest Airlines Corporation,
NWA Inc.,
Northwest Airlines, Inc.,
Paper, Allied-Industrial, Chemical & Energy
Workers Int'l Union (PACE) Local 5-0772,
Pinnacle Airlines Corporation of Tennessee,
Pinnacle Airlines Corporation,
Pinnacle Airlines, Inc.,
Piper Rudnick, LLP,
Teresa Brents,
Ted Davies,
Doug Hall,
Kim Monroe,
Phil Reed,
Phil Trenary,
Lloyd Walters.
Respondents**

DECISION AND ORDER
DISMISSING CLAIM

The Complainant filed her complaint under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), and the Sarbanes-Oxley Act of 2002 (S)X, as well as six environmental statutes, against Pinnacle Airlines, her local PACE Union (Local 5-0772), and numerous other organizations and individuals, alleging that they discriminated against her in retaliation for various protected activities. On May 7, 2004, I issued an Order dismissing Ms. Powers' claim. The Complainant appealed, and on August 31, 2007, the Administrative Review Board (ARB), issued its Order of Remand.

As the ARB noted in its August 31, 2007 Order, it accepted review in June 2004, but by the time the ARB received the record, four of the named respondents had filed for bankruptcy, including Northwest Airlines, Inc., NWA, Inc., Northwest Airlines Corporation, and Mesaba Aviation, Inc. Once all entities in bankruptcy had emerged, the ARB resumed consideration of the appeal.

The ARB concluded that I may have erred in determining that Ms. Powers' complaint did not state a claim under any of the eight statutes under which she brought her complaint. The ARB stated that, because there was nothing in the record to indicate that any of the respondents were served, and therefore none of them had the opportunity to respond to Ms. Powers' complaint, it would not decide whether her complaint in fact stated a claim under any of the cited acts. With certain exceptions, the ARB vacated my dismissal of Ms. Powers' claim, and remanded so that the respondents could have the opportunity to respond before a determination is made about whether Ms. Powers' complaint states a claim.

On October 24, 2007, the ARB issued an Order to Provide Documents, in response to Ms. Powers' motion for reconsideration on the grounds that the ARB lacked jurisdiction to issue a remand. The ARB directed that the parties search their records for copies of Ms. Powers' notices of intent to file her claim in federal district court. On December 21, 2007, the ARB issued an Order Granting Reconsideration in Part, dismissing Ms. Powers' SOX claim, and revising its August 31, 2007 Order of Remand to eliminate references to SOX.

Finally, in response to further pleadings filed by Ms. Powers, the ARB issued an Order on March 14, 2008, stating that the ARB would accept no further pleadings from Ms. Powers in the case until after I issued my decision on remand. The case file was received in this office on August 7, 2008.

On August 11, 2008, I issued a Preliminary Order and Order to Show Cause, noting that the Complainant had alleged discrimination under the AIR 21 Act, the Sarbanes-Oxley Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Federal Water Pollution Control Act, and the Toxic Substances Control Act. As a preliminary matter, and as directed by the ARB, I found that it was appropriate to determine whether Ms. Powers' complaint stated a cause of action under any of these Acts. Ms. Powers was provided twenty days from the date of this Order to show cause as to why her complaint should not be dismissed for failure to state a cause of action under the above-named statutes.

On September 24, 2008, I issued a second Order to Show Cause, noting that as of the date of the Order, no response had been received from the Complainant. The Complainant was directed to show cause, within twenty days from the date of the order, as to why her complaint should not be dismissed on grounds of abandonment.

On October 3, 2008, by facsimile, the Complainant submitted a fifty page document, with the subject "Courtesy Notice/Service of Filing." Attached was a copy of the Complainant's pleadings in a matter pending in the United States Court of Appeals for the Sixth Circuit, No. 08-

3204. It is captioned as “Amended Statutory Petition for Art. III Judicial Review of All Agency Orders.” As nearly as can be determined, it appears that this complaint encompasses, *inter alia*, the Complainant’s request that the Court vacate my two Orders to show cause, on the grounds that I lack subject matter jurisdiction.

On October 14, 2008, the Complainant submitted a letter notifying me and Chief Administrative Law Judge John Vittone that, as a “professional courtesy,” she was sending “authentic copies” of the 51 page facsimile she sent earlier. She stated that “we have never “abandoned” anything in 2004-AIR-19.” The Complainant stated that

Because these DOL matters *are still pending appellate* review in 6th Cir. Case 08-3204, it does not appear that the DOL/OALJ has any jurisdiction at this time to issue any orders that rely on the appealed US DOL ARB Orders of August 31, 2007, Dec. 21, 2007, or March 14, 2008.”

On October 22, 2008, I issued an Order to Show Cause, noting that it appeared from the Complainant’s filings that she had a matter pending in the Sixth Circuit Court of Appeals, and that she had petitioned the Court in connection with that matter to enter an order that the United States Department of Labor does not have subject matter jurisdiction in this particular claim. However, there was no indication that the Complainant specifically filed a notice of appeal of the ARB’s December 21, 2007 Order remanding this matter to the Office of Administrative Law Judges. The Complainant was hereby directed to provide documentation reflecting that she had properly appealed the ARB’s December 21, 2007 Order remanding this complaint to the Office of Administrative Law Judges, to include a copy of the notice of appeal, as well as the docket sheet reflecting that the notice of appeal was filed with the Clerk’s office for the Sixth Circuit Court of Appeals.

On November 13, 2008, the Complainant submitted, by facsimile, an eleven page document with attachments. Again, the Complainant claimed that this Court had no jurisdiction to issue any orders in connection with this claim, because she had “removed” it to the Sixth Circuit. The Complainant also submitted a copy of a General Docket sheet for the United States Court of Appeals for the Sixth Circuit, in “Coleen Powers v. U.S. Department of Labor, et al.,” No. 08-3204, which was docketed on February 26, 2008, as well as a list of docket entries for this matter. These entries reflect that the matter was dismissed for lack of jurisdiction, as a premature petition, on June 9, 2008. The Complainant has filed a petition for en banc rehearing on June 19, 2008; it appears that this request is pending.

Section 42121(b)(3) of the AIR 21 Act provides that:

Any person adversely affected or aggrieved by an order issued under paragraph (3) [a Final Order] may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall

not, unless ordered by the court, operate as a stay of the order.¹

In this case, the Complainant appealed my May 7, 2004 Decision and Order dismissing her claim to the Administrative Review Board (ARB), which remanded the matter back to me on August 31, 2007, and on December 21, 2007 for further proceedings consistent with its decision.

In other words, no “Final Order” has yet been issued in this particular claim, and thus no appeal could properly be taken to the Sixth Circuit Federal District Court under the provisions of the governing statutes. To the extent that the Complainant believes she has appealed any determination by the ARB, any such “appeal” is strictly of the ARB’s interlocutory order remanding this matter back to the Office of Administrative Law Judges for further proceedings.

Nor has the Complainant produced any documentation to reflect that she filed any sort of notice of appeal of the ARB’s August 31, 2007 or December 21, 2007 Orders remanding this matter to the Office of Administrative Law Judges. No such notice of appeal was filed with the Office of Administrative Law Judges.

The underlying case, which is the subject of the Complainant’s appeal to the Sixth Circuit Court of Appeals in Case Number 08-3204, was filed by the Complainant on June 30, 2005, as Case No. 05-2468. Nowhere on the docket sheet for this matter does it indicate that the Complainant filed anything resembling a notice of appeal in connection with any decision by the ARB in 2004 AIR 19. The matter was dismissed by the District Court on August 26, 2008 for failure to timely comply with orders of the Court. The Court also certified that an appeal of the matter would not be taken in good faith, and denied leave to appeal *in forma pauperis*.²

It is abundantly clear that jurisdiction in this claim remains with this Court, pursuant to the ARB’s December 21, 2007 Order remanding the matter to the Office of Administrative Law Judges for further proceedings. Nothing that the Complainant has undertaken in the Federal Courts for the Sixth Circuit has had the effect of relieving this Court of such jurisdiction.

Most importantly, the Complainant has not responded to my two Orders to show cause as to why her complaint should not be dismissed for failure to state a claim. The Complainant indicated in her most recent pleading that she relied on her previously filed April 18, 2004 response to my April 14, 2004 “Show Cause Order.”

In my May 7, 2004 Order dismissing the Complainant’s claim, I noted that she filed several pleadings in response to my April 14, 2004 show cause order, some of which she also filed in connection with 2004 AIR 6 and other matters before the Administrative Review Board. These included “Complainant’s Motion for Recusal of ALJ Chapman in 2004-AIR-6 & 2004-AIR-19;” “Complainant’s Notice of Filing Proposed, Preliminary, Comprehensive Witness List {2003-AIR-12; ARB 04-035; 2004-AIR-6; ARB 04-066; 2004-AIR-19};” and “Complainant’s Supplement to Her April 15, 2004 Motion for Continuance of Hearing in 2004-AIR-6 Based Further on Receipt of ALJ’s April 14, 2004 Order in 2004-AIR-19; Motion to Consolidate to

¹ The other environmental whistleblower statutes invoked by the Complainant also provide for review by the federal courts of **final** agency orders.

² The docket sheet for No. 05-2468, as well as the August 26, 2008 decision, is attached hereto.

Conserve Judicial Resources; Motion to Amend/Alter the Harmful Errors in the April 14, 2004 Order in 2004-AIR-19; Motion to ALJ to Properly Address the Conflict of Interests {Disqualify} & Prohibited Exparte Material Communications With Mr. Doug Hall and His Law Firm, Piper Rudnick, LLP in These Matters.”

In my May 7, 2004 Order, I noted that among various requests for relief in these pleadings, including a request that the Court become competent in the law and conduct introspection, the Complainant “reserves her right” to request an extension of time to respond to my April 14, 2004 Order, and to supplement her motion. I noted that the time for filing a response to my April 14, 2004 Order had expired, and the Complainant had not exercised her “right” to request an extension, nor had I granted an extension to respond.

The Complainant failed to provide a response to my August 11, 2008 Order to show cause as to why her complaint should not be dismissed for failure to state a cause of action. Nor did her previous pleading that she attempted to incorporate by reference respond to my previous order to show cause as to why her complaint should not be dismissed for failure to state a cause of action.

In short, despite several opportunities to do so, the Complainant has not complied with the Orders I issued directing her to show cause as to why her complaint should not be dismissed for failure to state a cause of action. It is clear from the lengthy pleadings she has submitted that she disputes this Court’s authority to take any action in this claim. Title 29 C.F.R. Section 18.6(d)(2)(v) provides, in pertinent part, that if a party fails to comply with an order of the administrative law judge, the administrative law judge may take such action as is just, including ruling that a decision be rendered against the non-complying party.

Accordingly, based on the Complainant’s failure to show cause as to why her complaint in this matter should not be dismissed for failure to state a claim, as directed in my August 11, 2008 Order, IT IS HEREBY ORDERED that the Complainant’s complaint for relief under AIR 21 is denied, and her claim is dismissed.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. Section 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200

Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. Sections 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).