



**Issue Date: 10 March 2010**

CASE NO.: 2009-AIR-00014

*In the Matter of:*

TIMOTHY JONES,  
Complainant,

vs.

CLASSIC HELICOPTERS LTD., L.C.,  
Respondent.

## **ORDER DISMISSING COMPLAINT**

### **INTRODUCTION**

This matter arises from a complaint filed by Timothy Jones (“Complainant”), who alleges that his former employer, Classic Helicopters Ltd., L.C. (“Respondent”), violated the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (the “Act”), by terminating his employment in retaliation for complaints he made to management concerning an altimeter discrepancy on the Respondent’s aircraft.

This matter was initiated with the Office of Administrative Law Judges (“OALJ”) on May 12, 2009, when the Complainant requested a formal hearing before the OALJ.

For the reasons set forth below, this matter is DISMISSED.

### **FACTUAL BACKGROUND**

The Respondent is an air carrier which provides safety-sensitive air transportation. The Complainant was hired on November 8, 2007, and employed by the Respondent as an Emergency Medical Service (“EMS”) helicopter pilot. On July 2, 2008, the Complainant carried out an EMS flight, transporting a patient from Utah to Las Vegas, Nevada. During the flight, the Las Vegas, Nevada, Air Traffic Control received information from the Complainant’s transponder which deviated from the Complainant’s actual altitude level. After landing, the Complainant reported to two individuals in Respondent’s management that his altimeter had malfunctioned, and management immediately requested an aircraft inspection to resolve the

problem. One week later, on July 9, 2008, the Complainant was terminated from his employment.<sup>1</sup>

On October 2, 2008, the Complainant filed a timely complaint (the “Complaint”) with the Occupational Safety and Health Administration (“OSHA”), alleging that he was terminated by the Respondent in retaliation for his protected complaints to management concerning the altimeter discrepancy.

OSHA investigated the complaint, and on April 8, 2009, the Regional Administrator of OSHA issued findings on behalf of the Secretary of Labor (“OSHA Findings”). OSHA found that although the Complainant’s initial complaints to management concerning the altimeter’s malfunctioning were protected activities, the evidence did not demonstrate by a preponderance of the evidence that the Complainant’s protected activities contributed to the Respondent’s decision to take adverse action against him. Rather, OSHA found that the evidence indicated that two actions taken by the Complainant following his protected activities intervened and severed any temporal inference of a causal connection between his protected activity and his termination one week later.<sup>2</sup> OSHA Findings, p. 2.

On May 12, 2009, the Complainant, represented by counsel, timely filed his objections to the findings of OSHA and requested a formal hearing before the OALJ. On June 3, 2009, the matter was set for a formal hearing before me from November 17 to 19, 2009, in Tucson, Arizona.

On September 4, 2009, the Complainant submitted a motion requesting a continuance of the hearing due to a work assignment requiring the Complainant to be out of the country from September 6, 2009, through December 7, 2009. In this motion, the Complainant advised that he would again be in this country and available for a rescheduled hearing from December 8, 2009, until January 5, 2010.<sup>3</sup> On the same day, the Complainant’s counsel formally withdrew as counsel in this matter, and provided the OALJ with the Complainant’s own contact information in Tucson, Arizona.

On September 8, 2009, the Respondent submitted a Motion for Summary Decision, which I received on September 10, 2009. The Respondent asked that the matter be dismissed with prejudice, arguing that discovery evidence unequivocally demonstrated that the Complainant did not engage in protected activity under the Act when he reported the altimeter’s malfunctioning. Respondent’s Motion for Summary Decision, pp. 1-3. Moreover, the

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<sup>1</sup> The above paragraph is based on facts recited by the Regional Administrator of the Occupational Safety and Health Administration (“OSHA”) in its determination issued on April 8, 2009. This brief statement of facts is not the product of a full and fair hearing, and should not be entitled to deference in any subsequent proceeding.

<sup>2</sup> Specifically, OSHA found: 1) On July 8, 2008, the Complainant commented to coworkers that the Respondent’s flights requiring reliance on Visual Flight Rules (“VFR”) were “inherently unsafe and [Respondent] should not be performing them,” which comment, OSHA found, “caused coworkers to be concerned for their safety when flying with Complainant;” and 2) On July 9, 2009, the Complainant “negligently fought the autopilot while the autopilot was operating correctly, creating a potentially fatal accident.” OSHA Findings, p. 2.

<sup>3</sup> The Complainant’s motion erroneously stated that he would be “available from December 8, 2009 through January 5, 2009.”

Respondent argued, the record showed that, by his own actions in this matter, the Complainant violated Respondent's established safety procedures and demonstrated a poor understanding of proper aircraft safety operations, such as when he flew "what he believed to be an unserviceable aircraft back to Page, AZ, rather than return to Las Vegas to have the repairs completed." Respondent's Motion for Summary Decision, pp. 3-4. Respondents further argued that the Complainant's allegedly improper actions constituted "a deliberate violation of applicable requirements governing air carrier safety pursuant to [subsection (d) of the Act], making Complainant ineligible to bring and/or maintain this action." Respondent's Motion for Summary Decision, p. 4.

On September 11, 2009, I issued an order vacating the scheduled hearing, pursuant to the Complainant's request. In that order I also extended, *sua sponte*, until December 31, 2009, the ordinary 15-day deadline for the Complainant to respond to the Respondent's motion for summary decision. I explained that I was extending the deadline because the Complainant probably did not receive the Respondent's motion before leaving the country, and he may not have made adequate arrangements to get his mail during his absence. In this order, I noted that I would reschedule the hearing in this matter after ruling on the motion for summary decision in the event that I denied the Respondent's motion.

I did not receive a response to the Respondent's motion for summary decision, or any other form of communication from the Complainant following his September 4, 2009, submissions. On January 8, 2010, I issued an order to show cause requiring the Complainant to show cause why I should not rule on the Respondent's motion for summary decision without a response from the Complainant. I indicated in this Order that if the Complainant needed more time to respond to the Respondent's motion, he should inform my office by January 22, 2010, and indicate how much additional time he needed.

After this order to show cause was issued, on or about January 20, 2010, the Complainant spoke to a legal assistant in my office and informed him that he was still out of the country, that he did not know how long he would be required to remain abroad, and that he thought his request for a hearing before the OALJ had been withdrawn. The legal assistant advised him that his request to withdraw his hearing must be put in writing.

I received neither a written response to the Respondent's motion nor a written request by the Complainant to withdraw his hearing request. On February 4, 2010, I issued a second order to show cause<sup>4</sup> ordering the Complainant to show why I should not dismiss this case for failure to prosecute. I ordered the Complainant to *either* respond to the Respondent's motion for summary decision *or* formally withdraw his request for a hearing by March 1, 2010. In the order, I indicated that if the Complainant did not respond in writing by that date, I would dismiss the case for failure to prosecute.

To date, I still have not received a written response to my second order to show cause, nor has the Complainant engaged in any additional verbal communications with my office.

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<sup>4</sup> I mistakenly indicated in this order to show cause that the Complainant spoke to my legal assistant when he called. He actually spoke to another legal assistant in the office.

## DISCUSSION

Courts possess the “inherent power” to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). This power is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 630-31. Consistent with this well-settled rule of law, the Administrative Review Board (“ARB”) has consistently allowed a claim’s dismissal when a complainant fails to respond to orders issued by the ARB or by an Administrative Law Judge (“ALJ”). *See, e.g., Jackson v. Northeast Utilities Co.*, ARB Nos. 98-041, 98-35, ALJ No. 98-ERA-6 at 2 (ARB June 22, 1998) (upholding ALJ’s dismissal of a whistleblower action based on complainant’s failure to respond to order to show cause); *Mastrianna v. Northeast Utilities Corp.*, ARB No. 99-012, ALJ No. 1998-ERA-33, at 2 (ARB Sept. 13, 2000) (dismissing complainant’s whistleblower claim for failing to state why he could not comply with ARB’s briefing schedule); *Gass v. Lockheed Martin Energy Systems, Inc.*, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB Jan. 29, 2004) (dismissing complainant’s whistleblower action after she failed to respond to the ARB’s orders).

Although offered ample opportunities to do so, the Complainant in this matter has failed to file a written response to my two orders to show cause. I clearly informed the Complainant in my second order to show cause that I would dismiss this case for failure to prosecute if he did not respond in writing by the given date. Nevertheless, the Complainant has, to date, failed to file any written response to my orders. I have given the Claimant sufficient opportunities to respond to my orders, and he has not responded. I am justified in dismissing his case at this time.

Moreover, the fact that the Complainant is no longer represented by counsel does not relieve him of his obligation to take appropriate action if he wishes to proceed with this claim. *See Dickson v. Butler Motor Transit/Coach USA*, ARB No. 02-098, ALJ No. 2001-STA-039 (ARB July 25, 2003) (upholding ALJ’s dismissal of a *pro se* complainant’s action after he continuously failed to communicate with the ALJ or the ARB after his counsel withdrew). A complainant’s lack of legal training does not excuse his refusal to pursue his case. *Id.* at 4.

Because I find this case ripe for dismissal on the basis of the Complainant’s failure to prosecute, I see no need to rule on the Respondent’s motion for summary decision.

## ORDER

Accordingly, on the basis of my finding that the Complainant, Timothy Jones, has failed to prosecute his case, this matter is DISMISSED.

A

JENNIFER GEE  
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).