



Issue Date: 29 January 2009

OALJ CASE NO.: 2009-AIR-00001

In the Matter of:

RICHARD NICHOLS,
Complainant,

v.

ALASKA AIRLINES, INC.,
Respondent.

**ORDER APPROVING COMPLAINANT'S WITHDRAWAL OF OBJECTIONS TO
SECRETARY'S SEPTEMBER 11, 2008 FINDINGS AND DISMISSING
HIS AIR 21 COMPLAINT, AND ORDER CANCELLING HEARING**

This case arose when the complainant, Richard Nichols ("Complainant"), filed a complaint under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C.A. § 42121, alleging that his employer, Alaska Airlines Inc. ("Respondent"), denied his medical benefits and his workers' compensation claim in retaliation for raising air-carrier safety concerns and communicating with the Federal Aviation Administration ("FAA").

On September 11, 2008, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, (Secretary) issued a Notice of Determination containing specific factual findings and legal conclusions which resulted in the dismissal of the complaint in this case (the "Secretary's September 11, 2008 Findings").

Complainant objected to the Secretary's Findings and requested a hearing before this Office. This case is set for hearing on February 26, 2009 in Seattle, Washington.

On November 17, 2008, I issued an Order to Show Cause Why Case Should not Be Dismissed For Failure to Timely File Complaint (the "OSC") ordering Complainant to file a legal brief and supporting evidence no later than *December 18, 2008* which proves that his whistleblower complaint was filed within 90 days of the first denial of his original health insurance claim and within 90 days of his original workers' compensation claim. My OSC also ordered Complainant to show cause why his case should not be dismissed for failure to timely file his complaint.

On December 18, 2008, Complainant violated my OSC by failing to file any legal brief providing evidence that his whistleblower complaint was timely filed. In its place, Complainant filed what appeared to be an *ex parte* communication with this Office requesting an extension of time to file a memorandum of points and authorities in support of his position why the complaint was timely filed to avoid case dismissal. The letter did not say when Complainant would be able to file his legal brief in response to my OSC nor did it provide good cause for granting the extension of time.

On December 22, 2008, I issued a letter notice to Complainant admonishing him from filing any further *ex parte* communications and copied Respondent counsel with the December 18, 2008 communication.

On January 8, 2009, at approximately 1:10 p.m., Respondent telefaxed its motion for summary decision and sanctions and its timely response to my earlier OSC (the "Response"). The Response argues that dismissal of the complaint is appropriate for failure to respond to my OSC by December 18, 2008 as ordered by me. In addition, the Response argues that Respondent's motion for summary decision should be granted because Complainant has failed to state a claim and not alleged or provided any evidence of any retaliatory action by Respondent occurring within 90 days preceding the filing of the complaint in this case.

Furthermore, the Response argues that the alleged retaliatory conduct asserted by Complainant which occurred within 90 days of the complaint filing was conduct by third parties other than Respondent. Finally, Respondent seeks an award of \$1,000.00 against Complainant pursuant to 49 U.S.C. subsection 42121(b)(3)(C) for filing a frivolous complaint having no merit and because that amount is an appropriate sanction for Complainant's failure to file a timely response to my OSC.

Also on January 8, 2009, at approximately, 3:26 p.m., Complainant filed a two-page letter addressed to me and copied to Respondent's counsel which explained that his December 18, 2008 letter requesting an extension to file a response to my OSC was actually copied to Respondent's counsel even though the letter did not so state. The letter also explained that Complainant faced other deadlines in December concerning his denied medical benefits and his attempt to receive documents from the Federal Aviation Authority.

On January 23, 2009, the deadline for filing a reply to the Response (motion for summary decision), Complainant filed correspondence which I interpret to be his written withdrawal of his objections to the Secretary's September 11, 2008 Findings (Withdrawal) pursuant to 29 Code of Federal Regulations (CFR) Section 1979.111(c). Specifically, Complainant agrees that the allegations of his complaint do not fall within the parameters of AIR 21 because his concerns primarily relate to the investigation of air safety issues which are normally handled by the FAA and not the Secretary of Labor. As a result, Complainant states that he "will need to pursue avenues other than 'AIR 21' to address the issues of aviation safety."

On January 28, 2009, Respondent filed a response to Complainant's withdrawal request stating that "[i]n light of Mr. Nichols' January 23, 2009, letter withdrawing his complaint, Respondent Alaska Airlines, Inc. asks that the Court dismiss Mr. Nichols' complaint with prejudice."

I find that pursuant to 29 CFR Section 1979.111(c), Complainant can withdraw his objections to the Secretary's September 11, 2008 Findings because they were not final when the Withdrawal was filed.

For good cause shown:

IT IS ORDERED that Complainant's written request to withdraw his appeal of the Secretary's September 11, 2008 Findings is **GRANTED**.

IT IS FURTHER ORDERED that with this Order, the Secretary's September 11, 2008 Findings are **REINSTATED, AFFIRMED, and FINAL** and Complainant is deemed to have waived any further proceedings before the U.S. Department of Labor regarding the matters which are the subject of his AIR 21 complaint.

IT IS FURTHER ORDERED that Complainant's AIR 21 complaint which composes OALJ Case No. 2009-AIR-00001 is **DISMISSED** *with prejudice*.

IT IS FURTHER ORDERED that the February 26, 2009 hearing in this case in Seattle, Washington is **CANCELLED**.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California