

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 November 2009

CASE NO.: 2009-AIR-00026

In the Matter of:

CLAUDIO OCCHIONE,

Complainant,

v.

FEDERAL AVIATION ADMINISTRATION,
CINCINNATI FLIGHT STANDARDS DISTRICT OFFICE
ELLEN M. TOM , AND WILLIAM BEST

Respondents,

and

PSA AIRLINES, INC.,

Party-in-Interest.

**RECOMMENDED DECISION AND ORDER
DISMISSING COMPLAINT FOR LACK OF JURISDICTION**

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21"). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor 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 provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety.

PROCEDURAL HISTORY

The Complainant, Claudio Occhione, is a pilot who was formerly employed as a First Officer by PSA Airlines, Incorporated (“PSA”), a passenger airline. In his complaint he alleges that he was prevented from obtaining certification as a Captain, and eventually discharged, in retaliation for having raised safety violations with the FAA. The complaint identified as respondents PSA, certain individual employees of PSA, the Cincinnati Flight Standards District Office (“FSDO”) of the FAA, and two inspectors employed by the FSDO.

The complaint was submitted to the Occupational Safety and Health Administration (“OSHA”) for investigation. On August 19, 2009, OSHA issued findings on the portion of the complaint concerning the FSDO and the two federal inspectors. In those findings it determined that they were not proper parties in an administrative proceeding under AIR 21 and dismissed the portion of the complaint involving them.

The August 19, 2009 OSHA findings did not address the merits of the complaint, and did not make any findings relating to PSA or its employees. The record submitted to me does not indicate whether OSHA has since then completed its investigation with regard to those respondents. Even if it has done so, no appeal of any such findings has been referred to me. Therefore, I do not at present have jurisdiction over PSA or any of its employees.

On September 18, 2009, Mr. Occhione filed an appeal of the August 19, 2009 OSHA findings. In that appeal he argued that the management of the Cincinnati FSDO “engaged in a systematic effort to prevent me from upgrading to captain.” He further argued that the two FAA inspectors that he had named as respondents “acted in collusion with PSA Airlines Inc” and that their actions and statements “actively contributed to my discharge on June 1, 2009.” He did not, however, offer any argument on the jurisdictional issue on which OSHA had based its findings.

On October 16, 2009, in order to provide the parties an opportunity to address the jurisdictional issue, I issued an order to show cause why the complaint against the FSDO and the two federal employees should not be dismissed. The Complainant submitted a response to that order on November 6, 2009. In that response he listed actions taken against him by the FAA inspectors that he had named as respondents and argued that those inspectors “have an even closer relationship with the air carrier than a contractor or subcontractor.” He went on to state that the inspectors are “directly and personally involved” with the highest level of PSA management on a daily basis.

DISCUSSION

49 U.S.C. § 42121(a) prohibits retaliatory discrimination against an employee by an “air carrier or contractor or subcontractor of an air carrier.” Section 42121(e) defines the word “contractor” as “**a company** that performs safety-sensitive functions by contract for an air carrier.” [emphasis added] The regulations implementing AIR 21 define an “air carrier” as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” 29 C.F.R. § 1979.101.

Neither AIR 21 nor the implementing regulations define the term “employer,” but the regulations define “employee” as “an individual presently or formerly working for an air carrier or contractor or subcontractor . . . or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.” 29 C.F.R. § 1979.101. Although the statute refers to an “employer” as the

potentially liable party, the regulations speak in terms of “named person,” 29 C.F.R. § 1979.104, which they define as “the person alleged to have violated the Act.” 29 C.F.R. § 1979.101.

Construing these definitions, the Administrative Review Board has concluded “that there must be an employer/employee relationship between an air carrier, contractor or subcontractor employer who violates the Act and the employee it subjects to discharge or discrimination” and that if a complainant fails to establish such a relationship “the entire claim must fail.” *Fullington v. AVSEC Services, LLC*, ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005).

The respondents in the present action are a field office of the Federal Aviation Administration and two of its employees. None of them are “air carriers” within the meaning of AIR 21. Viewing all evidence and factual inferences in the light most favorable to the Complainant, there is no evidence of an employer-employee relationship between the Complainant and any of the three federal respondents named in this action.

The Complainant argues that the respondents have a closer relationship with PSA than a contractor would have. Even accepting that as true, as I do for purposes of the motion, that does not make them contractors within the definition in 49 U.S.C. § 42121(e). First, neither an FAA field office nor any of its employees is a “company,” which is part of the statutory definition of a contractor. Second and more fundamentally, while they carry out aviation safety functions, they do so under the federal government’s authority to regulate air carriers, and not by contract with those carriers. *Cf. Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ Jun. 17, 2004).

Congress can, if it chooses, bring federal agencies within the scope of whistleblower protection statutes under the jurisdiction of the Department of Labor. For example, 42 U.S.C. §5851(a)(2) lists both the Nuclear Regulatory Commission and the Department of Energy among the employers that are subject to the whistleblower provisions of the Energy Reorganization Act. In enacting AIR 21 Congress did not choose to impose liability on the FAA or its employees. Further, in defining the entities that are potentially liable, Congress adopted a definition of “contractors” that excludes the respondents in this case.

None of the present respondents are air carriers or contractors of air carriers, nor have any of them had an employer/employee relationship with the Complainant. There is therefore no basis for jurisdiction under AIR 21 over any of them. As noted above, the complaint against PSA Airlines is still pending before OSHA, and this ruling does not affect that complaint.

RECOMMENDED ORDER

The complaint is **DISMISSED** for lack of jurisdiction over the Respondents.

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc

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).