

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 October 2010

CASE NO.: 2009-AIR-00018

In the Matter of:

PHILIP ZURCHER,
Complainant,

v.

SOUTHERN AIR, INC.,
Respondent.

Appearances: Kevin Peck, Esq.
Seattle, Washington
For Complainant

Steven W. Fogg, Esq.
Seann C. Colgan, Esq.
Seattle, Washington
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, *et seq.* This claim was tried in conjunction with Case Number 2009-AIR-00007 over several days in June and July, 2009: June 30-July 1, and July 20-22. All parties have had a full opportunity to present testimony, offer evidence, and submit post-hearing briefs. The parties were instructed to address this issue in their post-hearing briefs; however, both neglected to do so.

On September 29, 2010, the undersigned issued a Decision and Order for Case Number 2009-AIR-00007, holding that Complainant failed to show sufficient evidence that his complaints contributed to his termination and found in favor of Respondent.

At issue in this claim is the intent behind a letter written from Respondent to Complainant informing him of potential liability for attorney fees and costs connected to his suit against Respondent for allegedly terminating his employment in retaliation for his complaints

about safety issues. Complainant contends that Respondent sent him a letter with the intent to intimidate him into dropping his suit. Respondent argues that the letter was drafted for the sole purpose of informing Complainant of his potential liability for attorney's fees and costs should he proceed with the lawsuit.

At trial, the parties offered, and I admitted, the following exhibits: Administrative Law Judge Exhibits ("AX") 1-6; Complainant's Exhibits ("CX") 1-8, 10-12, 14-16, 18-29, 31-41, 42-67; Respondent's Exhibits ("RX") 1-5, 7-39, 41, 43, 47-48, 50-52, 55-61.

Based upon the evidence introduced, my observations of the demeanor of the witnesses, and consideration of the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

ISSUES

1. Whether Complainant was a covered employee under AIR 21 at the time he received the letter.
2. If the letter constituted adverse personnel action.

FINDINGS OF FACT

On March 25, 2008, Complainant, Phillip Zurcher, was terminated from his employ with Respondent, Southern Air, Inc. Hearing Transcript ("TR") at 864. Claimant requested a hearing in front of an Administrative Law Judge ("ALJ") on January 7, 2009, which was case 2009-AIR-00007. On January 28, 2009, Respondent's counsel, Mr. Steven Fogg, sent a letter to Claimant's counsel, Mr. Kevin Peck, to arrange a date for the disclosure of witness lists. In addition, the letter contained the following relevant language;

I am also taking this opportunity to encourage you to counsel you [*sic*] client to drop this matter. OSHA has already determined that Mr. Zurcher's claim has no merit, and that conclusion is very unlikely to be overturned. In addition, it appears from Mr. Zurcher's statement of objections that whatever disagreements he may have with Southern Air, he certainly was not a whistleblower under AIR 21. If he nevertheless continues to pursue this action, Mr. Zurcher is likely to incur liability of \$1000 for Southern Air's attorneys' fees, in addition to the costs of discovery and trial. *See* 49 U.S.C. § 4212(b)(3)(C). Please be advised that we will request such an award if Mr. Zurcher does not agree to withdraw his request for a hearing before Southern Air has incurred significant fees.

RX 50 at 474.

After receiving this letter, Claimant then filed a second claim (2009-AIR-000018) against Respondent, claiming that the letter was intended to intimidate him into dropping his case. On June 16, 2009, the undersigned consolidated the matters. At trial Complainant testified to feeling intimidated and afraid when he read the letter. TR at 424, 559. He claimed that the letter caused him to worry about his ability to pay for the potentially high cost of the litigation, even though he admitted to writing “Further intimidation!! I’m going to win” and drew a smiley face on the letter. *Id.* at 560, RX 50 at 474. Respondent argues that this is evidence of excitement inconsistent with his testimony that he was afraid. TR at 561.

CONCLUSIONS OF LAW

In order to prevail, an AIR 21 complainant “must prove that he is an employee covered under the statute, that he engaged in activity protected by the statute, and that an air carrier . . . subjected him to unfavorable personnel action because he engaged in protected activity.” *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 4 (ARB January 30, 2008) 49 U.S.C. 42121(a). An AIR 21 complainant must therefore meet four elements: (1) covered employee; (2) protected activity; (3) unfavorable personnel action; and (4) causation, such that the unfavorable personnel action was made in retaliation for the protected activity. Here the matters in dispute are whether Claimant was a covered employee at the time he received the letter and if the letter constitutes unfavorable personnel action.

Covered Employee

AIR 21 § 519 forbids any “air carrier or contractor or subcontractor of an air carrier” from discriminating against any “employee” for engaging in any protected activity. 49 U.S.C.A. § 42121(a). Employee is defined as “an individual . . . 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. The Administrative Review Board (“ARB”) found that the “crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant’s employment. . . Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes.” *Fullington v. AVSEC Services, LLC*, USDOL/OALJ Reporter (HTML), ARB No. 04-019 at 6, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005). Complainant must establish that Respondent had this “control.”

Here, Complainant argues that the discharge on his record from Respondent prevented him from obtaining another job as a flight engineer. TR at 554. He believes that this spot on his record has been so detrimental that it has effectively ended his flight career. Comp. Post-Hearing Brief at 12. However, Complainant did not assert that he believes that this is a result of blackballing in the community, and did not offer the undersigned any proof that this took place. Respondent contends that one possible reason that Complainant has been unable to find work in the airline industry is simply because companies are not hiring due to the weakened economy. TR at 555.

It may be possible that the termination on his record was enough to prevent him from gaining other employment. “An unfavorable entry in the employment record, especially one that an air carrier terminated the pilot for “unsatisfactory performance,” becomes permanent and public, with little meaningful opportunity for explanation, and potentially ruinous consequences for honest and competent pilots.” *See generally*, John J. Nance & Charles David Thompson, *The Pilot Records Improvement Act of 1996; Unintended Consequences*, 66 J. Air L. & Com. 1225, 1236 (2001) as cited in *Hirst v. Southwest Airlines*, 2003-AIR-00047 slip op. at 8 (ALJ May 26, 2004). Although this language specifically concerns pilots, the rationale extends to other essential flight crew members, including flight engineers like Complainant. Under the language of the statute, Respondent’s documentation of Complainant’s termination could constitute “influenc[ing]” another employer to not hire Complainant even though at the time Complainant received the letter it had been almost a year since his termination. Further, if Respondent gave an unfavorable reference to a potential employer (however deserving such a reference might be) that also could constitute such influence or control.

Unfavorable Personnel Action

Under AIR 21 § 519 employers are prohibited from taking adverse employment action against employees because they have engaged in any protected activity. Such actions include termination, or discrimination in regards to “compensation, terms, conditions, or privileges of employment.” 29 C.F.R. § 1979.102(a). In order to satisfy this element, Complainant must show, by a preponderance of the evidence, that employer’s action was “materially adverse” such that it “could dissuade a reasonable worker from making or supporting a charge of discrimination.” *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052 at 19, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008) quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Therefore, the test for retaliation statutes adjudicated by the Labor Department is whether employer’s actions could dissuade a reasonable worker from engaging in protected activity. *Melton* at 19-20. The Department of Labor seeks to encourage workers to come forward and report violations of safety regulations as a means of protecting the public, therefore the “materially adverse” test successfully promotes this public policy and the goal of the statutes.

Here the parties are not contesting that bringing the suit was a protected activity. At issue is whether the letter from Respondent’s counsel can constitute unfavorable personnel action. Mr. Zurcher had been terminated from the company’s employ since March 25, 2008, approximately 10 months before the letter was written on January 28, 2009. RX 50 at 474. As a former employee, the letter did not affect Complainant’s “compensation, terms, conditions or privileges” with the company because for all intents and purposes there was no longer any traditional employer-employee relationship. 29 C.F.R. § 1979.102(a).

In addition, the letter does not contain threatening language. Under 49 U.S.C. § 4212(b)(3)(C) if the Secretary of Labor finds that a complaint “is frivolous or has been brought in bad faith” s/he has the power to award reasonable attorneys’ fees not exceeding one thousand dollars. Similarly, 29 C.F.R. § 1979.109 grants the ALJ the power to award the same. While counsel’s assertion that Complainant would “likely” be liable for one thousand dollars in attorney’s fees was arguably an exaggeration, I do not believe that it can be called anything more than an attempt to zealously advocate for his client.

Applying the “materially adverse” test, I find that a letter informing a Complainant of potential monetary liability established by the AIR 21 statute could not dissuade a reasonable worker from bringing a legitimate cause of action. Most Claimants are likely aware that AIR 21 allows for an award of attorney’s fees before bringing their case to bar through either a reading of the statute or being informed by their attorney.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I find that Respondent did not unlawfully discriminate against Complainant because of his protected activity and, accordingly, his complaint is hereby **DISMISSED**.

A

Russell D. Pulver
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).