



Issue Date: 26 August 2010

Case No.: 2010-AIR-17

In the Matter of

MICHAEL R. BECKLEY,
Complainant

vs.

US AIRWAYS, INC.,
Respondent

**DECISION AND ORDER ON
RESPONDENT'S MOTION TO DISMISS**

Procedural Background

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century¹. The Secretary of Labor is empowered to investigate and determine “Whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements.

On 21 Nov 08, Complainant filed a complaint against Respondent with the Occupational Health and Safety Administration (OSHA). The complaint was investigated and dismissed on 19 Feb 10 as untimely. On 5 Mar 10, Complainant requested a hearing to review the dismissal.

Following an initial conference call with Complainant and Respondent’s Counsel, on 31 Mar 10, I set the hearing for 13 Jul 10 and ordered Complainant to file a more specific complaint, specifically identifying each protected communication and adverse actions. Said complaint was to be filed by 30 Apr 10. On 11 May 10, Respondent filed a motion to dismiss, based on Complainant’s failure to file a complaint. On 2 Jun 10, in another conference call, I cancelled the 13 Jul 10 hearing date and gave Complainant a second chance, ordering him to file his complaint by 2 Jul 10.

¹ 42 U.S.C. § 2121(2010).

On 23 Jun 10, yet another conference call was conducted and Complainant expressed hesitation about his ability to prosecute his case without calling former fellow employees whose jobs would be put at risk should they tell the truth about Respondent's actions. He also indicated he was more interested in improving safety than compensation or restitution. He failed to file a complaint by the 2 Jul 10 deadline and on 8 Jul 10, Respondent renewed its motion to dismiss for Complainant's failure to file a more specific complaint. I issued an order requiring Complainant to show cause why the motion to involuntarily dismiss the complaint should not be granted.

On 15 Jul 10, while the show cause order was pending, Respondent filed a motion for summary decision, alleging that Complainant failed to timely file his complaint with the Secretary of Labor, pursuant to 29 C.F.R. §18.40.

On 19 Jul 10, I issued another order, directing Complainant to respond within 14 days of receipt to show cause as to why the motion for summary judgment. I specifically cautioned Complainant that failure to timely respond to this order may result in dismissal of the complaint and that he must identify all facts in the employer's motion with which he disagrees.

On 20 Jul 10, Complainant filed his formal letter of complaint. The 19 Jul 10 show cause order was delivered to Complainant on 23 Jul 10. On 16 Aug 10, Respondent filed a motion to dismiss, arguing that Complainant's formal letter of complaint failed to comply with my order of specificity. On 23 Aug 10, Complainant filed a brief letter essentially saying that he does not have an attorney to help him respond to the legal technical aspects of his case, but he does know he reported hundreds of violations to the FAA and OSHA. Complainant did not address any aspect of the timeliness of his OSHA complaint.

Issues and Positions of the Parties

Respondent moves for summary decision, arguing that the amended complaint, as filed, does not establish a *prima facie* cause of action under AIR 21 and despite several opportunities, Complainant has failed to produce a complaint specifying a violation of a federal law or regulation related to safety, the adverse action taken, and the dates of such occurrences. Respondent further alleges that Complainant's appeal was not timely filed. Complainant has not directly responded to these issues.

Law

Parties are allowed to seek a summary decision without a full hearing.² They are entitled to a summary decision if:

the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.³

Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.⁴

The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.⁵ In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."⁶ While all of the evidence must be viewed in the light most favorable to the nonmoving party, the mere existence of some evidence in support of the non-moving party's position is insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party.⁷

The Act provides that "[a] person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file ... a complaint with the Secretary of Labor alleging such discharge or discrimination."⁸ The violation occurs when the employer communicates to the employee its intent to implement an adverse employment decision, rather than the date the employee experiences the consequences.⁹

² 29 C.F.R. § 18.40.

³ 29 C.F.R. §§ 18.40(d), 18.41(a).

⁴ 29 C.F.R. § 18.40(c).

⁵ *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ARB) (Dec. 30, 2005).

⁶ *Wise v. E.I. DuPont De Nemours and Co.*, 58 F.3d 193 (5th Cir. 1995).

⁷ *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

⁸ 49 USC §42121(b)(1).

⁹ *Sassman v. United Airlines*, 2005-AIR-4 (ARB Sept. 28, 2007); *Halpern v. XL Capital, LTD.*, 2004 SOX 54 (ARB) (Aug. 31, 2005), (citing *Overall v. Tennessee Valley Auth.*, 97-ERA-53 (ARB) (Apr. 30, 2001); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

The Act further provides that:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be 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 or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.¹⁰

The Act further requires that Complainant show a *prime facie* case of discrimination:

The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.¹¹

The administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, taking any appropriate action authorized by the Rule of Federal Civil Procedure and do all other things necessary to enable him or her to discharge the duties of office.¹² Dismissal of the claim is an appropriate remedy when Complainant fails to comply with a show cause order.¹³ Courts possess the "inherent power" to dismiss a case for lack of prosecution.¹⁴ 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."¹⁵

¹⁰ 49 USC §42121(a) (1-2).

¹¹ 49 USC §42121(b) (2)(b).

¹² 29 C.F.R. §18.29(a)(8-9).

¹³ *Pohl v United Airlines*, ARB No. 06-122, ALJ No. 2003-AIR-16 (ARB Mar. 18, 2008).

¹⁴ *Link v. Wabash R.R.Co.*, 370 U.S. 626, 630 (1962).

¹⁵ *Id.* at 630-631.

Discussion

Respondent supports its argument with an affidavit from a human resources director stating that Complainant filed his resignation from Respondent on 15 Mar 08, effective 29 Mar 08. OSHA's records indicate that Complainant filed his whistleblower complaint with that agency on 21 Nov 08. Complainant has never responded to the question of the timeliness of his initial claim. However, his complaint does indicate that it was "some weeks/months" after 25 Sep 07 that he "stopped going to work." He also submitted an unemployment hearing decision that noted he worked until 29 Mar 08. Thus, there is no genuine issue of fact that Complainant had 90 days from 29 Mar 08 to file his complaint.

Complainant offered nothing to create a genuine issue of fact that he filed his complaint sometime before 21 Nov 08. Although not an affidavit, sworn statements, or other responsive material, his request for hearing does note that he had been communicating with OSHA and experienced frustration in being directed to the correct office. However, even if I were to consider it, he specifically states that he was still employed at the time and was trying to deliver his detailed notes on safety violations and get help with the highly dangerous conditions. He did refer to being harassed and threatened, but only in the context of giving him motivation to being willing to come in and shut Respondent down for safety violations.

In short, Complainant failed to create a genuine issue of material fact that would allow a finding that he timely filed his initial whistleblower claim with OSHA. The remaining issues are moot.

Decision and Order

The complaint is **Dismissed**.

SO ORDERED this 26th day of August, 2010 in Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review with the Administrative Review 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).