



**Issue Date: 20 January 2012**

CASE NO.: 2010-AIR-00024

*In the Matter of:*

GUY COBB,

Complainant

v.

FEDEX CORPORATE SERVICES,

Respondent.

**DECISION AND ORDER GRANTING  
RESPONDENT'S MOTION FOR SUMMARY DECISION**

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" or "the Act") and the implementing regulations found at 29 C.F.R. §1979. 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.

The Complainant, Guy Cobb, was formerly employed by FedEx Corporate Services (FCS), the Respondent. After his employment was terminated he filed a timely complaint of violation of AIR 21 with the Occupational Safety and Health Administration (OSHA). OSHA dismissed his complaint and he requested review by the Office of Administrative Law Judges.

On December 29, 2011, FCS filed a Motion for Summary Decision. Mr. Cobb filed his response on January 16, 2012. In addition to responding to the Respondent's motion, he raised a counter-motion for summary decision.

**STANDARD FOR SUMMARY DECISION**

Summary decision may be granted where it is shown that there is no genuine issue of material fact to be determined in a hearing. 29 C.F.R. §18.41. In ruling on a motion for summary decision, an administrative law judge may grant the motion 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.” 29 C.F.R. § 18.40(d); *see also* Rule 56 of the Federal Rules of Civil Procedure. A fact is material and precludes granting summary decision if proof of the fact “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In determining whether there is a genuine issue of fact for the hearing, the judge may not make determinations of the credibility of witnesses and shall view “all the evidence and factual inferences in the light most favorable” to the non-moving party. *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1969)).

### STATUTORY PROVISIONS

AIR21 provides:

(a) **DISCRIMINATION AGAINST AIRLINE EMPLOYEES.** 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;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. §42121(a).

For purposes of AIR 21, the term “contractor” is defined as “a company that performs safety-sensitive functions by contract for an air carrier.” 49 U.S.C. §42121(e).

To establish a *prima facie* case of a violation of AIR 21, a complainant must demonstrate that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable adverse personnel action; and (4) the protected activity

was a contributing factor in the unfavorable personnel action. A complainant who establishes these elements is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.

## **BACKGROUND**

The Respondent, FCS, is a subsidiary of the FedEx Corporation (FedEx). The parent company owns several subsidiary operating companies, including FCS and FedEx Express. FedEx Express operates a large fleet of cargo-carrying airplanes and is clearly an air carrier within the meaning of AIR 21.

The Complainant was never employed either by FedEx Express or by the parent FedEx Corporation. FCS, his former employer, does not own or operate any aircraft. For purposes of determining coverage under the Act, the issue is whether FCS is a “contractor” within the definition quoted above.

FedEx operates a large package processing facility near runway 9/27 of Memphis International Airport (MIA) known as the SuperHub. The SuperHub is a high volume facility in which packages are unloaded from airplanes, sorted, and routed to their outgoing airplanes. Hurricane Creek Tunnel carries a stream under a portion of the airport facility. The tunnel runs under runway 9/27 near the SuperHub.

The Complainant was employed as a Business Continuity and Disaster Recovery (BCDR) professional. On November 1, 2006 the MIA Maintenance Department escorted him and other members of the BCDR group through the Hurricane Creek Tunnel. After this tour the Complainant submitted a report on the condition of the tunnel, titled Enterprise Vulnerability Study (EVS) 001.

The Complainant wrote in the Introduction to the Enterprise Vulnerability Study:

The purpose of this tour was to begin an assessment of FedEx’s underground data networks, buried near the Hurricane Creek tunnels and beneath FedEx’s SuperHub facilities. Today, based on our own internal FedEx information, we know data networking “single points of failure” exist at the airport, which, if affected, would completely cut off all data communications to and from the FedEx SuperHub. Our group’s assessment was intended to explore and consider these vulnerabilities within the context of a potential seismic event or terrorist attack.

Respondent’s Brief Exhibit F.

On page 9 of EVS 001 he described a meeting on January 8, 2007 with representatives of the Memphis Shelby County Airport Authority (MSCAA). Based on the data reviewed at this meeting he stated that “it is evident that the Hurricane Creek culvert will not be able to support the landing of a fully loaded (1.7 million pound) [Airbus] A380 on runway 9/27.” He contends

that he was fired in retaliation for this and other statements concerning the structural soundness of the tunnel and the runway.

The Respondent contends that the Complainant was fired for violation of its employee discount shipping policy. According to the motion, an employee made a hotline call to report possible misuse of the Complainant's shipping account in 2009. This report (Exhibit L of Respondent's Brief) led to an investigation. The Respondent contends that the reporting employee, who lived in another state, did not know the Complainant or know anything about the safety concerns that he had expressed beginning in 2007.

On November 13, 2009 the Complainant was issued a Letter of Termination for Unacceptable Conduct (Exhibit Q of Respondent's Brief). This letter stated that he had violated company policy "by sharing your discounted shipping privileges with family members" and that his employment was being terminated as of November 13, 2009.

### **RESPONDENT'S GROUNDS FOR SUMMARY DECISION**

The Respondent cites several grounds for its request for summary decision. These include the contentions that (1) it is not an employer covered by AIR 21; (2) the Complainant did not engage in protected activity under the Act because his professed concerns for the safety of the runway were not reasonable; (3) his expressed safety concerns did not contribute to his termination; and (4) his violation of the company's employee discount shipping policy was a legitimate non-discriminatory reason for his termination.

On a motion for summary decision I am required to construe all factual allegations in the light most favorable to the non-moving party. Applying that standard, the last three grounds listed above involve genuine issues of material fact and are not appropriate for summary decision.

### **AIR 21 COVERAGE OF THE RESPONDENT**

"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." *Fullington v. AVSEC Services, LLC*. ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005). As noted earlier, FCS does not own or operate any aircraft and is not itself an air carrier. In order for it to be subject to the Department of Labor's jurisdiction under AIR 21 it must therefore be a "contractor or sub-contractor of an air carrier" within the statutory definition.

The Complainant notes that the OSHA investigation found that FCS was covered by the Act and argues that this should dispose of the issue. However, the OSHA decision on jurisdiction, like that on the merits, is subject to a fresh review at the administrative law judge level. When presented with this precise issue, the Administrative Review Board held that "OSHA's findings [that the employer was covered by AIR 21] are not binding on the ALJ, who

conducts a *de novo* hearing on the merits.” *LeRoy v. Keystone Helicopter, Inc.* ARB No. 07-056, ALJ No. 2006-AIR-003, 024 (ARB Mar. 31, 2009).

The name of the Business Continuity and Disaster Recovery team on which the Complainant worked conveys the fact that its mission includes dealing with safety issues that could impact FedEx’s business. However, that fact standing alone does not mean that it provides safety services by contract with an air carrier.

The Respondent’s brief in support of the motion describes the mission of FCS as follows:

FedEx Services coordinates sales, marketing, information technology, customer service, and worldwide supply chain services support for the FedEx Brand. This includes the data management and networking expertise behind the package tracking capabilities for FedEx Express, FedEx Ground and FedEx Freight, along with e-commerce services, customer contact services, and other functions of the corporation’s professional services company. FedEx Services does not maintain a safety department and does not provide safety sensitive services to Federal Express Corporation or any other entity that is part of the FedEx family.

Respondent’s Brief Exhibit C.

In his reply brief the Complainant objected to this statement on the ground that it was not notarized. He did not dispute the accuracy of this list as far as it goes, but contended that it was incomplete:

FCS provides many additional services to FedEx Express the Respondent has not listed. One brief example is Information Security (InfoSec). InfoSec is a large area within FCS that provides critical data security protection for all of FedEx’s global systems including those of FedEx Express. Denise Wood, whom I presented my EVS 001 study, is the Chief Information Security Officer over this area and the Business Continuity and Disaster Recovery (BCDR) Department I worked for while creating, distributing, and presenting my Enterprise Vulnerability Studies to FedEx Express, FedEx Corporate, and FCS is a sub-group within the Information Security family.

Complainant’s Brief, p. 6.

In support of his position he offered a list of projects in which he had been involved:

The following is a list of both “safety functions” and “safety sensitive functions” that I performed as a FedEx Corporate Services Employee for FedEx Express:

- (1) October 2005: Every week day for more than three weeks I led individual tours of groups of firefighters through FedEx Express and

FedEx Corporate Services (FCS) facilities to better familiarize the firefighters with the floor plans and layouts of these very large facilities (see **Exhibit 13**).

- (2) February 2006: I led a group of structural engineers through FedEx Express facilities including the FedEx Express World Headquarters and FedEx Express SuperHub to discuss and document each facilities structural make up and how these facilities might be affected by an earthquake (see **Exhibit 12**).
- (3) February 2006: I personally installed an internal satellite phone in FedEx Express CEO and President Dave Bronczek's office. The Respondent may confirm this via Mr. Bronczek's administration assistant, Melanie Willer (see **Exhibit 55, 5th line of Excel Spreadsheet**). This installation checklist also shows that I was performing installations at the FedEx Express Global Operations Center (GOC), FedEx Corporate Headquarters, FedEx Corporate Communications at the FedEx Express World Headquarters (WHQ), and for FedEx Corporate Security (Bruce Townsend's group).
- (4) Spring 2006: In the Spring following Hurricane Katrina, FedEx Express organized a gathering at a hotel in Ft. Walton Beach, Florida to discuss *their* business continuity and disaster recovery plans and to document what did and did not work prior to, during, and after Katrina's landfall. My BCDR Manager, George Weske and I were specifically requested *by* FedEx Express to participate in the meeting which we both did.
- (5) November 2006: I began creating a prototype of tilt sensors that would be installed on all columns at the FedEx Express SuperHub Facility to provide an extremely fast assessment of the columns positions following a mid to major size earthquake (see **Exhibit 16**). I demonstrated this solution to FedEx Chairman, Fred Smith, in December of 2008 while with FedEx Innovations (see **Exhibit 6**).
- (6) November 2006: I organized a tour for a small group of FCS employees to document the structure of the Hurricane Creek Tunnel beneath the Memphis International Airport and Runway 9/27. We also had a geologist from the University of Memphis Center for Earthquake Research and Information (CERI) along to provide guidance specific to the soil structure around the tunnel and the potential for liquefaction during an earthquake. Our findings and documentation were the beginning of my *Enterprise Vulnerability Study 001 – Hurricane Creek – Memphis International Airport and SuperHub* (see **Exhibit 50**). All of this work was specific to FedEx Express.

- (7) Continuous: Our FCS Business Continuity and Disaster Recovery group and myself developed and coordinated disaster scenarios which involved all business units, including FedEx Express. This email describes a March 2006 scenario in which a tornado strikes the World Tech Center in Collierville, Tennessee (see **Exhibit 17**).
- (8) Continuous: I attempted communications with FedEx Express Managing Director Scott Mugno providing suggestions for mitigating the threat of avian flu, detecting package bombs (IEDs) before they are loaded on Express planes and in the SuperHub, structural and sensor techniques for mitigating damage to the Express SuperHub (see **Exhibit 49**). The Respondent has admitted that Mr. Mugno received these suggestions via my FedEx 2020 document (see **Exhibit 62**, page 4, Admission Nos 33, 34 & 35).
- (9) January 2007: Your Honor if you will look at **Exhibit 1**, this email string not only confirms the existence of project Northstar, the business continuity and disaster recovery planning effort at the Corporate level (FedEx Corporation), it proves that John Baxter (Mr. Baxter is a FedEx Express employee and FedEx Express liaison between FedEx Express and the Memphis International Airport) specifically requested *my* participation in FedEx Express “effort to determine what would happen to the Memphis International Airport ...in the event the Memphis area suffers a major earthquake.”
- (10) In 2009 our Innovation Group began testing the SenseAware product on FedEx Express planes. This sensor is a remote controlled cell phone that can detect temperature, humidity, position, acceleration, and GPS location in real time and transfer the data back to a host computer which displays the information to a customer via a website and browser. This was the first time the FAA had approved a cell phone device could be utilized on an air carrier’s plane (see **Exhibit 56**).

Complainant’s Brief, pp. 7-8.

Applying the requirement to construe the evidence in the light most favorable to the non-moving party, I will disregard the mission statement in Exhibit C of the Respondent’s brief and accept the Complainant’s definition of the information security mission of the company. I further accept his list of projects as representative of the type of work that he did as an employee of FCS.

The SuperHub is a major package processing facility, and maintaining the functionality of its data networks is clearly within the scope of the information security mission. The specific project that led to the tour of the Hurricane Creek Tunnel was, as the Complainant wrote in the Enterprise Vulnerability Study, “to begin an assessment of FedEx’s underground data networks, buried near the Hurricane Creek tunnels and beneath FedEx’s SuperHub facilities.” Protecting

these data networks from seismic activity, a terrorist strike, or other disasters is obviously an important priority for the corporation. However, the fact that a task is important does not necessarily mean that it is within the scope of the safety-sensitive contract provisions of AIR 21.

Section 42121(e) of AIR 21 defines a “contractor” as “a company that performs safety-sensitive functions by contract for an air carrier.” Neither the Act nor the implementing regulations define the term “safety-sensitive function.”

In the absence of such a definition under AIR 21, other federal aviation safety regulations may provide guidance. Congress used the same term in directing the FAA to institute drug and alcohol testing:

In the interest of aviation safety, the Administrator of the Federal Aviation Administration shall prescribe regulations that establish a program requiring air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of airmen, crew members, airport security screening personnel, and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator) for the use of a controlled substance in violation of law or a United States Government regulation; and to conduct reasonable suspicion, random, and post-accident testing of airmen, crew members, airport security screening personnel, and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator) for the use of alcohol in violation of law or a United States Government regulation.

49 U.S.C. §45102(a)(1).

The FAA regulations that implement this statutory direction provide that the program applies, among other categories, to “[a]ll individuals who perform, either directly or by contract, a safety-sensitive function listed in subpart E or subpart F of this part.” 14 C.F.R. §120.1(b). The regulation goes on to define the following terms:

(e) *Contractor* is an individual or company that performs a safety-sensitive function by contract for an employer or another contractor.

(f) *Covered employee* means an individual who performs, either directly or by contract, a safety-sensitive function listed in §§ 120.105 and 120.215 for an employer (as defined in paragraph (i) of this section). For purposes of pre-employment testing only, the term “covered employee” includes an individual applying to perform a safety-sensitive function.

....

(i) *Employer* is a part 119 certificate holder with authority to operate under parts 121 and/or 135 of this chapter, an operator as defined in § 91.147 of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. Military. An employer may use a

contract employee who is not included under that employer's FAA-mandated drug and alcohol testing program to perform a safety-sensitive function only if that contract employee is included under the contractor's FAA-mandated drug and alcohol testing program and is performing a safety-sensitive function on behalf of that contractor (i.e., within the scope of employment with the contractor.)

....

(k) *Performing* (a safety-sensitive function): an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such function.

....

(p) *Safety-sensitive function* means a function listed in §§ 120.105 and 120.215.

14 C.F.R. §120.7(e), (f), (i), (k), (p).

Sections 120.105 and 120.215 cover drug and alcohol testing respectively. Both have the same list of safety-sensitive functions falling within the scope of the testing program:

- (a) Flight crewmember duties.
- (b) Flight attendant duties.
- (c) Flight instruction duties.
- (d) Aircraft dispatcher duties.
- (e) Aircraft maintenance and preventive maintenance duties.
- (f) Ground security coordinator duties.
- (g) Aviation screening duties.
- (h) Air traffic control duties.

14 C.F.R. §120.105(a), §120.215(a).

The regulations for the drug and alcohol testing program are not directly applicable to the whistleblower protection program. However, the definitions that the FAA has given to the same terms that are used in AIR 21 tend to support the inference that the term “safety-sensitive functions” refers to activities directly and immediately related to the flight and maintenance of aircraft, rather than to information security and the other corporate security functions that the Complainant has described.

Based on the material submitted by both parties, determining the structural soundness of the tunnel under the runway was not a part of the mission either of FCS or of the specific project that led to the examination of the tunnel. That project was, according to the Complainant’s own report, designed to assess the risk to data networks that support the nearby SuperHub. After the tour the Complainant unilaterally decided to investigate the structural support of the runway.

The Complainant states that “[i]ndividuals in proximity to issues they believe to be safety violations are morally, ethically and legally required to report these issues and if they do not believe that they are being addressed, then they are bound to continue to escalate their belief until the correct owner of the issue provides a response the individual communicating the issue can rest assured is being appropriately and correctly addressed.” Complainant’s Brief, p. 27. This is a clear statement of the sincerity of his belief in the hazardous condition of the runway, but it does not resolve the question of statutory jurisdiction over his complaint.

I do not address the question of whether it was appropriate for him to expand the inquiry from security of data networks to the condition of the runway, or whether his concerns for the safety of the runway are correct. The issue raised by the motion is whether his personal decision to investigate the safety of the runway was enough to retroactively make FCS a “contractor” of FedEx Express for purposes of AIR 21.

The Complainant has offered no evidence that FCS ever performed safety-sensitive functions within the meaning of the Act by contract with FedEx Express or any other air carrier. His unilateral decision to undertake a safety analysis could not create such a contract relationship where none existed before. I find that the Respondent was not an employer covered by AIR 21.

This decision is limited to the issue of jurisdiction over the employer under AIR 21. The Complainant’s pending action against FedEx Express and MSCAA in the U.S. District Court for the Western District of Tennessee does not involve any issue of employer status under AIR 21, and this decision does not imply any determination on my part as to any of the issues that have been raised in that lawsuit.

### ORDER

The Respondent’s motion for summary decision is **GRANTED**. The Complainant’s counter-motion for summary decision is **DENIED**. The complaint is **DISMISED** on the ground that the Respondent FedEx Corporate Services is not an employer covered by AIR 21. The hearing scheduled for **February 28, 2012** is **CANCELLED**.

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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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: [ARB-Correspondence@dol.gov](mailto:ARB-Correspondence@dol.gov). 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).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).