

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 01 June 2010

Case Nos.: 2010-AIR-00012
2010-AIR-00013

In the Matter of:

PETER E. PETERSON,

Complainant,

v.

MARYLAND STATE POLICE AVIATION COMMAND,

Respondent.

**ORDER DENYING COMPLAINANT'S MOTION FOR DISCOVERY
AND GRANTING RESPONDENT'S MOTION TO DISMISS**

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 "Act"). The complaint was filed with the Occupational Safety and Health Administration (OSHA), which dismissed the complaint on December 14, 2009. The Complainant filed a timely request for a hearing with the Office of Administrative Law Judges.

The OSHA determination did not reach the merits. It found that the Respondent, the Maryland State Police (MSP), was not a covered entity under the Act "because it is a political subdivision of a state, and is not an individual, a partnership, or a corporation."

On March 16, 2010, the MSP filed a motion to dismiss the claim for lack of jurisdiction. The Complainant filed a response to the motion, and a motion to stay adjudication and to provide discovery on the sovereign immunity issue during the stay, on April 8, 2010. The Respondent replied on April 20, 2010.

BACKGROUND

The MSP Aviation Command is a state agency that operates aircraft in a variety of missions, some of which are peculiarly governmental in nature (*e.g.* search and rescue, law

enforcement support) and some of which are in the nature of civil air services (*e.g.* medical evacuation). In the medical evacuation mission it conducts interstate operations, in the course of transporting accident victims to medical facilities that may be in the District of Columbia or in one of the states that border Maryland.

The Complainant is a pilot who was formerly employed by the MSP. On September 11, 2008 he submitted a complaint concerning safety issues to the Inspector General of the U.S. Department of Transportation. The MSP sent him a notice terminating his employment on November 7, 2008. He filed the present complaint with OSHA on December 1, 2008, within the statutory time limit for filing complaints.

COMPLAINANT’S BASES FOR REQUESTING DISCOVERY

The Complainant’s motion for limited discovery rests on the assertion that there are factual issues that must be resolved in order to adjudicate the Motion to Dismiss.

The first of these concerns a memorandum dated March 5, 2008 from the Commander of the Aviation Command discussing the distinction between “public” and “civil” aircraft under federal aviation law. According to the motion, the Complainant learned of the existence of this memorandum in the course of preparing the brief on the Motion to Dismiss and requested a copy of it. The Respondent refused the request, but the Complainant obtained a copy of the memorandum and attached it to the brief as Exhibit 4.

In the Motion for Discovery, the Complainant asserts that “documents and correspondence surrounding [the memorandum’s] creation are important pieces of documentary evidence that are highly relevant to Peterson’s arguments in opposition to the MSP’s Motion to Dismiss.”

The second issue on which the Complainant’s motion requests discovery is whether the MSP has received any federal funding. This is requested because the answer to the motion to dismiss argues that “if MSP receives any federal funding, MSP may have waived sovereign immunity as a condition of receiving federal funds.”

The March 5, 2008 memorandum was sent from Major A.J. McAndrew, the commander of the Aviation Command, to all personnel of the Command. Its Background section begins:

Historically, aircraft owned and operated by a government entity, such as the Maryland State Police Aviation Command, were considered to be “public aircraft” and were exempt from many of the requirements in FAA regulations applicable to “civil aircraft,” including those governing aircraft airworthiness and flightcrew certification. The passage of Public Law 103-411 (the Independent Safety Board Act Amendment of 1994), made a major change in the definition of “public aircraft.” Under this statute, which became effective April 23,

1995, many former public aircraft operations are now subject to the regulations applicable to civil aircraft operations. For example, government owned and operated aircraft used to transport passengers are, in some circumstances, no longer considered to be public aircraft, i.e. VIP flights. Unless they receive an exemption from the administrator, the operators of such aircraft need to meet civil aircraft requirements such as those pertaining to certification, maintenance, and training.

STATUTORY DEFINITIONS

49 U.S.C. §40102(a) contains the following definitions:

(2) “air carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

(5) “air transportation” means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

.....

(15) “citizen of the United States” means---

(A) an individual who is a citizen of the United States;

(B) a partnership each of whose partners is an individual who is a citizen of the United States; or

(C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

.....

(16) “civil aircraft” means an aircraft except a public aircraft.

.....

(37) “person”, in addition to its meaning under section 1 of title 1, includes a governmental authority and a trustee, receiver, assignee, and other similar representative.

.....

(41) “public aircraft” means any of the following:

.....

(C) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).

The Department of Labor’s implementing regulations for AIR 21 use the definition of the term “air carrier” in 49 U.S.C. §40102(a)(2) verbatim. 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.

DISCUSSION

There is no explicit statement in the text of 49 U.S.C. § 42121 of an intent either to waive the federal government’s immunity or to abrogate that of the states. In *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Supreme Court held that the state’s sovereign immunity barred the Commission from adjudicating a private party’s complaint against the state before an agency administrative law judge without the state’s consent.

The Complainant has provided a copy of the OSHA determination dated May 5, 2008 on an earlier complaint. In that determination, the Regional Administrator of OSHA found that while the MSP “does not hold an ‘air carrier’ certificate, it conducts operations that would require an ‘air carrier’ certificate.” He concluded that the MSP was a “person” within the meaning of the Act and proceeded to the merits of the complaint. On the merits OSHA found that the employment actions complained of “did not meet the adverse action requirement of AIR 21” and dismissed the complaint.

There is no indication in the record provided that the Complainant appealed the May 5, 2008 determination. The MSP would have had no reason to do so, because it prevailed on the merits. Therefore, there has been no review by an administrative law judge or other adjudicatory authority of the Regional Administrator’s finding that the MSP was subject to the whistleblower protection provisions of the Act.

An administrative law judge hearing is *de novo*. Legal conclusions drawn by OSHA personnel in the course of their investigation are not binding even in the review of the same case, much less in a later case between the same parties. The May 5, 2008 determination does not provide any authority on the issues of sovereign immunity or air carrier status in the present case. In addition, the fact that the MSP acquiesced in a favorable decision on the merits does not estop it from now moving for dismissal on either of those issues.

The first subsection of the Act describes the prohibited conduct, and the entities that are subject to its prohibitions:

(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)

In the next subsection, describing the procedures for adjudicating a complaint, the Act uses the term “person” to refer to an employer (*e.g.* “person named in the complaint” 49 U.S.C. § 42121(b)(1); “person alleged to have committed a violation” 49 U.S.C. § 42121(b)(2)(A)). As noted above, another section of Title 49 defines the term “person” to include a governmental authority (49 U.S.C. §40102(a)(37)).

It is clear, and will be discussed in more detail below, that the aviation activities of government agencies, as “persons” under Title 49, are subject to regulation by the Federal government as part of its general responsibility for ensuring the safety of air travel. However, in defining the parties subject to the specific prohibitions on whistleblower retaliation, Congress did not use the word “person.” Instead it refers to three types of entities “air carriers,” “contractors,” and “subcontractors.”

Reading subsections (a) and (b) together, it appears that Congress first defined the entities that are subject to the Act in limited and reasonably precise terms. Having defined potential respondents in subsection (a), Congress turned in subsection (b) to describing the procedures by which the Department of Labor would adjudicate complaints against those entities. It could have continued to use the cumbersome designation “air carrier or contractor or subcontractor of an air carrier,” but instead used the less precise but more convenient “person.” The Section 40102 definition of “person” cannot properly be read to supersede the more specific language that Congress actually used in Section 42121(a) to describe the entities that are subject to Section 42121.

The March 5, 2008 memorandum from Major McAndrew noted that some flights of MSP aircraft were in the nature of civil rather than public aircraft operations, and that aircraft thus operating “need to meet civil aircraft requirements such as those pertaining to certification, maintenance, and training.” This is an acknowledgement of the fact by the responsible official. Discovery of the background material that went into the drafting of this memorandum would add nothing relevant to the motion to what the memorandum itself says. Neither Major McAndrew nor any other employee of the MSP could, in internal correspondence while preparing the memorandum, either expand or contract the federal legislative provisions that define entities subject to AIR 21. Discovery of any such internal correspondence would have no impact on the legal issues raised by the present motion. Construing the facts in the light most favorable to the Complainant, I find for purposes of the motion to dismiss that MSP aircraft, when engaged in operations such as medical evacuation and transportation of VIP passengers, are subject to the federal regulations prescribed for civil aircraft.

The fact of federal regulation of some state agency flight operations in the category of civil aircraft does not, however, answer the question of whether the personnel actions of such agencies are subject to AIR 21 whistleblower protection rules.

Aviation safety is a vital government interest, in furtherance of which the federal government regulates countless aspects of the operations of aircraft such as training, certification, and maintenance. It has different standards for public aircraft and for civil aircraft and, as Major McAndrews’ memorandum noted, MSP aircraft are subject to federal regulation as civil aircraft in some of their missions.

A separate way in which Congress has determined to enhance aviation safety is to encourage reporting of safety concerns by prohibiting employers from retaliating against whistleblowers. There is a legitimate public policy argument for extending that protection to all operators of aircraft. The argument is that if some whistleblower protection is good, more is better. An aircraft owned by a state, or the federal government, or a foreign entity, can fail

catastrophically in U.S. airspace and cause as great a disaster as one owned by a U.S. airline. Therefore, safety would be enhanced by giving the same whistleblower protection to employees of those governmental and foreign entities.

The reasonableness of this argument as a matter of policy does not justify reading it into the statute that Congress actually passed. The title of Section 42121(a) is “Discrimination against **airline** employees.” [emphasis added] As noted above, the statute then goes on to prohibit conduct by an “air carrier,” a term defined in Federal law as “a citizen of the United States” undertaking to provide air transportation. Granting that VIP flights and interstate medevac flights are “air transportation” within the meaning of 49 U.S.C. §40102(a)(5), some AC missions are “air transportation.” However, to find that a state of the Union is a “citizen of the United States” for purposes of the statute, and that in thus obliquely referring to the states Congress has abrogated their immunity by implication, stretches the interpretation of the statutory language further than it will go.

Congress can and does regulate the operations, maintenance, crew training and other safety related aspects of aircraft operating in the United States, whether the ownership of the aircraft is public or private, foreign or domestic. However, in the area of personnel policies to enhance safety, Congress has acted more narrowly. It has not purported to supersede the personnel practices of the states, or of foreign entities.

The Complainant has asked for discovery of federal funding that may have been received by the MSP on the grounds that such funding might have included a provision for waiving sovereign immunity. The Complainant has not pointed to any provision of law or regulation that would require such a waiver as a precondition for receiving any federal funding grant. In the complete absence of any provision for abrogation of sovereign immunity in the statute under which the complaint was brought, the request for discovery is unduly speculative.

ORDER

The Complainant’s Motion to compel discovery is **DENIED**. The Respondent’s Motion to dismiss the complaint is **GRANTED**.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc

Newport News, Virginia