

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 July 2012

CASE NO.: 2012-AIR-00013

In the Matter of:

ROBERTA CABAN,

Complainant,

v.

DELTA AIRLINES, INC.,

Respondent.

ORDER DISMISSING COMPLAINT

The above matter is a complaint of employment discrimination under Section 42121 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21 Act), 49 USC §42141 as implemented by federal regulations set forth in 29 CFR Part 1979. The case has been referred to the Office of Administrative Law Judges for formal hearing upon the May 14, 2012 request of the Complainant regarding the Occupational Safety and Health Administration April 6, 2012, determination that “the evidence in this case does not support that Complainant’s protected activity was a contributing factor in Respondent’s decision to terminate her employment. Respondent provided a legitimate business reason for taking this action against Complainant.”

On July 16, 2012, Respondent’s counsel filed “Respondent’s Motion to Dismiss AIR21 Complaint.” In support of the Motion to Dismiss the complaint, Respondent includes two exhibits. Exhibit “A” purports to be a “February 8, 2012 Record of Material Terms of Settlement Agreement at Mediation before Chief Magistrate Judge, U.S. District Court, Janet King.” This document reflects that the Complainant, with assistance of counsel, entered into a settlement agreement with Respondent through mediation on February 8, 2012, which required the payment of certain amounts for attorney fees, back pay and general damages; the observance of a confidentiality agreement by all Parties; the observance of a non-disparaging agreement among the Parties; and the dismissal with prejudice of the lawsuit against all the Parties; and

dismissal of the AIR-21 complaint then pending at the Occupational Safety and Health Administration. The Complainant, or her counsel at the mediation, was to notify the Occupational Safety and Health Administration within 30 days to effect dismissal of the AIR-21 complaint. Exhibit "B" is the May 25, 2012, Order of U.S. District Court Judge S.C. Jones in Complainant's Civil Action File No. 1:10-cv-04224-SCJ, in the U.S. District Court for the Northern District of Georgia, Atlanta Division, which found that the Complainant had entered into an enforceable settlement agreement and directed the Complainant "to file a stipulation dismissing this action. The stipulation shall be filed within seven (7) days of the entry of this order." Judge S.C. Jones also denied, as moot, Complainant's "pro se motions for extension in time to review contract and for second mediation." Judge S.C. Jones noted, in footnote 1 on page 2 of his Order, that "The requirement that [the Complainant] seek dismissal of her administrative complaint against Delta is a non-issue as the complaint has been dismissed by OSHA."

It is noted that the OSHA dismissal was promulgated on April 6, 2012, and that the Complainant filed an appeal of that decision with the Office of Administrative Law Judges on May 14, 2012, eleven days before Judge S.C. Jones entered his Order finding the Complainant bound to the terms of the settlement agreement reached on February 8, 2012.

By Order of July 16, 2012, the Complainant was advised of her right to representation before the Office of Administrative Law Judges; advised of the filing of Respondent's Motion to Dismiss; advised of the sole issue involving dismissal of the AIR-21 complaint based on settlement actions taken before the U.S. District Court for the Northern District of Georgia; and advised that failure to file a response to Respondent's Motion to Dismiss may result in an adverse determination against her interests. The Complainant was ordered to file with the Clerk of Court a response to Respondent's Motion to Dismiss no later than 2:00 PM, Tuesday, July 31, 2012, and was granted leave to file her response by facsimile transmission if her documents did not exceed 12 pages in length.

The Complainant filed her response to Respondent's Motion to Dismiss on July 31, 2012. The Complainant described difficulties she had with her attorney at the mediation before Judge J. King; allegations of ineffective assistance of counsel during the mediation; allegations that "OSHA simply did not keep up with the investigation and or handle their area of responsibility, [the] discrimination aspect." She reports that "my portion of the settlement for with DL is \$K¹ [and] now another attorney has placed a lien on the settlement ... In other words, if this settlement goes through I will pay out all attorneys and be at negative 5K for coming forward as a [whistle blower]. She submits that granting Respondent's Motion to Dismiss "is not justice and administration of the act."

FRAMEWORK

Complaints before the Office of Administrative Law Judges under AIR-21 are governed by Federal regulations set forth in 29 CFR Part 1979. Federal regulations implementing AIR-21 29 CFR §1979.144 provide that –

¹ The exact sum is not set forth in this Order due to the confidentiality aspects of the settlement agreement approved by the U.S. District Court for the Northern District of Georgia, Atlanta Division.

“In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge ... may, upon application, after three days notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.”

The AIR-21 statute at 49 U.S.C. §42121(b)(6)(C) provides that “Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28, United States Code.” AIR-21 also provides that “At any time before the issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation,” 49 U.S.C. §42121(b)(3)(A). Federal regulations at 29 CFR §1979.111(d) addresses settlement agreements entered into during the investigative and adjudicatory phases of the complaint process.

Federal regulations at 29 CFR §1979.109 provides that “Neither the Assistant Secretary’s determination to dismiss a complaint without completing an investigation pursuant to §1979.104(b) nor the Assistant Secretary’s determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge shall hear the case on the merits.”

Federal regulations at 29 CFR §1979.107(a) directs that “proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of 29 CFR part 18.” Federal regulations at 29 CFR §18.6 provides for the filing of motions by parties to a formal hearing. The regulations at 29 CFR §18.1(a) provides that “the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.”

Federal Rules of Procedure, Rule 70(a) provides “Party’s Failure to Act; Ordering Another to Act. If a judgment requires a party ... to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done – at the disobedient party’s expense – by another person appointed by the court. When done, the act has the same effect as if done by the party.”

Here Respondent’s counsel has applied for the pending AIR-21 complaint to be dismissed because such dismissal is required as a term of the settlement agreement entered into by the Parties and Ordered by U.S. District Court Judge S.C. Jones to be followed. Respondent seeks this action because the Complainant has failed to comply with the settlement agreement terms set before the U.S. District Court for the Northern District of Georgia.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the administrative file and Respondent's motion, and attachments thereto, this Administrative Law Judge finds that –

1. On June 14, 2011, the Complainant filed an AIR-21 complaint with the Occupational Safety and Health Administration.
2. The Parties entered into a settlement agreement on February 8, 2012 before Chief Magistrate Judge for the U.S. District Court for the Northern District of Georgia, J. King, which required the Complainant to notify the Occupational Safety and Health Administration of the settlement and request dismissal of the June 14, 2011 AIR-21 complaint no later than March 9, 2012.
3. On February 8, 2012 the AIR-21 complaint was pending before the Occupational Safety and Health Administration.
4. On April 6, 2012, the Occupational Safety and Health Administration issued a determination on the Complainant's AIR-21 filing that "the evidence in this case does not support that Complainant's protected activity was a contributing factor in Respondent's decision to terminate her employment. Respondent provided a legitimate business reason for taking this action against Complainant."
5. On May 14, 2012, the Complainant filed a request for hearing before the Office of Administrative Law Judges.
6. On May 25, 2012, Judge S.C. Jones, U.S. District Court for the Northern District of Georgia, Atlanta Division, found that the Complainant had entered into an enforceable settlement agreement and directed the Complainant to file a stipulation dismissing then pending actions within seven (7) days of the entry of his order.
7. The Complainant failed to notify the U.S. District Court for the Northern District of Georgia, Atlanta Division, that her AIR-21 complaint was pending before the Office of Administrative Law Judges at the time she was before Judge S.C. Jones on the issue of the voluntariness and validity of her settlement agreement entered into on February 8, 2012.
8. The Complainant failed to notify the Occupational Safety and Health Administration that she had entered into a settlement agreement with Respondent on February 8, 2012, through mediation before Chief Magistrate Judge for the U.S. District Court for the Northern District of Georgia, J. King.
9. The settlement agreement between the Parties has been specifically approved by the U.S. District Court for the Northern District of Georgia by Order of May 25, 2012 and requires dismissal of the AIR-21 complaint filed by the Complainant on June 14, 2011.

10. There is no evidence that the U.S. District Court for the Northern District of Georgia Order of May 25, 2012 has been appealed or is not otherwise a final Order.
11. There is no evidence that the U.S. District Court for the Northern District of Georgia has directed a person appointed by the Court to perform the specific act of notifying the Occupational Safety and Health Administration by March 9, 2012 to effect dismissal of the AIR-21 complaint pursuant to Federal Rules of Procedure, Rule 70(a), where Complainant has failed to so act.
12. Respondent has established good cause to dismiss the pending AIR-21 complaint.
13. The interests of justice require that the pending AIR-21 complaint and request for hearing be dismissed.

ORDER

It is hereby **ORDERED** that **the AIR-21 complaint** now pending before the Office of Administrative Law Judges **is DISMISSED**.

A

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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).