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Issue Date: 06 September 2012

CASE No: 2012-AIR-00008

In the Matter of:

DANIEL FORRAND,
Complainant,

v.

FEDEX CORPORATION,
Respondent.

Order Denying Motions to Strike Vague Allegations and for Summary Adjudication

Daniel Forrand, an aviation maintenance technician for Federal Express Corporation (FedEx) at the Los Angeles International Airport (LAX), sought employment protection from the Secretary of Labor under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ The motions FedEx filed to strike vague allegations and for judgment without trial (*i.e.*, a motion for summary adjudication)² on his claims are denied. The matter will proceed to trial.

I. Core Theory of the Complainant

Forrand says disclosures he made:

1. to FedEx and the FAA in September 2008 about work done on FedEx aircraft 562,³ and
2. to FedEx in a maintenance database on February 25, 2009 that recorded cracks on another aircraft,

were ones about air safety that AIR 21 protects.⁴ The FAA opened an investigation and took enforcement action against FedEx to remedy the issues Forrand raised in

¹ 49 U.S.C. § 42121.

² See 29 C.F.R. §§ 18.40 and 18.41.

³ Forrand Declaration. at ¶¶ 3–10.

his first complaint.⁵ He alleged that after the first complaint FedEx managers created a hostile work environment at LAX for him, which worsened after his second disclosure.

Immediately after he reported the cracks, the hostility escalated to a specific, public threat to his employment.⁶ It continued when the mid-level FedEx manager assigned to investigate instead deprecated the threat as no more than “horseplay.” When Forrand then complained to a senior FedEx manager in early March 2009 about the inadequate investigation, that senior manager instructed Forrand’s direct supervisor to enter adverse comments about Forrand in FedEx personnel records, which was done in late March 2009, as a direct response to Forrand’s protest. Forrand complained to the Secretary about these things, seeking a remedy under AIR 21 for retaliation.

He complained to the Secretary of Labor—through OSHA—on May 31, 2009. The Secretary recognized that his claims fall into two interrelated legal categories: (1) for a discrete act of actionable discrimination on March 25, 2009, and (2) for subjecting him over time to a hostile work environment.⁷ The Secretary found in favor of FedEx; Forrand, still as a pro se litigant, objected and sought the *de novo* hearing on his claims the Secretary’s regulations offer.

II. The Motion by FedEx to Strike Vague Allegations

FedEx first protests that Forrand’s allegations about wrongdoing are vague, and should be stricken under Rule 12(f), F.R.C.P.⁸ The criticisms appear to be directed to the narrative Forrand prepared as a pro se litigant that accompanied the pretrial statement he filed on April 25, 2012. The lawyer Forrand eventually retained appeared in the case in June, after FedEx moved to strike and for summary decision.⁹ The remedy for any lack of precision in the claims isn’t to dismiss them on their merits. It would be to require Forrand to delineate his claims more specifically, so FedEx has fair notice of their bases.¹⁰ Forrand’s statement of facts and declaration in the response to the FedEx motions to strike and for summary judgment does that. The motion to strike is denied.

III. Summary Adjudication

I indulge, as I must, all factual inferences in Forrand’s favor on the motion for summary adjudication, and focus primarily on the sufficiency of Forrand’s proof.

⁴ Forrand Declaration at ¶ 17.

⁵ Forrand Declaration at ¶ 10.

⁶ Forrand Declaration at ¶ 10.

⁷ Secretary’s Findings of February 13, 2012.

⁸ Motion to Strike and for Summary Decision, at 7.

⁹ An Entry of Appearance was filed by the lawyer on June 4, 2012.

¹⁰ *Evans v. US EPA*, ARB Case No. 08-059, OALJ Case No. 2008-CAA-003 (ARB July 31, 2012); *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, OALJ No. 2007-SOX-039, -042 (ARB May 25, 2011).

The standard for admissible proof in this administrative proceeding is not demanding. Formal rules of evidence do not apply.¹¹ Consistent with the Administrative Procedure Act, only “irrelevant, immaterial, or unduly repetitious” proof is rejected.¹²

Some of the declarations FedEx offered with its motion for summary adjudication have been stricken in a separate order because they rely on supporting material FedEx redacted.

I decline to rule separately on the 60 objections FedEx separately stated to Forrand’s evidence. A complainant must rely on inferences to show discrimination. I cannot say at this point that the many relevancy objections FedEx raised are well founded. Other objections raised, such as hearsay or the best evidence rule are misdirected given the relaxed evidentiary standard.

The question becomes whether what Forrand offered creates a dispute of material fact for trial. As one district judge aptly commented:

[O]nce a party responding to a Rule 56 motion has identified a genuine issue of material fact that would preclude summary judgment . . . nothing that the movant can offer up by way of reply as to its version of the facts can stave off rejection of the summary judgment motion—just as an omelette, once scrambled, cannot be stuffed back into the eggshell.¹³

FedEx created for itself a Morton’s fork when it attached two declarations¹⁴ to its reply. Reply affidavits and the absence of a genuine issue of material fact are almost always mutually exclusive.¹⁵ Either:

the new declarations frame disputes about facts Fedex believes are material, for it wouldn’t highlight extraneous facts by offering them in reply declarations; or

FedEx didn’t give Forrand notice in its initial filing of all evidence it meant to rely on.

Neither assists its quest to dismiss Forrand’s claims on the merits.

A. Forrand’s Interrelated Legal Theories of Liability

The AIR statute offers an employee a remedy for discrimination suffered in the 90 days before the employee complains to the Secretary.¹⁶ The Secretary can remedy retaliatory acts, if any, in March, April, or May of 2009.

¹¹ 29 C.F.R. § 1979.107(d).

¹² 5 U.S.C. § 556(d); *see also*, 29 C.F.R. § 1979.107(d) (authorizing the judge to “exclude evidence which is immaterial, irrelevant, or unduly repetitious.”)

¹³ *Waters v. City of Chicago*, 416 F. Supp. 2d 628, 629 n.1 (N.D. Ill. 2006). A similar point is made in *Cook v. Shaw Indus.*, 953 F. Supp. 379, 383 (M.D. Ala. 1996) (“rebuttal evidence only confirms . . . a material issue of fact exists”).

¹⁴ Declaration of Jack Earls (stricken), and Declaration of Ted J. Serafin.

¹⁵ Michael D. Moberly & John M. Fry, *Squandering the Last Word: The Misuse of Reply Affidavits in Summary Judgment Proceedings*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 43, 66 (2010).

¹⁶ 49 U.S.C. § 42121(b)(1); 29 C.F.R. § 1979.103(d).

Forrand raised issues of material fact in his declaration about whether the Online Documented Compliment/Counseling (OLCC) he received from his direct supervisor at the behest of a senior FedEx manager at LAX on March 25, 2009—within the limitation period—was a retaliatory act of discrimination. Several earlier specific events Forrand relies on as discriminatory (*i.e.*, retaliatory) were old enough that any remedy for them a discrete acts of discrimination is time-barred under the Act’s 90–day limitations period.¹⁷ Earlier events may be relevant proof, however, to give context to an actionable claim for retaliatory discrimination.¹⁸ Those same older acts may be the raw material Forrand relies on for his hostile work environment claim, as long as a discriminatory act that is part of that claim happened within the 90–day statutory limitation period.¹⁹

Intentional discrimination Forrand may have suffered after filing this OSHA complaint could be remedied too. Forrand declared that he complained to the OSHA investigator of discrimination (intimidation, threats, and coercion all being prohibited discrimination)²⁰ he suffered after he filed his OSHA whistleblower complaint.²¹

1. A Review of Forrand’s Factual Claims

Forrand says after he complained internally in late September 2008 about what wasn’t done as aircraft 562 was being returned to service. After he got inadequate responses within FedEx and took his concern to the FAA, in retribution FedEx managers at LAX began to treat him with hostility. On October 8, Forrand and other employees left a meeting early, but only Forrand was summoned to his direct supervisor, Richard Diehm, the Hangar Maintenance Manager to explain why he left early for lunch and to be told he was being investigated for doing so.²² About a month later (in early November 2008) Diehm required Forrand to submit a statement about why he “swiped out for lunch 17 minutes early.”²³ Diehm had been told to do this by Diehm’s supervisor, FedEx Senior Manager William Cusato.²⁴

¹⁷ See *Knox v. National Park Service*, ARB No. 10-105, OALJ No. 2010-CAA-002, slip op. at 3 (ARB April 30, 2012) (holding that to prevail in a hostile work environment claim under the Clean Air Act, a discriminatory act the complainant relies on must have taken place within the Clean Air Act’s shorter limitations period of 30 days).

¹⁸ *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-034, OALJ No. 2002-AIR-8, slip op. at 6 & n. 9 (2006), relying on *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

¹⁹ *Knox*, ARB No. 10-105 at 3.

²⁰ It violates the AIR 21 Act for an air carrier “to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee.” 29 C.F.R. §1979.102(b).

²¹ Forrand Declaration at ¶ 24.

²² Forrand Declaration at ¶ 12.

²³ Forrand Declaration at ¶ 13.

Although Forrand wasn't disciplined at that time, the written justification he was required to submit could be used for potential discipline thereafter.

A separate incident occurred in January 2009, when Forrand was accused of violating a policy on cell phone usage, for supposedly taking photographs of the FedEx facility. No discipline was involved, but his direct supervisor later wrote to him about the company policy on cell phone use.²⁵

The most severe act Forrand points to in the chain of events he says proves managerial hostility in retaliation for his protected air safety disclosures was a threat to Forrand's employment the FedEx Production Control Manager at LAX, James Doty, publically made on February 25, 2009 (of which more will be said later). That proof, in the context of other acts that treated Forrand unfavorably after his protected disclosures in September 2008 and February 2009, frames an issue of material fact about whether he was intentionally subjected to a hostile work environment. The OLCC of March 25, 2009 was a very senior manager's direct response to Forrand's complaint about how inadequately Cusato had investigated and responded to Doty's public threat to Forrand's employment. It was the last of those specific discrete acts of discrimination before Forrand brought his AIR 21 complaint to the Secretary of Labor.

2. Claim Details Given in Forrand's Declaration

According to the declaration I accept for now as true, Forrand's entry into the FedEx OMNI Maintenance Tracking System of information about cracks in an aircraft on February 25, 2009, prompted Doty to broadcast—inadvertently—a tirade on the hangar public address system. In it he threatened to have Forrand fired. Doty said:

I want him out the gate, fuck him, he write some cracks that NDT is looking at, he is working over by the carbon brake mod, I want the camera on him if that motherfucker wants to fuck with the bull he's gonna get the horns.²⁶

I infer that to put Forrand "out the gate" was to fire him. This sort of hostile, contemporaneous response to an air safety report Forrand entered in the FedEx computer maintenance system may be fairly characterized as direct evidence of discriminatory animus by a FedEx manager.²⁷ Direct proof isn't essential, of

²⁴ Diehm Declaration at ¶ 4. Diehm puts the date he required Forrand to respond as October, not November, 2009.

²⁵ Diehm Declaration, Ex. B, memo of Feb. 19, 2009.

²⁶ Forrand Declaration at ¶17.

²⁷ See *Wright v. Southland Corporation*, 187 F.3d 1287 (11th Cir. 1999) (non-precedential opinion in which other panel members concur in the judgment or result only); R. Joseph Barton, *Determining the Meaning of "Direct Evidence" in Discrimination Cases within the 11th Circuit*, FLORIDA BAR JOURNAL (Oct. 2003).

course,²⁸ but it is helpful to a claim. For whatever reason, FedEx had little to say in its reply about this proof. It did point out that the broadcast was made slightly more than 90 days before Forrand complained to the Secretary. The threat was broadcast on February 25, while he complained to OSHA on May 31, 2009. But as will be seen, the OLCC and the broadcast tirade are intertwined.

Cusato investigated the complaint Forrand lodged with FedEx about Doty's broadcast. Cusato dismissed it as "horseplay," although Custado did say that the language used [presumably by Doty, although the offending speaker was not identified] was "not condoned by FedEx."²⁹ Cusato said nothing about the threatening, retaliatory nature of Doty's rant.

Forrand complained on March 6, 2009 to the Managing Director for FedEx at LAX, Phillip Coley (who was senior to Custado), about being targeted for reporting air safety issues, and the inadequacy of the FedEx response to the Doty broadcast.³⁰ Coley's didn't care much for Forrand's complaint;³¹ Coley's response was to ask Forrand whether he was on an approved break, and whether Forrand had notified his supervisor that he was coming to see Coley.³² Shortly thereafter Coley had Cusato instruct Forrand's direct supervisor, Diehm, to criticize Forrand. In the March 25, 2009 OLCC, Diehm did just what Cusato told him to do. That OLCC entry by Diehm:

- a. disapproved of the way Forrand had conducted himself as Forrand met with the managing director (*i.e.*, Coley), although Diehm hadn't been there;
- b. discussed with Forrand "method[s] to get the best results when approaching management with concerns;"
- c. indicated concern with how stressed Forrand appeared to be; and
- d. questioned why Forrand had left his work area to raise the matter with Coley in the first place.³³

I cannot say as a matter of law that the OLCC of March 25, 2009 that Coley initiated wasn't intended to intimidate, threaten, or harass, *i.e.*, to discriminate against Forrand for standing up for himself instead of acquiescing in the way Custado had minimized the retaliation Doty broadcast. Forrand sees the OLCC issued at Coley's behest through Cusato and Diehm as one more effort in a long line

²⁸ See *Desert Palace Inc. v. Costa*, 299 F. 3d 838, 853-854 (9th Cir. 2002) (*en banc*), *affirmed*, 539 U.S. 90 (2003).

²⁹ Diehm declaration at ¶ 6, and its Ex D.

³⁰ Forrand declaration at ¶ 19.

³¹ Diehm declaration at ¶ 7.

³² Forrand declaration at ¶ 19.

³³ Forrand declaration at ¶¶ 19-22; see also the March 25, 2009 OLCC itself, attached to the Deihm Declaration, Ex. E.

of insults and indignities meant to intimidate and harass him, all of which began after he made the first of his protected air safety complaints. Workers are entitled to latitude in expressing dissatisfaction when an employer is dismissive of a complaint about retaliation. The Tenth Circuit explained it this way:

It would be ironic, if not absurd, to hold that one loses the protection of an antidiscrimination statute if one gets visibly (or audibly) upset about discriminatory conduct.³⁴

Forrand's declaration catalogs the discrimination visited on him from September 2008 through his May, 2009 complaint to OSHA, and thereafter.³⁵

B. Discussion

No regulations describe the kinds of “materially adverse” employment actions Article III district courts remedy under Title VII.³⁶ The test the U.S. Supreme Court set to divide adverse acts courts will rectify under Title VII³⁷ from matters too trivial to merit a remedy is compatible with the test found in the Secretary's regulation at 29 C.F.R. § 1979.102(b). The regulation defines the discriminatory actions the Secretary regards as adverse and will remedy under AIR 21.

It makes no difference on this motion that FedEx denies that an OLCC entry is discipline. Forrand has shown an OLCC is not wholly unrelated to discipline.³⁸ An OLCC entry itself says in all capital, bold print that it “may be considered as a factor when determining if any future discipline (i.e., warning letter, performance reminder & termination) is warranted.”³⁹ The Secretary's regulations reach beyond frank discipline—to acts that discriminate against an employee. There simply is no requirement in the regulations that there be some “tangible effect on his employment” before the Secretary can remedy discrimination. The regulation speaks in terms of an “unfavorable personnel action.”⁴⁰ The course of conduct Forrand alleged, especially the way FedEx management minimized Doty's retaliatory threat and the way Coley had Cusato and Diehm enter the OLCC after

³⁴ *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1022 (10th Cir. 2004); see also the application of the rule in *Formella v U.S. Dep't of Labor*, 628 F.3d 381 (7th Cir. 2010).

³⁵ Forrand Declaration at ¶¶ 5 through 22, pgs. 2 through 6.

³⁶ *Luder v Continental Airlines Inc.*, ARB No. 10-026, OALJ No. 2008-AIR-009, slip op. at 9 (ARB Jan. 31, 2012); *Melton v. Yellow Transp.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 24 (ARB Sept. 30, 2008) (Douglass, Transue, JJ., concurring).

³⁷ *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

³⁸ Declaration of William Cusato, Ex. E, referenced at pg. 15 of Forrand's response to the motion for summary judgment. Cusato supervised the Hangar Maintenance Manager, Richard Diehm, who was Forrand's immediate supervisor.

³⁹ See the OLCC itself, found at the Diehm Declaration, Ex. E (edited to change the quoted language from its original font); see also the similar unemphasized language used in the reply FedEx filed to Forrand's opposition, at pg. 3, ln.11.

⁴⁰ 29 C.F.R. § 1979.109(a).

Forrand complained to Coley about how Cusato ignored the threat and focused exclusively on the barnyard language, could be viewed as ratification by FedEx senior management in March 2009 of Doty's threat to Forrand's job.

The more time that passes between the events claimed as intimidating, threatening, or harassing and the safety report the worker relies on as protected activity, the more attenuated the inference becomes that the challenged events were intentional retribution for the protected report. But on summary judgment I don't evaluate how likely it is that I will find after trial that retaliatory animus contributed to taking the alleged discriminatory act(s). I only determine whether the inference of retaliation is a possible one. Direct evidence of an employer's mental processes is rare, so rare that most findings about whether intentional retaliation occurred depend on circumstantial evidence.⁴¹ When direct evidence is absent, timing and other factors become the grist for the claim of intentional discrimination. The same is true with respect to the post-complaint claims of retaliation on January 25, 2010, March 8, 2011, and August 23, 2011.⁴²

Some Title VII decisions hold that the passage of time will defeat an inference that a protected activity caused a discriminatory employment action. In those causes of action the employee relies on nothing more than chronology, *i.e.*, "mere temporal proximity"⁴³ to make the causal link that is an essential element of the retaliation claim. In that case, the temporal proximity must be "very close."⁴⁴ The March 25, 2009 OLCC can be viewed as a specific threat intended to dissuade Forrand and any other employees from making safety reports or retaliation claims. After Forrand reported the cracks in the aircraft on February 25, 2009, Doty almost immediately broadcast the threat to Forrand's employment. Forrand's complaint about Doty's broadcast led to Cusato's meaningless investigation into Doty's threat. Forrand's complaint about the sham investigation led to the retaliation Coley exacted in the form of the March 25, 2009 OLCC. When more than mere temporal proximity is involved, such as the series of acts Forrand alleges were discriminatory that took place after September 2008, the rule that demands very close temporal proximity of the protected report to the discriminatory act doesn't apply.

No fixed time period bars, as a matter of law, an inference that a series of adverse acts by the employer were designed to intimidate or harass the employee in retaliation for a protected disclosure. The law allocates to the factfinder whether to infer the causal link that is an essential element of a retaliation claim. The Third Circuit has emphasized that the evidence, considered as a whole, may merit an inference that an old protected act sparked retaliation:

"It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's *prima facie* case, and temporal proximity merely provides an evidentiary basis from which an inference

⁴¹ *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

⁴² Response to Motion to Strike and for Summary Decision at 11.

⁴³ *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001)(per curiam).

⁴⁴ *Id.*

can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.⁴⁵

I cannot say as a matter of law that it would be impossible to draw the causal inference Forrand advocates from the proof he offered. He alleged in his declaration acts of discrimination spanning the period from September 2008 to March 25, 2009.⁴⁶ Whether I will draw that inference depends on how persuasive or credible I find his witnesses, documents, and the countervailing proof FedEx offers at trial.⁴⁷ But for now I indulge all presumptions in Forrand's favor.

Forrand also claims his employment discrimination claim cannot be time barred because FedEx intentionally created a hostile work environment. Harassment that is retribution for a protected activity "is actionable only if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"⁴⁸

To prevail on that theory, Forrand must demonstrate that conditions at his workplace became both objectively and subjectively offensive, so much so that a reasonable person would find the workplace hostile or abusive, and that he perceived his workplace hostile and abusive too.⁴⁹ Forrand must show a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment.⁵⁰ I will not individually analyze each act Forrand relies on, asking whether each one shows a hostile or offensive work environment. To put it simply: a brick is not a wall. I must consider how FedEx treats over time those who complain—whether within the company or to the FAA—about air safety. Individual acts may build a pattern. The Third Circuit characterized the issue well:

⁴⁵ *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) (reversing dismissal of an in-house attorney's action for retaliatory discharge under Title VII, a discharge that occurred almost a year after the protected activity she alleged). The Ninth Circuit takes a similar approach to retaliation claims. See *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 751 (9th Cir. 2010) (recognizing that courts should not engage in a mechanical inquiry into how much time passed between the protected activity and an alleged retaliatory employment action); *Van Asdale v. International Game Technology*, 577 F.3d 989, 1003–04 (9th Cir. 2009); *Coszalter v. City of Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003).

⁴⁶ Forrand Declaration, ¶¶ 3 through 23, at pgs. 1 through 6.

⁴⁷ *Van Asdale*, 577 F.3d at 1000.

⁴⁸ *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000), quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

⁴⁹ *Dawson v. Entek, International*, 630 F.3d 928, 939 (9th Cir. 2011); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

⁵⁰ *Dawson*, 630 F.3d at 939; *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108 (9th Cir. 1998).

A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.⁵¹

Considering the totality of circumstances, I cannot say the evidence Forrand offered is insufficient to support a hostile work environment retaliation claim under the applicable standard.⁵² But the Secretary will remedy only hostile acts that occurred within 90 days of filing the OSHA complaint.

⁵¹ *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir.1990) (quoting *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir.1989), appeal after remand, 983 F.2d 1573 (11th Cir. 1993).

⁵² See *Faragher*, 524 U.S. at 788 (“[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”).

The motion for summary adjudication of Forrand's claims is denied.

So Ordered.

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California