



Issue Date: 04 April 2014

Case No. 2013-AIR-7

IN THE MATTER OF

**JEFFREY BONDURANT,
Complainant**

vs.

**SOUTHWEST AIRLINES, INC.
Respondent**

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

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ 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 their employment for taking any action relating to the fulfillment of safety or other requirements established by AIR 21.

Respondent argues that Complainant cannot meet the four required elements of an AIR 21 claim as a matter of law and seeks summary dismissal of the claim. Complainant argues that genuine issues of material fact exist for each element and summary decision is inappropriate.

BACKGROUND

After Respondent fired him on 18 Apr 12, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on 18 May 12. In that complaint he alleged three instances in which Respondent had discovered that it had transported air cargo that did not comply with federal safety standards. He further alleged that upon such discovery, Respondent was required to notify the Federal Aviation Administration (FAA), but had failed to do so. His specific whistleblower allegation was that Respondent fired him for raising the failures to report to the FAA.²

¹ 42 U.S.C. § 42121 *et seq.*

² Complainant did not allege that his protected activity related to any violation involved in the actual acceptance or transport of cargo, just the failure to report.

OSHA dismissed the complaint and Complainant timely objected and requested a hearing. The case was initially assigned to another Administrative Law Judge but transferred to me upon his retirement. Eventually, the parties completed discovery and Respondent filed a motion for summary decision to dismiss the complaint. Complainant then filed his opposition.

LAW

Summary Decision

Summary decision is a tool used to dispose of actions in which there is no genuine issue of material fact between the parties and which may be decided as a matter of law.³ An administrative law judge may grant a motion for summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.⁴ 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.⁵ The evidence is then viewed in the light most favorable to the nonmoving party.⁶ To meet its burden, though, "the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts."⁷ The nonmoving party may not rest solely upon his allegations or speculations, but must present specific facts that could support a finding in his favor at trial.⁸

To determine whether there is an issue of material fact, the ALJ must first examine the elements of the complainant's claims to sift the material facts from the immaterial. Then, considering the materiality of a fact, the ALJ "must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute" over it.⁹ The moving party bears the burden of showing there is no genuine issue of material fact, which may be done by showing there is an absence of evidence for an essential element of the complainant's claim.¹⁰

The nonmoving party must "make a showing on every element that is essential to his or her case and on which the party will bear the burden of persuasion at trial."¹¹ The ALJ will take all evidence presented by the nonmoving party as true, but "a properly crafted defense motion for summary judgment requires a complainant to exhibit admissible proof of facts crucial to his or her claim for relief...[which] must be grounded in affidavits, declarations and answers to discovery[.]"¹² If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.¹³

³ *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

⁴ 29 C.F.R. § 18.40 (d).

⁵ *Wise v. E.I. DuPont de Nemours and Co.*, 58 F.3d 193, 195 (5th Cir. 1995), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

⁶ *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

⁷ *Taita Chemical Co., Ltd. v. Westlake Styrene Corp.* 246 F.3d 377, 385 (5th Cir. 2001), quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

⁸ *Hasan v. Enercon Services, Inc.*, ARB No. 10-061, 2011 WL 3307579 at *3 (July 28, 2011); 29 C.F.R. § 1840(c).

⁹ *Hasan* at *3.

¹⁰ *Id.*, citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Celotex* at 322.

¹¹ *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, 2007 WL 1578494 at 7 (May 24, 2007).

¹² *Gallagher v. Granada Entertainment USA*, ALJ No. 2004-SOX-74 (April 1, 2005).

¹³ *Hasan* at 3.

AIR 21

The basis for Complainant's case is the whistleblower provision of AIR 21, which provides in pertinent part:

- (a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES – No air carrier or contractor or subcontractor may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or 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.¹⁴

To state a viable whistleblower claim under AIR 21, a complainant must show by a preponderance of the evidence: 1) he engaged in protected activity under Section 42121(a); 2) his employer was aware or had knowledge of the protected activity; 3) he suffered an unfavorable or adverse personnel action at the behest of the employer; 4) the protected activity was a contributing factor in the unfavorable action.¹⁵

Under the Act, protected activity has two features: 1) the information the complainant provided involved a purported violation of a regulation, order, or standard relating to air carrier safety¹⁶ and 2) the complainant's belief a violation occurred was objectively reasonable.¹⁷

To prevail on the current Motion, Complainant need not show that he meets the requirements for a claim under AIR 21. He must only show that a genuine issue of material fact exists that would allow a finder of fact to decide in his favor on each of these elements.

¹⁴ 49 U.S.C. § 42121(a)(1).

¹⁵ *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008) (the Fifth Circuit has stated as a separate element of the *prima facie* case that the employer knew the employee engaged in protected activity, while the Eleventh Circuit finds that element implicit in the "contributing factor" element; see, e.g. *Majali v. U.S. Dept. of Labor*, 294 Fed. Appx. 562 (11th Cir. 2008) (unreported); *Edward Mizusawa v. United Parcel Service*, ALJ No. 2010-AIR-00011 at 8 (ARB Oct. 21, 2010)).

¹⁶ Complainant need not prove an actual violation.

¹⁷ *Hindsman v. Delta Airlines, Inc.*, ARB No. 09-023, 2010 WL 2680567 at *3 (Jun 30, 2010).

ANALYSIS

Complainant's Allegations of Protected Activity

The foundation of Complainant's complaint is that Respondent violated a requirement that it notify the nearest FAA Regional or Field Security Office as soon as practicable after discovering a discrepancy or incident relative to the shipment of a hazardous material following its acceptance for transportation aboard an aircraft.¹⁸ He presented three specific allegations.

The first allegation related to the transport of a gas cylinder in August of 2011. Complainant alleged in his initial complaint to OSHA that after it was discovered that a cylinder of pressurized flammable gas had been transported, he reported the event to management so it could be reported to the FAA. He was told that no report was made and to release the cylinder to the shipper.

The second instance involved the 11 Feb 12 discovery of a box that was leaking human urine. Complainant alleged that employees under his direction reported the discovery to the FAA and he was then admonished by management, which told him not every incident needed to be reported. Complainant also alleged that his report led to a meeting in which FAA officials conducted an instructional meeting to ensure compliance with FAA expectations.

The third and final allegation was that on 22 Feb 12, an unsafe box of lithium batteries was discovered and although he reported it to management, they failed to report it to the FAA.

Respondent's Motion and Complainant's Answer

Respondent's Motion for Summary Decision was supported by transcripts of Complainant's deposition, various documents, e-mails, and witness declarations. It cited three grounds for dismissal. First, Respondent argues that the first time Complainant actually communicated any concerns about Respondent's failure to make required reports was when he was being told he had been terminated. Respondent's second argument is that there is no evidence that any of his alleged communications played a contributing factor in his termination. Lastly, Respondent submits that there is no evidence that would allow for anything but a finding by clear and convincing evidence that it would have terminated him even in the absence of any alleged protected activity.

Complainant filed a response equally supported by documents, deposition testimony, and witness statements.¹⁹ He argues that a genuine issue of material fact exists that requires denial of the Motion to Dismiss on all three grounds.

¹⁸ 49 C.F.R. § 175.31; §171.6.

¹⁹ Including his own post-Motion affidavit.

Protected Activity

The August 2010 Gas Cylinders

The evidence submitted by Respondent shows that a cylinder which was properly labeled as containing pressurized flammable gas was inadvertently and incorrectly accepted and transported from LAX. When the error was discovered in Houston, Complainant notified several people by e-mail that the transport had occurred, expecting them to report it to the FAA. Shortly thereafter, he sent another e-mail, asking how the FAA had reacted to the report.²⁰ In response, he was told that no report was made. At deposition, Complainant conceded that although he was concerned that no report had been made, once he was told no report was made about the cylinder, he did not bring it up to the FAA or Respondent. Respondent concludes that Complainant never made any protected communications about the cylinders.

While Complainant addressed Respondent's protected activity arguments in general, he offered no response to Respondent's argument that he never communicated to Respondent or the FAA his concern that Respondent had failed to report the gas cylinder incident.

The Leaking Urine Shipments

In his deposition, Complainant conceded that he may have confused two different instances of unreported boxes leaking urine in February 2012 and December 2011 shipments. He admitted that he did not report the February incident to the FAA or to anyone else. The evidence submitted by Respondent indicates that the December incident was reported internally by employees at Complainant's direction, but then was reported to the FAA by Respondent.

As he did with Respondent's gas cylinder argument, Complainant submitted no response to Respondent's argument that he never complained to anyone about a failure to report to the FAA cargo leaking urine in either February 2012 or December 2011.

The February 2012 Lithium Batteries

The evidence shows that a box of lithium batteries which were improperly packaged and should not have been accepted or transported nonetheless arrived in Austin where they were discovered, identified, and reported internally. There is evidence that Respondent's managers were confused by the information and believed that the box had been refused for shipment, so no report was required. However, the critically relevant question remains whether Complainant expressed to the FAA or Respondent's managers his reasonable concern that Respondent had failed or was going to fail to report the battery incident.

Complainant forwarded the initial e-mail identifying the problem and seeking confirmation that the packaging was incorrect. His e-mail emphasized that the package had not been refused but had in fact been shipped, but did not mention anything about reporting

²⁰ Complainant testified that he used a sexual reference to make the inquiry because he had been told in the past that the reporting decision was not his to make and he wanted to keep the mood light.

requirements, and eventually Complainant was told to communicate the problem to the shipper. When he did that, he told the shipper to expect to be contacted by the FAA. In his deposition, Complainant could not recall making any other communication that involved the idea that the battery shipment should be reported to the FAA. He also testified that he was never told that it had not been reported and consequently never went to Respondent or the FAA to complain that it had not been reported.

Discussion

The basic issue raised by Respondent's Motion is whether a finder of fact could, taking all credibility determinations and inferences in Complainant's favor, determine that he had communicated his reasonable concern to Respondent that it was failing to comply with a requirement to report shipping incidents. In this case, there are no significant disputes about what happened, what was said, who said it and when they said it. The same is not true for what Complainant meant to say or Respondent should have understood him to have said.

Particularly given this procedural setting, the question of whether or not Complainant had a reasonable concern that Respondent was failing to comply with a requirement to report shipping incidents is not in dispute. However, it is not enough that a complainant honestly and reasonably believed there was or would be a violation. He must also have communicated that concern and the essence of Respondent's Motion is that there is nothing in the record to allow a finder of fact to decide that he did so.

For an employee to come within the shelter of the whistleblower protection provisions of the Act, he must first be a whistleblower, which means someone had to hear him blow the whistle.²¹ Accordingly, the real question here is if there is a genuine issue of material fact that would allow a finding that a reasonable employer in Respondent's situation would have known that Complainant was communicating to it his concern that it was failing to comply with a requirement to report shipping incidents.

When Complainant asked if the FAA had been interested in the gas cylinder incident, he was told no report was sent. He testified that although he was concerned about that, once he was told no report was made about the cylinder, he did not bring it up to the FAA or Respondent. Complainant offered nothing in response to Respondent's argument that there was nothing in the record that could support a finding that he made a protected communication about the gas cylinder.

The same is generally true of the urine leaks. Complainant corrected the initial allegations he made to OSHA and conceded that there was some confusion. He admitted that contrary to his initial complaint to OSHA, no one at all reported the February leak and the December leak was in fact reported. In any event, Complainant again offered nothing in response to Respondent's argument that there was nothing in the record that could support a finding that Complainant made a protected communication and somehow told Respondent it should report the December leak and should have reported the February urine leak.

²¹ In an instance such as this, where the alleged communication was to the employer, that predicate may dovetail with the element requiring that the employer was aware or had knowledge of the protected activity.

Complainant did respond to Respondent's argument that there was nothing in the record that could support a finding that he made a protected communication about the lithium batteries. Complainant cited the fact that he forwarded the initial e-mail identifying the problem and seeking confirmation that the packaging was incorrect. Complainant relies exclusively on the fact that in the email he emphasized the package had not been refused but had in fact been shipped, arguing that by attempting to correct an erroneous assumption that the package had been refused, he was making the point that the package had been shipped and therefore the incident should be reported. He testified that he could not recall any other communications that he could argue expressed his concern that the battery shipment should be reported to the FAA. He also testified that he was never told that it had not been reported and consequentially never went to Respondent or the FAA to complain that it had not been reported.

The question is whether, based on what are essentially undisputed facts, a reasonable employer could have realized Complainant was trying to tell it that he believed it had or was going to violate the reporting requirements.²² The context in which he asked if the FAA was interested in the cylinder incident and made sure Respondent knew the batteries were actually shipped is important. The most important part of that context is that once Complainant learned that no report had been made, he never said a thing until he was being fired. That is highly relevant in determining if there was any possibility Complainant's communication could have led Respondent to understand Complainant to be saying he was concerned about the failure to report.

Indeed, Complainant testified that he was afraid to say any more than he did, and the record shows he did not say any more until being told he was fired. While it is true that whistleblower protections recognize the risks taken by employees who communicate such concerns and were enacted for that very reason, to qualify for protection, a whistleblower must actually do something that his employer would reasonably understand as a communication of his concern about compliance. Complainant has failed to show a genuine issue of material fact that would allow him to prevail on that issue.

The complaint is dismissed.

In view of the foregoing, the hearing scheduled for **30 Apr 14** in **Dallas, Texas** is hereby **CANCELLED**.

PATRICK M. ROSENOW
Administrative Law Judge

²² That reasonable employer includes any manager or supervisor, even if they were not involved in the decision to terminate. Whether or not the adverse action decision maker knew of the protected activity is a distinct and separate question from whether the communication qualifies as protected activity.

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). 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. 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).

