



Issue Date: 03 June 2013

In the Matter of:

**LEE F. McGARR,
Complainant,**

Case No.: 2013-AIR-00005

v.

**FEDERAL AVIATION ADMINISTRATION,
Respondent.**

ORDER DISMISSING CASE

This matter arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). On October 25, 2012, the Secretary issued findings. Specifically, the Secretary found that Complainant and Respondent are not covered within the meaning of Air 21, and that Complainant had not filed his complaint within 90 days of the alleged adverse action, as required by AIR 21.

On November 26, 2012, this matter was assigned to the undersigned for adjudication. On December 4, 2012, I issued an *Order to Show Cause*, ordering the parties to provide briefs within forty five (45) stating their position as to whether this matter should be dismissed for failure to state a claim upon which relief may be granted and lack of jurisdiction under AIR 21. On January 18, 2013, I received a letter from the *Pro Se* Complainant requesting a thirty day extension of time to present his argument showing why this case should not be dismissed. Claimant stated he was attempting to find counsel.

On January 22, 2013, I issued an *Order Granting Extension*, allowing the parties an additional thirty days to submit their arguments in response to my *Order to Show Cause*. On April 8, 2013, I received the Respondent’s *Request to File Out of Time*.¹ On April 15, 2013, I issued a *Second Order Granting Extension*, allowing the parties an additional fourteen days to

¹ Respondent stated that the first order it had received relating to this matter was the January 22, 2013, order, which did not arrive until April 2, 2013, because it was addressed to their general 800 Independence Avenue address. Respondent further stated that it was initially unclear which legal office within the Office of the Chief Counsel would handle this matter, since neither Complainant nor Respondent are covered within the meaning of AIR 21. However, to avoid further delay, the Employment and Labor Law Division agreed to handle this case going forward. The Respondent requested through Monday, April 15, 2013, to submit its position on the issue.

submit their arguments in response to my *Order to Show Cause*. On April 15, 2013, I received Respondent's *Brief in Support of Dismissal*. Complainant has not filed a response to my *Order to Show Cause*.

Coverage Under AIR 21

Respondent asserts that at the time Complainant filed his complaint with OSHA, Complainant was an Airspace Inspection Pilot, under the FAA's Flight Inspection Services Office. Respondent argues that Air 21 only prohibits discrimination against airline employees and Complainant cannot show he was an airline employee. Instead, as an employee of the federal government, Complainant has a right to file a complaint with the Office of Special Counsel, which has authority to instigate and prosecute claims of reprisal for whistleblowing. Respondent argues that Complainant is aware of this right and has used it. Respondent also argues that the flight inspection aircraft operated by the FAA do not meet the definition of an air carrier because they do not engage in transportation for revenue.

Discussion

AIR 21 provides that "No air carrier or contractor or subcontractor of an air carrier may discharge or otherwise discriminate against an employee" because of the employee's protected activities. 49 U.S.C.A § 42121(a). "Employee" means "an individual...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. *See also Fullington v. AVSEC Services, L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005). The burden is on Complainant to prove coverage under AIR 21 by the preponderance of the evidence. *See LeRoy v. Keystone Helicopter, Inc.*, ARB No. 07-056, ALJ Nos. 2006-AIR-3 and 24 (ARB Mar. 31, 2009).

Federal employees have recourse to separate legislation barring prohibited personnel practices, including reprisals for whistleblowing by federal agencies. *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004)(citing 5 U.S.C. § 2302(b)). In *Fader*, Complainant was a TSA employee, and the ALJ found that as a federal or former federal employee, Complainant did not qualify under AIR 21. *Fader*, 2004-AIR-27.

As the rules governing hearings in whistleblower cases contain no specific provisions for dismissal of complaints for failure to state a claim upon which relief may be granted, Fed. R. Civ. P. 12(b)(6) governs this matter. *Fullington* (dismissing AIR 21 case because complainant was not an employee of an air carrier). Dismissal should be denied "unless it appears beyond doubt that [the Complainant] can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op.(ARB Apr. 26, 2005).

In this case Complainant has offered no evidence that he is covered under AIR 21. Complainant worked for the FAA, and was therefore an employee of the federal government. Accordingly, I find that he was not an employee of an air carrier, or contractor or subcontractor

of an air carrier under AIR 21, and did not engage in any activity protected by AIR 21. There are no facts in support of Complainant's claim which would entitle him to relief under AIR 21.

Timeliness

According to the Secretary's Findings, Complainant alleged he had been disparately treated since February 2012. However, Complainant did not file his complaint until October 25, 2012.

AIR 21 states the following:

A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination.

49 U.S.C. § 42121.

Accordingly, I find that even if Complainant were covered by AIR 21, he did not file his complaint within 90 days of his adverse action. Therefore, the complaint is untimely.

ORDER

Having found that Complainant engaged in no activity protected under AIR 21 and that his complaint was untimely, I hereby **DISMISS** this case.

IT IS SO ORDERED.

CHRISTINE L. KIRBY
Administrative Law Judge

Washington, D.C.