



**Issue Date: 10 December 2014**

**CASE NO: 2014-AIR-00002**

*In the Matter of:*

SANDRA BARRETT,  
*Complainant,*

v.

SHUTTLE AMERICA CORPORATION,  
*Respondent.*

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

On October 1, 2014, this Office received Respondent Shuttle America's motion for summary decision, filed under the provisions of 29 C.F.R. § 18.40. Upon receipt, I issued a Notice to Complainant Sandra Barrett, informing her of the text of 29 C.F.R. § 18.40 and instructing her how to respond to Respondent's motion. For her convenience, I identified the issues to be addressed as: (1) whether Complainant's protected activity of filing an OSHA complaint on March 4, 2011 contributed to Shuttle America's decision to terminate her, and (2) whether Shuttle American has shown by clear and convincing evidence that it would have terminated her even if she had not filed an OSHA complaint in March of 2011. Ms. Barrett's opposition to Shuttle America's motion was received on November 6, 2014, and Shuttle America filed a timely reply brief on December 2, 2014.

For the reasons set forth below, I find that there are no disputes of material fact that would preclude summary decision in favor of Respondent. Although there are some disputes of fact, they are not material. The undisputed material facts show that Ms. Barrett has not met her burden to show that her protected activity was a contributing factor in Shuttle America's decision to terminate her. Even if it was a contributing factor, the undisputed material facts show by clear and convincing evidence that Shuttle America would have terminated Ms. Barrett's employment even if she had not engaged in protected activity. Accordingly, summary decision will be entered in favor of Respondent, and the complaint will be denied.

A. Request for Attorney

Ms. Barrett, in her opposition to Complainant's motion for summary judgment, has requested the assistance of an "assigned attorney/court assigned attorney" to assist her with her case. I cannot comply with her request. The AIR21 statute and its implementing regulations do

not provide for the appointment of an attorney to assist any party in an AIR21 whistleblower case. In addition, the Rules for Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges specifically prohibits an administrative law judge from appointing a representative for a party. 29 C.F.R. § 18.35.<sup>1</sup>

In the Notice of Hearing and Scheduling Order dated January 27, 2014, I advised Ms. Barrett of her right to representation by either an attorney or a non-attorney, and provided her with contact information for lawyer referral services offered by the State Bar of Georgia, the Atlanta Bar Association, and the Atlanta Volunteer Lawyers' Association. In her opposition brief, she acknowledged that she had contacted several attorneys, none of whom was willing to represent her without her paying a retainer. It appears that Ms. Barrett has made every effort to find counsel, but has been unsuccessful. There is little point to delaying the resolution of this case to give her still more time to find representation.

Based on the foregoing, Ms. Barrett's request for appointment of counsel will be denied.

#### B. Undisputed Facts

The evidence submitted by the parties establishes the following undisputed material facts:

1. Ms. Barrett was hired as a flight attendant by Shuttle America in September of 2006.
2. Between the date she was hired and October of 2010, Ms. Barrett was placed on report for (a) raising her voice to another flight attendant in July of 2008; (b) disturbing a flight attendant on another airline while boarding a flight on May 18, 2010; and (c) shouting at a passenger and being hostile and confrontational with another flight attendant during a Shuttle America flight on July 28, 2010. No discipline was imposed for any of those events.
3. In October of 2010, Ms. Barrett was disciplined for "poor CRM, aggressive and threatening behavior towards fellow crew members and complete lack of respect for the authority of" the pilot in command. She was given a final written warning and suspended from October 30 to November 2, 2010.
4. On March 4, 2011, Ms. Barrett filed a complaint with the Occupational Safety and Health Administration, alleging that her final warning and suspension were in retaliation for her having raised safety concerns with Shuttle America.
5. OSHA dismissed Ms. Barrett's complaint as untimely.<sup>2</sup>
6. On July 2, 2012, Ms. Barrett was reported as being "rude and mean to the schedulers"; however, there is no evidence that she was disciplined for her conduct.
7. On January 21, 2013, Ms. Barrett and a fellow flight attendant, Jacqueline Roodnat, were involved in a disagreement while working together on a Shuttle America flight.

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<sup>1</sup> "§ 18.35 Legal assistance. The Office of Administrative Law Judges does not have authority to appoint counsel, nor does it refer parties to attorneys."

<sup>2</sup> Although not part of the record on this motion, I take official notice that Ms. Barrett's complaint was dismissed by an Administrative Law Judge as untimely. *Barrett v. Shuttle America/Republic Airways*, ALJ No. 2012-AIR-010 (May 31, 2012). That dismissal was affirmed by the ARB. *Barrett v. Shuttle America/Republic Airways*, ARB No. 12-075, ALJ No. 2012-AIR-010 (ARB Feb. 28, 2014).

8. The pilot in command reported the disagreement to the crew scheduling office to inform the company about the conflict, and to request that Ms. Barrett and Ms. Roodnat not be scheduled to fly together. Donna Bandy-White, an employee of Respondent, conducted an investigation by obtaining statements from Ms. Barrett, Ms. Roodnat, the pilot in command, and the first officer.
9. Ms. Barrett's and Ms. Roodnat's versions of the events that transpired on the January 21 flight differed in significant respects. Ms. Roodnat reported that Ms. Barrett physically threatened her and challenged her to a fight, and Ms. Barrett reported that Ms. Roodnat was verbally aggressive and hostile to her.
10. The first officer on the January 21 flight reported that he had received two passenger complaints that Ms. Barrett had been rude and that the passengers had told Ms. Roodnat that they were sorry they had to work with Ms. Barrett. He also reported that during an in-flight conversation over the inner-phone with Ms. Roodnat, Ms. Barrett was confrontational with Ms. Roodnat, and that the pilot in command told the two flight attendants to stay away from each other.
11. The pilot in command of the January 21 flight heard Ms. Barrett ask Ms. Roodnat, after the flight was completed, whether Ms. Roodnat was "ready to do this." He interpreted those words as evidencing an intention to fight Ms. Roodnat. He also disclosed that two or three months earlier he had had to intervene in a physical confrontation between Ms. Barrett and another flight attendant.
12. Ms. Barrett was terminated from employment with Respondent effective February 6, 2013.
13. Ms. Roodnat was not terminated from employment with Respondent for her involvement in the January 21 incident because there were no independent witnesses to corroborate Complainant's allegations against her.

## B. Conclusions of Law

To succeed in her complaint, Ms. Barrett must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) Shuttle America took an adverse personnel action against her, and (3) her protected activity was a contributing factor in the adverse personnel action. *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 4-5 (ARB June 30, 2010).

### 1. Ms. Barrett Engaged in Protected Activity

Ms. Barrett filed a complaint with OSHA in March of 2011, alleging that she had been disciplined for raising safety concerns in October of 2010. Respondent does not dispute that her OSHA complaint constituted protected activity under AIR21, and for purposes of this Decision and Order, I find that it did.

### 2. Ms. Barrett Suffered an Adverse Employment Action

Ms. Barrett was terminated from her employment with Shuttle America on February 6, 2013. Respondent concedes, and I find, that Ms. Barrett's termination constituted an adverse employment action.

3. Ms. Barrett's Protected Activity Did Not Contribute to the Adverse Personnel Action

Engaging in a protected activity is a “contributing factor” to the adverse action if it “alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012). A complainant can show contribution by either direct or indirect proof. *Id.* If Ms. Barrett “does not produce direct evidence, [s]he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating [her] employment.” *Id.* Under the recent case of *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014), the Administrative Review Board held that an administrative law judge may not consider any evidence put forth by the respondent in support of its affirmative defense in evaluating the “contributing factor” element of the case. Whether evidence is submitted by a respondent in support of its affirmative defense, or to challenge the evidence submitted by the complainant, is a difficult distinction to make. In this case, however, I will consider only the evidence submitted by Ms. Barrett to determine whether she has submitted enough evidence to show the existence of a dispute of material fact over whether her protected activity was a contributing factor in Respondent’s decision to terminate her. Here, Ms. Barrett put forth no direct evidence on this element, but states simply that she “knows” that she was terminated because she filed an OSHA complaint, which is a protected activity. The evidence of record, however, does require me to discuss indirect proof.

One method of indirect proof is evidence of “temporal proximity” between the protected activity and the adverse action. *Id.*, citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). In other words, if there was a sufficiently short time between the protected activity and the adverse action, that alone can be enough to show that the former contributed to the latter. In this case, however, the protected activity occurred 23 months before the adverse employment action. That length of time, standing alone, is insufficient temporal proximity for me to find that the OSHA complaint contributed to the termination decision. Furthermore, Ms. Barrett submitted a number of documents, along with an audio recording of her Indiana unemployment insurance hearing, which showed that she was subject to disciplinary action several times before she was ultimately terminated. Although she disputes that the events for which she was disciplined actually took place, she does not dispute the fact of the discipline; indeed, she admits in her opposition brief and demonstrates with the submitted documents that she was disciplined five times between 2008 and 2012, and received a final written warning as part of the disciplinary action. These actions, combined with the 23-month gap between filing the OSHA complaint and her termination, demonstrate that her protected activity did not contribute to Respondent’s decision to terminate her employment.

Another method of indirect proof of discrimination is a respondent’s shifting explanations for taking the adverse action. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, -074, ALJ No. 2008-AIR-014, slip op. at 16 (ARB Sept. 30, 2009). In this case, Complainant has not shown that Respondent offered shifting explanations for its decision to terminate her. The large number of documents relating to her Indiana unemployment insurance claim, and the audio recording of the hearing on that claim, show that Respondent has consistently explained that its decision was based on the misconduct of January 21, 2013 along with Ms. Barrett’s disciplinary

history.<sup>3</sup> She has objected to Respondent's use of disciplinary actions that occurred more than two years old in making the decision to terminate her, based on what she says is a company policy, although it is unclear where the policy arose. This administrative proceeding, however, is not the place to litigate it.

4. *Respondent Would Have Terminated Complainant Had She Not Filed the OSHA Complaint*

Assuming that Ms. Barrett showed that her filing of the OSHA complaint contributed to the decision to terminate her employment, the burden then shifts to Respondent to show by clear and convincing evidence that it would have taken the same action even in the absence of protected activity.

Here, Respondent has established that Ms. Barrett was involved in an altercation with another flight attendant during a flight on October 21, 2012. After investigating the report of the pilot in command by taking statements from him, the first officer, Ms. Barrett, and Ms. Roodnat, Respondent determined that Ms. Barrett had violated three provisions of the airline's Standards of Conduct. Those standards are set forth in Chapter 9 of the Associate Handbook, a copy of which Ms. Barrett acknowledges she received. The specific provisions that Respondent found Ms. Barrett to have violated are found in Section 9.1.2:

2. Discourteous and abusive criticism toward other Company Associates, departments or guests of the Company.
4. Use of unprofessional, vulgar, abusive or loud language, actions or materials to any Associate, Supervisor, manager or guest.
5. Threatening, intimidating, coercing, fighting or otherwise interfering with other Associates, Supervisors, management or guests.

Chapter 9, section 9.1.1 further provides that "violations of any of the rules/regulations will subject the Associate to discipline up to and including discharge, depending on the seriousness of the violation or prior work history."

The record establishes that Shuttle America had an abundant basis for concluding that Ms. Barrett had violated those standards. To be clear, I need not decide whether she in fact engaged in the behavior reported by Ms. Roodnat, the pilot in command, or the first officer; my sole responsibility is to determine whether Shuttle America has shown that it would have terminated Ms. Barrett's employment even if she had not filed her March 2011 OSHA complaint. In that regard, I find that Shuttle America reasonably concluded that Ms. Barrett did

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<sup>3</sup> That the administrative law judge in Indiana declined to consider misconduct that allegedly occurred several years before January 21, 2013 is immaterial to this decision. The determination whether a claimant is entitled to state unemployment benefits is a matter of state law, with different standards and burdens of proof. As the ALJ in her hearing stated, Respondent had the burden to show that Ms. Barrett was terminated for misconduct, and the ALJ found that it failed to meet that burden. In this case, the burden is on Ms. Barrett, not the Respondent, to show that there is a dispute of material fact sufficient to preclude summary decision, and she has failed to meet that burden. Section 9.1.1 of the Associate Handbook explicitly permits termination, and permits basing the decision in part on the employee's prior work history.

commit the misconduct reported by the flight crew, as well as the other misconduct for which she was disciplined.

Ms. Barrett contends that other employees of Shuttle America who committed similar misconduct were not terminated, and therefore Shuttle America cannot meet its burden. In her deposition, Complainant identified six other such employees: Ms. Roodnat, Gaylon Brown, Lisa Killingsworth, Kelli Sherman, “Kathy,” and “Scratch and Sniff.” The last two employees were not identified with sufficient specificity to determine whether they committed similar misconduct to Ms. Barrett’s, and her claim that they did was based on multiple levels of hearsay. The other four, however, either did not, or did not have their misconduct confirmed by an independent witness. The undisputed evidence shows that Ms. Roodnat was not terminated for her involvement in the altercation with Ms. Barrett because no third-party witness corroborated Ms. Barrett’s accusation against her, but the captain of the flight on January 21, 2013 did observe belligerent conduct by Ms. Barrett toward Ms. Roodnat. With respect to Ms. Killingsworth and Ms. Brown, each reported to management that they had been attacked by the other, but there were no independent witnesses to corroborate either’s accusation. Finally, Ms. Sherman did not violate the policies that Ms. Barrett was found to have violated, but received warnings for poor attendance and was terminated for violating the company’s drug and alcohol policy.<sup>4</sup> None of those four employees had as extensive a disciplinary history for misconduct as Ms. Barrett. I find, therefore, that none of the employees identified by Ms. Barrett engaged in behavior that was similar to hers, and they are inappropriate comparators.

Furthermore, Respondent has identified five employees who did engage in behavior similar to Ms. Barrett’s, and whose employment was terminated. [Respondent’s Motion, Ex. 25.] It is clear that Respondent had written policies and procedures in place that allowed for termination for the misconduct that it found Ms. Barrett to have engaged in, and that it followed those procedures for other employees who engaged in similar misconduct that was verified. Those matters are not contradicted by any evidence from Ms. Barrett. Accordingly, I conclude that Respondent has established that there is no dispute of material facts, and those facts show by clear and convincing evidence that Respondent would have terminated Ms. Barrett for violating its Standards of Conduct even if she had not filed her OSHA complaint in March of 2011.

### **Conclusion**

For the reasons set forth above, I find and conclude that Respondent did not violate the employee protection provisions of AIR21 when it terminated Complainant’s employment.

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<sup>4</sup> Ms. Sherman was reinstated after filing a successful grievance under the collective bargaining agreement.

## **ORDER**

Based on the foregoing, IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED;
2. The complaint of Sandra Barrett, filed on May 7, 2013, is DENIED; and
3. The hearing scheduled to begin on February 17, 2015 is CANCELED.

**SO ORDERED.**

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

**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).