



**Issue Date: 18 November 2014**

Case No: 2014-AIR-00020

*In the Matter of:*

JASON C. KENT,

Complainant,

v.

BOEING COMPANY,

Respondent.

**DECISION AND ORDER  
DENYING  
EMPLOYER'S REQUEST FOR ATTORNEY'S FEES**

This case arises out of a complaint filed under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), Public Law 106-181, 49 U.S.C. § 42121.

On June 26, 2014, the Occupational Safety and Health Administration (OSHA) issued findings dismissing the complaint. The complainant, Mr. Jason Kent, elected not to appeal this finding to the Office of Administrative Law Judges. The OSHA finding on the merits of Mr. Kent's complaint is therefore now a final order that is not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A).

The Employer, Boeing Company, filed a request for attorney's fees on July 31, 2014. This request was based on 49 U.S.C. § 42121(b)(3)(C), which provides that the Secretary may award an employer an attorney's fee of up to \$1,000.00 if an employee's AIR21 complaint is frivolous or was brought in bad faith.

On August 8, 2014, counsel for Mr. Kent filed an opposition to this request. The matter was assigned to me and I accorded the parties the opportunity to submit documentary evidence and written arguments on the issue. Both parties submitted their positions in writing on October 24, 2014.

## BACKGROUND

Mr. Kent is an electrician who was employed by Boeing as an assembler in its South Carolina aircraft manufacturing plant from June 3, 2011 until October 15, 2013. Both sides have submitted affidavits and other documents concerning the circumstances of his termination. The merits of the case are not before me for decision, so attempting to assess credibility of the affiants would serve no purpose. I will summarize the statements with regard to their effect on the question of bad faith or frivolousness of the complaint. The crux of the motion is what Mr. Kent and his attorney knew or should have known when deciding to file the complaint, so it is appropriate to summarize their submissions in greater detail.

### *Mr. Kent's affidavit*

According to Mr. Kent's affidavit dated January 13, 2014, he reported concerns about safety to supervisory personnel during 2013. These concerns included risks of chaffing of electrical wiring and foreign object debris (FOD) in portions of the aircraft being assembled. Abrasion damage to wire insulation has the potential both to compromise the electrical system and to create FOD that can cause other damage.

A new Manufacturing Director, Eric VanAvery, spoke to a group of employees in August of 2013 and announced that he had an open-door policy. On or about August 10, 2013, Mr. Kent told Mr. VanAvery that he had a list of concerns. He scheduled a meeting with Mr. VanAvery for August 19, 2013.

When his manager learned that he had requested a meeting with Mr. VanAvery she sent another manager to obtain the list of issues that he planned to discuss with Mr. VanAvery. This meeting took place on August 13 or 14.

On August 16, 2013, Mr. Kent was taken to a meeting with a Boeing security manager and EEO investigator. At this meeting he was accused of sexual harassment and falsifying his work hours and removed from the facility. The scheduled meeting with Mr. VanAvery was cancelled and he was eventually fired on October 15, 2013.

### *David McLaughlin's affidavit*

Mr. Kent submitted an affidavit from David Bear McLaughlin, an engineer who had been employed by Boeing for more than 24 years. This affidavit, dated February 10, 2014, stated that Mr. Kent had raised concerns with him about risks of chaffing and FOD associated with the assembly of aircraft floors. He contended that the risks were greater because work was done out of the specified sequence, requiring disassembly and reassembly. Each act of disassembly and reassembly created new possibilities for chaffing.

Another of his concerns was the use of fasteners that were too long for the floor boards. Mr. Kent asserted that the ends of the fasteners sticking through the floor boards risked damaging the wiring under the floor. Mr. McLaughlin stated that he passed these on to the

person in charge of wire protection and that both he and Mr. Kent were criticized by Mr. Kent's immediate managers for raising the issue.

He and Mr. Kent discussed the scheduled meeting with Mr. VanAvery. Mr. McLaughlin and Jennifer Jacobsen advised Mr. Kent on how to prepare for and behave during the meeting. Mr. McLaughlin recommended preparing a list of his concerns in advance and to be prepared with facts to back up his concerns. Before the meeting took place Mr. Kent called him and told him that he had been escorted out of the plant and suspended. He asked Mr. McLaughlin to contact Mr. VanAvery's office to cancel the meeting because he would not be available. Mr. McLaughlin accordingly requested cancellation of the meeting.

*Jennifer Jacobsen's affidavit*

Ms. Jacobsen signed her affidavit on February 10, 2014. She stated that she had worked for Boeing from 2007 to 2013. She began work as an Interiors Mechanic and eventually became a Manufacturing Manager in interiors. Mr. Kent reported safety concerns to her describing the potential for chaffing and FOD from assembly work being done out of sequence. She agreed with his concerns and addressed them with his managers, documenting his claim with photographs. According to Ms. Jacobsen, the two managers "disagreed with Mr. Kent's concerns, and made sarcastic and disrespectful remarks to Mr. Kent for making safety complaints about the work being done out of sequence."

Ms. Jacobsen supported Mr. Kent's concern that excessively long fasteners increased the risk of abrasion damage to the wiring. Mr. Kent's manager opposed changing the fasteners because the change would result in delay. In spite of this opposition the change was made and Mr. Kent's managers "became hostile towards Mr. Kent and made no secret about their animosity towards Mr. Kent."

After Mr. Kent requested a meeting with Mr. VanAvery, she and Mr. McLaughlin advised him on how to prepare for and conduct the meeting. Soon after that she learned that Mr. Kent had been suspended and that he was eventually terminated.

*Robert M. Turkewitz's affidavit*

Mr. Turkewitz is Mr. Kent's attorney. He prepared an affidavit on October 20, 2014, summarizing his due diligence before filing the claim. He stated that he interviewed seven witnesses before filing the claim, and consulted with two attorneys experienced in the field. On November 29, 2013, he requested a copy of Mr. Kent's employment file, offering to obtain any required permission form from his client. Boeing declined the request.

*FAA letter*

On May 20, 2014 the Acting Manager of the Audit and Analysis Branch of the Federal Aviation Administration's Office of Audit and Evaluation sent Mr. Kent a letter stating that the FAA had completed its investigation of his air carrier safety allegations. The letter stated that:

The investigation substantiated that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred. Accordingly, the FAA is taking appropriate corrective and/or enforcement action.

The letter went on to note that the FAA's disposition of safety issues was independent of any investigation by the Department of Labor into Mr. Kent's allegations of discrimination.

#### *Boeing's factual assertions*

Boeing's position on the merits was stated in its February 21, 2014 letter to the OSHA investigator and expanded upon in its October 24, 2014 brief in support of the claim for fees. Boeing notes that Mr. Kent's managers submitted a complaint against Mr. Kent to the company's Human Resources Department on July 30, 2013. This complaint alleged that Mr. McLaughlin and Ms. Jacobsen were improperly approving electronic time card records for Mr. Kent.

In the course of interviewing coworkers concerning the time card complaint, investigators heard allegations of sexual harassment against Mr. Kent. These allegations were passed on to the Equal Employment Opportunity (EEO) Department to initiate a second investigation. The referral to the EEO Department occurred on August 8, 2013, before Mr. Kent's request for a meeting with Mr. VanAvery.

The EEO investigation obtained statements alleging sexual harassment of and threats of violence against co-workers. It was referred to the Security Manager of the facility on August 16, 2013, after Mr. Kent's request to meet with Mr. VanAvery but before the meeting was scheduled to take place. The Security Manager made an immediate decision to suspend Mr. Kent, leading to his removal from the facility and eventual termination, as described in his affidavit.

## **DISCUSSION**

Section 42121(b)(3)(C) of the Act provides that "[i]f the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000." Boeing's request for fees on July 31, 2014 stated that in the OSHA investigation Boeing had established by clear and convincing evidence that Mr. Kent was terminated for legitimate non-discriminatory reasons. Mr. Kent's counsel requested time to submit evidence to support his contention that he had a good faith basis for the original complaint.

In a letter dated August 19, 2014, Boeing's counsel opposed this request. Counsel noted that, because Mr. Kent did not appeal the OSHA determination, that determination is now a final and unreviewable agency determination. That is correct. From that finality, counsel argues that "there is no dispute that Mr. Kent never engaged in AIR21 protected activity" and that therefore "no evidence is needed from Mr. Kent in order to evaluate Boeing's request." Based on this argument, Boeing opposed permitting Mr. Turkewitz to submit evidence on the issue of good faith in the original complaint.

Counsel's theory on this procedural issue is breathtaking in its audacity. The OSHA determination letter was the only evidence on the issue available to me at that point. The August 19 letter argues, virtually in so many words, that the OSHA determination established that the complaint was frivolous and in bad faith, without any litigation of the issue. Further, it implies that OSHA's determination establishes bad faith as a matter of law, so conclusively that the employee is not entitled to the minimal due process of an opportunity to present evidence when the issue is raised for the first time after the OSHA determination.

OSHA never considered, much less decided in Boeing's favor, the issue of bad faith in filing of the claim. Despite this, Boeing contends that the OSHA determination on the merits is effectively *res judicata* on the issue of bad faith.

Most AIR21 cases litigated before administrative law judges are appeals of OSHA determinations that went against the complaining employee. Many of those appeals are eventually decided against the complainant by the ALJ and many of those ALJ decisions are affirmed by the Administrative Review Board.

If Boeing's theory of the conclusive effect of the original OSHA determination is correct, one would expect to see dozens of grants of attorney's fees to prevailing employers in the reported cases. However, the cases do not reflect this. Boeing has cited no case in support of such an expansive theory, and I have not found one. The few reported cases to consider the issue of Section 42121(b)(3)(C) fees have generally acknowledged that a claim may fail on the merits without rising to the level of a finding of frivolousness or bad faith. *See, e.g. Parshley v. America West Airlines*, ALJ No. 2002-AIR-10 (ALJ Aug 5, 2002); *Kinser v. Mesaba Aviation, Inc.* ALJ No. 2003-AIR-07 (ALJ Feb 9, 2004); *Peck v. Safe Air International, Inc.* ALJ No. 2001-AIR-03, ARB No. 02-028 (ARB Jan 30, 2004); *Allison v. Delta Airlines*, ALJ No. 2003-AIR-14, ARB No. 03-150 (Sep 30, 2004).

Boeing cites *Allison*, but that case provides it little, if any, support. In *Allison*, the ALJ granted the employer's motion for summary decision. The Board affirmed that decision. Yet even though the complaint was not strong enough to avoid summary decision, the Board held that the complaint was not frivolous within the meaning of Section 42121(b)(3)(C) and denied the employer's request for a fee award.

In addition to lacking support in the caselaw, Boeing's theory is incompatible with the proof requirements of AIR21. Stated briefly, a complaining employee must make a *prima facie* case that protected activity was a contributing factor in an unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(i). Once the employee has made this *prima facie* case, the employer may rebut that case if it demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of that behavior. 49 U.S.C. § 42121(b)(2)(B)(ii).

Under AIR21, an employee has 90 days from the unfavorable action to file a complaint. 49 U.S.C. § 42121(b)(1). No matter how strong his evidence on the *prima facie* case may be, he will lose if the employer can establish the affirmative defense of a legitimate non-discriminatory

reason for the action. In the first 90 days, without an OSHA investigation or any litigation discovery, a potential complainant is unlikely to know what, if any, evidence the employer can present on this affirmative defense. In an at-will employment situation, he may not even know what reason the employer will offer. Yet, under Boeing's theory, he brings the complaint at his peril because a loss on the merits at the OSHA level could subject him, more or less automatically, to liability for a \$1,000.00 sanction

Boeing's August 19, 2014 letter argues that "there is no dispute that Mr. Kent never engaged in AIR21 protected activity. Boeing terminated Mr. Kent solely as a result of substantiated allegations of inappropriate behavior." In the first place, there is a clear dispute over whether Mr. Kent engaged in protected activity in the evidence that Mr. Turkewitz gathered before filing the complaint. In the second place, the assertion is, based on the documents submitted, a non-sequitur. Boeing established the affirmative defense to the satisfaction of OSHA. However, even assuming that it could have done so in an ALJ hearing, its ability to establish that defense says nothing about whether there had been protected activity.

## CONCLUSION

Mr. Kent, Mr. McLaughlin, and Ms. Jacobsen allege that Mr. Kent raised safety concerns with his managers before requesting the meeting with Mr. VanAvery, and that those managers became hostile as a result. Boeing denies it. Boeing alleges that Mr. Kent engaged in timesheet falsification, sexual harassment, and threats of violence against co-workers. He denies it.

Mr. McLaughlin and Ms. Jacobsen also filed AIR21 complaints against Boeing. They are thus not disinterested witnesses. If they testified in a contested hearing their adverse relationship with Boeing would be proper matter for impeachment. It would be a legitimate basis for attacking their credibility in both cross-examination and argument.

Mr. Kent, Mr. McLaughlin, and Ms. Jacobsen identify by name the managers to whom they allege that Mr. Kent reported specific safety violations. Boeing has not provided statements from those managers, but such statements are not necessary for purposes of this motion. The denials by those managers would be merely redundant confirmation of what is already abundantly clear: that this is a case in which there are sharply contested versions of the facts bearing on the issue of whether Mr. Kent had a *prima facie* case under AIR21.

These different versions of the facts are textbook examples of the sorts of disputed evidence that a hearing on the merits is designed to resolve. If there were to be such a hearing it would be my duty to determine the credibility of the witnesses and resolve those disputes. However, there will be no such hearing on the merits. The issue raised by Boeing's request is whether the filing of the complaint justifies imposing the statutory sanction. It does not.

## ORDER

The Employer's request for an award of attorney's fees under 49 U.S.C. § 42121(b)(3)(C) is **DENIED**.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/mrc

**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).