



Issue Date: 15 April 2014

**CASE NOS. 2014-AIR-4
2014-TSC-3**

IN THE MATTER OF

**LAVERENE B. KELLY-LUSK,
Pro-Se Complainant**

v.

**DELTA AIR LINES, INC.,
Respondent**

ORDER ON MOTION TO DISMISS

Background

This matter involves a complaint under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)¹ and the Toxic Substances Control Act of 1986 (TSCA)² brought by Complainant against Respondent. Complainant filed her initial complaint with the U.S. Department of Labor Occupational Safety and Health Administration (OSHA) on 27 Sep 13. OSHA issued a decision dismissing the complaint on 30 Sep 13 and on 28 Oct 13 she filed her objection and requested a hearing. Following an initial conference call, I issued a scheduling order. I also requested Complainant re-file her complaint with me, listing each alleged protected activity and corresponding adverse action, which she did on 24 Feb 14.

The complaint is rambling and in its caption as an amended complaint, seeks relief for violations of occupational safety and health standards. It cites a number of various statutes, but only two are whistleblower provisions properly brought in this instance. At the factual core of her complaint is an allegation that on 17 Aug 87, she was preparing for boarding and departure of Respondent's flight from Dallas to Frankfurt. She mixed powdered iced tea mix into a liquid she believed to be water from a plastic bottle in the galley. When she and another crewmember drank the liquid, it turned out to be methanol. Both crewmembers became ill and had to be taken to the hospital. The bottle had been placed in the galley by the co-pilot, who had found it in his seat, where it had been left by a mechanic. It appeared to be a water bottle and although it had a

¹ 49 U.S.C. § 42121 *et seq.*

² 15 U.S.C. § 2622.

label, the label was hand-typed and on the “wrong side” of the bottle. It had no first aid information or warnings.

Complainant further alleges that she took the bottle to the hospital with her, but it was improperly confiscated by Respondent, who then told her it was lost en route to the insurance carrier. She subsequently filed a third party lawsuit over her injuries. Although she never clearly identified her whistleblowing communications, her complaints about the failure to properly handle the substance and report the incident appear to be her alleged protected activity. Her allegations of adverse activity are equally unclear, although she lists (1) having been forced to apologize to the gate staff for delaying the departure of the flight to Frankfurt; (2) being threatened with suspension or termination over weight standards; (3) being harassed by mechanics, who made special labels warning flight attendants that methanol is not for iced tea; (4) being given a poor performance review; (5) being terminated in 1993; (6) not being paid for vacation days or her final trip to Paris; (7) being the only member of a lawsuit in 1996 who was not offered her job back; (8) having not received her retirement check when due in September of 2013.

On 20 Mar 14, Respondent filed its answer and a motion to dismiss.³

APPLICABLE LAW

The regulations incorporate by reference procedural rules for hearings conducted under the Act. “Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations.”⁴ Those rules provide that the “Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.”⁵ Those rules in turn allow for a dismissal of a complaint if, even if all of the allegations in it are accepted as true, it still fails to state a claim on which relief may be granted.⁶

AIR21 provides:

- (a) [n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

³ The Motion argues the absence of a genuine issue of material fact standard (Fed. R. Civ. P. 56), but since no discovery has been conducted, it is more appropriate to apply a failure to state a claim standard, in which all facts in the Complaint, whether raised by a genuine issue of material fact or not, are assumed to be true (Fed. R. Civ. P. 12(b)(6)).

⁴ 29 C.F.R. § 1980.107(a).

⁵ 29 C.F.R. §19.1(a).

⁶ Fed. R. Civ. P. 12(b)(6).

(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[.]⁷

To state a viable whistleblower claim under AIR21, a complainant must show she engaged in protected activity under Section 42121(a), her employer was aware of the protected activity, she suffered unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable action.⁸ She must also file her complaint within 90 days of the adverse action.⁹

The TSCA similarly provides

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has-

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
- (2) testified or is about to testify in any such proceeding; or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.¹⁰

Under the TSCA, complainants must file their complaint within 30 days of the adverse action.¹¹

DISCUSSION

Respondent's Motion addresses only the AIR21 cause of action and does not mention the TSCA, even though Complainant raised both in her initial letter to OSHA and her amended complaint. That is not significant with respect to some of its arguments, but it is as to others. The grounds for dismissal submitted by Respondent are: (1) The initial complaint to OSHA was untimely; (2) The alleged adverse activities predated the effective date of AIR21 and the claim is barred; (3) Complainant engaged in no protected activity under AIR21; (4) Respondent took no adverse action against Complainant.

⁷ 49 U.S.C. § 42121(a)(1).

⁸ See e.g. *Allen v. Administrative Review Bd.*, 514 F.3d 468, 475-76 (5th Cir, 2008); *Davis v. United Airlines, Inc.*, 2001-AIR-5 (ALJ July 25, 2002).

⁹ 49 U.S.C. § 42121(b).

¹⁰ 15 U.S.C. § 2622(a).

¹¹ 15 U.S.C. § 2622(b).

Timeliness & Effective Date of AIR21

Complainant filed her initial letter to OSHA on 27 Sep 13. Under the 90-day deadline of AIR21, that means any cognizable adverse action must have taken place no earlier than 29 Jun 13. Under the 30-day TSCA time limit, any cognizable adverse action must have taken place no earlier than 28 Aug 13.

The most significant adverse actions Complainant alleges in her complaint (unfair treatment, harassment, failure to pay, termination, and refusal to reinstate) all took place in the 1980s and 1990s, many years before she filed her letter with OSHA. She alleged in her answer to Respondent's Motion that she has not been fully paid for her vacation days or her last trip to Paris, but also noted that those amounts had been in dispute since her termination in 1993. Accordingly, her complaint as to those adverse actions is dismissed as untimely under both AIR21 and the TSCA.¹²

The only remaining adverse action is her allegation that her checks from the retirement plan were delayed starting on or about 1 Sep 13. That is sufficient to defeat Respondent's Motion to Dismiss on the pleadings for untimeliness, under both AIR21 and the TSCA and on the ground that AIR21 was not yet effective.

Protected Activity

Respondent also argues that, even accepting all of Complainant's allegations as true, the facts fail to establish any protected activity under AIR21. Complainant's alleged protected activity all relates to her complaints and communications about the failure of maintenance personnel to properly control and label the bottle of methanol that she accidentally ingested, the way she was treated after ingesting it, and the way the incident was investigated by Respondent. None of her allegations reasonably relate to a violation or impending violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. Accordingly her complaint under AIR21 must be dismissed.

However, Respondent did not address whether or her allegations could constitute a protected activity under the TSCA and the complaint as to that cause of action remains.

Adverse Action

Respondent argues that the delayed check allegation must fail because (1) any delay was by the plan administrator and not Respondent and (2) even if it was by Respondent, it failed to meet the standard for actionable adverse action and was not done with knowledge of or in retaliation for any protected activity. While those arguments might be appropriate for a motion

¹² Additionally, any adverse action that took place before AIR 21 became effective on 5 Apr 00 would be dismissed, eliminating all but the allegation that her checks from the retirement plan were delayed.

for summary decision based on the absence of any genuine issue of material fact following discovery, they are not appropriate for a motion on the pleadings. That part of Respondent's Motion is denied.

ORDER

Respondent's Motion to Dismiss as to the entire AIR21 complaint is granted. The complaint under the TSCA is dismissed as to all adverse actions except for the delayed issuance of the retirement plan checks.

Since the case involves both Toxic Substance and Air Whistleblower causes of actions, it should have had both types of case numbers in the caption. As the AIR cause of action has been dismissed, the parties should henceforth use in the caption only the following OALJ case number **2014-TSC-3**.

ORDERED this 15th day of April, 2014 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge