



Issue Date: 23 February 2016

CASE NO.: 2014-AIR-00003
2014-CFP-00002 [related case]
2012-SOX-00016 [related case]¹

In the Matter of:

PAUL SIMKUS
Complainant,

v.

UNITED AIRLINES, INC.,
Respondent.

FINAL ORDER OF DISMISSAL

An Order to Show Cause was issued on January 11, 2016 in the instant case, which was brought under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”) (49 U.S.C. § 42121 *et seq.*, with implementing regulations appearing at 29 C.F.R. Part 1979). That Show Cause Order, which allowed the parties 30 days to respond, was issued as part of the “Decision and Order Granting Respondent’s Motion for Summary Judgment and Dismissing Case No. 2012-SOX-00016 and Order to Show Cause” (“Decision and Order”) of January 11, 2016, which is incorporated by reference herein. As the only response submitted was by the Respondent (“United”) in support of the dismissal of the complaint, and as dismissal is mandated under the undisputed facts, based upon the reasoning set forth in the Decision and Order, this case is being dismissed.

Procedural Background

The AIR 21 matter was docketed on October 17, 2013. On January 27, 2014, this case and Case Nos. 2012-SOX-00016 and 2014-CFP-00002 were consolidated for hearing purposes. On January 11, 2016, the undersigned issued a Decision and Order Granting Respondent’s Motion for Summary Judgment and Dismissing Complaint in Case No. 2012-SOX-00016 and an Order to Show Cause. In the Decision and Order, I found that the Complainant failed to establish that he engaged in any SOX-protected activity or that any adverse action was taken

¹ These three cases were consolidated for hearing purposes. The complaint in Case No. 2012-SOX-00016 was previously dismissed and Case No. 2014-CFP-00002 is being dismissed contemporaneously with this dismissal. Inasmuch as Case No. 2012-SOX-00016 has been dismissed, the dismissals in the two remaining cases are being issued separately, even though they are based on the same evidentiary record.

against him. The Show Cause Order ordered, inter alia, that within thirty (30) days of the date of the Order, the parties show cause, if there is any, or otherwise address the issue of whether Case No. 2014-AIR-00003 should not be dismissed, because it involves the same alleged adverse action as Case No. 2012-SOX-00016.

Respondent timely submitted its Memorandum Supporting Dismissal of Complainant's AIR 21 Complaint on February 10, 2016. The Complainant did not file a response and the period of time for filing a response has elapsed.

Facts

Case No. 2014-AIR-00003 involves the same parties as Case No. 2012-SOX-00016, but a different statutory basis (the AIR 21 Act). In May 27, 2011 and November 30, 2012 letters, following up on an April 14, 2011 oral complaint in that case, Complainant alleged that he reported safety concerns, specifically a November 13, 2010 accident between an unmanned pickup truck and a jet plane that was on taxi; these reports were made to an SEC investigator (Jeff Horner), his supervisor manager (Bob Heatherington), senior executives at United Airlines (including Kevin Thomas), IBT union representatives, and an OSHA investigator (Shawn Hughes). As a result, he claimed that he was subjected to a hostile work environment with payroll interference and specifically that he was placed on EIS [Extended Illness Status] on January 17, 2011 and he lost a signing bonus. OSHA found the claim lacked merit on September 10, 2013.

Discussion

In my Decision and Order I found, in relevant part, that Complainant failed to establish that he engaged in any SOX-protected activity when he: (1) reported asbestos in 2007, 2008, and 2009, but failed to present any evidence that at the time of these reports he actually believed that United was violating one of the laws listed in Section 1514 or the SEC rules, or that such belief was objectively reasonable; (2) allegedly made complaints about vendor procurement fraud, network outages, falsification of documents, and embezzlement, but failed to set forth specific facts that he engaged in such protected activity; (3) reported inaccurate stock distributions, but failed to put forth any evidence indicating the basis for his belief that the stock distribution was inaccurate or how the receipt of the distribution constituted any type of fraud under SOX; and (4) filed two SEC complaints, but failed to allege any type of fraud or violations of SEC rules and/or federal laws relating to fraud against shareholders in those complaints. (Decision and Order at 16-22). Additionally, I found that Complainant's placement on EIS on January 17, 2011 and delayed receipt of 72 hours of vacation pay did not constitute an adverse action as those actions were trivial (as any errors were promptly corrected when reported) and a result of the neutral application of Respondent's usual procedures regarding the accrual of more than sixteen (16) consecutive un-approved absences, coupled with Complainant's own admitted un-approved absences. *Id.* at 22-24.

In Respondent's Memorandum Supporting Dismissal of Complainant Paul Simkus's AIR 21 Complaint ("Resp. AIR 21 Memo."), Respondent argued that the Complainant's AIR 21 Claim should be dismissed as it implicates the same adverse actions raised in Simkus's SOX

claim and dismissed by this tribunal. (Resp. AIR 21 Memo. at 2). Respondent further argued that no adverse action occurred because (1) United corrected the initial error with Simkus's EIS placement; (2) there was no evidence to establish that Simkus's placement on EIS was for any reason other than his consecutive absences, in accordance with United's policies; (3) the Declaration of Jennifer Dziepak established that Simkus maintained his seniority, sick leave accrual, and available vacation time, undercutting any claimed adverse action as a result of Simkus's EIS placement; and (4) Simkus was clearly not deterred from engaging in any further protected activity through these alleged adverse actions, as evidenced by Simkus's subsequent filling of his Dodd-Frank Claim. *Id.* at 2-3. Accordingly, Respondent contends that it would be futile to engage in discovery and dispositive motions briefing and that the AIR21 complaint should be dismissed with prejudice. *Id.* at 2. I agree.

In view of the above, I find that Complainant's Case No. 2014-AIR-00003 should be dismissed as it involves the same alleged adverse action that was found not to be actionable in Case No. 2012-SOX-00016. Neither party has shown a rationale for pursuing this matter separate and apart from Case No. 2012-SOX-00016, and I agree with Respondent that this matter should be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 2014-AIR-00003 be, and hereby is **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status

of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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 on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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. §§ 1980.109(e) and 1980.110(b). 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. § 1980.110(b).