



Issue Date: 04 December 2014

Case No.: 2014-AIR-21

In the Matter of:
JOHN SWINT,
Complainant,

v.

NETJETS AVIATION, INC.
Respondent.

**ORDER REMANDING CLAIM TO OSHA FOR CONSOLIDATION
WITH COMPLAINANT'S SUBSEQUENT CLAIMS**

This proceeding arises from a claim of whistleblower protection under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”).¹ The statute prohibits retaliatory or discriminatory actions by covered employers against their employees who engage in activity protected by the Act. In this case, the Complainant has requested review by the Office of Administrative Law Judges (“OALJ”) of a finding by the Occupational Safety and Health Administration (“OSHA”) that the Respondent did not violate the Act.

On October 22, 2014, John Swint (“Complainant”) filed correspondence with the undersigned detailing additional allegations of retaliatory actions by NetJets Aviation, Inc. (“Respondent”) which purportedly occurred because of the same protected activities involved in the instant claim. Respondent replied on November 11, 2014, requesting that the matter before me, and any related discovery, be stayed until the resolution of a new OSHA investigation. On the same day, additional correspondence was received from the Complainant requesting that the case be held in abeyance, but that discovery should be conducted pursuant our procedural regulations. On November 12, 2014, I received an additional letter from the Respondent, again requesting that discovery be suspended pending the OSHA investigation of the additional allegations.

AIR 21 does not directly address supplemental complaints or consolidation of multiple Agency findings. 49 U.S.C. § 42121. However, our general procedural regulations do contemplate the consideration of additional post-complaint allegations in a claim.² Additionally, while I may not remand the case to OSHA for additional investigation “on the basis that a

¹ 49 U.S.C. § 42121 (2011).

² 29 C.F.R. § 18.5(e), “[t]he administrative law judge may... permit supplemental pleadings setting forth... occurrences or events which have happened since the date of the pleadings[,] and which are relevant to any of the issues involved.”

determination to dismiss was made in error,” there is no such prohibition on remanding the case for consolidation purposes. *See* 29 C.F.R. §1979.109(a). Further, both the Courts and ARB have favorably held that, where the reviewing authority does not have sufficient evidence with which to decide the case fully on its merits, the proper course is to remand to the agency for additional investigation. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *Ford v. Northwest Airlines, Inc.*, ARB No. 03-014, ALJ No. 2002-AIR-21 (ARB Jan. 24, 2003).

The *Ford* case presented a similar factual predicate and, in denying an interlocutory appeal of the ALJ’s decision and remand to OSHA, the ARB stated:

The purpose of the [ALJ’s] remand order is to conduct an investigation into the complaints of blacklisting that allegedly form a basis of Ford’s complaint. Thus the subject matter of the remand is not completely separate from the merits. In fact, it is possible that as a result of the investigation, the complaint will be resolved and no further adjudication by the ALJ or Board will be required. In any event, if ultimately [Respondent] is dissatisfied with either the results of the investigation or, if the complaint is upheld, with the ALJ’s determination regarding the alleged protected activities falling within the ambit of the complaint, Northwest may raise these issues with Board upon the filing of a timely petition for review of the ALJ’s final order.

Id. at 5.

The allegations in the Complainant’s initial action before me, and the subsequent alleged adverse actions which are currently before OSHA, are so intertwined that proceeding with either action unconsolidated would be piecemeal litigation and an inefficient use of the parties’ and court’s time. Further, the failure to consolidate may deprive the parties of their ability to fully present the issues relevant to their cases.

In his response to the Show Cause Order I issued on November 13, 2014, the Complainant, while not directly objecting to the remand, has raised concerns regarding delay and has requested that I maintain discovery dates previously established in my procedural orders. While I share the concerns expressed regarding delay of the claim and understand the public policy arguments made, I have no jurisdiction to maintain procedural deadlines after the case has been remanded.

IT IS THEREFORE ORDERED the claim now pending before me is **REMANDED** to OSHA for consolidation with the Complainant’s subsequent claims.

PETER B. SILVAIN, JR.
Administrative Law Judge

