

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 23 April 2015**

**CASE NO.: 2015-AIR-00003**

**IN THE MATTER OF**

**SHEIDA HUKMAN**

**Complainant**

**v.**

**US AIRWAYS, INC.,**

**Respondent**

**BEFORE: LEE J. ROMERO, JR.**  
**Administrative Law Judge**

**DECISION AND ORDER DENYING MOTION FOR LEAVE TO FILE  
AMENDED COMPLAINT AND GRANTING MOTION TO DISMISS**

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"). This statutory provision, in part, prohibits an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or to the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

This claim was brought by the Complainant, Sheida Hukman, against the Respondent, US Airways, Inc., alleging that she was discharged in violation of the Act. This matter is before me on an appeal from the finding of the Occupational Health and Safety

Administration ("OSHA") that the Complainant's claim failed to establish she engaged in any protected activity.

## I. BACKGROUND & CONTENTIONS OF THE PARTIES<sup>1</sup>

Complainant Sheida Hukman filed a complaint on February 20, 2013, with OSHA under the whistleblower provisions of AIR 21. On October 6, 2014, OSHA completed its investigation of Complainant's complaint, which alleged Respondent suspended her on December 10, 2012, for reporting illegal activities in violation of AIR 21. Following an investigation of the matter, OSHA found there was no reasonable cause to believe Respondent violated the Act because Complainant had not engaged in any protected activity. OSHA determined that Complainant's 2010 and 2011 reports that employees were smuggling other employees and relatives on flights without being on a manifest or having a passport did not constitute a violation of FAA orders, regulations, or standards, and thus, Complainant did not engage in protected activity when she reported such alleged misconduct. OSHA found the complaint was timely, however, as it was filed within 90 days of the alleged adverse action, pursuant to 49 U.S.C. § 42121(b).

On November 7, 2014, Complainant requested a hearing before the Office of Administrative Law Judges ("OALJ") to appeal the findings of OSHA. Complainant alleged she was subjected to various forms of discrimination and harassment because she reported violations of AIR 21.

On January 12, 2015, the undersigned issued a Revised Pre-Hearing Order and Order Denying Respondent's Motion, setting Complainant's due date to file a complaint as January 23, 2015. Consequently, Respondent had until February 9, 2015, to file an answer. On January 22, 2015, Complainant filed a Pre-Hearing Statement alleging that she made various complaints about illegal activities performed by US Airways employees in violation of aircraft weight and balance restrictions, citing "14 CFR, Part 121." Specifically Complainant alleged that she witnessed US Airways employees "smuggling" other employees or relatives on the plane and failing to report them in the

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<sup>1</sup> As a preliminary matter, it is recognized that Complainant is unrepresented, but nevertheless, it is generally noted that Complainant's submissions to the undersigned are vague and non-responsive to the issues. Often, Complainant's timeline of events are not in chronological order and frequently feature conflicting dates across filings. Given the inadequacy and inconsistency of Complainant's pleadings, I have compiled the following procedural history of this case and a summary of the arguments.

manifest as passengers. Complainant contends that compliance with weight and balance limitations is critical to flight safety, and that operating above the maximum weight limit compromises the structural integrity of the aircraft and adversely affects its performance. Complainant asserts that incorrect take-off weights are considered a safety hazard if pilots rely on faulty information when determining the right speed for take-off and landing. Complainant lists various other alleged incidents of retaliation and harassment that she believes were a result of her reporting such illegal activities on the part of Respondent and due to her sex, race, and national origin.

On February 13, 2015, Respondent filed an Answer and Motion to Dismiss Complainant's Complaint in Its Entirety. In its Answer, along with its specific denials and admissions, Respondent alleges that Complainant's claims are time-barred, and that Complainant never engaged in any protected activity under AIR 21. Alternatively, Respondent argues it would have taken the same actions regardless of whether Complainant engaged in any of the alleged protected activities. Specifically, Respondent argues AIR 21 does not protect an employee's rude, negative, and destructive behavior, even if a potential safety issue is intermingled with that misconduct. Lastly, Respondent avers it had no knowledge of Complainant engaging in any protected activity under AIR 21 when it took the alleged adverse actions.

In its dismissal, Respondent urges that the undersigned dismiss the case on three main grounds: 1) Complainant's claims are largely time-barred; 2) none of Complainant's purported protected activities pertain to air safety and therefore fall outside of AIR 21; and 3) 49 U.S.C. § 46503 does not apply to Complainant, and therefore she cannot base her AIR 21 claim upon that inapplicable statute. Respondent further requests the portions of Complainant's complaint that relate to past settlement negotiations be stricken because confidential settlement negotiations are inadmissible under 29 C.F.R. § 18.408.

Respondent asserts that all alleged events of retaliation or adverse action that occurred before November 22, 2012, 90 days before the filing of her OSHA complaint on February 20, 2013, should be dismissed as untimely. Respondent avers the only claims raised in the complaint that appear timely are those that occurred on November 30, 2012, December 10, 2012, and February 20, 2013. Moreover, Respondent avers that Complainant

cannot demonstrate any causal connection to the alleged adverse actions and any complaints regarding air safety. Respondent points out that Complainant believes the retaliatory events were caused as a result of her "perceived disability discrimination" and her complaints about national origin discrimination and sexual harassment. Therefore, Respondent argues, the lack of temporal proximity between any alleged reports of "illegal activities" eliminates any inference of an AIR 21 violation. In addition, Respondent avers the new allegations listed in Complainant's Pre-Hearing Statement are also time-barred for failure to include them in her original complaint, and because they deprived Respondent of notice of the new claims.

Respondent next addresses each instance of alleged protected activity and provides support for why it should be dismissed. Respondent first states that Complainant's alleged protected activity listed in paragraphs two and three of the complaint relate to discrimination on the basis of race, national origin, and sexual harassment, and they do not allege any violations of FAA orders, regulations, or standards. Thus, in addition to those claims being time-barred, they fail to raise a valid AIR 21 complaint. Respondent next states that the alleged protected activity listed in paragraph six of the complaint contains claims related to passenger count, which also does not raise an "objectively reasonable perceived violation of federal laws or standards touching on or relating to air carrier safety," and as a result, it must be dismissed. Respondent points out that Complainant has failed to cite any regulation to support her allegation that there was an AIR 21 violation.

Likewise, Respondent avers the alleged protected activity listed in paragraph seven contains irrelevant claims regarding a nurse practicing without a license, and therefore it must also be dismissed for failure to raise an AIR 21 air safety issue. Additionally, the 2014 complaint to the Department of State Licensing Compliance falls outside of Complainant's original allegations before OSHA, which was filed on February 20, 2013. Also for that reason, Respondent argues, the reporting of the nursing license could not have been a contributory factor for any alleged actions taken against her in the 90 days predating her February 20, 2013 OSHA complaint.

After addressing Complainant's allegations of alleged protected activity, Respondent addresses the list of purported adverse actions taken against Complainant. Respondent points out that the alleged adverse actions pertain to discrimination on the basis of her national origin, race, and sexual harassment

assertions. Moreover, Respondent asserts that Complainant fails to argue that the protected activity was a contributing factor in the alleged adverse actions. Respondent contends the only alleged adverse action that is connected to her alleged protected activity, labeled "Second Promotional Denial," occurred in January 2012, which is time-barred as occurring more than ten months before the 90-day time limit for bringing the OSHA complaint.

Next, Respondent addresses 49 U.S.C. § 46503, which Complainant alleges is the basis of the November 15, 2012 retaliation she incurred when she was subjected to the scene caused at the gate before flight departure, listed as protected activity five in her complaint. In addition to this incident being time-barred, Respondent argues the statute does not apply to the scenario. Specifically, the statute prohibits a person from interfering with security screening personnel in the performance of their duties. Because Complainant was a Customer Service Agent for US Airways and did not have security duties, the statute is inapplicable to her. Lastly, Respondent avers the portions of Complainant's complaint that disclose confidential settlement negotiations should be stricken from the complaint.

On February 23, 2015, the undersigned issued an Order to Show Cause why Respondent's Motion to Dismiss should not be granted. Complainant was given a deadline of March 9, 2015, to show cause.

On March 2, 2015, Complainant filed a Motion for Leave to File Amended Complaint. In her motion, she indicated she would like to add information regarding the background of AIR 21 and the elements needed to succeed on a whistleblower complaint. She added information regarding weight and balance restrictions of aircrafts, providing no citations, and she reiterated the events of "smuggling" employees on the plane. Complainant added new accounts of "smuggling," and sought to change her accounts of "discrimination EEOC" and "sexual harassment in the workplace" to examples of adverse action. Complainant moved to "add a recent Adverse Action," which involved harassment and threats by US Airways employees Jackie Edwards and Laura Anderson in 2013 or 2014.<sup>2</sup> Complainant also wished to add

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<sup>2</sup> Complainant failed to specifically date this event. She states, "Complainant is being harassed and threatened by US Airways Shift Manager Jackie Edwards who transferred to Las Vegas Airport back in 2013 and US Airways Former Employee Laura Anderson." Because any harassment could not

instances of adverse action on February 4, 2015, and on February 15, 2015, wherein she was denied an Employment Verification Letter from US Airways. Lastly, Complainant sought to change the description of her reporting the expired nursing license of Nicole Blanchard as an adverse action.

On March 5, 2015, Respondent submitted a Motion in Opposition to Complainant Sheida Hukman's Motion for Leave to File Amended Complaint. Respondent avers the motion is predicated upon "untimely, irrelevant, and groundless allegations raised in an eleventh-hour attempt to add claims or bases for claims." Respondent claims it will suffer undue prejudice if Complainant is allowed to amend her complaint, and that an amendment is not in the interest of justice or judicial efficiency. Respondent attacks the Motion to Amend by pointing out that it lacks dates for alleged new instances of adverse action, and it contains "confusing and generalized allegations[.]" Respondent also asserts that the proposed amendments are untimely and fall outside the ambit of AIR 21, and they fail to meet the minimal pleading standard required in the undersigned's Pre-Hearing Order.

On March 9, 2015, Complainant filed a Response to the Order to Show Cause, along with 15 exhibits. In her Response, Complainant reiterated the events on which she bases her claim, beginning from 2010 through 2013. In addition, Complainant adds new events of protected activity to her claim, dated "January 2009," "February 2010," "Summer 2010," "December 2, 2012," "December 3, 2012," "December 10, 2012," and one undated event. Complainant summarily states that all of the events she recounts are not time-barred simply because she filed with OSHA "within 90 [d]ays of the alleged adverse action[.]" Complainant further states that she had knowledge of air safety through her employment and "by searching safety issues on Federal Aviation Administration website and contacting the (FAA) The Federal Aviation Administration."

Also in Complainant's Response, Complainant asserts that weight and balance violations put passenger lives in danger. Complainant also conclusively states that her protected activity falls within AIR 21. Complainant recounted a recent event of retaliation, dated "November 15th to December 10th 2015[.]" and lastly, she addressed 49 U.S.C. § 46503, which is the "airport rage" statute. Complainant stated, "Complainant did not base

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have occurred before Ms. Edwards's transfer to Las Vegas, it is assumed that this allegedly retaliatory act took place in 2013 or 2014.

her AIR 21 claim upon (Airport Rage)[.] Complainant was trying to explain how US Airways retaliated against her even though their [sic] is a 'Federal Law Prohibits Airport Rage[.]' US Airways and the Union (CWA) are aware of Airport Rage." Complainant stated passenger service agents had "security duties" at the airport, including conducting security checks at the gate; asking passengers security questions when they check their bags; instructing passengers what they can bring in a carry-on item; instructing passengers about "oxygen" on board the aircraft; the responsibility to report "unusual stuff" and "[u]nusual person or employee who doesn't hold an Airport Badge and walking the Ramp;" conducting an overnight and first morning flight inspection of the aircraft; stopping unruly passengers; and conducting a security check at the gate, if TSA so requires. Complainant provided no reference to the source that mandated these duties. Lastly, Complainant stated she "has a serious claim," and that "Attorney Nonnie Shivers Counsel for US Airways her concern is about 'Money' [sic]" and not "peoples [sic] lives."

On March 18, 2015, Respondent filed a Reply in Support of Its Motion to Dismiss Complainant Sheida Hukman's Complaint. Respondent avers that Complainant merely restates her factual allegations and raises new allegations that cannot be raised. Respondent states Complainant has failed to provide sound legal bases to rebut Respondent's Motion to Dismiss. Respondent again advances the position that Complainant's case is largely time-barred, does not apply to AIR 21, and is unrelated to the statute regarding "airport rage." Further, Respondent argues Complainant's valid, non-time-barred claims pertain to unrelated discrimination and state nursing licensing laws, instead of air carrier safety. Respondent contends that Complainant's inclusion of additional futile allegations is unsupported by the law and unfairly prejudicial to Respondent.

Finally, Respondent addresses Complainant's contentions that she had security duties under the "airport rage" statute. Respondent points out that Complainant's job included security duties only in the sense that every individual who works at an airport has a responsibility to maintain security. Instead, Respondent avers, the statute was meant to cover individuals with "security screening" duties. Moreover, the verbal dispute Complainant had with a co-worker regarding boarding priority does not constitute an "assault," and it did not interfere with the performance of or lessen the ability to perform Complainant's job. Respondent also renewed its request that the

portions of Complainant's complaint containing details of settlement negotiations be stricken.

On March 20, 2015, Complainant filed a Motion for Extension of Time to File Response to Defendant's Motion to Dismiss. Complainant sought an extension of time to "aid this court in it's [sic] analysis of the issues presented and to help the employer understand the 'Safety Issue.'" On March 23, 2015, the undersigned issued an Order Granting Motion for Extension of Time to File Sur-Reply Brief and Cancelling Formal Hearing. In my Order, I gave Complainant a deadline of April 6, 2015, to file a Sur-Reply Brief.<sup>3</sup>

On April 13, 2015, Complainant filed a Sur-Reply Brief in Opposition to Defendant's Motion to Dismiss. Complainant alleges Respondent has failed to address the "real issue" of the complaint. Again, Complainant recounts the "smuggling" of passengers on aircrafts in alleged violation of federal law. Complainant adds details to her previously raised accounts, which were not included in her prior submissions to the undersigned. Complainant still asserts that her complaint is not time-barred, and she states that she was "set up" by US Airways management. She also claims that Respondent "confirmed that protected activity was the reason for her discharge." Complainant alleges that Respondent failed to provide documentation to her, and she reasserts that the "air rage" statute applies.

Complainant again describes the November 15, 2012 debacle at the US Airways gate, wherein her authority was allegedly undermined by coworkers, and an inaccurate passenger count was made. Complainant states she was retaliated against because she was harassed, given unpleasant assignments, given disciplinary actions, subjected to a hostile work environment, underpaid, denied promotions, and unfairly subjected to a medical examination. She claims the Americans with Disabilities Act was violated when she was mandated to take a medical examination, and when Nicole Blanchard administered her examination without a nursing license. Complainant avers that her medical report from her examining physician finding her unable to perform her duties was incorrect. Because Complainant's Sur-Reply Brief is beyond the scope of what is allowed in reply briefs and repetitive, I

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<sup>3</sup> It is noted that Complainant submitted another Pre-Hearing Submission on March 12, 2013, which included 62 exhibits. Because the deadline for pre-hearing submissions has passed, and because Complainant has already filed a Pre-Hearing Statement, I conclude this submission is untimely and improper.

find that it does not bolster Complainant's arguments or clarify issues.

## II. DISCUSSION

### A. MOTION FOR LEAVE TO AMEND COMPLAINT

AIR 21 proceedings are governed by the Rules of Practice and Procedure for Administrative Law Judges. 29 C.F.R. § 18, et seq. Amendments and supplemental pleadings are addressed in 29 C.F.R. § 18.5(e). Specifically, 29 C.F.R. § 18.5(e) states:

**(e) Amendments and supplemental pleadings.** If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge *may*, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter *if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint.* When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge *may*, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

29 C.F.R. 18.5(e) (emphasis added).

An ALJ may look to Rule 15 of the Federal Rules of Civil Procedure for guidance in applying 29 C.F.R. § 18.5(e). Sasse v. United States DOL, 409 F.3d 773, 781 (6th Cir. 2005). Four factors support a denial of a motion to amend pleadings, which are the following: 1) undue delay; 2) bad faith or dilatory motive on the part of the movant; 3) futility of amendment; and 4) undue prejudice to the opposing party. Forman v. Davis, 371 U.S. 178 (1962).

While I do not find that Complainant has engaged in undue delay or bad faith, I do find that an amendment of the complaint, filed after the deadline for discovery, to add the information Complainant wishes to include would be futile and possibly cause undue prejudice to Respondent. The events Complainant seeks to add to her complaint are either not dated, or they reflect a date which renders them untimely. Specifically, Complainant filed her claim with OSHA on February 20, 2013; thus, events that occurred after November 22, 2012, and before February 20, 2013 are timely. Complainant wishes to add an event where she took out a restraining order against her two former co-workers in 2013 or 2014. Because this occurrence is likely after February 20, 2013, it is factually prospective and patently unrelated to the original Complaint allegations. In addition, the events of alleged adverse action Complainant would like to add occurring on February 4, 2015, and on February 15, 2015, are also factually prospective and unrelated for the same reason, and I will not permit amendment to include them in the original complaint.

Beyond these specifically dated allegations in the request to amend, the other supplemental information Complainant seeks to add is vague and difficult to understand. It is challenging to determine whether the new information is within the scope of the original complaint because of lack of precision and clarity in the Motion for Leave to Amend Complaint. As such, Respondent would be at a disadvantage in attempting to decipher what the Complainant is attempting to add to her complaint. Respondent is additionally disadvantaged because the deadline for discovery, set as February 27, 2015, has passed; thus affording it no opportunity to seek clarification and defend its case against the new allegations sought to be added to the complaint. As a consequence, Complainant's Motion for Leave to Amend Complaint is **DENIED**.

## **B. MOTION TO DISMISS**

Dismissal of whistleblower complaints without a hearing may be appropriate under the summary decision provisions of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at 29 C.F.R. §§ 18.40 and 18.41, or less frequently, under Rule 12 of the Federal Rules of Procedure. Dos Santos v. Delta Airlines, Inc., 2013 DOL Ad. Rev. Bd. LEXIS 118, pp. 9-11, ALJ Case No. 2012-AIR-00020 (ALJ Jan. 11, 2013); 29 C.F.R. § 18.1(a) ("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."); Neuer v. Bessellieu, ARB No. 07-036, ALJ Case No. 2006-SOX-132 (ARB Aug. 31, 2009) ("The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted. It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims.").

I find that review of the issue for dismissal of the case is warranted inasmuch as it will obviate the need for a hearing on the substantive issues of whistleblower protections, should I find that Complainant failed to establish she engaged in protected activity under AIR 21. I will therefore determine whether Complainant's case should be dismissed under Federal Rule of Civil Procedure 12.

Under Rule 12(b)(6), all reasonable inferences are made in the non-moving party's favor. Neuer, @ 4. The burden is on the complainant to frame a complaint with enough facts to state a claim for relief that is plausible on its face. Id. The complaint must be liberally construed in favor of the complainant, and all facts pleaded in the original complaint must be taken as true. Roux v. Pinnacle Polymers, L.L.C., No. CIV.A. 13-369, 2014 WL 129815, at \*1 (E.D. La. Jan. 14, 2014). However, the undersigned is not bound by the Complainant's legal conclusions, as the purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. Id. Bond v. Rexel, Inc., No. 5:09-CV-122, 2011 WL 1578502, at \*3 (W.D.N.C. Apr. 26, 2011).

In considering a Rule 12(b)(6) motion to dismiss, "we must assume that all the facts alleged in the complaint are true" and generally construe the complaint in the light most favorable to the plaintiff. E.g., Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). "The complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal," DuBois v. Ford Motor Credit Co., 276 F.3d 1019, 1022 (8th Cir. 2002), and must contain enough facts to state a claim for relief "that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The Court may not consider materials outside the pleadings on a motion to dismiss. Sullivan v. Pinnacle Airlines, Inc., 2010 WL 3119787, at \*3-4 (D. Minn. May 28, 2010).

## 1. FAILURE TO FILE CLAIM TIMELY

A whistleblower claim must be filed timely in order to be considered before the OALJ. 29 C.F.R. § 1979.103 establishes the timeframe within which a complainant has to file her claim to be considered timely:

§1979.103 Filing of discrimination complaint.

(d) *Time for filing.* Within 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

29 C.F.R. § 1979.103. Thus, a claim filed outside of the 90-day window of the date of the adverse action is rendered untimely. Sullivan, at \*4 (dismissing an AIR 21 complaint as untimely because the claim was not filed within 90 days after the purported adverse action occurred).

Complainant in the instant matter believes various forms of adverse action were taken against her for engaging in protected activity regarding air carrier safety under AIR 21. She claims this adverse action spanned from as early as 2009 through 2014. Complainant filed her OSHA complaint on February 20, 2013; thus, the only claims that will be timely are claims that occurred between November 22, 2012 and February 20, 2013. As a result, all of Complainant's alleged experiences of adverse action before November 22, 2012, are **DISMISSED**, and all claims after February 20, 2013, are likewise disregarded.

The remaining claims that are deemed timely are the following:

- a) "More retaliation" that occurred on **November 30, 2012**. On this occasion, Complainant alleges she was assigned to work with individuals who had previously harassed her, such as Murphy Loehman. Complainant claims she was

humiliated in front of passengers and was told she could not charge a "move-up" fee, which is usually charged unless there is good reason. Complainant made a complaint to US Airways, but she was ignored.

- b) "More retaliation" that occurred on **December 2, 2012**. On this occasion, Human Resources Manager Eric Staples conducted "another frivolous coaching session" with Complainant. Complainant made a complaint with US Airways to Human Resources Manager Michael O'Donnell and was referred to Mr. Robert Yuri.
- c) "Perceived disability discrimination/retaliation" that occurred on **December 10, 2012**. On that occasion, Complainant alleges she had a meeting with Mr. Yuri concerning her complaints of harassment and discrimination. After two attempts to meet with him, Mr. Yuri was not available. Instead, Human Resources Manager Pam Armstrong and a Corporate Security Officer were sent to meet with Complainant. Ms. Armstrong informed Complainant that US Airways was suspending her based on allegations that she had threatened Mr. Yuri. Complainant was requested to submit to a medical examination, which she believed was retaliatory.
- d) "Perceived disability discrimination/retaliation" that occurred on **February 20, 2013**. On that occasion, Dr. Cruet, Complainant's examining physician, concluded that Complainant could not safely and effectively perform the essential functions of a Customer Service Agent. Complainant was removed from service. US Airways then allegedly demanded that Complainant seek treatment from a psychologist and obtain another evaluation before she returned to work. She requested a copy of Dr. Cruet's findings and report, believing that Dr. Cruet was incorrect and gave her false information.

## **2. LACK OF PROTECTED ACTIVITY UNDER AIR 21**

AIR 21 prohibits employers from discriminating against employees who provide air carrier safety violation information to their employer or to the federal government. Air carrier safety activities "relate to an employee's pursuit of concerns about compliance with Federal Aviation Administration orders, regulations or standards, or any other provision of Federal law relating to air carrier safety." 49 U.S.C. § 42121(a); 29

C.F.R. 1979.102(b); see also, Svendsen v. Air Methods, Inc., 2004 WL 1923132, @ 5, ARB Case No. 03-074 (Aug. 26, 2004).

To prevail on a whistleblower retaliation claim under AIR 21, the employee bears the initial burden to show by a preponderance of the evidence that: 1) the employee engaged in protected activity; 2) the employer had knowledge of the protected activity; 3) the employee suffered an adverse action; and 4) the protected activity was a contributing factor in the employer's decision to take the adverse action. Svendson, @ 4. If the employee makes a **prima facie** showing, the burden shifts to the employer to rebut the case by demonstrating clear and convincing evidence that the employer would have taken the same action absent the protected activity. Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010) (citing AIR 21 standards to illustrate the similar burden in a SOX whistleblower complaint).

Where no actual safety violation occurs, AIR 21 only extends protection to employees whose protected activities included providing information related to an "alleged, objectively reasonable perceived violation of federal laws or standards touching on or 'relating to air carrier safety . . .'" Fader v. Trans. Sec. Admin., Case No. 2004-AIR-27 (ALJ June 17, 2004). The alleged act must implicate safety definitively and specifically. Rougas v. Southeast Airlines, Inc., ARB Case No. 04-139, ALJ Case No. 2004-AIR-3, slip. Op. @ 9 (ALJ June 30, 2004). It follows that where an alleged safety violation is not objectively and reasonably related to safety, any complaints related to the matter are not protected by AIR 21. See e.g., Fader, Case No. 2004-AIR-27.

Considering all facts offered by Complainant as true under the applicable dismissal standard, I find that Complainant has failed to state a claim upon which relief can be granted. Although Complainant's complaint contains confusing and generalized allegations, her purported protected activities can be summarized as follows: 1) Complainant's reporting of "smuggling" passengers on several occasions in violation of weight and balance restrictions for aircraft safety; 2) Complainant's contacting of authorities on November 15, 2012, and her subjection to "airport rage" under 49 U.S.C. § 46503 at the departing flight gate that day; and 3) Complainant's reporting of Nicole Blanchard's expired nursing license.<sup>4</sup>

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<sup>4</sup> Any alleged protected activities and adverse actions regarding complainant's national origin, race, or sexual harassment allegations are not within the jurisdiction of the U.S. Department of Labor, and they will not be

Each of these alleged protected activities fails to state a claim under the whistleblower provisions of 49 U.S.C. § 42121. Complainant's reporting of "smuggled" individuals violating weight and balance restrictions on aircrafts does not qualify as protected activity because she has not cited an FAA regulation or standard that mandates such a limitation. Instead, Complainant provides only unsupported contentions that weight and balance issues are detrimental to aircraft safety, and in one instance, she suggests that the restriction stems from a US Airways company policy, titling a section in her pleadings as "US Airways Policy on Weight restricted [sic] Flight." Because Complainant has failed to cite a specific FAA order, regulation or standard that issues weight and balance restrictions on flights, she has not alleged a sufficient protected activity in support of a valid whistleblower claim.

In addition, Claimant's allegation that she was the subject of "airport rage" also fails to state protected activity. 49 U.S.C. § 46503 was enacted after September 11, 2001, to provide a criminal penalty for interfering with airport security. Complainant's position with US Airways as a Customer Service Agent lacks the required security responsibilities needed for Complainant to be protected under that law. While Complainant contends that she has some broad security duties, she in no way could be considered "security screening personnel," as the statute mandates.<sup>5</sup>

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discussed as a result. The alleged discrimination Complainant encountered, and the retaliation she incurred as a result of her complaints about such discrimination, while unfortunate, in no way relate to a violation of FAA orders, regulations, or standards, and thus do not fall within the whistleblower protections of 49 U.S.C. §42121.

<sup>5</sup> 49 U.S.C. § 46503 provides:

§ 46503. Interference with **security screening personnel**

An individual in an area within a commercial service airport in the United States who, by assaulting a Federal, airport, or air carrier employee who has security duties within the airport, interferes with the performance of the duties of the employee or lessens the ability of the employee to perform those duties, shall be fined under title 18, imprisoned for not more than 10 years, or both. If the individual used a dangerous weapon in committing the assault or interference, the individual may be imprisoned for any term of years or life imprisonment.

49 U.S.C. § 46503 (emphasis added).

Lastly, Complainant's reporting of Nicole Blanchard's expired nursing license also does not establish adequate protected activity under AIR 21. A complaint regarding an individual practicing nursing without a license is not related to air carrier safety. Again, Complainant cites no FAA standard, order, or regulation that would cause her actions to be protected under AIR 21 in reporting an expired nursing license. Nursing licenses are within the purview of the Department of State Licensing Compliance for regulation.

Turning now to whether Complainant's alleged protected activities present an objectively reasonable perceived violation of federal laws touching on or relating to air carrier safety, I find that Complainant has not met that burden. Moreover, Complainant has not alleged enough facts to state a claim for relief that is plausible on its face, and as such, she has not detailed sufficient facts to even determine whether her perception was reasonable. Complainant has simply strung together a myriad of events in her pleadings, which do not provide the undersigned with enough information to form a complete picture of her state of mind. Because each scenario of alleged protected activity is inconsistent across pleadings and factually insufficient, I find that Complainant's complaint must be dismissed.

### III. CONCLUSION & ORDER

In light of the above discussion, I find that:

1. Complainant's Motion for Leave to File Amended Complaint is **DENIED**.
2. Complainant's references to settlement negotiations are hereby stricken.
3. Respondent's Motion to Dismiss Complainant's Complaint in Its Entirety is **GRANTED**.

In view of the foregoing, Complainant's complaint is hereby **DISMISSED**.

**ORDERED** this 23<sup>rd</sup> day of April, 2015, at Covington, Louisiana.

LEE J. ROMERO, JR.  
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).