



Issue Date: 04 August 2015

CASE NO.: 2015-AIR-00016

OWCP NO.:

In the Matter of:

JEREMIAS ZAVALETA,
Complainant,

v.

ALASKA AIRLINES, INC.,
Respondent.

ORDER GRANTING SUMMARY DECISION

This claim arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121. On May 29, 2015, Respondent filed a Motion for Summary Decision (“Motion”). On June 26, 2015, Complainant filed his Opposition. On July 13, 2015, Respondent filed a Reply. This matter is currently set for hearing on October 7 and 8, 2015, in Sacramento, California. Complainant appears in this matter in pro se. Respondent is represented by Harry Korrell, Attorney at Law.

Respondent argues that summary decision is appropriate because Complainant cannot establish that he engaged in protected activity, that he suffered an adverse action, or that there was a connection between the protected activity and the adverse action. Mot. at 16. It argues that when Complainant sent e-mails about safety issues he was not engaging in protected activity. Mot. at 16-17. Respondent also contends that none of the actions it took with regards to Complainant constitute adverse actions. Mot. at 19. Finally, Respondent argues that, given the timing of its investigations and Complainant’s alleged protected activity, Complainant cannot prove a causal relationship between the alleged protected activity and adverse actions. Mot. at 22.

Complainant alleges that he engaged in protected activity and suffered adverse actions when he reported improperly installed landing gear and was subjected to retaliatory investigation, harassment, damage to his reputation, false accusations of fraud, a violation of his FMLA, threats of termination, stress, a failure to be considered for a promotion, and a demotion. Opp’n at 11. Complainant’s Opposition contains little in the way of argument, and primarily consists of a series of transcribed e-mails sent by Complainant to other persons. Since Complainant is proceeding in pro se, I have liberally construed his statements. *Young v. Schlumberger*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9-10 (ARB Feb. 28, 2003).

As discussed below, I find that Complainant has failed to demonstrate that there is a genuine issue of material fact that he suffered an adverse action. Therefore, Respondent's motion is granted and the matter is dismissed.

Statement of Facts

All facts are taken from the parties' filings in this case and from the attached exhibits, which are admitted into evidence for the purposes of this ruling only.

Complainant was employed by Respondent since 1998, first as an Aircraft Technician and, from 2004, as an Inspector in Everett, Washington. Mot. at 3. As an Inspector, his duties included ensuring that aircraft were airworthy, performing inspections of maintenance actions, and ensuring vendor compliance with Respondent's safety policies. Opp'n at 1-2. In January 2012, Respondent outsourced its maintenance operations to locations in Oklahoma City, Oklahoma, and Greensboro, South Carolina, causing Complainant to be furloughed. Mot. at 3. Complainant took a position as Lead Line Aircraft Technician with Respondent in San Francisco, California, but, later in 2012, Respondent conducted layoffs in San Francisco, so Complainant bid on an Inspector position in Oklahoma City. Mot. at 4. Complainant accepted the job in Oklahoma City even though it would mean commuting California, where Complainant and his ill father lived. Mot. at 4-5. Complainant was granted intermittent leave to care for his father between August 18, 2013, and February 17, 2014. Mot. at 5 n. 1.

On August 27, 2013, Complainant was scheduled to work from 10:30 a.m. to 8:30 p.m. Mot. at 5. At 10:49 a.m., Complainant e-mailed his manager, Kelly Robinson, his supervisor, Abdul Kahn, another inspector, and two maintenance representatives about an issue he had identified on an aircraft. Mot. at 5. This was similar to other e-mails Complainant had sent on August 1, 2, 9, 11, 19, and 25 as part of his Inspector duties. Mot. at 5; Robinson Decl. Ex. B. Also on August 27, 2013, at 4:50 p.m., Manager of Vendor Maintenance Tim Bunnell saw that Complainant was not in the office and contacted the manager Ms. Robinson. Mot. at 5. A few days later, Ms. Robinson contacted Labor Services Manager Sonia Alvarado, who recommended a review of Complainant's timekeeping practices, including his time and flight records. Mot. at 6. Ms. Alvarado conducted an initial review of Complainant's records. Mot. at 6.

On September 3, 2013, Respondent granted Complainant a temporary hardship posting to San Francisco, allowing Complainant to work as an Aircraft Technician for 60 days while being paid as an Inspector. Mot. at 6-7. On September 4, Ms. Alvarado met with Complainant, along with Ms. Robinson and two union representatives. Mot. at 7. Ms. Alvarado felt that Complainant was not providing direct answers to her questions, which were "yes or no" questions, so she terminated the meeting after a few hours and scheduled a follow-up meeting for September 12. Mot. at 7; Robinson Decl. at ¶ 13; Alvarado Decl. at ¶ 11-12. Ms. Alvarado thought that the September 12 meeting, attended by Complainant, Ms. Alvarado, Ms. Robinson, and two union Representatives who had not been at the September 4 meeting, was similarly unproductive. Mot. at 7; Alvarado Decl. at ¶ 13.

On September 30, 2013, Complainant sent an e-mail to Tammy Young, Respondent's Vice-President, Human Resources Administration, alleging that Ms. Alvarado had harassed him and that Mr. Bunnell had retaliated against him. Mot. at 8; Lautman Decl. at ¶ 9. In response, Ms. Alvarado was taken off of the investigation of Complainant's timekeeping practices and replaced by Scott Lautman, Manager of Human Resources, and attorney Ken Diamond was hired to perform an outside investigation of the harassment and retaliation allegations. Mot. at 8; Lautman Decl. at ¶ 10.

On October 10, 2013, Complainant contacted Respondent's Chief Operations Officer to raise safety concerns. Mot. at 8. On November 8, Complainant met with Mr. Lautman, Ms. Robinson, Mr. Kahn, and a union representative to convey the results of the investigation into Complainant's timekeeping practices, the outside investigation performed by Mr. Diamond, and the investigation into Complainant's October 10 safety concerns. Mot. at 9. Mr. Lautman told Complainant that there would be no discipline related to the timekeeping investigation since all of the inspectors in Oklahoma City had been violating company policy when tracking their hours. Mot. at 10; Robinson Decl. at ¶ 17; Lautman Decl. at ¶ 14. The evidence did not directly say, but it is reasonable to infer that the investigation included all of the inspectors in Oklahoma City due to the finding. Mr. Lautman also said that Mr. Diamond's investigation had not found any evidence of harassment or retaliation toward Complainant by either Ms. Alvarado or Mr. Bunnell, and that Respondent's safety department had concluded that none of the safety issues which Complainant had raised posed a safety risk. Mot. at 10-11; Robinson Decl. at ¶ 18; Lautman Decl. at ¶ 15, Ex. E.

On November 10, 2013, Complainant's temporary hardship posting to San Francisco ended and he returned to work in Oklahoma City. Mot. at 11. Pursuant to the collective bargaining agreement, Respondent denied Complainant's request for an additional temporary hardship posting. Mot. at 11; Lautman Decl. at ¶ 17. On December 4, 2013, Mr. Kahn held a meeting with the Inspectors in Oklahoma City to discuss work attendance and timekeeping. Mot., Robinson Decl. at ¶ 17, Ex. E. Respondent granted Complainant first recall rights for a line aircraft technician position in San Francisco on which he had bid, and Complainant took the position effective December 13, 2013, after being assured that his seniority would not be reduced. Mot. at 12; Alvarado Decl. Ex. G-I. Since that time, Complainant has received two pay raises, a longevity pay increase on June 28, 2014, of \$0.05/hr, and an unspecified increase on October 11, 2014, of \$0.50/hr. Mot. at 12-13.

In late 2014 and early 2015, Complainant applied for but did not receive two management positions with Respondent, both of which were non-contract, not subject to seniority, and open to external applicants. Mot. at 13. Hiring for the manager of line maintenance position for which Complainant applied on October 7, 2014, was delayed from the initial posting date, and the job was reposted at the end of January 2015. Mot. at 13; Taute Decl. at ¶¶ 4-6. Amy Taute, a human resources generalist for Respondent, e-mailed Complainant on January 29, 2015, instructing him to respond to her e-mail if he still wished to be considered for the manager of line maintenance position. Mot. at 13; Taute Decl. at ¶ 7. Complainant did not respond, and Ms. Taute concluded that he did not wish to be considered for the job. Mot., Taute Decl. at ¶ 8. Complainant also applied for a position as an airframe vendor maintenance representative but was screened out by Bruce David, Director of Vendor Maintenance and hiring manager for the position, because Complainant did not have the necessary qualifications. Mot. at 13.

Legal Standard

The administrative law judge ("ALJ") may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.72(a); *see also* Fed. R. Civ. P. 56(c). In cases before this Office, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011),

In a motion for summary decision, the initial burden is on the moving party to demonstrate that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once this burden is met, the non-moving party must establish the existence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). “A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the action.” *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-13, slip op. at 5 (ARB May 27, 2010) (internal quotation marks deleted). In opposing a motion for summary decision, the non-moving party may not rest upon mere allegations or denials, but instead must cite to particular materials in the record or show that materials cited do not establish the absence of a genuine dispute. 29 C.F.R. § 18.72(c); see *Anderson*, 477 U.S. at 250. In assessing a motion for summary decision, all evidence is viewed in a manner most favorable to the non-moving party. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 255; *Mara*, ARB. No. 10-051, slip op. at 5.

To succeed on a whistleblower claim made under AIR 21, the complainant must show by a preponderance of the evidence that: “[the complainant] engaged in protected activity under Section 42121; that the employer was aware of [the complainant’s] protected activity; that the complainant suffered unfavorable or adverse personnel action at the behest of [the] employer; and that the protected activity was a contributing factor in the adverse personnel action.” *Alexander v. Atlas Air, Inc.*, ARB No. 12-030, ALJ No. 2011-AIR-003, slip op. at 4 (ARB Sept. 27, 2012). A preponderance of the evidence standard requires that the evidence go beyond a mere inference; thus, to prevail “a complainant must prove unlawful discrimination” by superior evidentiary weight that would “incline a fair and impartial mind to one side of the issue rather than the other.” *Brune v. Horizon Air Industries*, ARB Case No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14 (ARB Jan. 31, 2006). If the complainant is successful in proving discrimination by a preponderance of the evidence, the employer may still avoid liability if it can show, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. See *id.* (citing 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. §1979.109(a)).

Viewed in the light most favorable to Complainant, the evidence here fails to establish a genuine issue of material fact as to whether Complainant was subject to any adverse action. For an alleged adverse action to be actionable under AIR 21, it must be “‘materially adverse’: that is, ‘harmful to the point that [the action] could well dissuade a reasonable worker from making or supporting a charge of discrimination.’” *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int’l Union (PACE)*, ARB No. 04-111, ALJ No. 04-AIR-19, slip op. at 12 (ARB Aug. 31, 2007) (quoting *Burlington Northern Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). An employer may not discharge “or otherwise discriminate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment,” or to “intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate” against an employee for engaging in protected activity. 29 C.F.R. § 1979.102(a)-(b).

Complainant contends that the investigation into his timekeeping constitutes adverse action, and that he was verbally abused and treated with “contempt in a hostile manner throughout the investigation.” Opp’n at 11. He did not, however, provide any evidence, apart from his own statements in e-mails to various persons, that any mistreatment took place. Complainant said that he was “retaliated against and harassed” by Ms. Alvarado but did not specify how, Opp’n at 3, and that Mr. Bunnell made false accusations against him, but did not say what those false accusations were or provide evidence of any accusations, true or false. Opp’n at 5. Complainant also said that Ms. Alvarado was vicious, hostile, and intimidating, accused him of fraud, and made threats to terminate

his employment, but again did not provide any details or documentation of the alleged intimidation, accusations, or threats. Opp'n at 5, 6. He claimed that an unnamed union rep told him that Ms. Alvarado was "trying to make any excuse to terminate [his] employment," but did not indicate how he or the union rep came by that information, or suggest that the union rep was willing to testify. Opp'n at 5. He did provide an e-mail from Ms. Alvarado regarding documentation of Complainant's hours, Opp'n at 7, 9, but the e-mail is not threatening, coercive or harassing in any way, even viewed in the light most friendly to Complainant's allegations. On the contrary, it is an even-handed request that Complainant clarify whether he would be providing a notebook with supporting documentation to her, and a statement that if he was not providing any additional information Respondent would "make a decision with what information [they] do have." Opp'n at 9. Complainant argues that the e-mail violated his FMLA, but does not explain how, and it is not readily apparent. Opp'n at 8.

Complainant said that Respondent tried to "eliminate" him, and that "[w]hile they did not actually terminate my employment, the only reason [Respondent] finally stopped their investigation is because they heard that OSHA and the FAA were involved." Opp'n at 11-12. This is pure conjecture on Complainant's part, as he provided no evidence to support his contention either that Respondent had attempted to fire him, or that Respondent halted its investigation in response to OSHA or FAA involvement. On the contrary, Respondent's evidence shows that the investigations, including the investigation by an independent attorney into Complainant's allegations of retaliation and harassment, ended only after a full inquiry. Complainant suggests that Respondent's continuing the investigation into timekeeping practices and initiating the investigation into his allegations of retaliation was somehow retaliation. Opp'n at 7, 11. He does not explain how the investigation by outside counsel into his own allegations of harassment and retaliation constitute further retaliation.

Similarly, Complainant does not explain or provide any evidence to support his contention that his reputation was harmed, either as an employee of Respondent or in the broader community. He does not point to any instances where he was accused of fraud by anyone. He does not offer any concrete evidence that he was ever threatened with termination. Respondent's investigation into timekeeping practices ended with no disciplinary action and nothing was added to Complainant's station file, which is equivalent to a personnel file, as a result of the investigation. Mot., Lautman Decl. at ¶ 18, Ex. E at 3.

Complainant said that, when he was recalled to San Francisco, Respondent "wanted [him] to lose all of [his] Inspector and Lead Seniority rights," and that Complainant had to "go to the Labor Director" to regain his rights. Opp'n at 6. The evidence he provided, however, does not indicate that Complainant ever lost his seniority rights, and Respondent's exhibits show that Complainant retained his seniority both when he was granted a temporary hardship posting and when his bid to return to San Francisco was granted. Mot., Alvarado Decl. Exs. G-I. Similarly, he did not offer any evidence which suggests that there was a lead mechanic position open in San Francisco which he should have been offered rather than the line mechanic bid position he accepted. Opp'n at 11.

Complainant's final contention is that he was improperly not considered for a promotion. The evidence indicates that Complainant applied for two jobs, which were not promotions but rather non-contract managerial positions. Mot., Taute Decl. at ¶ 5; David Decl. at ¶ 5. Complainant was not hired for one position, as a manager of line maintenance, because, according to Respondent's evidence, he applied but did not respond to the recruiter's follow up. Mot., Taute Decl. at ¶ 7-8. Complainant did not supply any evidence or explanation to refute this point. Complainant was considered, but ultimately not selected, for the position as airframe vendor maintenance representative because he did not have experience overseeing vendor workflow or managing vendor

relationships, while the individual ultimately selected had experience as a liaison between an airline and vendors. Again, Complainant did not offer anything more than his own allegations to refute Respondent's evidence.

While pro se complainants may be held to a lesser standard than legal counsel, especially in procedural matters, they still must meet the same burden of proving the necessary elements for a claim. *Grizzard v. Tennessee Valley Authority*, Case No. 90-ERA-52, slip op. at 4 n.4 (Sec'y Sept. 26, 1991). To survive summary decision, the nonmoving party may not rest "upon the allegations of his complaint, speculation or denials, but must set forth specific facts that could support a finding in his favor." *Alexander*, ARB No. 12-030, slip op. at 5. Given that Complainant has failed to provide any evidence that he was subject to an adverse employment action apart from vague and repetitive accusations of harassment, retaliation, and threats, and that Respondent has provided declarations and documentary evidence which indicate that Complainant was not subject to any adverse employment action, I find that Respondent has carried its burden, and that Complainant has not.

Complainant has not shown a genuine dispute of material fact that he was subject to any adverse action by Respondent. Therefore, the motion for summary decision is granted.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

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, 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. § 1979.110(a). 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).

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. § 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).