



**Issue Date: 15 November 2016**

Case No.: 2016-AIR-00024

In the Matter of

**CYNTHIA BRIGHT**

Complainant

v.

**JET BLUE AIRWAYS CORPORATION**

Respondent

**DECISION AND ORDER DISMISSING COMPLAINT DUE TO ABANDONMENT AND FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS**

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.<sup>1</sup> Implementing regulations are at 29 CFR Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003). Per 49 U.S.C. § 42121(b)(2)(A), and implemented by 29 CFR § 1979.100(b), the hearing in this matter is to commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties.

Procedural History

On September 25, 2012, the Complainant filed a complaint alleging discrimination by the Respondent because of whistleblower activities. In the complaint, the Complainant alleges that she was wrongfully terminated on July 6, 2012.

On May 6, 2016, the Occupational Safety and Health Administration (hereafter OSHA) issued its findings. OSHA found that the Respondent was an air carrier within the meaning of 49 U.S.C. §§ 42121 and 40102(a)(2), and that the Complainant was an employee within the meaning of § 42121 and covered by AIR 21. However, OSHA found that the Respondent terminated the Complainant after it had investigated a complaint accusing the Complainant of closing her eyes and thus giving the appearance that she was sleeping while on duty, in violation of the Respondent's Crewmember Blue Book and Flight Attendant Manual. Thus, OSHA dismissed the Complainant's complaint.

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<sup>1</sup> Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. See 49 U.S.C. § 42121.

By correspondence dated June 14, 2016, the Complainant mailed a letter to the Office of Administrative Law Judges (hereinafter OALJ). This letter was considered an appeal of the OSHA findings and the matter was referred to this Tribunal for adjudication.

On June 23, 2016, this Tribunal issued a Notice of Assignment and Conference Call, notifying the parties that a teleconference would take place on July 7, 2016 at 11:00 a.m. In this Notice, the parties were specifically directed to provide, within ten days of the date of this Order, a statement in writing that sets forth the party's positions in matters including any anticipated discovery issues. In this Notice this Tribunal informed the parties as follows:

**Discovery is to commence immediately.**<sup>2</sup> Within 21 days from the date of this order, and without awaiting a formal discovery request, the parties must provide to all other parties the documents and information set forth in 29 C.F.R. § 18.50(c)(1)(i). The Parties are advised that I have broad discretion to limit discovery in order to expedite the hearing and therefore they should begin their discovery immediately and plan accordingly. 29 C.F.R. § 1979.107(b).

On July 5, 2016, Respondent's counsel replied, asserting among other things, that the Complainant's complaint was not timely filed with OSHA, a question remained as to whether her appeal was timely, and that Respondent's counsel did not anticipate any significant discovery issues.

The Complainant informed this tribunal that she could not participate in the teleconference scheduled for July 7, 2016 due to treatment for a medical illness. In an Order dated July 6, 2016, the Tribunal rescheduled the teleconference for July 25, 2016. The teleconference was held as scheduled.

On July 28, 2016, this Tribunal issued a Notice of Hearing and Pre-Hearing Order setting a date for hearing of January 10, 2017 through January 12, 2017 in Boston, Massachusetts. This Order also informed the parties, among other things, that discovery was to commence immediately and was to be completed no later than November 11, 2016, and that a pre-hearing teleconference would be held on January 6, 2017.

On August 30, 2016, Respondent's counsel filed Respondent's Motion to Compel Initial Disclosures and Response to Discovery Requests Served July 7, 2016. *See* 29 C.F.R. § 18.21. Having not received a response from the Complainant, the Tribunal issued a Discovery Order dated September 1, 2016, directing the Complainant, within fourteen days of the date of the Order, to:

1. Comply with her initial discovery obligations as set forth in 20 C.F.R. § 18.50(c)(1);
2. Answer the Respondent's First Set of Interrogatories; and

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<sup>2</sup> This Tribunal also directed the Parties to familiarize themselves with the new rules, particularly the discovery rules at 29 C.F.R §§ 18.50 – 18.65. This notice informed the parties that the new rules are accessible at the following website: <https://www.federalregister.gov/articles/2015/05/19/2015-11586/rules-of-practice-and-procedure-for-administrative-hearings-before-the-office-of-administrative-law>.

3. Produce the documents requested responsive to Respondent's First Set of Requests for Production of Documents, except that she need not answer requests numbers 9 and 10.

Complainant was cautioned about the consequences of failing to comply with the Discovery Order, and warned that failing to comply with the Order could result in dismissal of her complaint.

On September 20, 2016, the Respondent's counsel filed Respondent's Motion to Dismiss for Failure to Comply with Discovery Order. In its Motion, Respondent's counsel indicated that it had not received any discovery responses or initial disclosures from the Complainant.

On October 11, 2016, this Tribunal issued an Order Directing Complainant to Respond.<sup>3</sup> In this Order, this Tribunal recounted the above history and noted that Complainant had been previously ordered to comply with her discovery obligations, including answering the Respondent's First Set of Interrogatories and to produce documents responsive to Respondent's First Set of Requests for Production of Documents, except for requests numbered 9 and 10. Respondent was again cautioned about the consequences of failing to comply with a Discovery Order, and again warned Complainant that failing to comply with that Order could result in dismissal of her complaint. Despite all of the prior warnings, Complainant was given fourteen days to show cause why her claim should not be considered as abandoned for her failure to cooperate in discovery.

On October 25, 2016, this Tribunal received from Complainant via facsimile a two-page letter. In this letter, Complainant explained that she has been seeking counsel but has not been able to find an attorney "who feels competent to take on a Whistle Blower [sic] lawsuit of this type and represent me sufficiently." She said that she was dealing with personal matters, including health issues. She wrote "I have tried to seek help in basic answers as to exactly what [Respondent's counsel] was asking me to provide. I am more than willing to accommodate the orders and requests, however, I am just not sure what is being asked." She reasserts that she wishes to have the facts and matters concerning the incident presented, and that she does not "wish to see this case dismissed." Finally, she claims that she wishes "to do whatever [sic] necessary to accommodate [Respondent counsel's] demands, to facilitate the matter moving forward."

On October 31, 2016, this Tribunal issued a Second Order Directing Complainant to Respond. In this Order, this Tribunal recounted all of the steps it has taken to encourage

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<sup>3</sup> In actuality, this Tribunal issued the Order Directing Complainant to Respond on September 23, 2016 which gave Complainant fourteen days to respond. However, it was discovered that this Tribunal could not establish that Complainant had been served that Order so the Tribunal reissued the Order, dated October 11, 2016. This Tribunal was able to establish that Complainant had received both that October 11, 2016 Order and the October 31, 2016 Order for served Complainant via these documents by UPS overnight delivery signature required. The October 11, 2016 document was served via UPS tracking number 1ZW0Y2350198776054 and the October 31, 2016 Order was served via UPS tracking number 1ZW0Y2350190112203. The documents were also sent via regular mail. None of the documents were returned to this office.

Complainant to comply with her obligations under a Discovery Order. She was warned “this Tribunal will give Complainant **one last chance to comply with its Discovery Order.**” (emphasis in original). She was further cautioned “**Failure to adequately respond to Respondent’s discovery requests within ten (10) days of the date of this Order will be construed as Complainant abandoning her claim and this matter will thereafter be dismissed with prejudice.**” (emphasis in original).

On November 11, 2016, Complainant sent “responses” to Respondent’s interrogatories.<sup>4</sup> Her responses were untimely. Further, her responses were vague and did not address the questions posed. Instead, Complainant said, for example, that the documents requested were in boxes where her computer was located “and would take weeks to locate all of the documents.” Complainant’s Response to Interrogatory No. 1. When asked to identify the names of persons relevant to her claim she wrote that “she could not recall the names of all of the individuals she sought help from.” Complainant’s Response to Interrogatory No. 3. Complainant did not identify a single person or a single document in response to Respondent’s interrogatories concerning persons that knew of her allegations, the alleged incident, or treatment providers, or documents that support her assertions. In short, Complainant’s “answers” remain non-responsive to the interrogatories posed by Respondent.

#### Discussion

If a party fails to obey an order to provide or permit discovery, an administrative law judge may issue further just orders. *See* 29 C.F.R. § 18.57(b). As result of Complainant’s failure to respond to discovery, this Tribunal has had to issue both a Discovery Order, an Order to Directing Complainant to Respond and a Second Order Directing Complainant to Respond. This Tribunal has been more than patient in giving the Complainant an *opportunity* for a hearing; there is no unqualified right to a hearing, particularly when a party fails to comply with its discovery obligations. *See* 5 U.S.C. § 554(c).

These are adversarial proceedings. Title 29 C.F.R. § 18.57 gives the Administrative Law Judge broad powers to regulate discovery. Complainant has filed a complaint alleging violations of AIR-21. A party cannot merely make an allegation and refuse to cooperate in the discovery process; discovery is a two-way street. This Tribunal repeatedly has informed the Complainant of her obligation to cooperate in the discovery process. *See* Notice of Hearing and Conference Call, at 2; Tr.<sup>5</sup> at 15-19; Notice of Hearing and Pre-Hearing Order, at 2; Discovery Order, at 2-3; and Second Order Directing Complainant to Respond, at 4.

This Tribunal recognizes that the Complainant appeared *pro se* and may not be well-versed in the discovery process. This Tribunal has previously informed the Complainant that its Rules of Practice and Procedure exist, where to find those rules, and repeatedly warned her about

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<sup>4</sup> Prior to issuing this decision, on November 14, 2016, this Tribunal contacted Respondent’s counsel to see what, if any, response it had received from Complainant. Upon learning that Complainant had provided a response, this Tribunal asked that Complainant’s responses be forwarded to this Tribunal as Complainant had not provided this Tribunal with copies of her responses to Respondent’s interrogatories. Copies of those responses have been added to the administrative record.

<sup>5</sup> “Tr.” refers to the transcript of the July 25, 2016 teleconference.

the consequences of failing to comply with this Tribunal's rules. Further, this Tribunal issued two Orders specifically explaining to Complainant what is required to be provided to opposing counsel as part of the discovery process. This Tribunal can do little more without stepping out of its role as an adjudicator.

For all the foregoing reason, this Tribunal finds Complainant has failed to comply with her discovery obligations as set forth in 29 C.F.R. § 18.50(c)(1). After repeated warnings, this Tribunal finds the appropriate remedy is dismissal per 29 C.F.R. § 18.57(b)(1)(v).

Independent of its powers under 29 C.F.R. § 18.57, this Tribunal possesses the "inherent power" to dismiss a case on its own initiative for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962); *see also* 29 C.F.R. § 18.12(b). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link, supra*, at 630-631. Dismissal as a sanction for failure to prosecute is a matter within the administrative law judge's sound discretion. *Ferguson v. Bomac Lubricant Techs., Inc.*, ARB No. 04-057, ALJ No. 2002-STA-27 (ARB June 29, 2005). Like the courts, the Department of Labor's Administrative Law Judges must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." This Tribunal separately finds that Complainant has abandoned her claim.

For all the foregoing reasons, the Complaint in this matter is hereby **DISMISSED** with prejudice.

SO ORDERED.

**SCOTT R. MORRIS**  
Administrative Law Judge

Cherry Hill, NJ