U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 December 2016

Case No.: 2016-AIR-00030

In the Matter of:

BRYAN M. DeLAURA
Complainant

v.

LEADING EDGE AVAIATION SERVICES
Respondent

ORDER DISMISSING COMPLAINT

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.[1] Implementing regulations are at 29 C.F.R. 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.

On December 29, 2014, Complainant filed a complaint alleging harassment, intimidation, hostile work environment, and constructive discharge by Respondent because of Complainant's whistleblowing activities. Complainant was terminated on August 6, 2014.

On August 19, 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, because Complainant requested that OSHA terminate its investigation and issue a determination based on the information it gathered at the time of the request, OSHA was unable to conclude that there was

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[1] Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121.

reasonable cause to believe a violation of the statute occurred. Thus, OSHA dismissed the complaint.

On September 7, 2016, Complainant submitted an objection to the Office of Administrative Law Judges ("OALJ"), appealing OSHA's findings. The matter was subsequently referred to this Tribunal for adjudication.

On September 23, 2016, this Tribunal issued a Notice of Assignment and Conference Call, notifying the parties that a teleconference would occur on October 11, 2016, at 2 p.m. Eastern Time. In this Notice, the parties were specifically directed to inform this Tribunal whether the Complainant's OSHA complaint was timely, whether the Complainant's appeal to OALJ was timely, whether the parties were properly identified and designated, the discrete acts of retaliation or discrimination alleged, feedback on proposed hearing dates and location, and any anticipated discovery issues. Respondent submitted its prehearing statement addressing these matters on September 30, 2016. Complainant did not respond to this Notice.

On October 11, 2016, this Tribunal held a pre-hearing teleconference where Complainant participated. The Tribunal explained to the parties the expectations in proceeding forward.

On October 12, 2016, this Tribunal issued a Notice of Hearing and Pre-Hearing Order setting the hearing for Tuesday, March 21, 2017 through Thursday, March 23, 2017 in Long Beach, California.

Respondent filed a Motion to Dismiss Complainant's Claim on November 7, 2016, arguing that Complainant's claim was untimely, and that the limitations period for bringing his claim had passed.

This Tribunal's office received an email from Complainant on November 20, 2016 stating that he "was giving up [his] claim." The Tribunal interpreted this communication as a motion to withdraw Complainant's objection to OSHA's findings below. 29 C.F.R. § 1979.111(c) permits a party to withdraw his or her objection to the findings or preliminary order of the Secretary at any time before the findings or order become final.

Because this request came in the form of an unsigned email, on November 20, 2016, this Tribunal issued an Order to Show Cause on November 21, 2016 giving Complainant the opportunity to clarify this Tribunal's understanding. This Tribunal gave Complainant until December 7, 2016 to notify it if he did <u>NOT</u> wish his claim to be dismissed. This Tribunal further instructed Complainant that, if it did not receive a response from Complainant by this date, it will assume that Complainant intended the email to be a request to withdraw his claim and would dismiss his claim with prejudice.

To date, Complainant has not responded to this Tribunal's Order to Show Cause concerning his request to dismiss his claim. Therefore, as set forth in the November 21, 2016 Order, this Tribunal will assume that Complainant intended his November 20, 2016 email to serve as his request to withdraw his appeal of the findings below. There is no evidence before

the Tribunal that Complainant's act or failure to act was made by threat of coercion. Thus, this Tribunal finds that Complainant's withdrawal request to be knowing, intelligent and voluntary.

Accordingly,

- Complainant's written request to withdraw his appeal of the Secretary's Findings is **GRANTED**; his complaint is hereby **DISMISSED** with prejudice
- OSHA's findings are **REINSTATED, AFFIRMED, and FINAL.**
- The hearing set to begin March 21, 2017 is hereby **CANCELLED.**

SO ORDERED

Digitally signed by Scott R. Morris
DN: CN=Scott R. Morris,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

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).