



Issue Date: 07 February 2018

Case No.: 2017-AIR-00029

In the Matter of

**AZIZ AITYAHIA,
Complainant**

v.

**AVIATION ACADEMY OF AMERICA,
Respondent**

RULING ON RESPONDENT'S MOTION TO DISMISS

1. Nature of Motion. The case arises pursuant to a complaint alleging violations under the employee protective provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or "the Act"), 49 U.S.C. § 42121 and the implementing regulations at 29 C.F.R. Part 1979. Pursuant to 29 C.F.R. § 18.70, Respondent filed a "Motion to Dismiss" for lack of jurisdiction under the Act. Respondent specifically asserts that it is not an organization covered by the terms of the Act and thus Complainant was not an employee subject to the protections of the Act.

2. Procedural History and Findings of Fact.

a) On June 10, 2017, Complainant filed a whistleblower allegation against Respondent with the Occupational Safety and Health Administration (OSHA). On July 3, 2017, Complainant was notified by letter that OSHA would not investigate the complaint and dismissed it because OSHA lacked jurisdiction over the matter. Specifically, OSHA determined that Respondent was not an air carrier or contractor or subcontractor within the meaning of AIR 21. OSHA also determined Complainant was not an employee within the meaning of the Act. On August 8, 2017, Complainant filed an objection to the OSHA findings and requested an appeal and hearing before the Office of Administrative Law Judges (OALJ).

b) On September 13, 2017, the undersigned issued a Notice of Case Assignment and Prehearing Order in this matter.

c) In compliance with the order, Complainant filed a pleading complaint on October 2, 2017, and Respondent filed a complaint response on October 11, 2017.

d) On November 27, 2017, Respondent filed the Motion to Dismiss¹ addressed by this ruling and order.

e) On December 28, 2017, Complainant filed a response to Respondent's Motion to Dismiss.²

f) Respondent is an aviation flight school operating at two airports in Texas. Respondent's primary and sole business enterprise is to provide aircraft pilot training programs. It does not offer passenger or cargo transportation services, and it has not contracted with any air carrier to provide aircraft service or maintenance or perform safety-sensitive functions on aircraft.

g) Respondent is a subsidiary company of Vision Technologies Aerospace Inc. (VT Aerospace). As Respondent's direct parent company, VT Aerospace is, in turn, one of several subsidiary companies operating under Vision Technologies Systems (VT Systems). VT Systems is a primary subsidiary of Singapore Technologies Engineering, Ltd. (ST Engineering). This corporate structure makes Respondent a third-tier subsidiary of ST Engineering.

h) In addition to Respondent, VT Aerospace is also the direct parent company of several other subsidiaries. One of those subsidiaries, Singapore Technologies Aerospace, Ltd., has a contract with Alaska Airlines, a U.S. air carrier, to provide aircraft maintenance and repair services.

i) Although Respondent is a subsidiary of VT Aerospace, it maintains and utilizes independent employment policies and procedures. Respondent also possesses independent insurance policies that are separate and distinct from those of its parent companies. The one notable area of business interaction between Respondent and VT Aerospace involves procuring payroll, information technology, finance, and human resources support from VT San Antonio Aerospace, which is another subsidiary of VT Aerospace.

j) Respondent's senior executive staff includes Mr. Paul Woessner, the General Manager, and Mr. Yusuke Kusajima,³ Chief Pilot. Both are directly employed by Respondent and are not employees of any other ST Engineering company.

k) In his position as Respondent's General Manager, Mr. Woessner makes all occupation decisions related to Respondent's employees. His managerial employment authority includes the ability to hire and promote employees, set pay rates, impose disciplinary action, and terminate an employee. Mr. Woessner hired Complainant to be a flight instructor for Respondent in March 2016. Mr. Kusajima and Mr. Woessner directly supervised Complainant during his employment with Respondent. Complainant was not supervised or managed by anyone not employed by

¹ Respondent's motion is marked as Appellate Exhibit 1 (AX-1)

² Complainant's response to AX-1 is marked as Appellate Exhibit 2 (AX-2)

³ In AX-1, Respondent's Chief Pilot is identified as Yusuke Fukajima. However, in Exhibit 1, attached as supporting evidence for AX-1, Mr. Woessner names Respondent's Chief Pilot as Yusuke Kusajima. The undersigned interprets the name Fukajima as a careless misidentification made by counsel while composing the motion.

Respondent. Mr. Woessner ultimately decided to suspend and then later terminate Complainant's employment. He made this decision after consulting an executive in another subsidiary company as well as Respondent's president.

3. Applicable Law and Analysis.

a) *Motions to Dismiss.* The proceedings in AIR 21 cases are conducted in accordance with the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at part 18 of title 29 of the Code of Federal Regulations. 29 C.F.R. § 1979.107(a). A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. 29 C.F.R. § 18.70(c).

b) *Parties' Positions.* Respondent asserts that, as a flight school, it does not qualify as either an "air carrier" or a "contractor or subcontractor" as those terms are defined for the purposes of applying AIR 21 jurisdiction to Complainant's claim. Respondent notes that it does not, by any means, directly or indirectly provide air transportation. Complainant contends that Respondent is a subsidiary of a larger company, which owns another subsidiary company that serves as a main contractor for a U.S. air carrier. As such, Complainant maintains that "air carrier" status should be imputed upon Respondent for the purpose of determining AIR 21 jurisdiction in this matter.

c) *Subject Matter Jurisdiction for an AIR 21 Claim.* Section 42121 of AIR 21 provides that "[no] air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee" for engaging in protected activity. The Act applies only to air carriers, or contractors or subcontractors of air carriers. 49 U.S.C. § 42121(a). Air carriers are defined as citizens of the United States who directly or indirectly provide air transportation. 49 U.S.C. § 40102(a)(2); 29. C.F.R. § 1979.101. A "citizen of the United States" includes a corporation or association organized under the laws of the United States. 49 U.S.C. § 40102 (a)(15)(c).

In determining whether AIR 21 jurisdiction exists in this matter, the threshold question the undersigned must resolve is whether Respondent may be considered an air carrier. In order to be considered an air carrier, Respondent must be an entity that undertakes "by any means, directly or indirectly, to provide air transportation."

"Air transportation means foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5). Interstate air transportation is defined as:

The transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft (A) between a place in (i) a State, territory, or possession of the United States and a place in the District of Columbia or another state, territory, or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a

place outside Hawaii; (iii) the District of Columbia and another place in the District of Columbia; or (iv) a territory or possession of the United States and another place in the same territory or possession; and (B) when any part of the transportation is by aircraft.

49 U.S.C. § 40102(a)(25).

The Administrative Review Board (ARB) previously ruled that “the repeated use of broad language in the AIR 21 statute indicates Congress’s intent that the definition of ‘air carrier’ be expansively construed.” *Cobb v. FedEx Corp. Servs., Inc.*, ARB No. 12-052, ALJ No. 2010-AIR-24 (ARB Dec. 13, 2013); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (expansive scope of a statute is apparent from broadly worded statutory language). The Board in *Cobb* further noted that “by prohibiting ‘contractors and subcontractors,’ as well as air carriers, from retaliating against employees for engaging in protected activity, Congress conveyed a clear aim to promote comprehensive aviation safety.” *Cobb*, ARB No. 12-052, slip op. at 10-12. Additionally, the ARB has applied precedent under which whistleblower statutes “are intended as remedial measures to be broadly construed.” *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 n. 73 (ARB Dec. 29, 2010).

In light of these authorities, the undersigned concludes that an examination of Respondent’s business activities for the purpose of determining whether it qualifies as an air carrier subject to AIR 21 jurisdiction should be expansive and apply the standard set forth by the ARB in its *Cobb* holding.

However, even when applying such an expansive interpretation to this matter, the undersigned concludes the record clearly fails to establish that Respondent is an air carrier. The evidence presented by both parties on this motion indisputably establishes that Respondent operates a flight training school with the sole purpose of educating student aircraft pilots. Nothing in the evidence proves that Respondent undertakes by any means, directly or indirectly, to provide air transportation. Respondent does not in any manner operate as a common carrier that supplies transportation of persons, cargo, or mail for compensation. As such, Respondent cannot be categorized as a “direct” air carrier.

Additionally, Respondent does not engage in the business of maintaining the security of air carriers nor is it in the business of providing integral services necessary for Respondent or another company to provide air transportation. *DHL Corp v. C.A.B.*, 584 F.2d 914, 915 (9th Cir. 1978). In sum, Respondent fails to qualify as either a direct or indirect “air carrier” by any criteria established in the *Cobb* decision.

In determining that Respondent is not an “indirect” air carrier, the undersigned found no persuasive legal authority to support Complainant’s argument that AIR 21 jurisdiction should be imputed to Respondent based on air carrier activities by other subsidiaries of Respondent’s parent company. Complainant argues that - because one of Respondent’s sister subsidiaries, Singapore Technologies Aerospace, Ltd., is a contractor for an air carrier - all subsidiaries under

the control of the main parent company, ST Engineering, should be considered contractors or subcontractors for the purposes of AIR 21 jurisdiction.

Complainant is partially correct in asserting that a respondent in an AIR 21 case can be found to engage in indirect air transportation based on a relationship with a parent company or sister subsidiary company. “The technicalities of corporate structure may not act to shield operating ‘segments’ of an air carrier from the air safety obligations as an air carrier under AIR 21.” *Cobb*, ARB No. 12-052, slip op. at 12; *see, e.g., Fleszar v. U.S. Dept of Labor*, 598 F.3d 912, 915 (7th Cir. 2010) (“In context, ‘contractor, subcontractor or agent’ sounds like a reference to entities that participate in the [parent’s] activities.”).

However, as Respondent correctly notes in its motion, there are no prior district court or ARB case decisions that hold an employer is subject to AIR 21 jurisdiction as an indirect air carrier based solely on a subsidiary relationship to either a parent or sister company engaged in business with an air carrier. As Respondent further accurately points out, the lack of such rulings is consistent with how courts apply the general legal principal that “the mere existence of a common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer.” *Lusk v. Foxmeyer Health Corp.*, 129 F.3d. 773, 778 (5th Cir. 1997).

The ARB in *Cobb* observed that “although there are no statutory criteria for determining an indirect air carrier . . . [g]enerally speaking, indirect air carriers are defined as those who ‘hold out a transportation service to the public under which they utilize the services of a direct carrier for the actual transportation by air.’” *Cobb*, ARB No. 12-052, slip op. at 9 (citations omitted). The Board extended this general precedent to include a subsidiary company that provides critical support to a parent company that operates as an air carrier engaged in air transportation. In so doing, the Board concluded that FedEx Services, a subsidiary of FedEx Express, indirectly provided air carrier services to FedEx Express and was therefore itself an “air carrier” even though the FedEx Services neither owned aircraft nor offered transportation services. *Id.* at 9-13.

In reaching its ruling in *Cobb*, the Board noted that “the operations of FedEx Services are integral to FedEx Express’s operation as an air carrier.” In support of this conclusion, the Board noted that the information technology services, cargo trucking operations, and disaster and security planning provided by FedEx Services were “essential, albeit indirect, components of the integrated all-cargo air service provided by FedEx Express.” *Id.* at 11. Accordingly, the Board concluded that, as a subsidiary, “FedEx Services operations are essential for the air transportation FedEx Express conducts.” *Id.*

No similar relationship exists between Respondent and its parent company or sister subsidiaries. The evidence is indisputable that Respondent operates an independent, stand-alone flight training school. As such, it neither supports - nor relies upon - either its parent company or a sister subsidiary for any integral business support related to air transportation. As reflected in the findings of facts, the only direct interaction Respondent has with any other company in its corporate structure is to utilize a sister subsidiary for its information technology support and administrative services. Such services, while admittedly important to the daily operation of the

business, are not “integral,” “vital,” or “essential” to Respondent’s business of training student pilots. Even assuming arguendo that such services are critical, more importantly, they are not provided to Respondent to enable it to engage in air transportation activities.

Based on the forgoing analysis, the undersigned concludes the uncontroverted facts in this case clearly establish that, as a matter of law, Respondent is neither a direct or indirect air carrier engaged in air transportation activities as defined in the Act. As a consequence, the employee whistleblower protections of AIR 21 do not impose subject matter jurisdiction upon Respondent.

d) *OSH Act Claim.* Alternatively, Complainant asserts that this matter is cognizable before the undersigned pursuant to section 11(c) of the OSH Act, 29. U.S.C. § 660(c). This argument also lacks merit.

Section 11(c)(2) of the OSH Act states:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within 30 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. If any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

The section plainly does not afford a private remedy for actions covered by the OSH Act. *Gomez v. Wilson*, 2013 WL 4099466, *3 (D. Neb., Aug. 13, 2013); *see also Ellis v. Chase Commnc’ns, Inc.*, 63 F.3d 473, 476-77 (6th Cir. 1995) (“OSHA does not create a private right of action.”); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973, 976-77 (5th Cir. 1975) (“The only provision in the statute which addresses itself to a private remedy clearly indicates that Congress did not intend OSHA to create a new action for damages in favor of employees.”). Complaints filed under Section 11(c) of the OSH Act that have been dismissed by the Secretary of Labor are not accorded an appellate remedy.⁴ Thus, this claim is not subject to OALJ jurisdiction.

⁴ Although Complainant does not have a private right of action under the OSH Act, the Act does not preempt a state law claim against Respondent for wrongful discharge in violation of public policy. *See e.g., Kohrt. V. MidAmerican Energy Co.*, 354 F.3d 894, 901-02 (8th Cir. 2004) (finding there is no federal common law action for wrongful discharge in violation of public policy, but OSHA's remedial scheme does not preempt a state law claim of wrongful discharge in violation of public policy).

4. Ruling and Specific Orders. Respondent's Motion to Dismiss is granted. The hearing scheduled for April 24, 2018, in San Antonio, TX is cancelled, and this case is dismissed.

SO ORDERED this day at Covington, Louisiana.

TRACY A. DALY
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, 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).