



Issue Date: 14 February 2019

CASE NO.: 2018-AIR-00042

In the Matter of:

AZIZ AITYAHIA,
Complainant,

vs.

AIR LINE PILOTS ASSOCIATION
Respondent,

ORDER GRANTING MOTION FOR SUMMARY DECISION

This matter was brought by Aziz Aityahia (“Complainant”) against the Air Line Pilots Association (“Respondent”) under the whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21” or “the Act”), 49 U.S.C. section 42121, with implementing regulations at 29 C.F.R. Part 1979, Subpart B. The hearing is currently scheduled for February 26, 2019, in Phoenix, Arizona.

On January 18, 2019, Respondent filed a Motion to Dismiss Appeal or In the Alternative for Summary Decision (“Motion”). On February 5, 2019, Complainant filed a Response.¹

I. LEGAL STANDARDS

Motion to Dismiss

Under this court’s rules 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).

¹ Under this court’s rules of practice and procedure Complainant’s Response was filed untimely. 29 C.F.R. § 18.33(d). Failure to timely file an opposition may result in the requested relief being granted. Because there is no sign of prejudice to the opposing party as a result of the late filing, I elect to accept and consider Complainant’s response.

The corresponding motion in the Federal Rules of Civil Procedure is 12(b)(6). But because "federal litigation materially differs from administrative whistleblower litigation within the Department of Labor . . . a different legal standard for stating a claim" is afforded in cases pending before the agency. *Gallas v. Medical Center of Aurora*, ARB No. 16-012, ALJ No. 2015-SOX-013 (ARB April 29, 2017.)² In administrative whistleblower proceedings before the Department of Labor a sufficient statement of the claims need only provide

1. Some facts about the protected activity, showing some "relatedness" to the laws and regulations of one of the statutes in our jurisdiction;
2. Some facts about the adverse action;
3. A general assertion of causation and;
4. A description of the relief that is sought.

Evans v. EPA, ARB No. 08-059, ALJ No. 2008-CAA-003, at 23 (ARB July 31, 2012.)

Motion for Summary Decision

On a motion for summary decision the court must determine, after viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine disputes of material fact, and whether the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 18.72(a); *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). I must look at the record as a whole, and determine whether a fact-finder could rule in the non-moving party's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587.

An issue is "genuine" if there is sufficient evidence to support the alleged factual dispute, and a fact is "material" if, under the substantive law, it affects the outcome of the litigation. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 4 (1990). To rule on a Motion for Summary Decision, I compare the evidence presented in the moving papers with the evidence presented in the opposing papers and determine whether there is any conflict in the evidence on any

² Respondent cites to *Powers* for the proposition that the corresponding Federal Rule of Civil Procedure addressing motions to dismiss, Rule 12(b)(6), sets the standard for determining whether a whistleblower states a claim. *Powers v. Paper, Allied-Indus., Chem. & Energy Wkrs. Int'l Union (PACE)*, ARB NO 04-11, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007). But the ARB overruled *Powers* in *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, at 23 (ARB July 31, 2012)(holding that the standard for dismissal for administrative whistleblower proceedings before the DOL is lower than the 12(b)(6) standard established in federal litigation.)

material issue. I do not weigh the evidence. If there is a conflict in the evidence on any material issue, I deny the motion, and the matter proceeds to hearing. If there is no conflict in the evidence on any material point, and the moving party is entitled to a decision as a matter of law, I grant the motion, and decide the case in favor of the moving party without any additional hearing. *See* 29 C.F.R. § 18.72(a); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But a party "cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." *First Nat. Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

II. EVIDENCE OF RECORD

Complainant served as a pilot for Mesa Airlines ("Mesa") from 2008 to 2009, but was furloughed in 2009. (Arbitration Transcript, "Transcript," pp. 7-8.) In March, 2013, Mesa recalled him from that furlough. (Transcript, p. 8.) To reclaim his position as a pilot he had to successfully complete a training program. *Id.* Complainant received an unsatisfactory rating on a simulator training three different times, and Mesa decided they would not allow him to continue with the program. (Transcript, p. 10.) Mesa terminated him on May 10, 2013. (Respondent's Exhibit, "RX," C.) On May 16, 2013, Respondent filed a grievance with Mesa on behalf of Complainant, and a hearing was held on July 10, 2013. (RX C.) On July 15, 2013, Mesa issued its written decision denying the grievance. The Respondent, representing Complainant, then submitted the grievance to the Airline System Board of Adjustment for arbitration. (RX B.)

Respondent's Senior Labor Relations Counsel, John B. Dean, represented Complainant at the System Board of Adjustment arbitration. (Transcript, p. 4); (Complainant's Exhibit "CX" 1.) Complainant sought reinstatement and the opportunity to continue with training. (RX B.) On October 30, 2014, the arbitrator issued an award finding justifiable cause to terminate Complainant's employment and denying reinstatement. (CX 1.) But the arbitrator awarded Complainant back pay and benefits because of Mesa's violation of a procedural provision in the collective bargaining agreement requiring a training review board. (RX C); (CX 1.) In the award the arbitrator stated "the Employer persuasively demonstrated that its termination of the Grievant was justified on the grounds of passenger/crew member safety," and that Mesa "made out a colorable case that arbitral reinstatement of this Grievant might well constitute a violation of public policy" (RX C.)

Complainant applied for a new First Officer position with Mesa in 2017. On November 27, 2017, Complainant received an email from Mesa Airlines Flight Operations Recruitment stating they appreciated his interest in a First Officer

position, but that the “human resources department has noted that you are ineligible for rehire” (CX 3.)

On December 12, 2017, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of AIR 21. (CX 2.) In his complaint he stated that he “continue [sic] to suffer adverse action because [he] have [sic] engaged in protected activities,” and asserted that Mesa fired him in May 2013, refused to rehire him in November, 2017, and continues to keep false statements about him, causing prospective employers to not hire him. (RX B);(CX 2.). The Secretary concluded Complainant suffered an adverse employment action when he was terminated in 2013, but dismissed the complaint because it was not filed within 90 days of the alleged adverse action. (RX A);(CX 4.). In his Objections to the Findings of the Secretary of Labor Complainant asserts

1. His complaint against Respondent was timely filed;
2. Respondent discriminated against him because it was aware of his protected activity and failed to provide adequate representation, including,
 - a. deliberately failing to “defend against the cause stated for employment termination by Mesa Airlines”; and
 - b. “deliberately permit[ing] the objection for reinstatement during the grievance process.”

(RX B.)

Complainant has a separate claim against Mesa pending before the Office of Administrative Law Judges. *Aityahia v. Mesa Airlines*, ALJ No. 2018-AIR-00044.

III. ANALYSIS

Section 11(c) of Occupational Safety and Health Act

Complainant alleges in his response that Respondent violated Section 11(c) of the Occupational Safety and Health Act, (“OSHA”) 29 U.S.C.S. §660(c). But I must dismiss the complaint as it relates to Section 11(c) because this court has no jurisdiction over such claims.

An employee who believes that he has been discriminated against by any person in violation of 11(c) may file a complaint with the Secretary alleging such discrimination. 29 U.S.C.S. § 660(c)(2). If appropriate the Secretary shall investigate, and if a violation is found shall bring an action in any appropriate U.S. district court. 29 U.S.C.S. § 660(c)(2). Complainant’s own exhibit, an informational sheet on

Section 11(c) distributed by OSHA, states that if the Administrator finds no violation the employee “may seek review by the Directorate of Whistleblower Protection Programs (DWPP)...” (CX 6.)

Thus, if any court had jurisdiction over the Section 11(c) claim, it would be the appropriate U.S. district court. If Complainant disagreed with the Administrator’s determination of no violation he could have sought review by the DWPP. But the Complainant has no private right of action under § 11(c), and the OALJ has no jurisdiction to act on it. *See Wood v. Dep’t of Labor*, 275 F.3d 107 (D.C. Cir. 2001) (Secretary’s decision to not bring an action in district court under § 11(c) is discretionary and not subject to judicial review); *George v. Aztec Rental Center, Inc.*, 763 F.2d 184 (5th Cir. 1985) (no private right of action); *McCarthy v. The Bark Peking*, 676 F.2d 42 (2d Cir. 1982) (same); *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980) (same); *Fletcher v. United Parcel Serv., Local Union 705*, 155 F. Supp.2d 954, 957 (N.D. Ill. 2001); *Holmes v. Schneider Power Corp.*, 628 F. Supp. 937 (W.D. Pa. 1986), *judgment affirmed*, 806 F.2d 252 (3d Cir. 1986); *Powell v. Globe Indus., Inc.*, 431 F. Supp. 1096 (N.D. Ohio 1977). Thus, I dismiss Complainant’s claims under Section 11(c) because I do not have jurisdiction over it, and thus it is not a claim upon which relief can be granted. 29 C.F.R. § 18.70(c)

The AIR 21 Whistleblower Provision

1. The Legal Standard

Complainant alleges Respondent discriminated against him in violation of AIR 21. It is a violation of AIR 21 “for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee” because the employee has engaged in protected activity. 29 C.F.R. § 1979.102(b). Protected activity includes providing information, filing a proceeding, or participating in a proceeding, “relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States.” 29 C.F.R. § 1979.102(b).

There is a two-pronged burden-shifting framework applicable to a whistleblower claim under AIR 21. 42 U.S.C § 42121(b). The complainant has the initial burden of satisfying prong one of the two-part test. *See* 42 U.S.C § 42121(b). To satisfy prong one he must demonstrate, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) the employer knew he engaged in protected activity; (3) he suffered an adverse personnel action by employer; and (4) his protected activity was a contributing factor in the adverse action. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR -11, slip op. at 6 (ARB June 29, 2007) (citing 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.104(b)(1)). 42 U.S.C § 42121(b). If the complainant demonstrates all four elements, then the bur-

den shifts to the employer to show, by clear and convincing evidence, that it would have taken the same adverse personnel action notwithstanding the protected activity. *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sep. 18, 2014). If Complainant cannot demonstrate each of the four elements then his claim is unsuccessful, and the employer prevails.

2. Analysis

The adverse actions Complainant alleges against Respondent include Respondent's failure to provide adequate representation at the arbitration upholding his termination from Mesa in 2013, which he alleges shows Respondent was complicit with Mesa in "collectively" punishing him, and Mesa's blacklisting and subsequent failure to rehire him in November, 2017.

First, I dismiss as untimely the allegations in his complaint concerning Respondent's alleged inadequate representation at the arbitration upholding his termination from Mesa in 2013. In its arbitration award issued on October 30, 2014, the System Board of Adjust upheld Complainant's 2013 termination. Upon the completion of the arbitration and issuance of the award Complainant was fully on notice of his termination and any perceived deficiencies in Respondent's representation of him at the arbitration. Yet he did not file the complaint with OSHA until over three years later on December 12, 2017. (Attachment B). A complainant alleging a violation under the Act must be filed with the Secretary within 90 days after the date on which such violation occurs. 42 U.S.C.S. §42121(b). Complainant failed to file within 90 days of the alleged adverse action becoming final, and thus his complaint regarding the termination is dismissed as untimely. 29 C.F.R. § 18.70(c).

Alternatively, even if the complaint was timely, I would grant summary decision because there is no genuine dispute of material fact. Respondent's role as a labor representative in arbitration, including any alleged ineffective representation, is not an adverse personnel action. Respondent is a labor union, not Complainant's employer, and thus generally cannot take any personnel action against him. In *Powers* the ARB held that an ALJ *could* have jurisdiction over a whistleblower complaint concerning a union *if* the union was acting as an agent on behalf of the employer. *See Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-19, at *30-31 (ARB Aug. 31, 2007)(vacating and remanding ALJ's dismissal of claim where the complaint alleged the union was acting as an agent of the employer when it failed to provide adequate assistance, because it was directed by the employer to not to provide it.) Complainant concludes Respondent was complicit and, together with Mesa, "collectively" punished him. But unlike in *Powers*, Complainant alleges no facts sufficient to support that conclusion. There is no evidence Respondent acted on Mesa's behalf, or under Mesa's direction, at the arbitration. Moreover, unlike in *Powers* where the union allegedly did not investigate or conduct a hearing on grievances filed against the employer because the employer directed it not to, *id.*, here the evidence demonstrates

Respondent expeditiously filed a grievance, held a hearing, petitioned for arbitration, and provided skilled representation of Complainant at the arbitration. Since there are no facts alleged which would support the conclusory assertion that Mesa and Respondent acted “collectively,” I grant summary decision as to the allegations against Respondent for inadequate representation because there is no *genuine* dispute as to whether Respondent took an adverse personnel action against Complainant.

Second, I find there is no genuine dispute as to a material fact regarding the remaining alleged adverse actions. Complainant alleges *Mesa* finding him ineligible for rehire and providing false statements about his performance to prospective employers is an adverse action by *Respondent* because Respondent was “complicit with Mesa Airlines to deny him further employment.” (Response, p. 2.). I find Respondent entitled to summary decision as a matter of law on these complaints. 29 C.F.R. § 18.70(c). Complainant asserts Respondent was “complicit” because “as a result of Respondent ALPA’s deliberate failures to properly represent [him] during the arbitration/grievance process, the termination was upheld and resulted in the most recent adverse action—the failure to rehire.” (Response, p. 4.) This assertion is extremely attenuated, and alleges no actual action by Respondent. Complainant has not alleged or offered any facts to suggest Respondent directly disseminated damaging information about him to prospective employers. *See Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 11-021, ALJ Nos. 2008-STA-020,-021, slip op. at 6 (ARB June 28, 2012)(defining blacklisting as disseminating damaging information that affirmatively prevents another from finding employment.) He also does not allege, or proffer any facts to suggest, that Respondent in any way determines or controls the statements Mesa provides to prospective employers. Complainant also fails to allege or proffer any evidence that Respondent had anything whatever to do with Mesa’s 2017 decision not to re-hire him.

In essence, Complainant alleges if Respondent had not failed adequately to represent him at the arbitration in 2013, he would have been reinstated, and thus Mesa would not have had the chance to not re-hire him, and would not have provided unflattering statements to other prospective employers in 2017. Complainant cannot circumvent the untimeliness of his allegation regarding inadequate representation at the arbitration in 2013 by asserting it triggered an adverse action by an entirely different party four years later. There is no genuine dispute regarding these adverse actions because Complainant has not provided any, much less sufficient, evidence to support his position that the alleged adverse actions by Mesa also constitute adverse actions by Respondent.

To prevail on his claims Complainant must demonstrate Respondent took an actionable adverse action against him. He has failed to proffer any facts to suggest it has done so. Having found no actionable adverse action I need not address the three other factors. A fact-finder could not rule in Complainant’s favor, and thus I grant summary decision for Respondent as to all claims against it.

IV. ORDER

For the reasons stated above, Respondent's Motion to Dismiss or in the Alternative for Summary Decision is GRANTED.

The February 26, 2019, hearing date in this matter is vacated.

This order does not affect the proceedings in *Aityahia v. Mesa Airlines*, 2018-AIR-00044.

SO ORDERED.

CHRISTOPHER LARSEN
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).