

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 05 November 2018

Case No.: 2018-AIR-00023

In the Matter of

FREDERICK FLORENCE

Complainant

v.

AERODYNAMICS, INC.

Respondent

ORDER DISMISSING COMPLAINT AND DENYING ATTORNEY'S FEES

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. *See* 49 U.S.C. § 42121. 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 shall commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties.

Procedural History

On November 15, 2017, Complainant filed a complaint with OSHA alleging Respondent discriminated against him in violation of the Act.

On March 13, 2018, OSHA did not find reasonable cause to believe that a violation of the statute occurred and dismissed the complaint.

On March 15, 2018, Complainant filed an appeal to the Office of Administrative Law Judges requesting mediation and a hearing. On April 4, 2018, this Tribunal issued a Notice of Assignment and scheduled a teleconference in this case for April 17, 2018.¹

On May 7, 2017, the Tribunal held its initial telephonic conference with the parties. Present for this teleconference was the Complainant and Respondent's counsel.² During this teleconference Complainant refused to accept service by email and insisted that he be served at

¹ This initial teleconference was rescheduled at the Complainant's requests in Orders dated April 17, 2018, April 20, 2018, and April 25, 2018.

² May 7, 2018 teleconference transcript, at 4 (here after "TTR").

an address in Aurora, Colorado by regular mail only.³ TTR at 18-19. Complainant represented that the address he provided the Tribunal has been his address for ten years. *Id.* at 19. However, he also refused to waive service by certified mail.

On May 16, 2018, this Tribunal issued a Notice of Hearing and Pre-hearing Order, setting August 23 and 24, 2018 for the hearing dates.⁴ On July 17, 2018, the Tribunal issued a Notice of Hearing Location: Byron G. Rogers U.S. Courthouse, 1919 Stout Street, Courtroom C502, Denver, CO 80294.⁵

On July 19, 2018, the Tribunal received an e-mail from Complainant acknowledging receipt of the Notice of Hearing and attached to this e-mail was a document entitled “Complainant’s Request for 15 Business Day Extension of Time to Conduct, Serve and Respond to Discovery.” In addition, Complainant included a service sheet indicating that he had sent this motion to Respondent’s counsel “via US mail.” Complainant also requested that he only be sent documents by regular mail because he is rarely home to receive and sign for certified mail.⁶

On July 23, 2018, the Tribunal issued an Order Granting in Part Complainant’s Request to Amend Certain Procedural Deadlines.⁷ In this Order, the last paragraph states the following:

To be clear, the hearing in this matter remains set to begin in Denver, Colorado at 9:30 a.m., August 23, 2018, with the hearing location being the Byron G. Rogers U.S. Courthouse, 1929 Stout Street, Courtroom C502, Denver, Colorado 80294.

On August 6, 2018, this Tribunal issued a Reminder Notice of New Discovery Dates, Pre-hearing Conference Call and Hearing Dates.⁸ This Order’s last paragraph provides:

³ As this Order is publically available, the Tribunal need not provide the full address where its orders were mailed. Suffice it to say that all mail in this matter were sent to address provided by Complainant and it is the same address that is contained on the letter he sent to OALJ appealing OSHA’s findings.

Additionally, during this teleconference Complainant indicated that he may wish to withdraw his Complainant. Accordingly, on May 8, 2018, this Tribunal issued a Notice of Requirement for Withdrawal of Complainant [sic]. The Tribunal mailed this to Complainant at the address he provided via regular, certified, and certified return receipt requested mail. The certified and certified return receipt requested mail was delivered to the address Complainant provided on May 12, 2018. The regular mail was not returned.

⁴ This Notice was sent regular mail as well as certified return-receipt requested mail. The U.S. Postal Service records reflect that the certified mail was delivered May 21, 2018 at 12:00 p.m. Additionally, the regular mail was not returned to the Tribunal.

⁵ This Notice was sent regular mail as well as certified return-receipt requested mail. Someone at the address provided by Complainant signed for this Notice. Additionally, the regular mail was not returned to the Tribunal.

⁶ The Tribunal notes that it offered to have service of documents in this case occur via e-mail and even proposed issuance of an Order Establishing E-mail Guidelines. However, during the pre-hearing teleconference Complainant refused to waive service by certified mail. *See* Transcript of May 7, 2018 initial teleconference, at 33; *see also id.* at 17-19, 27-34.

⁷ The Order was sent regular mail as well as certified return-receipt requested mail. Someone at the address provided by Complainant signed for this Notice. Additionally, the regular mail was not returned to the Tribunal.

The parties are reminded that hearing in this matter remains set to begin in **Denver, Colorado at 9:30 a.m., August 23, 2018, with the hearing location being the Byron G. Rogers U.S. Courthouse, 1929 Stout Street, Courtroom C502, Denver, Colorado 80294.** (emphasis in original)

On August 16, 2018, this Tribunal received a copy of a letter that Complainant had send to Respondent, OSHA, and the Associate Regional Solicitor for the U.S. Department of Labor. This letter was signed and dated August 7, 2018, and purported to provide these parties with notice that Complainant was “taking immediate leave from this proceeding.” Complainant alleged that the undersigned and his paralegal had demonstrated “inexcusable negligence” and “disgraceful conduct” at various points during the course of this case. He also asserted that the undersigned had “on more than three separate occasions repeatedly failed to maintain order and discipline in this matter thereby severely prejudicing the respondent.” Despite not sending this letter to the Tribunal, Complainant closed by stating: “The U.S. Department of Labor and this Tribunal are highly encouraged to immediately Dismiss this complaint Without Prejudice”

On August 17, 2018, the Tribunal issued an Order Addressing Complainant’s August 7, 2018 Letter and Request for Dismissal without Prejudice. In this Order, the Tribunal informed Complainant that it was not cancelling the hearing. The Tribunal further cautioned Complainant that a failure to appear at the hearing would require Complainant to explain his nonattendance.⁹

On August 23, 2018, at 9:30 a.m., at the Byron G. Rogers U.S. Courthouse, 1929 Stout Street, Courtroom C502, Denver, Colorado, the Tribunal opened the proceedings in this matter.¹⁰ Respondent’s counsel was present with two witnesses from Atlanta, Georgia ready to testify, but Complainant was not. Tr. at 8-9. The undersigned inquired from Respondent’s counsel if he had been in contact with Complainant or knew why Complainant was not in attendance. Tr. at 6. Thereafter, the Tribunal recessed in place for 30 minutes to give Complainant an opportunity to be present. Tr. at 7. Complainant did not arrive, and when the hearing reconvened Respondent made an oral motion to dismiss the case with prejudice and sought attorney’s fees.¹¹ The Tribunal deferred ruling on either motion, but informed Respondent that it would issue Complainant an Order to Show Cause and give Respondent the opportunity to file any motion for attorney’s fees in writing. Tr. at 10. Respondent also provided the Tribunal with six

⁸ The Order was sent regular mail, certified mail, and certified return-receipt requested mail. The regular mail was never returned to this office. Both the certified mail and certified return receipt requested mail was left with an individual at the address Complainant provided on August 10, 2018 at 1:57 p.m. However, the U.S. Postal Service records reflect that these letters were returned into the Postal System on August 10, 2018 at 6:06 p.m. and identified as Addressee Unknown. The certified mail was returned to this office with the remark “Unable to forward.” The certified return-receipt requested mail was also returned to this office with a note on the “green card” to return to sender and an additional note of “Not at address unk 8-10”.

⁹ This Order was sent regular mail, certified mail, and certified return-receipt requested mail. The regular mail was never returned to this office. The U.S. Postal Service records reflect that both the certified mail and the certified return-receipt requested mail were refused at the address provided by Complainant on August 24, 2018.

¹⁰ August 23, 2018 hearing transcript (“Tr.”) at 4.

¹¹ Tr. at 10; *see also* 49 U.S.C. § 42121(b)(3)(C).

exhibits. Tr. at 32-33. The Tribunal did not admit the exhibits at that time, as it wanted to see if Complainant had good cause for his failure to appear. Respondent's counsel argued that Complainant had made a frivolous complaint, that his hourly rate is \$250 per hour and that he had expended at least 20 hours on the case thus far. Tr. at 11. Respondent's counsel also asserted bad faith on the part of Complainant, noting that the knife alleged to have been in the cockpit was actually just a picture of a knife the co-pilot was considering purchasing. Tr. at 11.

Given that Respondent had its witnesses available and that they had travelled so far to attend the hearing, the Tribunal directed that Respondent provide their testimony and would later determine if Complainant had waived his right to cross-examine them. Tr. at 13. A summary of their testimony follows.

Mr. Gregory Weaver, Respondent's Vice President for Human Resources testified under oath. He has been in that position since March 2015.¹² Respondent is a Part 121 air carrier that also provides essential air service. Tr. at 21. He was familiar with Complainant and Complainant resided at an address in Aurora, Colorado.¹³ Respondent hired Complainant in April 2017, but by the summer it was becoming obvious that they were having issues with him. Tr. at 16. Respondent started receiving complaints from other crewmembers and it got to the point where many pilots refused to fly with him. Tr. at 16. Complainant created a belligerent atmosphere with his colleagues, including flight attendants, and some passengers complained about his hollering and screaming. Tr. at 18. On one occasion Complainant called in frantic that his co-pilot had a knife in the cockpit, waving it and threatening him. Tr. at 16, 21. However, after an investigation, including one by TSA, it turned out that the co-pilot was showing Complainant a picture of a knife that he intended to buy. Tr. at 16, 21. Additionally, Complainant missed many of his deadlines for training and recurrent training. When asked to come to the corporate office to complete the training, he refused to do so. When directed to report to the corporate office in September 19, 2017 to go over issues that the company was having with him, he refused to come. Tr. at 17. In regards to scheduling, Complainant accused Respondent of intentionally scheduling his flight days on days that conflicted with his religious practices. Respondent strictly applies Title VII and they had no idea that he was being asked to fly on these holidays. To this day, Respondent still does not know what his true religious beliefs are. Tr. at 18. Respondent terminated Complainant's employment on September 20, 2017. Tr. at 18. Mr. Weaver denied that there was any sort of retaliation by Respondent. Tr. at 19-20.

Ms. Ashley West, Respondent's Director of Safety and Compliance testified under oath. She has been in this position since June 2017. Tr. at 23. She is aware of the episode that involved a knife allegedly on an aircraft. Complainant had filed a complaint to the TSA who then conducted an investigation and included Respondent's Director of Security. Tr. at 23. The investigation found that the co-pilot showed Complainant a picture of a knife and not an actual knife. Tr. at 24. The Director of Safety showed her a picture of the knife. Tr. at 24. Ms. West was on the phone with him on September 20, 2017, when he refused to come to the final meeting after he would not complete a report. Tr. at 26, 30.

¹² Tr. at 15.

¹³ Tr. at 15. The Tribunal notes that the address Mr. Weaver provided is the same address Complainant insisted upon being served during the entirety of these proceedings. See Tr. at 35 (summary of prior instances where Complainant accepted mail at this address).

Complainant sent Ms. West an email about a “hot fuel” issue that she forwarded to Respondent’s Director of Operations. Tr. at 26. Ms. West considered this email the filing of an ASAP report¹⁴ on this incident. Tr. at 29. It concerning fueling the aircraft with an engine running and Complainant alleged that he was not briefed that that was going to happen. However, Respondent interviewed the prior crewmembers, who said they had told Complainant that this refueling was going to occur. Tr. at 26. Hot fueling is not a standard procedure. Tr. at 26-27.

At the conclusion of the testimony, the Tribunal gave Respondent 30 days to submit any formal justification for evidence that establishes bad faith or the frivolous nature of Complainant’s claim as well as evidence to support the attorney’s fee request. Tr. at 34.

On August 31, 2018, the Tribunal issued an Order to Show Cause Why Complainant’s Complaint Should Not Be Dismissed With Prejudice and Why Respondent Should Not be Awarded Attorney’s Fees. Although the Tribunal mailed this Order to the address Complainant insisted he be served, the registered mail was returned “return to sender, not deliverable as addressed, unable to forward.”

Discussion

Complainant failed to appear at the hearing, has not provided any explanation for his nonattendance, and has declined to contact the Tribunal in any other fashion. Title 29 C.F.R. § 18.12, Proceedings before administrative law judge, sets forth in part:

(b) Authority. In all proceedings under this part, the judge has all powers necessary to conduct fair and impartial proceedings, including those described in the Administrative Procedure Act, 5 U.S.C. 556. Among them is the power to:

(7) Terminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order.

Complainant has failed to comply with this Tribunal’s Orders despite all reasonable attempts to communicate with him. The Tribunal is under no obligation to chase a complainant, especially when he insisted that correspondence be sent to a specific address and was warned early in the proceedings about his obligation to respond to Orders from the Tribunal sent to the address provided. The Tribunal finds that Complainant has abandoned his claim, and that it should be dismissed for want of prosecution.

This Tribunal has also carefully considered Respondent’s request at the hearing to impose \$1,000 in attorney fees in this case as authorized by 29 C.F.R. § 1979.109(b) for complaints that are frivolous or brought in bad faith. In order to demonstrate that a complaint was frivolous, Respondent must show that the complaint lacked an arguable basis in law or fact. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, slip op. at 6 (ARB Sept. 30, 2004); *Brown v. Bargery*, 207 F.3d

¹⁴ ASAP stands for Aviation Safety Action Program. See generally, FAA Advisory Circular (“AC”) 120-66B.

863, 866 (6th Cir. 2000) (a complaint is frivolous if it lacks an arguable or rational basis in law or fact). A complaint should be dismissed as frivolous only if it lacks an arguable basis in law or fact, which means that it contains factual allegations that are “fantastic or delusional” or legal theories that are indisputably meritless. *Neitzke v. Williams*, 490 U.S. 319, 325, 327-28 (1989). The ARB has declined to award attorney fees under AIR 21 when a *pro se* complainant had maintained a firm and sincere belief that he had been the victim of retaliatory termination, even though he did not prevail following a hearing on the merits. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

While this Tribunal finds it to be a close question, it opts not to impose attorney fees against the *pro se* claimant.¹⁵ Based upon the evidence it currently has before it, the Tribunal cannot say definitively that all of Complainant’s allegations were “fantastic or delusional.” The Tribunal finds that Complainant’s claim that his co-pilot had a knife in the cockpit—when in reality he only had a *picture* of a knife—was alleged in bad faith. However, there is insufficient evidence to find that Complainant’s belief that he was fired in retaliation for reporting the hot fueling incident lacked an arguable basis in fact or law. Further, the Tribunal gave Respondent the opportunity to set forth in a written motion evidence of Complainant’s bad faith and it opted not to submit such a motion. Accordingly, Respondent’s request for attorney’s fees is denied.

ORDER

Based on the foregoing:

1. The Complaint in this matter is DISMISSED WITH PREJUDICE for want of prosecution; and
2. Respondent’s request for an award of costs is DENIED.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

¹⁵ “[W]e are reluctant to impose penalties against any litigant, particularly one appearing *pro se*.” *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir.1981) (*per curiam*).