In the Matter of:

CRAIG S. FRIDAY,

COMPLAINANT,

v.

NORTHWEST AIRLINES, INC.,

RESPONDENT.

ARB CASE NO. 03-132

ALJ CASE NO. 2003-AIR-19
2003-AIR-20

DATE: July 29, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
James A. Gauthier, Esq., ***Kent, Washington***

For the Respondent:
Timothy R. Thornton, Esq., Elizabeth M. Brama, Esq., ***Briggs and Morgan, P.A., Minneapolis, Minnesota***

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2003), and implementing regulations, 29 C.F.R. Part 1979 (2004). Craig Friday filed two complaints alleging that Northwest Airlines, Inc. subjected him to adverse actions in violation of AIR 21. On March 31, 2003, Northwest moved for summary decision on both complaints, and on June 27, 2003, an Administrative Law Judge (ALJ) issued an Order Denying Further Discovery and Granting Motion for Summary Judgment (Order), recommending that the complaints be dismissed. We adopt and attach the ALJ's opinion.

BACKGROUND

The ALJ has accurately recited the facts pertinent to the filing of Friday's whistleblower complaint with the Occupational Safety and Health Administration (OSHA). Order at 1-4. We summarize briefly.

Northwest employed Friday as an airline pilot. In 1998 Friday submitted to a psychiatric evaluation. As a result, he was diagnosed with "Cognitive Disorder NOS." Order at 2. Northwest placed Friday on medical retirement and, in August 1998, banned him from Northwest's property. *Id.* at 10. On December 17, 1999, Friday agreed to voluntarily terminate his employment with Northwest in exchange for Northwest's offer of disability retirement. His disability retirement accorded him travel privileges on Northwest flights but, at some point between February and June 15, 2000,[1] Northwest revoked those privileges after Friday sent a letter about allegedly unsafe conditions at Northwest to President Clinton and a number of news organizations. *Id.* at 5-6.

In April 2002, Rob Plunkett, the Airline Pilots Association (ALPA) union representative discussed Friday's travel pass situation with Northwest counsel, John Nelson. Nelson followed up with a letter dated April 22, 2002, confirming that the 2000 ban remained in effect. *Id.* at 6. On April 30, 2002, Friday filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Northwest's cancellation of his free travel pass benefits was in retaliation for addressing safety problems and, therefore, a violation of AIR 21.

Friday filed a second complaint with OSHA on November 18, 2002, alleging that the property ban constituted a violation of AIR 21. The second complaint also alleges that Northwest violated AIR 21 when, in a letter dated November 6, 2002, Northwest accused Friday of engaging in the unauthorized practice of law[2] and informed him that his actions would "be brought to the attention of the county attorney." *Id.* at 9. The ALJ consolidated Friday's claims and scheduled a hearing for April 21, 2003.

On March 31, 2003, Northwest filed a Motion for Summary Judgment on both of Friday's complaints. In response to the motion, Friday moved to continue the hearing and to compel discovery on a broad range of issues. On April 18, 2003, the ALJ issued an order granting a 60-day continuance of the hearing, a 30-day period for discovery (limiting discovery to the issues raised by the summary judgment motion), and provided

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[1] Northwest informed Friday of the revocation of his travel pass in a letter dated January 14, 2000, but the precise date of the letter is in dispute. The ALJ found that sufficient evidence supports the conclusion that Northwest informed Friday of the revocation of his travel pass no later than June 15, 2000.

[2] Northwest had been advised that Friday intended to represent another Northwest employee in the arbitration of a labor grievance filed against Northwest. Order at 9.

that a ruling on summary judgment would be deferred until 15 days after the completion of the allowed discovery. On May 13, 2003, Friday filed a "Memorandum in Support of Discovery in Response to Second Order Pertaining to Motion for Discovery," seeking discovery on issues not contemplated in the original order but related to OSHA's investigative process. Friday never filed a memorandum in opposition to the Motion for Summary Judgment. *Id.* at 3-4.

On June 27, 2003, the ALJ issued an Order Denying Further Discovery and Granting Motion for Summary Judgment which Friday now appeals to this Board.

The issues before the Board on summary judgment are: (1) whether the ALJ'd denial of Friday's "Memorandum in Support of Discovery in Response to Second Order Pertaining to Motion for Discovery" was arbitrary or an abuse of discretion and (2) whether Northwest has shown that there are no genuine issues of material fact and it is entitled to summary decision as a matter of law on the two complaints Friday filed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision under AIR 21. *See* 29 C.F.R. § 1979.110 (2004). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The ARB reviews an ALJ's recommended grant of summary decision de novo. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *Flor v. United States Dep't of Energy*, ALJ No. 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp*., 144 F.3d 151, 158 (1st Cir. 1998).

At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e). If the non-moving party fails to establish an element essential to his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-

moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

As to discovery motions, the Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion. *See Robinson v. Martin Marietta Servs., Inc*., ARB No. 96-075, ALJ No. 94-TSC-0007, slip op. at 4 (ARB Sept. 23, 1996).

DISCUSSION

I. The May 13, 2003 Memorandum in Support of Discovery

The ALJ did not abuse his discretion when he denied Friday's May 13, 2002 "Memorandum in Support of Discovery in Response to Second Order Pertaining to Motion for Discovery."

Under the ALJ's Rules of Practice and Procedure, a party may obtain discovery only for "relevant" information, and an ALJ may, upon motion of a party, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [a ruling that] …. [c]ertain matters not relevant may not be inquired into or that the scope of discovery be limited to certain matters." 29 C.F.R. §§ 18.14(a), 18.15(a) (2004). *See Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001).

In his June 27, 2003 denial of Friday's discovery request, the ALJ explained that Friday did not seek any information pertaining to the two key issues presented by the summary judgment motion: the date on which Northwest banned Friday from its property or the date it revoked his travel pass. The additional material sought pertains to an inquiry into the conduct of the OSHA investigation and is outside the scope of his authority. Order at 4. He explained his rationale and cited relevant authority and case law for his decision. Friday did not argue this point on appeal or cite any case law to support his views.

The Board concludes that the ALJ did not act arbitrarily or abuse his discretion when he denied Friday's "Memorandum in Support of Discovery in Response to Second Order Pertaining to Motion for Discovery." We affirm the ALJ's denial of Friday's further discovery request.

II. Motions for Summary Judgment

In his complaints Friday must allege facts and evidence that show that he engaged in protected activity under AIR 21, that Northwest knew of this activity, that he suffered an adverse employment action, and that the protected activity contributed to the adverse

action. 29 C.F.R. § 1979.104(b)(1). His complaint must be filed with OSHA within 90 days of the date of the adverse action. 29 C.F.R. § 1979.103(d).

Section 42121(a) of AIR 21 defines protected activity as reporting information or participating in proceedings related to violations of Federal air carrier safety laws, orders, regulations, or standards:

> (a) Discrimination against airline employees. – No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information 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 this subtitle or any other law of the United States;
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> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed 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 this subtitle or any other law of the United States;
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> (3) testified or is about to testify in such a proceeding; or
>
> (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C.A. § 42121(a).

A. Friday's April 30, 2002 Travel Pass Complaint

Friday alleges that Northwest took an adverse action against him by informing him in an April 22, 2002 letter from John Nelson, Northwest's counsel, that Northwest had revoked his travel pass. Friday complained the revocation was in retaliation for his complaints to various persons in government about Northwest's safety problems. Respondent's Exhibit (RX) 23. Northwest produced evidence that it informed Friday sometime between February and June of 2000 that his travel pass was revoked. The April 22, 2002 letter from Nelson confirmed that the earlier revocation remained in

effect. RX 11. Based on the evidence the parties submitted, the ALJ found that no reasonable fact-finder could decide that Northwest terminated Friday's travel pass *after June 15, 2000.*

AIR 21 requires that a discrimination complaint be filed within 90 days of the adverse action. The limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt marks the occurrence of the violation. *See Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 6 (ARB Jan. 30, 2004); *see generally Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

Friday filed his April 30, 2002 complaint almost two years after Northwest notified him that his travel pass had been revoked. Because this was not within the statutorily required 90 days of the adverse action, the ALJ summarily dismissed the complaint.

We have thoroughly examined the record, construing Friday's evidence in the light most favorable to him, and find that the ALJ properly determined that there are no genuine issues of material fact in dispute as to the date of revocation of the travel pass and that Friday's complaint was not filed within 90 days of the alleged adverse action. We conclude that Northwest is entitled to summary decision on Friday's first complaint as a matter of law.

B. Friday's November 18, 2002 Complaint

Friday's November 18, 2002 complaint alleges that Northwest committed an adverse action against him when it threatened him with arrest for the unlicensed practice of law and banned him from its property in retaliation for (1) his April 30, 2002 complaint, and (2) providing testimony in the arbitration of a grievance filed by Captain John Robinson, another Northwest pilot.

The ALJ confirms Friday's status as a former employee on disability retirement and recognizes that as such Northwest owes certain duties to Friday, primarily paying his pension and other retirement benefits secured by ALPA's Collective Bargaining Agreement. Order at 9. He concluded that:

> [a]n alteration of these obligations in retaliation for Friday's protected safety activities by Northwest would constitute a retaliatory act related to the employment relationship. Which is to say, Friday must establish that Northwest's actions were in some way related to the

> "compensation, terms, conditions, or privileges" which arise from Friday's relationship with Northwest as a medically retired former employee.

Order at 9. Therefore, to avoid summary decision on his second complaint, Friday must show that the actions alleged therein have an adverse effect on his status as a medically-retired former employee.

1. Threat of Prosecution for Unauthorized Practice of Law

On November 6, 2002, Nelson sent Friday a letter stating that Northwest had been advised that Friday intended to appear as a representative at arbitration for a grievance Robinson filed against Northwest. The letter informed Friday that such representation "would constitute the unauthorized practice of law" and that, if Friday appeared at the arbitration, Northwest would "be compelled to alert the county attorney." RX 20. Friday informed Northwest that he planned on attending the arbitration as a witness for Robinson. Northwest responded by letter, telling Friday that "so long as you are a witness … you will not be engaged in the unauthorized practice of law." RX 22.

Friday contends that the letter constitutes an adverse action in violation of AIR 21. The ALJ found that Friday presented no evidence that the November 6, 2002 letter constituted an adverse action under AIR 21 and that no facts support a conclusion that Northwest's threats to inform a county attorney of possible unlicensed law practice are related to Friday's compensation, terms, conditions, or privileges as a medically-retired former employee of Northwest. Therefore, he granted Summary Judgment. We agree.

2. Property Ban

Northwest initiated Friday's property ban in August 1998. Order at 10. In his second complaint, Friday contends that Northwest banned him from its property in November 2002. Friday now contends that "the 1998 ban was site and date-specific and that this new total ban effectively terminated his employment and extinguished his seven-year right to return from medically disabled retirement should his medical condition be cured." Order at 10.

The ALJ found that Friday produced no evidence supporting his contention that, as a medically disabled retiree, a ban from Northwest's property affects the "compensation, terms, conditions, or privileges of his employment relationship with Northwest." Order at 11. The ALJ also concluded that Friday's contention that the property ban would prevent him from returning to work is a theoretical argument based on a theoretical fact which may never occur. Therefore, he found that Friday had not shown that the property ban was adverse and granted Summary Judgment. Order at 11-12. We agree with these conclusions and find that Friday has failed to show that there are any genuine issues of material fact entitling him to a hearing on his second complaint.

CONCLUSION

The Board has reviewed the record and the relevant law and concludes that the ALJ properly granted summary decision on the two complaints Friday filed against Northwest. We therefore **ADOPT** the **ATTACHED** Order and, accordingly, the complaints are **DISMISSED.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge