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Issue Date: 27 June 2003

CASE NO.'s 2003-AIR-0019, 0020

In the Matter of:

CRAIG FRIDAY,
Complainant,

vs.

NORTHWEST AIRLINES, INC.,
Respondent.

ORDER DENYING FURTHER DISCOVERY AND GRANTING MOTION FOR SUMMARY JUDGMENT

Introduction

Mr. Craig Friday filed two complaints against his former employer, Northwest Airlines, Inc., on April 30 and November 18, 2002 under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121. The Occupational Safety and Health Administration ("OSHA") found that Complainant did not make the necessary prima facie showing required to support further investigation in either case. Complainant filed a timely request for a hearing with the Office of Administrative Law Judges ("OALJ"). Respondent answered with a Motion for Summary Judgment. Complainant moved for and I granted a continuance and a request under Fed. R. Civ. Pro. 56(f) for further discovery prior to deciding on the Motion for Summary Judgment. During the period allowed for further discovery, Complainant filed a Memorandum in Support of Discovery in Response to Second Order Pertaining to Motion for Discovery, requesting further discovery. Complainant has not filed any papers in opposition to Respondent's Motion for Summary Judgment.

For the reasons set forth below, further discovery is DENIED, the Motion for Summary Judgment is GRANTED and the complaints are DISMISSED.

Background Facts

This matter arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), 49 U.S.C. § 42121. AIR-21 gives employees of air carriers protection from retaliation when an employee provides information to his employer or to

the government concerning 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... ." The Procedural Regulations for handing complaints under AIR-21 are found in Title 29 of the Code of Federal Regulations, Section 1979.

Northwest Airlines, Inc. (hereafter "Northwest") is an "air carrier" falling under the statute. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.101. Captain Craig Friday was a pilot who formerly flew for Northwest. In late 1998, Friday was ordered by Northwest to undergo a psychiatric evaluation. After being examined by a psychiatrist, he was diagnosed with "Cognitive Disorder NOS." On December 17, 1999, Friday agreed to voluntarily terminate his employment with Northwest, under oath in an arbitration proceeding, in exchange for being offered the benefits of "Disability Retirement" as defined in the Air Line Pilots Association (ALPA) Collective Bargaining Agreement. The agreement includes return rights which allow Friday to return to Northwest within seven years if his condition is cured. CX F.

Northwest's filings show a protracted history of disagreements and litigation between Friday and Northwest. From 1997 until his retirement in 1998, Friday filed at least thirteen labor and safety-related grievances against Northwest with the ALPA. RX 4. Friday's retirement from Northwest was also the subject of a lawsuit, alleging wrongful discharge, disability discrimination, age discrimination, retaliation, intentional and negligent infliction of emotional distress, and defamation. RX 1. Chief Judge John C. Coughenour, of the United States District Court for the Western District of Washington granted Northwest's Motion for Summary Judgment on that suit on November 2, 2000. RX 5. The Ninth Circuit affirmed. *Friday v. Northwest Airlines, Inc.*, 31 Fed. Appx. 391 (9th Cir. 2002) (unpublished opinion).

Captain Friday has been a prolific writer of letters expressing his concerns about safety at Northwest. In response to a letter written by Friday in 1997, the FAA investigated weight and balance safety procedures at Northwest and issued a detailed report. RX 14. The report noted that while the investigation uncovered some "isolated problems" -- which were being adequately addressed by Northwest -- Northwest's weight and balance system was not in the "failure mode" alleged by Friday. Since then, Friday has written letters to, *inter alios*, Northwest CEO Richard Anderson, Secretary of Labor Elaine Chao, U.S. Representative Jennifer Dunn, Senator Maria Cantwell, Senator Ernest Hollings, various FAA and DOL officials, and Presidents Clinton and Bush expressing his continued concern for airline safety and decrying what he sees as Northwest's attempts to silence him. RX 25, 27, 29, 30, CX A, C, J, K, Q.

On April 30, 2002, Captain Friday filed his first AIR-21 complaint[1] (OSHA 0-1960-02-015; 2003-AIR-019). The complaint alleges that Northwest rescinded his free travel pass benefits in retaliation for his addressing complaints about Northwest's safety problems to various persons in the government, and for his imminent Congressional testimony about these concerns. RX 23. Friday's second complaint (OSHA 0-1960-03-006; 2003-AIR-020), filed on November 18, 2002, alleges that Northwest banned him from its property and threatened him with arrest for unlicenced practice of law in retaliation for his acting as a witness in a labor arbitration involving another Northwest pilot. RX 24. OSHA, acting pursuant to delegation of authority from the Secretary of Labor[2], dismissed the first complaint, determining that Friday failed to make a prima facie showing that Friday's "protected activity was a contributing factor" to the denial of his travel passes. 29 C.F.R. § 1979.104(b)(1)(iv). OSHA also found that the second complaint failed to make the necessary prima facie showing that Friday suffered an "adverse personnel action." and dismissed the claim. 49 U.S.C. § 42121(b)(2)(B)(i), 29 C.F.R. § 1979.104(b)(iii). On March 9, 2003, Friday made timely requests for hearings before the OALJ on both claims. 49 U.S.C. § 42121(b)(2)(A). The claims were consolidated and scheduled for hearing on April 21, 2003 in Seattle, Washington.

On March 31, 2003, Northwest filed a Motion for Summary Judgment on both complaints, along with a Memorandum in Support of the Motion and an affidavit containing evidence in support of the motion. In response, Friday moved to continue the hearing and to compel further rather broad discovery, pursuant to Fed. Rule Civ. Pro. 56(f). On April 18, 2003, I granted Friday's continuance motion. The Order Granting Motion for Continuance and Discovery continued the hearing in the case, for 60 days, extended the discovery period to 30 days from the date of the order, and authorized discovery limited to the issues germane to the summary judgment motion before me. The order provided that a ruling on Northwest's Motion for Summary Judgment would be deferred until 15 days after the completion of the allowed discovery. The parties would have until the end of this period to file papers in support or opposition to the Motion for Summary Judgment. The 45-day period to provide evidence or argument ended on June 2, 2003.

On May 13, 2003, Friday filed a "Memorandum in Support of Discovery in Response to Second Order Pertaining to Motion for Discovery" (the "Second Discovery Motion") in which he

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[1]Friday's first complaint also alleged a violation of Section 11(c) of the Occupational Health and Safety Act, 29 U.S.C. § 660(c). *See* C.F.R. § 1979.103(e). 29 U.S.C. § 660(C)(2) provides that , "[If] 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. In any such action, the United States district courts shall have jurisdiction... ." Thus, I do not address this claim here since jurisdiction appears to be exclusively in the U.S. district courts.

[2] Delegation of Authority and Assignment of Responsibility to the Assistant Secretary For Occupational Health and Safety, 65 Fed. Reg. 50017 (August 16, 2000).

seeks broad discovery on a number of the issues that had been not been contemplated in the original order. Friday appended seventeen exhibits pertaining to the facts of the case to the Second Discovery Motion. As of this time, Friday has not filed a memorandum in opposition to Northwest's Motion for Summary Judgment.

The gist of Friday's Second Discovery Motion is that he wishes to challenge the process by which OSHA came to the initial resolutions of his complaints[3]. OSHA dismissed Friday's complaints for failure to make the necessary prima facie showing. 29 C.F.R. § 1979.104(b). The Code of Federal Regulations prohibits me from scrutinizing the reasoning or process of OSHA's decision to "dismiss a complaint without completing an investigation pursuant to [29 C.F.R.] § 1979.104(b) ..." 29 C.F.R. § 1979.109(a). The decisions "whether to proceed with an investigation and to make particular investigative findings are discretionary decisions not subject to review by the ALJ." 68 FR 14105; 29 C.F.R. § 1979.109(a). Likewise, I may not remand a complaint to OSHA "for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error." 29 C.F.R. § 1979.109(a); *Cf. Ford v. Northwest Airlines, Inc.*, 2002-AIR-21, slip op. at 8 (ALJ Oct. 18, 2002) (remand to OSHA proper because ALJ reversed OSHA on jurisdictional grounds and OSHA had dismissed the complaint without making a determination pursuant to 29 C.F.R. § 1979.104(b)).

29 C.F.R. § 1979.109(a) makes it clear that it is not my role to review OSHA's investigation or decision, but hear the case *de novo*. 29 C.F.R. § 1979.107(b).

Analysis and Findings

I. The Second Discovery Motion

Friday's Second Discovery Motion seeks to discover "investigative materials obtained by OSHA in support of Complainant's AIR-21 retaliation claims." The original Order Granting Discovery and Continuance allowed Friday 30 days to discover any information pertaining to two key issues presented by the summary judgment motion: the date on which Friday was banned from Northwest's property and the date his travel pass was revoked. In correspondence preceding the filing of the Second Discovery Motion, Friday's attorney has stated that "if discovery is limited to the dates when these events occurred, then discovery will not be necessary as the actual dates are known to Complainant." James Gauthier's Letter to Judge Karst, April 23, 2003. As Friday admits that he does not require discovery on the issues addressed by the Order Granting Discovery and Continuance, and as the additional material Friday wishes to discover pertains to an inquiry into the conduct of the OSHA investigation which is not reviewable here, there is no need to for further delay or discovery. *Williams v. Lockheed Martin Corp.*, ARB Nos.

[3]Specifically, he alleges that ex parte communications between Northwest and OSHA led to improper dismissals. These communications appear to be explicitly authorized by the statute. 42 U.S.C. §42121 ("...affording the [Respondent] an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses... ").

99-054 and 99-064, ALJ Nos. 1998-ERA-40 and 42, slip op. at 6 (ARB Sept. 29, 2000); 29 C.F.R. § 1979.107(b).

The request for additional discovery is therefore denied.

II. The Motion for Summary Judgment

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c); C.F.R. § 18.40(d). The moving party bears the initial burden of showing the absence of a genuine issue as to any fact which may affect the outcome of the litigation. *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270 (9th Cir. 1979). Once this burden has been met, the "adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby*, 447 U.S. 242, 250 (1986). In doing so, "a party opposing the motion may not rest upon the mere allegations or denials [in its] pleading." 29 C.F.R. § 18.40(c).

A. The First Complaint

Friday's first complaint alleges that Northwest cancelled his free travel pass benefits in retaliation for his addressing complaints about Northwest's safety problems to various officials, and for his imminent Congressional testimony on these subjects. Northwest moves for summary judgement on four grounds: 1) that the complaint is untimely; 2) that the cancellation of Friday's travel pass is not an adverse personnel action because Friday is no longer a Northwest employee; 3) that the alleged violations occurred before the passage of AIR-21, and as AIR-21 is not retroactive, the statute can provide no relief; and 4) that Friday's claims are barred by the res judicata effect of the earlier district court judgment.

AIR 21 requires that "[a] person who believes that he or she has been discharged or otherwise discriminated against, . . . may not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination.." 42 U.S.C. § 42121(b)(1). It is generally accepted that the period for filing employment discrimination and retaliation complaints begins on the date the employee is given definite notice of the challenged employer decision. *See, Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980); *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988); *Howard v. Tennessee Valley Authority*, 90-ERA-24 (Sec'y July 3, 1991); *Mehen v. Delta Airlines* 2003-AIR-004, slip op.. at 3 (ALJ Feb. 24, 2003). For Friday's claim to be timely, he must have received definite notice of the cancellation of his travel pass on or after January 22, 2002 – 90 days prior to filing the complaint.

Northwest avers that Friday's travel pass privileges were taken away in February of 2000 as "an appropriate response" to Friday's letter to President Clinton written about unsafe

conditions at Northwest, with copies to a number of news organizations. Northwest points to a letter (the "Peterson Letter") from Northwest Vice President Gene Peterson to Friday which states, "By violating company orders you have forfeited your pass travel as a disability retiree." RX 17. While the letter is dated January 14, 2000, the actual date on which it was written is disputed. Its text refers to Friday's "letter of February 4, 2000" – 20 days after the date on the letter's caption. Northwest claims, without any offer of proof, that the Peterson Letter was actually written on February 15, 2000. However, on June 15, 2000, Peterson referred to the letter in a deposition taken in connection with Friday's lawsuit in federal court. RX 7. From this information, I infer that the latest date on which the letter could have been written was June 14, 2000. Northwest also attached a second letter (the "Nelson Letter"), dated April 22, 2002 from Northwest's labor counsel John Nelson to Rob Plunkett, an ALPA union representative, reaffirming that, "The Company revoked Mr. Friday's travel privileges in 2000, in response to his communications to the media. That revocation *remains* in effect." RX 11 (emphasis added).

From these facts, I find that Northwest has produced sufficient evidence to meet its burden to show that no reasonable fact-finder could decide Friday's travel pass were terminated after June 15, 2000, which is over 90 days prior to Friday's filing of his claim on April 30, 2002. *Anderson, supra*, 447 U.S. at 250. The burden now shifts to Friday to produce evidence that there is a "genuine issue of fact for the hearing." 29 C.F.R. § 18.40. Friday was given opportunity to conduct further discovery on this issue and although he has not filed an opposition to the motion, his Second Discovery Motion included specific factual exhibits which go beyond the allegations of his pleading. 29 C.F.R. § 18.40(c). I will take these into account in making a determination of whether there is a genuine issue of fact. 29 C.F.R. § 18.40(d).

Friday alleges that he received notice that Northwest rescinded his travel pass privileges in April 2002, when Northwest sent the Nelson Letter. RX 11. Friday argues that the 2000 revocation of his pass by the Peterson Letter was a mere threat, which was not implemented. Thus, Friday argues, the April 22, 2002 Nelson Letter was the real revocation, which triggered his timely complaint on April 30, 2002. In support of this argument Friday appended several documents to his Second Discovery Motion. Included was a copy of his "Travel Authority Card" which explicitly stated that it "must be surrendered upon request or termination of employment." CX L. Friday contends that Northwest has never requested that he surrender his card, and further contends that Northwest has sent him two updated cards, the last on August 5, 2002[4]. Also attached was an application to use the travel pass, postmarked August 22, 2002, sent from Northwest to Friday. CX N. If these documents are intended to show that Friday's travel pass privileges were never actually revoked or were reinstated sometime after the Peterson Letter, then they would also show that Northwest never stripped Friday of his travel privileges, and that therefore there was no unfavorable personnel action upon which to base this complaint. *See*, 29 C.F.R. § 1979.109(a) (complainant must demonstrate that "protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint").

[4]This fact is unverified. The copy of the Travel Authority Card in Exhibit L was undated, as there was no image of the front side. The additional cards were not attached as evidence.

Another exhibit includes a transcript of a voice mail message to Friday from the ALPA union representative Plunkett relaying his conversation with Northwest counsel John Nelson. The message was recorded on April 19, 2002, three days before the Nelson Letter was sent to Plunkett. Plunkett stated that he had spoken with Nelson regarding the "pass situation" and said that Nelson had told him that Nelson was "not aware with [sic] any problem with you being able to use your passes" and that he would "check with Thorton [Northwest's lead attorney on Friday's case]" and "get back to [Plunkett] to confirm." CX O. The exhibit also contains a sworn statement by John Robinson that Mr. Plunkett had told him that Friday's travel pass ban had been reinstated. John Robinson is a Northwest pilot whose disputes with Northwest are in arbitration. Friday is scheduled to be a witness for Robinson in that arbitration. See below.

This Plunkett message contains at least one layer of hearsay and the Robinson statement merely adds an additional layer to the same declaration. Although the formal rules of evidence do not apply in this proceeding, affidavits in support or opposition to summary judgement should be based on actual personal knowledge and not hearsay, or worse, double or triple hearsay. 29 C.F.R. §§ 18.40(c), 1979.107(d); *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991), *cert. granted,* 503 U.S. 958 (1992), *aff'd on other grounds,* 508 U.S. 49 (1993). Additionally, the plain reading of the correspondence can only support the conclusion that the Nelson letter was a follow-up to confirm the actual status of Friday's travel pass. Nelson "was not aware with [sic] any problem," so he "check[ed] with Thorton" and three days later he wrote the Nelson Letter "to confirm" that the 2000 ban remained in effect. All of the statements are consistent with the fact that Friday's travel pass was cancelled sometime in 2000.

In order to avoid summary judgment on this complaint, Friday must produce persuasive evidence that Northwest deprived him of travel privileges *on or after* January 22, 2002. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Friday has not produced such evidence.

On the First Complaint, summary judgment for respondent is hereby granted, and therefore, Northwest's other grounds need not be addressed.

B. The Second Complaint

Friday's second complaint alleges that Northwest threatened him with arrest for unlicenced practice of law and banned him from its property in retaliation for his first AIR-21 complaint and acting as a witness in the arbitration of a labor grievance filed by John Robinson. The complaint states that Friday believes that the property ban has the effect of a discharge, removing his right to return to duty should he no longer be medically disabled, a right secured by Northwest's Collective Bargaining Agreement with the ALPA. The OSHA investigation dismissed the complaint on the grounds that Friday failed to make a prima facie showing that these allegations addressed unfavorable personnel actions. 29 C.F.R. § 1979.104(b)(1)(iii). Northwest seeks summary judgment on this complaint on numerous grounds, arguing that the property ban and the threats to report Friday to the authorities are not personnel actions as

contemplated by AIR-21; that the complaint is not timely; that res judicata effect of the earlier district court case barred the complaint; that the activity in the complaint occurred before the enactment of AIR-21; and that Friday has disavowed the complaint.

The Supreme Court's interpretation of Federal Rule of Civil Procedure 56(c) applies to 29 C.F.R. § 18.40(c), which governs summary judgment in this proceeding. *See, Hasan v. Burns & Roe Enterprises, Inc.,* ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001) (applying *Celotex* standard to 28 C.F.R. § 18.40(c)).

> "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

"A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the *unfavorable personnel action* alleged in the complaint." 29 C.F.R. § 1979.109(a) (emphasis added). Of course, in order make such a demonstration, the complaint must allege that the complainant suffered an unfavorable *personnel* action in the first place. Under AIR-21, "Unfavorable personnel action" consists of "discharg[ing] or otherwise discriminat[ing] against an employee with respect to compensation, terms, conditions, or privileges of employment." 49 U.S.C. § 42121(a).

For the purposes of AIR-21, Friday is an employee because "Employee means an individual presently or formerly working for an air carrier..." 29 C.F.R. § 1979.101. The general rule, applied in other whistleblower and retaliation contexts is that complainants who are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way. *See Delcore v. Northeast Utilities*, 90-ERA-37 (Sec'y Mar. 24, 1995) (Whistleblower protections of Energy Reorganization Act); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198-200 (3d Cir. 1994) (Title VII anti-retaliation provision); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir.1977) (Anti-retaliation provisions of Fair Labor Standards Act). There is no reason to apply a different standard to AIR-21 actions.

Northwest owes certain duties to Friday as a former employee on disability retirement, primarily paying his pension or other retirement benefits secured by ALPA's Collective Bargaining Agreement. RX 6 (agreement before retirement board that Friday is a disability retiree). As a disabled retiree, Friday continues to accrue seniority and may return to work if his medical disability abates within seven years of his retirement. CX F. An 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.

1. The Threats of Prosecution for Unauthorized Practice of Law

In a letter dated November 6, 2002, Northwest counsel John Nelson sent Friday a letter stating that Northwest had been advised that Friday intended to represent Captain John Robinson in the arbitration of a labor grievance filed against Northwest. RX 20. Nelson warned Friday that advocacy of this sort would "constitute the unauthorized practice of law." The letter outlined Nelson's analysis of the relevant Minnesota law on practicing law without a license. It concluded by stating that, "The law is clear. Your representation of Mr. Robinson before the System Board of Adjustment would be illegal. If you persist in your intention to appear at the hearing, your crime will be brought to the attention of the county attorney."

Friday responded with a letter, dated November 10, 2002. RX 21. He stated he had "every right to attend the arbitration of Captain John Robinson's grievance ... as his witness." Friday added that he would be contacting the Minnesota Bar, the county attorney mentioned in Nelson's letter, and U.S. Department of Labor to lodge complaints about Nelson's "threatening a witness and interfering with the process." Friday notified Nelson that "My wife and I will be at the arbitration in the capacity to [sic] witnesses whether this agrees with your plans or not."

Two days later, Nelson responded. RX 21. He acknowledged that Friday would be attending the hearing as a witness and that "[s]o long as you are a witness, and you do not perform the function of representative or advocate, you will not be engaged in unauthorized practice of law." Nelson also noted that as Friday was banned from Northwest's property, the arbitration would have to be moved to another venue.

Friday bears the burden of making a prima facie showing that he suffered an unfavorable personnel action. *Taylor v. Express One International Inc.*, 2001-AIR-2, slip op. at 26 (ALJ Feb. 15, 2002). When the nonmoving party bears the burden of proof, "the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex, supra*, 477 U.S. at 324. I find that Northwest has properly done so. There are no facts which support a conclusion that Northwest's threats to inform a county attorney of a possible unlicenced practice of law, are related to the employment relationship between Northwest and Friday, or its compensation, terms, conditions, or privileges.

Friday presents no evidence to show that Nelson's threats constitute an adverse personnel action. *Celotex, supra,* 477 U.S. at 322-323. He may not rely on the allegations in his complaint. 29 C.F.R. § 18.40. Friday was been given additional time for discovery and to answer Northwest's motion, but he has failed file a memorandum in opposition. From the exhibits accompanying his Second Discovery Motion, no inferences can be made to constitute an issue of material fact on this question. There is no showing that further discovery is likely to uncover facts that would allow Friday to prove this element. *Compare, Holden v. Gulf States Utilities*, 92-ERA-44, slip op. at 9 (Sec'y Apr. 14, 1995); Fed. R. Civ. Pro. 56(f).

Summary Judgment for respondent is granted on this ground, and therefore, Northwest's other grounds for summary judgment need not be addressed.

2. The Property Ban

In the November 12, 2002 letter sent to Friday regarding his upcoming testimony in Captain Robinson's arbitration hearing, Northwest counsel John Nelson told Friday that, "as you are banned from access to Northwest Airlines' property" the arbitration would have to take place at an alternate location. Friday understood this statement to be a total "ban from all Northwest property in retaliation for protected acts" including being a witness on safety issues at the arbitration and for filing his previous AIR-21 complaint. Second Discovery Request at 1. Northwest contends that the ban was in effect since August of 1998 and that it was initially put in place because of acrimony arising from Friday's initial placement on medical retirement. Friday alleges that this letter was his first notice of the property ban. Friday avers 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.

In support of its motion for summary judgment, Northwest produced documents to show that it has consistently designated Friday a "former employee on disability retirement status." RX 21. As part of the agreement affording him disability retirement status and the benefits conferred by that status, Friday answered, under oath in an arbitration preceding,

> Q: And do you understand, Mr. Friday, that termination of employment under the plan is defined by complete severance of an employee's employment relationship with the employer and all affiliates, if any, for any reason other than the employee's death.
>
> Friday: Yes.

RX 6.

Northwest argues that since Friday voluntarily ended his employment in 1998, the property ban cannot be a de facto termination of that employment. The property ban is fully consistent with this severance of employment relationship, since, as a former employee or retiree,

there is no reason for Friday to be on Northwest property[5]. As the property ban is unrelated to and does not arise from a present employment relationship and it is not related to the "compensation, terms, conditions, or privileges" owed Friday as a disabled retiree of the company, its post-termination imposition, whether in 1998 or 2002, should not be considered an adverse personnel action.

Northwest's argument is persuasive. Northwest has produced sufficient evidence to establish that there is no genuine issue of material fact supporting that the property ban is an unfavorable personnel action. Since Friday bears the burden of proving that he suffered an adverse personnel action, *Taylor, supra*, 2001-AIR-2, slip op. at 26 (ALJ Feb. 15, 2002), the burden shifts to him to produce evidence sufficient to show that there is a question of material fact on this issue. *Anderson, supra*, 447 U.S. at 250.

Friday attached to his Second Discovery Motion a number of documents that seek to prove that he was still an "employee" of Northwest when the property ban was put into effect from which one can infer that the property ban was a constructive termination. He includes two Northwest seniority rosters, which are in different formats, one dated July 1, 2002 and one dated May 2003. CX G. Friday's name appears on both rosters[6]. He also includes a page from the his union's collective bargaining agreement which states that medically retired pilots continue to accrue seniority for seven years from their retirement date and can return to flying during that period upon proof that they are no longer disabled. CX F. Much like the new copies of the "Travel Authority Card" in the first complaint, these lists prove too much. If Friday remained on the seniority list as of May 2003, the November 2002 property ban did nothing to alter his status. Friday produces no additional evidence to show a genuine issue of material fact to support why, as a medically disabled retiree, being banned from Northwest's property relates to or arises from the compensation, terms, conditions, or privileges of his employment relationship with Northwest.

Friday argues that the property ban would prevent his exercising his right to return to active duty if he is found to be well enough to fly. This is a theoretical argument. If at some future time Friday might take measures towards returning to active duty, and Northwest uses the property ban to frustrate the exercise of his rights guaranteed by the Collective Bargaining Agreement[7], then Friday may have a remedy under AIR-21. To defeat a motion for summary judgment the nonmoving party must produce something more than mere speculation, conjecture

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[5]Note that if the property ban had prevented Friday from appearing as a witness at Robinson's arbitration, the aggrieved party would be Robinson, not Friday. This is a moot issue as Northwest was willing to hold the arbitration elsewhere.

[6]The coding "DRP" appears next to Friday's name in the 2002 roster.

[7] If, for instance, Friday had reached a point where his reinstatement efforts required an examination by a doctor on company property or the use of a flight simulator in a Northwest facility and Northwest prevented him from doing so, Friday might properly allege unfavorable personnel action.

or a hypothetical fact which may never occur. 29 C.F.R. § 18.40(c) specifically requires specific facts showing that there is a genuine issue of fact which can defeat the summary judgment motion. *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 5-6 (ARB Jan. 30, 2001).

Summary judgment is granted for respondent on this ground, and therefore, Northwest's other grounds need not be addressed.

Complaints 2003-AIR-19 and 2003-AIR-20 are dismissed.

A

ALEXANDER KARST
Administrative Law Judge