



**In the Matter of:**

**DAVID D. LEBO,**

**ARB CASE NO. 04-020**

**COMPLAINANT,**

**ALJ CASE NO. 2003-AIR-25**

**v.**

**DATE: August 30, 2005**

**PIEDMONT-HAWTHORNE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Robert G. McIver, Esq., *Hunter, Higgins, Miles, Elam & Benjamin, PLLC,*  
*Greensboro, North Carolina***

*For the Respondent:*

**Denis E. Jacobson, Esq., *Tuggle Duggins & Meschan, P.A., Greensboro, North  
Carolina***

### **FINAL DECISION AND ORDER**

This case arises under section 519 (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). Regulations implementing section 519 appear at 29 C.F.R. Part 1979 (2004).

Complainant David D. Lebo filed a complaint of unlawful discrimination against Piedmont-Hawthorne (Piedmont) which, after investigation, the Occupational Safety and Health Administration (OSHA) found to be without merit. Following Lebo's timely objection, an Administrative Law Judge (ALJ) conducted a hearing on the complaint and issued a Decision and Order (D. & O.) finding Piedmont liable for violating AIR 21. This Board accepted Piedmont's petition for review and the parties submitted timely briefs. Based on our review of the record, we affirm the ALJ's decision.

## BACKGROUND

The ALJ presented a detailed and accurate recitation of the facts, so we need only summarize.

Lebo worked as an aircraft mechanic for Piedmont's facility at the Greensboro, North Carolina airport. D. & O. at 7. In addition to his work at its facility, Piedmont also assigned Lebo to perform on-call maintenance for other companies. *Id.* Lebo performed the on-call maintenance work outside normal business hours for air carriers that did not have in-house maintenance support at the Greensboro airport. Performing on-call maintenance required that Lebo be available twenty-four hours a day. *Id.* Piedmont also made Lebo responsible for training other Piedmont mechanics to perform on-call work and eventually made him head of on-call training. *Id.*

In September 2002, Piedmont ordered Lebo to replace the eight pads on the thrust reverser of a Beech jet that was at Piedmont for scheduled maintenance. *Id.* Lebo had difficulty installing the new pads and so advised his crew chief, Joe Johnson. *Id.* After installing the pads as best he could, Lebo explained to Johnson that he had taken the job as far as he could. *Id.* Even though the job was clearly incomplete, Johnson nevertheless asked Lebo to sign off on the work. He refused because the job was incomplete. *Id.*

On September 12, 2002, Rick Buffkin, the Assistant Service Manager, accompanied by Johnson and Roger Bullins, the Service Manger, met with Lebo and issued him a notice of suspension. *Id.* at 8. They told Lebo that he was being suspended for a week because his work on the thruster pads was unacceptable. Johnson had reported to the managers that Lebo had said that he had completed the thruster pad job. *Id.* at 7-8. Lebo said he had not completed the job and denied telling Johnson that he had. Lebo then told the managers that Johnson had engaged in falsifying maintenance records on the Beech jet and on other aircraft as well. *Id.* at 8. The Company officials sent Lebo home.

When he stopped at Piedmont on Friday, September 13, 2002, to get his tools, Lebo encountered Christian Sasfai, Piedmont's General Manager, who had been out of town when Lebo was suspended. *Id.* Lebo told Sasfai about the events surrounding his suspension and also repeated his accusation about Johnson falsifying maintenance records. On Monday, September 16, 2002, Buffkin asked Lebo to come into work, and when he did, Buffkin fired him. *Id.*

After a two-day hearing in Winston-Salem, North Carolina, the ALJ issued a decision in October 2003 finding a violation of AIR 21 and ordering relief. Piedmont filed a timely petition for review and the parties submitted briefs. Lebo also moved this Board to reopen the record.

## ISSUES PRESENTED

The issues before the Board are: (1) whether AIR 21 applies to Lebo's complaint, (2) whether Lebo's protected activity was a "contributing factor" in Piedmont's decision to fire him, (3) whether Piedmont would have fired Lebo without the protected activity, and (4) whether Lebo's request to introduce additional evidence is appropriate.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary has jurisdiction to review the ALJ's decision under AIR 21. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to this Board her authority to review cases under, inter alia, AIR 21. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

This Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). We review conclusions of law de novo. *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 4-5 (ARB Dec. 30, 2004).

## DISCUSSION

### I. Applicable Law

The whistleblower provision of AIR 21 prohibits air carriers, their contractors and subcontractors from retaliating against employees for raising complaints related to air carrier safety. 49 U.S.C.A. § 42121. The Act and its implementing regulations make it unlawful for an air carrier to discriminate against an employee engaging in protected activity. The regulations read, in relevant part:

It is a violation of the Act for any carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other way discriminate against any employee because the employee has: (1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the 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 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).

To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the respondent subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). The requirement that protected activity must have contributed to a respondent's decision to take unfavorable action assumes that the respondent knew about a complainant's protected activity. If the respondent has violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *Id.* at § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-3, slip op. at 22 (ARB Jan. 30, 2002).

## II. The ALJ's Decision

The ALJ determined that Lebo engaged in protected activity by telling Piedmont's management about Johnson's falsification of maintenance records. *Id.* at 18. The ALJ found that Lebo's allegations involved safety and that the testimony of former Piedmont mechanics describing record falsification "lent objective reasonableness" to Lebo's charges. *Id.* The ALJ also found that Piedmont's discharge of Lebo constituted an adverse employment action. *Id.* at 19.

The ALJ further found that Lebo had proven that the protected activity was a contributing factor in the adverse employment action taken against him. *Id.* at 24. Through detailed analysis, the ALJ determined that the only relevant intervening event between Lebo's suspension and his discharge was his complaint about record falsification, that is, the only intervening event was Lebo's protected activity. *Id.* at 19-24. The protected activity, therefore, was a contributing factor in the discharge.

The ALJ rejected Piedmont's attempt to show that, even if Lebo engaged in protected activity, it would have fired him anyway because of his substandard performance in installing the thruster pads and his failure to seek help. *Id.* at 24-26. Piedmont thus failed to meet its burden of showing, by clear and convincing evidence, that it would have fired Lebo even without the protected activity. *Id.* at 26.

Finally, the ALJ ordered Piedmont to reinstate Lebo, and to pay back wages with interest as well as costs and expenses reasonably incurred. *Id.* at 27-32.

## III. Analysis

### A. AIR 21 is applicable

AIR 21 "shall not apply with respect to an employee . . . who . . . deliberately causes a violation of any requirement relating to air carrier safety . . ." 49 U.S.C.A. § 4121(d). Although Lebo consistently denied it, three Piedmont witnesses testified at hearing or by affidavit that Lebo had told them at the meeting on September 12, 2002, that he had mishandled the thruster pad job "to make a point." D. & O. at 22;

Respondent's brief (Resp. Br.) at 9-10. Because the ALJ found that the thruster pads involved safety and because Lebo allegedly admitted that he deliberately did substandard work, Piedmont argues that AIR 21 does not protect him. Resp. Br. at 9-14.

Piedmont's argument succeeds only if one believes that Lebo made the statement attributed to him. The ALJ expressly found that Lebo did not make such statement and we agree. D. & O. at 22-24. The ALJ refused to credit the testimony of Piedmont's witnesses on this point because they delayed mentioning Lebo's alleged statement for six months. *Id.* In November 2002, two months after Lebo's discharge, both Bullins and Buffkin recorded their reasons for firing Lebo; neither of these writings, however, contains any reference to Lebo's having said he botched the job to make a point. *Id.* Only in March 2003 in attorney-prepared affidavits do Bullins, Buffkin, and Johnson each allege for the first time that Lebo told them he had purposefully performed substandard work. *Id.* Because substantial evidence supports the ALJ's finding that Lebo did not say he purposefully botched the job, we affirm the determination that AIR 21 protected Lebo's action.

*B. Protected activity is a contributing factor*

Piedmont argues that Lebo failed to show that his protected activity contributed to his discharge because his claim rests solely on the temporal proximity between the activity and the discharge, and according to the Company, temporal proximity is not sufficient to make Lebo's case. Resp. Br. 14-19.

Piedmont is mistaken; Lebo's evidence consisted of more than temporal proximity. For example, Piedmont argues that only after Lebo was suspended did it discover that Lebo's work was much worse than first appeared. Specifically, Bullins testified that, when the pads were removed, they could see that Lebo had "over-drilled" the rivet holes, requiring Piedmont to get the manufacturer's permission to use non-standard rivets in making the repair. The sloppiness of the work required Lebo's discharge. Resp. Br. at 8-9.

Piedmont could have succeeded on this point if Bullins had actually discovered the "over-drilled" holes *after* the suspension. By his own statement, however, Bullins admitted he had the pads removed *before* Lebo's suspension. In his November memo regarding Lebo's discharge, Bullins wrote that it was only after removing the pads that he, Buffkin, and Johnson "decided that we would send [Lebo] home for the rest of the week," that is, that they would suspend him. Complainant's Exhibit (CX) 10 at 3. Therefore, Piedmont's contention that it did not fully appreciate the poor quality of Lebo's work until after it suspended him is pretext. When an employer offers pretext as a reason for disciplining an employee, it evidences discrimination. *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981). Substantial evidence supports the ALJ's determination that Lebo's protected activity contributed to his discharge, and thus, we affirm this finding.

*C. Piedmont would not have fired Lebo anyway*

According to Piedmont, the ALJ erred in not finding that, even without the protected activity, Piedmont would still have fired Lebo. Resp. Br. at 19-30. Lebo's substandard work on the thruster pads and his failure to seek help from his managers mandated his discharge. *Id.* In support of this position, Piedmont lists some 15 "facts" which it believes show that it would have fired Lebo anyway. Resp. Br. at 21-23. The following examples indicate why Piedmont's reliance on these "facts" is misplaced.

One "fact" Piedmont asserts is that "Lebo had proper instructions to perform the work or access to proper instructions." Resp. Br. at 21. This presumably bolsters Piedmont's argument that Lebo did substandard work on purpose. Of course, this assertion helps Piedmont only if the instructions were accurate. The testimony of Crew Chief Joe Johnson called their accuracy into question. As an example of one of the ways Lebo botched the pad installation job, Johnson testified that Lebo had failed to "drive the rivets with primer." However, nowhere in the "proper instructions" is there reference to the use of primer for driving rivets or for anything else. Respondent's Exhibit (RX) 8; D. & O. at 25.

Another "fact" Piedmont lists is that it had "to redo the work at a sizeable cost to the Company." Resp. Br. at 22. Bullins testified that one element of the "sizeable cost" was that he was forced to have another worker spend the time to redo the thruster pad job completely and that the work had taken approximately one and a half days (12 hours). D. & O. at 25. Piedmont's ability to redo the work in 12 hours is surprising because the manufacturer's directions for pad replacement indicate that it would take an employee 37.4 hours, nearly a week of work, to install the pads. RX 8; D. & O. at 25. Accordingly, the veracity of Piedmont's protestation about the cost is questionable.

Substantial evidence supports the ALJ's determination that Piedmont failed to prove by clear and convincing evidence that it would have fired Lebo even if he had not engaged in protected activity.

*D. Lebo's motion to reopen the record*

Lebo has moved this Board to permit him to supplement or reopen the record to show that, because Piedmont has failed to comply with the ALJ's order to reinstate him, this Board should convert the order to reinstate into an order for front pay. Lebo cannot obtain that redress in this forum.

AIR 21 requires that, if a company violates the Act, reinstatement must be ordered. 49 U.S.C.A. § 42121(b)(3)(B). In October 2003, the ALJ ordered Piedmont to reinstate Lebo; Piedmont failed to do so. Comp. Br. in Support of Motion to Reopen Record at exhibit 6. Lebo's remedy for this failure, however, rests not with this Board, but with the district court:

A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

49 U.S.C.A. § 42121(b)(6). We deny Lebo's motion to reopen or supplement the record.

#### **IV. Relief**

If the Secretary determines that a violation of AIR 21 has occurred, the Secretary shall order the person who committed such violation to (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. 49 U.S.C.A. § 42121(b)(3)(B). Since the remedies the ALJ ordered are consistent with AIR 21, we affirm the ordered relief as herein modified.

Finally, Lebo has notified this Board that he is seeking additional attorneys' fees for work performed after the ALJ's decision. Complainant's Brief (Comp. Br.) at 28. AIR 21 permits the award of "all costs and expenses (including attorneys' and expert witness fees) reasonably incurred," and accordingly, this Board has awarded attorneys' fees for work that the successful party has performed after the ALJ decision. 49 U.S.C.A. § 42121(a)(3)(B); *see Pettit v. American Concrete Prods.*, ARB No. 00-053, ALJ No. 99-STA-047 (ARB Jan. 29, 2003); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19 (ARB Feb. 6, 2004).

#### **CONCLUSION AND ORDER**

For the reasons stated above, we **AFFIRM** the ALJ's finding that Piedmont's discharge of Lebo violated AIR 21, and we also **AFFIRM** the ALJ's ordered remedies as herein modified. Accordingly, Piedmont is **ORDERED** to:

1. Reinstate David Lebo to his former position together with the compensation and restore the terms, conditions, and privileges associated with his employment;
2. Pay David Lebo back pay in the amount of \$ 43,419.43 for the period through September 6, 2003, plus \$1,111.35, less interim earnings, for each week until the date of reinstatement, or the date of a bona fide offer of reinstatement if Lebo declines reinstatement, whichever is earlier;
3. Pay David Lebo interest on the back pay beginning on September 16, 2002, and continuing until the actual date of payment. The rate of interest is the Federal short term rate specified at 26 U.S.C.A. § 6621, and it is compounded quarterly;

4. Pay David Lebo the value of medical insurance and lost 401(k) contributions, \$4,503.45 through September 6, 2003; and

5. Pay David Lebo all costs and expenses, including attorneys' fees, reasonably incurred by him in connection with this proceeding.

It is **FURTHER ORDERED** that David Lebo has 30 days in which to submit a petition for additional attorneys' fees and other litigation expenses. He is to serve any such petition on Piedmont, and Piedmont will be permitted 30 days in which to file objections to the petition.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**