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Issue Date: 07 October 2004

CASE NO.: 2004-AIR-00012

In the Matter of

BRENT BARKER
Complainant

v.

AMERISTAR AIRLINES, INC.,
AMERISTAR JET CHARTER, INC.,
Respondent

ORDER GRANTING RESPONDENT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

This matter involves a complaint of discriminatory adverse employment action in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21 Act"), 42 U.S.C. § 42121, (the "Act"), brought by Brent Barker ("Complainant" hereinafter) against Ameristar Airlines, Inc., Ameristar Jet Charter Inc. ("Respondent" hereinafter). On June 3, 2004, Ameristar filed a dispositive motion for summary decision in the instant matter. Complainant filed a response to the motion on June 18, 2004. By Order issued July 7, 2004, I denied Respondent's Summary Judgment motion.

A hearing was held on August 2, 2004, August 3, 2004 and August 4, 2004, in Dallas, Texas. At the hearing, Respondent renewed its motion with respect to two elements of Complainant's alleged protected activity. I advised the parties that I was inclined to grant the motion for Summary Judgment as I did not believe that the two issues raised safety concerns. Because counsel for Complainant had not had the opportunity to file a timely response to Respondent's original motion, I allowed time for a written response. On September 7, 2004, Complainant timely filed his response. I received the transcript of the hearing proceedings on September 14, 2004.

Background

The pleadings of the parties set forth the following undisputed facts. Complainant was employed as a pilot, Chief Pilot and air checkman by Respondent for the period from September 23, 2002 until April 14, 2003. Respondent is an air carrier operating under a Part 125 certificate issued by the Federal Aviation Administration ("FAA" hereinafter). During the period relevant to this adjudication, the President and sole owner of Respondent also owned and operated two other companies, Ameristar Jet Charter, operating under FAA Part 135 certificate, and Ameristar Air Cargo, Inc., operating under FAA Part 121 certificate.

Complainant was involuntarily terminated from his employment, and alleges that his termination was in reprisal for his involvement in protected whistleblowing activity. During the course of his employment with Respondent, Complainant reported to FAA and to company officials his concerns involving pilots' duty hours and rest time, the proper maintenance of flight logs, equipment maintenance, and Respondent's use of aircraft call signs and business practices.

Contentions of the Parties

Respondent moved to exclude the evidence regarding Complainant's reports of alleged violations involving Respondent's use of an affiliated company's call signs and its alleged commercial transactions with customers outside the scope of its Part 125 certificate. Respondent contends that these activities are not protected activity under the Act because they do not involve safety issues. Respondent seeks summary judgment in its favor on these two allegations.

Complainant opposes exclusion of the evidence pertaining to these allegations, and opposes the grant of summary judgment against it. Complainant argues that the Act extends coverage to reports of alleged violation of any FAA rule or regulation.

Discussion

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. §18.40, *see also* Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The primary purpose of the summary judgment rule is to dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). The existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment unless the factual dispute is material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). If the moving party properly supports its motion, the burden shifts to the non-moving party, who must establish by specific facts that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993).

Protected Activity under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 29 C.F.R. Part 179, 49 U.S.C. § 40101 et seq.

The employee protection provisions of the Act prohibit any air carrier from intimidating, threatening, restraining, coercing, blacklisting, discharging or in any other manner discriminating against any employee 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 air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or

any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

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 FAA or any other provision of Federal law relating to air carrier safety under this subtitle or nay other law of the United States;

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. section 42121. The controlling regulations set forth at 29 C.F.R. § 1979.102(a) incorporate this statutory language.

Complainant offers several theories to support his contention that the protection of the whistleblowing provisions of the Act should extend to Respondent's alleged improper use of another air carrier's call signs and its alleged improper business transactions. Complainant argues that the language of the Act and regulations should be read disjunctively, so that the phrase "relating to air carrier safety" modifies only the phrase "or any other provision of Federal law". I find this construction of the statute strained, particularly as it ignores the meaning of the words that follow "relating to air carrier safety", to wit: "under this subtitle or any other law of the United States". Moreover, this construction is inconsistent with the statutory language that introduces section 42121: "Protection of employees providing air safety information". 49 U.S.C. § 42121. The statute clearly intends to protect employees who report alleged violations that pertain specifically to air carrier safety.

I find support for my construction of the statutory language in decisions of the Administrative Review Board ("ARB") that conclude that specific safety contentions must be alleged for whistleblower protection to apply. In its decision in *Jan Svendsen v. Air Methods, Inc*., 03-074 (ARB August 26, 2004, ALJ 02-AIR-16), the ARB concluded:

> AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. Air carriers, contractors and their subcontractors are prohibited from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, condition, or privileges of employment because the employee…engaged in the air carrier safety-related activities the statue covers. 49 USCA. Sec 42121(a); 29 C.F.R. sec 1979.102(a). Those concerns may be pursued through reports to an employer of the Federal Government of a violation or an alleged violation of the foregoing air carrier safety standards or through the initiation of or participation in a proceeding regarding such violation.

Svendsen, supra., at 5. In another case brought under the AIR 21 Act, the ARB concluded that "AIR21 section 519 prohibits discrimination by any 'air carrier or contractor or subcontractor of

an air carrier' against any 'employee' for providing air safety information." *Peck v. Safe Air International, Inc.*, 02-028, 8 (ARB January 30, 2004, ALJ 01-AIR-3).

In other whistleblowing cases[1], the ARB determined that the alleged protected activity must implicate safety definitively and specifically, regardless of whether an allegation is ultimately substantiated. *Minard v. Nerco Delamar Co*., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The ARB found that the complaint must be "grounded in conditions constituting reasonably perceived violations." Id. The complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v Westinghouse Hanford Co*., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

Although acknowledging this standard, Complainant urges a broad interpretation of protected activity, and argues that the two reported activities at issue meet the test of "touching on" air carrier safety. See, *Weil*, ALJ 2003-AIR-00018; *Fader*, ALJ 2004-AIR-0027. I am not persuaded that the Respondent's use of another carrier's call signs or its securing of transport contracts beyond those allowed under its certification touch on safety issues in any way. In the first instance, Complainant admits that no specific FAA rule or regulation was implicated by Respondent's use of another carrier's call signal. In the second instance, it is clear that the FAA considers the commercial activities of Respondent to be purely economic. In support of its argument, Complainant submitted a copy of a Consent Order entered between the Department of Transportation ("DOT") and Respondent that addresses whether Respondent exceeded the privileges of its Part 125 certificate by offering transport to the public at large.

I find nothing in the Consent Order to suggest that safety concerns were raised by Respondent's commercial activities. In its inquiry into the allegation regarding whether Respondent exceeded the scope of its license, the Enforcement Office of the DOT focused on whether by violating DOT's licensing requirements, Respondent engaged in an unfair and deceptive trade practice and unfair method of competition. See, Attachment 1, Complainant's Response to Respondent's motion for summary judgment, page 1. The Enforcement Office looked at whether Respondent's activities invoked "the Department's economic licensing jurisdiction". Id., at page 4. Accordingly, I find that the probative value of the Consent Order is limited to my consideration of Complainant's objection to Respondent's motion for Summary Judgment. It is of no probative value to me in my adjudication of the whistleblowing action before me and is excluded from consideration in that context.

Despite finding that Complainant has not established that the allegations regarding call letters and commercial transactions are protected activity under the AIR 21 Act, I am unable to entirely exclude the evidence regarding the allegations from the record. Complainant has alleged that he raised these issues with FAA simultaneously with allegations that I find constitute

[1] When enacting the AIR 21 Act, Congress directed that the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851 model apply to the enforcement of complaints brought under AIR 21 Act.

protected activity. Therefore, the fact that they were raised by Complainant has some probative value.

Conclusion

I find that it is appropriate to GRANT Summary Judgment for Respondent, and exclude the two activities in dispute from consideration as protected activity. I hereby exclude from the record the Consent Order between Respondent and DOT, except for the limited purposes of ruling on Respondent's motion for Summary Judgment. I DENY Respondent's motion to exclude the evidence regarding the allegations from the record for the reasons stated above.

So ORDERED.

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Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey