



**In the Matter of:**

**DANA MEHEN,**

**ARB CASE NO. 03-070**

**COMPLAINANT,**

**ALJ CASE NO. 03-AIR-4**

**v.**

**DATE: February 24, 2005**

**DELTA AIR LINES,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***Dana Mehen, pro se, Tucson, Arizona***

***For the Respondent:***

***Scott G. Blews, Esq., Delta Air Lines, Atlanta, Georgia***

**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 (AIR21), 49 U.S.C.A. § 42121 (West 2003), and implementing regulations, 29 C.F.R. Part 1979 (2003). Dana Mehen alleges that Delta Air Lines discriminated against her because she reported to Delta that exposure to pesticides while working as a flight attendant on Delta air planes contributed to her disability. *Mehen v. Delta Air Lines*, ALJ No. 2003-AIR-4 (ALJ Feb. 24, 2003) (Recommended Decision and Order, "R. D. & O."). We grant summary decision for Delta.

**PROCEDURAL POSTURE OF THE CASE**

On July 5, 2002, Mehen filed a complaint with the Occupational Safety and Health Administration invoking the AIR21 whistleblower protection provision. R. D. & O. at 1. Mehen alleged that Delta violated AIR21 § 42121 by harassing her and denying

her health benefits because she reported to Delta that she had become permanently disabled by pesticide exposures she experienced while working as a flight attendant for Delta. *Id.* at 3-4.<sup>1</sup>

Delta moved to dismiss on the ground, inter alia, that reporting an occupational injury or its cause is not protected activity within the meaning of § 42121(a). The ALJ agreed with Delta and dismissed the complaint on the ground that Mehen failed to allege facts sufficient to establish an essential element of an AIR21 whistleblower complaint, viz., that she engaged in protected activity. *Id.* at 5.<sup>2</sup>

#### STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision under AIR21 § 42121(b)(3) and 29 C.F.R. § 1979.110. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR21 § 42121).

The Board reviews an ALJ's conclusions of law de novo. *Cf. Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004). Under § 42121, we review the ALJ's findings of fact under the substantial evidence standard. 29 C.F.R. § 1979.110(b).

---

<sup>1</sup> Mehen asserted that Delta violated the AIR21 whistleblower provision when it denied her worker's compensation claim in 1997, when it denied her request for long term disability benefits in 2000, and when it denied her request for extension of COBRA benefits on March 6, 2002. R. D. & O. at 2.

The ALJ ruled that Mehen's complaint was untimely in part. AIR21 § 42121(b)(1) requires that a complaint be filed "not later than 90 days after the date on which such violation occurs." Thus, Mehen's July 5, 2002 complaint was timely only for a violation that occurred within the preceding 90 days – the period beginning May 5, 2002. Each of the actions about which Mehen complained occurred before May 5, 2002.

Thus, the ALJ properly dismissed Mehen's complaint with respect to the 1997 denial of worker's compensation benefits and the 2000 denial of long term disability benefits. R. D. & O. at 3. However, the ALJ correctly found that Mehen's complaint about the denial of a COBRA extension in March 2002 was timely based on equitable tolling. *Id.*

<sup>2</sup> The recommended decision is not clear as to whether the ALJ found Mehen's allegation of protected activity insufficient because Mehen's report to Delta did not implicate a violation of air carrier safety law or because Mehen's report to Delta focused exclusively on Mehen's personal injury rather than on air carrier safety.

## ISSUE

Did Mehen's report to Delta that she was injured while working as a flight attendant qualify as protected activity within the meaning of § 42121(a)?

## DISCUSSION

We find Delta's motion to dismiss to be a Fed. Rule of Civ. P. 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted. The ALJ granted Delta's motion. R. D. & O. at 4-5. However, it is clear from the recommended decision that the ALJ considered factual allegations and documents extraneous to the pleadings. Thus, Delta's motion is more properly treated as a motion for summary decision pursuant to 29 C.F.R. §§ 18.40, 18.41. See *Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004). 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).

The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision" as a matter of law. 29 C.F.R. §§ 18.40, 18.41; *Flor v. United States Dep't of Energy*, 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994). If the non-moving party fails to show 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. *Rockefeller v. United States Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Mehen supplemented her pleadings pursuant to the ALJ's order. R. D. & O. at 4. Mehen submitted numerous documents and a written statement to identify with particularity the activity that she believed was protected. Mehen Document Collection pages 1 – 312, Dec. 27, 2002; Statement Jan. 21, 2003. In these submissions, Mehen alleged that in 1994 Delta approved her request for temporary disability leave based on a diagnosis of respiratory injuries that fires on board Delta air planes in 1986 and 1991 had caused. Statement at 4. Mehen further alleged that in 1997, while she was still on temporary disability leave, she reported to Delta that her physician had determined that exposures to pesticides on board international flights had exacerbated these respiratory injuries and that the exposures had caused her to be permanently and totally disabled. *Id.*

After receiving Mehen's new diagnosis of permanent, total disability, Delta required Mehen to submit to additional disability evaluations. Statement at 4. Two physicians who evaluated her at Delta's request concluded that Mehen was not disabled and could return to work – a finding that Mehen disputed. *Id.* In Mehen's view, Delta

subjected her to medical evaluation and denied her benefits only because she called attention to pesticide exposure at foreign airports:

As soon as I notified Delta Airlines of my new medical diagnosis relating direct causal [sic] to the fire accident/pesticides, Delta retaliated against me. To harass me into going away, to not ever bringing the pesticide issue to the attention of everyone – mainly ill flt. [sic] attendants who might connect how they became so ill.

Statement at 6.

Documents Mehen submitted to the ALJ also included copies of numerous EPA, Department of Transportation, Association of Flight Attendants, and Delta public documents discussing the hazards to passengers and crew of pesticide spraying on U. S. planes. Documents at pp 49 – 146. These documents indicate that though pesticide spraying on board U. S. planes is banned in the United States, it occurs at foreign airports where the local government requires pesticide spraying, and that the United States has persuaded many foreign governments to eliminate or restrict the spraying requirement. Finally, Mehen cited various OSHA safety requirements that might apply to pesticide spraying on Delta planes if it were conducted in the United States. Statement at 6.

In her complaint Mehen must allege facts and evidence that show that she engaged in protected activity, that Delta knew of this activity, that she suffered an adverse employment action, and that the protected activity contributed to the adverse action. 29 C.F.R. § 1979.104(b)(1).

Section 42121(a) of the Act 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;

(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;

(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).

Even construing all of Mehen's factual allegations in the light most favorable to her, as we must on summary decision, we find that Mehen has not articulated a viable factual basis for her claim that she engaged in protected activity. Reporting to Delta her belief that she had been injured by pesticide spraying that was mandated by foreign governments, but that was not subject to any law of the United States, does not fall within the plain language of § 42121 – providing information or filing a proceeding relating to a violation of Federal air carrier safety laws.

#### **CONCLUSION**

Because Mehen failed to allege facts sufficient, if proved, to establish an essential element of her AIR21 whistleblower complaint, viz., that she engaged in protected activity, we grant summary judgment for Delta and **DENY** the complaint.

**SO ORDERED.**

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

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**