



In the Matter of:

JOSH ALLISON,

ARB CASE NO. 03-150

COMPLAINANT,

ALJ CASE NO. 2003-AIR-00014

v.

DATE: September 30, 2004

DELTA AIR LINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Laurence H. Margolis, Esq., Atlanta, Georgia

For the Respondent:

**Thomas J. Munger, Esq., Lawrence H. Wexler, Esq., Munger & Stone, LLP,
Atlanta, Georgia**

FINAL DECISION AND ORDER

This case arises under Section 519 (the employee 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). Regulations implementing Section 519 appear at 29 C.F.R. Part 1979 (2003). Josh Allison filed a complaint alleging that Delta Air Lines disciplined him in violation of AIR21 Section 519. Delta filed a motion for summary decision pursuant to 29 C.F.R. § 18.40(a) (2004), seeking dismissal of the complaint. An Administrative Law Judge (ALJ) concluded that there were no genuine issues of material fact in this case and recommended dismissal with prejudice. For the following reasons, we conclude that Delta is entitled to summary decision.

FACTUAL BACKGROUND

The dispositive facts in this case are not in dispute. Allison began working for Delta in December 1989 and in August 1998, he became a machinist at Delta's Technical Operations Center in Atlanta, Georgia. Allison reported to the department leads, who in turn reported to the Foreman Joe O'Hara. O'Hara reported to a manager who reported to the Director – Engine Maintenance, Cecil Ronald Cherry. Delta's Motion for Summary Decision, Exhibit (RX) A (Deposition of Josh Allison) at 30, 37-38.

In 1999, Delta began using a computer software program called Shop Excellerator (SE) to record tasks performed by employees. After completing an assignment, an employee was responsible for accessing this program, entering a personal password, and electronically "signing off" on the work he or she had completed. This task was integral to the process of conducting repairs on landing gear. RX A at 104-106, 109-113.

On June 22, 2001, Allison arranged a meeting with Cherry. During this discussion Allison told Cherry that employees were sharing and misusing SE passwords. Cherry told Allison he would conduct his own investigation into the password sharing and that he would not retaliate against Allison for raising the issue. RX B (Statement of Cecil Ronald Cherry, Jr.) at 1-2.¹

On June 23, 2001, Allison went to a computer that Lead Machinist Steve Agers had used earlier that day and found a list of SE passwords. RX A at 157. Allison e-mailed the list to himself and Steve Endler, a Delta mechanic. He also printed a copy of the list. RX A at 268, 271, Deposition Exhibit 20.

On June 24, 2001, Endler received an e-mail that Agers appeared to have sent at 6:57 p.m. the previous day. Endler opened the message, which contained the password list. RX C (Affidavit of Steven Endler) at ¶ 4. Endler informed O'Hara of the e-mail and O'Hara contacted Cherry. Cherry concluded that someone other than Agers had accessed Agers's files without authorization and had e-mailed the password list to Endler. Cherry considered the release of this list to a non-management employee a violation of company policy and requested that Delta's security division conduct an investigation. RX B at 1-2.

On August 10, 2001, Allison was called into a meeting with Cherry, O'Hara, and Delta security investigators Gail Griffith and Larry Hammett. Griffith told Allison that Delta could establish that he was near Agers's computer on June 23, 2001. RX B at 3. The investigators asked Allison if he had accessed Agers's computer, and Allison responded by stating that he was not required to answer that question. Allison asked to

¹ Cherry informed Delta's Quality Assurance Department and FAA Liaison Office about the password sharing. RX B at 2. The Federal Aviation Administration investigated and in April 2002 concluded that the password sharing violated federal aviation regulations. Allison's Response to Respondent's Motion for Summary Decision, Exhibit B.

speak to Cherry in private. The two went into Cherry's office, where Allison told Cherry that he would not answer the question. *Id.* Cherry told Allison that if he did not cooperate he would suspend Allison. Allison again told Cherry that he would not cooperate, so Cherry suspended him "pending review due to his refusal to cooperate and his conduct at the meeting." *Id.*

On November 20 and December 7, 2001, Delta wrote to Allison to schedule a meeting to discuss his return to work. Allison did not respond to either letter. On December 18, 2001, Delta sent Allison a letter from Mike Medeiros in Human Resources stating, "Mr. Allison, if you have not contacted me by Friday, December 28, 2001, in order to establish a time for you to meet with your foreman and me, I will have no alternative but to assume you have abandoned your position at Delta and we will process your termination accordingly." RX A Deposition Exhibits 21-24. Allison did not respond to this letter. On January 17, 2002, Medeiros sent Allison a letter informing him that, because he had not responded to the letters, his employment had been terminated. *Id.*

CASE HISTORY

On November 8, 2001, Allison filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Delta was harassing and investigating him. OSHA investigated the complaint and found that it was meritless. Allison requested a hearing before an ALJ. Delta deposed Allison on April 15, 2003. On June 23, 2003, Delta moved for summary decision.

On August 13, 2003, the ALJ issued a Recommended Decision and Order (R. D. & O.), concluding that Allison engaged in an "unauthorized frolic" when he accessed Agers's e-mail folder. The ALJ opined that, "[o]nce Complainant himself committed a deliberate violation of an air carrier safety requirement by forwarding the passwords to someone else, he lost his entitlement to claim whistleblower protection under AIR21 section 519 for reporting the sharing of passwords in his department." R. D. & O. at 7. Allison now appeals the ALJ's ruling to this Board.

ISSUE PRESENTED

Should the Board dismiss Allison's complaint because Delta has shown that there are no genuine issues of material fact and Delta is entitled to summary decision as a matter of law?

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 in cases arising under AIR21. *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).

DISCUSSION

To prevail on a complaint brought under AIR21 Section 519, a complainant must prove that he engaged in activity protected by the statute and that the respondent subjected him to an unfavorable personnel action because he engaged in such activity. If the respondent has violated AIR21 Section 519, "the Secretary may not order relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity." *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

Allison engaged in protected activity when he discussed the password-sharing problem with Cherry on June 22, 2001. But Delta did not violate AIR21 Section 519 when it suspended Allison or terminated his employment, because those actions were not in retaliation for his June 22 discussion. We find that Delta is entitled to summary decision for the following reasons.

First, Allison's refusal to cooperate in the investigation constitutes a legitimate, non-discriminatory reason for Allison's suspension. The password system was implemented to require each employee to document the completion of his or her tasks. But letting another employee verify the completion of such tasks defeated the purpose of the login requirement. Cherry told Allison that if he did not cooperate in the investigation he would suspend Allison. Allison chose not to cooperate. Allison's burden on summary decision is to create a triable issue of fact on whether Cherry suspended him for failing to cooperate or in retaliation for his June 22 disclosure on password sharing. He has failed to do so.

Second, Delta has established that it would have taken the same action against Allison in the absence of his protected activity. Delta's administrative policies prohibit "entering another person's mailbox without specific authorization." RX A Deposition Exhibit 5 ("Electronic Mail Procedures"). Delta has submitted proof that it has recommended terminating other employees' employment when they committed infractions similar to Allison's. RX D. And Delta did not violate AIR 21 Section 519 by terminating Allison's employment. Delta attempted to arrange meetings with Allison to facilitate his return to work. See RX A Deposition Exhibits 21-24. Allison's burden on summary decision is to adduce evidence that Delta did not attempt to arrange his return to work because of the June 22 expression of safety concerns. His response is that he did not believe the content of the letters and was reluctant to return to Delta's premises because of his fear of being arrested. Allison's Response to Respondent's Motion for Summary Decision at 9-10. But his speculation regarding the motivation of Delta's letters falls short of the admissible evidence necessary to defeat Delta's motion. See *Anderson*, 477 U.S. at 256.

Because Allison has failed to create a genuine issue of material fact concerning Delta's proffered reasons for suspending him and terminating his employment, we rule that Delta is entitled to summary decision on Allison's complaint.

The ALJ held that Delta is entitled to summary decision because Allison engaged in a subsequent act that may have violated air safety (i.e., sending the password list to Endler), and he therefore "lost his entitlement to claim whistleblower protection." See R. D. & O. at 7. Cf. 29 C.F.R. § 1979.102 (AIR21's interpretive regulations at 29 Part 1979 do not apply to any air carrier employee who deliberately violates any requirement relating to air carrier safety under any law of the United States). The ALJ supports his holding by citing *Fields v. United States Dep't of Labor Admin. Review Bd.*, 173 F.3d 811 (1999), in which the Eleventh Circuit affirmed this Board's conclusion that employees who had previously engaged in protected activity were not entitled to protection under the Energy Reorganization Act after conducting unauthorized tests on a nuclear reactor. But we conclude that a *Fields* analysis is unnecessary to resolve this case. Delta prevails on its motion for summary decision only because it presented a non-discriminatory reason for the actions it took in response to Allison's refusal to cooperate in the investigation.

Finally, Delta contends that Allison's Petition for Review was filed to "harass Delta into paying Allison to resolve this meritless action to avoid further attorney fees" and Delta is therefore entitled to attorney's fees. Respondent's Opposition to Complainant's Petition for ARB Review of ALJ Decision and Respondent's Request for Award of Attorneys' Fees at 6. We disagree. AIR21 Section 519 states that if a complaint is frivolous or brought in bad faith, the Board may award to a successful respondent "a reasonable attorney's fee not exceeding \$1,000." 49 U.S.C.A. § 42121(b)(3)(C). But Delta must show that Allison's complaint lacks an arguable basis in either law or fact:

A complaint is frivolous "if it lacks an arguable basis in law or fact." *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir.1999). "A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Talib*, 138 F.3d at 213.

Berry v. Brady, 192 F.3d 504, 507 (5th Cir. 1999). Allison's complaint passes both of these tests. First, the complaint is based upon Allison's contention that Delta retaliated against him in violation of AIR21 Section 519, so it contains an arguable basis in law. Second, the dispositive facts we have reviewed in this case are not baseless; they simply do not support Allison's contention that Delta violated the law. Delta does not provide any evidence indicating that Allison has pursued this complaint for vexatious reasons, so we deny its request for attorney's fees.

CONCLUSION

We have thoroughly examined the record and find that there are no genuine issues of material fact in dispute. We conclude that Delta is entitled to summary decision as a matter of law and **DISMISS** Allison's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge