



In the Matter of:

COLEEN L. POWERS,

ARB CASE NO. 04-035

COMPLAINANT,

ALJ CASE NO. 03-AIR-12

v.

DATE: September 28, 2004

PINNACLE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Coleen L. Powers, pro se, Memphis, Tennessee

For the Respondent:

Doug Hall, Esq., Piper Rudnick, LLP, Reston, Virginia

FINAL DECISION AND ORDER OF DISMISSAL

This case arises under the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C.A. § 42121 (West 1997), and its implementing regulations, 29 C.F.R. Part 1979 (2003). The Administrative Law Judge (ALJ) determined that the Complainant, Coleen Powers, failed to state a claim upon which relief under AIR21 could be granted. Therefore, on December 10, 2003, the ALJ issued a Recommended Decision and Order Granting Respondent, Pinnacle Airline's Inc.'s Request for Summary Judgment (R. D. & O.).¹

¹ Powers originally alleged additional violations under the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A (West 1997), as well as four additional environmental whistleblower protection statutes. Finding no basis for these claims, the ALJ dismissed them before issuing her Recommended Decision and Order in the AIR21 case. Order Granting Respondent's Request for Partial Dismissal and Denying Complainant's Request for Default Judgment.

BACKGROUND

On December 22, 2003, pursuant to 49 C.F.R. § 1979.110(a), Powers filed with the Administrative Review Board (ARB) an “Appeal and Petition for Review of December 10, 2003 RDO, and Motion for Leave of Court to File Motion for Summary Reversal and Remand to a Different ALJ for Denovo [sic] Hearing Consolidation [sic] with OALJ Case 2004AIR0006.”² Simultaneously, Powers filed a 62-page document entitled “Complainant’s Initial Brief & Memorandum of Law to Support Her Timely Petition” The Board issued its Notice of Appeal and Order Establishing Briefing Schedule on January 8, 2004, and granted Powers leave to file a motion for summary reversal. She was ordered to submit an initial brief **not exceeding 30 pages in length** on or before February 6, 2004.

On February 2, 2004, along with a motion for summary reversal, Powers requested that the Board accept her December 22, 2003 filing as her initial brief; or, in the alternative, that the Board grant her an extension of time to file a new brief. On March 11, 2004, the Board denied her request to accept the December 22, 2003 brief, which exceeded the briefing order’s 30-page limitation, but did grant her request for more time to file a new brief. The Board ordered Powers to file a conforming initial brief of thirty pages or less on or before March 26, 2004.

By the March 26, 2004 deadline, Powers had again failed to file a conforming brief. Instead, she requested that the Board accept as her initial brief a document that was attached in support of her February 2, 2004 motion for summary reversal. This February 2, 2004 document purported to incorporate entirely by reference the legal arguments of her 62-page filing from December 22, 2003, which this Board had already refused to accept as Powers’ brief. Therefore, on March 31, 2004, the Board issued an order denying Powers’s request to accept the nonconforming brief, and granting her yet another extension of time to file a brief of 30 pages or less. The order stated that, “unless the Board receives a brief that complies with the Board’s briefing order on or before April 14, 2004, Powers’s complaint will be subject to summary dismissal without further notification.” The Board also issued an order denying Powers’s request for summary reversal.

On April 13, 2004, Powers filed another document with the Board, promisingly entitled “Complainant’s Brief Pursuant to the Board January 8, 2004, March 11, 2004, & March 31, 2004 Orders.” Although this document falls within the Board’s 30-page limitation, its legal analysis again relies almost exclusively on her previous filings. All former filings are specifically incorporated by reference, amounting to well over 100

² The Board has authority to review the ALJ’s recommended decision in AIR21 cases pursuant to 49 U.S.C.A. § 42121(b)(3) (West 1997) (granting authority to the Secretary of Labor to issue final decisions in AIR21 cases); 29 C.F.R. § 1979.110 (allowing appeals to the ARB in AIR21 cases); Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review AIR21 cases and issue final decisions).

pages of total argument. The April 13, 2004 document itself contains only a few scraps of legal argument.

As this Board has previously made clear to Powers, the Board will not consider previous filings that do not comply with the briefing order. *See Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 453 (6th Cir. 2003) (noting that parties cannot circumvent a brief's page limitation through incorporation by reference of former filings). Nevertheless, Powers has doggedly continued to insist that she may incorporate her previous filings without any regard to page limitations.

DISCUSSION

The Board's authority to effectively manage its affairs, including authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases." *Link v. Wabash*, 370 U.S. 626, 630–31 (1962). This Board has authority to issue sanctions, including dismissal, for a party's continued failure to comply with the Board's orders and briefing requirements. *See Blodgett v. TVEC*, ARB No. 03-043, ALJ No. 2003-CAA-7 (ARB March 19, 2003) (dismissing complaint for failure to comply with briefing order); *cf.* Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b) (permitting courts to dismiss a complaint for failure to comply with court orders).

Considering that Powers is proceeding in this appeal without representation by counsel, this Board has afforded her expansive latitude in achieving compliance with procedural requirements. This latitude, however, is not without bounds. Powers's persistent and contumacious refusal to comply with the Board's briefing order warrants sanctions in this case.

After receipt of Powers's most recent nonconforming brief, the Board considered the initial sanction of requiring the Respondent, Pinnacle Airlines, Inc., to reply only to those claims actually set forth in the April 13, 2004 document itself, without reference to the incorporated documents. After careful consideration, however, the Board has concluded that any analysis present in this document is insufficient to justify further consideration of this appeal.

Powers raises several issues on appeal, none of which is adequately dealt with in her brief. Her first issue, concerning the ALJ's dismissal of her environmental and Sarbanes-Oxley claims, is not supported by her brief. *See* Fed. R. App. P. 28(a)(9) (requiring the Complainant's brief to set forth legal argument and citations to supporting authority). Her April 13, 2004 document fails to allege any basis for finding error in the ALJ's dismissal.

Next, Powers takes issue with the ALJ's refusal to include Northwest Airlines, Northwest AirlinK, and numerous other parties as respondents in this case. The ALJ made clear, however, that these entities were not named in the original Complaint and

that Powers cannot unilaterally add additional parties after proceedings are underway. Powers's brief does not provide any basis for questioning the ALJ's decision.

Powers's third issue, whether the ALJ unlawfully granted summary judgment before conducting a "denovo [sic] hearing on the merits," is also without merit. The ALJ has authority to grant summary disposition when no genuine issue as to any material fact is in dispute. 29 C.F.R. § 18.40; Fed. R. Civ. Pro. 56. *Accord Moore v. Department of Energy*, ARB No. 99-047, ALJ No. 98-CAA-16 (ARB June 25, 2001). Contrary to the Powers's contention, 29 C.F.R. § 1979.107(b) and 109(a) do not require the ALJ to stubbornly continue proceedings even after the ALJ determines that no material facts are at issue. Neither the statute, the regulations, nor the case law supports Powers's position.

Her fourth contention is that the ALJ erred in granting Pinnacle's motion for summary judgment. This Board reviews an ALJ's recommended grant of summary disposition de novo. *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 03-SOX-18, slip op. at 3 (ARB Feb. 25, 2004). Summary decision is appropriate when no material facts as to any genuine issue are in dispute. *Id.* To be successful in an AIR21 case, Powers must establish that: (a) she is an employee protected under AIR21; (b) she engaged in protected activity; and (c) an air carrier, or contractor or subcontractor of an air carrier, subjected her to an unfavorable personnel action because she engaged in protected activity. *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 01-AIR-03, slip op. at 5 (ARB Jan. 30, 2004).

But Powers has not shown that the ALJ erred in granting Pinnacle's motion for Summary Judgment. That is, she has not shown that a genuine issue of material fact exists as to whether Pinnacle took adverse action against her or that it did so because of protected activity. See R. D. & O. at 14. Because Powers failed to establish the essential elements of retaliation and causation, the ALJ properly dismissed the case. Aside from repeated unsupported assertions that the ALJ erred, Powers simply fails to set forth any basis for reversing the grant of summary decision.

CONCLUSION

Requiring Pinnacle to respond to the unsubstantiated allegations in the Powers's brief would not facilitate clarification or resolution of the issues and would further waste the resources of this Board. Therefore, due to Powers's continued delay and contumacious refusal to conform her brief to the Board's briefing requirements, along with her failure in her April 13, 2004 filing to provide any legitimate legal basis for her appeal, Powers's appeal is hereby **DISMISSED**.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge