U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 May 2005

Case No.: 2004-AIR-00033

In the Matter of:

LOUIS D. MARSH, JR.,
Complainant,

v.

ERICKSON AIR-CRANE, INC.,
Respondent.

BEFORE: RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

Complainant Louis D. Marsh brought this whistleblower complaint pursuant to the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21 or the Act), 49 U.S.C. § 42121 et. seq.

For the reasons stated below, Complainant's claim is DISMISSED.

I. Background

A. Procedural History

Complainant, Louis D. Marsh, was terminated from his employment with Erickson Air-Crane on October 28, 2003. On January 9, 2004, Complainant sent a letter to Congressman Mark Foley alleging that Respondent terminated him in retaliation for safety complaints. Congressman Foley's office forwarded the complaint to the Occupational Safety and Health Administration.

On July 26, 2004, OSHA advised Complainant that its investigation of his complaint was complete and that it was dismissing his wrongful termination claim. Complainant filed this appeal of the OSHA findings on August 3, 2004.

B. Factual History

In his initial complaint, Complainant alleged that Respondent, who owns the FAA Type Certificate on the S-64e and the S-64f model helicopters, violated Federal Air Regulations for the helicopters by failing to install fuel filters. Complainant further alleges that he informed his manager at Erickson of this violation and was terminated from his employment. Complainant argues that the termination violated the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, as implemented by 29 C.F.R. Part 1979 (2002) ("AIR" or "the Act").

In his response to Respondent's motion to dismiss, Complainant referred this Court to Erickson Air Crane's website, and argued that the belly tank located on the outside of Erickson's helicopters carries cargo, and thus, Respondent is an air carrier under the Act.

Respondent, on the other hand, asserts that it is not covered by the Act since it does not meet the statutory definition of an "air carrier." It performs highly specialized operations including fire-fighting, logging, construction, and hydroseeding, rather than transportation activities. Furthermore, Respondent argues that, since it does not hold an operating certificate issued pursuant to 14 C.F.R. Part 119, it cannot be considered an air carrier; instead, it holds a Part 133 certificate, making it an air operator under the FAA regulations.

Alternatively, Respondent contends that Complainant's termination was legitimate reasons and that Complainant is unable to establish a *prima facie* case for whistleblower protection.

II. Analysis

Section 519 of the AIR Act prohibits an air carrier, contractor or subcontractor of an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or federal government information relating to any violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121 (a).

In order to show coverage under AIR, the employee must show that his employer is an "air carrier" within the meaning of the Act. Broomfield v. Shared Services Aviation, 2004-AIR-20 (ALJ Aug. 9, 2004) (slip op. at 3).

There is little decisional law applying AIR 21. The question that is presented in this case – coverage under the Act – has been addressed in two Administrative Law Judge opinions. In Lentz v. Sky King, Inc., 2001-AIR-1 (ALJ Feb. 14, 2001), the judge held that the term "air carrier" under 49 U.S.C. § 42421 is a general term that includes both common carriers and private carriers.

In Broomfield v. Shared Services Aviation, 2004-AIR-20 (ALJ Aug. 9, 2004) the administrative law judge undertook a more detailed analysis of the term "air carrier:"

> The regulations implementing AIR 21 state that the definition of "air carrier" under the Federal Aviation Act, 49 U.S.C. § 40101 *et seq.* ("FAA") is applicable to AIR 21. [*See* Procedures for Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 68 Fed. Reg. 55, 14101 (Mar. 21, 2003).] The FAA defines "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly to provide air transportation." 49 U.S.C. 40102(a)(2). Air transportation is further defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. §40102 (a)(5).

Id. at 3. "Foreign air transportation" is "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft." 49 U.S.C. § 40102 (a)(23). "Interstate air transportation" is "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft" between one place in a State, territory, or possession of the United States and another. 49 U.S.C. § 40102 (a)(25).

In this case, it is undisputed that Respondent performs specialized work including fire-fighting, logging, construction, and hydroseeding. While Complainant does assert that Respondent's helicopters transports water and seeds in "belly tanks" that are attached to the outside of the helicopter with brackets, that assertion does not support a finding that the Respondent is an air carrier. Rather, the Respondent has a Part 133 certificate under the FAA guidelines, making it an air operator that carries only external loads, not an air carrier which transports passengers, cargo, or mail. The Act does not cover the employer in this case.

III. **Order**

Complainant Louis B. Marsh's whistleblower complaint is DISMISSED since Respondent Erickson Air Crane is not an air carrier under the Act.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/vlj
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200

Constitution Avenue, NW, Washington DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. 55 1979.109(c) and 1979.110(a) and (b).