

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 30 November 2005

Case No.: 2005-SOX-65
2005-SOX-96

In the Matter of:

Coleen L. Powers,
Complainant

v.

Pinnacle Airlines,
Respondent.

**STATUS ORDER AND
ORDER DISMISSING SOX CLAIMS**

On October 27, 2005, I held a prehearing conference with the parties in Memphis, Tennessee. At that time, numerous issues were discussed, and the parties were directed to complete several tasks in preparation for the hearing. Subsequently, the parties have filed the following pleadings.

For the Complainant:

Complainants' Supplemental Information on Damages from the Inquiries of ALJ Linda S. Chapman at the October 27, 2005 Pre Trial Conference & Motion for Protective Order

Complainants' Responses to the ALJ's October 31, 2005 "Summary of Prehearing Conference", Complainants' Supplemental Information/Inquiries to October 27, 2005 Pre Trial Conference, & Complainants' Motion for Three-Way Teleconference to Further Clarify Issues

Complainants' Responses & Objections to Pinnacle's Nov. 3, 2005, and Nov. 8, 2005 Service Documents, Including Their "Renewed Motion for Dismissal as Sanctions"

Complainants' Responses to ALJ Chapman's November 7, 2005 "Order to Show Cause" & Motion for Extension of Time to File an Amended Response Within 90 Days, if Necessary, Due to Recent Notices Received From Bankruptcy Court on Defendants' Chapter 11 Bankruptcy

Complainants' Responses & Objections to Pinnacle's November 8, 2005 Supplemental Discovery Requests

Complainants' Motion to Compel Pinnacle to Comply with ALJ Nov. 7, 2005 Order; In the Alternative, Motion for Sanctions Against Pinnacle for Willful Failure to Comply with ALJ Oct. 27, 2005 Discovery Rulings and Her Subsequent Nov. 7th, 2005 Discovery Order; and Complainants' Responses & Objections to Pinnacle's November 16, 2005 Service Document Titled, "Supplement to Respondent's Renewed Motion for Dismissal as Sanctions"

Complainants' Rebuttal Reply to Pinnacle's November 22, 2005 "Response" to Complainants' November 17, 2005 Responses to ALJ Chapman's November 7, 2005 "Order to Show Cause" & Motion for Extension of Time to File an Amended Response Within 90 Days, If Necessary, Due to Recent Notices Received From Bankruptcy Court on Defendants' Chapter 11 Bankruptcy

For the Respondent:

Pinnacle Airlines, Inc's Motion for Additional Time to Respond to Judge's Request for Information

Respondent's Compliance with Pre-Hearing Conference Instructions

Respondent's Renewed Motion for Dismissal as Sanctions

Supplement to Respondent's Renewed Motion for Dismissal as Sanctions

Respondent's Response to Complainants' Responses to ALJ Chapman's November 7, 2005 "Order to Show Cause" & Motion for Extension of Time to File an Amended Response Within 90 Days, if Necessary, Due to Recent Notices Received From Bankruptcy Court on Defendants' Chapter 11 Bankruptcy

Second Supplement to Respondent's Renewed Motion for Dismissal as Sanctions

DISCUSSION

Complainant's Request for a Protective Order

At the prehearing conference, and in my Order issued on October 31, 2005, the Complainant was directed to advise the Court as to whether she still intended to seek \$10 million in damages, and if so, the basis for the computation of the damages, as requested by the Respondent in discovery. The Complainant was also specifically directed to provide the Respondent with the documents that support her claim for damages, and the parties agreed to make this exchange on November 11, 2005.

In her response to the Court, the Complainant stated that her \$10 million damages claim

was “intertwined” with her claims filed in Federal District Court, and since they are “ancillary,” they remain unchanged. I take this response to mean that the Claimant still intends to claim \$10 million in damages in this case.

Despite extensive discussion at the prehearing conference about the requirement that she articulate her computation of her damages for the Respondent, in her filings the Complainant objected to the Respondent’s demand for specific damage computations, claiming that they were “premature,” and that the Respondent had not articulated any grounds for support of his request. Of course, this ignores the Court’s specific instructions that the Complainant provide the Respondent with the basis for her calculation of damages, as well as the documentation that supports her claim for damages.

The Complainant objects to production of what she characterizes as “privileged and confidential communications that contain her federal privacy information,” but she has not indicated precisely what privileges she thinks apply, or the nature of the “confidential communications” she is worried about. As discussed at the prehearing conference, the Complainant has placed her alleged damages in issue, and the Respondent is entitled to know the basis for her claim for damages, and to production of the evidence that supports her claim.

Title 29 C.F.R. § 18.6(d)(2) provides that if a party fails to comply with an order for the production of documents, the Court may, *inter alia*,

Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

The Complainant’s request for a protective order is denied, and the Complainant is directed to provide the Respondent, forthwith, the basis for her calculation of her claim for damages, as well as the documents that support her claim. The Complainant shall have until December 7, 2005 to comply; the Complainant will not be allowed to introduce at the hearing any documents or testimony based on calculations that were not provided to the Respondent by this date.

Dismissal of SOX Claims

On November 7, 2005, I issued an Order to Show Cause, directing that the Complainant show cause why her complaint under the Sarbanes Oxley Act should not be dismissed, on the grounds that she has filed her complaint in federal district court.

The Complainant has requested 90 days to file a response, due to bankruptcy notices she has received regarding Mesaba Airlines. Mesaba Airlines is not a party in this proceeding. Moreover, even if it were, the fact that it may have filed for bankruptcy protection has no bearing on the question of whether the Complainant’s claim in this forum should be dismissed.

As she is entitled to do under the Sarbanes Oxley Act, the Complainant has filed her complaints, as they appear in both 2005 SOX 65 and 2005 SOX 96, in Federal District Court.

On that basis, her claims under the Sarbanes Oxley Act are hereby dismissed with prejudice.

Complainant's Affirmative Defense of "Laches"

The Complainant argues that the Respondent, by choosing not to call witnesses at her unemployment benefits hearing in December 2004 and January 2005, has prejudiced her by "limiting and obstructing her ability to compel witness testimony" in this proceeding, and that the Respondent has no admissible evidence that it terminated her for a legitimate non discriminatory reason. As I have previously ruled, any findings by the state unemployment compensation commission are not binding in this proceeding. Nor does the fact that the Respondent chose not to participate in that proceeding preclude it in any way from presenting evidence and testimony in this proceeding.

It is not at all clear what relief the Complainant expects in this regard. I note that she has requested that the Respondent be ordered to pay witness fees and expenses for the witnesses she intends to call, on the grounds that she is indigent. There is no provision in the statute or regulations that allow me to order one party to pay the other party's litigation costs at this point in the proceedings. Perhaps the Complainant wished to use testimony from certain employees of the Respondent, elicited at an unemployment compensation hearing, in this proceeding. But the Respondent was not required to participate in the unemployment compensation proceeding, and the fact that it chose not to do so does not preclude it from introducing evidence in this proceeding, nor does it require the Respondent to bear the cost of producing the Complainant's witnesses.

Complainant's Request for Additional Discovery

The Complainant alleges that she has not received all of her requested discovery, arguing that the Respondent has not responded to her May 26, 2005 discovery requests, which she reserved on September 22, 2005. In an Order issued on July 19, 2005, I granted the Respondent's request for a protective order with respect to all but a handful of the Complainant's discovery requests. As I noted after extensive discussion, these discovery requests were virtually identical to the discovery requests served by the Complainant in previous proceedings, in which I had granted the Respondent a protective order.

The Complainant argues that her claim in 2005 SOX 96 "relate[s] all the way back" to July 2001, and thus this discovery is appropriate and proper. In fact, the Complainant's claim in 2005 SOX 96 was filed as an "amendment" to her December 27, 2004 complaint that is the subject of 2005 SOX 65, and alleges continuing retaliation. There is nothing in this complaint that "relates back" to the Complainant's previous complaints. In other words, there is nothing about 2005 SOX 96 that resurrects the Complainant's claims in *Powers I* through *IV*.

I have already granted the Respondent's request for a protective order with respect to the Complainant's May 26, 2005/September 22, 2005 discovery requests. The Complainant is not entitled to a response to these requests.¹

¹ This includes the Complainant's request for crew scheduling tapes for December 31, 2003.

Respondent's Request for Sanctions

The Respondent has renewed its motion for sanctions for the Complainant's misconduct. As grounds therefore, the Respondent cited the Complainant's refusal to comply with discovery, as instructed at the prehearing conference, and her request for a protective order and her claim that she is not required to respond to discovery, despite the fact that the Court has ordered her to do so on multiple occasions.

The Respondent also pointed to the Complainant's November 16, 2005 filing with the Administrative Review Board (ARB), in which she accused the ARB of bowing to "political pressures," accused the Department of Labor of unlawfully withholding FOIA documents, and stated that this Court was under "internal and external political influences and pressure" to "completely disregard" the Respondent's violations of the law. The Respondent also noted the fact that the Complainant continues to pursue claims on behalf of persons who are not parties to this action (i.e., other crewmembers), and against persons and entities who are not parties to this action (i.e., "named persons").

As the Complainant has been repeatedly warned, her unsubstantiated allegations of wrongdoing by this Court, and other government entities, as well as Respondent, have no place in this proceeding. The Complainant has also been repeatedly advised that the only parties in this proceeding are herself and Pinnacle Airlines, and that she should caption her pleadings accordingly. Obviously, these warnings have fallen on deaf ears, as the Complainant continues to file pleadings on behalf of herself and all "affected crewmembers," against "named persons/respondents." The Complainant also continues to inappropriately disparage this Court and the Respondent, as well as every governmental agency conceivably connected to this claim.

By continuing to disregard the directives of this Court, the Complainant risks dismissal of her claim before it can be heard on the merits. This claim is scheduled for hearing in late January 2006. I will not dismiss the Complainant's claim at this time, but she is advised that I have the power to do so, and that further disregard of the Court's orders jeopardizes consideration of her claim.

As discussed above, the Complainant has again been directed to provide the Respondent with the basis for the calculation of her alleged damages, as well as the supporting documents. Should the Complainant fail to comply, she will be precluded from producing evidence on this issue at the hearing. Accordingly, the Respondent's request for dismissal on this ground is denied.

Complainant's Request for Sanctions

The Complainant has requested that I order the Respondent to comply with my November 7, 2005 Order, or in the alternative, impose sanctions for Respondent's failure to comply with discovery. The Complainant has not indicated exactly what the Respondent has allegedly failed to do, although her motion states that "they apparently refuse to produce FAA evidence and other relevant discovery documents because the information requested is *adverse* to them."

In my October 31, 2005 Order summarizing the prehearing conference, I directed the Respondent to provide the Complainant with a copy of the FAA Report regarding the October 2, 2004 incident *upon its receipt of that report*. The Complainant has not established nor even alleged that the Respondent has received such a report. The Complainant's request for sanctions is denied.

CONCLUSION

At this point, I do not see the need for a teleconference with the parties. Should I determine that a teleconference is necessary before the hearing, the parties will be appropriately notified.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The Complainant's claims under the Sarbanes Oxley Act are dismissed, on the ground that she has filed these claims in federal district court.
2. The Complainant's request for a protective order is denied, and the Complainant is directed to respond forthwith to the Respondent's discovery requests regarding her alleged damages.
3. The Complainant is not entitled to a response to her May 26, 2005/September 22, 2005 discovery requests.
4. The Respondent's request for dismissal is denied.
5. The Complainant's request for sanctions is denied.

SO ORDERED.

A

LINDA S. CHAPMAN