U.S. Department of Labor

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Issue Date: 20 February 2008

CASE NO.: 2004-AIR-00011

IN THE MATTER OF:

THOMAS E. CLEMMONS,
Complainant

v.

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,
Respondents

APPEARANCES:

Steven K. Hoffman, Esq.
For Complainant

Christopher E. Howe, Esq.
For Respondents

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER ON REMAND

This case involves Respondents termination of Complainant (Clemmons) on January 20, 2003 allegedly in violation, of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121, *et. seq.*, ("AIR21" or "the Act") and the regulations promulgated there under at 29 C.F.R. Part 1979. In part the Act prohibits an air carrier, contractor or sub-contractor 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 provides to the employer or the federal government information about violations or alleged violations of Federal Aviation Administration's (FAA) rules, orders, regulations or standards or any other provision of federal law related to air carrier

safety.

Respondents employed Clemmons from September 6, 2002, until his termination on January 20, 2003. On April 14, 2003, Clemmons filed a complaint with the Department of Labor alleging Respondents terminated him for reporting to his supervisors and the Federal Aviation Administration (FAA) Respondents violations of FAA Rules 121 and 125, pertaining to inadequate maintenance of aircraft and working pilots in excess of the maximum permissible duty hours. On January 20, 2004, following an investigation, the Regional Supervisor for the Occupational Safety and Health Administration (OSHA) found Clemmons' complaint to have merit. Respondents disagreed and filed a timely request for a formal hearing pursuant to 49 U.S.C. § 42121 (B)(2)(a).

This matter was referred to the Office of Administrative Law Judges for a formal hearing which was held in Dallas, Texas, on July 27-30, and September 21-22, 2004. Following the hearing the undersigned on January 14, 2005 issued a Decision and Order finding *inter alia* that Respondents had violated the Act when it terminated Clemmons. Thereafter upon appeal, the Administrative Review Board (Board) on June 29, 2007, issued a Decision and Order on Remand finding that the undersigned erred by merging Respondents' burden of production with its burden of proving by clear and convincing evidence that it would have taken the adverse action in terminating Clemmons absent protected activity. The Board also found that the undersigned erred by: (1) not determining whether Clemmons proved by a preponderance of the evidence that his protected activities contributed to his termination; (2) finding that pretext compelled a finding of discrimination; and (3) not considering whether Respondents would have terminated Claimant absent protected activity.

The parties filed briefs in support of their positions on remand. In considering these briefs the undersigned notes the Board instructions on the legal standards to apply at the investigative stage and the hearing stage with Clemmons initially required at the investigative stage to establish a *prima facie* case by alleging the existence of facts and "either direct or circumstantial evidence" showing that: (1) he engaged in protected activity; (2) Respondents knew or suspected, actually or constructively that he had engaged in protected action; (3) he suffered unfavorable personnel action; and (4) and the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the unfavorable personnel action. Clemmons met that burden by showing protected activity (complaints about violations of FAA rules on pilot hours of duty and lack of necessary aircraft maintenance to Frazer and Wachendorfer) and temporal proximity between such activity and his discharge. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ Case No. 2002-AIR-8, slip op. at 13.

At the hearing stage, Respondents had the burden of production, not proof, and needed only to articulate some legitimate, non-discriminatory reason for its actions. If Respondents met this burden, Clemmons then was required to demonstrate or prove by a preponderance of credible evidence that: (1) he engaged in protected activity; (2) Respondents knew of such protected activity; (3) he suffered adverse personnel action and; (4) the protected activity was a

contributing factor in the unfavorable personnel action.[1] Assuming Clemmons met this burden, Respondents in order to escape liability must show by clear and convincing evidence they would have taken the same unfavorable action in the absence of the protected activity.

I. ISSUES

1. Whether Respondents produced, not proved, legitimate, non-discriminatory reasons for terminating Clemmons.

2. If so, whether Clemmons proved by a preponderance of the evidence that his protected activity contributed to his termination.

3. If so, whether Respondents have established by clear and convincing evidence that Respondents would have discharged Clemmons absent his protected activity.

II. Respondents' Production of Non-Discriminatory Reasons

Respondents contend it need only articulate not prove a legitimate non-discriminatory reason for Clemmons discharge in order to defeat any inference of discrimination from Clemmons' *prima facie* case citing *St. Mary's Honor Ctr.,* 509 U.S. 502, 509 (1993). Moreover, they contend Clemmons must prove intentional discrimination without the benefit of any inferences or presumptions having at all times the ultimate burden of persuading the trier of fact, that Respondents discriminated against him citing; *Texas Dept. of Cmty Affairs v. Burdine,* 450 U.S. 24, 254 (1981).

Respondent cites the following 6 reasons in support of its discharge of Clemmons:

1. On December 18, 2002, Clemmons admittedly learned from management via-an e-mail that his pilots were confused about whether they had the proper, up-to-date airplane navigation charts, yet Clemmons admitted he changed nothing to avert this condition.

2. Clemmons was supposed to produce to his supervisor Lindon Frazer, updated operational manuals, but he never did so. (Tr. 1295-96, 1532).

[11] This is the same burden of proof established by the Board in Sarbanes-Oxley (SOX) whistleblower actions (*Allen, Waldon, Breaux v. Administrative Review Board, U.S. Dept of Labor,* ____F.3rd___ (5th Cir., 2008), No. 06-60849 (January 22, 2008). The Board has adopted the definition of "adverse employment action" set forth in the recent case of *Burlington Northern & Santa Fe Railroad Co., v. White* 126 S. Ct. 2405 (2006), as that which might well have dissuaded a reasonable employee from engaging in protected activity. A "contributing factor" is any factor which alone or in combination with other factors tends to affect in anyway the outcome of the decision. (*Allen, Walden, and Breaux* at 10; *Klopfenstein v. PCC FlowTechs. Holdings, Inc.,* ARB Case No. 04-149 at 13. (ARB, May 31, 2006).

3. In early January, 2003, when Jet Charter's Director of Operations Pat Hulsey, conducted a follow-up audit of Ameristar's pilot records, he discovered that Clemmons had still not corrected all the deficiencies Hulsey had uncovered in an earlier audit. (Tr. 1209).

4. By January 9, 2003, Ameristar's President Tom Wachendorfer, became so frustrated with Clemmons' inability or unwillingness to draft a pilot schedule to his requirements, that he drafted memo to Frazer ordering him to do what Clemmons was supposed to do but failed to do. (RX-17).

5. On January 13, 2003, Clemmons proffered yet another pilot schedule that Wachendorfer rejected, which led Clemmons to distribute an angry and insubordinate e-mail to pilots in which he insulted Ameristar's president with a slur, blamed the president for rejecting Clemmons' pilot schedule, seditiously solicited pilots to resign, disloyally informed them that he would support their unemployment claims after they quit, and then stated that he hoped he would not be working at Ameristar much longer. (RX-20).[2] Respondents did not cite the January 13, 2003 e-mail as a reason for termination until a May 9, 2003 filing with OSHA. This filing constituted Respondents' fourth official submission of reasons for Clemmons discharge. (D.O. at 34).

6. On the evening of January 16, 2003, on his one and only revenue flight, Clemmons failed to properly load freight onto his aircraft, even though it was his job to teach

[2] Clemmons sent an e-mail on January 13, 2003 to various pilots. This e-mail was not received by Respondents until March 28, 2003. It read as follows: "Today I submitted a revised schedule to Mr. Wachendorfer as per his demand. It was 14 on and 7 off as promised when you were hired. It was (surprise, surprise) not acceptable. He added days to give you 15 on and 6 off so you may have a weekend off. Really you have only 5.5 days off and work 15.5 days. I DID NOT MAKE THIS SCHEDUDLE AND I AM SORRY! It is effective immediately.

I have received a few resignations. If you decide to leave, be very explicit in your letter of resignation. I would expect you to cite your concerns and address each one, i.e. Concerns about safety pay was not as promised, days off and on are not as promised, having to ask permission before log-book write ups, encouragement to violate duty rest time rules, etc…

I will support fully your unemployment claims by sending you a letter, on company letter head, supporting your individual claims. I will furnish each of you a copy of your training records and a letter of recommendation if needed.

Hopefully I will not be here much longer myself. If I can help you in any way, please let me know while I am still the DO. Again I thank you all for your support. Good Luck to us all. (EX-20).

pilots how to do so, which led Wachendorfer to intervene by phone to help get the freight loaded. (Tr.765-66).

Respondents contend: (1) the sequence of events make it impossible for Clemmons to prove his case because all 6 asserted reasons occurred after Clemmons' protected activity; (2) temporal proximity at most establishes an inference of discrimination; (3) evidence of pre-text does not establish proof of discrimination without the fact finder believing Clemmons' explanation of intentional discrimination citing; *Price v. Federal Express Corp.,* 283 F.3d 715, 720 (5th Cir.283 F.3d 715, 720) (5th Cir.2002); (4) pre-text is insufficient as a matter of law to prove discrimination where the evidence conclusively reveals a non-discriminatory reason for adverse action or where a complainant presents only a weak issue of fact as to whether employer's reasons were untrue and substantial independent evidence exists showing no discrimination had occurred citing; *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 148 (2000); *Rubinstein v. Administrator of Tulane Educational Fund,* 218 F.3d 392, 400 (5th Cir. 2000) *cert. denied,* 532 U.S. 937 (2001); (5) Clemmons must rebut or show all reasons for his discharge to be false citing; *Wallace v. Methodist Hosp. System,* 271 F. 3d 212, 220 (5th Cir. 2001, *cert. denied on* 535 U.S. 1078 (2002); (6) where pre-text is present an employer need show only a good faith belief Clemmons had not done what was expected of him to defeat a claim of discrimination. *See Mayberry v. Vought Aircraft Co.,* 55 F. 3d 1086, 1091 (5th Cir. 1086, 1091 (5th Cir. 1995).

Alternatively, Respondents argue that Clemmons would have been discharged absent any protected activity, because of a January 13, 2003 insubordinate e-mail Clemmons issued slurring president Wachendorfer, undercutting Wachendorfer's pilot schedule requirement and encouraging other pilots to quit, and because of a January 16, 2003 failure to properly load an aircraft citing; *Duprey v. Florida Power and Light Co.,* ARB No.00-700, 2000-ERA-5 at slip op. 4 (ARB Feb. 27, 2003); *Yule v. Burns Int'l Security Service,* 93-ERA-12 (Sec'y May 24, 1995).

On remand, the ARB has directed, first a determination of whether Respondents produced, not proved legitimate, non-discriminatory reasons for Clemmons discharge. In that regard, I find without determining the credibility of asserted reasons for Clemmons discharge that Respondents articulated 6 facially non-discriminatory reasons for Clemmons discharge, thereby rebutting Clemmons' *prima facie* case and requiring him to prove by a preponderance of evidence that: (1) he engaged in protected activity; (2) Respondents knew of the protected activity; (3) Clemmons suffered an unfavorable or adverse personnel action, and (4) the protected activity was a contributing factor in the unfavorable personnel action.

Concerning protected activity, the Board at page 7 of its Remand, found that Clemmons had discussed with Frazer and Wachendorfer the issue of dispatchers pushing pilots to work beyond the mandated 16 hour limit. (D.O. at 47, 48). These discussions continued into December, 2002, and resulted in Clemmons and pilot Barker's meeting with FAA representative Brown on January 7, 2003, after which Wachendorfer asked Clemmons who had been meeting with the FAA and told Barker "We don't talk to the FAA here, we keep our problems in house." (D.O. at 12, 13, 16, 24).

Clemmons also had frequent discussions with Frazer about Respondents' policy of requiring pilots to first inform maintenance of mechanical problems before recording the problem. Pilots including Sprat objected to this procedure because once informing maintenance, repairmen repeatedly tried to convince them to fly unsafe planes to a maintenance base rather than first writing up the problem and grounding aircraft. However, even with write ups maintenance failed to correct the problem and as a result Sprat quit. (D.O. at 19-23). [3]

Clemmons proved not only protected activity and Respondent's knowledge of it by a preponderance of evidence, but also adverse employment action, namely Clemmons discharge on January 20, 2003. Indeed Respondent did not contest these facts on remand. On the sole remaining issue of whether protected activity was a contributing factor in Clemmons termination, Clemmons showed not only temporal proximity, but pre-text and shifting defenses. While Respondents assert 6 different reasons Wachendorfer testified there were only two reasons for the discharge: Clemmons inability to load a plane and/or instruct others how to do so on January 16, 2003, and his inability to create a workable schedule over a period of several months.[4] During this time however, Wachendorfer altered schedule change days from Saturday to Monday and modified schedules from 14 days on and 7 days off to 14.5 days on and 6.5 days off to 15 days on 6 days off without timely informing Clemmons of the changes. Wachendorfer testified he was concerned about Clemmons schedules which allegedly provided insufficient coverage. Respondents however introduced no schedules documenting inadequate coverage. More importantly, Wachendorfer admitted Frazer was responsible for reviewing the schedules prior to submission and never criticized him for allegedly submitting poor schedules. (D.O. at 27, 28, 45). In essence, Wachendorfer's complaints were selective or directed only at Clemmons and baseless as well.

Concerning the loading incident of January 16, 2003, Wachendorfer testified he had to instruct Clemmons on how to load an aircraft, whereas in fact, he did not talk to Clemmons at all but rather talked to pilot Wanamaker about loading procedures due to the fact that Clemmons was recovering from a slip and fall accident on ice resulting in a bad headache. Contrary to Wachendorfer's testimony about having to give specific instruction on cargo loading, all Wachendorfer did was to tell Wanamaker simply to strap down the cargo and leave. Clemmons was responsible for loading 20 out of 24 pallets. Respondents moreover conveniently ignored the

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[3] Federal aviation regulations (FAR) Section 125.323, provides as follows: The pilot in command shall ensure that all mechanical irregularities occurring during flight are entered in the maintenance log of the airplane at the next place of landing. Before each flight, the pilot in command shall ascertain the status of each irregularity entered in the log at the end of the preceding flight. Among the unsafe conditions were uncorrected fuel spills. (D.O. at 21.) Barker confirmed the fact that maintenance problems were not taken care of properly. (D.O. 23).

[4] The Board at page 3 of its remand mentions two scheduling problems. One of these involved an instance of November 26 when Clemmons was on vacation and Barker while in charge let a pilot off early requiring Wachendorfer to pay pilot overtime, and another instance on December 2 where a pilot was not where he was supposed to be requiring Respondents to buy a plane ticket for the pilot to get to the plane he was scheduled to fly. However, neither of these problems had to do with Clemmons' schedules. (D.O. 46).

fact, that loading was made difficult not due to pilot error, but rather, to the customer providing incorrect measurements. (D.O. at 11, 12).

Wachendorfer had no basis for complaining about Clemmons loading instructions when loadings problems were caused by inaccurate dimensions provided by the customer. Wachendorfer falsely accused Clemmons of not knowing how to load and falsely claiming he had to provide loading instructions, where as in fact, it was Clemmons who determined how to load the cargo. (D.O. at 11).

Concerning the alleged pilot confusion about updated charts, Respondents contend Clemmons did nothing to advert this confusion. The record shows otherwise with Stacy Muth, questioning Clemmons' procedure for distributing the charts. Clemmons explained the procedure and learned that the plane crew in questioned which raised the issue of current charts did in fact have current charts. Clemmons did not change procedures for supplying aircraft because in fact there was no need to do so. (D.O. at 10, 11, 46).

Concerning Clemmons' e-mail of January 13, 2003, Respondents assert that the e-mail insulted Wachendorfer by calling him "Wachmeoffendorfer"; blamed Wachendorfer for rejecting Clemmons' pilot schedule, seditiously solicited pilots to resign, disloyally informed the pilots he would support their unemployment claims and stated he hoped he would not be working for Respondents much longer. While referring to Wachendorfer as Wachmeoffendorfer would appear to be inappropriate when considering the fact that Wachendorfer adopted a policy which had pilots flying excess hours with unsafe aircraft that needed maintenance, and engaged in non-authorized common carriage on 112 separate occasions, all in violations of FAA regulations, he was in effect abusing pilots, creating unnecessary safety issues, and justifying Clemmons' action in encouraging pilots to resign rather than fly under those conditions. (D.O. at 12-16, 19-21, 23). However, even as important it was to protest these working conditions, it was equally important to note that Respondents (Wachendorfer or Frazer, Clemmons immediate supervisor) were unaware of this e-mail until March 28, 2003. (D.O. at 17-21, 23, 25, 50). In fact it is hard to believe Wachendorfer would have seen the January 13 e-mail prior to Claimant's discharge and not mentioned it in his testimony.

Finally concerning updating pilot records and manuals, it is clear that Clemmons' had not followed all of Hulsey's recommendations for updating this data. However, the FAA never cited Respondents for missing required documentation, and had it fact, on several occasions on October 15, 2002 and January 17, 2003, approved Respondents' training manuals. (D.O. at 37, 38, 43). The FAA also approved Respondent's general operations manual, and in fact, never penalized it for any of its manuals or lacking pilot training records. (D.O. at 32, 42, 43). Respondents were not concerned with insuring timely and proper recording of flight data as witnessed by the appointment and retention of Raymond as Clemmons replacement when it fact it was Raymond who instructed Foster not to fill out a required form indicating he flew a flight. (D.O. at 50, 52). Contrary to Respondents' claim I find no credible evidence to indicate Hulsey or Frazer ordered Clemmons to comply with Hulsey's directives. (D.O. at 44). Rather Hulsey's directives were recommendations or suggestions designed to aid Clemmons in setting up operations for a new airline operation.

The discriminatory nature of Clemmons discharge was confirmed not only by Respondents pre-textual or false reasons asserted for his discharge, but by the presentation of shifting defenses as seen in human resources director, Ms. Rives', explanations to the Texas Workforce Commission (TWC) for Clemmons discharge. After discussing the reasons with Frazer, Ms. Rives on February 5, 2003; March 31, 2003; April 4, 2003; and June 26, 2003, provided the following reasons:

> February 5, 2003 and March 31, 2003-using poor judgment in implementing training plans and scheduling as directed by Frazer; allowing his (Clemmons') flight currency to lapse.[5]
>
> April 4, 2003-inefficient pilot schedules; inability to load cargo on a January 16, 2003 flight requiring Frazer's intervention.
>
> June 26, 2003-failing to document training records, or update manuals.

On May 9, 2003, Ms. Rives told OSHA, Clemmons was fired for failure to update manuals, maintain accurate pilot training records, create an efficient pilot schedule, manage pilots, disseminate navigational charts, and lowering pilot moral by issuance of January 13, and 14, 2003, e-mails to pilots. (D.O. at 30-34).

While a showing of pretext does not necessarily support a finding of intentional discrimination, pretext combined with the elements of a *prima facie* case may support a showing of intentional discrimination. *St. Mary's Honor Ctr., v. Hicks,* 509 U.S. 502, 511 (1993). Indeed proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination that at times is quite persuasive. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147 (2000). For example, the record may conclusively show some other non-discriminatory reason or there may be abundant and uncontroverted evidence that no discrimination occurred in which case a complainant would fail to meet his burden. Indeed, the Act provides that an employer may avoid liability by proving by clear and convincing evidence that it would have taken the adverse action absent the protected activity.

Respondents contend it would have discharged Clemmons absent any protected activity because of his unwillingness to load as much freight as could be safely done is simply false. Complainant never refused to load any freight, and in fact, it was he who suggested overlapping freight to fit more pallets aboard. Wachendorfer gave no instructions except to tell Wanamaker to just strap down the pallets and leave. During the initial loading operations Clemmons was being treated for a slip and fall injury. (D.O. at 11).

[5] This was the first time that Respondents criticized Clemmons for poor pilot training or allowing his flight currency to lapse. In fact, Frazer conceded Clemmons did not teach pilots how to load or unload. (D.O. at 44).

When considering the entire record, I am convinced Respondents had no legitimate reason to discharge Clemmons. Rather, Respondents singled out Clemmons for disciplinary action because it wanted to relieve itself of a supervisor who refused to condone pilot abuse by working them past allowable duty time, or having them fly unsafe aircraft due to lack of proper maintenance. Respondents also wanted to eliminate a supervisor who would not condone common carriage as indicated by his conversations with Frazer. Indeed, it was uncontested that Airways by consent order engaged in common carriage on 112 separate occasions from October 22, 2002 to March 18, 2003 for which the FAA fined Respondents $123,000. (D.O. at 4, 48). In effect, I find Respondents had no legitimate reason to terminate Clemmons and to cover up the true reason for his discharge, manufactured facially legitimate reasons. Accordingly I find, that Clemmons established by a preponderance of credible evidence that Respondents discharged him because of his protected activities. Further, Respondents failed to establish by clear and convincing evidence that evidence that it would have discharged Clemmons absent his protected activities. Further I re-affirm my previous order, as it appears at page 74 of original Decision and Order which issued on January 14, 2005.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board received it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U. S. Department of labor, Office of Administrative law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* C.F.R. §§ 1979.109© and 1979.110(a) and (b).