U.S. Department of Labor

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Issue Date: 08 March 2006

Case Nos.: **2004-AIR-00022**
2004-AIR-00029

In the Matter of:

GREG FORD,
Complainant,

v.

SOUTHEAST AIRLINES,
Respondent.

Before: WILLIAM S. COLWELL
Administrative Law Judge

For the Complainant:
Gary L. Evans, Esq., Coats & Evans, P.C., The Woodlands, Texas

RECOMMENDED DECISION AND ORDER DENYING SUMMARY JUDGMENT FOR COMPLAINANT AND GRANTING DEFAULT JUDGMENT FOR COMPLAINANT

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (hereinafter "AIR 21" or "the Act"). This statutory provision, in part, prohibits 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 to the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a). This claim was brought by Greg Ford (hereinafter "Complainant") against Southeast Airlines (hereinafter "Respondent") alleging that he was discharged and otherwise retaliated against for engaging in activity protected by the Act.

BACKGROUND OF THIS CASE

Complainant was employed by Respondent as a pilot. In April of 2003, Complainant was instructed to pilot a flight for Respondent at a time that Complainant claimed violated FAA regulations governing reserve and rest hour requirements for pilots. Complainant complained to his superiors about the alleged violation. Subsequently, on April 30, 2003, Complainant was discharged from his employment with Respondent.

On May 20, 2003, Complainant attended a meeting with various employees of Respondent in which he was offered reinstatement after a suspension. Complainant agreed to be reinstated after a 90-day suspension. During that suspension, on July 28, 2003, Complainant filed his original complaint with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, alleging that he was a victim of adverse employment action taken because he had engaged in activity protected by the Act.[1]

On August 19, 2003, Complainant returned to work for Respondent, but problems continued. On October 20, 2003, Complainant filed a second complaint with OSHA alleging continuing adverse employment action in violation of the Act.

OSHA completed its investigation of Complainant's first complaint on March 9, 2004 and determined that Respondent had not violated the Act. On April 12, 2004, Complainant appealed that determination to the Office of Administrative Law Judges (OALJ), U.S. Department of Labor. On May 20, 2004, OSHA completed its investigation of Complainant's second complaint and concluded that this complaint was also without merit. Complainant also appealed this determination to the OALJ. On July 23, 2004, an order was issued consolidating these two appeals so that they could be heard together before a single Administrative Law Judge. On November 2, 2004, Complainant filed a third complaint with OSHA, which OSHA referred to the OALJ for consideration with the existing cases.

Effective November 30, 2004, Respondent ceased business operations. On December 17, 2004, counsel for Respondent submitted a Notice of Withdrawal of Appearance to this court. Since Respondent no longer had either counsel or employees to represent it in this proceeding, an order was issued on January 21, 2005 postponing any hearing in the case pending a resolution of Respondent's legal status.

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[1] The following abbreviations will be used as citations to the record:
Com. Compl.: Complainant's First Complaint to OSHA
OSHA Determination: OSHA Determination Letter for Original Complaint
Com. 2nd Compl.: Complainant's Second Complaint to OSHA
OSHA Determination 2: OSHA Determination Letter for Complainant's Second Complaint
Com. 3rd Compl.: Complainant's Third Complaint to OSHA
Com. Mot. for Summ. Dismissal: Complainant's Motion for Summary Dismissal and for Decision and Order Granting Relief

By summer 2005, there was still no clear resolution of whether Respondent would be filing for bankruptcy or not. Consequently, an order to show cause why the hearing should not be canceled and the case decided by summary decision was issued on July 12, 2005. Complainant filed a motion for summary decision on September 19, 2005.[2]

COMPLAINANT'S MOTION FOR SUMMARY DECISION

Standards for Summary Decision

Motions for summary decision in proceedings before an Administrative Law Judge in the Department of Labor are governed by the rules set out in 29 C.F.R. §§ 18.40 and 18.41. Under those sections, an administrative law judge may grant a motion for summary decision "when no genuine issue of material fact is found to have been raised" and the moving party is entitled to decision as a matter of law. 29 C.F.R. § 18.41(a). This standard is essentially the same as the standard applicable in granting summary judgment under Federal Rule of Civil Procedure 56. *Hasan v. Burns and Roe Enterprises*, ARB No. 00-080 at 6 (ARB Jan. 30, 2001).

Although Respondent has filed nothing in response to Complainant's motion for summary decision in this case, Complainant must still demonstrate that there is no genuine issue of material fact and that he is entitled to decision as a matter of law for his motion to prevail. Moreover, in deciding a motion for summary decision, all evidence must be considered in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). Thus, the materials submitted by Complainant in support of his motion for summary decision must be examined in the light most favorable to Respondent regardless of Respondent's failure to respond.

Findings of Fact

Respondent was a commercial airline company engaged in the transportation of persons and cargo and an entity covered by AIR 21. OSHA Determination at 1; 49 U.S.C. § 40102 and 42121(e). Respondent employed Complainant as a Pilot, an employee position defined by and covered by AIR 21. OSHA Determination at 1; 49 U.S.C. § 42121(a).

On April 24, 2003, while on flight reserve status, Complainant received a call assigning him a flight. Com. 2nd Compl. at Exhibit 16. Complainant informed the scheduling manager he was unable to operate the flight, because his reserve status was going to end at 8:00 p.m. that evening, and any flight after this time would be illegal regarding allowable hours of service. *Id*. Complainant was informed that piloting the flight would not be illegal per FAA Part 121, Supplemental Flight and Duty Regulations.

[2] Although this submission by Complainant requests "summary dismissal" that request is being treated as one for summary decision.

Id. The scheduling manager handed the telephone to the Director of Operations, Dave Lusk, who directed Complainant to arrive at the airport within two hours for the scheduled flight. *Id*. Complainant ultimately accepted the assignment. *Id*.

On April 30, 2003, Complainant was informed that he was terminated. *Id*. at Exhibit 8. In an internal memorandum, Respondent cited Complainant's repeated complaints of scheduling decisions that violated applicable regulations as one factor in his discharge. *Id*. at Exhibit 11. The repetition of these complaints by Complainant was confirmed by OSHA in its investigation, but that investigation also confirmed Respondent's assertion that Complainant lacked an accurate understanding of the applicable scheduling regulations. OSHA Determination at 3. A representative of the Federal Aviation Administration "confirmed this assertion" for OSHA as well. *Id*.

In addition to Complainant's repeated claims of illegal scheduling decisions, Respondent's internal memorandum cited other reasons for his discharge. Com. 2nd Compl. at Exhibit 11. These included: ongoing problems with scheduling Complainant for flights, Complainant missing "show times" for flights, Complainant refusing to fly trips when he believed himself to be short of rest time, Complainant frequently making hotel vans late to the airport, and Complainant treating the Manager of Crew Scheduling belligerently when he was displeased by his schedule. *Id.* Additionally, Complainant has submitted an internal memorandum from another of Respondent's employees to the Director of Operations, Dave Lusk, that retells an incident occurring a few weeks before Complainant's termination in which Complainant behaved rudely to passengers on one of his flights and nearly knocked a small girl down the stairs leading into the airplane without pausing or apologizing. *Id.* at Exhibit 17.

On May 20, 2003, a meeting was attended by Complainant, Lusk, and the Vice President of Operations, Terence Haglund. *Id*. at Exhibit 4-4A. During this meeting, Respondent agreed to reinstate Complainant after a 90-day suspension and on the condition of compliance with a signed agreement. *Id*. The agreement included eight points, requiring, *inter alia*, that Complainant commit to become "familiar with supplemental flight duty times," to understand the concepts of "reserve status" and "crew rest," to "work in harmony with other employees," to depart hotels "on time with Crew," and "to be a team player." *Id*. Complainant accepted the offered reinstatement and signed the agreement. *Id*.

Complainant's suspension was scheduled to end at 8:30 a.m. on August 19, 2003, but a variety of steps had to be completed after that date before Complainant would be returned to flight status. These steps were outlined for Complainant in an "Agreement and Understanding for Reinstatement of Greg Ford," which Complainant signed at a meeting with his superiors on August 19, 2003. *Id*. at Exhibit 5. This agreement made clear that Complainant would be required to go through all of the steps of a new employee before he would be returned to flight status. *Id.* These included completing a full application with fingerprinting and a drug screening, completing a recurrent flight training class and simulator testing, and being on probation for one year like a new employee. *Id.* A tape recording of the meeting made by Complainant

confirms that these requirements were explained to Complainant orally as well as in the written agreement. OSHA Determination 2 at 2.

As Complainant began the process of completing these steps, further problems occurred, and Complainant was not returned to flight status until the end of October 2003. Com. 2nd Compl. at 16-17. First, Complainant was prevented from attending a recurrent training class that began on September 8, 2003 because he had not yet completed either his application or a satisfactory drug test. *Id*. at 14. Because Complainant could not attend the September 8, 2003 class, he was rescheduled to attend the next recurrent training class, which did not begin until October 6, 2003. *Id*. Second, Complainant was prevented from returning to flight status even after satisfactorily completing his recurrent training and simulator test. *Id*. at 16-17. This delay was caused by Complainant having altered a records release form in his application materials by specifying on the document that it was only for "medical information." *Id*. Respondent required Complainant to sign a new "unaltered" release before he would be returned to flight status. *Id*.

During the pendency of this action, the conflicts between Complainant and Respondent continued. Com. 3rd Compl. at 1. On July 28, 2004, Complainant was removed from active flying status with pay, and then, on August 26, 2004, Complainant was removed from the payroll. *Id*.

Conclusions of Law

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century prohibits 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 to the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a). To be entitled to relief under the Act, a Complainant must show by a preponderance of the evidence that:

1. Respondent is an air carrier subject to AIR 21;
2. Complainant engaged in activities protected by AIR 21;
3. Respondent actually or constructively knew of, or suspected, such activity;
4. Complainant suffered an unfavorable personnel action;
5. Complainant's activity was a contributing factor in the unfavorable personnel action.

49 U.S.C. § 42121(b)(2)(B)(i) & (iii); 29 C.F.R. § 1979.104(a) & (b)(1)–(2); *see also Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101–02 (10th Cir. 1999). In order for his motion for summary decision to succeed, Complainant must establish that there is no genuine issue of material fact as to any of these five elements.

In this case, Complainant has not carried his burden of establishing that there is no genuine issue of material fact as to each of the five required elements. Complainant has carried his burden with respect to the first, the third, and the fourth requirements. Respondent is an air carrier subject to AIR 21, Respondent knew of the activity that Complainant alleges was protected, and Complainant did suffer unfavorable personnel action when he was fired and then suspended. Beyond that, however, Complainant has failed to establish that no factual issue exists as to the remaining elements.

First, there is a factual issue as to whether or not Complainant engaged in protected activity by complaining to Respondent that he believed Respondent was violating FAA regulations concerning reserve and rest hours. In order for a Complainant's report of a purported violation to be protected, that belief about the purported violation must be *objectively* reasonable. *Svendsen v. Air Methods, Inc.*, 2002-AIR-16 at 46-47 (ALJ Mar. 3, 2003), *aff'd Svendsen v. Air Methods, Inc.* ARB No. 03-074 (ARB Aug. 26, 2004). In this case, Complainant's belief may not have been objectively reasonable.

Respondent, OSHA, and an FAA representative all assert in the materials submitted by Complainant that Complainant had a flawed understanding of the FAA regulations. Moreover, OSHA's investigation indicates that this was not a new disagreement between Complainant and Respondent. Thus, there are genuine issues of material fact as to whether Complainant's belief was based on a flawed understanding of the applicable regulations and whether Complainant was put on notice that his understanding was flawed by the prior disagreements. If either of those things is true, his belief may not have been objectively reasonable.

Second, there is a genuine issue of material fact as to whether or not there is a connection between Respondent's adverse personnel actions and any alleged protected activity engaged in by Complainant. Respondent referenced Complainant's repeated allegations of regulatory violations as one factor in his initial discharge, and Complainant argues that this is the cause of his firing and subsequent suspension. Respondent's records indicate, however, that Complainant voiced his concerns over regulatory compliance in a belligerent and unprofessional manner and that Complainant had a history of other performance problems. If these things are true, then Complainant's allegedly protected activity may have not have been a contributing factor in Respondent's adverse personnel action, because an adverse personnel action can be legally based upon the manner in which a complaint is made rather than on the complaint itself. *Svendsen v. Air Methods, Inc.*, ARB No. 03-074 at 6 (ARB Aug. 26, 2004). Thus, there are genuine issues of material fact as to how Complainant voiced his concerns, what history of other problems he had in his employment with Respondent, and what role these facts played in Respondent's decision.

Conclusion

Since Complainant has failed to demonstrate that there are no genuine issues of material fact remaining in this matter, summary decision is inappropriate in this case.

Thus, Complainant's motion for summary decision should be denied. Since Respondent is no longer able to appear in its defense in this case, however, Complainant is entitled to a default judgment against Respondent.

DEFAULT JUDGMENT

Standards for Default Judgment

Proceedings before the OALJ are conducted according to the procedural rules set out in 29 C.F.R. § 18. Under those regulations, Administrative Law Judges have authority to enter a default decision against a party if that party fails to file an answer or otherwise abandons its case. 29 C.F.R. § 18.5(b); 29 C.F.R. § 18.39(b). Those regulations also provide that when a party fails to comply with an order, the Administrative Law Judge may order that a decision of the proceeding be rendered against the non-complying party. 29 C.F.R. § 18.6(d)(2)(v).

Complainant Is Entitled to Default Judgment

Respondent ceased business operations effective November 30, 2004, and on December 17, 2004, counsel for Respondent submitted a Notice of Withdrawal of Appearance to this court. Since Respondent no longer had either counsel or employees to represent it in this proceeding, an order was issued on January 21, 2005 postponing any hearing in the case pending a resolution of Respondent's legal status. By summer 2005, there was still no clear resolution of whether Respondent would be able to retain counsel and file for bankruptcy or not, and no new counsel or other representative had entered an appearance in this case. Consequently, an order to show cause why the hearing should not be canceled and the case decided by summary decision was issued on July 12, 2005.

Although Complainant filed a motion for summary decision on September 19, 2005, no response has been received from Respondent to either Complainant's motion or my order to show cause. Moreover, Respondent has made no official appearance by either counsel or representative in this case since its counsel withdrew in December 2004. Accordingly, I find that Respondent is in default and conclude that judgment should be entered for Complainant.

Amount of Default Judgment

In the materials he has submitted, Complainant claims that as a result of Complainant's termination/suspension and these subsequent events, he suffered lost wages and other economic losses. Com. 2nd Compl. at 18. For the months of May through October 2003, Complainant alleges that he lost $26,370 in wages and $2261 in *per diem* compensation. *Id*. He also alleges the loss of an additional $22,128 in wages due to Respondent's refusal to upgrade him. Com. Mot. for Summ. Dismissal at Exhibit A, p.8. He also claims losses of $888.18 in health insurance premiums, $1,515.02 in

per diem expense reimbursement, and $350 in other job-related expenses. Com. 2nd Compl. at 18. Additionally, Complainant estimates that $10,000 in damage was done to his career and professional reputation and that the attorney's fees and costs in the case were also approximately $10,000. Com. Mot. for Summ. Dismissal at 6-7.

The applicable regulations authorize the award of compensation, including back pay, to a prevailing Complainant. 29 C.F.R. § 1979.109(b). Because back pay promotes the remedial statutory purpose of making the discrimination victim whole again, "unrealistic exactitude is not required" in calculating back pay. *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976), *quoting Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975). Uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party. *McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ NO. 96-ERA-6 (ARB Sept. 24, 1997). Therefore, Claimant's request for compensation, including back pay, in the amount of $53,512.20 is hereby granted.

Complainant also seeks interest on the award of back pay to which he is entitled. The goal of awarding back pay is to place an employee in the position he would have been in absent discrimination, and prejudgment interest on a back pay award is necessary to achieve this end. Prejudgment interest on back wages recovered in litigation before the Department of Labor is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code at 26 U.S.C. § 6621. Therefore, Claimant's request for prejudgment interest on his compensation award of $53,512.20 is hereby granted at the statutorily specified rate.

The applicable regulations also authorize the award of compensatory damages and an award of all reasonably incurred expenses and attorney's fees. 29 C.F.R. § 1979.109(b). Therefore, Complainant's requests for compensatory damages in the amount of $10,000 and for reasonably incurred attorney's fees and costs of $10,000 are hereby granted.

RECOMMENDED ORDER

It is hereby RECOMMENDED that:

1. Summary Decision be DENIED for Complainant,

2. a DEFAULT JUDGMENT be entered in favor of Complainant for:

    a. $53,512.20 in back wages and other compensation,

    b. prejudgment interest calculated in accordance with 29 C.F.R. § 20.58(a) on that amount from the date the payments were due as wages until the actual date of payment,

c. $10,000 in compensatory damages for damage to his career and professional reputation, and

d. $10,000 in attorney's fees and costs reasonably incurred in connection with this proceeding.

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WILLIAM S. COLWELL
Administrative Law Judge

WSC/MAWV

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, Room S-4309, 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 receives 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 29