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Office of Administrative Law Judges
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Issue Date: 20 May 2005

Case No: 2005-AIR-3

In the Matter of

STEPHEN C. DAVIDSON

Complainant

v.

MIAMI AIR INTERNATIONAL, INC.

Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). These provisions provide protection from discrimination to employees in the airline industry who engage in certain types of protected activity. The regulations implementing Section 519 appear at 29 C.F.R. § 1979.100 et seq.

The proceedings before the Office of Administrative Law Judges ("OALJ") were initiated on November 11, 2004, when Stephen C. Davidson (hereinafter Complainant or Davidson), requested a hearing before the OALJ on his AIR 21 Complaint.[1] This matter is currently set for hearing in Miami, Florida,

[1] Davidson included American Airlines, Inc. (hereinafter American), as a Respondent in his Complaint. On April 22, 2005, Complainant filed a Motion to Dismiss With Prejudice all Claims Against American. On May 16, 2005, I granted Complainant's Motion and dismissed all claims against American with prejudice.

during the week of July 11, 2005. The Respondent has now filed a Motion for Summary Decision asking that this matter be dismissed.

Miami Air International, Inc.'s (hereinafter Miami) Motion was styled "Miami Air International, Inc.'s Motion for Summary Final Order" (hereinafter Miami's Motion), and was mailed on February 14, 2005 and received by this office on February 17, 2005. The Motion includes the Affidavit of Carlos L. De Zayas who is the attorney who represented Miami in an earlier 2001 AIR 21 case which had been filed by Davidson against Miami. The Motion also contains six attachments captioned Exhibits ("MX") one through six. The description of these Exhibits is as follows: "MX 1" is a copy of the Complainant's application for workers' compensation benefits against American dated December 19, 2002; "MX 2" is a copy of the Complainant's application for workers' compensation benefits against American dated January 16, 2004; "MX 3" is a copy of the civil action the Complainant filed against American in the U.S. District Court, Southern District of Florida; "MX 4" is a copy of Complainant's civil action filed against American in the 11th Judicial Circuit in Miami-Dade County, Florida; "MX 5" is a copy of a letter written to Administrative Law Judge Michael P. Lesniak dated November 21, 2002; and "MX 6" is a copy of the provisions of 49 U.S.C. § 44703.

Complainant responded to Miami's Motion on March 6, 2005 and submitted Exhibits ("CX") A through K. These Exhibits are as follows: "CX A" is a copy of Complainant's employment identification cards from both American and Miami; "CX B" is a copy of a letter from a handwriting examiner and a document that Complainant alleges contains a forged signature; "CX C" contains various communications that Complainant alleges concern fraudulent documents; "CX D" contains a copy of a letter written to Judge Michael P. Lesniak on February 6, 2005; Judge Lesniak's response in the form of an Order dated February 16, 2005, and the hearing transcript dated November 6, 2002 regarding Complainant's 2001 AIR 21 complaint against Miami; "CX E" contains 35 documents presented to American by Miami; "CX F" contains various written requests by Complainant to Miami to obtain a copy of his personnel record; "CX G" contains a copy of the Settlement Agreement between Complainant and Miami, a letter to the EEOC Miami District Office requesting his complaint against Miami be dismissed, and a letter from the EEOC granting the request; "CX H" is a copy of Complainant's video tape deposition by American dated June 17, 2004; "CX I" is a copy of an Arbitration Opinion and Award dated July 7, 2003; "CX J"

contains copies of 46 documents whose significance or relevance in this matter is questionable; and "CX K" contains a letter from Dr. Robert Fiscella, M.D. dated December 6, 2000 indicating Complainant is fit for duty; a letter from Complainant to Chief Brian Fields dated September 6, 2004; and a copy of a Settlement Agreement that is unsigned.

For the reasons stated below, the Respondent's Motion for Summary Decision will be granted, and the Complaint of Stephen C. Davidson dismissed.

Undisputed Material Facts[2]

Based on my review of the record generally, the Miami Motion and attachments, and the Complainant's response to the Motion, I find the following material facts to be undisputed and I view these facts in a light most favorable to the Complainant.

American hired Complainant on October 13, 1989, as a Flight Engineer. After training was completed, he was promoted to First Officer. He was discharged on December 17, 1999 for failing to make the rank of Captain under American's "up or out" policy. Thereafter, Complainant filed a union grievance and an Equal Employment Opportunity Commission (hereinafter EEOC) complaint against American.

However, while Complainant's union grievance was pending, he was hired by Miami on September 25, 2000, as a First Officer and later discharged on November 1, 2001. Following his discharge, Complainant filed against Miami both an AIR 21 complaint with DOL as well as an EEOC complaint.[3] In the AIR 21 complaint, Mr. Davidson alleged that he was terminated in retaliation for having pointed out errors in Miami's operational manual. The Regional Administrator for DOL investigated the complaint and found that Miami did not violate AIR 21 by discharging Davidson. Complainant appealed the decision and requested a hearing before an Administrative Law Judge. The parties eventually agreed to settle the claim[4], which was approved by an Administrative Law Judge on November 19, 2002.

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[2] The Respondent has not disputed that they are an "air carrier" falling under the provisions of AIR 21. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.101.

[3] Complainant alleged in his EEOC complaint that he was terminated because of his race which is African American.

[4] The Settlement Agreement provides that in consideration of $60,000, Davidson agrees to release Miami from all claims, causes of action, and claimed violations of the law. Whereby, Miami agrees: "To the extent that

During September 17-19, 2002, the Allied Pilots Association System Board of Adjustment (hereinafter the Board) held a hearing to determine if Complainant was prematurely terminated by American. On July 7, 2003, the Board ordered American to provide Complainant with initial training as First Officer and a job in that position once he completed training. Complainant completed his First Officer training in December of 2003 and is currently flying as a First Officer for American today.

In the context of defending the civil action pending in State Court against American, counsel for American issued two subpoenas: one on December 6, 2002, and one on June 15, 2004, to Miami's Human Resource Manager, Frank Ryba, seeking documents relating to Complainant's employment with Miami. Complainant failed to object to either of the subpoenas and Miami produced the documents as requested.

On July 16, 2004, Complainant filed the current Complaint against American and Miami under AIR 21 alleging that Miami released documents to American in violation of the terms of Miami and Complainant's Settlement Agreement from the earlier AIR 21 complaint filing. Complainant states that:

> MAI has retaliation (sic) against me at least once with the above mentioned Airline for filing Whistle Blower charges against them!!!
>
> This is clearly a violated (sic) our settlement agreement on November 6, 2002. I request that action be taken against Miami Air International as a result of their negative actions against me. I request the reopening of my whistle Blower case. I want American Airline and their representatives barred from using the fraudulent documents and derogatory information, provided by Miami Air International, against me in any way.

Upon investigating Davidson's Complaint, the Regional Administrator for DOL on October 13, 2004 determined that no violation had occurred under AIR 21. On November 11, 2004, Complainant appealed the findings and requested a formal hearing.

Miami Air can expunge complainant's records (personal) (training) it will do so and hereby agrees to refrain from derogatory info to the extent permitted by law." (CX G).

In the November 11, 2004 request for hearing letter, Complainant gave seven reasons why he was requesting a hearing. Complainant first states that pursuant to the Settlement Agreement, the Proficiency Check Form OPS-109 was supposed to be removed. Complainant states that this form is forged and according to the Miami Police Department and Mr. Gene Kirkendall, it is a violation of federal law to have forged his signature on this form. Second, Complainant discusses why the civil suit against American is legitimate and why he refused to settle the claim. Third, Complainant reiterates that Miami has provided American with several documents that contain conflicting information. Fourth, Complainant discusses why he did not have an opportunity to challenge the subpoenas from American to Miami. Fifth, Complainant states that records presented American contain letters from co-workers after he was terminated from American in 2001. He alleges that Miami had no right to add these documents to his employment records. Sixth, Complainant alleges that Miami settled his 2001 AIR 21 complaint because Miami had falsified his signature on a permanent FAA record. Finally, Complainant stated that he requested this hearing because Miami has not processed his request to obtain a copy of his personnel records.

Pursuant to Claimant's request for a formal hearing, the case was transferred to the OALJ. Thereafter, the complaint against American was dismissed and Miami has filed this Motion for Summary Decision.[5]

DISCUSSION AND APPLICABLE LAW

Standard for Summary Decision

The standard for granting summary decision in AIR 21 cases is analogous to the rules governing summary judgment under the Federal Rules of Civil Procedure. *Mehen v. Delta Air Lines,* DOL ARB, No. 03-070, slip op. at 3 (Feb. 24, 2005); Fed. Rule of Civ. P. 56(e). Applicable regulations provide that an Administrative Law Judge may enter summary judgment for either party where the pleadings, affidavits, material obtained by

[5] On May 9, 2005, I received Miami's Motion to Strike and Response to Davidson's Correspondence and Complaint to DOL/OSHA dated April 13, 2005. The Motion indicates that Davidson has now filed another AIR complaint with the U.S. Department of Labor (hereinafter DOL). A copy of that complaint was attached to the Motion. Any subsequent filing by Davidson with DOL will be treated by the Agency as a separate complaint filing. I have no jurisdiction over that matter and it will not be considered in any way in this Order relating to Miami's Motion for Summary Judgment.

discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.40(d). The opposing party may not rest upon the mere allegations or denials of such pleading but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c).

A material fact is one that might affect the outcome of the suit, and a genuine dispute is one where a reasonable jury could find for the nonmovant based on the evidence. *Anderson v. Liberty Lobby, Inc.,* U.S. 242, 247 (1986). A properly supported summary decision motion should not be defeated based on the mere existence of an alleged factual dispute; a "scintilla" of evidence is not enough. *Id.* Summary decision is appropriate when a party fails to sufficiently establish the existence of an essential element of that party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). All evidence and factual inferences are viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). *See also Williams v. Lockheed Martin Corp.,* ARB NOS. 99-54 & 99-064, OALJ Nos. 1998-ERA-40, 42 (Sept. 29, 2000).

In its Motion for Summary Decision, Miami argues that there is no genuine issue as to any material fact and that they are entitled to a favorable decision as a matter of law. Specifically, Miami argues that this court lacks jurisdiction over these proceedings because Davidson's claim is not protected by AIR 21. Miami explains that Complainant did not state he was discriminated against by Miami because he engaged in protected activity pertaining to the violation of any federal law relating to air carrier safety. In fact, Complainant only alleges that this claim arises out of a purported breach of a Settlement Agreement entered into in an earlier case. Miami states that any action that is taken by either party to enforce the terms of such Agreement can only address a breach of the Agreement, but it is not a separate and distinguishable act of alleged discrimination and/or retaliation. Miami also argues that if this court determines that jurisdiction exists, Complainant is not entitled to relief because the clear and unambiguous terms of the Settlement Agreement required them to maintain and eventually provide the Complainant's employment records to American.

Additionally, Miami argues that at the time this claim was filed, Complainant was not an "employee" covered by the Act.

Miami states that once the parties signed the Settlement Agreement, Complainant was no longer considered an employee under AIR 21. Miami concedes that Complainant was a covered Miami employee for purposes of his 2001 complaint under AIR 21,

In response to Miami's Motion, Complainant failed to dispute the allegations made by Miami but instead argued that documents provided by Miami to his prospective employer should be accurate and consistent, especially when they refer to a pilot's qualifications and the reason for a person's separation from a company. Complainant then lists and discusses documents that he believes to contain false or defamatory information. Complainant alleges that Miami has circulated fraudulent documents knowing that they were fraudulent. Specifically, Complainant alleges a number of things including that the October 19, 2001 OPS-109 form was completed outside of his presence; that Miami's November 1, 2001 Letter of Termination contains false information; and that Miami added a third reason for his termination on the November 30, 2001 Determination Notice of Compensation Claim. Complainant also alleges that Miami provided documents to American on or around April 30, 2004, which is prior to the June 2004 subpoena. Complainant then provides an "Exhibit List," which lists all of the documents he plans to use during the upcoming hearing.

In a separate statement, Complainant comments about the exhibits Miami submitted in support of its Motion for Summary Decision. In response to "MX 1 and 2," Complainant admits to having a worker's compensation lawsuit in progress and that he declined to drop the claim when American offered a settlement. In response to "MX 3 and 4," he acknowledges that he does have a civil suit pending against American. He also states that counsel for American has provided counsel for Miami with information from his personnel file. He believes this information sharing is illegal. In response to "MX 5," Complainant mentions that he sent the letter to Administrative Law Judge Michael P. Lesniak in an effort to get out of the Settlement Agreement between him and Miami. Finally, in response to "MX 6," Complainant states that the information Miami has provided to other employers has been beyond their legal responsibilities. Complainant then offers suggestions on how to expunge documents from his file.

Davidson was a *Pro Se* Complainant until March 22, 2005 when Nicolas A. Manzini, Esq., entered his appearance in this case on behalf of Davidson. Due to the *Pro Se* status, and by Orders entered on February 23, 2005 and March 11, 2005, I provided

Complainant and Mr. Manzini with notice of Miami's Motion for Summary Decision and advised him of his right to file a responsive statement. He was also warned that failure to respond could result in the entry of a summary judgment against him.

Additionally, due to Mr. Manzini's late appearance in this case, in an Order dated March 23, 2005, I gave counsel until April 6, 2005 to respond to Miami's Motion.[6] No formal response from Mr. Manzini was ever submitted.

Miami argues in a later filing that Complainant's first response was not adequate because the document failed to include any Affidavits, legal or factual arguments, or address any issues discussed in the Motion. Miami contends that due to Complainant's repeated failure to file a responsive document to the Motion for Summary Decision, that Davidson's Complaint should be dismissed with prejudice and reasonable costs and attorney fees should be awarded.

Scope of Coverage and Burdens of Proof Under AIR 21

In general, AIR 21 provides that no airline employee may be discharged or otherwise discriminated against by an air carrier if he or she has done one of the following:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . .;
>
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any

[6] On April 5, 2005, Mr. Manzini contacted this office and spoke to my law clerk. He asked if it was necessary for him to respond to Miami's Motion since Complainant had previously submitted a response. Mr. Manzini was instructed that a response was necessary due to Complainant's *Pro Se* status at the time his initial response was filed. My law clerk also telephoned Mr. Manzini's office on April 6, 2005 to remind him that a response was due on that date.

other provision of Federal law relating to air carrier safety;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

Peck v, Safe Air International, Inc., ARB No. 02-028, AlJ No. 2001-AIR-3, slip op. at 5 (ARB Jan. 30, 2004); 49 U.S.C. § 42121 (a).

A complaint alleging a violation under AIR 21 must be dismissed "unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." 29 C.F.R. § 1979.104(b). To show a prima facie violation of the statute by the Respondent, the following must be established:

(i) The employee engaged in a protected activity or conduct;
(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;
(iii) The employee suffered an unfavorable personnel action; and
(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b)(1)(i-iv).

Temporal proximity between protected activity and adverse personnel action normally will satisfy the burden of making a prima facie showing of knowledge and causation. *Peck,* ARB No. 02-028, slip op. at 6 (*citing* 29 C.F.R. § 1979.104(b)(2)). However, even if the Complainant establishes a violation of the Act, relief may not be granted "if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event." *Peck,* ARB No. 02-028, slip op. at 6 (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

Issue of Employee Standing

Complainant alleges that Miami released personnel documents to American in violation of the terms of the Miami and Complainant Settlement Agreement in an earlier AIR case filing. Davidson argues that the releases took place in retaliation for his 2001 AIR complaint filed against Miami. Miami argues that I lack jurisdiction to hear this claim because Complainant was not an employee as defined under AIR 21 at the time of the personnel documents release or at the time he filed this claim. Section 1979.101 defines employee as an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier. *Peck*, ARB No. 02-028, slip op. at 9 (*quoting* 29 C.F.R. § 1979.101).

Miami does not dispute that Complainant was an "employee" defined under AIR 21 in the 2001 Complaint, nor does Miami dispute that they are an "air carrier" as defined under Section 1979.102. Miami argues that based upon the terms of the Settlement Agreement in the earlier case that Complainant's employment with Miami was terminated and thus he was not protected under the Act against any Miami disclosures subsequent to the agreement date.

The facts establish that at the time Miami responded to the subpoena and produced to American the contested documents, there was no employment relationship between Complainant and Miami. The subpoena responses occurred in December 2002 and June 2004. The record establishes that Miami hired Complainant on September 25, 2000, as a First Officer and discharged him on November 1, 2001. He was never rehired by Miami. Therefore, in 2002 and 2004, Complainant was a former employee of Miami as defined under Section 1979.101 for purposes of the 2004 AIR 21 Complaint. *See Friday v. Northwest Airlines, Inc.*, 2004-AIR-16 and 17 (ALJ June 16, 2004).[7]

Under AIR 21, coverage can extend to former employees depending on the surrounding factual circumstances of the alleged violation. *See Peck*, ARB No. 02-028, slip op. at 6. However, the impact of the Complainant's status as a former employee is limited under AIR 21. *Friday*, 2004-AIR-16 and 17, slip op. at 8. "The general rule, applied in other whistleblower and retaliation contexts, is that complainants who

[7] In *Friday*, the Administrative Law Judge determined that the Complainant was a former employee defined under the Act, although he had voluntarily terminated his employment.

are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way." *Id.*, (*citing Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977); *Delcore v. Northeast Utilities*, 90-ERA-37 (Sec'y Mar. 24, 1995)).

As a former employee who terminated his relationship with the Respondent by signing a Settlement Agreement, "only those actions by the Respondent which affect the benefits the Complainant is entitled to as a former employee, his possible re-employment, or his ability to seek other employment (such as blacklisting claim), are covered as a personnel action under AIR 21." *Friday*, 2004-AIR-16 and 17, slip op at 8. Since Complainant has not specifically alleged any of these actions by Miami in this claim, I find that Stephen C. Davidson was not a covered employee of Miami at the time of the document disclosures and thus his claim is not covered under the Act. Therefore, Miami's Motion for Summary Decision must be granted for this reason alone.

Protected Activity

Miami is also entitled to Summary Decision based upon Complainant's failure to show that he engaged in any protected activity. Complainant alleges that in retaliation for filing his 2001 complaint under AIR 21, Miami breached their Settlement Agreement by complying with subpoenas issued by American. Miami argues that this court lacks jurisdiction because even assuming the Settlement Agreement was breached, the Complainant's allegation relating to the document disclosure does not involve protected activity. Based upon the undisputed facts in the record, I conclude that Miami's argument has merit.

In order to prevail under AIR 21, Davidson must establish that he engaged in protected activity. *See Mehen*, DOL ARB, No. 03-070, slip op. at 4; § 1979.104(b)(1). Protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government. *Svendsen v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 2002-AIR-

16, slip op. at 48 (ARB Aug. 26, 2004); *Weil v. Plant Airways, Inc.*, 2003-AIR-18 (ALJ Mar. 16, 2004).

Davidson's Complaint alleges retaliation based upon an alleged breach of a Settlement Agreement executed by Complainant and Miami and which administratively closed an earlier whistleblower complaint filed by Complainant in 2001. The breach of a Settlement Agreement does not fall within the plain language of Section 42121 involving the providing of information or the filing of a proceeding relating to a violation of Federal air carrier safety laws. *Mehen,* DOL ARB, No. 03-070, slip op. at 5. Thus, even assuming a breach had occurred, it would not constitute protected activity under these circumstances.

Davidson also alleges that Miami has retaliated against him "at least once" by providing fraudulent documents to American for filing his earlier whistleblower complaint against Miami. Additionally, Complainant alleges that Davidson has also provided fraudulent documents to other prospective employers. The Board has stated that while a complaint "may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive, or event." *Peck,* ARB No. 02-028, slip op. at 9. *See Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004). Although Davidson's Complaint might infer that Miami has affected his ability to seek other employment, Complainant failed to show specific facts demonstrating that Complainant's employment was affected at American or with any other air carrier because of Miami's alleged disclosure of fraudulent documents. Complainant has not alleged specific facts to support his allegation.

The Complainant's representations concerning whether Miami is required to expunge certain documents pursuant to the parties Settlement Agreement is not an issue over which I have jurisdiction. According to the judicial enforcement provisions of AIR 21, if a Complainant is seeking enforcement of the terms of a Settlement Agreement, then he is required to file a civil action in the United States District Court in the jurisdiction where the violation occurred. 29 C.F.R. § 1979.113. Thus by law, I do not have jurisdiction to enforce the terms of the Settlement Agreement.

For the reasons stated above, I find that Complainant does not qualify as an employee covered under AIR 21 for purposes of his Complaint against Miami. Additionally, even assuming Complainant was a covered employee, he has not alleged sufficient facts to show that he engaged in protected activity

under the Act. Also assuming his Complaint seeks enforcement of any provision of the Agreement, I do not have jurisdiction over that matter.

Davidson's burden on summary decision with respect to Miami was to create a triable issue of fact concerning his employee status with Miami and his engaging in protected activity. *See Allison v. Delta,* ARB No. 03-150, ALJ No. 2003-AIR-00014, slip. op. at 5 (ARB Sept. 30, 2004). He has failed to do so. Since essential elements of his claim have not been shown by Davidson, summary decision is appropriate and Miami's Motion for Summary Decision must be granted.

Based on this record, Complainant has failed to demonstrate that he engaged in any protected activity or that he suffered an unfavorable personnel action by the Respondent. Since Complainant cannot establish a *prima facie* case of discrimination under AIR 21, Davidson's Complaint must be dismissed pursuant to § 1979.104(b). Therefore, I find that there exists no genuine issue of any material fact and that Miami is entitled to judgment as a matter of law.

ATTORNEY FEES

Miami also asks that it be awarded reasonable costs and attorney fees, and all other relief permitted by law that is deemed to be just and proper. Miami argues that they are entitled to attorneys' fees because Davidson did not allege a violation under AIR 21 in his Complaint or file a responsive document to their Motion. Miami does not allege that Complainant acted in bad-faith when he filed his Complaint.

Under the Act, reasonable attorney's fees may be awarded, not exceeding $1000, to a prevailing employer if the complaint is determined to be frivolous or brought in bad-faith. *Peck,* ARB No. 02-028, slip op. at 15 (*quoting* 49 U.S.C.A. § 42121(b)(3)(C)). *See Allison,* ARB No. 03-150, slip. op. at 6; 29 C.F.R. §§ 1979.109(b) and 1979.110(e). In *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999) it is said that:

> A complaint is frivolous "if it lacks an arguable basis in law of fact." *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which

> clearly does not exist." *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir. 1999). "A Complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Talib*, F.3d at 213.

I find insufficient evidence to show that Davidson's Complaint was frivolous or brought in bad faith. Davidson vociferously argues that Miami's alleged breach of their Settlement Agreement was a violation of AIR 21. Complainant believes that based on the Agreement that Miami was required to eliminate certain derogatory documents in his personnel file. He also holds a firm belief that Miami retaliated against him when they allegedly sent derogatory documents to American. Since I must conclude that Complainant held a firm and sincere belief that he was a victim of retaliation, I find that his Complaint was not based upon a meritless legal theory nor was it based upon baseless facts.

I also find Davidson's belief that he was an employee covered under the Act to be reasonable. The record shows that Complainant worked for Miami as a pilot during 2000 and 2001. Miami does not contest that Davidson was an employee covered by the Act when he filed his first AIR 21 complaint. Therefore, as an employee covered under the Act for the first AIR 21 complaint, it is understandable that Complainant would think that he was also a "former employee" as defined under the Act and, therefore, a covered employee for purposes of the second filing.

Since Miami has not demonstrated that Complainant filed a frivolous Complaint or that it was brought in bad-faith, Miami's request for attorneys' fees and costs is DENIED.

ORDER

It is ORDERED that the Motion for Summary Decision filed by the Respondent, Miami Air International, Inc., is hereby GRANTED and Stephen C. Davidson's complaint filed against Miami is

hereby dismissed. In view of this disposition, Respondent's other pending motions outlined in my Order dated March 23, 2005, and filed subsequent to that date, are rendered moot.

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Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. 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. §§ 1979.109(c) and 1979.110(a) and (b).