U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 15 December 2008

CASE NO.: 2005-AIR-00023

In the matter of:

LUIS PATINO
Complainant

v.

BIRKEN MANUFACTURING COMPANY
Respondent

Appearances:

James Talbert-Slagle, Esq., and Lynn M. Mahoney, Esq., Law Offices of Leon Rosenblatt, West Hartford, Connecticut, for the Complainant

Robert Hirtle, Esq., Rogin, Nassau, Caplan, Lassman & Hirtle, Hartford, Connecticut, for the Respondent

DECISION AND ORDER ON REMAND GRANTING RELIEF

This case arises from a claim for whistleblower protection filed by Luis Patino ("Complainant") against his employer, Birken Manufacturing Company ("Birken" or "Employer"), under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21" or "Act"). 49 U.S.C. §42121. On June 21, 2006, I issued a Recommended Decision and Order dismissing Complainant's complaint. On July 7, 2008, the Department of Labor's Administrative Review Board ("ARB") issued a Decision and Order Of Remand vacating a portion of my decision and remanding the matter. (ARB No. 06-125) (July 7, 2008). The ARB agreed with my determination that the Complainant proved by a preponderance of the evidence that he engaged in protected activity, and that he suffered adverse action in part because of his protected activity. Slip op. at 6. However, the ARB remanded the case to me, holding that I failed to apply the proper standard in determining whether the Employer rebutted the Complainant's showing that his protected activity contributed to his termination. Specifically, the ARB directed me to evaluate whether the Employer met its burden of establishing by clear and convincing evidence

that it would have taken the same adverse action absent the Complainant's protected activity. *Id.*[1]

A. Issue On Remand

AIR21 prohibits an air carrier or its contractors or subcontractors "from discharging or otherwise discriminating against employees who inform their employers or the federal government, or who file proceedings, about violations or alleged violations of any order, regulation, or standard of the Federal Aviation Administration or of any other federal law concerning air safety." *Brune v. Horizon Air Indus.*, ARB No. 04-037, OALJ No. 2002-AIR-8, slip op. at 1 (ARB Jan. 31, 2006); 49 U.S.C. § 42121(a).

To establish a violation of the employee protection provisions of AIR21, a complainant must demonstrate: 1) that he engaged in protected activity; 2) that the Employer was aware of the protected activity; (3) that he suffered an adverse employment action; and 4) that the protected activity was a contributing factor in the adverse action. If the complainant succeeds in proving that the respondent has violated AIR21, the complainant is entitled to relief, unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.104(d); *Peck v. Safe Air Int'l, Inc.*, 2004 WL 230770; ARB No. 02-028, OALJ No. 2001-AIR-3, slip op. at 10 (ARB Jan. 30, 2004); *Brune*, ARB No. 04-037, slip op. at 14.

My initial Recommended Decision and Order found that the Complainant engaged in protected activity when he delivered his notes concerning allegedly non-conforming aircraft engine parts to Pratt & Whitney, a major customer of Birken, and then later to Birken, and that Birken was aware of the Complainant's protected activity. I also determined that the protected activity was a contributing factor in Birken's decision to terminate the Complainant's employment.

On remand, the ARB directed me consider whether the Employer rebutted Complainant's showing of a violation of AIR 21, that is, whether Birken demonstrated by clear and convincing evidence that it would have fired Complainant in the absence of his protected activity. ARB Dec. at 6, citing *Peck*, slip op. at 10; *Clemmons v. Ameristar Airways, Inc.*, 2007 WL 1935557 (ARB Nos. 05-048, 05-096) (ALJ No. 2004-AIR-11) (June 29, 2007). The evidence is undisputed that the Complainant did not disclose his diary of allegedly defective aircraft engine parts for a period of six years until he disclosed the diary to Pratt & Whitney during a routine audit of Birken's parts operation, and then subsequently to Birken. Complainant contends that he regularly informed his foreman of his concerns in a timely fashion on an ongoing basis. Comp. Br. at 11. This statement misses the point. The evidence establishes that each time the Complainant raised a concern with a part he believed was non-conforming, his supervisor would consult with the Engineering Department and report back to the Complainant on whether he could continue working on the part in question. Thus, the Company reasonably believed it had addressed the Complainant's concerns with the specific parts he questioned. Apparently

[1] On December 9, 2008, a telephone status call was held with the parties. The parties indicated they were doubtful a settlement could be reached and stated that their previous briefs had sufficiently addressed the issue on remand.

unsatisfied with the responses he received from Birken's Engineering Department, the Complainant took no action, other than to create an ongoing diary of allegedly non-conforming parts which he maintained for a six year period. During this period, the Complainant told no one that he was keeping a diary or log of defective engine parts. It was not the Complainant's periodic reports to his supervisor of allegedly non-conforming parts which lead to his discharge. Rather, it was his failure to inform Birken or, for that matter, any other entity such as Pratt and Whitney or the FAA of his concerns regarding many allegedly nonconforming aircraft engine parts for six years. [2]

Birken maintains that it discharged the Complainant because he concealed "manufacturing information in his diary for a period of six years without turning it over to the company, Pratt & Whitney, or the Federal Aviation Administration." Resp. Br. at 22. Birken considered the Complainant's concealment of the diary/list of allegedly defective parts an "integrity violation" as the failure to report information that potentially affected aircraft safety "could have put the flying public and government employees at risk." EX 8 and Resp. Br. at 25. However, Birken's president testified that had the Complainant reported "a correct statement of improper conduct by our people, he would not have been let go." TR 223. This statement strongly suggests that Complainant's failure to inform the company or an outside entity of the diary/notes in a timely manner would not have resulted in his discharge had any of the parts listed in the diary been found to be nonconforming. Birken's stated rationale for terminating the Complainant, the failure to timely report the allegedly defective parts recorded in the diary, is undermined by the company president's statement inferring that if any of the parts identified in the diary had been defective, the failure to turn the information over would not have lead the Company to terminate the Complainant.

In addition, Birken did not produce the company's personnel manual or disciplinary rules, precluding an evaluation of whether the company complied with the disciplinary system. Nor did Birken offer evidence of any discipline imposed upon other employees for violations of company policies. In light of the statement that the Complainant would not have been fired if the diary had shown "improper conduct by our people", i.e., the manufacture of defective parts, and the absence of evidence of disciplinary action taken against other employees for violations of company policies, I find the Employer failed to meet its burden of demonstrating by clear and convincing evidence that it would have terminated the Complainant in the absence of his protected activity. Accordingly, based upon this evidence, I conclude the Complainant has successfully established a violation of AIR 21 and he is entitled to relief.

B. Back Pay Award

An award of back pay is appropriate under the AIR 21. 49 U.S.C. § 42121(b)(3)(b); 29 C.F.R. § 1979.109(b). The Complainant is not seeking reinstatement to his position as he testified he decided to retire as of April 2005. TR 7. At the hearing, he stated he sought back pay from the date of his termination on November 8, 2004, until April 1, 2005, the date he

[2] The Complainant's conduct in this regard is unconscionable.

decided to retire, and attorney fees. TR 7-9, 20, 121-123.[3] Complainant explicitly stated he had incurred no other damages. TR 8.

At the time of his termination the Complainant was earning $16.00 per hour. CX 9; TR 161-162. Based on the evidence submitted, the Complainant worked 38.83 hours per week. *Id*. He is entitled to back wages from November 9, 2004 to April 1, 2005, a period of twenty weeks and four days. Taking the full twenty week period at 38.83 hours per week and an hourly rate of $16.00 results in a gross back wage award of $12,425.60 for this period (20 x 38.83 x 16 = $12,425.6). For the remaining four day period, the Complainant worked an average of 7.76 hours per day (38.83 ÷ 5) for a total of 31.06 hours over this period, at a rate of $16.00 per hour, for a gross back pay award of $497.02. Accordingly, the Complainant's gross back pay award for the period November 9, 2004 to April 1, 2005 totals $12,922.62.

C. Attorney Fees

The Complaint seeks an award of attorney fees. Pursuant to the AIR 21 and the regulations implementing the statute, the successful complainant is entitled to award of attorney fees. 49 U.S.C. § 42121(b)(3)(b); 29 C.F.R. § 1979.109(b). In the present case, the Complainant has not submitted any evidence on attorney fees. Thirty (30) days is hereby allowed to Complainant's counsel for the submission of an application for attorney's fees and costs. A service sheet showing that service has been made upon all the parties, must accompany this application. The Respondent shall have fifteen (15) days following the receipt of any such application within which to file any objections.[4]

ORDER

1. Birken shall pay the Complainant back pay in the amount of $12,922.62;

2. Complainant's counsel shall submit a fully documented fee request within 30 days and Respondent shall have 15 days from receipt of the request to file objection.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

[3] In spite of specific direction from the undersigned at the start of the hearing, the Complainant did not provide a specific date in April 2005 on which he decided to retire. TR 9-10, 120-123. The record was held open for thirty days to permit the Complainant to check his records and provide the Court with the specific date on which he decided to retire. TR 240-241. No evidence or stipulation was submitted and the record closed. Absent such evidence, I find April 1 to be a reasonable retirement date.

[4] The parties are urged to consult with one another regarding the attorney fee and to make every effort to resolve issues related to the fee application, before filing of the fee application.

Boston, Massachusetts

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 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 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).