U.S. Department of Labor

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

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

Issue Date: 30 March 2006*In the Matter of*

David Mathews
Complainant

v. Case Number 2006 AIR 00001

Alteon Training LLC/ The Boeing Company
Respondent

Recommended Order of Dismissal

This case comes under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997) and the implementing regulations at 29 C.F.R. Part 1979 and in accordance with 29 C.F.R. Part 18 of the Rules of Practice and Procedure of the Office of Administrative Law Judges. The case is now set for hearing May 2, 2006 . However, the Complainant filed a Motion to Dismiss on March 7, 2004, and I am asked to dismiss this matter without prejudice or take "any other appropriate action."

The Respondent argues that withdrawal "is the only appropriate action" but argues that the complaint was legally and factually insufficient and requests that I enter an order awarding reasonable attorney's fees to the Respondent. It requests a "portion" of fees spent in discovery, $3525 (15 hours at $235 per hour).

Law and Regulations

29 CFR § 1979.111, withdrawal of complaints, objections, and findings; settlement, sets forth in part:

> (c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved.

49 USC § 42121(b)(3)(C) sets forth that if the Secretary of Labor finds that a complaint is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

> 29 CFR § 1979.109 Decision and orders of the administrative law judge, sets forth that:
> (b) … If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

In the comment to the publication of the regulation, the following discussion was set forth:

> The AFA suggested that § 1979.105(b) should be changed to require the named person to produce proof of attorney's fees and to provide the evidence directly to the complainant in cases where OSHA finds that a complaint is frivolous or brought in bad faith. The NWC commented that such sanctions against the complainant should not be available during the investigation phase. In consideration of the comments presented and OSHA's own re-evaluation of the statutory language, OSHA has deleted the paragraph delegating

to OSHA responsibility for assessing attorney's fees up to $1,000 during the investigation phase for complaints frivolously filed or filed in bad faith (§ 1979.105(b)). The remaining paragraphs of this section have been renumbered. The named person may seek attorney's fees for complaints filed frivolously or in bad faith in the administrative law judge proceeding as provided in § 1979.106(a). Such attorney's fees may be sought for fees incurred during the investigation of a frivolous complaint, even where the Assistant Secretary finds no merit to the complaint and the complainant does not file any objection to the determination. See § 1979.105(b) and § 1979.109(b).

Federal Register: March 21, 2003 (Volume 68, Number 55).

FINDINGS

Both Complainant's counsel and Respondent's counsel have filed affidavits in this matter.

Withdrawal

No one objects to withdrawal, although the terms of withdrawal are in dispute.

Complainant requests that the matter be dismissed without prejudice.

Because there is no specific rule, voluntary dismissal of whistleblower complaints are governed by Rule 41 of the Federal Rules of Civil Procedure. *Rainey v. Wayne State University*, 90-ERA-40 (Sec'y Jan. 7, 1991) (order to show cause), slip op. at 3, dismissed, (Sec'y Feb. 27, 1991). Rule 41 applies because there are no procedures for voluntary dismissals contained in Air 21, the implementing regulations at 29 C.F.R. Part 24, or the regulations at 29 C.F.R. Part 18.

I note that in *Bradish v. The Detroit Edison Co*., 94-ERA-20 (Sec'y Aug. 8, 1994), the Secretary dismissed a complaint without prejudice, pursuant to the Complainant's request for withdrawal.

Although I discussed this issue with the parties in a telephone hearing, neither party has commented on this issue. There is no reason to deny the request.

Therefore, the request for withdrawal is granted. 29 CFR § 1979.111c.

Attorney's Fee

Respondent's attorney alleges that she had to prepare for a deposition in this matter. She requests $3500 for preparation. My recollection is that on or about January 5, 2006, in a telephone conference, Complainant's counsel told me that he could not obtain required discovery and he asked me how to withdraw the claim. I told him to seek authority from his client. See January 5, 2006, Transcript at p. 11. I also discussed this matter in a second telephone conference that was not recorded because it was held after working hours and I could not obtain a court reporter. At that time, there was a pending Motion to Compel and I was told that counsel was trying to obtain permission to withdraw the claim. This occurred in February, 2006.

Respondent's counsel reiterates this, in large part, in her affidavit:

> In a telephone conversation with me regarding the status of Mt. Matthews' discovery responses, Jay Kirksey, Mr. Matthews' counsel, explained that he had been unable to "find" his client. Mr. Kirksey also said in a teleconference with the Administrative Law Judge that he had been unable to serve discovery responses because he could not get his client to contact him.

In Complainant's attorney's rendition, he advises by affidavit that he "advised Ms. Phillips of the dismissal several times and also advised her that I was unable to find my client or

get my client to contact me for these same reasons, which Ms. Phillips accurately sets forth in Paragraphs 3 and 4, though inaccurately leaves out a portion of our conversation."

As I was also a party to three (3) conversations among counsel, and as I was told that Complainant was advised by counsel to withdraw, I accept the Complainant's attorney's rendition on this issue.

With respect to whether the claim is frivolous, Complainant's counsel accepts by affidavit that:

> Complainant was asked, though he repeatedly objected, to train pilots in China on equipment for which he lacked adequate training and thus, as he expressed on several occasions, was placing the pilots and their passengers at risk. This fell on deaf ears, including when he expressed his concerns in Seattle, Washington during training sessions, on which he did do poorly because indeed, as he had told them through the tenure of his employment, he had not been provided previous training or experience in the areas of which they were presently attempting to train him. In addition, Complainant was of the information and belief that these pilots he was training in China did and would be flying in US air space governed by the FAA. Respondent would be hard-pressed to disagree that a trainer not qualified in the area in training does indeed affect international passengers, including US citizens, and causes a dangerous circumstance by reason of being an unqualified instructor ….

See Affidavit of Jerry M. (Jay) Kirksey, Esquire.

To prevail, the Respondent must demonstrate that the complaint lacked an arguable basis in either law or fact. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ No. 2003-AIR-14, slip op. at 6 (ARB Sept. 30, 2004); *Powers v. Pinnacle Airlines, Inc*., ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006).

Respondent argues that the Complainant knew FAA regulations did not apply in China and that he worked entirely in China with employees of Chinese airline; "Therefore, he didn't have a reasonable belief that respondent was violating U.S. and/or FAA air safety requirements."[1]

I note that although the Complainant was to have flown outside the United States, part of the training allegedly occurred in Seattle, Washington. Therefore, arguably, situs exists in the United States. Further, Complainant alleges that pilots he was training in China "would be flying in US air space governed by the FAA."

I accept that had the case progressed, these facts would have been at issue. Therefore, the Respondent has not met its burden to show otherwise.

It is true that after filing the complaint, Complainant did little to prosecute the claim. However, Respondent filed her request for fees based on a frivolous claim before any other action was taken and as of January 5, to a reasonable degree of probability, had reason to know that the Complainant would seek dismissal.

I also note that Respondent commented that part of the claim rests with Complainant's his own lack of credentials. However, Respondent has not established that it is outside the realm of possibility or even probability that one may be asked by an employer to assume a prohibited duty.

After having been fully advised in these premises, I find that the Respondent failed to establish that the claim lacks an arguable basis.

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[1] Citing to the OSHA finding.

ORDER

Based upon a full review of the record before me I enter the following:

1. The Complainant's Motion to Withdraw without prejudice is **GRANTED**.
2. The Respondent's request for attorney's fees is **DENIED**.
3. The scheduled hearing is **CANCELLED**.

A

DANIEL F. SOLOMON
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 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 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).