U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 November 2007

CASE NO. 2007-AIR-7

In the Matter of:

MARK J. HOFFMAN,
Complainant

v.

NETJETS AVIATION, INC.,
Respondent

RULING AND ORDER ON COMPLAINANTS MOTION FOR A PROTECTIVE ORDER

Background

Procedural Background

A hearing, involving the above-named parties, will be conducted under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR Act"), 42 U.S.C. § 42121, in the above-captioned matter, on January 15-18, 2008, in Columbus, Ohio. Discovery is scheduled to cease on November 30, 2007, pursuant to my September 24, 2007, Order Granting Joint Motion to Extend Deadlines. On November 15, 2007, Complainant filed a Motion for a Protective Order pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (hereinafter "Rules of Practice and Procedure"), under 29 C.F.R. § 18.15(a). On November 21, 2007, the respondent, NetJets Aviation, Inc., (hereinafter "NJA"), filed a response to Complainant's motion.

NJA served its Third Set of Interrogatories, Third Request for Production of Documents, Second Request for Admissions, and Notice of Mental Examination on November 2, 2007. The Notice of Mental Examination stated that the scope of the scheduled mental examination is whether Complainant has suffered emotional distress and mental anguish due to being placed on paid administrative leave, being issued a written warning, and being denied a promotion, all in 2006. The examination is scheduled to be done by a doctor that NJA has chosen.

Complainant, Hoffman's, Contentions

Complainant seeks protection from the following: a mental examination scheduled by NJA; several requests for admission; several interrogatories; and, several requests for documents. Complaint argues that the mental examination is unnecessary, that NJA has exceeded the allowed number of interrogatories, that several interrogatories and a document request seek information protected by the work product doctrine, and finally, that a request for documents seeks confidential and protected communications which took place between union members. Complainant's contentions are more fully discussed below.

Respondent, NJA's, Contentions

In its response to Complainant's Motion, NJA argues that Complainant should undergo a mental examination because he has placed his mental condition at issue by seeking damages for emotional distress and because discovery responses, to date, have produced conflicting evidence as to whether Complainant has or has not suffered emotional distress. NJA also argues that it has not exceeded the permissible number of interrogatories, that its interrogatories and document requests do not seek information that is privileged, and that Complainant has failed to show that producing Complainant's message board postings is oppressive, unduly burdensome and embarrassing.[1]

The Law

AIR Act Statutory Elements

49 U.S.C. § 42121 *et seq.*, is similar to most whistleblower statutes in that it requires that the complainant establish that: (1) he or she engaged in protected activity; (2) he or she was subject to unfavorable employment action; and, (3) a causal connection exists between the protected activity and the adverse action. The burden then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

To prevail on a hostile work environment claim, the complainant must establish that: (1) he or she engaged in a protected activity; (2) he or she suffered intentional harassment related to that activity; (3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins v. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2elec. Op. at 42 (ARB Feb. 28, 2003).

In AIR cases, the protected activity essentially is providing to the employer or federal government information regarding any alleged violation of any order, regulation, or governmental standard related to air carrier safety. 49 U.S.C. § 42121(a).

[1] Complainant sought a protective order from Requests 28 and 29. In Respondent's Opposition to Complainant's Motion for Protective Order, Respondent agreed to delete Request 29 in its entirety.

Discovery

Title 29, C.F.R. Part 18, sets forth the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges. When those rules are inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter controls. 29 C.F.R. § 18.1(a). The Federal Rules of Civil Procedure apply to situations not controlled by Part 18 or rules of special application. 29 C.F.R. § 18.1(a). Furthermore, an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for the District Courts. 29 C.F.R. § 18.29(a)(8).

Part 18 provides for the following discovery methods: depositions, upon oral examination or written questions; written interrogatories; production of documents; and, requests for admissions. 29 C.F.R. § 18.13. Any party may serve another party with written interrogatories, and the served party may either comply with or object to the interrogatories, and must provide the reasons for any objection. 29 C.F.R. § 18.18(a)-(b). Parties may seek the production of documents describing each item with reasonable particularity, and the party served may either comply with or object to, giving reasons for any objection. 29 C.F.R. § 18.19. Likewise, parties may seek written admissions from opposing parties. 29 C.F.R. § 18.19. An additional discovery tool provided for under Part 18 is a physical or mental examination. 29 C.F.R. § 18.19(a)(3).

Part 18 also provides for the scope of discovery. 29 C.F.R. §§ 18.13-.14. Discovery may be had into any relevant matter not privileged, regardless of whether it may be ultimately admitted into evidence, if reasonably calculated to lead to the discovery of admissible evidence. 29 C.F.R. § 18.14(a)-(b). While the FRCP do not define "relevancy," the Federal Rules of Evidence ("FRE") define it as, "…evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also* 29 C.F.R. § 18.401.

A party may obtain discovery of a relevant, non-privileged matter prepared in anticipation of a hearing by or for the opposing party's representative, including consultants or lawyers, only upon showing that: (1) the former has a substantial need for the materials in the preparation of his or her case; and (2) he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials by some other means. 29 C.F.R. § 18.14(c). When ordering such discovery, the administrative law judge must protect against the disclosure of "the mental impressions, conclusions, opinions, or legal theories" of the party's attorney or other representative. 29 C.F.R. § 18.14(c).[2]

Once relevancy is shown, the party seeking to prevent discovery has the burden of raising and sustaining any objections to discovery based on attorney-client privilege, work product, harassment, and undue burden. Fed. R. Civ. P. 26(b)-(c). If the written objections to discovery are not plain and specific to show a basis in fact for the motion's conclusionary statements as to the burden, the trial court in its discretion may deny relief. *See* 4 MOORE, FEDERAL PRACTICE, §§ 33, 20. *White v. Wirtz,* 402 F.2d 145 (C.A. Okl. 1968).

[2] Fed. R. Civ. P. 26(b)(3) contains similar language.

An administrative law judge may protect a party from certain discovery requests upon a showing of good cause; a protective order may be issued, when required "to protect the party or person from annoyance, embarrassment, oppression, or undue burden or expense." 29 C.F.R. § 18.15. Such orders may require that discovery not take place, that discovery be limited to certain terms and conditions, that discovery be limited to certain matters, or that discovery be conducted only in the presence of those properly designated. 29 C.F.R. § 18.15.[3]

Discovery Requests at Issue

Mental Examination

Complainant argues that a mental examination is not necessary for his claim of "garden variety emotional distress damages"[4] as such a claim neither puts his mental health condition at issue nor justifies subjecting him to a mental examination. Complainant additionally argues that NJA may use the examination to negatively effect Respondent's medical certification to fly, and that a mental examination would be intrusive, oppressive and embarrassing.

NJA argues that Complainant has placed his mental health condition at issue because he seeks compensatory damages for emotional distress and mental anguish. Second, NJA argues that discovery responses regarding whether Complainant has suffered from or suffers from mental anguish and emotional distress have been conflicting. Complainant asserts in his Answers to Interrogatories and deposition testimony continuing mental anguish and emotional distress, but claims that he has not suffered mental health conditions that are required to be reported under the Federal Aviation Regulations as part of his medical certification. NJA asserts that a mental examination would alleviate this conflict.

For Complainant to hold his current position, NJA, pursuant to FAA regulations, requires that Complainant has a First Class Medical Certificate. As part of receiving a First Class Medical Certificate, Complainant is required to complete FAA Form 8500-8 and give it to the doctor performing his examination, the Aviation Medical Examiner. Question 18(m) on the form asks whether the person had or has "[m]ental disorders of any sort, depression, anxiety." Complainant has answered "no" to this question for the relevant time periods, and maintains that he did not suffer from any conditions that should have been reported.

In addition, 14 C.F.R. § 67.101 states that to be eligible for a First Class Medical Certificate, a person must meet several requirements. With respect to mental standards, a person must not have an established medical history or clinical diagnosis of psychosis, a personality disorder that is repeatedly manifested by overt acts, bipolar disorder, substance abuse, substance dependency or any other personality disorder, neurosis or mental condition that renders the person unable to safely perform his duties.

Complainant takes the position that he is asserting only "garden variety" emotional distress claims and, as such, is not placing his mental health condition at issue. He further asserts

[3] Fed. R. Civ. P. 26(c) contains similar language.
[4] Complainant's Motion for Protective Order p. 5.

that he has not suffered from any condition that is reportable on Form 8500-8 or any condition that would implicate 14 C.F.R. § 67.101.

Because Complainant is not claiming to have suffered from any of the above mental conditions and is only claiming "garden variety" emotional distress, which is below the threshold reporting requirements of Form 8500-8, I find that Complainant has not put his mental health condition at issue. Complainant has submitted documents stating that he does not intend to call any expert witnesses to prove emotional distress. In addition, Complainant has not sought treatment for emotional distress resulting from the subject of this litigation so medical records or medical testimony will not be introduced.

If Complainant chooses to claim emotional distress which reaches the threshold reporting requirements of Form 8500-8 as discussed above, then Complainant will have placed his mental condition at issue. In such case, Complainant will be required to attend a mental examination at the request of NJA.

Requests for Admission

Complainant objects to Requests for Admission 305 and 306 on the grounds that the requests seek to undercut Complainant's claim for emotional distress by showing that Claimant answered no to questions regarding mental disorders for his medical certification.

> Admit that the mental anguish you claim to have suffered and for which you are seeking damages is insignificant and as a result, you have not reported the mental anguish to your Aviation Medical Examiner ("AME") per the Federal Aviation Regulations ("FARs").
>
> Admit that the emotional distress you claim to have suffered and for which you are seeking damages is insignificant and as a result, you have not reported the emotional distress to your AME per the FARs.

Complaint's Motion is denied with respect to the above requests. In support of his Motion for the Protective Order, Complainant has failed to address how the above requests create embarrassment, oppression, undue burden or expense, and he has failed to show good cause. 29 C.F.R. § 18.15(a). Instead, he has stated in a conclusory manner that a protective order should be issued because the request seeks to undermine his claim of emotional distress.

Interrogatories

Complainant seeks a protective order which allows him to not answer NJA's Second and Third Set of Interrogatories. Complainant argues that NJA's First Set of Interrogatories consisted of forty-five subparts,[5] and exceeded the limit of twenty-five interrogatories as set forth in Fed. R. Civ. P. 33. Therefore, he does not have to answer the additional questions posed in NJA's Second and Third Set of Interrogatories.

[5] Respondent's First Set of Interrogatories contained fourteen numbered interrogatories.

Fed. R. Civ. P. 33(a) limits a party to twenty-five (25) discrete interrogatories absent court approval of more.[6] Parties may seek leave of the court for more consistent with the principles of FRCP 26(b)(2). If a "subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory no matter how it is designated." *Willingham v. Ashcroft*, 226 F.R.D. 57, 59 (D.D.C. 2005).

Complainant's request is denied. NJA has served a total of eighteen interrogatories and the interrogatories contain subparts. However, none of the subparts form an inquiry that is "separate and distinct" from the main question. As such, I find that NJA has not exceeded the numerical limit set forth in Fed. R. Civ. P. 33(a).

In addition, NJA's eighteen interrogatories contain a total of fifty-eight subparts. Complainant submitted a total of thirty interrogatories. Within Complainant's First Set of Interrogatories, through number twenty-five, Complainant had forty-four subparts and multiple compound questions.[7] NJA's interrogatory requests are not numerically unreasonable.

Complainant specifically seeks protection from answering Interrogatory 16. He argues that the following interrogatory seeks information that is protected under the work product doctrine.

> Identify the titles and authors of all materials you have reviewed regarding the Toxic Substances Control Act ("TSCA") and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"). Provide a privilege log if necessary.

Complainant is correct in asserting that the interrogatory requests information that may fall under the work product doctrine. Papers prepared in anticipation of this case by Complainant's counsel, communications between Complainant and his counsel, and the legal theories of Complainant's counsel all fall within the scope of the interrogatory. Additionally, with respect to the materials falling under work product, NJA has failed to show both a substantial need for the materials in the preparation of its case and an inability to obtain the substantial equivalent of the materials without undue hardship. 29 C.F.R. § 18.14.

However, it is possible that Complainant may have responses to Interrogatory 16 that do not fall within the work product doctrine or are not otherwise protected. Complainant will not receive a protective order with regard to such responses.

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[6] I find that the Federal Rules of Civil Procedure are applicable and may supplement more specific Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. 29 C.F.R. Part 18. Section 18.18, "Written Interrogatories to Parties," does not address limitations on the number of interrogatories. However, Part 18 clearly permits an administrative law judge to establish limits or expand the scope of discovery. Fed. R. Civ. P. 33(a) similarly is designed to reasonably limit discovery.

[7] For example, Complainant's First Set of Interrogatories, Interrogatory 1 reads "What are the names, office and home addresses, telephone numbers, dates of birth, titles, duties, relationships to respondent, and dates of providing information, for all individuals who provided information to answer any requests in this matter?" Respondent's First Set of Interrogatories, Interrogatory 1 asks for the same information, but phrases the question into seven subparts.

Request for Documents

Complainant seeks protection from answering Request 32 on the grounds that the information sought is protected by work product.

> All documents identified in your response to Interrogatory No. 16. Provide a privilege log if necessary.

For the above-mentioned reasons, Complainant's request for a protective order is granted in part; however, Complainant must produce any document responses that do not fall within the work product doctrine or are not otherwise protected. Complainant shall provide a privilege log.

Complainant also seeks protection from answering Request 28 on the basis that the request is undue, embarrassing, and oppressive by intruding into confidential and protected communications among union members.[8]

> Request 28
>
> All documents relating in any manner to postings you made on the International Brotherhood of Teamsters, Local Union No. 1108's pilot message board for the period January 1, 2006 to present.

Complainant's request is denied. In support of his Motion for the Protective Order, Complainant has failed to address how the above request creates embarrassment, oppression, undue burden or expense, and he has failed to show good cause. 29 C.F.R. § 18.15(a). Complainant states that the postings are protected and confidential communications. However, the request only seeks postings made by Complainant, and does not seek the postings of other Union members or conversations between Union members. In addition, Complainant has provided a letter from the Union's General Counsel stating that Complainant is free to produce his own postings and will not violate the site's Terms of Service in doing so.[9]

However, Complainant's request for the production of postings to take place in camera is granted. NJA's request is broad and may encompass sensitive postings that are not relevant to this case. I will determine which postings are properly discoverable.

Conclusion

Complainant's Motion for a Protective Order is denied with respect to Requests for Admissions 305 and 306, Request for Document 28, and NJA's Second and Third Set of Interrogatories.

Complainant's Motion for a Protective Order is granted with respect to Interrogatory 16 and Request for Document 32 to the extent of materials falling under the work product doctrine

[8] NJA has withdrawn Request 29 which sought the posting of other union members.
[9] See Complainant's Motion for a Protective Order, p. 93 Appendix.

or otherwise protected. Responses that do not fall within the work product doctrine and are not otherwise protected, must be produced. In addition, Complainant must provide a privilege log.

Complainant's Motion for a Protective Order is granted with respect to the mental examination to the extent that Complainant is claiming "garden variety" emotional distress that is not as severe as the mental conditions that would be reportable on FAA Form 8500-8. In other words, Complainant can not claim that he has suffered emotional distress that rises to the level of the mental conditions inquired into on Form 8500-8. If Complainant chooses to do so, he will then have placed his mental health condition at issue, and will be required to attend a mental examination.

ORDER

WHEREFORE, IT IS ORDERED THAT Complainant's Motion for a Protective Order is GRANTED in part and DENIED in part.

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RICHARD A. MORGAN
Administrative Law Judge