



In the Matter of:

LORRETTA JEAN FULLINGTON,

ARB CASE NO. 04-019

COMPLAINANT,

ALJ CASE NO. 2003-AIR-30

v.

DATE: October 26, 2005

**AVSEC SERVICES, L.L.C.; SOUTHWEST
AIRLINES CO; MIDAMERICA BUILDING
MAINTENANCE CORP.; OCS GROUP OF
COMPANIES,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Kristina S. Holman, Esq., *Las Vegas, Nevada*
Sangeeta Singal, Esq., *San Francisco, California***

For the Respondents:

**Gary C. Moss, Esq., *Piper Rudnick, LLP, Las Vegas, Nevada*
Angela Edwards Dotson, Esq., *Piper Rudnick, LLP, Los Angeles, California***

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2003), and implementing regulations, 29 C.F.R. Part 1979 (2005). Loretta Fullington claimed that Southwest Airlines discriminated against her in violation of AIR 21 while she was a supervisor for AVSEC Services, L.L.C., which had cleaning contracts with Southwest and other airlines. An Administrative Law Judge (ALJ) recommended

dismissal of the claim against Southwest. [Recommended Decision and] Order (R. D. & O.). We adopt the recommendation and dismiss Southwest.

BACKGROUND

AVSEC terminated Fullington's employment on August, 27, 2002. Her initial complaint with the Occupational Safety and Health Administration (OSHA) claimed that, after she complained to the Federal Aviation Administration (FAA), AVSEC harassed her and eventually terminated her employment. *See* Discrimination Case Activity Worksheet, dated October 22, 2002. In an October 25, 2002 letter from her attorney to OSHA, Fullington also complained against Mid-America Building Maintenance Incorporated, Southwest Airlines, National Airlines, and American Airlines as additional respondents. Letter from Sangeta A. Singal to OSHA, dated October 25, 2002.

The October 25, 2002 complaint makes the following factual averments, which we take as true for the purposes of the motion to dismiss: Fullington was a Duty Manager for AVSEC, a janitorial and aircraft detailing company that held contracts with various airlines, including Southwest Airlines, National Airlines and American Airlines. AVSEC was a wholly owned subsidiary of Mid-America Building Maintenance.

As Duty Manager, Fullington was "responsible for supervising the cleaning crews and ensuring the work was properly performed and completed. Her duties also included assignment of shifts, employment discipline and retention, scheduling, and payroll performing tasks." Southwest and the other airlines "controlled and supervised the work of AVSEC employees" insofar as the airlines "generated memorandums, and critiqued, evaluated and directed the work done by AVSEC employees." Southwest filled out a "cleanliness report card" that evaluated the working areas of individual workers.

According to Fullington's complaint, AVSEC employees started performing in-airline FAA security checks for Southwest Airlines on July 1, 2002. Fullington was one of the Duty Managers held responsible for performing cabin seat security checks. Fullington became aware that "Southwest was not supposed to contract out security duties to AVSEC, a cleaning company, . . . that the manner in which the security checks were being performed was incorrect, and that important, standard security procedures were being massively sidestepped and ignored, all in grave violation of FAA guidelines." Letter from Sangeta A. Singal, at 2.

Fullington alleges that she then complained to an AVSEC accounts manager overseeing security responsibilities, an AVSEC regional general manager, and a Southwest supervisor. When they failed to take corrective action, she went to the FAA and "informed them of the security breaches." Fullington claims the FAA was not only "surprised" that AVSEC was performing security checks, but also found them to be "haphazard," "incorrect," or "not . . . done at all." Accordingly, the FAA instructed Fullington "on the correct way to perform the security checks" and initiated an investigation into her complaints.

On August 14, 2002, the AVSEC accounts manager who oversaw security reprimanded Fullington for taking too much time performing the security checks, performing them the wrong way, and taking time away from her supervisory duties. According to her, he threatened her job. She then made a complaint to the Department of Transportation (DOT) on August 16, 2002.

Fullington and the AVSEC accounts manager had a second heated exchange over compliance with FAA procedures on August 19, 2002, and he again threatened that she would be called before the regional general manager and would not like the outcome.

On August 22, 2002, the FAA met with the AVSEC regional general manager and a Southwest representative for three hours about Fullington's complaints. Immediately thereafter she says AVSEC suspended her. The regional general manager complained that her actions had caused him to spend three hours with the FAA and Southwest. He said, "[D]o you have any idea how that made me look or feel?"

Then, on August 27, 2002, DOT contacted AVSEC to discuss Fullington's safety complaints. And finally, on August 29, 2002, the AVSEC regional general manager terminated her employment. Her check, payable through August 29, 2002, was dated August 27, 2002.

Fullington then began seeking redress with OSHA. On April 25, 2003, OSHA dismissed Fullington's initial complaint against AVSEC. On May 6, 2003, Fullington appealed the OSHA decision and requested a hearing before an ALJ, and on May 22, 2003, the ALJ assigned the case for trial. On May 23, 2002, OSHA issued additional findings, dismissing Fullington's complaint against Southwest and the other airlines for failure to state a prima facie whistleblower case. Fullington did not file a new request for hearing and appeal from that decision. However, in a July 31, 2003 notice, the ALJ consolidated the complaints against AVSEC and Southwest.

On August 14, 2003, Southwest filed a motion to dismiss, which Fullington opposed. In the September 25, 2003 R. D. & O., the ALJ denied Southwest's motion to dismiss insofar as Southwest argued that Fullington had failed to file a timely objection to OSHA's May 23, 2002 additional findings. R. D. & O. at 2. The ALJ concluded that Fullington's first notice of appeal "substantially complied" with the requirements for filing a timely appeal under AIR 21. Southwest has not briefed that ruling on appeal. See Respondent Southwest Airline Co.'s Reply to Complainant Loretta Fullington's Appeal from the Administrative Law Judge's Grant of Respondent Southwest Airline Co.'s Motion to Dismiss and Denial of Complainant's Motion for Reconsideration of Respondent's Motion to Dismiss. Accordingly, we consider the timeliness of appeal issue waived. *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-00005, slip op. at 6 (ARB Dec. 30, 2004); *Development Res., Inc.*, ARB No. 02-046, slip op. at 5 (ARB Apr. 11, 2002).

In the R. D. & O., the ALJ also dismissed the complaint against Southwest on the ground that Fullington failed to articulate a prima facie case against Southwest.

Fullington “could qualify” as Southwest’s employee, her complaints to supervisors and federal agencies about flight safety were protected activities under AIR 21, and her recitation of the facts showed that she was subjected to adverse action. *Id.* at 3-4. But the ALJ found that Fullington failed to allege other required elements of a prima facie case against Southwest, i.e., “Fullington’s allegations do not give rise to the inference that Southwest knew of her protected activity or initiated her termination from AVSEC on account of her protected activity.” *Id.* at 3.

Fullington filed a Motion for Reconsideration of the R. D. & O. on October 3, 2003, which Southwest opposed, and which the ALJ denied by order dated October 23, 2003. We now turn to the merits of Fullington’s appeal.

ISSUE

The issue presented to us is whether Fullington’s failure to state a claim against Southwest entitles it to dismissal from the case.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ’s recommended decision under AIR 21 § 42121(b)(3) and 29 C.F.R. § 1979.110. See Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary’s authority to issue final orders under, inter alia, AIR 21 § 42121). We review an ALJ’s conclusions of law de novo, *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-4, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 5 (ARB Dec. 30, 2004), but under § 42121, we review the ALJ’s findings of fact under the substantial evidence standard. 29 C.F.R. § 1979.110(b).

DISCUSSION

I. Elements of AIR 21 Whistleblower Complaint

AIR 21 provides that “[no] air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment,” 49 U.S.C.A. § 42121(a), because the employee has engaged in certain protected activities. These protected activities include: providing to the employer or (with knowledge of the employer) the 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 . . .” 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102.

The AIR 21 complainant must allege and later prove that she was an employee who engaged in activity the statute protects; that an employer subject to the act had knowledge of the protected activity; that the employer subjected her to an “unfavorable personnel action;” and that the protected activity was a “contributing factor” in the

unfavorable personnel action. 49 U.S.C.A. § 42121(a), (b)(2)(B)(iii). *Cf.* 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the employer has violated AIR 21, the employee is entitled to relief unless the employer 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.A. § 42121(b)(2)(B)(iv). *Cf.* 29 C.F.R. § 1979.104(d). *See, e.g., Negron*, ARB No. 04-021, slip op. at 6; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 slip op. at 9 (ARB Jan. 30, 2004).

II. Fullington's Failure to State a Claim Against Southwest

We first consider whether it was legal error for the ALJ to have dismissed Fullington's AIR 21 complaint against Southwest. The rules governing hearings in whistleblower cases contain no specific provisions for dismissal of complaints for failure to state a claim upon which relief may be granted. *See* 29 C.F.R. Parts 18 and 24 (2005). It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims. 29 C.F.R. § 18.1 (a). Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party's favor. *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 4 (ARB Apr. 26, 2005). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* slip op. at 5 (citation omitted). *Cf.* 49 U.S.C.A. § 42121(b)(2)(B)(i) (OSHA will decline to conduct an investigation of a complaint unless the complainant "makes a prima facie showing" that protected activity was a contributing factor in a respondent's adverse action); 29 C.F.R. § 1979.104(b) (same).

The October 25, 2002 letter from Fullington's lawyer to OSHA constitutes her complaint against Southwest.¹ Drawing all reasonable inferences in Fullington's favor, we agree with the ALJ's determination that Fullington engaged in protected activity and that she suffered an unfavorable personnel action; disagree on whether the factual averments show that Southwest was in an employment relationship with her and was aware of the protected activity; and agree that Southwest did not take adverse action or cause AVSEC to take adverse action against her.

Under AIR 21, protected activities include providing to the employer or 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.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102. Fullington alleges that she became aware that AVSEC was performing security checks in violation of FAA guidelines and that she provided that information to an AVSEC accounts manager, an AVSEC regional manager, a Southwest supervisor, and later the

¹ Although Fullington repeatedly refers to the October 25, 2002 letter as her first complaint, *see e.g.,* Complainant Loretta Fullington's Opposition to Respondent Southwest Airlines Co.'s Motion to Dismiss, September 2, 2003, at 2, it is in fact her second. Her first complaint, which OSHA dismissed on April 25, 2003, was against AVSEC.

FAA and DOT. If proven, those facts are clearly sufficient to establish that Fullington engaged in protected activity.

Fullington was subjected to an unfavorable personnel action. Under AIR 21, such an action includes discharge or other discrimination “with respect to compensation, terms, conditions, or privileges of employment.” 49 U.S.C.A. § 42121(a). The AIR 21 regulations provide that it is a violation for a covered employer to “intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has [engaged in protected activity].” 29 C.F.R. § 1979.102(b). Fullington contends that AVSEC harassed, threatened, suspended and eventually discharged her. Those allegations are without question enough to demonstrate that Fullington was subjected to an unfavorable personnel action. However, the question we subsequently address is whether those actions are attributable to Southwest.

Fullington alleges that Southwest had knowledge of her protected activity. Employer knowledge is an element of an AIR 21 retaliation claim. An employee must provide information relating to a violation to the employer or “with any knowledge of the employer” to the Federal Government. 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102(b)(1). The ALJ concluded that Fullington did not allege that Southwest had knowledge of her complaints. R. D. & O. at 3-4. However, we disagree. Her complaint contends that she complained about security procedures to a Southwest supervisor and that on August 22, 2002, the FAA met with the AVSEC regional general manager and a representative of Southwest about Fullington’s complaints. Letter from Sangeta A. Singal, at 2-3. Those contentions are sufficient to overcome a motion to dismiss on the issue of employer knowledge.

The last, and pivotal, issue is whether Fullington was an employee and Southwest was an employer subject to liability under AIR 21. AIR 21 provides that “No air carrier or contractor or subcontractor of an air carrier may discharge or otherwise discriminate against an employee” because of the employee’s protected activities. 49 U.S.C.A. § 42121(a). *See also* 29 C.F.R. § 1979.104(b)(1)(i)-(iv). “Employer” is not defined in the statute or regulations, but the definition of “employee” in the regulations “means an individual . . . working for an air carrier or contractor or subcontractor . . . or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.” 29 C.F.R. § 1979.101. Although the statute refers to “employer” as the potentially liable party, the regulations speak in terms of “named person,” 29 C.F.R. § 1979.104, which they define as “the person alleged to have violated the Act.” 29 C.F.R. § 1979.101. We therefore conclude that there must be an employer-employee relationship between an air carrier, contractor or subcontractor employer who violates the Act and the employee it subjects to discharge or discrimination, but that the violator need not be the employee’s immediate employer under the common law.

Our interpretation of the provisions of AIR 21 is consistent with the position we have taken in claims of unlawful discrimination arising under other whistleblower protection provisions. The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control

over, or interfered with, the terms, conditions, or privileges of the complainant's employment. See *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and cases cited therein. See also *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003) (all actions under the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004)). Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. *Lewis*, slip op. at 7. If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001) (environmental whistleblower acts).

With an eye to these principles, we now discuss the allegations in Fullington's complaint. We disagree with the ALJ's conclusion that Fullington alleged sufficient facts to establish that Southwest controlled her employment with AVSEC, but agree with his ultimate conclusion that Southwest did not cause the termination of her employment. AVSEC was a janitorial company that had contracts for cleaning services with Southwest. AVSEC was a contractor and Southwest is an air carrier. Both are subject to the Act. AVSEC was Fullington's common law employer and Fullington contends that AVSEC harassed, threatened, suspended and eventually discharged her. Her contention that AVSEC took adverse action against her almost immediately after Fullington made safety complaints to the company and to federal agencies might state a prima facie case against AVSEC for an AIR 21 violation. 29 C.F.R. § 1979.104(b)(2) ("[I]f the complainant shows that the adverse personnel action took place shortly after the protected activity, [that] giv[es] rise to the inference that it was a factor in the adverse action.>").

That is not the case, however, with respect to Southwest. Fullington was a Duty Manager for AVSEC crews cleaning Southwest airplanes. Fullington states that Southwest "controlled and supervised the work of AVSEC employees" to the extent the airline "generated memorandums, and critiqued, evaluated and directed the work done by AVSEC employees." Southwest filled out a "cleanliness report card" that evaluated the working areas of individual workers. But controlling the quality of a contractor's employee's work performance under the contract is not tantamount to having "the ability to hire, transfer, promote, reprimand, or discharge" that employee, as our case law requires. Fullington does not claim in her complaint that Southwest had the ability to hire or fire her. Nor does she recite any facts from which we could conclude that Southwest influenced AVSEC to take unfavorable personnel actions against her. From the fact that AVSEC took action against Fullington after she voiced safety concerns, we do not draw the inference that Southwest controlled the decision.

Thus, because Fullington failed to allege facts sufficient, if proved, to establish essential elements of her AIR 21 whistleblower complaint, viz., that Southwest was Fullington's employer under the Act and that it took or caused AVSEC to take, adverse action against her, we concur in the ALJ's dismissal of her whistleblower complaint for failing to state a claim on which relief can be granted.

III. Analysis under Summary Decision Standard

In deciding that Fullington did not state a prima facie case against Southwest, the ALJ reviewed more than just the allegations in her complaint. He also considered Southwest's Motion to Dismiss and Fullington's opposition. *See* R. D. & O. at 3-4. To the extent the ALJ and we rely upon factual allegations beyond those contained in Fullington's October 25, 2002 complaint, Southwest's motion to dismiss should be handled as a motion for summary decision pursuant to 29 C.F.R. §§ 18.40, 18.41. *See Mehan*, slip op. at 3; *Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004).

The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "if the pleadings, affidavits, material obtained by 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" as a matter of law. 29 C.F.R. §§ 18.40, 18.41; *Mehan*, slip op. at 3; *Flor v. United States Dep't of Energy*, 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994). If the non-moving party fails to show an element essential to his case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Mehan*, slip op. at 3; *Rockefeller v. United States Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

We have scrutinized Fullington's additional pleadings in light of the summary decision standard. Her filings with the ALJ and with us on appeal merely state in conclusory terms that Southwest had control over her work and illegally terminated her employment. *See, e.g.*, Complainant Loretta Fullington's Opposition to Respondent Southwest Airlines Co.'s Motion to Dismiss, September 2, 2003, at 5 ("Complainant Fullington alleges that Southwest Airlines qualifies as an employer party because it exercised sufficient control over her work."); Complainant Loretta Fullington's Motion for Reconsideration of Respondent Southwest Airline Co.'s Motion to Dismiss, October 3, 2003, at 7 ("Southwest Airlines exercised its employer power by illegally terminating Fullington's employment"); Complainant Loretta Fullington's Initial Appellate Brief, December 26, 2003, at 10 (Southwest Airlines "effected [sic] [Fullington's] terms and privileges of employment via her termination."). Although those allegations might have been sufficient to overcome a motion to dismiss if they had appeared in the complaint, they are not sufficient on summary decision to overcome Southwest's denials that it played any part in the termination of her employment.

Notwithstanding opportunities to do so, Fullington fails to recite any facts that would demonstrate that Southwest actually played a role in the adverse actions AVSEC took against her. Under the summary decision standard, she does not create a genuine issue of material fact that would entitle her to relief against Southwest.

CONCLUSION

Under either a motion to dismiss or summary decision standard, Fullington is not entitled to relief against Southwest. Therefore, we **AFFIRM** the ALJ's recommendation and **DENY** her complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge