



In the Matter of:

PATRICK L. WEIL,

ARB CASE NO. 04-074

COMPLAINANT,

ALJ CASE NO. 2003-AIR-18

v.

DATE: October 31, 2005

PLANET AIRWAYS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Darin A. DiBello, Esq., *Seidman, Prewitt & DiBello, P.A., Coral Gables, Florida*

For the Respondent:

Caran Rothchild, Esq., *Greenberg Traurig, P.A., Fort Lauderdale, Florida*

FINAL DECISION AND ORDER

Patrick Weil filed a complaint alleging that his former employer, Planet Airways, Inc. (Planet), retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005) and its implementing regulations, 29 C.F.R. Part 1979 (2005). On March 16, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) concluding that Weil's complaint should be dismissed. For the following reasons, we affirm the ALJ's decision and deny the complaint.

BACKGROUND

Planet Airways is a charter air service that flies out of Fort Lauderdale, Florida; its corporate office is in Orlando. R. D. & O. at 21. Weil was hired in May 2000 and

fired on February 15, 2002. *Id.* at 12. Weil was Director of Passenger Services, reporting to Frank Barber, the Director of Operations. *Id.* at 8. Frank Barber reported to Tony DeCamillis, President of Planet, and Peter Garrambone, CEO. *Id.* at 21-22. Weil and Barber worked in Fort Lauderdale while DeCamillis and Garrambone worked in Orlando. *Id.*

On February 4-5, 2002, Weil and another employee attended a seminar sponsored by the U.S. Customs Service. R. D. & O. at 5. At the seminar, the Customs officials discussed the Advanced Passenger Information System (APIS) which had been instituted as an anti-terror measure to monitor individuals entering and leaving the United States.¹ *Id.* Under the mandated APIS procedures, Planet was required to electronically transmit passenger identification information to Customs before each of its flights originating outside the United States. *Id.* Although airlines had been required to abide by APIS since January 2002, beginning February 18, 2002, the Government would impose heavy fines against any non-complying airline. *Id.* at 16. *See also* CX A, C; RX 40, 47.²

On or about February 7, 2002, upon returning from the seminar, Weil and his boss, Frank Barber, informed the corporate office of the APIS requirements via a telephone conference call to Orlando. R. D. & O. at 5, 38; Tr. at 188. In Orlando, the CEO, Peter Garrambone, was joined in the conference call by Michael Hackert, Vice President of Marketing and Sales. *Id.* at 13. In Weil's view, neither Garrambone nor Hackert took the APIS requirements seriously. For example, during the course of the call, they vetoed Weil's recommendation that the Company purchase a \$10,000 computer program for preparing the manifests in the appropriate format. *Id.* After a heated discussion, Garrambone announced that Planet would develop its own computer program to prepare the passenger manifests and that he would send a computer person to Fort Lauderdale the next day to work on the matter. *Id.* at 6-7. When the computer person did not arrive, Weil called Garrambone, and when Garrambone said the person would arrive the next week, Weil replied that that would be too late and Garrambone terminated the call. *Id.* at 13, 6-7. Even though Garrambone told Weil that the APIS matter would be taken care of, Weil was not satisfied and repeatedly telephoned Garrambone during the week of February 11, 2002. Eventually, Garrambone refused to take Weil's calls. *Id.* at 13.

Both Weil and Barber were fired on February 15, 2002. R. D. & O. at 6, 12. Weil filed a whistleblower complaint on March 11, 2002, alleging that he was fired because he objected to Planet's "overlooking safety and security issues." RX 22. After the Occupational Safety and Health Administration (OSHA) investigated his complaint and determined that there was no reasonable cause to believe that Planet had violated

¹ On November 16, 2001, the President signed the Aviation and Transportation Security Act establishing APIS. 49 U.S.C.A. § 44909(c) (West 1997 & Supp. 2005); 19 C.F.R. Parts 122, 178 (2005).

² The citations used in this decision are: CX for Complainant's exhibits; RX for Respondent's exhibits; and Tr. for hearing transcript.

AIR 21, Weil requested an administrative hearing. RX 25. The hearing was held on September 4 and 5, 2003, in Fort Lauderdale, Florida.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has jurisdiction to review the ALJ's recommended decision. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to this Board her authority to review cases under, inter alia, AIR 21. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

This Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). This means that if substantial evidence on the record considered as a whole supports the ALJ's findings of fact, they shall be conclusive. We review conclusions of law de novo. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 4-5 (ARB Dec. 30, 2004).

DISCUSSION

The whistleblower provision of AIR 21 prohibits air carriers, their contractors and subcontractors from retaliating against employees for raising complaints related to air carrier safety. 49 U.S.C.A. § 42121. To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer subjected him 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), 42121(b)(2)(B)(iii). The requirement that protected activity must have contributed to the employer's decision to take unfavorable action assumes that the employer knew about a complainant's protected activity. If the employer has violated AIR 21, the complainant 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. *Id.* at § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-3, slip op. at 22 (ARB Jan. 30, 2004).

The ALJ found that Weil had engaged in protected activity. Specifically, he found that Weil's advocacy of APIS compliance and his continuing concern that Planet was not doing enough to ensure compliance amounted to a protected activity under AIR 21.³ R. D. & O. at 36-39. Since substantial evidence supports the ALJ's finding, we agree that Weil engaged in protected activity.

³ The ALJ viewed Weil's complaint as "anticipatory whistleblowing" because Planet was legally incapable of violating the APIS regulations until February 18, 2002, days **after** Weil had complained about non-compliance. R. D. & O. at 38. The record demonstrates, however, that the APIS requirements applied to Planet as early as January 2002, and that the February 18, 2002, date was significant only because fines would attach to non-compliance after that date. *See* CX C, A; RX 47, 40.

Obviously, Planet's firing Weil is adverse or, as the ALJ put it, "the most significant unfavorable personnel action" one can receive. R. D. & O. at 39.

The ALJ also found that Weil's APIS-related activities were not a contributing factor in his firing. R. D. & O. at 44. Instead, Weil was fired because of his persistent failure to behave appropriately, his argumentative and uncooperative manner with colleagues and customers, and his disruptive behavior as evidenced by five written warnings and a one-week suspension in the preceding six months. Even Frank Barber, clearly a witness sympathetic to Weil, testified at length about how outraged he was by Weil's loss of temper and unprofessional behavior. *Id.* at 42. Again, substantial evidence supports this finding and it is, therefore, conclusive. Thus, the ALJ properly concluded that Planet did not violate AIR 21.

Weil's Appeal

Weil makes four arguments on appeal: (1) the ALJ failed to understand the nature of Weil's position at Planet and failed to rely on any competent non-hearsay evidence regarding the alleged basis for Weil's termination; (2) the ALJ's ruling has no evidentiary basis because of the absence of direct testimony from the primary instigators of Weil's termination, i.e., Garrambone and Hackert; (3) the ALJ erroneously concluded that the witnesses called by Planet were credible; and (4) the ALJ admitted a document involving Barber's whistleblower case.

I. The Nature of Weil's Position and Hearsay Testimony

Weil argues that the ALJ did not understand that his behavioral problems were due to Hackert's antagonizing him continually. Compl. Initial Br. at 3. According to Weil, Hackert's salary was tied to his flight sales, and therefore, to increase sales Hackert "made promises" to customers which were difficult for Weil to fulfill. *Id.* Weil maintains that Hackert's continual provocations caused him to lose his temper and act unprofessionally.

We find no evidence that Hackert "caused" Weil to act unprofessionally. At any rate, such evidence would be irrelevant. Weil's burden is to prove that his protected activity contributed to his discharge. Besides, a fair reading of the ALJ's scrupulously detailed decision indicates that he clearly understood the relationship between Hackert and Weil, but he nevertheless found that Weil's unprofessional behavior was the reason Planet decided to fire him. R. D. & O. at 9-11, 40-41.

Moreover, Weil's argument, Compl. Initial Br. at 5-6, that the ALJ improperly admitted hearsay evidence is meritless because (a) he failed to show that, in fact, any hearsay evidence was admitted, (b) he failed to object to the admission of hearsay during the hearing, and (c) formal rules of evidence do not apply at hearings brought under AIR 21. 29 C.F.R. § 1979.107(d).

2. Primary Instigators

Weil contends that we should reverse the ALJ because Planet failed to call Garrambone or Hackert as witnesses. He writes that, because “[n]either Mr. Hackert nor Mr. Garrambone testified or were deposed in the process of the trial,” there was no “evidentiary basis for the ALJ’s ruling.” Compl. Initial Br. at 6. This argument is particularly inappropriate because the record contains no evidence that Weil either deposed them or subpoenaed them to testify.

3. Witness Credibility

Weil argues that the ALJ erred when he found that Planet’s two witnesses were credible. Compl. Initial Br. at 8. Human Resources Director Carell Rodriguez and Company President Anthony DeCamillis each testified for Planet. To support his argument, Weil claims that Rodriguez incorrectly testified that Weil worked for Hackert rather than for Barber. While Rodriguez did not name the correct supervisor, Weil fails to indicate how this one error nullifies the import of Rodriguez’s testimony. *See* Tr. at 283. Neither this example nor any of the others that Weil offers succeeds in supporting his argument that the ALJ erred in finding Rodriguez and DeCamillis credible. Accordingly, we reject the argument.

4. Respondent’s Exhibit 63

Finally, Weil argues that the ALJ erred in admitting Planet’s Exhibit 63, a letter from OSHA regarding a whistleblower complaint that Frank Barber filed. Compl. Initial Br. at 10. This argument is completely meritless because Weil failed to object to the exhibit when it was offered. In fact, when the ALJ asked Weil if he had any objection to the admission of this exhibit along with others, Weil said no. *See* Tr. at 28, 30.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ’s finding that Weil did not prove by a preponderance of the evidence that Planet fired him because of protected activity. Furthermore, his arguments on appeal are unavailing. Accordingly, we **DENY** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge