

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 August 2005

Case No. 2005-AIR-20

In the Matter of

FRANK H. KOSTLEVY
Complainant

v.

AIRTRONICS, INC.
Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER APPROVING WITHDRAWAL OF COMPLAINT

This proceeding arises under the employee protection provisions of 49 U.S.C. § 42121 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, and the applicable regulations issued thereunder at 29 C.F.R. Part 1979 published at 67 Fed. Reg. 15453 (Apr. 1, 2002) (hereinafter AIR 21). On April 21, 2005, the Area Director, Occupational Safety and Health Administration, U.S. Department of Labor, issued his findings on a complaint filed by Frank H. Kostlevy against Airtronics, Inc. in which he concluded that the complaint of Mr. Kostlevy was not timely filed nor does it allege facts to meet the required elements of a *prima facie* case of discrimination under AIR 21. Thus, the Area Director found that it was reasonable to believe that the Respondent had not violated 49 U.S.C. § 42121.

Subsequently, I was advised that the parties had entered into a Mediation Agreement which was signed on April 22, 2005. Jon D. Anderson, counsel for Complainant, by letter dated June 14, 2005, verified the existence of the Mediation Agreement but did not request approval of the Agreement or dismissal of the case until he had conducted further discussions with Mr. Kostlevy. In a subsequent mailing dated July 12, 2005, Mr. Anderson asked that this case be stayed until final payment is made by Respondent on February 1, 2006 pursuant to the Mediation Agreement.

Following receipt of the above correspondence, I issued an Order Compelling Filing of Settlement Agreement on July 29, 2005. In response to the Order, Mr. Anderson submitted a written statement indicating that the Mediation Agreement had, in fact, been signed on April 22, 2005 but that it related to a law suit which had been filed in a Wisconsin Circuit Court. The mailing of Mr. Anderson did not include a settlement agreement and, in fact, Mr. Anderson requests that if his mailing was unacceptable in disposing of the case that the complaint of Mr. Kostlevy be withdrawn pursuant to Section 1979.111(a). I accept the representation of Mr. Anderson as being a request that this case be withdrawn pursuant to the provisions of Section 1979.111(c) which authorizes the Administrative Law Judge to approve the withdrawal of a complaint.

The AIR regulations closely parallel those found in the Surface Transportation Assistance Act, 49 U.S.C. § 31105 and the applicable regulations codified at 29 C.F.R. Part 1978 (hereinafter STAA). Twenty-nine C.F.R. § 1979.111(c) permits a party to withdraw his objections to the Findings or Order of the Regional Administrator at any time before the Findings or Order become final by filing a written withdrawal with the Administrative Law Judge. Fed. R. Civ. P. 41(a)(1) is not applicable since it permits a dismissal without prejudice only at a time before an Answer to the Complaint has been filed. In this case, the Secretary's Findings were issued and the Complainant timely filed objections coupled with a request for hearing. The Complainant's response constitutes an Answer, and therefore, renders Rule 41 inapplicable.

In view of the above, IT IS ORDERED that the Complainant's request to withdraw his objections to the Secretary's Findings is hereby GRANTED pursuant to authority conferred by 29 C.F.R. § 1979.111(c). The Findings of the Area Director, Occupational Safety and Health Administration concluding that the Respondent had not violated 49 U.S.C. § 42121 of the Act are hereby affirmed and reinstated. This Order is the final administrative action and no Secretarial review is required. *Underwood v. Blue Springs Hatchery*, 87-STA-21 (Dep. Sec'y Nov. 2, 1987) (Order to Show Cause).

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RUDOLF L. JANSEN
Administrative Law Judge