U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

BRITANNY ANTONELLIS,

COMPLAINANT,

v.

REPUBLIC AIRWAYS,

RESPONDENT.

ARB CASE NO. 2019-0046

ALJ CASE NO. 2018-AIR-00024

DATE: February 8, 2021

Appearances:

For the Complainant:
Jason L. Jones, Esq.; *Weissman & Mintz, LLC*; Somerset, New Jersey

For the Respondent:
David J. Carr, Esq., and Paul C. Sweeny, Esq.; *Ice Miller, LLP*; *Indianapolis, Indiana*

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR

21).[1] Brittany Antonellis (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that her former employer, Republic Airways (Respondent), retaliated against her after she submitted an Aviation Safety Action Program (ASAP) report. The presiding Department of Labor Administrative Law Judge (ALJ) denied relief. We affirm.

BACKGROUND

Complainant worked as a First Officer for Respondent.[2] On February 9, 2017, Complainant conducted a pre-flight inspection and walk-around of an aircraft before a flight.[3] While completing these routine inspections, she observed deficiencies with the aircraft and alerted the captain.[4] The captain checked on the deficiencies, agreed with Complainant, and told her that he was going to call maintenance.[5] Shortly thereafter, the captain returned to the cockpit and stated that he sent a picture of the deficiency to maintenance and that maintenance had approved the flight to depart based on the picture.[6] Complainant felt uncomfortable continuing the flight because this was not the normal procedure and she never saw the captain write the discrepancies in the logbook.[7] Complainant submitted a voluntary ASAP report concerning the flight on February 20, 2017.[8]

Prior to the February 9, 2017 flight, Respondent provided FirstLab, a third-party drug testing administrator, a list of safety-sensitive employees that could be selected for random drug testing.[9] FirstLab selected 350 to 400 employees, including Complainant, through its random-generator program.[10]

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1 49 U.S.C. § 42121 (2020). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2020).

2 D. & O. at 4; Respondent's Exhibit (RX) 8; Transcript (Tr.) at 136.

3 D. & O. at 5; Tr. at 96.

4 D. & O. at 5.

5 *Id*. at 6.

6 *Id*.

7 *Id*.; Tr. at 97.

8 D. & O. at 6; Tr. at 97-98.

9 D. & O. at 8; RX 15, 17, 44, 46; Tr. at 233-38, 273, 286, 319-21.

10 D. & O. at 8-9; RX 45; Tr. at 287.

Respondent informed Complainant that she was selected for a random drug test on February 22, 2017.[11] Complainant called Respondent's Designated Employer Representative (DER) multiple times on her way to the testing facility and reported that she was having difficulty finding the testing facility, that she had other things to do that day including an appointment with the Federal Aviation Administration (FAA), and that she was going to file an ASAP report concerning the conditions she experienced on her way to the facility.[12] During one of these calls, Respondent's Human Resource Manager of Compliance warned Complainant that she could be terminated if she did not complete the drug test.[13]

Once Complainant arrived at the testing facility, she was unable to produce a sufficient specimen.[14] Complainant stated that she was in a lot of pain and needed medical attention.[15] The testing facility's executive director told Complainant that she needed to stay and follow the "shy bladder" procedure, that she did not look like an emergency case, that she would have to call Respondent if she had an issue with the testing procedures, and that she would be considered a test refusal if she did not produce a specimen.[16] Complainant called Respondent's DER and told her that she could not produce a sufficient specimen, and that she needed medical attention.[17] Respondent's DER reiterated to Complainant that it would be considered a refusal to test if she did not produce a sufficient specimen, and that she did not have permission to leave the drug test.[18] Nevertheless, Complainant decided to leave the testing facility.[19] Later that day, the testing facility alerted Respondent that Complainant refused to test, and Respondent suspended Complainant.[20]

On March 6, 2017, Respondent conducted an investigative hearing and concluded that Complainant refused to test.[21] On or around March 7, 2017,

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11 D. & O. at 9; Tr. at 149, 248-51, 265-66.

12 D. & O. at 10-11; Tr. at 112-13, 154, 251-53, 257-60, 266, 291-92.

13 D. & O. at 10; Tr. at 293.

14 D. & O. at 11; Tr. at 117-19.

15 *Id*.

16 D. & O. at 11; Tr. at 119-20, 155, 157.

17 D. & O. at 12.

18 *Id*.; RX 46; Tr. at 121, 155,157.

19 D. & O. at 13; Tr. at 122, 158. Complainant voluntarily took two drug tests over the next two days but these did not qualify as substitutes for her February 22, 2017 drug test.

20 D. & O. at 12, 15; RX 24; Tr. at 376-79, 395-96.

21 D. & O. at 16; Tr. at 380-81.

Respondent sent Complainant a letter terminating her employment for her test refusal.[22] After the termination letter was issued, Complainant's union filed a grievance, and Respondent agreed to reinstate Complainant pending the outcome of the FAA's investigation into her test refusal.[23] The FAA completed its investigation and revoked Complainant's license and medical certificate.[24] Following the FAA's investigation and findings, Respondent sent Complainant a second letter terminating her employment.[25]

Complainant filed a complaint with OSHA on May 29, 2017, and it was dismissed on February 16, 2018. Complainant requested a hearing before the Department of Labor (DOL) Office of the Administrative Law Judges (OALJ) on March 16, 2018.

On March 26, 2019, the ALJ issued a Decision and Order dismissing Complainant's complaint (D. & O.). On April 24, 2019, the Administrative Review Board (ARB or Board) received Complainant's Petition for Review. For the reasons discussed below, we affirm the ALJ's D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[26] In AIR 21 cases, the ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.[27] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a

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[22] D. & O. at 16; RX 30, 47; Tr. at 128, 382.

[23] D. & O. at 16; RX 31, 47.

[24] D. & O. at 16; Tr. at 131, 165.

[25] D. & O. at 16; RX 32, 47; Tr. at 130, 384-85.

[26] 29 C.F.R. § 1979.110(a); *see also* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[27] *Yates v. Superior Air Charter, LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019); citing 29 C.F.R. § 1979.110(b).

conclusion."[28] The Board reviews an ALJ's determinations on procedural issues under an abuse of discretion standard.[29]

DISCUSSION

To prevail in a retaliation case under AIR 21, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity that caused or was a contributing factor in the adverse employment action taken against the complainant. [30] The failure to prove any one of these elements necessarily requires dismissal of a whistleblower complaint. If the complainant meets his or her burden of proof, the respondent may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior.[31]

Complainant alleged that she engaged in protected activity when she told Respondent's personnel that she was going to file an ASAP report concerning the conditions she experienced while traveling to the drug testing facility and when she filed an ASAP report concerning the February 9 flight. The ALJ found that Complainant's notice that she was going to file an ASAP report about the trip to the testing facility was not protected under AIR 21 while the ASAP report concerning the flight was protected.[32] Additionally, the ALJ found that Complainant failed to prove by a preponderance of the evidence that the ASAP report she filed was a contributing factor in her selection for a random drug test, in Respondent's reporting her as a drug test refusal, or in Respondent's decision to terminate her employment.[33] In finding that Complainant failed to establish that her protected activity was a contributing factor in the adverse actions taken against her, the ALJ rejected Complainant's contentions after comprehensively reviewing the extensive evidence of the record. In sum, the ALJ was persuaded, based upon the

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[28] *Hoffman v. NetJets Aviation, Inc.*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 4 (ARB Mar. 24, 2011) (citing and quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

[29] *Hoffman,* ARB No. 2009-0021, slip op. at 14 (citation omitted).

[30] *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 6 (ARB Feb. 13, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).

[31] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

[32] D. & O. at 21-22.

[33] *Id*. at 26-29.

preponderance of the evidence, that Complainant's employment was terminated because she lost her medical certificate and pilot's license.[34]

Complainant argues on appeal that the ALJ erred in determining that her notice that she was going to file an ASAP report concerning the travel conditions to the drug testing facility is not protected under AIR 21[35] and that her ASAP report concerning the February 9 flight was not a contributing factor in Respondent's adverse actions her.[36] Complainant also avers that the ALJ erred in the factual background contained in the D. & O.,[37] his credibility assessment of Complainant,[38] and his conclusions concerning Complainant's reasoning for departing the drug testing facility.[39]

Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude that the ALJ's D. & O. to deny the complaint is supported by substantial evidence. None of Complainant's arguments demonstrate that the ALJ abused his discretion or committed reversible error. We recognize that the trip to the testing facility was arduous but those activities and conditions do not fall within the statute's protections. Most importantly, there was simply no evidence that Complainant's protected conduct was at all linked to her selection to be drug tested. They were wholly separate, to put it simply, incidences. The record is clear on this point. Accordingly, we summarily **AFFIRM** the ALJ's D. & O.

SO ORDERED.

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34 *Id*. at 29.

35 Complainant's Opening Brief (Comp. Br.) at 20-22.

36 *Id*. at 23, 27.

37 *Id*. at 1-17.

38 *Id*. at 18-19.

39 *Id*. at 19-20.