



In the Matter of:

BRIAN DOLAN,

COMPLAINANT,

v.

AERO MICRONESIA, INC. d/b/a
ASIA PACIFIC AIRLINES,

RESPONDENT.

ARB CASE NOS. 2020-0006
2020-0008

ALJ CASE NO. 2018-AIR-00032

DATE: June 30, 2021

Appearances:

For the Complainant:

James M. Maher, Esq.; *Law Office of James M. Maher*; Hagatna, Guam; and Georgette Bella Concepcion, Esq.; *Brooks Concepcion Law, P.C.*; Hagatna, Guam

For the Respondent:

Steven P. Pixley, Esq.; *Tan Holdings Corporation Legal Department*; Saipan, Northern Mariana Islands

For the Occupational Safety and Health Administration:

Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Megan E. Guenther, Esq., Alyssa C. George, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *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 Brian Dolan (Complainant) filed two complaints with the Occupational Safety and Health Administration (OSHA) alleging that his former employer, Asia Pacific Airlines (Respondent), retaliated against him after he engaged in several protected activities from August 2015 to September 2016. The presiding Department of Labor Administrative Law Judge (ALJ) awarded relief. Both parties appealed the decision to the Administrative Review Board (ARB or Board). We consolidate the appeals and affirm.

BACKGROUND

Complainant worked as a pilot for Respondent.² Respondent is an all-cargo air carrier that hauls fish, mail, and other cargo to and from numerous islands in the South Pacific.³ Complainant alleged that he engaged in the following protected activities throughout his tenure with Respondent: (1) expressing concerns about ferrying a Boeing 757 from Hawaii to Guam with an inexperienced pilot in August 2015;⁴ (2) submitting a written statement concerning low fuel levels on a March 22, 2016 flight from Marjuro to Honolulu;⁵ (3) cancelling a flight due to inclement

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 5. Complainant began as a first officer in 2003, but was promoted to captain in 2010, and later promoted to check airman. Hearing Transcript (Tr.) at 447, 526; *see also* Complainant's Exhibit (CX) 1; Respondent's Exhibit (RX) 8. A check airman is a "person who is qualified, and permitted, to conduct flight checks or instruction in an airplane, in a flight simulator, or in a flight training device for a particular type of airplane." 14 C.F.R. § 121.411(a)(1).

³ D. & O. at 6; Tr. at 50-53, 160, 525-56, 578, 706, 822.

⁴ D. & O. at 9-10. Following Complainant's concerns, Respondent made the decision to cancel the flight, and the aircraft remained in Hawaii for ten months until it received certification approval.

⁵ D. & O. at 10-16. Respondent investigated this incident because, according to the flight log, the aircraft landed in Honolulu with a low reserve of fuel remaining.

weather on August 23, 2016;⁶ and (4) conducting a line check⁷ on a pilot, Captain Goodman, and reporting that he failed the line check on September 26, 2016.⁸

On November 25, 2016, Complainant filed an AIR 21 complaint with OSHA concerning the above alleged protected activities. Complainant claimed that Respondent retaliated against him by removing him from the flight schedule, failing to promote him, writing negative performance evaluations for him, and harassing him.⁹ While this complaint was still pending, Complainant filed a second complaint with OSHA on June 27, 2017.¹⁰ In this complaint, Complainant alleged that Respondent reduced his flight hours and then terminated his employment because he filed the November 25 OSHA complaint.¹¹

On March 19, 2018, OSHA dismissed Complainant's complaints.¹² OSHA determined that: (1) Complainant engaged in protected activity in August 2015, and again in August and September 2016; (2) Respondent's warning letter and termination of Complainant's employment constituted adverse employment actions; and (3) the timing of the adverse actions did "not lend [themselves] to temporal proximity" as the adverse actions took place seven to ten months after the occurrence of the protected activities. Complainant objected to these findings and requested a hearing before the Department of Labor (DOL) Office of the Administrative Law Judges (OALJ) on April 25, 2018.

⁶ D. & O. at 16.

⁷ A line check is an annual evaluation required by the Federal Aviation Administration (FAA) regulations and Respondent's General Operations Manual (GOM). D. & O. at 17; *see* Tr. at 266, 497; *see also* 14 C.F.R. § 121.440.

⁸ D. & O. at 17-18.

⁹ *Id.* at 1-2; RX 1; Brief for the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae (OSHA Br.) at Ex B.

¹⁰ D. & O. at 1-2.

¹¹ OSHA Br. at Ex B.

¹² D. & O. at 2; CX 23; RX 7. The Secretary's Findings appear to address both the November 25, 2016 OSHA complaint and the June 27, 2017 OSHA complaint because it refers to Complainant's alleged protected activities from his November 25 OSHA complaint and Complainant's employment termination, the latter of which was only alleged in his June 27 OSHA complaint.

On September 26, 2019, the ALJ issued a Decision and Order awarding relief to Complainant (D. & O.).¹³ On October 8, 2019, the ARB received Complainant's Petition for Review. On October 10, 2019, the ARB received Respondent'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.¹⁴ 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.¹⁵ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁶ The Board reviews an ALJ's determinations on procedural issues under an abuse of discretion standard.¹⁷

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.¹⁸ 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

¹³ *Dolan v. Aero Micronesia, Inc.*, ALJ No. 2018-AIR-00032 (ALJ Sept. 26, 2019) (D. & O.).

¹⁴ 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).

¹⁵ *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).

¹⁶ *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)).

¹⁷ *Hoffman*, ARB No. 2009-0021, slip op. at 14 (citation omitted).

¹⁸ *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)).

and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.¹⁹

Complainant alleged that he engaged in several protected activities from August 2015 through September 2016, while employed by Respondent. The ALJ found that Complainant's adverse actions stemming from protected activities prior to August 27, 2016, were time barred.²⁰ However, the ALJ determined that the line check incident in September 2016 was timely and protected under AIR 21.²¹ The ALJ also found that Complainant proved by a preponderance of the evidence that the line check incident was a contributing factor in Respondent's decision to remove Complainant from future check rides.²² In finding Complainant had established that his protected activity was a contributing factor in the adverse action, the ALJ focused on testimony, including un rebutted testimony, and the proximity of Complainant's removal from check rides in concert with the totality of other events in this case.²³ As a result, the ALJ awarded Complainant \$5,000 for emotional distress, \$1,000 for loss of reputation damages, and attorney's fees and costs. The ALJ also required Respondent to expunge any reference to Complainant's removal as a line check airman from his personnel file and to refrain from making references to his removal as a line check airman in any inquiries from prospective employers.²⁴

Although the ALJ concluded that the check line incident was a protected activity and that Respondent took adverse employment actions against Complainant in response to it, he determined that this incident was not a contributing factor in Respondent's decision to terminate Complainant's employment.²⁵ In finding that Complainant failed to establish that the line check incident was a contributing factor in his termination, the ALJ rejected Complainant's contentions after comprehensively reviewing the extensive evidence of the record. In sum, the ALJ was persuaded that the ten-month gap between the September 2016 line check and the June 2017 employment termination did not lend itself to an inference of causation and that there was "no other evidence . . . [that]

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

²⁰ D. & O. at 23-25.

²¹ *Id.* at 26-30.

²² *Id.* at 30-31.

²³ *Id.* at 31-33.

²⁴ *Id.* at 38-40.

²⁵ *Id.* at 33.

establishes the required causal nexus.”²⁶ Since the ALJ concluded that the line check incident was not a contributing factor in his termination, the ALJ did not award back pay and other damages.

Complainant argues on appeal that the ALJ erred by failing to consider his June 26, 2017 OSHA complaint,²⁷ and by finding that Complainant did not present sufficient evidence to be awarded back pay.²⁸ In response, Respondent asserts that the ALJ did not err in failing to consider the June 26 OSHA complaint because Complainant did not introduce it during the OALJ hearing, and it was still pending before OSHA.²⁹ The Board also received an amicus brief from OSHA recommending that the case be remanded to OALJ for a clear ruling on Complainant’s retaliatory termination claim.³⁰

In Respondent’s appeal, it claims that the ALJ erred in finding that Complainant engaged in protected while conducting the line check,³¹ and in finding that Respondent took adverse employment actions against Complainant.³² Conversely, Complainant avers that Respondent’s interpretations of AIR 21 and federal aviation regulations concerning reckless operation³³ are misguided, and that his protected activity does not lose its “protected status” due to Respondent’s allegation that he acted recklessly during the check ride.³⁴

Upon consideration of the parties’ briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude that the ALJ’s Decision and Order awarding relief is supported by substantial evidence. None of the arguments posed by the parties demonstrate that the ALJ abused his discretion or committed reversible error.

²⁶ *Id.*

²⁷ Complainant’s Opening Brief (Comp. Br.) at 6-11.

²⁸ Comp. Br. at 11.

²⁹ Asia Pacific Airlines’ Opposition to Brian Dolan’s Brief (Resp. Response) at 8.

³⁰ OSHA Br. at 14-15.

³¹ Asia Pacific Airlines’ Opening Brief (Resp. Br.) at 7-9.

³² Resp. Br. at 9-10.

³³ 14 C.F.R. § 91.13

³⁴ Complainant’s Response to Asia Pacific Airlines’ Opening Brief (Comp. Response) at 1-2.

We recognize that the ALJ stated that “the complaint before this Tribunal is limited to the 11/25/16 OSHA complaint and therefore the Decision and Order that follows does not materially discuss Complainant’s allegations in his 6/27/17 OSHA complaint.”³⁵ However, this statement appears to be a harmless error by the ALJ.

Throughout the proceedings, the ALJ permitted all evidence and testimony concerning Complainant’s reduced hours and termination into the record,³⁶ and his analysis fully considered both adverse employment actions.³⁷ Ultimately, he found that the termination had no nexus to an activity protected under AIR 21. As such, we find that the record is clear on this point, and a remand for the ALJ to consider Complainant’s termination from employment is unnecessary. Accordingly, we summarily **AFFIRM** the ALJ’s D. & O.

SO ORDERED.

³⁵ D. & O. at 1-2 n.2.

³⁶ *Id.* at 30-31; *see* Tr. at 20, 79, 116, 120, 122, 131, 839.

³⁷ D. & O. at 30-31, 33.