U.S. Department of Labor

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

In the Matter of:

DARREN KOSSEN,

COMPLAINANT,

v.

ASIA PACIFIC AIRLINES,

RESPONDENT.

ARB CASE NO. 2021-0012

ALJ CASE NO. 2019-AIR-00011

DATE: October 28, 2021

Appearances:

For the Complainant:
William C. Budigan, Esq.; *Budigan Law Firm*; Seattle, Washington

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

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

ORDER DENYING RECONSIDERATION AND MOTIONS TO REOPEN THE RECORD

PER CURIAM. Darren Kossen (Complainant) filed a complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] (AIR),

[1] 49 U.S.C. § 42121 (2000).

and its implementing regulations,[2] alleging that his former employer, Asia Pacific Airlines (Respondent), had unlawfully discriminated against him under the AIR's whistleblower protection provisions. After a hearing on February 25-28, 2020, an Administrative Law Judge (ALJ) found that Complainant failed to prove that Respondent had violated the AIR and denied the complaint on November 9, 2020. On August 26, 2021, the Administrative Review Board (Board) affirmed the ALJ's decision.

On October 7, 2021, Complainant submitted a Motion for Opening the Record for Newly Discovered Evidence, asking the Board to reopen the record to admit five pieces of newly discovered evidence and reverse the ALJ's finding that Complainant failed to prove his claim. On October 15, 2021, Complainant submitted another Motion for Opening the Record for Newly Discovered Evidence, asking the Board to reopen the record to admit two additional exhibits.[3] The Board may order an ALJ to reopen the record based upon "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial."[4] Under this standard, the moving party must show that "(1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such

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[2] 29 C.F.R. Part 1979.

[3] We consider these motions as being included within motions for reconsideration, since the Board has already issued a Decision in this matter. We deny reconsideration because none of Complainant's arguments for admitting new evidence and changing the disposition of this case fall within the limited circumstances for reconsideration. The limited circumstances in which the Board will reconsider its decisions include: 1) material differences in fact or law from those presented to the Board of which the moving party could not have known through reasonable diligence; 2) new material facts that occurred after the Board's decision; 3) a change in the law after the Board's decision; or 4) a failure to consider material facts presented to the Board before its decision. *Onysko v. Utah Dep't of Envt'l Quality*, ARB No. 2019-0042, ALJ Nos. 2017-SDW-00002, 2018-SDW-00003, slip op. at 2 (ARB Feb. 4, 2021) (Order Denying Motion for Reconsideration) (citation omitted).

[4] *Benson v. N. Alabama Radiopharmacy, Inc.*, ARB No. 2008-0037, ALJ No. 2006-ERA-00017, slip op. at 2 (ARB May 27, 2010) (quoting Fed. R. Civ. P. 60(b)(2)); *Smith v. Lake City Enters., Inc.*, ARB No. 2014-0063, ALJ No. 2006-STA-00032, slip op. at 3 (ARB Dec. 10, 2014).

that a new trial would probably produce a different result."[5] The Board will grant such relief only in exceptional circumstances.[6]

In the October 7 motion, Complainant presents five exhibits that he alleges provide substantial weight to his retaliation claim by showing, among many things, the filing date of Complainant's first Federal Aviation Administration (FAA) complaint and that Respondent had violated FAA regulations when its pilots inflated their logged flight hours. Complainant claims that he was unable to obtain this evidence with due diligence before the end of the hearing because the FAA "was deliberately hiding documents" and because the FAA and Respondent "are working together to make sure [Complainant] never pilots commercial flights." Complainant does not present evidence to support these allegations against the FAA.

Besides making unsupported allegations against the FAA, Complainant fails to persuade the Board that any of the proffered evidence would likely produce a different result at a new hearing. The evidence that Complainant had filed his first complaint with the FAA on July 10, 2017, does not substantially change the weight of the evidence because the ALJ found that Complainant had filed a complaint "[s]ometime between June and December of 2017."[7] Complainant also fails to

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[5] *Benson*, ARB No. 2008-0037, slip op. at 2 (quoting *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (D.C. Cir. 1995)).

[6] *Knox v. U.S. Dep't of the Interior*, ARB No. 2003-0040, ALJ No. 2001-CAA-00003, slip op. at 3 (ARB Oct. 24, 2005).

[7] Decision and Order (D. & O.) at 22.

coherently explain why several of the other exhibits would cause the ALJ to reach a different finding.[8] We therefore deny Complainant's October 7 motion.

In the October 15 motion, Complainant proffers two new exhibits that he alleges directly support his retaliation claim. Complainant claims that the new pieces of evidence, which appear to be parts of FAA investigative reports related to his whistleblowing activity, could not be found prior to the hearing before the ALJ because the FAA would not disclose them until October 12, 2021. Complainant appears to have obtained both pieces of evidence through Freedom of Information Act (FOIA) requests. Complainant states that the exhibits contain the unredacted portions of previously admitted exhibits.

Complainant seems to admit in his motion that the FOIA requests were made on August 9, 2021, one and a half years after the hearing before the ALJ. Complainant fails to explain why the requests were not made prior to the hearing or how he could not have discovered such evidence by due diligence prior to the hearing.[9] Without such explanation, we cannot grant the relief Complainant seeks.

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[8] Complainant also presents an email to him from a pilot whom Respondent had hired that states that his hiring occurred in late October 2017. Complainant claims that this undercuts the ALJ's finding of no retaliation because it shows that Respondent had hired new pilots to replace Complainant before he gave his notice of resignation on November 22, 2017, and, therefore, that Respondent had planned to fire and replace him. Complainant argued that he had rescinded his resignation and that the end of his employment in January 2018 was a termination. D. & O. at 28. The ALJ found that Complainant did not establish that an adverse action had occurred because he had failed to prove that he rescinded his termination indefinitely or that Respondent understood that Complainant rescinded his resignation. *Id.* Complainant fails to explain why he was unable to obtain such information from the pilot with due diligence beyond stating that he "could not have found [the pilot's] email because it was never written until far after the record was closed at Hearing 2/25/20." Further, the ALJ relied on several additional pieces of evidence, including the testimony of Complainant's superiors, to find that Respondent never understood Complainant to have rescinded his resignation indefinitely. *See id.* We are not persuaded that the ALJ would likely change his finding with the proffered evidence.

[9] Complainant does not explain his inability to obtain the new evidence beyond stating: "This new evidence could not be found prior to the hearing because FAA would not disclose It [sic] until 10/12/21."

Complainant also fails to persuade the Board that the proffered evidence would likely produce a different result at a new hearing. Complainant seems to contend that the new evidence is important because it allegedly shows that Respondent engaged in the wrongdoing that Complainant accused it of committing in his reports to the FAA[10] and that a witness for Respondent lacked credibility.[11] The evidence, however, does not provide any new material information and has marginal probative value. Complainant states that the new information shows that an FAA investigation occurred on January 8, 2018, three days before Respondent terminated his employment, which demonstrates temporal proximity between his protected activity and his discharge. However, the record already demonstrated that the investigation occurred around that time.[12] Further, any additional evidence that demonstrates that the FAA investigated Respondent and violated regulations is merely cumulative because the record had already established those facts.

Accordingly, we **DENY** Complainant's Motions for Opening the Record for Newly Discovered Evidence.

SO ORDERED.

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[10] The FAA investigated Respondent regarding its pilots allegedly misreporting their flight times after Complainant contacted the FAA about its "legal interpretation of international flight times." D. & O. at 19. The FAA later investigated Respondent for air carrier safety allegations and a "safety allegation" filed by Complainant and found that violations had occurred. *Id.* at 20.

[11] New evidence that is merely impeaching does not warrant the reopening of the record. *Benson*, ARB No. 2008-0037, slip op. at 2.

[12] D. & O. at 23.