



In the Matter of:

ANGEL NEGRON,

ARB CASE NO. 04-021

COMPLAINANT,

ALJ CASE NO. 2003-AIR-10

v.

DATE: December 30, 2004

VIEQUES AIR LINK, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Enrique Jose Mendoza Mendez, Esq., San Juan, Puerto Rico

For the Respondent:

Luis R. Mellado-Gonzalez, Esq., San Juan, Puerto Rico

FINAL DECISION AND ORDER

This case arises under Section 519 (the employee protection provision) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2003). Regulations implementing Section 519 appear at 29 C.F.R. Part 1979 (2004). Angel Negron filed a complaint alleging that Vieques Air Link (VAL) violated AIR 21 by suspending, transferring, and discharging him in retaliation for making safety complaints. Following a hearing, an Administrative Law Judge (ALJ) ruled that VAL violated AIR 21 and recommended that Negron be reinstated and awarded damages. He subsequently awarded costs and attorney's fees. For the following reasons, we affirm the ALJ's recommendations.

BACKGROUND

The record fully supports the ALJ's factual and procedural history set forth at pages 2-11 of his November 19, 2003 Corrected [Recommended] Decision and Order (R. D. & O.).¹ To summarize, VAL is an air carrier operating scheduled and "on demand" flights throughout Puerto Rico, Culebra, and the United States and British Virgin Islands. ALJ Exhibit (ALJX) 1, p. 1. VAL hired Negron in May 2001 as a pilot based in Fajardo, Puerto Rico. Negron flew "island hopping" routes around Puerto Rico, making 12 to 14 flights per day. R. D. & O. at 2.

While pilots with air transport licenses piloted flights with published schedules, Negron possessed a commercial pilot's license that limited him to "on demand" flights. "On demand" flights had pre-determined times, but only occurred when there was enough passenger demand. R. D. & O. at 2; Transcript (Tr.) at 397-98. Regardless, as an "on demand" pilot, Negron assumed responsibility for the safety of the cargo, crew members, and passengers on the aircraft once he signed the flight manifest. *Id.*

On January 28, 2002, Negron saw a manifest listing Francisco Cruz, VAL's Director of Operations, as a passenger at a weight of 240 pounds. Negron believed that this was an incorrect weight for Cruz, so he kept a copy of the manifest. *Id.* On February 20, 2002, Negron received a manifest and complained to Johnny Ramos-Melendez, VAL's counter supervisor, that because some of the passengers' weights were not consistent with the weights listed in the manifest, the plane was overweight. Negron and Ramos constructed a new manifest. *Id.*

Cruz called Negron on February 21, 2002, and told him to stop clarifying the passenger weight manifest because the practice was causing friction with company employees. R. D. & O. at 2-3. The following day, Negron and Cruz argued because, according to Negron, Cruz was upset that he had taken a plane to maintenance. On February 25, 2002, Negron telephoned Jose Gueits, principal operation inspector for the Federal Aviation Administration (FAA), and informed Gueits about his February 21 and 22 discussions with Cruz. Negron also submitted a letter to Gueits on February 25, 2002, documenting his argument with Cruz. *Id.* at 4; Complainant's Exhibit (CX) 10.

On March 1, 2002, Negron and Ramos argued, in the presence of VAL passengers, over Negron's efforts to weigh passengers listed on a manifest Ramos created. R. D. & O. at 4-6. Ramos informed Cruz of the argument, whereupon Cruz issued a letter that same day suspending Negron for two days for arguing in the presence

¹ The ALJ issued the Corrected Decision and Order pursuant to a request that the Board grant leave to correct the ALJ's previous recommended order. *See* the Board's January 8, 2004 Order Granting Motion for Leave to Correct Clerical Error and Resetting Briefing Schedule.

of VAL passengers. CX 11; Transcript (Tr.) 461. Negron met with VAL managers on March 5, 2002, to discuss the incident. CX 15. Negron disagreed with VAL's decision to suspend him and on March 20, 2002, he requested payment for the two days he was suspended. R. D. & O. at 7; CX 16.

On March 19, 2002, Osvaldo Gonzalez, President of VAL, held a meeting between management and the pilots. The meeting was called because Gonzalez wanted to give Negron and the other pilots an opportunity to "speak freely about their complaints." Tr. 148. Negron attended the meeting, during which he expressed safety concerns and offered criticism of VAL's managers. R. D. & O. at 7.

The FAA visited VAL on March 22, 2002, to perform an inspection. Later that day, VAL informed Negron that he was suspended for fifteen days without pay for arguing with Ramos on March 1, 2002, and for his conduct at the March 19, 2002 meeting. *Id.* at 7-8; Respondent's Exhibit (RX) 4.

Negron submitted a letter to Gonzalez on March 23, 2002. The letter made reference to Negron's participation in the March 22, 2002 FAA inspection. CX 17. Also on March 23, 2002, Negron sent a letter to the FAA in which he stated that VAL had flown an overweight plane. CX 18.

On April 17, 2002, Negron received a letter stating he failed to verify the manifest or conduct the required passenger briefing in both English and Spanish on a flight he piloted on April 10, 2002. The letter also indicated that further infractions by Negron would result in disciplinary action. CX 19.

Negron wrote a letter to Cruz on April 29, 2002, alleging that he was being harassed. The letter also mentioned Negron's discussions with Gueits. CX 21. Negron also sent a letter to the FAA on April 29, 2002, encouraging the FAA to investigate VAL for overloading its planes and harassing him. CX 22.²

On May 6, 2002, Jimmy Adams, VAL's chief pilot, handed Negron a memorandum informing him that within 30 days his duty station would be changed from Fajardo on the mainland to the island of Vieques. R. D. & O. at 9; RX 8. Negron asked Adams how he was supposed to get to Vieques from his home on the mainland, but Adams did not respond. R. D. & O. at 9. On May 7, 2002, Negron filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that VAL twice suspended him in violation of AIR 21.

Negron submitted a letter to Adams on May 11, 2002, requesting further information about the transfer. *Id.* at 10. He submitted another letter to Adams on June

² On May 31, 2002, Negron received a letter from the FAA thanking him for addressing safety irregularities at VAL and noting that his concerns had prompted VAL to adopt procedures to correct those problems. R. D. & O. at 10-11; CX 23.

3, 2002, requesting transportation to Vieques from the Fajardo Airport. The letter also informed VAL that Negron would report to the Fajardo Airport at 5:30 a.m. *Id.*

On June 4, 2002, Negron arrived at Fajardo Airport at 5:30 a.m. and waited the entire day for instructions from VAL. No one employed by VAL spoke to Negron during the entire day. *Id.* Later that day, Cruz reprimanded Negron for not reporting to the Vieques Airport. The letter also informed Negron that, if he did not report to the Vieques Airport by 6:00 a.m. on June 5, 2002, VAL would conclude that he had abandoned his employment. CX 25.

Negron and Cruz exchanged two more letters on June 4, 2002. Negron's letter told Cruz that he tried to get to Vieques and that he would again report to the Fajardo Airport at 5:30 a.m. on June 5, 2002. CX 27. Cruz's letter to Negron stated that VAL was not responsible for assisting Negron in finding transportation to Vieques. The letter also stated, "If you are not present June 6, 2002 at Vieques Airport at 6:00 a.m., we will interpret your failure to attend your job as an abandonment of duties and a voluntary resignation." CX. 28.

Negron reported to the Fajardo Airport at 5:30 a.m. on June 6, 2002, and informed VAL that he did not intend to abandon his employment but he could not afford to pay rent for a stay over in Vieques as well as pay rent for his family's residence. CX. 29. Cruz notified Negron by letter dated June 13, 2002, that, since he had not reported to the Vieques Airport at 6:00 a.m. on June 6, 2002, VAL concluded that he abandoned his employment. CX. 30.³

OSHA investigated Negron's May 7, 2002 complaint and on November 25, 2002, issued its findings. OSHA concluded that Negron's suspensions and discharge constituted violations of AIR 21. On December 30, 2002, VAL requested an administrative hearing before the ALJ, who held a hearing on May 19-21, 2003, in San Juan, Puerto Rico. On November 19, 2003, the ALJ issued a Corrected Decision and Order finding that the adverse actions VAL imposed were in retaliation for Negron's protected safety complaints and therefore violated AIR 21. VAL now appeals the ALJ's ruling to this Board.

ISSUES PRESENTED

The issues before the Board are (1) whether the ALJ's conclusion that VAL violated AIR 21 is supported by substantial evidence and (2) whether the ALJ's rulings on remedies are supported by substantial evidence.

³ Negron later amended his complaint to allege that VAL had "constructively discharged" him.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision under AIR 21 Section 519(b)(3), 49 U.S.C.A. § 42121(b)(3) (final order of Secretary) and 29 C.F.R. § 1979.110 (ARB review). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, AIR21 Section 519).

Pursuant to 29 C.F.R. § 1979.110(b), "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 1979.110(b). *See* 68 Fed. Reg. 14,106 (Mar. 21, 2003) (the Board "shall accept as conclusive ALJ findings of fact that are supported by substantial evidence").⁴

In weighing the testimony of witnesses, the ALJ as fact finder has had an opportunity to consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988). The ARB gives great deference to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 99-STA-21, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). *Accord Lockert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989)(court will uphold ALJ's credibility findings unless they are "inherently incredible or patently unreasonable.").

However, the Board reviews an ALJ's conclusions of law de novo. *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir.1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

⁴ The preamble to the regulations notes that "the substantial evidence standard" also is applied under the employee protection provision of the Surface Transportation Assistance Act (STAA). The STAA regulations state: "The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive." 29 C.F.R. § 1978.109(c)(3) (2004).

DISCUSSION

A. Governing Law

The employee protection provision of AIR 21 was enacted to protect employees against retaliation by air carriers, their contractors and their subcontractors, for raising complaints related to air carrier safety. 49 U.S.C.A. § 42121. The regulations implementing AIR 21 provide that it is unlawful for an air carrier to discriminate against an employee for engaging in protected activity:

It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has: (1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States ...

29 C.F.R. § 1979.102(b).

To prevail on an AIR 21 Section 519 complaint, a complainant must prove that he engaged in activity the statute protects, that the respondent 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), (b)(2)(B)(iii). The requirement that protected activity must have contributed to a respondent's decision to take unfavorable action assumes that the respondent knew about a complainant's protected activity. If the respondent has violated AIR 21 Section 519, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

B. VAL Discriminated Against Negron in Violation of AIR 21

Negron engaged in protected activity through his numerous written correspondences with VAL management and the FAA. His complaints about overweight planes and altered flight manifests informed both VAL and the FAA of violations of federal air carrier safety regulations. *See, e.g.,* 14 C.F.R. § 23.25 (weight limits), §

135.63(a) (recordkeeping requirements for load manifest), § 135.71 (airworthiness check). Negron also engaged in protected activity when he verbally complained about VAL's safety violations, most notably during his participation in the March 19, 2002 meeting with VAL management.

VAL knew about Negron's protected activity through his letters to management, his conversations with Cruz, and the March 19, 2002 meeting. Although he did not send copies of his letters to the FAA to VAL, he mentioned his contacts with the FAA in letters to VAL, and VAL management knew that Negron's complaints prompted the FAA's March 22, 2002 inspection. R. D. & O. at 11-12.

Substantial evidence on the record supports the ALJ's conclusion that VAL violated AIR 21 by retaliating against Negron for these protected activities. First, the ALJ found that VAL's contention that it suspended Negron on March 1, 2002, for arguing in front of passengers was not rational. Initially Ramos received the lesser penalty even though he was the individual who violated flight safety regulations. Ramos testified that Cruz informed him that the reason for Negron's suspension was that Negron's work methods were "too strict" and VAL wanted "to get rid of him." *Id.* at 17. Although Cruz denied making this statement, the ALJ found Ramos' testimony to be more credible than Cruz's. *Id.*

Second, the ALJ noted that Negron received his second suspension two days after his March 20, 2002 letter to Cruz stating that he intended to file a complaint with the FAA, and on the same day that the FAA conducted its inspection in response to Negron's previous FAA complaints. *Id.* at 17-18. Additionally, VAL failed to explain why it intended, through the March 22, 2002 suspension, to again punish Negron for his March 1, 2002 argument with Ramos. Because substantial evidence supports the ALJ's conclusions that VAL suspended Negron on March 1, 2002, and March 22, 2002, for engaging in protected activity, we affirm his ruling on these matters.

Third, we agree with the ALJ's conclusion that VAL transferred and discharged Negron for engaging in protected activity and not, as VAL contends, for business purposes. VAL failed to convince the ALJ of the necessity of the additional flight from Vieques to which Negron had been assigned. *Id.* at 19-20; ALJX 1.⁵ At the time of his transfer, Negron had not received an Air Transport Pilot license, so he could not be assigned to pilot scheduled flights. Tr. 397. The ALJ also found that VAL employed pilots who lived on the mainland but were allowed to fly planes out of Fajardo to begin their early morning flights in Vieques. R. D. & O. at 20.

⁵ "Respondent also did not explain the necessity for the additional flight from Vieques. On the contrary, Respondent referred to the 'slow down for on demand flights,' 'low season' for tourism... less passengers flying to Vieques ... Respondent deliberately placed Complainant in this situation knowing full well that he would be unable to comply with Respondent's orders, and when he could not comply, Respondent accused him of abandoning his job, and terminated him in retaliation for his protected activity." ALJX 1.

The ALJ concluded that “[t]he only plausible explanation for Respondent’s decision to schedule Complainant to such an early morning flight was to preclude him from taking an early morning flight from Fajardo to Vieques in time to make his assigned flight.” *Id.* We agree. After informing Negron about the transfer, VAL was reluctant to discuss the transfer or address Negron’s concerns about the economic impact of his transfer. Ramos testified that VAL transferred Negron to Vieques intending to force him to resign. Tr. 69 (“What I recall is that since Mr. Negron reported to the Fajardo Airport, they were going to transfer him to report to Vieques in order to force him to resign.”). Negron’s discharge was the result of VAL’s discriminatory decision to transfer his duty station. The transfer and discharge were both in retaliation for Negron’s complaints to management and the FAA. Both are therefore prohibited by the employee protection provision of AIR 21.

We concur with the ALJ’s conclusion that VAL’s proffered rationales for transferring Negron were pretextual. Adams and Gonzalez provided conflicting testimony while attempting to argue that Negron was transferred because it was necessary to transfer a plane in the fleet to Vieques. R. D. & O. at 9, citing Tr. 125, 167, 365, 379. VAL then asserted that Negron signed a contract permitting his transfer, but the ALJ concluded that this contract probably was not operable at the time of transfer. *Id.* at 20. VAL finally alleged that its decision was based upon Negron’s lack of seniority. The ALJ found that VAL’s seniority argument was not credible, noting that VAL did not assert seniority as a determining factor in Negron’s transfer until the hearing. *Id.* at 19. An employer’s shifting explanations may be considered evidence of pretext. *See, e.g., Hobby v. Georgia Power Co.*, 90-ERA-30 (Sec’y Aug. 4, 1995), citing *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 935 (11th Cir. 1995); *James v. Ketchikan Pulp Co.*, 94-WPC-4 (Sec’y Mar. 15, 1996). We conclude that VAL’s explanations do not clearly and convincingly indicate that it would have transferred and discharged Negron in the absence of his protected activity.

In sum, the record supports the ALJ’s determination that the adverse actions imposed by VAL were in retaliation for Negron’s protected activity. We therefore find that the ALJ’s conclusion that VAL violated AIR 21 is supported by substantial evidence, and we affirm his ruling.

C. Relief Awarded

We next address remedies. As the prevailing party in this case, Negron is entitled to reinstatement. 49 U.S.C.A. § 42121(b)(3)(B)(ii); 29 C.F.R. §1979.109(b). We affirm the ALJ’s conclusion that Negron is entitled to reinstatement to VAL’s Fajardo base at the salary and grade he maintained before his discharge, with the conditions and privileges of employment he enjoyed before his transfer. VAL shall also purge Negron’s personnel file of all disciplinary letters and memoranda generated in retaliation for his protected activities.

A prevailing party is also entitled to back pay for any period of unemployment caused by the respondent's unlawful discrimination. *Id.* The ALJ held that Negron is entitled to back pay for his two suspensions and the time he was unemployed following his discharge. Substantial evidence supports the ALJ's back pay award. R. D. & O. at 20-21, citing CX 33; Tr. 326, 328-29, 331, 341-42, 344. We therefore affirm the ALJ's back pay award in the amount of \$5,457.38. The ALJ also awarded Negron \$896.79 for medical insurance payments made pursuant to COBRA. We affirm this amount.

AIR 21 and its implementing regulations additionally permit an ALJ to award compensatory damages (for emotional distress, inconvenience and the like) if deemed appropriate. 49 U.S.C.A. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). We conclude that substantial evidence supports the ALJ's award of \$50,000 in compensatory damages. Negron testified that he had two young children (including an infant) and that, among other hardships, he was forced to sell his automobiles and deplete his family's savings. R. D. & O. at 22-23. The ALJ found Negron's testimony regarding his losses credible, and we defer to his ruling. The amount of compensatory damages awarded by the ALJ is consistent with amount awarded in similar cases. *Id.* at 23, citing *Jones v. EG&G Def. Materials Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-00003 (ARB Sept. 29, 1998); *Leveille v. New York Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 94-TSC-3, 4 (ARB Oct. 25, 1999); *see also Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001) (awarding complainant \$250,000 in compensatory damages for emotional distress, humiliation, and loss of reputation).

Finally, as the prevailing party in this case, Negron is entitled to reimbursement for attorney's fees and costs. 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). On February 2, 2004, the ALJ issued a Supplemental [Recommended] Decision and Order (S. R. D. & O.) awarding Negron \$15,961.48 in attorney's fees and costs. Because VAL did not request review of the S. R. D. & O., the ALJ's decision became final. 29 C.F.R. § 1979.110(a).

CONCLUSION

Vieques Air Link, Inc. is hereby ordered to:

1. Reinstate Negron at the salary and grade he maintained before his discharge, with the conditions and privileges of employment he enjoyed before his transfer.
2. Remove from Negron's personnel file all disciplinary letters or memoranda generated in retaliation for his protected activities.
3. Pay Negron back pay in the amount of \$5,457.38, plus interest from the date each payment was due, as wages. The rate of interest the rate established by 26 U.S.C.A § 6621 (West 2002).
4. Reimburse Negron for medical insurance payments in the amount of \$896.79.

5. Pay Negron \$50,000 in compensatory damages.

6. Pay Negron attorney's fees and costs of \$15,961.48.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge