



**In the Matter of:**

**FRANK BARBER,**

**ARB CASE NO. 04-056**

**COMPLAINANT,**

**ALJ CASE NO. 02-AIR-19**

**v.**

**DATE: April 28, 2006**

**PLANET AIRWAYS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

*Darin A. DiBello, Esq., Seidman, Prewitt & DiBello, P.A., Coral Gables,  
Florida*

*For the Respondent:*

*Caran Rothchild, Esq., Greenberg Traurig, P.A., Fort Lauderdale, Florida*

### **FINAL DECISION AND ORDER**

Frank Barber filed a complaint alleging that his former employer, Planet Airways, Inc., retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005) and its implementing regulations, 29 C.F.R. Part 1979 (2005). A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.), concluding that Barber's complaint should be denied. For the following reasons, we affirm the ALJ's decision and deny the complaint.

### **BACKGROUND**

Substantial evidence in the record supports the ALJ's comprehensive exposition of the facts. R. D. & O. at 2-36. We summarize briefly. At all relevant times, Planet

Airways was a charter air service that operated out of Fort Lauderdale, Florida. Its corporate office was in Orlando. Hearing Transcript (TR) at 988. Planet hired Barber as Vice-President/ Director of Operations on April 15, 1999. He signed a two-year contract. Complainant's Exhibit (CX) FF. His primary job objective was to obtain Planet's certification by the Federal Aviation Administration (FAA) as a commercial carrier. TR at 58-59.

Barber's main contact at the FAA was Diane Halloran, FAA's Principal Operations Inspector (POI) assigned to Planet. TR at 122-24. He reported a number of safety concerns to her in 1999-2000, including: (1) Planet's non-compliance with FAA requirements about safety manuals, TR at 71-73; and (2) a potential violation of the required aircraft-staffing ratio resulting from Planet's alleged reluctance to hire additional employees, TR at 75-81.

In November 1999, DeCamillis asked Safety Director Ken Pellegrino to investigate the continuing employee complaints about Barber's management. DeCamillis also talked with Barber about dealing with Planet's employees and using constructive rehabilitation instead of suspensions as discipline. TR at 809-11. Subsequently, Barber and Halloran told DeCamillis that Pellegrino would have to be fired because he had misrepresented his experience on his resume. CX HH, VVVV; TR at 130-32. DeCamillis did not want to fire Pellegrino but felt pressured by Halloran and permitted him to resign. TR at 817-20. Later, Planet rehired Pellegrino as Safety Director. TR at 170-71.

Then, in November 2000, Barber told Garrambone to fire Pellegrino because he had failed to revise the safety manuals, conduct safety meetings, produce a safety newsletter, and implement an aviation safety program. TR at 96-98; CX VVVV. Garrambone resisted but Halloran presented him with a letter outlining five safety deficiencies she had uncovered. CX J. Pellegrino then resigned again. CX WWWW.

Though Barber succeeded in obtaining FAA certification for Planet, the company did not renew his contract in May 2001. The reason, according to Anthony DeCamillis, President and owner of Planet, was that numerous employees had complained about Barber's treatment of them. TR at 806-11. Also, DeCamillis stated that he and Peter Garrambone, the Chief Executive Officer, felt "threatened" that the FAA certification Barber had obtained would be jeopardized if they tried to replace him. TR at 803-04, 806-20, 903-04.

In June 2001, while Barber was on vacation, Planet provided air service to Frontier Airlines for ten days after a hail storm damaged its planes. TR at 107-110. Barber filed a Voluntary Disclosure Report to Inspector Halloran and the FAA, admitting that Planet had violated regulations prohibiting such service unless passengers were stranded. CX DDDD; Respondent's Exhibit (RX) 38, 145, 238, 239.

In August 2001, Planet managers informed Barber that maintenance records were not properly kept and tracked, as FAA regulations required, to ensure airplane

worthiness. He reported the situation to Garrambone, who authorized an external audit. The audit revealed “major problems” with the maintenance reporting system. TR at 112-120, 306-11.

Subsequently, an internal dispute developed over which Planet employees were entitled to receive a copy of the audit. CX QQ. Barber informed Inspector Halloran of the issue and she told Garrambone and DeCamillis that the General Maintenance Manual required Planet’s managers of quality control and maintenance to have copies of the audit, which were later distributed. RX 156, 158, 159, 162, 165-67.

DeCamillis stated that the definitive decision to fire Barber was made in September 2001 when the company began contacting recruiting firms to find a replacement. CX QQQ. Also, two captains whom Barber had suspended several times for various infractions and who had subsequently been fired, filed whistleblower complaints with the Occupational Safety and Health Administration (OSHA) against Planet in the fall of 2001. CX ZZZZ; RX 234. Planet settled the complaints after the OSHA inspector found that Barber had retaliated against the two captains for reporting safety concerns to the FAA. RX 65; CX QQQ; TR at 661-63.

In November 2001, Barber was at training session for flight attendants where the newly hired human resources manager, Carell Rodriguez, observed him make an obscene gesture with an inflatable life vest. TR at 506-07. Later that month, DeCamillis and Garrambone met with several Planet managers, including Barber, and admonished the group that they had to work as a team and solve their internal personal problems. TR at 923-29. Rodriguez stated that Barber came to his office after the November 14, 2001 meeting and ridiculed Garrambone’s remarks about his family members dying of a heart attack. TR at 511. Barber also boasted that he was a bullet-proof whistleblower, and that he would shut the airline down if anything happened to him. TR at 512.

Rodriguez wrote to Garrambone in December 2001, summarizing the employee complaints he had received and Barber’s retaliation against the two captains and others for expressing safety concerns. RX 54. Rodriguez stated that Halloran exerted too much influence on Planet through Barber. *Id.* For example, Halloran edited and rewrote the company’s manuals and suggested that one technical employee be fired. Rodriguez also delineated several instances of Barber’s inappropriate behavior towards, and relationships with, female employees and described an incident in which Barber ridiculed Planet’s choice of Merrill Lynch to manage a 401k fund for employees. *Id.*

On February 14, 2002, Barber met with Bill Weaver, manager of the Fort Lauderdale Flight Standards District Office, and explained his concerns and allegations about safety and compliance issues at Planet. TR at 327-30. Weaver stated he would have Planet evaluated, and asked Barber to put his concerns in writing, which he did. *Id.*

On February 15, 2002, Planet fired Barber. TR at 332, 588-93. DeCamillis explained that Planet fired Barber because of “his demeaning and unprofessional treatment of employees, and his persistent campaign of defamation against the owners of

the company.” CX QQQ. DeCamillis added that the subsequent OSHA findings regarding Barber’s retaliation against employees who reported safety concerns to the FAA only confirmed Planet’s decision. TR at 893-94.

Barber filed a complaint with the Occupational Safety and Health Administration (OSHA) on February 22, 2002, alleging that Planet had terminated his employment in retaliation for raising safety concerns. OSHA dismissed the complaint, RX 101, and Barber requested an administrative hearing, which was held on February 11-14, 2003.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary has jurisdiction to review the ALJ’s recommended decision. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to the Administrative Review Board (ARB) her authority to review cases under, inter alia, AIR 21. Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

The ARB reviews the ALJ’s factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). This means that if substantial evidence on the record considered as a whole supports the ALJ’s findings of fact, they shall be conclusive. We review conclusions of law de novo. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 4-5 (ARB Dec. 30, 2004).

### **DISCUSSION**

The whistleblower provision of AIR 21 prohibits air carriers, their contractors and subcontractors from retaliating against employees for raising complaints related to air carrier safety. 49 U.S.C.A. § 42121. To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer knew about such activity, that the employer 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), 42121(b)(2)(B)(iii). If the employer has violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int’l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-3, slip op. at 22 (ARB Jan. 30, 2004).

#### **The ALJ’s analysis and conclusions**

The ALJ stated that, for the purposes of his decision, he would assume that Barber had engaged in protected activity and that Planet was aware of his complaints to the FAA and Inspector Halloran about safety issues during his employment. R. D. & O. at 37. The ALJ also found that there was “no doubt” that Planet’s firing of Barber was an

adverse employment action. *Id.* For the purposes of this decision, we will accept the ALJ's assumptions.

The ALJ then considered the final element that Barber had to prove, i.e., whether his protected activity was a "factor" in Planet's termination of his employment. The ALJ determined that "the evidence and testimony in this case support [Planet's] position that [Barber] was not terminated due to any protected activity." R. D. & O. at 37.

Instead, the ALJ found that Planet fired Barber because he sexually harassed employees, retaliated against other employees for raising safety issues with the FAA, and maintained an inappropriate relationship with Halloran, the FAA inspector. Thus, the ALJ concluded that Planet fired Barber for non-discriminatory reasons unrelated to his protected activity, and therefore denied his AIR 21 claim. R. D. & O. at 38.

### **Barber failed to establish that his protected activity contributed to his firing**

The ALJ articulated the proper legal standard and concluded that the record supported Planet's position that Barber's complaints to the FAA played no role in the termination of his employment. Implicit in the ALJ's determination that Planet fired Barber for non-discriminatory reasons is the conclusion that Barber failed to prove by a preponderance of the evidence an essential element of his claim, i.e., that the safety concerns and violations he reported to the FAA during his employment were a contributing factor in Planet's decision to fire him.

We read the ALJ's decision to mean that Barber did not meet his burden of proof to show that his protected activity was a contributing factor in Planet's decision to fire him. Because Barber failed to establish this essential element of his claim, the ALJ could properly conclude that Planet did not violate AIR 21 and thus deny Barber's complaint. We agree with the ALJ's conclusion for the following reasons.

First, substantial evidence supports the ALJ's finding of no nexus between Barber's complaints to the FAA's Weaver on February 14 and his firing on February 15, 2002. Planet had decided to fire Barber months earlier and chose February 15 as the date because Barber's replacement could not start work until then. Additionally, Planet had arranged with the local sheriff's office on February 13 – the day before Barber complained to Weaver – to have a deputy present at the actual firing. Thus, Barber's meeting with Weaver on February 14 had nothing to do with Planet's implementation of its decision to fire Barber on February 15. R. D. & O. at 37; TR at 580, 617, 640-48, 655-58.

Second, substantial evidence supports the ALJ's decision to credit the testimony of Carell Rodriguez, Planet's human resources manager. He testified that Planet had 130 to 140 employees when he began working in October 2001. Almost immediately, he received complaints about Barber's sexual harassment, poor management, and retaliation against employees. "[I]t was a Human Resources nightmare." TR at 535-56.

Rodriguez's testimony about the numerous complaints from Planet personnel is amply corroborated by the journal he kept, his letters to Garrambone, and the statements of employees and former employees. RX 43, 46, 54-60, 120, 134, 172, 173.

Third, substantial evidence supports the ALJ's conclusion that Planet fired Barber because he was behind Planet's firing of the two captains who had voiced safety concerns to the FAA. RX 54; TR at 821-31. After the captains filed whistleblower complaints, Planet settled with both men despite Barber's opposition and paid damages of more than \$60,000.00. RX 65, 80, 84, 85, 87, 92; TR at 612. As Rodriguez testified, Planet "didn't have a leg to stand on." TR at 604.

Finally, substantial evidence supports the ALJ's finding that, although Barber's relationship with Halloran may have played a role in his firing, it was not the protected activity parts of the relationship that contributed to Planet's decision. R. D. & O. at 38; RX 61, 137, 153, 155, 238, 239. According to the ALJ, Barber treated Halloran as if she were his boss instead of DeCamillis and Garrambone. The ALJ found that Barber "seemed to be conspiring with her to the detriment of Planet" – together, they intimidated Planet's employees and forced Planet's owners to make personnel decisions that Barber and she wanted. The ALJ correctly found that this "inappropriate" and "unusual" personal relationship between a high-ranking airline official and an FAA inspector charged with regulating that airline contributed to Barber's firing, not the safety concerns he reported to Halloran.

The only evidence in the record that connects Barber's protected activity during his employment at Planet and his firing is temporal proximity.<sup>1</sup> Barber reported safety violations to the FAA in July and September 2001 and January 2002; Planet's decision to fire him was definitely made in September 2001 and carried out in February 2002. Thus, a temporal connection exists between Barber's protected activity and Planet's adverse action.

Nonetheless, while a temporal connection between protected activity and an adverse action may support an inference of retaliation, *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005), the inference is not necessarily dispositive. For example, inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused the adverse action. *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be

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<sup>1</sup> Barber himself testified that Planet did not retaliate against him for his November 20, 2000 memorandum to Garrambone reporting a manager's safety violations and requesting his removal. CX VVVV; TR at 394-95. Barber also testified that Planet did not retaliate following the Voluntary Disclosure Reports he submitted to the FAA on July 20, 2001, September 11, 2001, and January 30, 2002, concerning Planet's violations of the regulations governing the number of crew flying hours. RX 38, 42, 72; TR at 397-400.

insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.

In this case, two intervening events in late 2001 – the investigation of the two whistleblower complaints and the letter from Rodriguez to Garrambone – could have independently caused the termination of Barber's employment. The first intervening event, the OSHA investigation of the fired captains' complaints, convinced Planet's owners that Barber as Planet's Director of Operations had retaliated against the two captains in violation of AIR 21. RX 84-85. DeCamillis testified that Planet agreed to settle the cases in December 2001 for substantial sums and had "no choice" but to fire Barber because of the retaliation. TR at 831, 893-900, 951; RX 87, 92.

As for the second intervening event, Planet hired Rodriguez in October 2001 to improve employee relations at the Fort Lauderdale office. Within days of starting work, Rodriguez began investigating employees' complaints about Barber's treatment of them. Rodriguez kept a daily log of his interactions and discussions with Barber and other employees. RX 120. On December 12, 2001, Rodriguez summarized his findings in a letter to Garrambone, concluding that: (1) Barber's history was "tainted" with examples of sexual harassment; (2) he created a hostile and intimidating work environment; (3) he had a "compromising relationship" with the FAA; (4) he wrongfully demoted, suspended, and fired employees; (5) he retaliated against employees for expressing safety concerns; (6) he exhibited behavior contrary to Planet's values; and (7) his overall management was substandard. Rodriguez favored firing Barber immediately, but if not, he strongly recommended Barber's suspension until OSHA completed its investigation. RX 54.

In addition, Barber himself substantiated some of Rodriguez's concerns about his treatment of employees and his disrespect for Garrambone. Barber admitted at the hearing that he referred to some employees as incompetent, old, and senile. TR at 373. He publicly called one employee a f---ing liar and testified that he "probably" made other derogatory comments about employees and supervisors. TR at 373, 376. Barber also admitted that he posted cartoons and jokes making fun of certain employees, who later complained to Rodriguez. TR at 381-82. Barber agreed that he mimicked Garrambone's accent and speech in front of employees. TR at 377. He admitted telling vendors, employees, and FAA personnel that Planet was "cheap" and "tight" with money. TR at 383. He did not deny referring to someone who had not been paid properly as having been "garramboned." TR at 378-79.

While Planet's adverse employment action followed Barber's protected activity, that temporal inference alone is insufficient to establish that Barber's protected activity was a contributing factor in his firing. The fact that Planet could have independently fired Barber for retaliating against employees in violation of AIR 21 or for inadequate performance as a manager preponderates against any inference that his protected activity was a contributing cause of Planet's adverse action. The fact that Barber tacitly agreed with many of the non-discriminatory reasons Planet established for terminating his employment further undermines a determination that his protected activity was a

contributing cause of his firing. Therefore, we conclude that Barber failed to establish by a preponderance of the evidence an essential element of his claim.

### **Barber's arguments on appeal**

On appeal, Barber argues that the ALJ, in finding that Planet fired Barber for legitimate reasons, improperly relied on hearsay evidence, which consisted of employees' statements describing Barber's treatment of them; DeCamillis's testimony about what Garrambone and others said; and the OSHA investigator's report of the captains' whistleblower complaints. Complainant's Initial Brief at 2-3, 9-15. Barber contends that because Rodriguez solicited the statements from employees whom Barber had criticized or reprimanded, the ALJ erred in finding that the statements corroborated Rodriguez's testimony. Barber also argues that the ALJ erred in crediting the written statements of those employees and FAA personnel who did not testify at the hearing. Finally, Barber quarrels with the ALJ's reliance on hearsay evidence to conclude that his relationship with Halloran was inappropriate. Brief at 13-22.

The administrative procedure rules codified at 29 C.F.R. Part 18 (2005), define hearsay as a statement, other than one made by the declarant while testifying at the hearing, that is offered in evidence to prove the truth of the matter asserted. 29 C.F.R. § 18.801(c). "Hearsay is not admissible except as provided . . . by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order, or by Act of Congress." 29 C.F.R. § 18.802.

The regulations governing AIR 21 provide that administrative hearings will be conducted according to the rules of practice and procedure at 29 C.F.R. Part 18, "[e]xcept as provided in this part." 20 C.F.R. § 1979.107(a). Section 1979.107(d) states that the formal rules of evidence shall not apply at administrative hearings, "but rules or principles designed to assure production of the most probative evidence shall be applied." 29 C.F.R. § 1979.107(d). That subsection permits the ALJ to exclude evidence which is immaterial, irrelevant, or unduly repetitious.

In this case, the ALJ overruled Barber's hearsay objections to the admission of the employees' statements that Rodriguez had requested. TR at 524-27, 529, 532-33, 577-79. The ALJ ruled that the documents were not being admitted to prove the truth of the allegations of harassment and retaliation contained therein but to demonstrate the plethora of employee complaints against Barber. The ALJ permitted Rodriguez to testify at length about the particulars of the employee complaints he had received and the other incidents of Barber's behavior that he had recorded in a handwritten journal. RX 120; TR at 498-560.

The ALJ acted within his discretion in admitting the employees' statements over Barber's objections for two reasons. The statements did not constitute hearsay because they were not admitted to establish the truth of the complaints against Barber, but to corroborate Rodriguez's testimony that Planet had "a very large [employee] base



complaining” about Barber. TR at 535. Even if the employees’ statements were to be deemed hearsay, the ALJ could properly determine, pursuant to 29 C.F.R. § 1979.107(d), that the statements in themselves had some probative value and were therefore admissible.

Further, Barber’s argument about the ALJ’s error in calling the statements affidavits is specious. The ALJ relied on the testimony of Rodriguez and DeCamillis, as corroborated by documentary evidence, to find that Planet fired Barber for legitimate reasons. Read in context, the ALJ’s comment that the “affidavits” were “damaging” to Barber’s case merely indicates that the number of employee complaints against Barber was one of Planet’s legitimate reasons for his firing. R. D. & O. at 38.

Finally, Barber argues that the ALJ should have required Planet’s owner, Garrambone, and the employees who signed statements, to testify. The burden of deposing potential witnesses or subpoenaing them to testify at a hearing belongs to the parties, not to the ALJ. *See* 29 C.F.R. §§ 18.22, 18.24(a). In his pre-hearing statement, Barber listed his witnesses and included “[a]ll witnesses listed by defendant” Planet. Barber had the opportunity to depose or subpoena any of Planet’s potential witnesses named in its pre-hearing statement. Yet, there is no evidence that Barber either deposed or subpoenaed any of the witnesses about whose absence at the hearing he now complains.

In addition to his hearsay contentions, Barber argues that the ALJ erred in according great weight to Rodriguez’s testimony because it “was riddled with inconsistencies.” Further, Barber claims that Rodriguez lied under oath, changed his story, and lacked the capacity to recollect critical issues. Barber contends that the ALJ’s determination that Rodriguez had no reason to be biased was insufficient to prove the truthfulness of his testimony. Brief at 3-8.

The ARB will uphold an ALJ’s credibility findings based on substantial evidence unless they are “inherently incredible or patently unreasonable.” *Negron*, slip op. at 5 (citation omitted). Barber points to several statements in the record that he claims demonstrate that Rodriguez was not credible and that he exaggerated employee complaints of mistreatment. TR at 609, 616, 619-20, 24.

The testimony of Rodriguez does not support Barber’s characterization. Rodriguez explained why he kept a separate journal documenting complaints about Barber and why he obtained written statements corroborating these complaints from only a few of the employees who complained to him. TR at 561-63, 576-78, 606-09, 616-28.

Similarly, Barber’s charges that Rodriguez “lied under oath” in talking about the journal he kept during his employment at Planet are not borne out by his testimony. Rodriguez admitted that he may have kept more than one journal and that he had rewritten his initial hastily scribbled notes on Barber into something more readable after realizing how extensive the employee complaints were. TR at 620-29.

On cross-examination by Barber's attorney, Rodriguez logically explained why he did not consult with Barber about the two captains' whistle-blower cases, TR at 603-06, and agreed that a statement in his February 5, 2002 memorandum on the timing of Planet's decision to fire Barber was inaccurate. TR at 607-616. Further, Rodriguez reiterated that he had not been hired to help Planet justify firing Barber. TR at 643. After reviewing Rodriguez's answers to the questions put by Barber's attorney, we conclude, as did the ALJ, that Rodriguez was a credible witness. Therefore, we reject Barber's argument.

### **CONCLUSION**

Substantial evidence in the record as a whole supports the ALJ's finding that Planet did not fire Barber because of his protected activity. Therefore, the ALJ correctly concluded that Planet did not violate AIR 21. Furthermore, we have considered, but rejected, Barber's arguments on appeal. Accordingly, we **DENY** the complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**