



In the Matter of:

COLEEN L. POWERS,

ARB CASE NO. 05-022

COMPLAINANT,

ALJ CASE NO. 2004-AIR-32

v.

DATE: July 27, 2007

PINNACLE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Coleen L. Powers, *pro se*, Memphis, Tennessee

ORDER DENYING COMPLAINANT'S MOTION FOR RECONSIDERATION

On January 31, 2006, the Administrative Review Board issued a Final Decision and Order (F. D. & O.) in this case arising under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ The F. D. & O. affirmed the Recommended Decision and Order of a Department of Labor Administrative Law Judge (ALJ) dismissing Coleen Powers's AIR 21 complaint because she refused to comply with the ALJ's orders directing her to respond to interrogatories and produce documents even though the ALJ gave Powers adequate

¹ 49 U.S.C.A. § 42121 (West 2005 Supp.). AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. 29 C.F.R. § 1979.101 (2006). Air carriers, contractors and their subcontractors are prohibited from discharging or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)," engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(a).

opportunities to respond and Powers well knew the consequences of failing to comply with such orders.²

On March 13, 2006, Powers filed “FORMER CREWMEMBER POWERS’ DETAILED OBJECTIONS & REBUTTAL REPLIES TO US DOL ARB UNAUTHORIZED & ERRONEOUS ‘ORDER’ FILED JANUARY 31, 2006, [RECEIVED FEBRUARY 08, 2006 CERTIFIED MAIL, RETURN RECEIPT]; MOTION FOR RECONSIDERATION, AND FOR ENTRY OF MODIFIED ORDER THAT REMANDS BACK TO US DOL OALJ & CONSOLIDATES 05-022/ 04-AIR-32 WITH US DOL OALJ CASES 2006-AIR-4 AND 2006-AIR-5¹ FOR DENOVO HEARING ON THE RECORD ON ALL AIR 21 CLAIMS, WITH REASSIGNMENT TO DIFFERENT ALJ (Motion). On March 31, 2006, Powers filed a Petition for Review with the United States Court of Appeals for the Sixth Circuit.³ Because the Board had not yet ruled on Powers’s Motion when she filed her petition for review with the court of appeals, the Department of Labor filed a motion with the court to suspend the briefing schedule until the Board acted upon the pending motion. The court granted the Department’s motion. Accordingly, we consider here Powers’s motion for reconsideration.

DISCUSSION

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.⁴ Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.⁵ Rule 40 expressly requires that any petition for rehearing “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended”⁶ A petition for rehearing should not reargue unsuccessful positions or assert an

² F. D. & O. at 10-11.

³ *Powers v. Administrative Review Board, U S. Dep’t of Labor*, No. 06-3486.

⁴ *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff’g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-23, slip op. at 2-6 (ARB Nov. 20, 1998); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006, slip op. at 1 (ARB Feb. 17, 2005). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

⁵ *See generally* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3986.1 (West 2006).

⁶ Fed. R. App. P. 40(a)(2).

inconsistent position that may prove more successful.⁷ Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing.⁸ But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.⁹ In considering a motion for reconsideration, the Board has applied a four-part test to determine whether the movant has demonstrated:

(i) material differences in fact or law from the presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.^[10]

As an initial matter we note that Powers filed her Motion for Reconsideration forty-one days after the Board issued its F. D. & O. Given the Board's recent decision in *Henrich v. Ecolab, Inc.*,¹¹ there is a substantial question whether Powers's motion was timely filed. But even if it had been timely, upon consideration of the Motion's merits, we would nevertheless deny reconsideration.

Upon review of Powers's motion we conclude that she has failed to meet any of the provisions of the Board's four-part test for reconsideration. Instead Powers's motion consists of a rehashing of arguments the Board has already considered and rejected and

⁷ *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

⁸ *Utahns for Better Transp. v. United States Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993).

⁹ *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

¹⁰ *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 03-LCA-4, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-5, 2003-ERA-10, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 03-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004 SOX-54, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-LCA-3, slip op. at 3 (ARB Oct. 24, 2005).

¹¹ ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

allegations not material to the basis for the Board's F. D. & O. Accordingly, we **DENY** Powers's motion in its entirety.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge