



In the Matter of:

THOMAS E. CLEMMONS,
COMPLAINANT,

ARB CASE NOS. 05-048
05-096

ALJ CASE NO. 2004-AIR-11

v.

DATE: June 29, 2007

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Steven K. Hoffman, Esq., Marie Chopra, Esq., *James & Hoffman, P.C.*,
Washington, District of Columbia**

For the Respondent:

Chris E. Howe, Esq., *Kelly, Hart & Hallman, P.C.*, Fort Worth, Texas

DECISION AND ORDER OF REMAND

Thomas E. Clemmons alleges that Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21 or the Act)¹ when Ameristar terminated his employment after he complained about air safety issues. A

¹ 49 U.S.C.A. § 42121 (West 2007). Regulations implementing AIR21 appear at 29 C.F.R. Part 1979 (2006).

United States Department of Labor Administrative Law Judge (ALJ) heard the case and concluded that Ameristar violated the Act. He recommended that Airways and Jet Charter pay Clemmons back pay, interest, costs, and attorney fees. But because the ALJ committed legal error, we vacate his orders and remand for further consideration.

BACKGROUND

The Ameristar corporate family, headquartered in Addison, Texas, includes three airlines: Ameristar Airways, Ameristar Jet Charter, and Ameristar Air Cargo. Thomas Wachendorfer, President, owns all three companies. Other members of Ameristar management include Lolly Rives (human resources), Stacy Muth (dispatch), and Lindon Frazer, who has held positions at each of the companies. At the time in question, Frazer was Airways's Vice President of Operations. Pat Hulsey was Director of Operations for Air Cargo but also served the corporation in tasks with Airways.

Each of the different Ameristar companies is certified according to the Federal Aviation Regulations (FAR). FAR Part 121 has stricter training guidelines but a more flexible duty time rule than Part 125. Part 121 and Part 135 allow common carriage. Common carriage occurs when a company advertises services to the public. Part 125 companies are prohibited from common carriage and can only engage in contract carriage. Jet Charter was formed in the early 1990s as a Part 135 company to charter passengers. Air Cargo was formed in 1999 to provide the public with common carriage under Part 121. Airways was formed in 2002 as a Part 125 company.

While hiring personnel, in late August and early September 2002, the company interviewed Clemmons, a former pilot for Southeast Airlines, for a captain position. The company later decided to offer him a position as Director of Operations. Clemmons's official start date was September 6, 2002. Clemmons's responsibilities as Director of Operations at Ameristar Airways included hiring pilots, scheduling pilots, updating manuals, coordinating personnel, maintaining pilot records, directing training, and disseminating information (charts) to pilots.

Shortly after Clemmons hired them and they began to fly, pilots complained about their pay. According to the pilots, they were not getting paid what they had been promised. Brent Barker, a former pilot for Southeast Airlines, was Clemmons's Chief Pilot. In response to continued complaints, on November 25 Barker and Clemmons wrote a memorandum to Airways management requesting an increase in pay.

In addition to grievances about pay, pilots voiced their concerns about duty time violations. By federal aviation regulation, each flight crewmember and flight attendant must be relieved from all duty for at least 8 consecutive hours during any 24-hour period.² In a December 17 e-mail, Clemmons notified Wachendorfer, Frazer, and Muth that pilots were being pushed to work beyond the 16-hour duty time restriction and that

² 14 C.F.R. § 125.37 (2006).

this was a violation of the Part 125 regulations to which there were no flexible exceptions. In a follow-up e-mail, management asked Clemmons about his research concerning the duty time regulations and requested that he provide more details.

Clemmons was also concerned about Airways's maintenance policy. He complained that pilots were being directed to seek permission from Airways maintenance officials at company headquarters before they registered mechanical problems in their logbooks. Clemmons felt that requiring a call to headquarters before logging the problem violated federal regulations.

Another issue that arose during Clemmons's employment was pilot scheduling. Management wanted a fourteen days on, seven days off schedule for the pilots. Drafting work schedules was Clemmons's responsibility. Frazer supervised Clemmons and reviewed Clemmons's schedules before they went out. On November 26, the week of Thanksgiving, Clemmons was on vacation and had left Barker in charge of the scheduling. Barker let a pilot off early for the holiday, resulting in a scheduling problem. Wachendorfer then had to pay pilots to stay overtime to cover the absent pilot. In an e-mail responding to the incident, Wachendorfer expressed concern over the incident and scheduling generally.

Thereafter, two more incidents involving work crew scheduling occurred. On December 2 a pilot was not where he was supposed to be. The company had to buy a plane ticket to get the pilot to the plane that he was scheduled to fly. On December 7, Wachendorfer sent an e-mail to Clemmons, Frazer, and Muth. He was angry and indicated that the scheduling system, among other things, was unacceptable and that things needed to change.

Ten days later, an Airways pilot complained to dispatch that he was unsure whether his charts were current.³ Muth, the dispatch manager, e-mailed Clemmons and questioned his procedure for keeping charts current. Clemmons was responsible for making sure that current charts were on the airplanes.

Soon, Clemmons's relationship with management deteriorated even more. Back in November, soon after operations began, Hulseley had audited the pilots' records and found that they did not contain ground school records and other information. Frazer told Hulseley to conduct a second audit of the pilot records in early January. Hulseley found that the records still lacked certain information.

³ "Charts" is shorthand for the information that the Director of Operations was responsible for disseminating. Charts include information on routes, airports, and NOTAMs (notice to airmen). NOTAMs are generated from the government and supplied to airline companies through vendors. An example of a NOTAM is an alert that a certain airport is working on a runway. The notice informs pilots of the construction.

Earlier, on December 31, Clemmons had complained to dispatch that Airways was using Jet Charter's call sign in violation of FAA regulations. The call sign is the initial three letters that a pilot uses to communicate with others. "AJJ" was Jet Charter's sign and Airways was using this acronym as its call sign. Clemmons informed dispatch that they could not use Jet Charter's call sign unless they asked permission from the FAA. Clemmons stated that he would be happy to begin the process of requesting a new call sign for Airways but that Frazer had told him not to do this. After hearing about this, Frazer worked with Jet Charter and obtained a written letter of permission allowing Airways to use Jet Charter's sign. Clemmons and Barker had a meeting with Ron Brown from the FAA on January 7. At the meeting, Clemmons and Barker submitted the request to share Jet Charter's call sign. Clemmons and Barker also discussed common carriage and duty time regulations.

Meanwhile, the scheduling difficulties continued. On January 9, Wachendorfer sent a memorandum to Clemmons and Frazer stating that one of Clemmons's schedules was unacceptable. Wachendorfer reiterated his desire for a two weeks on and one week off schedule. In response to Wachendorfer's memorandum, Clemmons consulted with Muth, who gave him suggestions on drafting a schedule. Clemmons turned in a second schedule, which was also rejected. Frazer ended up working on a substitute schedule. Clemmons reacted to Frazer's new schedule by sending an insubordinate e-mail to the pilots that insulted Wachendorfer and apologized for the schedule. Clemmons wrote that the schedule was not his fault and that he was washing his hands of it. In this January 13 e-mail, Clemmons also offered to assist pilots who were thinking about quitting Airways and indicated his desire to leave the company.

Then, on January 16, Clemmons flew a revenue flight with a pilot. Clemmons and the other pilot had trouble loading all of the freight. They were able to load 12 of the 24 pallets. Clemmons called dispatch, and they concluded that the client had given wrong pallet dimensions. Wachendorfer became involved. He called the other pilot and told him how to load the pallets. With Wachendorfer's instructions they were able to load 20 of the 24 pallets.

Two or three days later, Frazer recommended to Wachendorfer that Clemmons be terminated. Wachendorfer concurred. On January 20, with Rives present, Frazer met with Clemmons and terminated his employment.

Clemmons filed an unemployment benefits claim with the Texas Workforce Commission (TWC). Airways responded to the TWC claim on February 5 and March 31st. Both of Airways's TWC filings stated that it had fired Clemmons because of poor performance, work schedule problems, and maintaining poor flight currency.⁴ And in

⁴ Flight currency refers to operating the aircraft in the most economical method possible. To achieve this, companies use flight simulators to train pilots to fly the plane more efficiently. Airways indicated in its February 5 and March 31 TWC filings that Clemmons's use of an actual aircraft to train pilots instead of the simulator was a poor decision because of the attendant costs.

another filing with TWC, on April 4, Airways listed poor performance, work schedules, and also the January 16 loading incident as reasons for the termination.

The TWC first ruled in Clemmons's favor and awarded benefits. Airways appealed, and in its petition referred to Clemmons's poor performance and his failure to maintain pilot records. TWC reversed its earlier ruling and found that Clemmons was terminated for insubordination.

Meanwhile, on April 14, 2003, Clemmons had filed the instant whistleblower complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA). After investigating, OSHA found in Clemmons's favor. Upon Ameristar's request, an ALJ conducted a hearing. On January 14, 2005, the ALJ issued a [Recommended] Decision and Order (D. & O.) in which he concluded that the company violated the Act. Airways and Jet Charter appealed.⁵ On April 11, 2005, the ALJ issued a [Recommended] Supplemental Decision and Order awarding Clemmons \$225,239.19 in attorney fees and costs. Ameristar petitioned for review of this Supplemental Order as well.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board (ARB or the Board).⁶ In cases arising under AIR21, we review the ALJ's findings of fact under the substantial evidence standard.⁷ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁸ We must uphold an ALJ's finding of fact that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice" had the matter been before us de novo.⁹ The Board, however, reviews the ALJ's legal conclusions de novo.¹⁰

⁵ The ALJ found that Airways and Jet Charter jointly employed Clemmons and therefore were properly included as respondents. Airways and Jet Charter did not contest this finding on appeal.

⁶ See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

⁷ 29 C.F.R. § 1979.110(b).

⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁹ *Universal Camera*, 340 U.S. at 488.

¹⁰ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 4

DISCUSSION

1. The AIR21 Legal Standard

AIR21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or 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 this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States¹¹

To prevail in an AIR21 case, a complainant like Clemmons must demonstrate that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable (“adverse”) personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.¹² If Clemmons proves that Ameristar violated AIR21, he is entitled to relief unless Ameristar demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.¹³

(ARB June 29, 2006).

¹¹ 49 U.S.C.A. § 42121(a). An employer also violates AIR21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

¹² See 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov. 30, 2006).

¹³ See 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

2. The ALJ's Decision

The ALJ found that Clemmons's discussions with Wachendorfer and Frazer about violations of the duty time regulations constitute protected activity.¹⁴ Ameristar argues that Clemmons was merely presenting his research on the duty time regulations and was not expressing a safety concern. Therefore, Ameristar argues that his discussions with Wachendorfer and Frazer were not protected. Part 125.37 duty time regulations clearly implicate air carrier safety. Therefore, since substantial evidence supports the ALJ's finding that Clemmons discussed violations of the duty time regulations with Wachendorfer and Frazer, those discussions constitute protected activity.

The ALJ found that Clemmons also engaged in protected activity when he complained to management about the call sign, the common carriage issue, and the policy of calling headquarters before logging mechanical problems. Ameristar argues that these other activities are not protected because they do not implicate air carrier safety or were not communicated to Ameristar. Since substantial evidence supports the ALJ's conclusion that the duty time discussions constitute protected activity, we need not decide at this time whether these other activities are protected under AIR21.

With respect to whether Ameristar knew about the protected activity and took adverse action, management knew about Clemmons's duty time concerns because he discussed them with Wachendorfer and Frazer. They also exchanged e-mails.¹⁵ Ameristar terminated Clemmons's employment on January 20, 2003. Termination, of course, constitutes an adverse action.

The ALJ concluded that Ameristar violated AIR21 when it terminated Clemmons. As noted, he recommended that Ameristar pay Clemmons back pay, interest, costs, expenses, and attorney fees. But because the ALJ committed legal error, we vacate his recommended orders and remand for further proceedings consistent with this opinion.

3. The ALJ's Legal Errors

(1) The ALJ erred in applying Ameristar's burden of production.

The ALJ appears to have merged Ameristar's burden of production with its later burden to prove by clear and convincing evidence that it would have taken the adverse action absent protected activity. This was error.

¹⁴ D. & O. at 62.

¹⁵ CX 19.

After Clemmons made a prima face case of discrimination, Ameristar merely had to produce a legitimate, nondiscriminatory reason for terminating Clemmons.¹⁶ But the ALJ wrote:

If Complainant presents a prima facie case showing that protected activity was likely a contributing factor in the unfavorable personnel action, then Respondent has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.¹⁷

Ameristar offered six reasons for terminating Clemmons: failing to draft pilot schedules per management's instruction, failing to maintain proper pilot records, failing to revise manuals, improper dissemination of charts, a problematic revenue flight, and the inflammatory e-mail Clemmons sent on January 13, 2003.¹⁸ The ALJ found that Ameristar proved (apparently by clear and convincing evidence) that four of these reasons were legitimate. But he did not find that the two other reasons (failure to disseminate charts and failure to revise manuals) were legitimate, apparently because Ameristar did not establish their legitimacy by clear and convincing evidence.¹⁹ Excluding these two reasons under the clear and convincing burden of proof constitutes reversible error. On remand, the ALJ should determine whether Ameristar *produced*, not proved, legitimate, non-discriminatory reasons for terminating Clemmons.

(2) *The ALJ erred in applying AIR21's "contributed to" standard.*

We cannot be certain that the ALJ properly applied AIR21's requirement that the factfinder find, by a preponderance of the evidence, that protected activity "contributed to" the adverse action. The ALJ wrote:

I find Complainant has established, by a preponderance of the evidence, his protected activity contributed to his termination on January 20, 2003. He has thus proven all five elements set forth in *Peck* to establish a *prima facie* case of discriminatory employment retaliation.²⁰

¹⁶ *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 10 (ARB Jan. 30, 2004) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

¹⁷ D. & O. at 60.

¹⁸ D. & O. at 65.

¹⁹ D. & O. at 66.

²⁰ D. & O. at 65.

Thus, the ALJ held that Clemmons proved a prima facie case by a preponderance of the evidence. Under AIR21, after a whistleblower like Clemmons files a complaint, OSHA will investigate the complaint only if the whistleblower makes a “prima facie showing” that protected activity was a contributing factor in the alleged adverse action.²¹ But if the case proceeds to a hearing before an ALJ, the whistleblower must prove by a preponderance of evidence (“demonstrate”) that the protected activity was a contributing factor in the alleged adverse action.²²

This case, of course, proceeded to a hearing before an ALJ who concluded that Ameristar violated AIR21. But in so concluding, the ALJ did not specifically discuss or find that Clemmons’s protected activity contributed to Ameristar’s decision to terminate him. Instead, he applied the contributing factor standard only in concluding that Clemmons had proved a “prima facie” case. Did he mean, therefore, that Clemmons was entitled to an OSHA investigation, a proceeding that had already occurred and over which the ALJ has no jurisdiction? Probably not. Did he mean that Clemmons had, by proving a prima facie case, created a presumption that Ameristar retaliated? Perhaps. The ALJ may simply be guilty of imprecision. But by not specifically applying the contributing factor standard in concluding that Ameristar violated AIR21, the ALJ erred. On remand, the ALJ should determine whether Clemmons proved by a preponderance of the evidence that his protected activity contributed to his termination, not simply whether he has proven one of the elements of a prima facie case.

(3) The ALJ erred in finding that pretext compels a finding of discrimination.

The ALJ wrote:

In conclusion, Complainant established a *prima facie* case of unlawful retaliation which Respondent successfully overcame by producing clear and convincing evidence of legitimate reasons for the discharge. However, based on the foregoing discussion, an examination of the record as a whole leads me to conclude these reasons were, in fact, illegitimate and pretextual in nature. As such, I find Respondent engaged in unlawful discriminatory retaliation for Complainant’s protected activities by discharging him on January 20, 2003, absent legitimate reasons.²³

²¹ 49 U.S.C.A. § 42121(b)(2)(B)(i).

²² 49 U.S.C.A. § 42121(b)(2)(B)(iii).

²³ D. & O. at 70.

Thus, when the ALJ wrote “as such,” he appears to hold that because Ameristar’s reasons for terminating Clemmons were pretext, Ameristar thus discriminated. True, the factfinder’s disbelief of the employer’s reasons, together with the elements of the prima facie case, may support a showing of intentional discrimination.²⁴ But a finding of pretext alone does not compel a conclusion that the employer discriminated.²⁵ If the ALJ so concluded, this constitutes reversible error. On remand, if the ALJ still concludes that Ameristar retaliated against Clemmons, he should clarify what evidence supports that conclusion.

(4) The ALJ erred when he did not consider whether Ameristar proved that it would have terminated Clemmons absent protected activity.

AIR21 provides that once a whistleblower proves that protected activity contributed to the adverse action, the employer has the opportunity to avoid liability by proving, by clear and convincing evidence, that it would have taken the adverse action absent protected activity.²⁶ Here, after he concluded that Ameristar violated the Act, the ALJ erred when he did not analyze, discuss, make findings, or conclude whether Ameristar sufficiently proved that it would have terminated Clemmons’s employment absent his complaints about duty time regulations. If on remand the ALJ still concludes that Ameristar violated the Act, he should make findings and conclude whether Ameristar avoids liability.

²⁴ *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (factfinder may infer discrimination from pretext together with evidence supporting prima facie case); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (“Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive.”).

²⁵ *Hicks*, 509 U.S. at 524 (holding that a finding that “the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason” of unlawful discrimination is correct); *Reeves*, 530 U.S. at 148 (“Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory. For instance, . . . if the record conclusively revealed some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.”); *Rubinstein v. Admins. of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000) (finding that the ultimate burden of demonstrating discrimination was not satisfied, despite a showing of pretext).

²⁶ 49 U.S.C.A. § 42121(b)(2)(B)(iv) (“Prohibition. – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.”)

CONCLUSION

The ALJ committed four legal errors. Therefore, we **VACATE** the ALJ's January 14, 2005 Decision and Order and **REMAND** this matter for proceedings consistent with this opinion.²⁷

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

²⁷ The ALJ awarded attorney fees and costs in the amount of \$225,641. Ameristar appealed this order. The Board assigned case number 05-096 to Ameristar's appeal of this order. Given our disposition of the merits case, we vacate and remand this attorney's fees order as well, with leave to reinstate or modify the order if appropriate.