



In the Matter of:

BRENT W. BARKER,

ARB CASE NO. 05-058

COMPLAINANT,

ALJ CASE NO. 2004-AIR-012

v.

DATE: December 31, 2007

AMERISTAR AIRWAYS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Steven K. Hoffman, Esq., and Marie Chopra, Esq., *James & Hoffman, P.C.*,
Washington, D.C.**

For the Respondent:

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

FINAL DECISION AND ORDER

Brent W. Barker filed a complaint alleging that his former employer, Ameristar 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 2007) and its implementing regulations, 29 C.F.R. Part 1979 (2007). A Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.), denying Barker's complaint. For the following reasons, we affirm the ALJ's decision and dismiss the complaint.

BACKGROUND

Substantial evidence in the record supports the ALJ's comprehensive exposition of the facts. R. D. & O. at 3-16. We summarize briefly.

The Ameristar corporate family, headquartered in Addison, Texas, includes three airlines: Ameristar Airways, Ameristar Jet Charter, and Ameristar Air Cargo. Complainant's Exhibit (CX) 1, 2, 6. Thomas Wachendorfer, President, owns all three companies. Hearing Transcript (TR) at 495. Each is certified according to the Federal Aviation Regulations (FAR). FAR Part 125 governs Ameristar Airways, which was formed in 2002 to carry cargo under limited contracts with specific companies. CX 6. Part 125 companies are prohibited from advertising their services to the public, which is known as common carriage, and can engage only in contract carriage. TR at 502-04.

Barker started work on September 23, 2003, as Chief Pilot and check airman for Airways, earning an annual salary of \$63,998.00. CX 39, 71; TR at 44. He spent the first few weeks training newly hired pilots. TR at 55-61. Airways began flying operations in mid-October. TR at 54. Barker's duties included conducting test flights and pilot proficiency checks, ensuring consistent use of standard operating procedures, coordinating pilot availability, and maintaining pilot training records. Respondent's Exhibit (RX) 5-6.

In November, Barker and the Director of Operations, Thomas Clemmons, wrote a letter to Wachendorfer and Lindon Frazer, Vice-President of Operations, outlining pilots' concerns about Airways's pay policy and scheduling procedures. CX 9. The letter generally suggested doubling the wages of captains and first officers, who were paid base salaries of up to \$36,000.00 per year plus mileage. CX 71. The letter stated that Airways would lose personnel if the pay issue were not resolved. Shortly thereafter, pilots found extra pay in their checks, which they nicknamed "mystery money." TR at 91, 277.

Subsequently, several pilots complained to Barker about perceived violations of the duty and rest time regulations. CX 51, 60, 76. The pilots alleged that they were being asked to work more than the 16 hours in a day permitted by the FAR and were being interrupted during their rest periods. The pilots were also unhappy about a memorandum from Frazer asking them to call the maintenance department before noting any safety deficiencies in the log book. CX 52. Barker testified that he interpreted the memo to mean that pilots needed permission to log a maintenance problem. TR at 102-03.

The problems with on-duty times and maintenance continued. CX 14-17. Barker and Clemmons met with Ron Brown, the regional Federal Aviation Administration

(FAA) inspector, in early January 2003 at their Airways office. TR at 97-98. Brown asked them to put their concerns in writing. TR at 107. Immediately following the meeting, Wachendorfer stopped by the office and told both pilots that he expected them to handle problems “in-house.” TR at 116; but see TR at 381.

Two weeks later, Airways fired Clemmons, and James Matthew Raymond became Director of Operations. CX 42. Raymond’s first concern was the state of Airways’s documentation of pilot training and certification. TR at 722-27; CX 54. He sent Barker an e-mail asking him to complete training records and furnish the documents for two first officers tested by Barker to upgrade to captain. TR at 117; CX 58. Barker thought he had complied with the required record-keeping, but admitted that he had not promptly filed the captain upgrade forms or signed ground school training certificates. TR at 121, 192-208.

From January through April, Barker had been “flying the line” on a schedule of two weeks on duty, one week off, and had not performed any of his chief pilot duties. TR at 70. During this time, Barker raised several concerns with Raymond about maintenance problems, particularly repeated equipment defects that were recorded as fixed but were not or had reoccurred. TR at 149-53. Among them were a broken wing spoiler, a pressurization deficiency, and a fuel leak, for which Barker grounded the plane. TR at 158-61.

On March 28, 2003, Barker wrote a memorandum to Raymond, Frazer, and Wachendorfer, with a copy to the FAA inspector, advising them of the spoiler and fuel pump problems. He noted that the three DC-9s in the Airways fleet had “numerous repeat write-ups” in the maintenance logbook and advised that this “alarming trend must be reversed. Safety should be paramount and not a by-product of day-to-day operations.” CX 18. Frazer responded that day that he would “investigate the allegations, and report back to all of you.” He sent a copy of his response to all Airways pilots and to the FAA inspector. RX 21.

Meanwhile, Wachendorfer, Frazer, and Raymond had been discussing curtailment of Airways’s operations because business was “slow” and “deteriorating” and the company had been losing money - about \$650,000.00 in the previous 15 months. TR at 650, 711. Wachendorfer decided to keep just one plane flying all the time, which required two crews of one captain and one first officer each. TR at 553-56, 640.

Raymond consulted with Aurora Ann (Lolly) Diaz Rives, human resources manager, and selected six of the remaining ten pilots to be laid off, including Barker. TR at 615-45. Raymond and Frazer called each of the pilots on April 14, 2003, to tell them of the reduction in force (RIF). TR at 632. Barker testified that when he asked Frazer, “why me?”, Frazer replied that Barker’s salary was much larger than everyone else’s. TR at 162-64.

Barker filed a complaint with DOL’s Occupational Safety and Health Administration (OSHA) on April 24, 2003, alleging that his discharge was retaliatory.

CX 69. OSHA investigated and found merit in Barker's complaint. CX 70. Airways appealed, and a DOL ALJ held a hearing on August 2-4, 2004.

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).

In AIR 21 cases, 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-010, slip op. at 4-5 (ARB Dec. 30, 2004).

DISCUSSION

The whistleblower provision of AIR 21 extends protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors 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). The implementing regulation describes the protected activities, including the following:

- (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)(1).

The AIR 21 complainant must allege and later prove that he was an employee who engaged in activity the statute protects;¹ that an employer subject to the act had knowledge of the protected 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), (b)(2)(B)(iii); 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the complainant proves by a preponderance of the evidence that the respondent has violated AIR 21, 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); 29 C.F.R. § 1979.104(d). *See, e.g., Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004).

The ALJ’s analysis and conclusions

Initially, we note that the ALJ appears to have confused the prima facie gatekeeper test applied during the investigatory stage of an AIR 21 complaint, 49 U.S.C.A. § 42121(b)(2)(B)(i), with the complainant’s burden of proof required at the hearing stage, 49 U.S.C.A. § 42121(b)(2)(B)(ii). R. D. & O. at 27. The former section guides OSHA’s investigation of a complaint. The latter section requires a complainant to demonstrate, i.e., prove by a preponderance of the evidence, that protected activity was a contributing factor that motivated a respondent to take adverse action against him. Unless the complainant carries this burden, the ALJ need not determine whether the employer has established by clear and convincing evidence² that it would have taken the same action absent the protected activity. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006). However, because substantial evidence supports the ALJ’s ultimate conclusion that Barker failed to prove that his protected activity was a contributing factor in the RIF, we conclude that any missteps in her analysis are harmless errors.³

¹ Airways does not contest the ALJ’s finding that the three aviation companies Wachendorfer owned were sufficiently integrated to comprise a single employer. R. D. & O. at 26.

² Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” BLACK’S LAW DICTIONARY 577 (7th ed. 1999). Or as the ALJ noted, the “clear and convincing” standard is higher than “preponderance of the evidence” but lower than “beyond a reasonable doubt.” *Yule v. Burns Int’l Sec. Serv.*, ALJ No. 1993-ERA-012, slip op. at 8 (Sec’y May 24, 1995).

³ “To secure an investigation, a complainant merely must raise an inference of unlawful discrimination, i.e., establish a prima facie case. To prevail in adjudication, a complainant must prove unlawful discrimination. This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar . . . Title VII burden shifting pretext framework . . .” *Brune*, slip op. at 14.

The ALJ found that Barker's complaints to Airways's management concerning the pilots' duty and rest time violations, the de-icing fluid procedures, and maintenance defects such as fuel leaks, pressurization problems, and faulty equipment were related to aircraft safety. Therefore, she determined that these complaints constituted protected activity. R. D. & O. at 28-29. She also concluded that Airways was aware of Barker's protected activities and took some measures to address the issues. Finally, Airways did not contest that discharging Barker was an adverse action. R. D. & O. at 29. Because substantial evidence supports the ALJ's findings regarding these three elements of Barker's complaint and the legal analysis was correctly applied, we affirm them.

In discussing whether Barker's protected activities contributed to his discharge, the ALJ stated that the temporal proximity between Barker's March 28, 2003 letter to the FAA and his April 14, 2003 discharge established the inference of a causal nexus and thereby a prima facie case. R. D. & O. at 29. After considering (1) Frazer's March 28, 2003 letter to Raymond seeking a list of record-keeping deficiencies he had noted in January 2003 and (2) Barker's ongoing complaints about maintenance problems, the ALJ declined to infer that either of these factors contributed to Airways's RIF decision. R. D. & O. at 30. She noted that Barker offered "little evidence" to establish that his reports of maintenance issues contributed to his dismissal. *Id.*

The ALJ also found that Barker's complaints to the FAA were not a factor in Airways's decision to discharge him. While crediting Barker's account that Wachendorfer told Clemmons and him to keep complaints in-house, the ALJ accorded greater weight to the record evidence showing that Airways and the FAA had regular and frequent communications about the issues Barker raised. R. D. & O. at 30.

Without explicitly stating Barker's burden of proof to establish by a preponderance of the evidence that his protected activity was a contributing factor to his discharge, the ALJ concluded: "I find no evidence that Complainant's protected activities were a contributing factor to his discharge beyond the temporal proximity of his March 28, 2003 letter and his termination on April 14, 2003." R. D. & O. at 31. The ALJ noted that the ultimate burden of persuasion remained with the complainant who must prove by a preponderance of the evidence that the respondent discriminated against him for engaging in a protected activity. *Id.*

Barker failed to establish that his protected activities contributed to his RIF

Barker bears the burden of establishing by a preponderance of the evidence that protected activity was a contributing factor in Airways's decision to discharge him. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 5 (ARB June 29, 2006). He need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006).

In this case, the only evidence that connects Barker's protected activity during his employment at Airways and his discharge is temporal proximity. Wachendorfer told Barker in January to keep Airways's problems in-house, Barker copied the FAA with his March 28, 2003 e-mail regarding maintenance problems, and the RIF occurred two weeks later.

Temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation. 29 C.F.R. § 1979.104(b)(2). While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

In support of his assertion that temporal proximity was sufficient, Barker proffered Frazer's March 31, 2003 e-mail asking Raymond for a list of the record-keeping deficiencies he noted after he became Director of Operations. According to Barker, the timing of this request showed that Airways sought to retaliate against him for sending his March 28, 2003 letter of complaint to the FAA.

We agree with the ALJ's ultimate conclusion that temporal proximity alone was insufficient in this case to establish that Barker's protected activity was a contributing cause to Airways's decision to discharge him. First, she credited Raymond's testimony that Frazier's March 31, 2003 request did not concern Barker. Rather, Frazer's request related to Airways's preparation of its defense to Clemmons's unemployment claim. TR at 759. Indeed, the March 31, 2003 e-mail describes in detail the "corrections" to the records that Raymond made upon assuming his duties and does not mention Barker's name at all. RX 17. The ALJ found that Clemmons had the ultimate responsibility for maintenance of Airways's records and that Raymond did not discipline Barker for failing to complete the pilots' training paperwork in January. Substantial evidence supports the ALJ's findings and the ALJ applied the correct law. R. D. & O. at 30. Therefore, we affirm her determination that Frazer's March 31, 2003 e-mail was not a contributing factor in Airways's decision to include Barker in the RIF of six pilots.

We also agree with the ALJ's conclusion that Barker's complaints about maintenance problems and his letter to the FAA were not contributing factors in Airways's decision to discharge Barker as part of the RIF. R. D. & O. at 30-31. The record shows that, of the four pilots Airways retained after the April 2003 RIF, two had openly complained about Airways's scheduling and maintenance practices and had also grounded planes. CX 14, TR at 535. Also, despite grounding planes for maintenance problems and repairs, Barker continued to be assigned flights "on the line" and was in fact performing no chief pilot duties in February-March 2003. TR at 612. Further,

Raymond made efforts to address Barker's safety concerns and was in regular communication with the FAA inspector about safety and maintenance issues. TR at 682; CX 56, 57, 61. Finally, Airways took no action against Barker contemporaneously with any of his air safety or maintenance complaints. TR at 672-80.

Substantial evidence supports the ALJ's factual findings and she applied the correct law. Accordingly, we affirm her determination that Barker failed to meet his burden of proof to establish that his protected activity was a contributing factor in his discharge. Thus, we conclude that Barker failed to establish by a preponderance of the evidence an essential element of his claim. Therefore, Barker's claim fails.

Whether Airways's reasons for discharging Barker were pretext

In her analysis, the ALJ attempted to provide an alternate conclusion of law. She stated: "Assuming *arguendo* that Complainant's protected activities were a contributing factor, the burden shifts to Respondent to present clear and convincing evidence of a legitimate, non-discriminatory business reason for its decision, and to show that it would have taken the same unfavorable action in the absence of his protected activity." R. D. & O. at 31.

This statement of the law is in error. Under the *McDonnell-Douglas* analytical framework cited by the ALJ, R. D. & O. at 27, once a complainant has presented a *prima facie* case, a respondent's burden is merely to produce a legitimate non-discriminatory reason for its adverse decision. If such a reason is produced, the burden of proof then returns to the complainant to prove by a preponderance of the evidence that the legitimate reason was pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Under AIR 21, only if the complainant has proven discrimination by a preponderance of evidence does the respondent have any evidentiary burden. To avoid liability to a complainant who has proven his case, a respondent must demonstrate by "*clear and convincing evidence*," not that it had legitimate business reasons for discharging a complainant, but that it would have taken the same adverse action absent the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv) (emphasis added). Thus, the ALJ's conclusion that Airways "established by clear and convincing evidence that it had legitimate business reasons for discharging" Barker, R. D. & O. at 32, is a legal misstatement. See *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 096, ALJ No. 2004-AIR-011, slip op. at 7 (ARB June 29, 2007) (error to merge respondent'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).

Because the legal reasoning is flawed, we decline to adopt the ALJ's pretext analysis. R. D. & O. at 32-34. However, substantial evidence in the record supports her factual finding that Airways's declining business was the impetus for the RIF. Raymond testified that business in the first few months of 2003 was "slow," "deteriorating," and "infrequent." TR at 650, 711. Wachendorfer testified that a RIF was necessary because Airways was steadily losing money - about \$650,000.00 in the past 15 months - and he

needed to curtail his operations. TR at 553-56, CX 32. Wachendorfer decided that only one of Airways's three DC-9 planes was needed, and it could be staffed by two crews, consisting of one captain and one first officer each. TR at 560. He told Frazer and Raymond to choose which six pilots of the ten still employed to ruff, TR at 544, 581, and Raymond as Director of Operations made the decision, TR at 615. We affirm these findings.

Barker's arguments on appeal

Prior to issuing her decision, the ALJ granted partial summary judgment to Airways on the grounds that that Barker's complaints regarding Airways's use of a sister enterprise's call sign and its alleged commercial transactions outside the scope of its Part 125 certificate were not protected activity under AIR 21 because they did not involve safety issues. October 7, 2004 Order Granting Respondent's Motion at 4.

Barker argues on appeal that the ALJ erred as a matter of law in determining that Barker's complaints about the call sign and commercial transactions were not safety issues. Complainant's Brief at 17-21. While the ARB has broadly construed protected activity under AIR 21, we need not decide in this case whether all the regulations under Parts 121, 125, and 135 relate directly to air safety. The ALJ properly found that Barker engaged in protected activity. Therefore, even if she erred in concluding that Barker's complaints regarding use of the call sign and Airways's transactions did not "touch on" safety, any error is harmless. Order at 4.

Barker also argues that the ALJ erred in refusing to admit evidence of Airways's retaliatory discharge of Clemmons. Complainant's Brief at 15-17. Barker contends that Airways's firing of Clemmons shortly before Barker's discharge "makes it more likely than not" that Airways also fired Barker for his whistleblowing activities. Brief at 15. According to Barker, because both pilots complained about the same issues, Clemmons's earlier firing coupled with Barker's discharge establishes a "general pattern" of discriminatory conduct toward whistleblowers. Brief at 16.

This argument is not convincing. Clemmons testified extensively about the situation at Airways and his interactions with Barker. TR at 299-409. The ALJ found most of his testimony irrelevant and sustained Airways's objections. TR at 375. Having reviewed the testimony, we agree with the ALJ that Clemmons's testimony added nothing to Barker's case beyond confirming some of the facts. TR at 409.

Finally, Barker argues that substantial evidence does not support the ALJ's findings that (1) Airways produced clear and convincing evidence that it discharged Barker for a non-retaliatory reason and (2) Barker failed to prove that Airways's reason for his discharge was pretext. Complainant's Brief at 21-30. As we have said, Airways's burden under the *McDonnell Douglas* analytical framework was only to produce a legitimate, non-discriminatory reason for the RIF of six pilots, which it did. Further, regarding Barker's pretext arguments, the ALJ dismissed Barker's complaint because he

failed to establish by a preponderance of the evidence that his protected activity was a contributing factor to his discharge.⁴ Because Barker has failed to prove this essential element of his claim, it is not necessary to discuss pretext. For these reason, we reject Barker's arguments.⁵

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's conclusion that Barker failed to establish that his protected activity contributed to his discharge in Airways' RIF. Therefore, the ALJ correctly concluded that Airways did not violate AIR 21. Furthermore, we have considered, but rejected, Barker's arguments on appeal. Accordingly, we **DENY** the complaint.

SO ORDERED.

C. MADONNA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

⁴ We note that Barker does not directly quarrel with the ALJ's conclusion, R. D. & O. at 34, that he failed to establish an essential element of his complaint. *See* Complainant's Brief at 16. While we could conclude that Barker had thus waived any argument and affirm the ALJ's decision on that basis, we have addressed the merits in the interests of justice. *See Garcia v. Wantz Equip.*, ARB No. 99-109, ALJ No. 1999-CAA-011, slip op at 2 n.1 (ARB Order Feb. 8, 2000) (ARB May 30, 2002) (ARB has authority to relax procedural rules in the interests of justice and absence of prejudice to other parties).

⁵ Barker also faults the ALJ for not finding pretext established by the "inconsistent and ever-changing rationales" proffered by Airways for his discharge. Brief at 24. The ALJ discussed the "inconsistencies" in Raymond's testimony and Airways's "changing" rationales for choosing Barker to ruff. R. D. & O. at 33. She concluded that the inconsistency of Raymond's concern about some FAA rules and his disregard of others were not significant enough to discredit his testimony. R. D. & O. at 34. Substantial evidence supports the ALJ's factual findings. Therefore, we reject Barker's argument.