



In the Matter of:

MARK J. HOFFMAN,

ARB CASE NO. 06-141

COMPLAINANT,

ALJ CASE NO. 2005-AIR-026

v.

DATE: July 22, 2008

NETJETS AVIATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, *Tate & Renner*, Dover, Ohio

For the Respondent:

Celeste M. Wasielewski, Esq., *DLA Piper Rudnick Gray Cary US, LLP*, Washington, District of Columbia

FINAL DECISION AND ORDER

This case arises under the employee 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 2008) and its implementing regulations, 29 C.F.R. Part 1979 (2007). Mark Hoffman filed a complaint alleging that his employer, NetJets Aviation (NetJets), violated AIR 21 by retaliating against him for engaging in protected activity. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) denying Hoffman'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 exposition of the facts. R. D. & O. at 1-5. We summarize briefly.

Hoffman has worked at NetJets since 1997. NetJets manages an air charter operation with over 340 aircraft from the Citation V to the Boeing Business Jet. NetJets employs nearly 2000 pilots. Among the NetJets pilots, there are several types of instructors including Check Airman, Instructor, and Initial Operating Experience (IOE) Instructor. R. D. & O. at 2.

During his tenure at NetJets, Hoffman frequently informed the company of maintenance and safety concerns and alleged that NetJets retaliated against him for raising such concerns. Hoffman's concerns include a fuel leak incident in 2001, an airport closure incident in 2001, a nose bay latches incident in June of 2004, a ferry permit issue in July of 2004, and a landing light incident in November of 2005.¹

On July 16, 2004, NetJets scheduled Hoffman to ferry a plane from Denver, Colorado to Wichita, Kansas. NetJets assigned crewmembers from a different fleet to be transported on the flight. R. D. & O. at 5. Prior to taking off, Hoffman noted that the ferry permit did not authorize carrying non-essential personnel. R. D. & O. at 5; Joint Exhibit (JX)-11. Hoffman attempted to call Billy Smith at NetJets but was unable to reach him. Thereafter, Hoffman called Dennis Garcia at the FAA. Respondent's Exhibit (RX)-6; R. D. & O. at 5. After a "lively" discussion with Garcia, Hoffman received a subsequent fax from NetJets that authorized the additional passengers. JX-10; R. D. & O. at 5; Transcript (Tr.) 392, 393. Garcia wrote an e-mail to NetJets complaining about Hoffman's call. RX-7. On August 2, 2004, NetJets suspended Hoffman for unprofessional conduct and for not following the chain of command in contacting Garcia. JX-16. On August 5, 2004, Hoffman filed a grievance to protest the three-day suspension. A hearing was held on August 12, 2004, and the suspension was reduced to one day. A second hearing was held on October 6, 2004, and all records of the incident were removed. Hoffman received back pay for the suspension. R. D. & O. at 5.

On May 3, 2004, prior to the ferry incident, NetJets posted a bid listing several IOE instructor positions. Approximately thirty pilots applied for an IOE position. R. D. & O. at 2. While pilots bid on IOE instructor positions, they are not awarded strictly on seniority. Tr. 219. According to NetJets, the job criteria for the IOE position included chief pilot and assistant chief pilot feedback, peer feedback and international experience. Tr. 221; JX-3; NetJets's Brief at 2. Candidates were scored on a point system ranging from "0" to "3" in each of the categories. Hoffman scored a "0" in both international experience and supervisory feedback. JX-3;

¹ As we discuss below, the ALJ held that to the extent that Hoffman's complaint concerned alleged adverse actions occurring before December 2004 it is untimely because the incidents occur more than 90 days before Hoffman filed his March 7, 2005 complaint with OSHA.

NetJets's Brief at 2. Of the thirty candidates, seven positions were awarded on July 9, 2004. R. D. & O. at 3, 10; JX-5. Hoffman did not receive an IOE position.

Shortly thereafter, on August 5, 2004, Hoffman filed a grievance over his failing to receive an IOE position. In the grievance, Hoffman indicates that the bid process should be awarded on seniority. JX-6; R. D. & O. at 2. As a result of his grievance, the System Board of Adjustment (SBA) held a hearing on November 3, 2004. Tr. 45; R. D. & O. at 3. Bill Clawson, Steve Schwartz, Emily Anne Caldwell, and Richard Meikle served on the SBA. Tr. 15. While the SBA did not find a violation of labor law, they recommended Hoffman be interviewed for the position, and, according to an e-mail by Clawson, Hoffman was not to be compared with other candidates. R. D. & O. at 3; RX, Tab E at 5326. Jacob Decker, John Martin, Billy Smith and James Nichols interviewed Hoffman on November 16, 2004. On December 8, 2004, Hoffman was notified that he was not awarded the IOE position despite the interview. Tr. 212. Hoffman filed another grievance with the SBA on January 5, 2005. R. D. & O. at 13. The SBA denied Hoffman's second grievance noting Hoffman's poor supervisor and peer feedback and negative comments about his interview.

On March 7, 2005, Hoffman filed a complaint with Occupational Safety and Health Administration (OSHA). In his complaint, Hoffman alleged retaliation for voicing safety concerns. OSHA investigated all of Hoffman's allegations and on May 5, 2005, determined that NetJets had not violated AIR 21. Hoffman requested a hearing before an ALJ. Thereafter, Hoffman amended his complaint to include claims of continuing violations and harassment. According to Hoffman, NetJets intentionally grounded him from piloting aircraft during 2005. The ALJ held a hearing on February 7-8, 2006. After the hearing, Hoffman filed a motion for leave to file a supplemental pleading introducing new evidence concerning his April 21, 2006 suspension for violating the company's recordation policy. The ALJ denied the motion and issued an R. D. & O. on August 4, 2006. The ALJ found that the denial of the IOE position was an adverse action and that Hoffman's complaint was timely with respect to the denial. The ALJ also concluded that Hoffman did not satisfy the criteria for hostile work environment and that NetJets proved by clear and convincing evidence that it would have denied Hoffman the IOE position for legitimate, non-discriminatory reasons. Hoffman filed a Petition for Review with the Board on August 14, 2006.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision. 29 C.F.R. § 1979.110; Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121). We review an ALJ's conclusions of law de novo. *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004). We review the ALJ's findings of fact in an AIR 21 case under the substantial evidence standard. 29 C.F.R. § 1979.110(b).

DISCUSSION

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from discharging or “otherwise discriminat[ing] against an 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).

An AIR 21 complainant must prove that he was an employee who engaged in activity the statute protects; 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). The complainant is then 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. 49 U.S.C.A. § 42121(b)(2)(B)(iv). *See, e.g., Peck v. Safe Air Int’l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 18 (ARB Jan. 30, 2004).

Protected activity and adverse action

The ALJ concluded that Hoffman engaged in protected activity and that the employer knew of his protected activity. R. D. & O. at 17-18. Substantial evidence supports the ALJ’s finding and we therefore affirm the ALJ.

The ALJ also concluded that Hoffman’s alleged adverse actions occurring before December 2004, for example, a four-day evaluation ride stemming from a fuel leak incident in 2001 or his August 2004 suspension from the ferry incident, were time-barred. Because these alleged adverse actions occurred more than 90 days before Hoffman’s March 7, 2005 complaint with OSHA, we affirm the ALJ’s conclusion. 49 U.S.C.A. § 42121(b)(1) (requiring complainant to file complaint with OSHA “not later than 90 days after the date on which” the violation occurs).

The ALJ limited his discussion to the denial of the IOE captain position and the hostile work environment claim. Hoffman was informed of his denial of the IOE position on December 8, 2004, and Hoffman filed his complaint on March 7, 2005. We agree with the ALJ that Hoffman’s complaint concerning his denial of the IOE position is timely and constitutes an adverse action.

The ALJ found that Hoffman’s alleged incidents of retaliation were discrete acts or were not adverse actions and thus did not constitute a hostile work environment. R. D. & O. at 18 n.11, 19. For Hoffman to prevail on a hostile work environment theory, he must prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins v. U.S. Env’tl.*

Prot. Agency, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 43 (ARB Feb. 28, 2003). We concur with the ALJ that that acts which Hoffman experienced were discrete, non-intentional or otherwise insufficient and thus Hoffman has failed to prove that his claims meet the criteria for a hostile work environment.

Causation

We generally agree with the ALJ's legal analysis. We note, however, that the ALJ should have made a finding that Hoffman's protected activity did or did not contribute to the alleged adverse actions about which Hoffman complains before making a finding that NetJets proved by clear and convincing evidence that it would have denied the IOE position in the absence of protected activity. In his Petition for Review, Hoffman argues the ALJ erred and that the point system was concocted and that international experience was not part of the job requirement. Hoffman's Pet. for Rev. at 6. We find that substantial evidence supports the ALJ's finding that NetJets proved by clear and convincing evidence that it would have denied Hoffman the IOE position.

First, Hoffman did not have the international experience which the company sought and most of the awardees possessed. Hoffman alleges that the criterion of international experience was made up. The company counters with testimony noting the need for international experience prior to the May bid. NetJets's Brief at 2; Tr. 215; RX, Tab F at 5423 (July 28, 2004 memorandum on international flights). A July 28, 2004 memorandum corroborates the company's interest in international experience as does the fact that of the seven who were awarded the bid, five had international experience. RX, Tab F at 5423; R. D. & O. at 3, 10.

Second, Hoffman scored poorly among the thirty candidates, ranking 27/30. Hoffman only received a score of "1." JX-3; R. D. & O. at 10. More than thirteen other pilots scoring better than Hoffman also did not receive the IOE instructor position. NetJets's Brief at 4. Hoffman argues that the point system was pretext. Decker counters Hoffman's argument, stating that the point system was developed in part to be more objective. Without attempting to resolve the factual disputes, we find that substantial evidence supports the ALJ's view.

Third, NetJets's testimony indicates that several interviewers noted that Hoffman did not interview well. Specifically, Martin, a member of the interviewing panel, testified that Hoffman was not well-suited for the position. Tr. 477; NetJets's Brief at 7. Finally, Hoffman himself concedes that he had been denied the IOE position over twenty five times. Hoffman's Brief at 14.

Hoffman amended his original complaint to include allegations of continuing violations and harassment. In particular, Hoffman alleges that NetJets intentionally grounded him. The ALJ found that NetJets did not retaliate against Hoffman in his scheduling during 2005. R. D. & O. at 19. The record supports the ALJ's finding. During the period from May 20, 2005 to July 11, 2005, Hoffman was assigned several planes, which he wrote up for maintenance problems. Because he wrote the planes up for maintenance problems, he lost flying time. NetJets's Brief at 23-24. Hoffman also took a vacation during this period. RX-10. From July 11, 2005 through

October 10, 2005, NetJets experienced a reduced demand for flights and Hoffman was not the only pilot with decreased flying time. R. D. & O. at 15 (noting that seventy pilots had less flying time than Hoffman during the time in question); Tr. 516. Finally, Hoffman was on a seven days on / seven days off schedule and would have been able to fly only one-half of the days from July 11 through October 7, 2005. R. D. & O. at 15. We therefore affirm the ALJ's finding that NetJets did not retaliate against Hoffman by intentionally grounding him from flying.

Other motions

On appeal, Hoffman also argues that the ALJ erred in denying the post-hearing motion to supplement pleadings. While the ALJ rules allow for liberal amendment under 29 C.F.R. § 18.5(e), Hoffman has identified a new post-hearing adverse action arising under a different set of facts and occurrences than the matters in litigation. The post-hearing consideration of the new evidence would prejudice NetJets. Therefore, the ALJ did not abuse his discretion in denying Hoffman's motion to supplement his pleadings. *Kelley v. Heartland Express, Inc. of Iowa*, ARB No. 00-049, ALJ No. 1999-STA-029, slip op. at 2 (ARB Oct. 28, 2002).

Hoffman also raises procedural and evidentiary points of error. We review allegations that an administrative law judge erred in ruling on procedural issues under the abuse of discretion standard. In other words, we determine whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 8 (ARB Apr. 28, 2006); *Sabin v. Yellow Freight Sys., Inc.*, ARB No. 04-032, ALJ No. 2003-STA-005, slip op. at 6-7 (ARB July 29, 2005). We find that the ALJ did not abuse his discretion. In affirming the ALJ's opinion, we do not consider evidence outside of the record. Therefore, NetJets's motion to strike portions of Hoffman's brief relating to evidence outside of the evidentiary record is granted.

CONCLUSION

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

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge