In the Matter of:

RICHARD EVANS, **ARB CASE NOS. 07-118, 07-121**

COMPLAINANT,

v. **ALJ CASE NO. 2006-AIR-022**

MIAMI VALLEY HOSPITAL, **DATE: January 13, 2010**

and

CJ SYSTEMS AVIATION GROUP, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert A. Klinger, Esq., *Robert A. Klinger Co., LPA*, Cincinnati, Ohio

For the Respondents:
Avrum Levicoff, Esq., and Edward I. Levicoff, Esq., *Levicoff Silko & Deemer, PC*, Pittsburgh, Pennsylvania

ORDER DENYING MOTION TO STAY

Richard Evans filed a complaint with the United States Department of Labor alleging that his employers, Miami Valley Hospital (MVH) and CJ Systems Aviation Group, Inc. (CJ), violated the employee protection provisions of the Wendell H. Ford Aviation Investment and

Reform Act for the 21st Century (AIR 21 or the Act)[1] when they fired him after he raised concerns about air safety issues. After a hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that MVH and CJ violated AIR 21 and awarded Evans reinstatement, back pay, compensatory damages of $100,000.00, and attorney's fees. MVH and CJ appealed to the Administrative Review Board (ARB), which affirmed the ALJ's decision.[2]

Subsequently, CJ filed a motion with the ARB to stay the execution of the money damage award on the grounds that its appeal of the ARB's decision was pending in the United States Court of Appeals for the Sixth Circuit.[3] Evans filed an opposition to CJ's motion on September 21, 2009.

The ARB applies a four-part test to determine whether to stay its own actions. The factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the ARB grants a stay; and (4) the public interest in granting a stay.[4] After evaluating CJ's motion according to these four factors, we deny a stay in this case because CJ has not satisfied any of the four factors.

First, as Evans points out, CJ's motion did not specifically address the likelihood that it would prevail on the merits of its appeal to the Sixth Circuit. CJ simply objected to the ARB's interpretation of what constitutes protected activity under AIR 21 and disputed the ARB's interpretation of section 42121(d), which exempts from the protection of AIR 21's whistleblower provisions those employees who violate air safety standards.[5]

---

[1] 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2009).

[2] *Evans v. Miami Valley Hosp. & CJ Sys. Aviation Group, Inc.*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-022 (ARB June 30, 2009).

[3] *See* Fed. R. App. P. 18(a)(l) (stating that a petitioner must ordinarily move first before the agency for a stay pending review of its decision or order). CJ initially filed its motion to stay on September 9, 2009, but it was not recorded as received by the ARB. In response to the ARB's September 21, 2009 notice of non-receipt, CJ re-filed its motion on September 29, 2009.

[4] *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030, slip op. at 4 (ARB June 27, 2007); *see State of Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987).

[5] CJ's Motion for Stay of Execution at 2; 49 U.S.C.A. § 42121(d). AIR 21's employee protections "shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or

As the ARB stated, protected activity under AIR 21 has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be objectively reasonable.[6] Evans clearly met this standard when on August 25, 2005, he called dispatch and grounded his helicopter because he reasonably believed that an autopilot malfunction, windscreen vibration, and hydraulic leak made it unsafe to fly and then called a Federal Aviation Administration (FAA) official to report the windscreen vibration. Common sense itself dictates that a pilot's reasonable perception of these mechanical defects in an aircraft implicates air safety under FAA regulations. Therefore, we reject CJ's argument that Evans's actions "cannot conceivably constitute legally protected activity."[7]

We also reject CJ's argument that the ARB erred as a matter of law in concluding that Evans did not deliberately violate FAA regulations by flying the helicopter when it was not airworthy and by not noting defects in the logbook.[8] In support of its argument, CJ simply offers its interpretation of Evan's actions on August 24-25.[9] Substantial evidence, however, amply supports the ALJ's findings that Evans did not violate any regulation in flying the helicopter on August 24 and logging a defect on August 25.[10]

Second, CJ is not likely to be irreparably harmed absent a stay. CJ argues that requiring payment of a damages award despite the pendency of its appeal "could be severely prejudicial" because Evans might not repay the money if CJ prevails in its appeal. But, as we noted in *Tipton*, potential monetary damage does not constitute irreparable harm.[11] Further, in *Dutkiewicz v. Clean Harbors Envtl. Serv., Inc.*, we stated that recoverable monetary loss may constitute

---

such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States."

[6] *Evans*, slip op. at 13-14.

[7] *See* CJ Petition for Review to the United Court of Appeal for the Sixth Circuit at 7.

[8] *See* 14 C.F.R. §§ 91.7, 135.65.

[9] *See* CJ Petition at 8-10.

[10] *Evans*, slip op. at 12-13.

[11] *Tipton*, slip op. at 4, citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough.").

irreparable harm only where the loss threatens the very existence of a respondent's business.[12] CJ has not shown that execution of the monetary award would threaten its existence. Therefore, CJ has failed to show that it would suffer irreparable harm if we deny a stay.

Third, Evans will be harmed if the ARB stays execution of the back pay award and compensatory damages that the ALJ ordered. The purpose of a back pay award is to make the wronged employee whole, that is, to return him to the position he would have been in had his employer not retaliated against him. The purpose of monetary damages is to compensate the employee not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.[13]

Although interest is accruing on Evans's back pay award,[14] it has been more than four years since CJ violated AIR 21 by discharging Evans. During that time, CJ has made use of the wages that rightfully belonged to Evans. Further, in awarding compensatory damages, the ALJ credited Evans's testimony about the harms he suffered because of CJ's wrongful termination. To stay damages that compensate the harm Evans suffered would only further harm Evans. Therefore, we reject CJ's argument that "no irreparable harm will befall" Evans by delaying enforcement[15]

Finally, CJ makes no argument regarding a public interest that granting a stay would serve. Inasmuch as CJ has failed to satisfy any of the four factors necessary for issuing a stay pending judicial review, we **DENY** its motion for a stay.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE. BEYER
Administrative Appeals Judge

---

[12] ARB No. 97-090, ALJ No. 1995-STA-034, slip op. at 2 (ARB Sept. 23, 1997).

[13] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 10 (ARB June 29, 2006).

[14] The ALJ ordered MVHI and CJ to pay Evans $79,945.44 in back pay plus appropriate interest and $100,000.00 in compensatory damages. *Evans v. Miami Valley Hosp. & CJ Sys., Inc.*, ALJ No. 2006-AIR-022, slip op. at 54 (Aug. 31, 2007). Evans subsequently filed an enforcement action in federal district court pursuant to 49 U.S.C.A. § 42121(b)(6)(A).

[15] CJ Motion at 3.