



In the Matter of:

TIMOTHY A. CLARK,

ARB CASE NO. 08-133

COMPLAINANT,

ALJ CASE NO. 2005-AIR-027

v.

DATE: September 30, 2010

AIRBORNE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD,

Appearances:

For the Complainant:

Timothy A. Clark, pro se, Horseheads, New York

For the Respondents:

Pamela Doyle Gee, Esq., Davidson & O'Mara, P.C., Elmira, New York

Before: Luis A. Corchado, *Administrative Appeals Judge*, Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*

FINAL DECISION AND ORDER

Timothy A. Clark filed a complaint with the United States Department of Labor (DOL) alleging that his employer, Airborne, Incorporated, 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 it laid him off after he raised concerns about

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

air safety issues. A DOL Administrative Law Judge (ALJ) concluded that Airborne had not violated AIR 21 and denied Clark's claim. Clark appealed to the Administrative Review Board (ARB). We affirm.

BACKGROUND

Airborne is an on-demand, charter aircraft firm doing business as First Flight Management and based in Horseheads, New York, but with leased planes stationed in four other cities.² John Dow has been president of Airborne since its founding in 1987. Several managers report directly to him, including the Director of Maintenance, Charles J. Letizia; the Director of Administration, Kathleen Biggio; and Clark, the Director of Quality Assurance.³

Clark began work for Airborne on November 1, 1999, as an aircraft technician and was promoted to head mechanic in 2001.⁴ The next year, Clark became Assistant Director of Quality Assurance, received a 9.1 percent raise in July 2003, and on September 15, 2003, took over as director, replacing Albert Booth, who had retired.⁵

As Director of Quality Assurance, Clark had to ensure that Airborne personnel complied with its manual, applicable federal aviation regulations (FARs), manufacturers' recommendations, and Federal Aviation Administration (FAA) manuals, instructions, and inspections. He also had to maintain a current maintenance tracking system with lists of required inspections and component cycles, establish and monitor records of new parts and supplies, and generally oversee all aircraft maintenance issues.⁶

On December 30, 2003, Dow sent a state-of-the-company report to all employees, as he had done in past years.⁷ The letter noted that despite "the somewhat bleak description" of the past four years' financial status, the company had never been in a better position to succeed, although there would be an increased workload, and the benefits of an increase in charter sales would not be immediate. In fact, Dow added, the company would face a new set of challenges over the next four to six months to support the anticipated additional flying.

² Timothy A. Clark Exhibit (TAC) 87, Hearing transcript (TR) at 31.

³ Joint Exhibit (JX) 1.

⁴ TR at 22, 229-34.

⁵ TAC 39, TR at 128.

⁶ Respondent's Exhibit (RX) 2, TR at 34-36, 55-59.

⁷ RX 9, *see* TAC 53-54, 57-65.

In mid-January, the company heard that the owner of a Gulfstream IV (N614RD) that Airborne chartered out of Salt Lake City, intended to sell the plane.⁸ Biggio testified that this sale would be a financial setback that would require some layoffs of staff to reduce the workforce.⁹ Dow testified that he and his management team began discussing at their weekly meetings who would have to be laid off.¹⁰

On February 12, 2004, Clark sent a memorandum to Letizia, with a copy to Dow, warning them that an airworthiness directive was overdue on another Gulfstream IV (N885TA), a direct violation of a FAR. He noted that maintenance records had not been timely received and asked for immediate action to resolve the problem.¹¹ Clark sent a second memo to Letizia and Dow on February 18 complaining not only that certain maintenance was still overdue but also that an aircraft needed to be removed from Airborne's charter to avoid further violation of the FARs and possible fines.¹² Both memos stated that Clark would defer to Letizia's judgment about how to handle the situation. Clark received no response to these memos, but he was on vacation the week following February 18, and Letizia was aware of and addressed the issues Clark had raised.¹³

On February 26, 2004, Clark wrote to Dow and Biggio requesting a 20 percent increase in his salary. Clark stated that while he "appreciate[d] the position of the company at this point in time," he was told when he accepted the position of Director of Quality Assurance, that he would receive a pay raise "at a later date." He noted that he started the job on September 15, 2003, and it was now February 26, 2004, and no one had mentioned anything about the salary increase. Clark admittedly brought this to Dow's attention while knowing how busy he was.¹⁴

The next day, Dow talked with Biggio and then told Clark, "not only can't we consider your raise, but we are actually looking to probably lay your position off." Clark testified that Dow told him on February 27 that, while he had been in line for a raise, there was no money for raises, and his job as quality assurance director was "in

⁸ See TAC 65, TR at 306.

⁹ TR at 239-41.

¹⁰ TR at 306-07.

¹¹ TAC 17, TR at 66-69.

¹² TAC 12.

¹³ TR at 330-31.

¹⁴ RX 1.

jeopardy.”¹⁵ Biggio stated that she and Dow discussed Airborne’s finances and Clark’s raise request over the weekend. Biggio then talked with Booth about taking on some of Clark’s duties on a part-time, as needed basis. By Monday, March 1, Dow had decided to lay off Clark and three other pilots due to the company’s anticipated loss of the revenue from managing the Gulfstream. Biggio added that such layoffs usually took place at the end of the week.¹⁶

Letizia learned through Biggio at 11:00 a.m. on March 5 that Clark would be laid off later that day.¹⁷ At about 1:00 p.m., Clark placed in Letizia’s mailbox a third memo complaining that he had not received certain maintenance forms for two weeks and pointing out that several maintenance items were overdue and needed to be cleaned up. Clark stated that the Palm Beach operation was a “fly-by-night” operation with no regard for FARs and safety. He opined that maintenance records there were “pencil whipped” and not done correctly.¹⁸

At 2:20 p.m. on March 5, Biggio handed Clark a letter confirming his layoff effective that day. She wrote: “We deeply regret having to make this decision and truly appreciate your efforts on FirstFlight’s behalf, but due to conditions beyond our control, we have no other alternative.” Biggio stated that Clark was eligible for unemployment benefits and that Airborne would continue his insurance coverage until April 30, when he would be eligible for COBRA benefits. She added: “Again, we sincerely regret having to take this action and hope this situation will be short-lived.”¹⁹

The next day, Letizia called Clark and asked if he would be interested in taking on contract work for Airborne. Clark testified that he told Letizia he would give him an answer when such work became available, but Letizia heard Clark’s response as, “I can’t answer that until I talk with my lawyer.”²⁰

Clark filed a complaint with the Occupational Safety and Health Administration (OSHA) on April 26, 2004.²¹ OSHA dismissed the complaint.²² Clark requested a

¹⁵ TR at 95-96, 307.

¹⁶ TR at 239-46.

¹⁷ TR at 248-49.

¹⁸ TAC 2, TR at 82-84, 92-93.

¹⁹ TAC 1.

²⁰ TR at 136, 335.

²¹ RX 5.

²² TAC 87.

hearing, which was held on October 25-26, 2005. The ALJ determined that Airborne had not violated AIR 21, and Clark appealed. The ARB remanded the case for further proceedings.²³ On remand, the case was reassigned to ALJ Adele Odegard.²⁴ After reassignment of the case, the Office of Administrative Law Judges issued an order on April 16, 2008, permitting any party to file a motion within 30 days if such party objected to a decision being reached based on the existing record. Clark did not respond. On April 23, 2008, ALJ Odegard issued an order permitting any party wishing to submit matters for her consideration to do so within 45 days. Again, Clark did not respond. Subsequently, the ALJ concluded that Airborne had not violated AIR 21, and Clark again appealed to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.²⁵ In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.²⁶ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁷ Thus, if substantial evidence in the record supports the ALJ's findings of fact, they shall be conclusive.²⁸ The ARB reviews the ALJ's legal conclusions de novo.²⁹

²³ *Clark v. Airborne, Inc.*, ARB No. 06-082, ALJ No. 2005-027 (ARB Mar. 3, 2008).

²⁴ ALJ Teitler died during the pendency of Clark's appeal, and the case was reassigned to ALJ Odegard. See 29 C.F.R. § 18.30, which provides that if an ALJ designated to conduct the hearing becomes unavailable, the Chief Administrative Law Judge may designate another ALJ for the purpose of further hearing or other appropriate action.

²⁵ See Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

²⁶ 29 C.F.R. § 1979.110(b).

²⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

²⁸ *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 4-5 (ARB Dec. 30, 2004).

²⁹ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

DISCUSSION

AIR 21 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 States^[30]

To prevail under AIR 21, Clark must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the adverse personnel action.³¹ If Clark proves that his protected activity was a contributing factor to the termination of his employment, then he is entitled to relief unless Airborne demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.³²

Protected activity, knowledge, and adverse action are uncontested

ALJ Teitler found that Clark's three memos in February and March constituted protected activity because they reported alleged FAA violations pertaining to overdue and incomplete maintenance on a specific aircraft. ALJ Teitler also found that Airborne's management knew of these memos and that Clark's layoff was an adverse

³⁰ 49 U.S.C.A. § 42121(a).

³¹ 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-028, slip op. at 11 (ARB Nov. 30, 2006).

³² See 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

action.³³ On remand, ALJ Odegard adopted these findings.³⁴ We affirm them as supported by substantial evidence and uncontested on appeal.³⁵

Clark's protected activity did not contribute to his layoff

In his March 6, 2006 decision, ALJ Teitler determined that Clark failed to prove that his layoff was “because of” or “due to” his protected activity.³⁶ These terms could be construed as meaning “the reason” rather than a contributing factor. On appeal, the ARB held that ALJ Teitler had applied the wrong legal standard in finding that Clark did not meet his burden of proof and remanded the case for the ALJ to consider the evidence under the contributing factor standard.³⁷

On remand, ALJ Odegard applied the correct standard, noting that a contributing factor is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.”³⁸ She determined that two other events – the anticipated drop in revenue from the sale of the Gulfstream IV and Clark’s request for a 20 percent raise – negated the temporal inference of a causal connection between Clark’s protected activity in February and his layoff in March. The ALJ concluded that, other than temporal proximity,³⁹ the record contained no other evidence establishing a nexus between Clark’s safety complaints and Airborne’s layoff decision and that therefore, Clark had failed to prove that his protected activity was a contributing factor to his layoff.⁴⁰

³³ *Clark v. Airborne, Inc.*, ALJ No. 2005-AIR-027, slip op. at 7-8 (ALJ Mar. 6, 2006).

³⁴ Decision and Order on Remand (D. & O.) at 2.

³⁵ *Florek v. Eastern Air Cent., Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 14 (ARB May 21, 2009).

³⁶ *Clark*, slip op. at 8-9 (ALJ Mar. 6, 2006).

³⁷ *Clark*, ARB No. 06-082, slip op. at 2-3.

³⁸ *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-022, slip op. at 17 (ARB June 30, 2009).

³⁹ Temporal proximity is “one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

⁴⁰ D. & O. at 6-7.

Clark argues on appeal that because the nature of his job as Airborne's quality assurance director involved aircraft safety and his two February memos addressed safety issues, some contribution of his protected activity to his layoff is "an absolute certainty." Clark claims that his protected activity threatened Airborne with FAA penalties, loss of revenue, and the risk of losing its FAA certification and that is why Airborne laid him off.⁴¹

The ALJ was not persuaded by Clark's argument. Substantial evidence supports the ALJ's factual findings underlying her conclusion that Clark's memos did not contribute to his layoff. Biggio and Dow testified that after they learned in mid-January that one of the planes Airborne managed was going to be sold, it was "pretty obvious" they would have to lay off some employees including pilots to stay afloat financially and began discussing potential layoffs at weekly management meetings.⁴² Dow informed Clark on February 27 that he might be laid off, and Clark acknowledged this warning.⁴³ Biggio emphasized that Clark's request for a 20 percent raise "made the choice easy for us," since he had received a raise in July 2003 and "everybody knew that cash was extremely tight" in February 2004.⁴⁴

In the March 5, 2004 discharge letter, Biggio thanked Clark for his work, apologized for the layoff, and stated that the company hoped that the "situation would be short-lived."⁴⁵ The next day, Letizia called Clark and asked if he would be interested in taking on contract work for Airborne. Clark testified that he told Letizia he would give him an answer when such work became available, but Letizia testified that Clark's "exact words were, I can't answer that until I talk with my lawyer."⁴⁶

Apart from the relatively close timing between Clark's February memos and his layoff in early March, there is no other evidence supporting his assertion that his memos contributed to his layoff. In fact, Clark admitted that he did not mention the February memos to the FAA officials, with whom he met all day on March 1.⁴⁷ Further, Clark does not refute Letizia's testimony that he resolved the maintenance concerns that Clark

⁴¹ Complainant's Brief at 19-20.

⁴² TR at 236-40, 306.

⁴³ TR at 95-96.

⁴⁴ TR at 274-80.

⁴⁵ TAC 1.

⁴⁶ TR at 136, 335.

⁴⁷ TR at 96-97.

had raised about the Palm Beach operation.⁴⁸ Most importantly, substantial evidence supports the ALJ's finding that Airborne's "precarious financial position" and Clark's request for a 20 percent raise a few days before the layoff decision were the direct causes for laying off Clark. We affirm the ALJ's conclusion that Clark failed to establish that his protected activity contributed to his layoff.⁴⁹

Airborne would have laid off Clark absent his protected activity

Even if Clark's protected activity in issuing the two February memos⁵⁰ was a contributing factor to his layoff, the ALJ also found that Airborne's reasons for the layoffs constituted clear and convincing evidence that Airborne would have laid off Clark absent his protected activity and that therefore, Clark had failed to establish a violation of AIR 21.⁵¹

ALJ Teitler found no pretext in Airborne's stated reasons for laying off Clark and concluded that Airborne had established by clear and convincing evidence that it would have laid off Clark absent his protected activity.⁵² On appeal, the ARB rejected the ALJ's determination because he failed to specify any rationale or authority for concluding that Airborne avoided liability.⁵³ On remand, ALJ Odegard considered Airborne's rationale and concluded that Airborne established by clear and convincing evidence that it would have taken the same adverse personnel action against Clark absent his protected activity.⁵⁴

Clear and convincing evidence denotes a conclusive demonstration; it indicates "that the thing to be proved is highly probable or reasonably certain."⁵⁵ This standard of proof is more rigorous than the preponderance-of-the-evidence standard but lower than

⁴⁸ TR at 326-28.

⁴⁹ *Barker v. Ameristar Airways, Inc.* ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 7-8 (ARB Dec. 31, 2007).

⁵⁰ By his own testimony, Clark's memo dated March 5 preceded Biggio's layoff announcement by an hour and 20 minutes. TR at 91-92.

⁵¹ D. & O. at 7.

⁵² *Clark*, slip op. at 9-10 (ALJ Mar. 6, 2006).

⁵³ *Clark*, ARB No. 06-082, slip op. at 2-3.

⁵⁴ D. & O. at 7-8.

⁵⁵ *Yadav v. L-3 Commc'ns Corp.*, ARB No. 08-090, ALJ No. 2006-AIR-016, slip op. at 17 (ARB Jan. 7, 2010), citing BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

the beyond-a-reasonable-doubt criterion of criminal cases.⁵⁶ Thus, clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.

We agree with the ALJ's findings of clear and convincing evidence. First, Airborne's financial straits were well documented. In 1999, a major partner pulled out of a deal and exposed Airborne to a \$1.6 million loss.⁵⁷ In 2001, the company moved to smaller offices and received a personal infusion of cash from Dow to remain in business.⁵⁸ In 2002, when Clark was still a mechanic, Airborne laid off three employees because its biggest customer filed for bankruptcy.⁵⁹ There was credible evidence that the company had not been profitable since its founding.⁶⁰ While Dow's December 2003 letter to employees was optimistic, it warned that the company had faced and survived "incredible business and financial challenges," but its capabilities would be "strained to their limits" in the coming year.⁶¹

Prior to Clark replacing Booth as Director of Quality Assurance, the position was part-time. Because of the expected decrease in charter revenue due to the sale of the Gulfstream, Airborne also laid off three pilots. Dow and his managers had discussed the layoffs in late January prior to Clark's memos and during February. Biggio testified that Clark's request for a 20 percent raise was a "slap in the face" considering Airborne's circumstances, because the company had never given anyone such an increase, and Clark had received two previous raises. That request triggered Dow's decision to let him go, particularly after Biggio persuaded Booth to do the job on an as-needed contract basis, thereby cutting costs.

The bottom line is that, because of anticipated decreased revenues, Airborne was forced to lay off Clark and three other pilots. The choice of Clark was clearly and convincingly a direct result of his unwise and untimely request for a raise. Therefore, we affirm her decision and dismiss Clark's complaint.

⁵⁶ *Barker*, ARB No. 05-058, slip op. at 5 n.2.

⁵⁷ TR at 303.

⁵⁸ TAC 60.

⁵⁹ TAC 61.

⁶⁰ TR at 303.

⁶¹ TAC 53.

CONCLUSION

Substantial evidence in the record supports the ALJ's findings of fact. She applied the correct law to those findings on remand. Therefore, we affirm the ALJ's decision and **DISMISS** Clark's complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge