



**In the Matter of:**

**PATRICIA A. HINDSMAN,**

**ARB CASE NO. 09-023**

**COMPLAINANT,**

**ALJ CASE NO. 2008-AIR-013**

**v.**

**DATE: June 30, 2010**

**DELTA AIR LINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Patricia A. Hindsman, *pro se*, Douglasville, Georgia**

*For the Respondents:*

**Thomas J. Munger, Esq., *Munger & Stone, L.L.P.*, Atlanta, Georgia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

Patricia A. Hindsman filed a complaint with the United States Department of Labor alleging that her employer, Delta Air Lines, Inc., violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)<sup>1</sup> when it fired her after she refused to return to work because of air safety concerns.

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

Delta filed a motion for summary decision seeking dismissal of the complaint.<sup>2</sup> An Administrative Law Judge (ALJ) concluded that there were no genuine issues of material fact in Hindsman’s complaint and recommended dismissal. We affirm.

## BACKGROUND

The undisputed material facts are as follows.<sup>3</sup> Hindsman was the lead flight attendant on an October 1, 2007 Delta flight from Atlanta to St. Louis. Prior to departure, she saw a suspicious portable oxygen device in one compartment. Hindsman checked the pre-departure report and asked the gate agent and the captain about the device.<sup>4</sup> Both replied that they thought devices such as portable oxygen concentrators (POCs) were allowed on board.<sup>5</sup>

Hindsman asked the couple who owned the device what make and model it was. Neither knew and became belligerent. Hindsman then sought assistance from a lead agent who told Hindsman that Delta would not delay the flight to resolve the problem and that she would have to decide whether to take the passengers and the device or deplane them. Hindsman looked at the device, consulted her flight attendant manual, and learned that the device was a POC listed in her manual as approved for flight by the Federal Aviation Administration (FAA). Hindsman informed a flight attendant who reported to the captain that the POC was FAA-approved. He then told her to “shut the door and let’s go.” The plane left the gate eight minutes late.<sup>6</sup>

On October 3, 2007, Hindsman wrote to Delta’s flight safety director to report “a blatant disregard by certain employees at Delta Air Lines concerning the safety of the aircraft, crew and passengers” on the October 1 flight. She alleged that before she found out that the POC was flight-approved, Delta was going to dispatch the flight knowing that a potentially explosive device was on board and that she informed the captain during the

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<sup>2</sup> See 29 C.F.R. § 18.40(a) (2009).

<sup>3</sup> See Employer’s Exhibits (EX) A-D, Complainant’s Exhibits (CX) 1-16. Some of these exhibits are immaterial to the issue of protected activity. See CX 1-3, 9, 14-16.

<sup>4</sup> CX 5A, Complainant’s Cross-Motion for Summary Judgment and Opposition to Respondent’s Motion for Summary Decision.

<sup>5</sup> The Delta manual explains the difference between a liquid oxygen canister or tank (LOX) and a portable oxygen concentrator (POC). The former is flammable and thus a hazardous material prohibited on a commercial flight. The latter is an electrical device that contains no hazardous material but concentrates ambient air that the user then breathes. See FAA Advisory Bulletin No. DGAB 00-01 (Aug. 31, 2000).

<sup>6</sup> CX 5A.

flight that she could not believe that Delta would put “on time” over the safety of the passengers.<sup>7</sup>

After the incident, Hindsman sought counseling and did not return to work.<sup>8</sup> Subsequently, Delta fired Hindsman, effective April 8, 2008, for excessive absenteeism.<sup>9</sup>

Hindsman filed a complaint with the Department of Labor’s Occupational Safety and Health Administration (OSHA) alleging that Delta employees tried to dispatch the October 1, 2007 flight after she informed them of a potentially explosive device onboard because they were not going to delay the flight to check into the matter.<sup>10</sup> She also alleged that the captain violated FAA regulations by ordering the door to be closed and the jet way to be pulled before the cabin was secure.

OSHA dismissed the complaint on June 6, 2008, and Hindsman requested an ALJ hearing.<sup>11</sup> In response, Delta filed a motion for summary decision. Hindsman opposed the motion and filed a cross-motion for summary decision.<sup>12</sup> On October 28, 2008, the ALJ granted Delta’s motion, dismissed Hindsman’s complaint, and canceled the scheduled hearing.

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board (ARB).<sup>13</sup> The ARB reviews an ALJ’s recommended

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<sup>7</sup> *Id.*

<sup>8</sup> CX 6(c).

<sup>9</sup> CX 11.

<sup>10</sup> Exhibit A, Motion for Summary Decision.

<sup>11</sup> CX 12.

<sup>12</sup> In her cross-motion, Hindsman stated that she would rely on the undisputed facts in her case. Complainant’s Cross-Motion for Summary Judgment and Opposition to Respondent’s Motion for Summary Decision. Delta argues that by filing her own motion for summary decision, Hindsman agrees that no disputed material facts exist. Respondent’s Brief at 2. Because Hindsman did not appeal the denial of her motion, the ARB need not address this issue.

<sup>13</sup> *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); 29 C.F.R. § 1979.110.

decision granting summary decision de novo;<sup>14</sup> the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.<sup>15</sup>

An ALJ may issue a summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law.<sup>16</sup> Accordingly, the ARB will affirm an ALJ's recommended granting of summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law.<sup>17</sup>

## DISCUSSION

AIR 21 provides:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . 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 or any other law of the United States.<sup>[18]</sup>

To prevail, Hindsman must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) Delta knew that she engaged in the protected activity; (3) Delta took an adverse personnel action against her, and (4) the protected activity was

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<sup>14</sup> *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005).

<sup>15</sup> *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003).

<sup>16</sup> 29 C.F.R. § 18.40(d).

<sup>17</sup> *Fullington v. AVSEC Servs., L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 8 (ARB Oct. 26, 2005) (citations omitted).

<sup>18</sup> 49 U.S.C.A. § 42121(a).

a contributing factor in the adverse action.<sup>19</sup> If Hindsman proves that Delta violated AIR 21, she is entitled to relief unless Delta demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.<sup>20</sup> Hindsman's failure to prove by a preponderance of the evidence any one of the above listed elements of her complaint warrants dismissal.<sup>21</sup>

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.<sup>22</sup> The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety.<sup>23</sup>

We have reviewed the undisputed material facts in the light most favorable to Hindsman. We agree with the ALJ's conclusion that while Hindsman was aggressively carrying out her duties as lead flight attendant to ensure safety, once she discovered that the POC was FAA-permitted, she could not have had a reasonable belief that flying with it on board violated air safety regulations. Therefore, she did not engage in protected activity on the October 1 flight. Because Hindsman failed to establish a required element of her complaint, the ALJ properly dismissed her complaint as a matter of law.

On appeal, Hindsman argues that the ALJ improperly focused on whether any safety violations actually occurred on October 1 and that there "is no doubt whatsoever" that her October 3, 2007 memorandum to Delta constituted protected activity.<sup>24</sup> Her memo itself demonstrates that no violation of air safety regulations occurred on October 1. Hindsman stated that both the captain and the lead agent told her that POCs were

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<sup>19</sup> See 49 U.S.C.A. § 42121(a), (b); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining scope of coverage, procedures, and burdens of proof under AIR 21).

<sup>20</sup> See 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

<sup>21</sup> *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

<sup>22</sup> *Rooks v. Planet Airways*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 6 (ARB June 29, 2006).

<sup>23</sup> *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008); *Rougas v. Southwest Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-003, slip op. at 9 (ARB July 31, 2006).

<sup>24</sup> Complainant's Brief at 18-21.

permitted on board, and she later discovered that the passengers' POC was flight-approved. According to Hindsman's own account of the incident, she, the captain, and the flight attendant all knew that the POC was acceptable before the plane took off.

Hindsman also argues that the October 1, 2007 incident involved a safety violation because ground personnel put an on-time departure over the safety of the aircraft by attempting to dispatch the flight without investigating the issue of the POC. As the ALJ stated, mere words do not create an FAA violation when the parties' actual conduct does not violate FAA regulations.<sup>25</sup> While the lead agent did say that the flight would not be delayed, she also clearly told Hindsman to decide whether to take the passengers and the POC or deplane them. Hindsman chose to determine whether the POC was FAA-approved and did so.

Finally, Hindsman argues that the captain violated an FAA regulation, 29 C.F.R. § 121.589, because the cabin was not secure when he told the flight attendant to close the doors after being informed that the POC was FAA-approved.<sup>26</sup> The regulation does not address cabin security, however. It simply says that if an item is too big to fit into the overhead bin or below a seat after the door is closed, the plane must return to the gate to have the item stored in the cargo bay.

#### **CONCLUSION**

Hindsman did not, on undisputed facts, engage in activity protected by AIR 21. Therefore, Delta is entitled to summary decision as a matter of law. Accordingly, we **AFFIRM** the ALJ's recommended decision and **DISMISS** Hindsman's complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

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<sup>25</sup> D. & O. at 6.

<sup>26</sup> Complainant's Brief at 20.