U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

TERRY WALLUM, **ARB CASE NO. 09-081**

COMPLAINANT, **ALJ CASE NO. 2009-AIR-006**

v. **DATE: September 2, 2011**

BELL HELICOPTER TEXTRON, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Terry Wallum, ***pro se*****, Arlington, Texas**

For the Respondent:
Arthur T. Carter, Esq., Sarah R. Teachout, Esq., ***Haynes and Boone, L.L.P.,*** **Dallas, Texas.**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Administrative Appeals Judge*****; and Joanne Royce,** ***Administrative Appeals Judge***

DECISION AND ORDER OF REMAND

Terry Wallum filed a complaint under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)[1] with the United States Department of Labor's Occupational Safety and Health

---

[1] 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2010).

Administration (OSHA). Wallum alleged that "Respondent [Bell Helicopter Textron, Inc.] has continued to retaliate against him in reprisal for initiating a previous whistleblower discrimination complaint that OSHA investigated."[2] OSHA dismissed his complaint.[3] Wallum objected and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Prior to the hearing, the ALJ granted Bell's motion to dismiss Wallum's complaint. Wallum appealed to the Administrative Review Board (ARB). We vacate the dismissal and remand for further proceedings.

Preliminary Matter: Substitution of Party-Complainant

The Respondent notified the Board on September 14, 2010, that Wallum had died on August 23, 2010. The ARB issued an order for Wallum's widow to establish that his death did not extinguish his claim and that she is the proper party to pursue it. Pamela Wallum responded with a motion for substitution of party pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure. She argued that Bell was a covered employer and had violated AIR 21, and that the remedy should include all compensation lost as a result plus compensatory damages. Bell did not oppose the motion but noted that if the ARB

---

[2] *Wallum v. Bell Helicopter Textron, Inc.,* ALJ No. 2009-AIR-006 (Apr. 2, 2009)(D. & O. I).

[3] Subsequent to filing the complaint that is the subject of this appeal before the Board (ARB No.09-081) based on Wallum's suspension, Wallum filed another complaint under AIR 21 with OSHA alleging that Bell Helicopter terminated his employment because he engaged in protected activity. Before OSHA investigated the termination complaint or referred it to the Office of Administrative Law Judges for a hearing, Wallum moved the Board to consolidate this subsequent complaint with the currently pending appeal. Wallum also filed a motion for temporary reinstatement. The ARB denied both motions. *Wallum v. Bell Helicopter Textron, Inc*., ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 2 (ARB June 16, 2009).

The termination complaint was ultimately referred to the same ALJ who had adjudicated Wallum's earlier complaint. On January 26, 2010, the ALJ issued a Recommended Decision and Order Dismissing Complainant's Complaint. *Wallum v. Bell Helicopter Textron, Inc.,* 2009-AIR-020 (Jan. 26, 2010)(D. & O. II). Citing the fact that the issue presented by the termination complaint "is identical to the issue in ALJ Case No. 2009-AIR-006," the ALJ dismissed the complaint, finding that "for those same reasons [set forth in the ALJ's prior decision] Respondent is neither an air carrier nor a contractor or subcontractor of an air carrier within the meaning of AIR-21." D. & O. II at 1. Wallum did not appeal the ALJ's dismissal of the complaint based on Wallum's termination, and thus the ALJ's D. & O. II became the Secretary of Labor's final decision. *See* 29 C.F.R. § 1979.110. Regardless whether the finality of this second decision would have had any effect on our adjudication of the coverage issue presented in this appeal, Bell Helicopter has waived its opportunity to so argue both before the Board and the ALJ on remand (even if it had been inclined to do so) by its failure to raise the argument before the Board in this appeal. *Accord Florek v. Eastern Air Cent., Inc.,* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 6 (ARB May 21, 2009).

decided it is a covered employer, Bell would object to the survival of any claim purporting to seek punitive or exemplary damages.

Rules 25 and 43(a)(1) of the Federal Rules of Appellate Procedure provide that if a party dies after a notice of appeal has been filed, the decedent's personal representative may be substituted as a party. Accordingly we must decide whether Wallum's claim survives his death, and, if so, whether his wife is the proper party to pursue it.

Survival of the claim depends on whether the cause of action under the relevant statute is penal or remedial in nature. Only in the latter case is the cause of action transferable. The Sixth Circuit developed a three-factor analysis: "(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered."[4]

AIR 21 does not provide for a penalty in the form of punitive damages.[5] While the whistleblower statutes, AIR 21 included, have clear public interest purposes, they are remedial statutes that aim to protect individual whistleblowers from employer retaliation. The "make whole" remedies provided – full reinstatement with back pay and compensatory damages – benefit the harmed individual. As such, the recovery is proportionate to the harm inflicted – the employee is to be made whole as if the adverse action had not occurred. For these reasons, we find that Wallum's complaint survives his death. We grant Mrs. Wallum's motion for substitution of party and adjudicate her claim.

BACKGROUND AND PROCEEDINGS BEFORE THE ALJ

Bell Helicopter is a Textron subsidiary. It designs and manufactures vertical lift aircraft, primarily helicopters, and sells them to military and commercial customers. It also operates a helicopter training academy, runs a full-service repair-and-overhaul facility for helicopters, and provides aircraft spares and component repair services to the U.S. government and military contractors. Wallum was a gearbox assembler in Bell's transmission department before he was suspended in October 2006 and ultimately fired on May 27, 2009.

Prior to a hearing on the complaint, Bell filed a motion to dismiss on the grounds that it was not an air carrier or contractor and was therefore not a covered employer under AIR 21. Wallum responded that (1) Bell was an air carrier because OSHA ruled in 2008

---

4 *Murphy v. Household Fin. Corp.*, 560 F.2d 206, 208-09 (6th Cir.1977).

5 *Powers v. Pinnacle Airlines, Inc.,* ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 3 (ARB Oct. 31, 2005).

that Bell was a covered employer within the meaning of 49 U.S.C.A. § 40102(a)(2),[6] (2) Bell's warranty program promised repairs and spare parts, and (3) Bell's website described a repair-and-overhaul facility for its customers.

In his response, Wallum referred to Bell Helicopter Textron's internet home page and noted Bell's aircraft maintenance and support services to its customers. Wallum also argued that Bell is a contractor because its helicopters are purchased under contract by the U.S. military services, which engage in air transportation and by commercial buyers who also engage in air transportation and are thus air carriers. Wallum did not submit any evidence with his response.

The ALJ treated Bell's motion to dismiss as a request for summary decision and granted it.[7] The ALJ first reasoned that Bell was not an air carrier because it did not "undertake by any means, directly or indirectly to provide air transportation."[8] The ALJ also found that Bell was not a contractor because he did not perform "safety-sensitive functions by contract for an air carrier."[9]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.[10] The ARB reviews an ALJ's recommended decision granting summary decision de novo; the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.[11]

---

6 OSHA's findings are not binding on the ALJ. 29 C.F.R. § 24.107(b) (hearing will be conducted de novo on the record). *See Powers v. PACE,* ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 7 (ARB Order Dec. 21, 2007) (ALJ erred in relying on OSHA's findings to dismiss respondents).

7 29 C.F.R. § 18.40(a). *Wallum v. Bell Helicopter Textron, Inc.*, ALJ No. 2009-AIR-006, slip op. at 5 (ALJ Apr. 2, 2009).

8 49 U.S.C.A. 40102(a)(2). OSHA's investigator stated that Bell operates under a "PC 100" license obtained through the FAA. "In other words, Bell depends on the FAA to allow it to operate and if the FAA does not give them a permit they cannot carry out their duties." August 25, 2008 OSHA Letter.

9 49 U.S.C.A. § 42121(e).

10 *See* Secretary's Order 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110.

11 *Peters v. American Eagle Airlines, Inc.*, ARB No. 08-126, ALJ No. 2007-AIR-014, slip op. at 3 (ARB Sept. 28, 2010).

An ALJ may issue a summary decision if the pleadings, affidavits, "material obtained by discovery or otherwise, or matters officially noticed" 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.[12] 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.[13]

As the non-moving party, Wallum is required to go beyond the pleadings and "designate 'specific facts showing that there is a genuine issue for adjudication.'"[14] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[15] The determination of whether facts are material is based on the substantive law upon which each claim is based.[16]

DISCUSSION

To prevail on his complaint initially, Wallum must prove by a preponderance of the evidence that Bell is subject to AIR 21's employee protection provision, namely, that it is an air carrier or contractor or subcontractor of an air carrier.[17]

An air carrier is "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[18] Air transportation means "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft."[19]

---

[12] *Id.*; 29 C.F.R. § 18.40(a) (2010).

[13] *Hindsman v. Delta Air Lines, Inc.,* ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 3-4 (ARB June 30, 2010).

[14] *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[15] *Brady v. Direct Mail Mgmt., Inc*. ARB No. 06-044, ALJ No. 2006-SOX-016, slip op. at 4 (ARB Mar. 26, 2008).

[16] *Menefee v. Tandem Transp. Corp.,* ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 4 (ARB Apr. 30, 2010) (citations omitted).

[17] 49 U.S.C.A. § 42121(a).

[18] 49 U.S.C.A. § 40102(a)(2); *see also* 29 C.F.R. § 1979.101.

[19] 49 U.S.C.A. § 40102(a)(5).

Interstate air transportation means "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft" between states and territories "when any part of the transportation is by aircraft."[20] Contractor means "a company that performs safety sensitive functions by contract for an air carrier."[21]

On appeal, Wallum, who is pro se, repeated the arguments he made to the ALJ and annotated his pleading with reference to print-outs of information contained on Bell's internet website,[22] showing that Bell operates a helicopter training academy, runs a full-service repair and overhaul facility, and provides aircraft spares and component services to U.S. government and military contractors.[23] Based on Bell's website, Wallum contends before the ARB, as he did before the ALJ, that Bell Helicopter is an air carrier because it indirectly provides air transportation to the extent that companies that are air carriers engaging in air transportation purchase its aircraft. Wallum further argues, again based on the information contained on Bell's website, that Bell is a contractor as defined under AIR 21 because the company engages in flight instruction duties through its training academy and in aircraft maintenance duties through its repair facility. Wallum argues that, based on the evidence he presented by way of reference to Bell's website, the ALJ erroneously concluded that no genuine issue of material fact existed.[24]

In considering coverage, the ALJ found that Bell "builds helicopters, it does not transport passengers or property for compensation, and there is nothing before the Court to support a finding otherwise."[25] However, the ALJ failed to consider whether Wallum's reference to the internet evidence bearing on the issue of coverage could show that Bell was an air carrier or a contractor as defined by AIR 21 and thus a covered

---

20 49 U.S.C.A. § 40102(a)(23).

21 49 U.S.C.A. § 42121(e). Safety sensitive functions include flight instruction and aircraft maintenance. 14 C.F.R. Part 121, App. 1 (2010).

22 http://www.bellhelicopter.com/.

23 Petition for Review at 2-3. Wallum also made a number of procedural arguments that we need not address in view of our remand.

24 Bell contends that we should not consider Wallum's argument and the print-outs he attached to his pleading on appeal because he did not submit this evidence below. Respondent's Brief at 7 n.3. We reject Bell's argument because in his response to Bell's motion to dismiss before the ALJ, Wallum specifically identified Bell's website and referred to statements and material describing its air safety functions. Petition for Review at 4-5.

25 D. & O. at 4.

employer subject to AIR 21's whistleblower provisions.[26] Nor did the ALJ address Wallum's argument that Bell's website showed other air safety aspects of its business. Because the ALJ apparently failed to consider the website information when determining whether there existed issues of material fact that precluded granting summary decision in Bell's favor, we remand this case for further proceedings. On remand, the ALJ should determine whether the website information or other evidence Wallum submitted is sufficient to conclude that material issues of fact regarding Bell's coverage as an air carrier or contractor exist such that summary decision should be denied.

Mindful of our duty to remain impartial and refrain from becoming an advocate for a pro se litigant, we are equally mindful of our obligation to "construe complaints and papers filed by pro se litigants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."[27] Accordingly, in returning this case to the ALJ, we note the Board's adoption of federal precedent requiring a judge to give pro se litigants notice of the requirements for opposing a motion for summary disposition, including the right to file affidavits and other evidence in response to such motions, and that such notice be provided in a form sufficiently understandable to apprise litigants of what is required.[28] The concern that led the Board in *Hooker* and *Motarjemi* to insist upon such notice is also expressed by the Seventh Circuit in *Lewis v. Faulkner*.[29] Involving a prisoner pursuing his claim pro se, the concern the court raised is also applicable to cases involving pro se whistleblower litigants:

---

[26] *Cf. Evans v. Miami Valley Hosp.,* ARB Nos. 07-118, 07-121; ALJ No. 2006-AIR-022, slip op. at 8-9 (ARB June 30, 2009). In *Evans* the evidence established that Miami Valley Hospital (MVH) owned three helicopters and contracted with CJ Systems to furnish pilots and mechanics for MVH's air ambulance service called CareFlight. The record further supported findings that MVH's CareFlight program performed about 1,900 helicopter transports a year and was designed to provide rapid transport of skilled nurses to critically ill or injured patients and rapid transport of the patient and medical crew to a tertiary care center. The ARB held that MVH indirectly provided air carrier services, which made it an air carrier within the meaning of AIR 21.

[27] *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 4 (ARB Jan. 31, 2011) (quoting *Cummings v. USA Truck, Inc*., ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005) (citations omitted)). Such latitude is also afforded to pro se respondents. *See Dale v. Step 1 Stairworks, Inc*., ARB No. 04-003, ALJ No. 02-STA-030 (Mar. 31, 2005)

[28] *Hooker v. Washington Savannah River Co*., ARB No. 03-036, 2001-ERA-016, slip op. at 8 (ARB Aug. 26, 2004); *Motarjemi v. Metropolitan Council Metro Transit Div.,* ARB No. 08-135, 2008-NTS-002, slip op. at 4 (ARB Sept. 17, 2010). *See also Timms v. Frank*, 953 F.2d 281, 285 (7th Cir 1992) ("a short and plain statement in ordinary English" is appropriate because "the need to answer a summary judgment motion with counter-affidavits is contrary to lay intuition").

[29] 689 F.2d 100 (7th Cir. 1982).

> We think it is therefore a fair inference from the rules themselves, irrespective of any implications of the due process clause of the Fifth or Fourteenth Amendments, that a district court cannot properly act on a motion for summary judgment without giving the opposing party a reasonable opportunity to submit affidavits that contradict the affidavits submitted in support of the motion and demonstrate that there is a genuine issue of material fact which precludes granting the defendants summary judgment. . . . A reasonable opportunity presupposes notice. Mere time is not enough, if knowledge of the consequences of not making use of it is wanting.
>
> The lack of explicit notice would not be troubling if it were obvious to a layman that when his opponent files a motion for summary judgment supported by affidavits he must file his own affidavits contradicting his opponent's if he wants to preserve factual issues for trial. But this aspect of federal civil practice is contrary to lay intuition, which is that the first step in a civil litigation is the filing of a complaint, the second the filing of an answer, and the third the trial of the case. . . . It would not be realistic to impute to a prison inmate . . . an instinctual awareness that the purpose of a motion for summary judgment is to head off a full-scale trial by conducting a trial in miniature, on affidavits, so that not submitting counter affidavits is the equivalent of not presenting any evidence at trial. We credit the plaintiff with knowing that if his case was tried and he failed to present evidence he would lose. This much he should know without having read the Federal Rules of Civil Procedure. But we do not think he can be charged with the further knowledge that a failure to offer affidavits when his opponent files something called "Motion To Dismiss, Or In The Alternative, For Summary Judgment" is an equivalent default.[30]

Accordingly, we remand this case with the further instruction that prior to reconsideration of Bell's motion for summary decision the ALJ must provide Wallum with an appropriate notice containing, as the ARB required in *Motarjemi,*[31]: (1) the text of the rule governing summary decisions before ALJs (i.e., 29 C.F.R. § 18.40), and (2) a short and plain statement that factual assertions in Bell's affidavits will be taken as true unless Wallum contradicts Bell with counter affidavits or other documentary evidence.

---

30 *Lewis,* 689 F.2d at 102.

31 Slip op. at 4.

Conclusion

In response to Bell's motion for summary decision, Wallum referred the ALJ to Bell's website, which appears to contain information from which the ALJ could have concluded that issues of material fact exist with respect to the question of whether Bell is an air carrier or contractor within the meaning of AIR 21. The ALJ committed reversible error in not considering this information. Consequently, we vacate the ALJ's Decision and Order and remand this case to the ALJ for consideration of the information contained on the Bell website and such additional evidence as Wallum might present. Upon remand Wallum is to be afforded, consistent with the Board's prior rulings in *Hooker* and *Motarjemi*, appropriate notice and a reasonable opportunity to submit affidavits or other evidence in opposition to Bell's motion for summary decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge