



In the Matter of:

**PAUL LUCIA, LAWRENCE
ABERNATHY, and RUSSELL
COWLES,**

**ARB CASE NOS. 10-014
10-015
10-016**

COMPLAINANTS,

**ALJ CASE NOS. 2009-AIR-017
2009-AIR-016
2009-AIR-015**

v.

AMERICAN AIRLINES, INC.,

DATE: September 16, 2011

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

Darin M. Dalmat, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia

For the Respondent:

Donn C. Meindertsma, Esq., *Conner & Winters, LLP*, Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER OF REMAND

The Complainants, Paul Lucia, Lawrence Abernathy, and Russell Cowles, each filed complaints alleging that their employer, American Airlines, Inc., retaliated against them in violation of the whistleblower 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 2007) and its implementing regulations, 29 C.F.R. Part 1979 (2010). On October 15, 2009, a Department of

Labor Administrative Law Judge (ALJ) concluded in three separate Decisions and Orders (D. & O.'s) that all of the Complainants were precluded from proceeding under the AIR 21 whistleblower provisions because they had elected to proceed with binding arbitration under the Air Transport Labor Act. The ALJ dismissed all three complaints. For the following reasons, we reverse the ALJ's D. & O.'s and remand the cases for further proceedings consistent with this decision.

CONSOLIDATION OF ARB CASE NOS. 10-014, 10-015, AND 10-016

In view of the substantial identity of the legal issues and in the interest of judicial and administrative economy, the Complainants' appeals are hereby consolidated for the purpose of review and decision. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos., 2006-SOX-037, -108, 2007-SOX-055; slip op. at 6 (ARB Apr. 30, 2008); *Harvey v. Home Depot*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020 -036; slip op. at 8 (ARB June 2, 2006); *Agosto v. Consol. Edison Co. Inc.*, ARB Nos. 98-007, -152; ALJ Nos. 1996-ERA-002, 1997-ERA-054; slip op. at 2 (ARB July 27, 1999).

BACKGROUND

All three Complainants worked as pilots for American Airlines. D. & O.'s at 4. The Complainants were each scheduled to perform duties as pilots for American Airlines at different places and times, but at some point each of the Complainants called their respective supervisors and stated that they were sick and could not perform scheduled flight duties. *Id.* at 4. After they called in sick, American Airlines sent each of them a letter directing them to submit medical documents to substantiate their illnesses or injuries for their use of sick leave. D. & O.'s at 4. Abernathy submitted the requested medical documentation after the deadline American Airlines set. Abernathy D. & O. at 4. Lucia and Cowles failed to submit the requested medical documentation. Lucia and Cowles D. & O.'s at 4. American Airlines converted each of the Complainants' paid sick leave to unpaid sick leave for the time that they called in sick and did not provide timely medical documentation. *Id.* at 4.

The Complainants' union, the Allied Pilots Association, filed grievances on behalf of the Complainants because American Airlines changed the paid sick leave to unpaid sick leave. D. & O.'s at 4. The Complainants each filed AIR 21 complaints, through the Allied Pilots Association counsel, alleging that American Airlines retaliated against them because they called in sick rather than flying an aircraft in violation of the Federal Aviation Regulations, 14 C.F.R. Part 61.53.¹ *Id.* The Complainants each requested reimbursement of pay, attorney's fees, and other forms of relief, including compensatory damages.

¹ See 14 C.F.R. § 61.53 (2011) ("no person . . . may act as pilot in command or in any other capacity as a required pilot flight crew member while that person knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation").

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in AIR 21 cases. 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(a).

AIR 21's implementing regulations provide, "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 1979.110(b). The Board reviews the ALJ's legal conclusions de novo. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (citing *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 Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

DISCUSSION

1. AIR 21 Whistleblower Provision

AIR 21's whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsection (a):

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.

To prevail under AIR 21, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor to the alleged adverse action. *See* 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a).² If the complainant proves that the

² A complainant's failure to prove by a preponderance of the evidence any one of the above listed elements of his complaint warrants dismissal. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a).

2. ALJ Decision and Order Dismissing the Complaints

The ALJ began his analysis in each case by explaining that AIR 21 prohibits collateral attacks on the Secretary's orders in any criminal or other proceedings. *D. & O.'s* at 5. *See* 49 U.S.C.A. § 42121(b)(4)(B).

The ALJ stated that AIR 21 requires air carriers to comply with certain provisions of the Railway Labor Act (RLA), 49 U.S.C.A. § 42112. The purpose of these provisions is "to 'provide for prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions' and 'to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of interpretation or application of agreements covering rates of pay, rules, or working conditions.'" *D. & O.'s* at 6. The ALJ next stated that this provision applies to the parties in these cases. He further stated that the RLA provides for the settlement of covered disputes and that when arbitration is the selected method of settlement, arbitration awards filed in a U.S. District Court are binding on the parties regarding "the merits and facts of the controversy submitted to arbitration." *Id.* Unless the arbitration award is impeached or appealed, district courts must enter judgment on arbitration awards, and those judgments are final and conclusive on the parties. *Id.*

The ALJ stated that the Complainants each had complaints before arbitration panels that would either be granted or denied at the same time that they had complaints under AIR 21. *Id.* at 6-7. The ALJ next stated: "While the fact pattern involved in the arbitration and whistleblower complaint are the same, it is possible that the results of the arbitration panel and this Administrative Law Judge could be [o]pposite. Such findings cannot exist since the AIR 21 order cannot be collaterally attacked in any other civil action and the arbitration award is conclusive and binding on the parties when entered by the U.S. District Court." *Id.* at 7. The ALJ noted that AIR 21 does not contain a provision for removal to the district courts for decision that would permit alignment of the decisions under arbitration and AIR 21. The ALJ concluded that the Complainants must proceed under either their collective bargaining agreements or AIR 21 to ensure judicial integrity and that because they had pursued their cases under their collective bargaining agreements, they were precluded from proceeding under AIR 21. *Id.* Based on his finding that the Complainants had declared that their complaints related to wage and working conditions rather than to public safety by electing to proceed under their collective bargaining agreements, the ALJ dismissed each of the complaints.

3. Analysis

Before turning to the merits, we address American Airlines' argument that the case is moot since, after the ALJ's decision, it repaid the Complainants the sick pay that it had docked and removed disciplinary letters from the Complainants' personnel files in accordance with an

arbitration award in the Complainants' favor that was entered after the ALJ issued the D. & O.'s Letter from American Airlines' Counsel to ARB General Counsel (Sept. 27, 2010).

A. Mootness

Under Article III of the Constitution, the jurisdiction of federal courts extends only to actual cases and controversies. *Lane v. Roadway Express, Inc.*, ARB No. 03-006, ALJ No. 2002-STA-038, slip op. at 2 (ARB Feb. 27, 2004). See also *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). A federal court must dismiss disputes as moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Lane*, ARB No. 03-006, slip op. at 2-3 (citations omitted); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Although administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. *Lane*, ARB No. 03-006, slip op. at 3; see also *United States Dep't of the Navy*, ARB No. 96-185 (ARB May 15, 1997).

Mootness results "when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Lane*, ARB No. 03-006, slip op. at 3 (quoting *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) (citing *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911))). Allegations become moot when a party "has already been made whole for damage it claims to have suffered." *Id.* (quoting *Madyun v. Thompson*, 657 F.2d 868, 872 (7th Cir. 1981)). The burden of demonstrating mootness rests on the party claiming mootness. *Id.* (citing *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000))). As "long as the parties have 'a personal stake in the outcome of the lawsuit,' *Lewis*, 494 U.S. at 478, (internal quotation marks omitted), and [the Board] can afford some kind of 'meaningful relief' to a prevailing party, a case is not moot, *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)." *American Atheists v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 287 (6th Cir. 2009). The remedy does not have to satisfy a complainant's "every expectation: '[T]he availability of a partial remedy is sufficient to prevent a case from being moot.'" *Id.* (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (internal quotation marks omitted)).

Here, Abernathy, Lucia, and Cowles retain a live dispute with American Airlines over whether American Airlines retaliated against them because they engaged in protected activity. If Abernathy, Lucia, or Cowles prevail, even if American Airlines has already repaid their backpay, they may be entitled to compensatory damages under AIR 21, which could possibly include damages for pain and suffering. 49 U.S.C.A. § 42121(b)(3)(B)(iii). See *Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992). See also *Calderon*, 518 U.S. at 150. Each of the Complainants sought compensatory damages in their complaints: Abernathy in the amount of \$4,150 plus interest; Cowles in the amount of \$2,129, plus interest; and Lucia in the amount of \$1,419.64, plus interest. Because the ALJ could grant relief to the Complainants if they prevailed on the merits, the case is not moot. If the Complainants prevail on the merits, the ALJ may of course award attorney's fees on remand.

Because the retaliation claim is not moot, American Airlines' motion to dismiss is denied.

B. Concurrent Claims under AIR 21 and Collective Bargaining Agreement

AIR 21 limits collateral attacks on final orders issued by the Secretary of Labor. Section 42121(b)(4)(B) states:

LIMITATION ON COLLATERAL ATTACK. – An order of the Secretary of Labor with respect to which review would have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

A “collateral attack” is “[a]n attack on a judgment in a proceeding other than a direct appeal.” *Wall v. Kholi*, 131 S. Ct. 1278, 1284 (2011) (quoting BLACK’S LAW DICTIONARY 298 (9th ed. 2009) (emphasis omitted)). *See also Pratt v. Ventas, Inc.*, 365 F.3d 514, 519 (6th Cir. 2004) (citing *Pratt v. Ventas Inc.*, 273 B.R. 108, 114 (W.D. Ky. 2002) (citing *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992))) (“A ‘collateral attack’ is a tactic whereby a party seeks to circumvent an earlier ruling of one court by filing a subsequent action in another court.”). The ALJ here construed language of Section 42121(b)(4)(B) to preclude contractual arbitration alongside the administrative whistleblower proceeding because “it is possible that the results of the arbitration panel and this [ALJ]” could be inconsistent, and that “[s]uch findings cannot exist since the AIR 21 order cannot be collaterally attacked in any other civil action and the arbitration award is conclusive and binding on the parties when entered by the U.S. District Court.” D. & O.’s at 7. The ALJ’s construction was error. Both the contractual arbitration proceeding pending before the arbitrator *and* the retaliation proceeding pending before the Secretary can both proceed, as any decision by the arbitrator cannot be construed as a collateral attack on a final decision by the Secretary in this case.

A remedy in arbitration does not work to collaterally attack an AIR 21 remedy, to which the Complainants may be entitled, because the causes of action are different and wholly independent. In AIR 21 cases, a complainant must prove retaliation by a preponderance of evidence by establishing that: (1) he/she engaged in protected activity; (2) he/she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the adverse personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a). If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a). Subsection (A) of section 42121(b)(4) states that persons can obtain review of the Secretary of Labor’s appealable orders only in the United States Court of Appeals for the circuit where the violation occurred or the circuit where the complainant resided at the time of the violation, and subsection (B) proscribes review in any other venue. On the other hand, under Section 21 of the collective bargaining agreement at issue in this case, grievances are resolved by an arbitrator who has authority to issue final decisions on *contractual* disputes, including discipline and discharge grievances. *See* 45 U.S.C.A. § 181

(Thomson/West 2007) incorporating subchapter I of the Railway Labor Act setting out collective bargaining procedures for air carriers. A petition to impeach an arbitration award in airline cases such as this is ultimately appealable to the federal courts but the scope of review is extremely limited. Petitions may only be brought for a failure to comply with the Act's procedural requirements, that the award does not conform to the stipulations of the agreement to arbitrate, or for fraud or corruption. *See* 45 U.S.C.A. § 181 incorporating 45 U.S.C.A. § 159 (Thomson/West 2007); *see also* *Armstrong Lodge No. 762 v. Union Pacific R. Co.*, 783 F.2d 131, 134 (8th Cir. 1986); *Int'l Brotherhood of Teamsters, AFL-CIO, et al. v. United Parcel Serv.*, 447 F.3d 491, 498 (6th Cir. 2006); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 811 (1985).

As the ALJ recognized, the proceedings under the collective bargaining agreement and AIR 21 could potentially have varying outcomes, however no conflict would result because the actions have independent causes and purposes.³ In AIR 21 proceedings, complainants must prove that they engaged in protected activity that contributed to their adverse employment action; that is in this case that the circumstances of calling in sick constituted protected activity that contributed to an adverse employment action within the scope of the Act. *See, e.g., Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130; ALJ No. 2008-AIR-011, slip op. at 8 (ARB July 27, 2011). In arbitration, the Complainants in this case filed a grievance alleging a contractual dispute associated with the proper handling of sick pay. The distinctly separate nature of the statutory and contractual rights at issue here is not made less separate because they concern some or all of the same facts. In *Alexander v. Gardner*, 415 U.S. 36 (1974), the Supreme Court addressed the relationship between a grievance process for collective bargaining agreements and the enforcement of an individual's right to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, et seq. (West 2003). The plaintiff in *Alexander* filed a race discrimination complaint with the state employment commission just prior to an arbitration hearing. The state referred the Title VII complaint to the U.S. Equal Employment Opportunity Commission. The district court dismissed the Title VII complaint holding that the plaintiff's election for arbitration precluded the Title VII claim. The court of appeals affirmed. The Supreme Court reversed.

The Court held that while a union may "waive certain statutory rights related to collective activity, such as the right to strike" there "can be no prospective waiver of an employee's rights under Title VII." *Id.* at 52. The Court stated that Title VII "stands on plainly different ground" as it concerns "an individuals' right to equal employment opportunities" and "represent[s] a congressional command that each employee be free from discriminatory practices." *Id.* The Court further held that:

a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent

³ In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the Supreme Court found enforceable a collective bargaining agreement that required union members to arbitrate their federal statutory claims. No such analogous provision appears to be contained in the collective bargaining agreement at issue here.

origins and are equally available to the aggrieved employee. This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. . . . [T]he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has *no general authority to invoke public laws*

415 U.S. at 52-53 (emphasis added). *See also McDonald v. City of West Branch*, 466 U.S. 284, 288-289 (1984) (arbitration did not foreclose separate complaint brought under 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737-738 (1981) (arbitration award did not preclude a subsequent suit based on the same underlying facts alleging a violation of the minimum wage provision of the Fair Labor Standards Act). Like in *Alexander*, the Complainants' AIR 21 claims in this case involve federal statutory rights to be free from retaliation while engaged in protected activity at work. This federal statutory claim is completely independent of their contractual rights under their collective bargaining agreement. Further, any judicial relief ordered can be equitably structured such that it is offset by any arbitration award ordered for the same relief to avoid duplicative recovery. *See, e.g., Sears Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956). Therefore, as duplicative recovery can be avoided, we conclude that the Complainants may proceed with their AIR 21 actions even though they also pursued remedies in arbitration under their collective bargaining agreements.

CONCLUSION

Accordingly, we **REVERSE** the ALJ's conclusion that the Complainants were precluded from bringing their AIR 21 claims because they pursued remedies in arbitration under their collective bargaining agreements, and **REMAND** for proceedings consistent with this decision.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge