



In the Matter of:

PHILIP ZURCHER,

ARB CASE NO. 11-002

COMPLAINANT,

ALJ CASE NO. 2009-AIR-007

v.

DATE: June 27, 2012

SOUTHERN AIR, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kevin Peck, Esq., *The Peck Law Firm, PLLC*, Seattle, Washington

For the Respondent:

Steven Fogg, Esq., *Corr, Cronin, Michelson, Baumgardner & Preece, LLP*, Seattle, Washington

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

The Complainant, Philip Zurcher, filed a complaint alleging that his employer, Southern Air, Inc., retaliated against him 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 (2011).

On September 29, 2010, a Department of Labor Administrative Law Judge (ALJ) concluded in a Decision and Order (D. & O.) that Zurcher failed to show that his protected activity was a contributing factor in Southern Air's decision to terminate his employment. D. & O. at 14. The ALJ therefore dismissed Zurcher's complaint. For the following reasons, we affirm the ALJ's D. & O.

BACKGROUND¹

Zurcher worked for Southern Air as a flight engineer from August 7, 2007, to March 25, 2008, when Southern Air terminated his employment. D. & O. at 2. A flight engineer is the system expert on the aircraft. Tr. at 274. The captain and first officer rely on a flight engineer's "expertise in relation to systems on the aircraft, which include like the electrical system, the hydraulic system, the fuel system." Tr. at 274. Chief Pilot William Cline was Zurcher's supervisor. His duties as chief pilot were to manage and direct the crew members, to do the hiring and interviewing of the potential candidates for the pilot positions, and to liaison with the director of Operations and the other departments to coordinate the activities of the crew members. Tr. at 732. Thomas Gillies is Southern Air's Chief Operating Officer, which is in third position under the CEO and president. Tr. at 857-58. Timea Kovach is Southern Air's manager of crew scheduling. D. & O. at 5.

In February 2008, Zurcher "raised a variety of scheduling and safety-related complaints." *Id.* at 3. In late February, Southern Air transitioned to a new flight-scheduling computer system that caused many scheduling problems. *Id.* at 4. In March, Zurcher sent several e-mails complaining about the problems with scheduling. *Id.* Zurcher earned a reputation among the schedulers of being "very rude and disrespectful" in his phone calls to them. *Id.* at 5.

On March 9, 2008, Zurcher sent an e-mail to the entire scheduling department with the subject line, "I quit," and complained about it not being safe to fly because he did not have the ability to rest and that he had to fly sick and unrested. *Id.* at 5. He stated that he did not want to hear any excuses from the schedulers, that the schedulers needed to do their jobs, and that the schedulers were not putting forth enough effort. *Id.* In response to this e-mail, Zurcher's supervisor, Chief Pilot Cline, e-mailed Zurcher on March 10, 2008, and stated that while he knew that scheduling was frustrating, that it was not right for Zurcher to take jabs at the schedulers because the schedulers were working hard to make things as good as they possibly could. *Id.* Cline warned Zurcher to moderate his tone in dealing with scheduling. *Id.* Zurcher responded to Cline that he would watch his wording and only give constructive input in the future. *Id.* Zurcher did continue sending e-mails to the scheduling department and continued to make complaints about various issues including scheduling issues, fatigue, flying on his Guaranteed Days Off (GDOs), violation of the twelve-in-twenty-four rule, adequate sleep under the regulations and under his collective bargaining agreement, and excessively dirty planes. *Id.*

¹ When referring solely to the trial transcript (Tr.), we do so only for purposes of background information, and are not making findings of fact.

On March 13, 2008, Zurcher was in Brussels and was diagnosed with infectious diarrhea. *Id.* By March 15, 2008, when Zurcher was in New York, his condition had worsened to the point that he was put in the hospital. *Id.* at 7. On March 17, 2008, Zurcher returned home to Seattle with instructions from the doctor to refrain from working for seven days. *Id.*

On March 19, 2008, Zurcher spoke to Kovach and asked her to reschedule his GDOs so that he could minimize his use of sick days. *Id.* at 7. Under Zurcher's collective bargaining agreement, "GDOs were days on which Respondent could schedule crewmembers in return for additional pay." *Id.* at 3. GDOs were not absolutely guaranteed days off. *Id.* Kovach rescheduled Zurcher's GDOs and placed him on reserve starting March 27. *Id.* at 7. This allowed Zurcher to use only two sick days during his expected recovery. *Id.* Kovach asked Zurcher to inform scheduling if he felt well enough to return to duty at any point after March 27, and he agreed to do so. *Id.*

On March 25, 2008, Kovach asked a new scheduler, Larissa Lytwyn, to call Zurcher, to inquire as to his progress in recovering and about when he expected to return to work. *Id.* at 7; Tr. at 635-36. After Lytwyn called him and started to talk, Zurcher told her that he did not appreciate being called on his GDO, said "What part of fucking GDO do you not understand?," and hung up on her. D. & O. at 7; Tr. at 637-38; 863-64. The phone call lasted 37 seconds. D. & O. at 7. Chief Operating Officer Gillies and Tinea Kovach, Southern Air's manager of scheduling, witnessed Lytwyn's reaction immediately following the phone call – Lytwyn was nearly in tears and shaking and told Kovach and Gillies what Zurcher said to her. D. & O. at 8; Tr. at 637-39, 863-64. Gillies then called Chief Pilot Cline and found out that Zurcher was in his probationary period and had previously been reprimanded for being rude towards schedulers; after learning these things Gillies decided to terminate Zurcher's employment and told Cline to do so. D. & O. at 8; 864-65. Zurcher admitted at the hearing that he talked to someone in scheduling on March 25, 2008, and that it was possible that it was Lytwyn. D. & O. at 7; Tr. at 380. He also admitted that he could have said to some scheduler, he did not know whom, on March 25, 2008, "What part of GDO do you not understand?" D. & O. at 7; Tr. at 467.

Southern Air's employee handbook states that "[t]he use of profanity or abusive language" is "strictly prohibited and will subject the individual involved to immediate disciplinary action up to and including termination." RX 7 at 112-13. Southern Air's employee handbook lists a discipline policy that calls for a verbal warning for a first offense, a written warning placed in the personnel file for a second offense, and suspension or termination depending on the severity of the offense for a third offense. RX 7 at 113. However, the handbook also states that an "employee may be terminated without steps 1 or 2 if the offense is serious in nature." RX 7 at 113.

On March 26, 2008, Cline called Zurcher and told him that Southern Air was terminating his employment because of his abusive language towards Lytwyn and because of prior instances in which he was disrespectful to schedulers. D. & O. at 8. Zurcher agreed with Cline that he had not been professional with the schedulers and attempted to talk Cline out of firing him. *Id.* On March 28, 2008, Zurcher "wrote to Gillies asking for his termination to be reversed, and apologizing for 'any sarcastic remarks [he] made to scheduling.'" *Id.* Zurcher was aware that he

was a probationary employee and that abusive language could lead to termination. *Id.* Southern Air did not reverse Zurcher's termination.

Zurcher filed an AIR 21 complaint on April 28, 2009.

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 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. Analysis

The ALJ began by stating that it was not disputed that Zurcher was a covered employee or that Southern Air engaged in adverse action against Zurcher when it terminated his employment. D. & O. at 10. The ALJ then set forth the burden of proof. He correctly stated the issue as whether the complainant proves by a preponderance of the evidence that protected activity contributed to the adverse action. *Id.*³ The only issues in dispute before the ALJ were protected activity and causation.

Next, the ALJ found that Zurcher engaged in several protected activities. They included complaints about dirty planes, duty time violations, reporting sick, and fatigue. *Id.* at 11-13.

The ALJ found that Zurcher's complaints about Southern Air calling and scheduling him for flights on his GDOs was not protected activity because the Federal Aviation Regulations (FAR) do not have a provision for GDOs and because the provisions for GDOs (derived from the collective bargaining agreement) state that Southern Air was within its rights to contact a crew member on his GDO and schedule him to fly on GDO days. *Id.* at 11. The ALJ also found that Zurcher's complaint about a missing manual was not protected because the complaint did not address any violation or potential violation of federal law relating to air carrier safety. *Id.* at 12. Neither party disputed the ALJ's findings on the issue of protected activity and so we consider this issue waived.

After hearing testimony and reviewing the record, the ALJ concluded that although Zurcher engaged in protected activity, he failed to show that it was a contributing factor in Southern Air's decision to terminate his employment. The ALJ found that Gillies made the decision to terminate Zurcher and that the basis for the decision was Zurcher's use of profanity and rudeness toward co-workers. *Id.* at 14-15. The ALJ cited numerous facts supporting his conclusion. The use of profanity was considered serious misconduct and explicitly forbidden in the Employee Handbook. *Id.* at 15. The ALJ believed Lytwyn's account that Zurcher used

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).

³ The ALJ erred however, when he stated that the complainant must show by a preponderance of the evidence that the respondent's legitimate, nondiscriminatory reason is pretext – if the complainant proves by a preponderance of the evidence that protected activity contributed in any way to the adverse action, then the complainant has met his burden.

profanity when she called him on March 25, 2008, and that the only topic Zurcher mentioned was the GDO. *Id.* at 7. Discussions about GDO did not involve protected activity. *Id.* at 4, 11. Gillies did not know about Zurcher's protected activity. *Id.* at 14. The ALJ found that Gillies decided to terminate Zurcher's employment after 1) he witnessed the telephone exchange between Lytwyn and Zurcher, 2) he asked Cline whether Zurcher was probationary and found out that he was, and 3) he asked Cline whether Zurcher had acted this way before and found out that Zurcher had. *Id.* Although Cline was involved in the termination, it was Gillies who made the decision to terminate Zurcher's employment and who had the ultimate decision-making power. *Id.* at 14-15. Substantial evidence supports the facts the ALJ cited and these facts sufficiently support the ALJ's ultimate conclusion. The ALJ noted that there was evidence of temporal proximity between the termination and some protected activity, but believed Southern Air's reason for termination was that Zurcher crossed the line in his comments with Lytwyn. *Id.* In reality, there was even closer temporal proximity between the use of profanity on March 25 and the termination of employment the next day.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's conclusion that Zurcher failed to prove by a preponderance of the evidence that his protected activity was a contributing factor in the termination, and we **DENY** the complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge