



**In the Matter of:**

**JOHN ALEXANDER,**

**ARB CASE NO. 12-030**

**COMPLAINANT,**

**ALJ CASE NO. 2011-AIR-003**

**v.**

**DATE: September 27, 2012**

**ATLAS AIR, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**John Alexander, *pro se*, Chino Hills, California**

***For the Respondents:***

**Robert J. Ffrench, Esq., Houston, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

This case arises under the employee whistleblower protection provisions of the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007). Complainant John Alexander (Alexander or Complainant) filed a complaint alleging that Respondent Atlas Air, Inc. (Atlas Air or Respondent)<sup>1</sup> retaliated against

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<sup>1</sup> The Complainant identified Atlas Air Worldwide Holdings, Inc. (Atlas Worldwide), in addition to Atlas Air, Inc., as a Respondent in the caption of his Petition for Review. However, Alexander's complaint filed with the Department of Labor's Occupational Safety and Health Administration (OSHA) did not name Atlas Worldwide as a Respondent, nor was Atlas Worldwide

him in violation of AIR 21's whistleblower protection provisions for raising air transportation safety concerns. Alexander appeals from a Decision and Order issued by a Department of Labor Administrative Law Judge (ALJ) on December 21, 2011, granting summary decision in the Respondent's favor and dismissing Alexander's complaint. For the following reasons, the Board affirms the ALJ's Decision and Order.

## **BACKGROUND**

Commencing in August of 1999, Atlas Air employed Alexander as a pilot. In 2008, Atlas Air initiated civilian flights into Afghanistan as part of the U.S. Air Force Mobility Command's Civil Reserve Air Fleet. Alexander had concerns about the safety and legality of these flights, which he alleges he raised in his workplace and to his union representatives. In January 2010, Atlas Air terminated Alexander's employment after the Federal Aviation Administration (FAA) notified it of the results of an alcohol and drug test that Alexander had taken in December of 2009 and revocation of his pilot's license. Alexander appealed the FAA's findings and his license revocation, and the National Transportation Safety Board (NTSB) subsequently determined that Alexander's drug test was procedurally flawed, overturned the FAA's decision, and reinstated Alexander's pilot's license. As a result, Alexander returned in October of 2010 to his employment with Atlas Air, with full back pay and benefits.

Pending his appeal of the FAA's ruling, Alexander filed a timely complaint with OSHA alleging that Atlas Air had retaliated against him in violation of AIR 21's whistleblower protection provisions for complaining about the safety of its operations in Afghanistan by selecting him for FAA drug testing and for failing to timely reinstate him to his former employment upon being informed of the NTSB's decision overturning the FAA's ruling. OSHA found Alexander's whistleblower complaint without merit, and he requested a formal hearing before a Department of Labor ALJ.

After receiving the hearing request, the presiding ALJ ordered the Complainant to file a clarifying complaint identifying with particularity his alleged protected activity and the adverse action he alleged that the Respondent took in retaliation. Alexander filed a complaint clarifying three instances of alleged protected activity, i.e., two e-mails, dated July 27, 2009, and December 16, 2009, both addressed to Alexander's union representative, in which he raised safety concerns and his objections to the Respondent's night flight operations and refusal to fly (which he allegedly had raised in 2008 with his chief pilot and the Respondent's flight scheduling office). Atlas Air's retaliation, Alexander alleged, consisted of wrongfully subjecting him to drug testing, terminating from employment because of the testing results notwithstanding acknowledged errors in the testing, failing to timely reinstate his employment upon reversal of the FAA's ruling, and failing and refusing to reinstate him to his former assigned work locale. ALJ

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admitted as a party Respondent before the ALJ, nor did Atlas Worldwide otherwise enter an appearance before the ALJ. Moreover, there exists nothing in the record that is before the Board that would indicate that Atlas Worldwide is a necessary and indispensable party to these proceedings. Accordingly, Atlas Worldwide is not identified as a party Respondent before the Board.

Decision and Order on Respondent's Motion for Summary Decision (D. & O.), at 2. Following extensive discovery, Atlas Air filed a motion for summary decision, supported by multiple affidavits and deposition testimony, in which the Respondent argued that the evidence showed that Alexander did not engaged in AIR 21 whistleblower protected activity and that, even if he did, the Respondent had no knowledge of his activities and thus, there existed no causal relationship between Alexander's activities and any adverse personnel action taken against him. In response, Alexander filed a legal brief supported by numerous documents but no affidavits or countervailing evidence. Based upon the evidentiary record thus established, the presiding ALJ found that there existed no genuine issues of material fact and that the Respondent was entitled to judgment as a matter of law. Accordingly, the ALJ granted the Respondent's motion and dismissed Alexander's complaint, whereupon Alexander filed a timely appeal with the Administrative Review Board.

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

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under AIR 21 and its implementing regulations at 29 C.F.R. Part 1979 upon appeal of a decision of an Administrative Law Judge.<sup>2</sup> The Board's review of an ALJ's grant of summary decision is de novo, and governed by the same standard the ALJ uses in deciding a motion for summary decision.<sup>3</sup> That standard is found at 29 C.F.R. § 18.40(d) and, consistent with Rule 56 of the Federal Rules of Civil Procedure, permits an ALJ to enter summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Accordingly, the Board views the evidence of record in the light most favorable to the nonmoving party in determining whether there exist any genuine issues of material fact and whether the ALJ correctly applied the relevant law.<sup>4</sup>

### **DISCUSSION**

As previously noted, Complainant Alexander's claim of retaliation in violation of AIR 21's whistleblower protection provision is, in essence, that he engaged in AIR 21 protected activity by raising safety concerns addressed to his union representative (which he was informed

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<sup>2</sup> 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).

<sup>3</sup> *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999- STA-021, slip op. at 2 (ARB Nov. 30, 1999).

<sup>4</sup> *Lee v. Schneider Nat'l Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

were, in turn, forwarded to the Respondent), and objecting to night flying operations, for which he was subjected to drug testing, which resulted in his temporary termination from employment.

The basis of Alexander's claim is 49 U.S.C.A. § 42121, which provides in relevant part:

Protection of employees providing air safety information. (a) Discrimination against airline employees. – 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 (or any person acting pursuant to a request of the employee)—

(1) 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 or any other law of the United States;. . . .

As the ALJ correctly noted, to prevail on a whistleblower claim under AIR 21, the complainant must show by a preponderance of the evidence that he (or she) engaged in protected activity under Section 42121; that his employer was aware of the complainant's protected activity; that the complainant suffered unfavorable or adverse personnel action at the behest of his employer; and that the protected activity was a contributing factor in the adverse personnel action. If the complainant proves that his protected activity was a contributing factor in the adverse action taken against him, he is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action absent his protected activity.<sup>5</sup>

On appeal, Alexander challenges the ALJ's decision arguing, in essence, that notwithstanding the ALJ's findings, his concerns about the safety of the Respondent's operations, his e-mails to the union in which certain of those concerns were expressed, and his objections to the Respondent's night flying constituted AIR 21 protected activity of which the Respondent was aware, and that his protected activity was a contributing factor in the adverse employment action taken against him.

The problem with Alexander's challenge is that in addressing whether Alexander met any of the showings necessary to establish that he engaged in protected activity and that such protected activity was a contributing factor in the adverse employment action of which Alexander complained, the ALJ's decision was effectively limited to the affidavits and evidence

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<sup>5</sup> *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 4; (ARB June 15, 2012), 49 U.S.C.A. § 42121(b)(2)(B)(iii) and (iv).

Atlas Air presented in support of its motion for summary decision, given that Alexander submitted no affidavits or evidence in opposition to Atlas Air's motion. As the ALJ properly noted (and informed Alexander upon the filing of the Respondent's motion),<sup>6</sup> in responding to a motion for summary decision the nonmoving party may not rest solely upon the allegations of his complaint, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). Where the moving party presents admissible evidence in support of a motion for summary decision, as occurred in this case, the nonmoving party must submit admissible evidence to raise any genuine issue of material fact and, again, cannot rely on the allegations of his complaint alone.<sup>7</sup>

Thus, notwithstanding that the ALJ, and the ARB on appeal, have considered the evidence of record in the light most favorable to Alexander, the evidence that is of record neither supports Alexander's contention that he engaged in AIR 21 protected activity nor creates issues of material fact that would warrant denying the Respondent's motion for summary decision. Similarly, the evidence of record, again viewed in the light most favorable to Alexander, fails to support his contention that the Respondent was aware of his concerns or create a genuine issue of material fact with respect to the Respondent's awareness, assuming they constituted protected activity. Nor does the evidence of record support a finding that those concerns were a contributing factor in the employment action of which Alexander complains or create a genuine issue of material fact with respect to the matter of causation.

## CONCLUSION

As the ALJ found, the evidentiary record establishes that Alexander was concerned about the general safety of aircrews operating in Afghanistan and communicated those concerns to his union representative and that he was also concerned that Atlas Air's nighttime operations in Afghanistan violated regulations or orders. However, the evidence of record does not create a genuine issue of material fact that would permit a finding that Alexander engaged in AIR 21 protected activity by communicating his concerns to Atlas Air. Nor does the evidence of record create a genuine issue of material fact that would permit a finding that Atlas Air knew of

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<sup>6</sup> To his credit, the presiding ALJ went "the extra mile" to assure that Alexander was fully apprised of the specific requirements for opposing the motion since he was without legal representation when the Respondent filed its motion (although he subsequently retained legal counsel in responding to the motion, see D. & O. at 2). Consistent with federal practice, the ALJ informed the Complainant of his right to file a response opposing the Respondent's motion in which, among other requirements, his version of the facts had to be established by affidavit, sworn statements, or other responsive evidentiary material. D. & O. at 7.

<sup>7</sup> *Hasan v. Enercon Servs.*, ARB No. 10-061, ALJ No. 2004-ERA-022, slip op. at 5 (ARB July 28, 2011).

Alexander's concerns or that those concerns were a contributing factor in the adverse personnel action of which Alexander complains. Accordingly, the ALJ's Decision and Order granting the Respondent's motion for summary decision and dismissing Alexander's complaint is **AFFIRMED**.

**SO ORDERED.**

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

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

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**