



In the Matter of:

THOMAS E. CLEMMONS,

ARB CASE NO. 12-105

COMPLAINANT,

ALJ CASE NO. 2004-AIR-011

v.

DATE: June 17, 2014

AMERISTAR AIRWAYS, INC.,

and

AMERISTAR JET CHARTER, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Steven K. Hoffman, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia

For the Respondent:

Chris E. Howe, Esq., *Kelly, Hart & Hallman, LLP*, Fort Worth, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge, concurring.*

ORDER AWARDING ATTORNEY'S FEES AND COSTS

In a January 14, 2005 decision and order,¹ a Department of Labor Administrative Law Judge (ALJ) concluded that Ameristar Airways and Ameristar Jet Charter, Incorporated violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act)² when Ameristar fired Thomas E. Clemmons after he complained about air safety issues. Ameristar appealed to the Administrative Review Board (ARB or Board), which vacated the ALJ's recommended decision and remanded the case for further consideration.³

On remand, the ALJ again concluded that Ameristar had violated AIR 21.⁴ Ameristar appealed to the ARB, which affirmed the ALJ's decision on May 26, 2010.⁵ Ameristar appealed that decision to the United States Court of Appeals for the Fifth Circuit, which affirmed the ARB's conclusion that Ameristar had violated AIR 21, but remanded the case to address the unresolved issue of after-acquired evidence of possible wrongdoing by Clemmons and the effect, if any, on the appropriate amount of back pay to be awarded.⁶

On remand from the Fifth Circuit, the ALJ concluded that Ameristar must pay Clemmons the entire back pay award as ordered in his initial decision.⁷ Ameristar again appealed to the ARB, which affirmed the ALJ's conclusion that Ameristar failed to meet its burden of proof to show that Clemmons's wrongdoing was so severe that Ameristar would have fired him on those grounds alone.⁸

¹ *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Jan. 14, 2005).

² 49 U.S.C.A. § 42121 (Thomson/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2013).

³ *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, -096; ALJ No. 2004-AIR-011 (ARB June 29, 2007).

⁴ *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Feb. 20, 2008).

⁵ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB May 26, 2010).

⁶ *Ameristar Airways, Inc. v. Admin. Review Bd.*, 650 F.3d. 562 (5th Cir. 2011).

⁷ *Clemmons v. Ameristar Airways, Inc.*, ALJ No. 2004-AIR-011 (ALJ Aug. 20, 2012).

⁸ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 12-105, ALJ No. 2004-AIR-011 (ARB Nov. 25, 2013).

The ARB has twice previously awarded Clemmons attorney's fees and costs. On January 5, 2011, the ARB awarded Clemmons's attorney fees of \$55,328.00 and costs of \$1,252.04, totaling \$56,580.04 for legal services before the ARB.⁹ We instructed Clemmons's attorney to petition the ALJ for additional fees for services rendered on remand and for reinstatement of the ALJ's initial award of attorney's fees.¹⁰ On June 23, 2011, the ALJ ordered reinstatement of the initial fee award of \$225,293.19 for pretrial and trial work, and an additional \$4,792.50 for legal services rendered on the first remand for a total of \$230,085.69. Ameristar appealed and the ARB affirmed an award of \$228,413.19 in fees and costs on April 27, 2012.¹¹

Clemmons now seeks an award of attorney's fees and costs for litigating the Respondents' appeal before the Fifth Circuit and the subsequent remand proceeding before the ARB.

DISCUSSION

Under AIR 21, the Secretary of Labor shall, at the complainant's request, assess against a person who violated the employee whistleblower protection provision the costs of bringing the case, including attorney's fees the complainant reasonably incurred.¹² The regulations governing AIR 21 provide for an award of attorney's fees incurred by a complainant who prevails before the ALJ and before the ARB.¹³ Further, the ARB has held that an attorney's services before a United States Court of Appeals are also compensable under the Act.¹⁴

⁹ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB Jan. 5, 2011), Order Awarding Attorney's Fees and Costs, *recon. denied*, June 7, 2011.

¹⁰ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 5 (ARB June 7, 2011) Order Denying Reconsideration of Attorney's Fee Award.

¹¹ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 11-061, ALJ No. 2004-AIR-011, slip op. at 5 (ARB Apr. 27, 2012), Order Awarding Attorney's Fees and Costs.

¹² 49 U.S.C.A. § 42121(b)(3)(B)(iii).

¹³ 29 C.F.R. § 1979.109(b).

¹⁴ *Dalton v. Copart, Inc.*, ARB Nos. 04-027, -138; ALJ No. 1999-STA-046, slip op. at 2 (ARB Feb. 8, 2006).

A successful complainant is entitled to reimbursement for attorney's fees and legal expenses and costs, including expert witness fees, reasonably incurred in bringing the complaint.¹⁵ The ARB has endorsed the lodestar method to calculate attorney's fees. This requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.¹⁶

Clemmons's fee petition seeks hourly rates of \$390.00 and \$215.00 for two attorneys, \$125.00 for a law clerk, and \$110.00 for a legal assistant. The petition requests the amounts of \$54,138.75 in legal fees and \$1,973.13 in costs for defending the Fifth Circuit appeal, briefing the after-acquired evidence issue to the ARB on remand, and preparing this fee petition.

The Board has reviewed the fee petition submitted for legal services rendered by Clemmons's attorneys from August 2010 through August 2012 before the Fifth Circuit, and from October through December 2012 for services before the ARB, as well as allowable costs. We find that the legal services rendered are adequately described, appropriate, and that the number of hours is reasonable in view of the issues addressed in this case. Also, the fee petition provides evidence that the attorney and the non-attorney practitioners' hourly rates are in line with legal fees prevailing in the community.¹⁷

In any event, Ameristar does not contest the requested fees and costs. Accordingly, Ameristar is assessed \$54,138.75 in legal fees, plus \$1,973.13 in costs, for a total of \$56,111.88.¹⁸

¹⁵ *Evans v. Miami Valley Hosp.*, ARB Nos. 08-039, -043; ALJ No. 2006-AIR-022, slip op. at 3 (ARB Aug. 31, 2009).

¹⁶ *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 2 (ARB Apr. 3, 2008); *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026 (ARB Aug. 31, 2004).

¹⁷ *Clemmons*, ARB No. 11-061, slip op. at 5.

¹⁸ *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2005-AIR-009, slip op. at 12 (ARB May 21, 2009).

CONCLUSION

Pursuant to 49 U.S.C.A. § 42121(b)(3)(B)(iii), Ameristar is ordered to pay Clemmons the assessed amount of \$56,111.88 for legal fees and costs incurred in this action before the Fifth Circuit and upon remand before the ARB.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Luis A. Corchado, *Administrative Appeals Judge, concurring.*

I concur in the order because Ameristar did not contest the fee application and that is sufficient for me.

LUIS A. CORCHADO
Administrative Appeals Judge