



In the Matter of:

SHEIDA HUKMAN,

ARB CASE NO. 15-054

COMPLAINANT,

ALJ CASE NO. 2015-AIR-003

v.

DATE: JUL 13 2017

U.S. AIRWAYS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Sheida Hukman; pro se; Las Vegas, Nevada

For the Respondent:

Nonnie L. Shivers, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart, P.C.; Phoenix, Arizona

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Leonard J. Howie III; Administrative Appeals Judge

DECISION AND ORDER OF REMAND

Sheida Hukman filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that her former employer, U.S. Airways, Inc. retaliated against her in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century¹ and its implementing regulations.² On April 23, 2015, an Administrative Law Judge (ALJ) issued a Decision and Order denying Hukman's motion for leave to file an amended complaint and granting U.S. Airways' motion to dismiss Hukman's claims. We affirm the ALJ's

¹ 49 U.S.C.A. § 42121 (Thomson Reuters 2016) (AIR 21).

² 29 C.F.R. Part 1979 (2016).

denial of Hukman's motion for leave to amend, reverse the ALJ's grant of the motion to dismiss, and remand.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under AIR 21 and its implementing regulations.³ The ARB reviews an ALJ's factual determinations under the substantial evidence standard but reviews legal conclusions de novo.⁴ Recognizing that we must be impartial and refrain from advocating "for a pro se complainant, we are equally mindful of our obligation to 'construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude.'"⁵

In considering an ALJ's dismissal for failure to state a claim, we accept Hukman's factual allegations as true and draw all reasonable inferences in her favor.⁶ Likewise, when considering a summary decision motion for whether a genuine issue of material fact exists, we view the allegations and evidentiary submissions in the light most favorable to Hukman, the non-moving party.⁷

BACKGROUND

Hukman filed a complaint with OSHA that was dated (in handwriting) February 14, 2013.⁸ Hukman alleged that the complaint was filed January 21, 2013, (in her Motion to Amend Complaint) and February 14, 2013 (in her petition for review and brief to the Board).

³ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

⁴ 29 C.F.R. § 1979.110(b); *Benjamin v. Citationshares Mgmt., L.L.C.*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 2 (ARB Nov. 5, 2013) (citation omitted).

⁵ *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 12-110, ALJ No. 2009-AIR-020, slip op. at 3 (ARB Sept. 19, 2012) (quoting *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)).

⁶ *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 16-012, 15-076; ALJ Nos. 2015-SOX-013, 2015-ACA-005, slip op. at 2 (ARB Apr. 28, 2017) (citing *Tyndall v. U.S. EPA*, ARB No. 96-195, ALJ Nos. 1993-CAA-006, 1995-CAA-005; slip op. at 2 (ARB June 14, 1996)).

⁷ *Id.* (citing *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 11 (ARB Dec. 28, 2012)).

⁸ The complaint is on paper that indicates that it was printed on January 29, 2013.

Respondent alleges that the complaint was filed on February 20, 2013. A document called "Discrimination Intake Worksheet" states "sent letter in February 2012, received February 20, 2013," and is dated March 21 and 22, 2013.

Hukman alleged three activities that the ALJ addressed as protected activity. First, Hukman alleged that in 2010 and 2011, she reported that her co-workers at U.S. Airways were smuggling other employees or relatives onto flights without being on the flight manifest and that this was a safety issue because compliance with weight and balance limitations is critical to flight safety (and incorrect take-off weights are a safety hazard, if pilots are relying on faulty information). Second, Hukman alleged that on November 15, 2012, she had a dispute with a co-worker regarding boarding priority that she viewed as an assault (and an inaccurate passenger count was made at that time). Third, Hukman alleged that she reported that a nurse was practicing without a license because her license had expired and that this nurse was retaliating against Hukman and threatening her employment. Hukman also alleged in her complaint that she engaged in protected activity on December 25, 2011, when she reported that a co-worker's brother was put on a plane without a passport and became a fugitive from the law, although the ALJ did not mention this allegation in his Decision and Order. Hukman alleged that Homeland Security investigated this incident and interviewed her as a part of its investigation.

Hukman alleges that because she engaged in protected activity, U.S. Airways took adverse action against her including: 1) the November 15, 2012 dispute (the second protected activity listed above) that Hukman terms "airport rage incident," 2) harassment in the form of unpleasant work assignments, disciplinary action, hostile work environment, being underpaid, promotion denial, and unfair subjection to a medical examination, 3) retaliation in the form of a November 20, 2012 assignment to work with individuals who had harassed her, humiliated her, and ignored her complaints, 4) a December 2, 2012 coaching session, 5) December 10, 2012 disability and retaliation discrimination consisting of a U.S. Airways representative being unavailable to her, being suspended, and being asked to submit to a medical examination, and 6) February 20, 2013 disability discrimination and retaliation in which Hukman's examining physician concluded that Hukman could not perform her job, whereupon U.S. Airways removed her from service.

The ALJ disposed of Hukman's case on U.S. Airways' motion to dismiss, stating that he was considering the motion under Federal Rule of Civil Procedure 12(b)(6). The ALJ indicated that he could "not consider materials outside the pleadings on a motion to dismiss."⁹ The ALJ also stated that protected activity "must implicate safety definitively and specifically."¹⁰ The ALJ concluded that Hukman failed to state a claim for which relief could be granted.¹¹ With regard to Hukman's report that her co-workers were smuggling other employees onto flights, the

⁹ D. & O. at 11 (citing *Sullivan v. Pinnacle Airlines, Inc.*, 2010 WL 3119787, at *3-4 (D. Minn. May 28, 2010)).

¹⁰ *Id.* at 14 (citing *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-003, slip op. at 9 (ARB June 20, 2004)).

¹¹ *Id.* at 14-15.

ALJ stated that it was not protected activity because Hukman did not cite “an FAA regulation or standard that mandates such a limitation.”¹² With regard to the airport rage incident, the ALJ stated that there was no protected activity because Hukman failed to show that she was security screening personnel, as was required for protection under the airport rage statute.¹³ Finally, the ALJ stated that Hukman failed to show that she engaged in protected activity when she reported a nurse practicing with an expired nursing license because this activity was not related to air carrier safety and because she did not cite an FAA regulation regarding the reported situation.¹⁴ With regard to all of the alleged protected acts, the ALJ found that Hukman did not meet her burden to prove that any of the acts presented “an objectively reasonable perceived violation of federal laws touching on or relating to air carrier safety.”¹⁵

DISCUSSION

As an initial matter, Hukman appears to have challenged the ALJ’s denial of her request to amend her complaint, stating that her amendments were reasonable and within the scope of the original complaint.¹⁶ We are “very reluctant to interfere with an ALJ’s control over procedural and discovery issues.”¹⁷ The ALJ did not allow amendment because Hukman’s submission was vague, difficult to understand, and because the deadline for discovery had passed, putting Respondent at a disadvantage in attempting to seek clarification and defend its case. We hold that the ALJ did not abuse his discretion in denying Hukman leave to amend her complaint.

We now turn to the heart of Hukman’s appeal, the issue of protected activity. To prevail on her whistleblower complaint, Hukman must prove by a preponderance of the evidence that (1) she engaged in activity protected by AIR 21, (2) that an unfavorable personnel action was taken against her, and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against her.¹⁸ For activity to be protected under 49 U.S.C.A. § 42121(a)(1), a complainant must provide information relating to a violation of a Federal Aviation

¹² *Id.* at 15.

¹³ *Id.*

¹⁴ *Id.* at 16.

¹⁵ *Id.*

¹⁶ Hukman Reply Brief at 4 and 19.

¹⁷ *Mawhinney v. Transp. Workers Union*, ARB No. 15-013, ALJ No. 2012-AIR-014, slip op. at 3 n.11 (ARB Feb. 3, 2015) (citing *Pragasam v. Wellness Home Healthcare Inc.*, ARB No. 11-017, ALJ No. 2010-LCA-018, slip op. at 6 (ARB Apr. 12, 2011)); see also *Hasan v. Commw. Edison Co.*, ARB No. 99-097, ALJ No. 1999-ERA-017, slip op. at 2 (ARB Sept. 16, 1999) (“The Board should be particularly chary of interfering with an ALJ’s control over the time, place and course of a hearing, but rather should support the sound exercise of an ALJ’s broad discretion in this area.”).

¹⁸ 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

Administration (FAA) order, regulation, or standard or of any federal law relating to air carrier safety.¹⁹ A complainant must have a reasonable belief in a violation and this reasonable belief has both objective and subjective components.²⁰ To prove subjective belief, a complainant must prove that she actually “believed that the conduct [s]he complained of constituted a violation of relevant law.”²¹ To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account “the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”²²

Again, Hukman alleges that she engaged in protected activity when she reported 1) that coworkers were smuggling co-workers onto planes without listing them on the manifest (and that this was unsafe because of weight and balance issues), 2) that co-workers engaged in an altercation with her (which she calls the airport rage incident), and 3) that a nurse was practicing with an expired license. The ALJ concluded that none of these activities were protected. We affirm the ALJ’s conclusions that the airport rage incident and the report about a nurse’s expired license do not state claims with respect to protected activity—neither of these reports purports to involve violations of FAA orders, regulations, or standards, or any federal laws relating to air carrier safety. However, we reverse the ALJ’s conclusion that Hukman did not state a claim with respect to the first allegation of protected activity.

The ALJ considered Hukman’s pleadings including her complaint, the case activity worksheet dated February 20, 2013, Hukman’s Request for Hearing, her pre-hearing statement dated January 26, 2015, her March 9, 2015 Response to the Order to Show Cause, and her April 13, 2015 sur-reply brief in opposition to the Defendant’s Motion to Dismiss.²³ While Hukman

¹⁹ 49 U.S.C.A. § 42121(a).

²⁰ *Benjamin*, ARB No. 12-029, slip op. at 5-6 (“an employee engages in protected activity any time he or she provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, so long as the employee’s belief of a violation is subjectively and objectively reasonable.”) (citing 49 U.S.C.A. § 42121(a)(1); *Blount v. Nw. Airlines*, ARB No. 09-120, ALJ No. 2007-AIR-009, slip op. at 6 (ARB Oct. 24, 2011)).

²¹ *Sylvester v. Parexel Int’l, L.L.C.*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011) (citation omitted); see also *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, ALJ No. 2013-AIR-016, slip op. at 5 (ARB Jan. 21, 2016) (citations omitted) (for a subjective belief, the complainant must have a “good faith” belief).

²² *Id.* at 15 (quoting *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

²³ D. & O. at 2-8. While the ALJ stated that Hukman’s sur-reply brief was beyond the scope of what is allowed in reply briefs, repetitive, and did not bolster her arguments or clarify issues, he did indicate that he considered it. He did not consider a second pre-hearing submission Hukman filed (dated March 12, 2015), which included 62 exhibits because she had already filed a prehearing statement and because the deadline for prehearing statements had passed. D. & O. at 8 n.3.

submitted materials outside of her pleadings including materials attached to her request for hearing and her response to the Order to Show Cause, it does not appear that the ALJ considered these submissions because he stated that he ruled on Respondent's motion as a motion to dismiss under the Federal Rules of Civil Procedure Rule 12(b)(6) failure to state a claim. However, the ALJ should have considered the motion as a motion for summary decision and therefore considered Hukman's submissions attached to her pleadings, as we will explain more fully below. In any event, analyzing the issue as the ALJ framed it, we determine that Hukman's pleadings survive a 12(b)(6) motion to dismiss. For the same reasons, her pleadings and additional submissions also survive a motion for summary decision.

Hukman's pleadings state a cause of action with respect to protected activity. Specifically, she sufficiently alleged at least one instance of protected activity²⁴ when she alleged that flights were taking off with incorrect numbers and types of people listed on the manifest because the incorrect information touched on the safety of the flights and because weight on a flight could reasonably be perceived to be a safety issue to one such as Hukman, a customer service representative. Additionally, in her first pre-hearing statement dated January 26, 2015, Hukman listed the regulations at 14 C.F.R. Part 121 as supportive of weight and balance limitations on flights. In reviewing these regulations, it appears that several of them do relate to weight and balance limitations.²⁵ While Hukman cited these regulations, she was not required to do so to state a claim.²⁶

Further, because Hukman made submissions outside of her pleadings, the motion should have been analyzed as a motion for summary decision. Federal Rule of Civil Procedure (d) states that if, on a motion for failure to state a claim upon which relief can be granted under 12(b)(6), "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Thus, the ALJ should have considered the submissions outside the pleadings in determining whether to dismiss Hukman's claim.²⁷ We do so now.

Although the ALJ listed the date as March 12, 2013, the document has a stamped date received of March 12, 2015.

²⁴ Hukman alleged another instance of protected activity that could be protected that the ALJ did not address. Hukman did not appeal the ALJ's failure to discuss her allegation in this appeal however. She alleged that a passenger was allowed on a flight without any identification which posed a security risk. If this case goes to a hearing, it may be that this instance would be more fully fleshed out at trial.

²⁵ See 14 C.F.R. §§ 121.693, 121.175, 121.191, 121.189, 121.195, 121.197, 121.665.

²⁶ "A complainant need not cite to a specific violation, [but] allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)." *Simpson v. United Parcel Svc.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008).

²⁷ Additionally, the ALJ stated that Hukman's claim must be dismissed because her alleged protected acts did not implicate safety definitively and specifically. D. & O. at 14. However, AIR 21

Summary decision is appropriate if the 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.²⁸ If the pleadings and documents submitted by the parties demonstrate the existence of a genuine issue of material fact, then summary decision cannot be granted.²⁹ Denying summary decision simply indicates that an evidentiary hearing would be required to resolve some factual questions relating to the issue at hand and is not an assessment on the merits of any particular claim or defense. Analyzing whether Hukman's pleadings and submissions show that there is a genuine issue of material fact such that Hukman's claims survive a motion for summary decision on the issue of protected activity, we look to her submissions. Hukman's submissions include many reports that Hukman made that her coworkers were smuggling people onto aircraft, not counting jumpseaters, and counting adults as children.³⁰ In at least one of these reports, she specifically mentioned weight restrictions (see July 25, 2012 report).³¹ Hukman also included an accident description of an airplane crash in which the airplane was destroyed on January 8, 2003, and which was caused in part by issues having to do with the weight and balance of the plane.³² Another of Hukman's submissions, a CBS news article, stated that the FAA fined American Eagle \$2.5 million for failing to calculate baggage weight on dozens of flights despite warnings, and that "[i]ncorrect takeoff weights are considered a safety hazard if pilots rely on faulty information when determining the right speed for takeoff and landing."³³ We conclude that Hukman's pleadings and submissions show that there is a genuine issue of material fact as to whether Hukman held a reasonable belief that the circumstances she was reporting as weight and balance issues were violations of the FAA regulations. Therefore, her claim cannot be dismissed on this basis and we reverse.

Finally, there is also an issue as to the timeliness of at least one of Hukman's claims. According to the AIR 21 regulations, "[t]he date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or by other means, the complaint is filed upon receipt."³⁴ It is not clear when

does not require protected activity to relate "definitively and specifically" to safety. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-009, slip op. at 8 (ARB Feb. 13, 2015).

²⁸ 29 C.F.R. § 18.72 (2016).

²⁹ *Gallas*, ARB Nos. 16-012, 15-076, slip op at 6.

³⁰ See Hukman's submissions attached to her Response to Order to Show Cause (stamped date March 9, 2015). See also Hukman's submissions attached to her request for hearing (reports dated August 13, November 24, 2010; March 2, 2012; and July 25, 2012).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 29 C.F.R. § 1979.103(d).

Hukman filed her complaint and a fact-finding is necessary to establish the filing date for purposes of the record. The complaint itself lists the date it was created as "February" and in handwriting "14, 13." It is printed on paper with a date at the bottom of "1/29/13." The "Discrimination Intake Worksheet," attached to the Assistant Secretary's Findings, has a date of "03/21/13" in handwriting at the top, and states, also in handwriting, "sent letter in February 2012 Rec 02/20/2013." The Assistant Secretary's Findings state that Hukman filed her complaint on February 20, 2013, but does not indicate how it came to this conclusion. As we are already remanding to the ALJ, and because a disputed event occurred on November 15, 2012, that would be a timely adverse action if the complaint was filed (as Hukman claims) on February 14, 2013, but would be untimely if filed (as US Airways claims) on February 20, 2013, we hold that on remand, the ALJ must make an explanatory determination regarding Hukman's filing date.

CONCLUSION

Accordingly, we **REVERSE** the ALJ's Decision and Order dismissing Hukman's complaint, and **REMAND** for proceedings consistent with this decision. We **AFFIRM** the ALJ's denial of leave to amend and determinations regarding Hukman's alleged protected activities relating to airport rage and an expired nursing license.

SO ORDERED.



PAUL M. IGASAKI
Chief Administrative Appeals Judge



JOANNE ROYCE
Administrative Appeals Judge



LEONARD J. HOWIE III
Administrative Appeals Judge