



**In the Matter of:**

**JEFFREY BONDURANT**

**ARB CASE NO. 2017-0050**

**COMPLAINANT,**

**ALJ CASE NO. 2013-AIR-00007**

**v.**

**DATE: September 2, 2020**

**SOUTHWEST AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Jane S. Leger, Esq.; *The Ferguson Law Firm, LLC*; Beaumont, Texas**

***For the Respondent:***

**Douglas W. Hall, Esq.; *JONES DAY*; Washington, District of Columbia  
and Natalia Delaune, Esq.; *JONES DAY*; Dallas, Texas**

**BEFORE: James A. Haynes, Thomas H. Burrell, and Heather C.  
Leslie, *Administrative Appeals Judges***

## **DECISION AND ORDER**

Complainant Jeffrey Bondurant filed a complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century<sup>1</sup> with the Department of Labor's Occupational Safety and Health Administration (OSHA). In the complaint he alleged that Respondent Southwest Airlines (Southwest) terminated his employment in response to complaints he made

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<sup>1</sup> 49 U.S.C. § 42121 (2000) (AIR 21). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2019).

regarding violations of regulations and standards of the Federal Aviation Administration (FAA). A Department of Labor Administrative Law Judge (ALJ) determined that Bondurant failed to establish that he had engaged in protected activity under the Act, and thus granted Respondent's motion for summary decision. Bondurant petitioned for review, challenging the ALJ's dismissal of the claim. The Administrative Review Board (the Board) concluded that there was a genuine issue of material fact precluding summary decision, and thus vacated the ALJ's decision and remanded for further proceedings. Following a hearing on the merits, the ALJ found on remand that Complainant did not establish that he had engaged in protected activity or, in the alternative, that any protected activity contributed to the decision to terminate his employment. Thus, the ALJ dismissed the complaint. For the following reasons, we summarily affirm the ALJ's decision.

### **BACKGROUND**

Southwest employed Bondurant for 23 years; for the last six he worked as a Cargo Customer Service Manager. In 2010, Bondurant was issued a disciplinary letter regarding inappropriate behavior at a company/customer golf outing. He was placed on a Last Chance Agreement in lieu of termination as a result of repeating his unprofessional and inappropriate conduct at another company-sponsored golf outing in November 2011.

Thereafter, Bondurant reported a number of incidents when he alleged that the airline transported hazardous material without properly notifying the FAA. In late February or early March 2012, the Senior Manager of Cargo for the western half of the United States, Elden Allen, learned that Bondurant was not often present at his home station in Houston, that he managed operations by phone, and "did not foster a team atmosphere." Allen began reviewing Bondurant's travel records and found that Bondurant had been violating company policy by using "must ride" passes to commute. Allen met with Bondurant in Houston regarding performance issues on March 29, 2012.

Bondurant alleges he informed the airline that hazardous cargo issues had not been reported to the FAA, but did not identify specific incidents or claims. Management denies these allegations. Subsequently, Allen sent Bondurant an email asking him to account for his whereabouts on a number of days from January to March 2012. Bondurant responded with an explanation that management felt was incomplete and inconsistent. Following a discussion between Allen, Mark Grigg, Vice President for Cargo and Charters, and Matt Buckley, Senior Director for Cargo and Charters, management concluded that Bondurant had violated his Last

Chance Agreement, and decided to terminate his employment. Bondurant filed a complaint under Air 21 on May 18, 2012.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions in cases arising under AIR 21 and to issue agency decisions in these matters.<sup>2</sup> The Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.<sup>3</sup>

### DISCUSSION

AIR 21's employee protection provisions generally prohibit covered employers and individuals from retaliating against an employee because he or she provides information or assists in an investigation related to the categories listed in the whistleblower provisions of the statute.<sup>4</sup> To prevail on an AIR 21 whistleblower complaint, the employee must prove by a preponderance of the evidence that he or she engaged in activity the statute protects, that the employee suffered an adverse employment action, and that the protected activity was a contributing factor in the employer's decision to take the adverse action.<sup>5</sup> The failure to prove any of these elements requires dismissal of a whistleblower complaint. Because the ALJ found that Complainant did not establish by a preponderance of the evidence that any protected activity contributed to the termination decision we limit our discussion to this finding.

Substantial evidence in the record supports the ALJ finding that Complainant failed to prove that his alleged protected conduct was a contributing

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<sup>2</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

<sup>3</sup> 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter, LLC, d/b/a Jetsuite Air*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

<sup>4</sup> See 49 U.S.C. § 42121(a).

<sup>5</sup> See 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. §1979.109(a); *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. at 5 (ARB Jan. 16, 2020).

factor in management's decision.<sup>6</sup> The ALJ found that the management personnel with whom Bondurant interacted regarding the alleged protected activity did not have any involvement with the decision to terminate Bondurant's employment. Rather, the decision was made by other employees who directly and credibly testified that their decision was not related to the transportation of hazardous materials, and that this topic never came up during their discussions. The ALJ found that this testimony was credible, probative, and supported by the other evidence of record.

In addition, the ALJ rejected Bondurant's contention that temporal proximity established causation or provided circumstantial evidence of causation. In context with other facts, the timing between the Last Chance Agreement, the complaint by another employee about the state of the office in Houston, and the investigation into Bondurant's work is as close in time to Complainant's firing as any alleged protected activity. Moreover, the ALJ found that Complainant failed to establish that Respondent's proffered reason for the termination was pretext. Management had obviously been unhappy with Bondurant's performance since at least the issuance of the Last Chance Agreement. The ALJ noted that management continued to give Bondurant the benefit of the doubt even during the investigation of complaints about the operation of the Houston office. It was not until the end of the investigation and the presentation of the findings to upper management that Respondent made the decision to terminate Bondurant's employment.

Having reviewed the evidentiary record as a whole and upon consideration of the parties' briefs on appeal, we conclude that substantial evidence supports the ALJ's findings of fact that Complainant failed to prove that his alleged protected activity was a contributing factor in the termination of his employment.

#### CONCLUSION

Since Complainant has failed to demonstrate that the ALJ committed a reversible error, we **AFFIRM** the ALJ's dismissal of the complaint.

**SO ORDERED.**

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<sup>6</sup> As we affirm the ALJ's findings of fact that Complainant failed to prove that his alleged protected activity was a contributing factor in the termination of his employment, we decline to reach the ALJ's protected activity analysis.