



In the Matter of:

JOHN SWINT,

ARB CASE NO. 2017-0051

COMPLAINANT,

ALJ CASE NOS. 2014-AIR-00021
2016-AIR-00011

v.

DATE: April 27, 2020

NETJETS AVIATION, INC.,

RESPONDENT.

Appearances:

For the Complainant:

John Swint; *pro se*; Fremont, Ohio

For the Respondent:

Joseph C. Devine, Esq. and Ryan A. Cates, Esq.; *Baker & Hostetler, LLP*; Columbus, Ohio

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge* and James A. Haynes and James D. McGinley, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ John Swint filed two complaints with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, NetJets Aviation, Inc., retaliated against him for engaging in activities protected by AIR 21.

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

An Administrative Law Judge (ALJ) issued decisions on November 29, 2016, and June 7, 2017, dismissing Swint's claims and, ultimately, both complaints. We summarily affirm the ALJ's decisions.

BACKGROUND

NetJets is a private aircraft company employing approximately 2,800 pilots who fly its planes worldwide. Swint is a pilot employed by NetJets. He filed complaints with OSHA on August 24, 2013, and October 22, 2014, alleging that NetJets violated AIR 21 by retaliating against him on numerous occasions. Following its investigation of the complaints, OSHA concluded that NetJets violated AIR 21 by issuing Swint a one-day suspension after he sent an inappropriate cell phone message to a co-worker.

Swint requested a hearing before an ALJ and identified fourteen specific actions taken by NetJets that he contended were in retaliation for engaging in activities protected by AIR 21. He alleged that NetJets (1) pressured him to ignore a bird strike on an aircraft; (2) demoted him from Pilot-in-Command to Second-in-Command; (3) required him to attend a training session; (4) recorded his attendance at that session; (5) pressured him to fly with out-of-date aeronautical charts; (6) denied him a promotion to Challenger 350 Check Airman; (7) denied him a promotion to Challenger 350 Instructor Pilot; (8) pressured him to improperly record maintenance discrepancies; (9) denied him a promotion to Challenger 350 Initial Operating Experience Captain; (10) required him to attend a Pilot Review Board meeting to explain an inappropriate email message; (11) denied him a promotion to Challenger 650 Instructor Pilot; (12) denied him a promotion to Challenger 650 Check Airman; (13) issued the aforementioned one-day suspension; and (14) denied him a promotion to Challenger 650 Initial Operating Experience (IOE) Captain. *See* Decision and Order Granting in Part, and Denying in Part, Respondent's Motion for Summary Decision (First D. & O.) at 5-6.

The ALJ consolidated the complaints and, prior to a hearing, NetJets filed a Motion for Summary Decision seeking dismissal of all fourteen claims. On November 29, 2016, the ALJ issued the First D. & O. dismissing the first twelve of the above-listed claims. The ALJ conducted a hearing on the two remaining claims (i.e., the one-day suspension and denial of a promotion to Challenger 650 Initial Operating Experience Captain) and on June 7, 2017, issued a Decision & Order (Second D. & O.) in which he held that Swint failed to prove a causal connection

between these last two actions and any AIR 21-protected activities. Swint now appeals both the First D. & O. and Second D. & O. to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to review ALJ decisions in cases arising under AIR 21 and its implementing regulations at 29 C.F.R. Part 1979. 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); 29 C.F.R. §1979.110(a). The Board engages in de novo review of an ALJ's decision granting summary decision. *See* 5 U.S.C. § 557(b) (1976); *Griffo v. Book Dog Books, LLC*, ARB No. 2018-0029, ALJ No. 2016-SOX-00041 (ARB May 2, 2019). Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2019). On summary decision, the ALJ, in the first instance and the Board on appeal must review the record in the light most favorable to the nonmoving party. *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015- SOX-00025, slip op. at 3 (ARB July 5, 2018).

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

DISCUSSION

AIR 21's employee protection provisions generally prohibit covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the AIR 21 whistleblower statute.² To prevail on an AIR 21 whistleblower complaint, the

² The employee protection provisions of AIR 21 state the following:

- (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

employee must prove by a preponderance of the evidence that he was an employee who engaged in activity the statute protects, that an employer subject to the act subjected him to an adverse employment action, and that the protected activity was a contributing factor in the employer's decision to take the adverse action. *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 4 (ARB Jan. 16, 2020).

The parties stipulated that Swint engaged in numerous activities protected by AIR 21 between 2013 and 2014. Second D. & O. at 4. But the record supports the ALJ's conclusion that none of the employment actions described in Swint's complaints were taken in retaliation for AIR 21-protected activity. With respect to Claims 1, 3, and 4, Swint failed to present sufficient evidence to support his assertion that he was pressured to ignore maintenance discrepancies following a bird strike or that being directed to attend training on post-flight inspection procedures constituted an adverse employment action. First D. & O. at 6-8. The demotion alleged in Claim 2

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;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding 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;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

was a temporary scheduling matter, and the allegations of promotion denials and pressure to fly presented in Claims 6, 7, and 8 were untimely. *Id.* at 9.³

With respect to Claim 9, Swint learned on March 3, 2014, that “the ‘interview process had begun’ for the Challenger 350 [IOE Captain] position” and he “assumed [he] would not be selected because [he] had not been invited to an interview.” Declaration of John Swint (Declaration) at 2. We have reviewed the record and conclude that Swint has failed to create a genuine issue of fact about whether NetJets did not interview him for the position because he engaged in AIR 21-protected activity. According to Swint, he submitted the Declaration in response to NetJets’ Motion for Summary Decision to “address the contributing factors that connect [his] protected activities to the adverse actions.” Declaration at 1. But the Declaration does not contain any information supporting his assertion that his exclusion from an interview for the Initial Operating Experience Captain position was retaliatory. And in his brief before the Board, Swint does not describe how his exclusion was retaliatory, but instead asserts that “in the interest of judicial economy [he] should be granted relief because it will serve the ends of justice.” Complainant’s Brief at 10.

The record indicates that Swint was not forced to fly with out-of-date aeronautical charts as alleged in Claim 5, but instead, was provided access to his requested charts, and he flew without encountering problems. *Id.* at 9. Further, the record also supports the ALJ’s conclusion that Swint failed to meet his burden on summary decision to establish that NetJets’ failure to promote him to either the Challenger 650 Instructor Pilot or Check Airman positions, as alleged in Claims 11 and 12, could have been related to his protected activity. *Id.* at 11-12.

The record also substantiates the ALJ’s conclusion that NetJets did not violate AIR 21 by requiring Swint to attend a Pilot Review Board meeting (Claim 10) and issuing him a one-day suspension (Claim 13). On February 18, 2014, Swint sent an email from his company-provided cell phone that read in the subject line, “Fcuk y.” NetJets suspended him for a day because he “misrepresented the facts when given the opportunity to explain” the message. Second D. & O. at 16. Swint admitted that the message was inappropriate and a violation of Company rules, and

³ The ALJ erred by concluding that Claims 8 and 9 were not properly before him because they were not investigated by OSHA. First D. & O. at 9-11. Although this conclusion is incorrect (*see* 29 C.F.R. § 1979.107(b)), the ALJ’s error is harmless because Claims 8 and 9 fail on alternative grounds.

the ALJ concluded that the investigation and suspension were the result of the email message and not any activity protected by AIR 21. *Id.*

Finally, NetJets did not subject Swint to an adverse employment action as alleged in Claim 14 by excluding him from the list of candidates for the position of Challenger 650 Initial Operating Experience Captain. The ALJ acknowledged the effect Swint's suspension could have had on his exclusion from consideration but found that NetJets provided Swint with an opportunity to interview for the promotion, and he refused. *Id.* at 14-15. Swint therefore cannot claim that a failure to promote him to the position was retaliatory.

On appeal, Swint alleges that the ALJ failed to consider all of his exhibits, affidavits and other evidence supporting his claims, and that the ALJ erred as a matter of law by denying his complaints. *See* Complainant's Brief at 6-38. We have reviewed these assertions in light of the record and none compel us to reverse the ALJ's rulings.

CONCLUSION

The ALJ properly concluded that NetJets was entitled to summary decision as a matter of law on Claims 1 through 12 in this matter. Swint failed to prove by a preponderance of the evidence that any AIR 21-protected activity he engaged in was a contributing factor in the NetJets' decision to take the actions described in Claims 13 and 14. Accordingly, we **AFFIRM** the ALJ's First D. & O. and Second D. & O. and **DISMISS** Swint's complaints.

SO ORDERED.