U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

ROBERT STEVEN MAWHINNEY, **ARB CASE NO. 2020-0067**

COMPLAINANT, **ALJ CASE NO. 2012-AIR-00017**

v. **DATE: February 4, 2021**

AMERICAN AIRLINES, INC.,

RESPONDENT.

Appearances:

For the Complainant:
Robert Steven Mawhinney, *pro se,* LaJolla, California

For the Respondent:
Robert Jon Hendricks, Esq.; *Morgan, Lewis & Bockius LLP*, San Francisco, California; John D. Hayashi, Esq.; *Morgan, Lewis & Bockius LLP*, Costa Mesa, California

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] Complainant Robert Steven Mawhinney filed a complaint alleging that

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[1] 49 U.S.C. § 42121 (2000). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2018).

Respondent American Airlines violated AIR 21 by terminating his employment in retaliation for reporting safety concerns. On September 3, 2020, an Administrative Law Judge (ALJ) issued an Amended Order Granting Motion for Summary Decision (Order), dismissing the complaint. Mawhinney filed a Petition for Review of the Order.

The Administrative Review Board has jurisdiction to review the Order.[2] The Board reviews an ALJ's grant of summary decision de novo.[3] Under the regulation governing the entry of summary decision, judgment must be entered if the pleadings, affidavits, material obtained in discovery, 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.[4] In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party, and the ALJ may not weigh the evidence or determine the truth of the matter.[5]

Upon review of the Order and the parties' arguments, we conclude that the ALJ's decision is in accordance with the law and is well-reasoned. We also conclude that Mawhinney's briefs on appeal fail to satisfy his burden to show that the ALJ erred in granting summary decision. As a result, we **ADOPT** and **ATTACH** the Order and, accordingly, we **DISMISS** Mawhinney's complaint.[6]

SO ORDERED.

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[2] 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. 13186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

[3] *Vinayagam v. Cronous Sols., Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029, slip op. at 2 (ARB Feb. 14, 2017).

[4] 29 C.F.R. § 18.72.

[5] *See, e.g., Vudhamari v. Advent Glob. Sols.*, ARB No. 2019-0061, ALJ No. 2018-LCA-00022, slip op. at 3 (ARB July 30, 2020).

[6] Our ruling is limited to the specific facts of this case.

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 September 2020

CASE NO: 2012-AIR-00017

In the Matter of:

ROBERT STEVEN MAWHINNEY,
Complainant,

v.

AA AIRLINES,
Respondent.

AMENDED ORDER GRANTING MOTION for SUMMARY DECISION[1]

This matter arises under the employee-protection provisions of the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121 et seq. and its implementing regulations found at 29 C.F.R. § 1979. Now pending after a long and complex procedural history are a renewed motion to dismiss and a motion for summary decision filed by Respondent AA Airlines ("Respondent" or "AA"). As AA's motion to dismiss is supported by evidence outside the four corners of the complaint, it is deemed to be a motion for summary decision. For the reasons set forth below, it will be granted.

Procedural History[2]

First DOL AIR21 Complaint

Respondent terminated the employment of Complainant Robert Steven Mawhinney ("Complainant" or "Mr. Mawhinney") in 2001. Mr. Mawhinney filed a complaint under AIR21, which was ultimately settled. Under the approved settlement, the parties agreed that Mr. Mawhinney would be restored to his employment with AA, and that all future employment disputes were required to be addressed in arbitration.

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[1] This Amended Decision and Order is issued to include the appeal rights that were omitted from the initial Decision and Order. There are no substantive changes.

[2] This procedural history address only the captioned case. Another case, *Mawhinney v. Transport Workers Union Local 591*, ALJ No. 2012-AIR-00014, was for a time consolidated with this one, but was eventually severed and has been concluded.

Current DOL AIR21 Complaint

AA discharged Complainant again in 2011. Mr. Mawhinney filed a complaint under AIR21 with the Occupational Safety and Health Administration, alleging that his termination was in retaliation for reporting safety concerns. After an OSHA investigation, the complaint was dismissed on a finding that the termination did not violate AIR21. Mr. Mawhinney objected to the findings, and requested a hearing before an administrative law judge. The complaint was forwarded to the Office of Administrative Law Judges, where it was assigned to me on June 27, 2012.

On July 19, 2012, I stayed this matter after being informed that Respondent had filed a petition in bankruptcy. After the bankruptcy proceedings concluded, I lifted the stay by order dated February 3, 2014.

On May 14, 2014, I granted Respondent's motion to dismiss and to compel arbitration on the grounds that, under the terms of the settlement of a previous AIR21 complaint by Complainant, all employment-related matters between Mr. Mawhinney and AA were required to be arbitrated. Mr. Mawhinney appealed that order to the Administrative Review Board.

On January 21, 2016, the Administrative Review Board vacated my order dismissing this complaint and compelling arbitration, and remanded for further proceedings, because the settlement agreement in the earlier case could not be enforced by an administrative law judge, but by a U.S. District Court. The parties engaged in further litigation before me, but, as discussed below (*see infra*, discussion under "second arbitration"), the district court issued an order compelling Mr. Mawhinney to engage in arbitration specifically regarding his AIR21 complaint. After the court did so, this matter was placed in abeyance pending the outcome of the arbitration proceedings.

First Arbitration

Mr. Mawhinney invoked the arbitration clause of his earlier settlement agreement to address his allegations of retaliation and wrongful termination. After a six-day hearing (held during the time period that the ARB was considering my dismissal order), the arbitrator ruled in favor of AA on all issues ("First Arbitration"). The arbitrator found, with respect to the charge of retaliation, that Mr. Mawhinney "was not terminated in retaliation for engaging in any protected activity." Complainant thereafter filed a petition to vacate the arbitration award in district court, and AA filed a cross-petition to confirm it. The district court granted AA's cross-petition. The Ninth Circuit affirmed the district court's order. *Mawhinney v. AA Airlines, Inc.*, 692 Fed. App'x 937 (July 3, 2017).

Second Arbitration

After the ARB vacated my order dismissing the complaint and compelling arbitration, AA initiated arbitration proceedings and served a demand on Mr. Mawhinney to participate. When Mr. Mawhinney did not respond, AA filed an action in district court, requesting an order compelling Mr. Mawhinney to arbitrate the claims raised in this complaint. The district court did so, and the arbitrator was asked to address (1) whether the doctrines of res judicata and/or collateral estoppel bar Respondent's pending employment retaliation claim under 49 U.S.C. § 42121; (2) whether AA violated 49 U.S.C. § 42121 with regard to Mr. Mawhinney's employment; and (3) whether AA breached the terms of the 2002 settlement agreement. AA filed a motion for summary decision on the first issue. On December 20, 2017, the arbitrator granted summary decision, finding that the doctrines of res judicata and/or collateral estoppel apply to prevent Mr. Mawhinney "from pursuing any further relief based upon claims of employment retaliation and/or wrongful termination." AA filed a petition to confirm the arbitrator's award, which the district court granted. On June 5, 2020, the Ninth Circuit affirmed the district court's confirmation of the arbitration award. *Mawhinney v. AA Airlines,* 807 Fed. App'x 720 (9th Cir. June 5, 2020).[3]

Discussion

Under Rule 18.72(a) of the OALJ procedural rules, the administrative law judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." There is no dispute over the procedural facts discussed above; they are a matter of public record and, as Complainant did not dispute them, I accept them as true. 29 C.F.R. § The issue is whether, as a matter of law, the arbitral and federal-court decisions preclude Mr. Mawhinney from pursuing his AIR21 claim in the Department of Labor. I find and conclude that they do.

Pursuant to the terms of the settlement agreement reached in the 2001 AIR21 complaint, Mr. Mawhinney invoked arbitration on the issues of retaliation and wrongful termination. After a six-day hearing at which a number of witnesses testified, and in which a number of exhibits were introduced, the arbitrator determined that Mr. Mawhinney "was not terminated in retaliation for engaging in any protected activity," and issued an award in favor of AA. The district court confirmed the arbitration award, the Ninth Circuit affirmed, and the Supreme Court denied *certiorari*.

After the ARB vacated and remanded my earlier dismissal of this matter, AA sought and obtained an order compelling Mr. Mawhinney to arbitrate certain matters, including whether the first arbitration award precluded him from

[3] AA asserts that Mr. Mawhinney's motion for reconsideration, rehearing, and hearing en banc was denied on June 26, 2020; however, the order denying that motion was issued in the Ninth Circuit case addressing the first arbitration, which was closed in 2018. It appears that Mr. Mawhinney's similar motion in the second arbitration is still pending before the Ninth Circuit. Given the basis for the panel's affirmance of the district court judgment, I deem it unnecessary to wait for the Court to address Complainant's motion, or for the results of any further appeal.

pursuing his AIR21 complaint on the grounds of res judicata or collateral estoppel. The arbitrator granted AA's motion for summary decision on that issue, and the district court confirmed the award. Mr. Mawhinney appealed the district court's order to the Ninth Circuit, which affirmed the district court.

Under the Federal Arbitration Act, a judgment confirming an arbitration award "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13(c). Thus, the judgments entered on the two arbitrations are final judgments of a district court, and it is established that (1) Mr. Mawhinney was not terminated in retaliation for engaging in protected activity, and (2) Mr. Mawhinney may not further pursue his AIR21 claim. The latter final judgment is sufficient to grant AA's motion. And because the judgments confirming the arbitration awards have the same force and effect as a judgment in a civil action, I need not determine whether the arbitrator's findings alone form a basis for granting summary decision based on res judicata; the arbitration proceedings resulted in the equivalent of a judicial judgment in favor of Respondent, which has been affirmed, and Complainant has no further recourse.

Because I am granting summary decision based on the preclusive effect of the arbitration awards, as confirmed by the judgments of the district court that were themselves affirmed by the Court of Appeals, I need not and do not address Respondent's argument regarding collateral estoppel. And the grant of summary decision makes moot Respondent's motion for summary decision on the merits.

ORDER

For the foregoing reasons, IT IS ORDERED:

1. The motion of Respondent for dismissal is deemed to be a motion for summary decision is GRANTED;
2. Respondent's motion for summary decision on the merits is DENIED as moot; and
3. This matter is DISMISSED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/ksw
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which

the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).