U.S. Department of Labor

Occupational Safety and Health Administration
Chicago Regional Office
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January 19, 2024

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Re: Chicago Department of Aviation and Southwest Airlines/Conway/5-1260-19-012

Dear Counselors,

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mike Conway (Complainant) against the Chicago Department of Aviation on October 16, 2018, under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (AIR-21) and later amended to include Southwest Airlines as a Respondent on July 13, 2023.

Procedural History and Parties

On October 16, 2018, Complainant filed a complaint of retaliation with OSHA, alleging that the Chicago Department of Aviation notified him of a five-day suspension that day, due to his protected activities. Complainant continued to update OSHA in a timely manner on subsequent adverse actions as soon as he became aware of them, including removal of his airfield duties and access, lost wages, reduced overtime, denial of promotion, fifteen-day suspension, and formal reprimand. He further alleges the foregoing actions were due to his attempts to safely follow FAA airfield reporting requirements. Specifically, Complainant alleged he was subjected to these adverse actions for raising objections to senior leaders regarding an executive who wanted to call a wet airfield dry at the request of the air carrier Southwest Airlines, for reporting his concern to his managers and manager for Southwest Airlines, and for eventually reporting these violations to and participating in the following investigations with the City of Chicago Office of Investigator General (OIG), the Federal Aviation Administration (FAA), and to OSHA in the filing of this complaint. The complaint was filed within ninety days of this first adverse action and is timely filed.

On May 17, 2023, OSHA provided a "Due Process Letter" to the Chicago Department of Aviation, explaining that based on the investigation conducted to date, OSHA believed there was reasonable cause to believe that the Chicago Department of Aviation violated AIR-21 and that the preliminary promotion of Complainant to the position of Assistant Chief Airport Operations Supervisor was warranted. OSHA also provided the Chicago Department of Aviation a copy of the available evidence gathered to date, redacted as appropriate to protect any confidential witness information. The Chicago Department of Aviation was invited to submit a response within 10 business days and to meet with OSHA. On May 25, 2023, OSHA agreed to extend the request until June 20, 2023, and on June 15, 2023, OSHA agreed to a further extension until close of business on June 22, 2023. On June 22, 2023, the Chicago Department of Aviation provided a response to the Due Process Letter, with additional documentation.

On August 22, 2023, Southwest Airlines received notice of the amended complaint, and Southwest provided a response on September 11, 2023, claiming that the late filing of the complaint was prejudicial, that the amended complaint was time-barred and could not be tolled, and that the evidence does not support that Southwest engaged in any discriminatory conduct against Complainant, in violation of AIR-21. OSHA's investigation concludes that this amended complaint reasonably falls within the scope of the original complaint. Within his original statement, Complainant indicated that the pressure on him to violate FAA regulations came from Southwest Airlines, and he provided a fact pattern supporting that his disclosure to Southwest Airlines had caused a Southwest Manager to reach out to his senior leaders, and that he was given a reprimand as a result of his statements to Southwest Airlines on March 20, 2018[1]. While the March 20, 2018, reprimand was not timely filed, Complainant's original complaint alleged other adverse actions (five-day suspension and removal of his red badge access) that were timely filed. Complainant's amended complaint alleges Southwest, along with the Chicago Department of Aviation, was responsible for these two adverse actions, and OSHA regards the amended complaint against Southwest Airlines with respect to these two adverse actions as timely filed. However, the evidence does not support that Southwest Airlines pressured the Chicago Department of Aviation to take these two adverse actions against Complainant. As such OSHA does not find reasonable cause to believe that Southwest Airlines violated AIR-21 and dismisses the complaint against Southwest Airlines.

Following an investigation by a duly-authorized investigator, and having considered the response to OSHA's May 17, 2023, Due Process Letter, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region V, finds that there is reasonable cause to believe that the Chicago Department of Aviation violated AIR-21.

Background

On December 15, 1995, Complainant was hired by the Chicago Department of Aviation, hereinafter "Respondent," as an Airport Operations Supervisor I, and was subsequently promoted to an Airport Operations Supervisor II during 1999, performing duties at Respondent's Midway Airport. As part of his on-field duties, Complainant was responsible for updating runway conditions, which included continual runway examinations, and was also responsible for reporting episodic changes to runway

[1] This reprimand was untimely, as Complainant filed this complaint more than 90 days later, on October 16, 2018.

driving conditions, so that pilots would be safely appraised of actual runway conditions as they were observed, through NOTAM reports.

Accurate reporting of runway conditions is especially important at Respondent's Midway airport because of its shorter runway which means that additional surface moisture, snow, or ice, can impact flight landings. A NOTAM that lists the runway as wet due to visible moisture, in combination with other factors, can cause air carriers to cancel flights or impose more weight restrictions for the flights.

On February 17, 2018, Complainant received a call from Deputy Commissioner Costas Simos who stated that Southwest was "looking to cancel the NOTAM for the runways 555". Complainant responded that they had looked at it and it was still wet. Simos told Complainant it was Simos' call, and he wanted to call it dry. Twenty-one minutes later, Complainant called back to Simos and again informed him that "31 center is still wet. I mean, my brakes are coming on and 22 left is wet from the approach all the way to 31 left with deicer." Complainant attempted to explain to Simos why the airfield was still wet according to the FAA's definition that included visible dampness on more than twenty five percent of the runway. Simos, who was not present at the airport, told him it was all dry. Complainant responded "we're looking at it and they're not, so, but I'll do it. I'll do whatever you tell me to do." Complainant then did as instructed, but also reported the specifics of the violation to his supervisor Joe Ambrosia, Airport Manager Terry Thomas, and Thomas' supervisor, General Manager David Kaufman.

Several days later, Kaufman and Simos had a discussion with Complainant where Complainant still insisted that Simos' directive had violated FAA regulations. During this conversation, Simos made a comment that this could impact his own job and pension.

On March 16, 2018, Complainant suspected that his peers or Southwest's own pilots were calling in the runway as Clear/Dry when it was Clear/Wet; therefore, he contacted the air carrier's manager, Southwest Assistant Chief Pilot Colin Scantlebury about it. During this discussion, Complainant informed Scantlebury of these concerns. Southwest Airlines informed Respondent of the disclosure, and on March 19, 2018, Simos sent a directive that "Nobody is authorized to call the SWA chief pilot's office without my approval." The next day, Complainant received a verbal reprimand for his protected disclosure.

On September 4, 2018, Complainant was involved in a minor runway infraction. The following day, Complainant received a discussion by his managers, retraining, and his supervisor later prepared and signed a document indicating a verbal counseling had occurred on September 5, 2018.

Beginning on or around September 17, 2018, and for the next week, Complainant filed complaints with the City of Chicago Inspector General, Respondent's Human Resources, and the Federal Aviation Administration (FAA) regarding Respondent's directive that he does not downgrade runway conditions when required.

On October 7, 2018, Respondent began to consider issuing Complainant further discipline for the infraction. On October 16, 2018, Complainant was informed of his pending five-day suspension, which was to be served ending December 2, 2018.

On November 2, 2018, Respondent manager O'Donnell was made aware Complainant had filed a retaliation complaint with OSHA, and on November 30, 2018, Respondent acknowledged receipt of Complainant's retaliation complaint filed under AIR-21.

On December 4, 2018, as required, Complainant downgraded runway conditions after observing wet runway conditions for more than 25% of all the runways. As Complainant had just come on shift, he continued to drive the runways in order to update his assessment of all airfield surfaces.

On December 11, 2018, Complainant met with O'Donnell, Kaufman, and his supervisor. In this meeting, O'Donnell informed Complainant she was removing his red badge. Based on witness testimony and documentary evidence, O'Donnell did not give him any further directives.

On January 19, 2019, Complainant called Kaufman on a recorded line because he wanted clarification of his job duties, some of which he could not do without a red badge, and he did not want to get in trouble for either violating red badge access rules or for not doing his job. Complainant said that he had a basic yellow stripe, and the only thing he could do, without an escort, was to drive surface roads. Kaufman indicated this was correct. Complainant also asked Kaufman to send him an email directive. Kaufman refused but added that he would allow Complainant to drive without an escort on other areas a yellow stripe was not authorized, as his duties required it.

On January 28, 2019, and again on February 1, 2019, to perform his duties, Complainant joined an escort caravan maintained by one of his supervisors. As an employee with a yellow stripe, he had permission to join the caravan onto a movement area. Later that same day, O'Donnell asked Complainant why he had joined these two convoys across a movement area. In response, Complainant indicated he had done so at this supervisor's direction. O'Donnell then confirmed with Complainant's supervisor that the supervisor had directed Complainant to join the convoy.

On July 23, 2019, Respondent gave Complainant a fifteen-day suspension, for his protected activity on December 4, 2018, in correctly reporting downgraded runway conditions, and for having joined the two convoys on January 28, 2019, and February 1, 2019.

On August 2, 2019, Thomas sent an email to Human Resources and senior managers stating, "Given my understanding that [Complainant] has undertaken legal action[2] against the City, I'm submitting the PIP form as a draft for your evaluation." Within the two-page draft Performance Improvement Plan (PIP), the only corrective actions listed were for Complainant to improve his receptivity to guidance and, improve his practices regarding field condition reporting. The draft PIP was never given to Complainant.

In September of 2019, Complainant realized that Respondent had not properly increased his pay for his yearly step increase and immediately contacted Respondent. Complainant was not paid the updated rate until four months later.

On August 4, 2020, Complainant was interviewed for the position of Assistant Chief Airport Operations Supervisor, and all three panelists elected to put Complainant in the hire category.

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[2] At this point the only legal action Complainant had undertaken was his AIR-21 complaint.

Respondent would promote the two most senior employees who were placed in the selected candidate list, which meant Complainant would have been promoted. However, Thomas changed his mind during the final hiring meeting, and as the hiring official decided to take Complainant out of the hire category. Thomas claimed that he came to this decision because Complainant spent too much time discussing his protected complaints with management.

On April 18, 2023, Complainant was issued a notice of reprimand for escorting two police officers on January 16, 2023, so they could serve a federal subpoena regarding a related court case, 20-CV-004966 (N.D. Ill).

Respondent's Response

Respondent alleges that it is not an air carrier under AIR-21 and that Complainant is not a covered employee. Respondent contends that Complainant was given a five-day suspension for a runway incursion, by policy. Respondent asserts that Complainant's report that all Midway runways were wet was not based in fact because he was observed not performing his runway observation duties by observing the entire length of all runways. Respondent asserts that it investigated and determined he had not observed all parts of the runways, and as a result it removed him from field duties and restricted his airport badge to yellow, meaning that he would require an escort to be on the airfield. Respondent asserts that as a result of his badge restriction, Complainant was not eligible for overtime. Respondent claims that Complainant was not simply told that he had a yellow badge access, but instead, Complainant was directly told he could not drive on the more secure red badge area without direct authority from the deputy director. Respondent claims Complainant was underpaid due to a clerical error and that once Human Resources realized the error, Respondent paid Complainant the amount due. Respondent claims that Complainant was not promoted to Assistant Chief of Airport Operations because an independent panel did not rate him as the best qualified.

In response to the Due Process Letter, Respondent amended its earlier position to claim that Complainant did not engage in any protected activity until his disclosure to the FAA on or around September 20, 2018. Respondent also claimed that no violations of AIR-21[3] had occurred on February 17, 2018, going into detail on why it believes Costas meant well and acted reasonably[4] when he directed Complainant to call the runways dry on that date. Respondent asserted that Complainant's five-day suspension was not disparately assessed because separate managers at different airports had previously been given five-day suspensions to other employees for runway incursions. Respondent indicated that it had decided to make this policy shift[5] prior to Complainant's incursion but after an earlier incursion[6] that year where Midway management had

[3] Respondent denies a violation of AIR 21 occurred on February 17, 2018, but Complaint does not allege any retaliatory act was taken against him on that date. However, as discussed herein, on February 17th, Complainant engaged in protected activity under AIR 21.

[4] The record is clear that Costas did violate FAA regulations, rules, or procedures in his actions, that Complainant immediately pushed back on this directive, and then when forced into the violation, informed his two managers Kaufman and Thomas.

[5] Respondent did not provide any written records supporting its claim that a policy decision had been made and communicated to now assess 5-day suspensions for all runway infractions, prior to Complainant's infraction.

[6] Respondent also denies that this was an incursion, a position inconsistent with its response to the FAA.

not given discipline. In addition, Respondent provided a five-day suspension as evidence for an employee that was suspended after Complainant. However, this discipline was given four and a half months after the employee's infraction, well after notification of this claim of retaliation, and after Respondent's claim to have changed the incursion policy. Respondent also contends that Complainant was not doubly disciplined for his incursion because it removed the dated verbal counseling from what it considers a draft copy[7], for the final suspension notice. In response to the Due Process Letter, Respondent claimed that Complainant's action (which OSHA has found to be protected) in downgrading runway reported conditions[8] through Notice to Air Men (NOTAM) reports for pilots of runway conditions on December 4, 2018, was the only reason his red badge access was removed.

Coverage

Respondent is a covered employer under AIR-21 as a contractor of an air carrier. Complainant worked for Respondent at Midway Airport as an Airport Operations Supervisor II and was an applicant for a position as an Assistant Chief, Airport Operations Supervisor, and is a covered employee of a covered company.

Protected Activity

The evidence supports that Complainant engaged in protected activity on February 17, 2018, when he objected to a directive to not report degraded runway conditions, and when he then informed his leadership team of this event. Complainant engaged in protected activity on February 20, 2018, and on March 16, 2018, when he discussed these same concerns first with Simos and Kaufman, and then with Southwest Airlines. Complainant also engaged in protected activity from September 17 through September 27, 2018, when he filed complaints related to safety and misreporting of runway conditions with Respondent and the FAA. Complainant also engaged in protected activity when he filed a complaint of retaliation with OSHA on October 19, 2018, and again on December 4, 2018, when Complainant reported an all-field downgrade to wet conditions.

Knowledge

Respondent had knowledge of these protected actions at the time it made the decision to issue Complainant discipline, based on documentary evidence, Respondent's own assertions, and witness testimony, including interviews with these same managers who made the decision to issue discipline.

Adverse Actions

Complainant timely filed a Complaint alleging he was subject to several adverse actions, beginning on September 5, 2018, when he was verbally counseled. On October 16, 2018, Complainant was informed of a pending five-day unpaid suspension. On December 11, 2018, Complainant's airfield

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[7] However, the version Respondent claims was a draft was presented to Complainant, signed by the supervisor for Complainant and the supervisor herself, dated November 7, 2018, and noted the effective date of the suspension.

[8] Respondent was unable to provide evidence that Complainant had not safely and correctly downgraded a runway during a weather event where he had observed more than the FAA required length of runway.

access privileges and red badge were removed. With limited access privileges, Complainant was no longer eligible for the overtime hours he had been receiving. For the calendar 2019-year, Respondent did not give Complainant his mandatory pay raise. On July 23, 2019, Complainant was suspended for fifteen days. On August 24, 2020, Complainant was not selected for promotion. While Complainant also received a letter of reprimand on April 18, 2023, in connection with escorting two police officers to serve a subpoena, the investigation did not establish that this reprimand was issued in retaliation for his protected activities in 2018 and 2019, or in violation of AIR-21.

Nexus

There is evidence supporting a nexus between Complainant's protected activity and Respondent's adverse actions against him. Within two weeks of Complainant's disclosures to Respondent and the FAA, Respondent issued Complainant a five-day suspension for a minor incursion he had already received lesser discipline for on September 5, 2018. Within 12 days after formally acknowledging receipt of Complainant's whistleblower complaint under AIR-21, Complainant was removed from his airfield position. Respondent admits it removed Complainant's access and suspended him for 15 days because of his actions on December 4, 2018. Despite Respondent's assertion that these actions were not protected, they were protected under AIR-21. As confirmed by FAA officials, witness testimony and documentary evidence, Complainant had followed correct FAA procedures to safely downgrade airfield conditions, contrary to Respondent's wishes.

There is evidence Respondent held animosity towards Complainant because of his protected activities. Simos informed Complainant that his concerns could impact Simos' job and pension and issued a new directive to not contact the Chief Pilot's office without his approval. Respondent removed Complainant's red badge when Complainant followed FAA guidance and Respondent's policy by downgrading airfield conditions per his assessment of the runways. Respondent unjustifiably claims that Complainant's protected activity on December 4, 2018, was an "egregious violation." Thomas noted that he was submitting the PIP as Complainant had "undertaken legal action" under AIR-21. Evidence indicates that Thomas noted Complainant spent too much time discussing his protected activities during his August 4, 2020, interview as part of the reason Complainant was removed from the "selected candidate list." Evidence indicates that had Costos not replaced the original hiring official with Thomas, the responsible manager who was required to formally answer to the FAA about Complainant's disclosures, Complainant would have been placed on the "selected candidate list" and thus promoted.

There is evidence Complainant was disparately treated. Respondent issued Complainant a five-day suspension for the lowest level of incursion. However, the same management team reviewed a more severe incursion earlier that the same year and did not recommend any discipline. According to Complainant's disciplinary record, Respondent had already counseled Complainant verbally about the incident on September 5, 2018, and Respondent's practice was not to issue a suspension if it had already issued verbal discipline. Additionally, and contrary to Respondent's policies, Complainant's pay was withheld when Respondent created a Performance Improvement Plan that Complainant was never given.

Pretext

O'Donnell claimed that she removed Complainant's badge due to his behavior of December 4, 2018, in downgrading airfield conditions from clear/dry to clear/wet during a weather event, stating she had to do this "because he was so unsafe, it was beyond any comprehension that I had." However, the evidence established that Respondent's decision makers have not permanently removed any other red badge, even though they have documented more severe instances of unsafe behavior.

Respondent gave Complainant specific instructions on a recorded line on what he was allowed to do without a red badge. Complainant followed his managers' instructions and his assignments in order to perform his job duties. After Respondent reviewed this recorded directive, and confirmed with his supervisors their instructions, Respondent still disciplined Complainant for following his manager's instructions. Respondent did not discipline Complainant's manager or supervisor for their responsibility in having Complainant join the convoys, or for failing to communicate or document what Respondent now argues was a separate and overriding directive to Complainant.[9]

Respondent also withheld Complainant's yearly step and rate increase for 2019 without a valid reason, and continued to do so for four months after Respondent was first notified of the error.

Respondent then reversed its preliminary decision to place Complainant in a select pool of candidates which would have resulted in his promotion, as confirmed through notes from Wendy Alexander, and the official memorandum Thomas prepared, because Complainant spent too much time talking about his past protected activity with management[10]. Therefore, Respondent's reason for the denied promotion appears pretextual.

On the basis of the findings above, OSHA finds reasonable cause to believe that Respondent violated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (AIR-21) in that Complainant's protected activities were a contributing factor in the adverse actions taken against Complainant and Respondent has not shown by clear and convincing evidence that it would have taken the same action absent the protected activities. Therefore, OSHA finds that there is reasonable cause to believe that Respondent violated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (AIR-21), and issues the following Order:

ORDER

1. Upon receipt of this Secretary's Findings and order, Respondent shall preliminarily promote Complainant to the position of Assistant Chief Airport Operations Supervisor.
2. Respondent will pay Complainant $103,093.02 in lost wages and overtime. This amount includes a loss of $270 per week in overtime during December of 2018, and beginning in January of 2019, a weekly loss of $482.73 until his ability to earn overtime was reinstated

[9] Supporting the lack of an actual directive, Respondent's January 7, 2019, response to the claim of retaliation, which it provided to Complainant and OSHA on Complainant's current employment status, did not discuss any directive.

[10] A review of the interview notes from all attendees reflects that Complainant discussed his protected activity as an appropriate response to the first question asked.

on June 27, 2020. This amount also includes a $15,000 a year differential for loss of promotion beginning on August 24, 2020, through the date of this Order, a $5,801.23 loss in pay due to 16 days of actual suspension without pay, and $7,212.97 as 50% of lost wages for 165 hours without pay over the course of 66 medical appointments during work hours, due in part to Respondent's mistreatment.

3. Respondent shall pay Complainant interest on these back wages at the rate paid on tax overpayments determined under section 6621 of the Internal Revenue Code. As of January 19, 2024, interest due is $14,714.14 and continuing.
4. Respondent shall pay Complainant interest on back wages stemming from Respondent's failure to timely increase Complainant's normal 2019 rate increase for a full year, until January of 2020, in the amount of $200.15.
5. Respondent shall pay Complainant $50,000 in emotional distress stemming from the campaign of harassment and mistreatment against Complainant which caused Complainant significant medical issues during 2019 and 2020, totaling 66 medical visits. Respondent will also pay $2,907.06 in medical related expenses that were not covered by insurance relative to the outcome of this mistreatment.
6. Respondent shall pay reasonable attorney fees and litigation costs to Complainant in connection with bringing this complaint under AIR-21.
7. Respondent shall expunge Complainant's employment records of any reference to the exercise of his rights under AIR-21. Respondent shall ensure that the facts and circumstances related to this complaint are not used against Complainant to deny him any future opportunities with the Respondent and that no negative references relating to the facts and circumstances related to this complaint are provided to any prospective hiring manager. Respondent shall expunge all records of Complainant's discipline prior to April 18, 2023, from his personnel record.
8. Respondent shall not retaliate or discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to AIR-21.
9. Respondent shall email the enclosed notice to all Department of Aviation employees and post it in a place where notices to employees are normally posted at each of its facilities. The posting shall be signed by a responsible official of Respondent and maintained for a period of one hundred and eighty (180) days from the date of posting. The date of posting shall be marked on the notice.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review.

Objections must be filed in writing with the Office of Administrative Law Judges:

Primary method - **via email to: OALJ-Filings@dol.gov**

Secondary method (if unable to file via email) - via hard copy submission to:

Chief Administrative Law Judge - Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
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Telephone: (202) 693-7300; Fax: (202) 693-7365

With copies to:

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In addition, please be advised that the U.S. Department of Labor does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an ALJ in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments, presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board (ARB), to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the statute. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for the handling of AIR-21 complaints can be found in Title 29, Code of Federal Regulations 1979, and may be obtained at www.whistleblowers.gov.

Sincerely,

William J. Donovan
Digitally signed by William J. Donovan
Date: 2024.01.19 16:27:34 -06'00'

William J. Donovan
Regional Administrator

cc: Complainant
Chief Administrative Law Judge, USDOL
Federal Aviation Administration