



**In the Matter of:**

**AZIZ AITYAHIA,**

**ARB CASE NO. 2019-0068**

**COMPLAINANT,**

**ALJ CASE NO. 2018-AIR-00044**

**v.**

**DATE: June 9, 2020**

**MESA AIRLINES,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**R. Chris Pittard, Esq.; *Pittard Law Firm*; San Antonio, Texas**

***For the Respondent:***

**Stephanie J. Quincy, Esq.; *Quarles & Brady LLP*; Phoenix, Arizona**

**Before: James A. Haynes, Heather C. Leslie, and James D. McGinley,  
*Administrative Appeals Judges***

## **DECISION AND ORDER**

PER CURIAM. The Complainant, Aziz Aityahia, filed a retaliation complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)<sup>1</sup> with the Department of Labor's Occupational Safety and Health Administration (OSHA). Complainant alleged that Respondent Mesa Airlines (Mesa) retaliated against him violation of

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

the whistleblower protection provisions of AIR 21.<sup>2</sup> OSHA concluded Complainant suffered an adverse employment action when he was terminated in 2013, but dismissed the complaint because it was not filed within 90 days of the alleged adverse action. The case was referred to the Office of Administrative Law Judges (OALJ) at Complainant's request. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Aityahia's complaint because after holding a hearing and receiving evidence, he found that Aityahia failed to prove by a preponderance of the evidence that he suffered an adverse employment action. ALJ Decision and Order (June 19, 2019) (D. & O.). Alternatively, he found that Respondent established by clear and convincing evidence that it would not have rehired Complainant in 2017, even in the absence of the protected activity. Aityahia has appealed the dismissal of his complaint to the Administrative Review Board (ARB). We summarily affirm the ALJ's dismissal.

### **JURISDICTION AND STANDARD OF REVIEW**

The Administrative Review Board has jurisdiction to review the ALJ's AIR 21 decision pursuant to 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). 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 No. 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. *See* 49 U.S.C. § 42121(a). To prevail on an AIR 21

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<sup>2</sup> Aityahia also filed a claim involving the same facts as this case against the Air Lines Pilots Association which was dismissed by an ALJ on February 14, 2019. *See* ALJ No. 2017-AIR-00042. This decision was reviewed and affirmed by the ARB by decision dated May 19, 2020. *Aityahia v. Air Line Pilots Assoc.*, ARB No. 2019-0037, ALJ No. 2018-AIR-00042 (ARB May 19, 2020).

whistleblower complaint, the employee must prove by a preponderance of the evidence that he was an employee who 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. *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). The failure to prove any one of these elements necessarily requires dismissal of a whistleblower complaint. As the ALJ found that Complainant did not establish by a preponderance of the evidence that he suffered an adverse employment action, a required element, we will limit our discussion to this finding.

Initially, we note that the ALJ found that with regard to any alleged adverse employment action taken in 2013, the 90 day limitations period had run long before Aityahia filed his complaint, and Aityahia offered no justification for the application of equitable tolling. D. & O. at 13, n.6. *See* 49 U.S.C. §42121(b)(1); 29 C.F.R. §1979.103(d). As this finding is consistent with our prior decision, it is affirmed. *Aityahia v. Air Line Pilots Assoc.*, ARB No. 2019-0037, *supra*.

In the case before us, the ALJ thoroughly considered Aityahia's timely contention that Mesa's refusal to rehire him in 2017 was also an adverse employment action. The ALJ's analysis, and the facts of this case, readily demonstrate that Complainant did not establish an adverse employment action in 2017. Accordingly, we adopt and affirm the ALJ's findings as to this element. The ALJ credited the training pilots' assessment of Complainant's flying proficiency, which was corroborated by the reviewing officials in 2013. He concluded that the extensive evidence of record established that Aityahia was not qualified for the position for which he applied in 2017, and thus the Respondent's refusal to rehire him was not an adverse employment action. The ALJ thoroughly explained his factual and legal findings, and we incorporate them into this decision.<sup>3</sup>

## CONCLUSION

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<sup>3</sup> Moreover, we reject Complainant's contention that this appeal should be reviewed under the framework of Section 11(c)(2) of the OSH Act. That act does not provide an administrative appellate remedy for complaints that are dismissed by the Secretary of Labor.

Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Aityahia's complaint.

**SO ORDERED.**