



**In the Matter of:**

**DANNY HO,**

**ARB CASE NO. 2020-0027**

**COMPLAINANT,**

**ALJ CASE NO. 2019-AIR-00009**

**v.**

**DATE: June 30, 2021**

**AIR WISCONSIN AIRLINES,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Danny Ho; *pro se*; Land O' Lakes, Florida**

***For the Respondent:***

**Audrey M. Calkins, Esq. and W. Chris Harrison, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Memphis, Tennessee**

**Before: James D. McGinley, *Chief Administrative Law Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges***

## **DECISION AND ORDER**

PER CURIAM. This matter arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century.<sup>1</sup> Danny Ho (Complainant) filed a whistleblower complaint alleging that his former employer, Air Wisconsin Airlines (Respondent), terminated his employment in retaliation for raising safety concerns. The Administrative Law Judge ("ALJ") issued an order granting Respondent's motion for sanctions and order of dismissal. Complainant appeals the ALJ's order. We affirm.

---

<sup>1</sup> 49 U.S.C. § 42121 (2020) (AIR 21); 29 C.F.R. Part 1979 (2020).

## BACKGROUND

Complainant worked for Air Wisconsin Airlines as a mechanic. On November 26, 2015, and December 2, 2015, he notified Respondent's management that he had safety concerns. He was fired on December 4, 2015.

Complainant filed a claim with the Occupational Safety and Health Administration ("OSHA") on March 18, 2016, alleging that Respondent fired him in violation of AIR 21. On January 9, 2019, OSHA dismissed the case based on its determination that Complainant was fired for performance issues, and that this decision was made before he reported his safety concerns.

Complainant requested a hearing before an ALJ with the Office of Administrative Law Judges ("OALJ") on February 13, 2019. The ALJ issued a notice of assignment, hearing, and prehearing order on May 31, 2019. This order directed the parties to complete discovery within 120 days (i.e., September 28, 2019). The ALJ also ordered the parties to submit any discovery requests at least 30 days before the deadline. In an effort to help Complainant comply with the ALJ's scheduling order, Respondent filed a motion to continue the proceedings and to reschedule the hearing on June 28, 2019.<sup>2</sup> The ALJ granted the motion on July 17, 2019.<sup>3</sup>

Respondent filed a motion asking the ALJ to compel Complainant's deposition and for sanctions on September 10, 2019.<sup>4</sup> The motion stated that on September 9, 2019, Respondent served the Complainant with a Notice of Deposition scheduled for September 26, 2019, but Complainant did not cooperate. Complainant responded that he should not have to submit to an oral deposition because English is his second language and requested a written deposition.

On September 23, 2019, the ALJ granted Respondent's motion in part and denied it in part. The ALJ ordered Complainant to appear at an oral deposition on September 26, 2019.<sup>5</sup> The ALJ's Order specifically stated, "If Complainant fails to appear for his deposition, he may be subject to sanctions [under] 29 C.F.R. § 18.64(d)(2)." The ALJ explained that:

*Sanctions could include, dismissal of Complainant's case with prejudice or granting a motion for summary decision against him. This*

---

<sup>2</sup> Resp. Motion to Continue and Reschedule Hearing (June 28, 2019).

<sup>3</sup> Notice of Continuance and Rescheduled Hearing (July 17, 2019).

<sup>4</sup> First Motion for Sanctions.

<sup>5</sup> Order (Sept. 23, 2019) at 2.

means that Complainant's case could be ended and he would not have the option to bring the same claims against Respondent ever again. [The ALJ] further explained that an order compelling the Complainant to cooperate in discovery was the appropriate measure because the Complainant had not yet failed to comply with the notice for deposition[.]<sup>6</sup>

The ALJ denied the Respondent's request for dismissal of the claims.<sup>7</sup>

Ultimately, Complainant complied with the ALJ's Order and appeared for the oral deposition on September 26, 2019. Respondent provided a Cantonese interpreter to translate for Complainant during the scheduled oral deposition. However, Complainant's behavior delayed the deposition, and he disobeyed the ALJ's explicit order when he abruptly refused to be deposed as the ALJ had ordered. For example, Complainant aggressively confronted the interpreter about her credentials, even though they were speaking in Cantonese without any difficulty. Respondent also presented the interpreter's credentials to Complainant. Despite Respondent's efforts, it is undisputed that, without any explanation, Complainant abruptly refused to participate in the oral deposition, stormed out of the room, and slammed the door against a glass wall.

Complainant served a request for interrogatories and production of documents on September 24, 2019. Thereafter, Complainant filed motions to compel Respondent to respond to his discovery requests, which the ALJ denied.

Respondent filed a second motion for sanctions and dismissal or, alternatively, a motion to compel on September 30, 2019.<sup>8</sup> Respondent requested the ALJ to issue an order compelling the Complainant to appear at a rescheduled deposition and to issue sanctions, up to and including dismissal. The ALJ issued an order directing Complainant to make a good faith effort to comply with Respondent's discovery requests, and rescheduled the hearing for a second time.

After Complainant failed to appear at the rescheduled deposition, Respondent filed a third motion for sanctions and dismissal on December 11, 2019.<sup>9</sup> Complainant responded by contending that Respondent failed to respond to his discovery requests. Complainant's motion to compel and for sanctions was pending before OALJ on the date of the re-scheduled deposition. Complainant also contended there were no grounds for a second deposition because the discovery

---

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> *Id.*

<sup>8</sup> Respondent's Second Motion for Sanctions.

<sup>9</sup> Respondent's Third Motion for Sanctions.

deadline had passed. The ALJ granted Respondent's motion and dismissed the case on January 23, 2020.

Complainant filed a timely appeal to the Administrative Review Board ("ARB" or "Board"). Both parties filed briefs.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Board to issue agency decisions in AIR 21 cases.<sup>10</sup> The Board reviews an ALJ's imposition of discovery sanctions, including the sanction of dismissal, under an abuse of discretion standard.<sup>11</sup>

### DISCUSSION

ALJs have an inherent authority to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."<sup>12</sup> Failure to comply with a judge's order may result in sanctions, which includes dismissal of the proceeding.<sup>13</sup> When determining whether dismissal is warranted, there are several factors an ALJ may consider, including: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a sanction for failure to cooperate or noncompliance, and (5) whether the efficacy or lesser sanctions were considered.<sup>14</sup>

Here, the ALJ took into account Complainant's *pro se* status, explained the discovery rules to him, and warned him three times of the potential consequences of

---

<sup>10</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. 13186 (Mar. 6, 2020).

<sup>11</sup> *Jenkins v. EPA*, ARB No. 2015-0046, ALJ No. 2011-CAA-00003 (ARB Mar. 1, 2018); *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001 (ARB June 15, 2012); *Saporito v. Florida Power & Light Co.*, ARB Nos. 2009-0009, -0010, ALJ No. 2008-ERA-00014 (ARB Feb. 28, 2011); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB Nos. 2004-0167, -0183, ALJ No. 2004-STA-00043 (ARB Jan. 9, 2006).

<sup>12</sup> *Newport v. Fla. Power & Light, Co.*, ARB No. 2006-0110, ALJ No. 2005-ERA-00024, slip op. at 4 (ARB Feb. 29, 2008); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962); see also 29 C.F.R. § 18.29(a) ("[i]n any proceeding . . . the [ALJ] shall have all powers necessary to the conduct of fair and impartial hearings").

<sup>13</sup> 29 C.F.R. § 18.57(b).

<sup>14</sup> *Howick v. Campbell-Ewald Co.*, ARB No. 2004-0065, ALJ No. 2004-STA-00007, slip op. at 8 (Nov. 30, 2004) (citing *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984)).

failing to participate in discovery.<sup>15</sup> The ALJ also gave Complainant multiple opportunities to comply, and postponed the hearing twice to give the parties more time to complete discovery.<sup>16</sup> Despite the ALJ's repeated efforts to persuade Complainant to participate in good faith in this proceeding, Complainant's responses to Respondent's interrogatories were incomplete or evasive, and he repeatedly disregarded the ALJ's Orders to participate in discovery. For example, even after Respondent hired a Cantonese interpreter to assist Complainant during the deposition, he simply walked out.<sup>17</sup> In addition, Complainant acknowledged that although the ALJ ordered him to appear at a deposition, he willfully refused to participate, and implied he was trying to run out the clock on the discovery deadline.<sup>18</sup> Further, the ALJ considered Complainant's refusal to comply with her prior orders when she determined lesser sanctions would be an ineffective solution. Thus, the ALJ applied the correct legal standard, thoroughly considered all five factors, and the procedural background supports the ALJ's reasoning.

Complainant contends there are several factors the ALJ did not consider. First, Complainant contends Respondent offered him a \$10,000 bribe. However, this sum was a settlement offer.<sup>19</sup> Thus, Complainant's bribery argument is meritless.

Complainant next contends that Respondent did not request dismissal. However, Respondent made its third request for dismissal on December 11, 2019, which the ALJ granted.<sup>20</sup> Thus, Respondent properly requested dismissal.

---

<sup>15</sup> Notice of Assignment, Notice of Hearing, and Prehearing Order (May 31, 2019), RX 1; Order Granting in Part and Denying in Part Resp. Motion to Compel Complainant's Deposition and for Sanctions (Sept. 23, 2019), RX 5.

<sup>16</sup> Notice of Continuance and Rescheduled Hearing (July 17, 2019); Order Granting in Part and Denying in Part Resp. First Motion for Sanctions and Dismissal of the Case or, Alternatively, Second Motion to Compel Deposition and for Sanctions, and Motion to Modify Deadlines in the Pre-Hearing Order and Continue Trial (Nov. 13, 2019), RX 12.

<sup>17</sup> Complainant's Responses to Resp. Interrogatories and Requests for Production of Documents (Sept. 24, 2019), RX 6; Resp. First Motion for Sanctions and Dismissal of the Case or, Alternatively, Second Motion to Compel Deposition and for Sanctions, and Motion to Modify Deadlines in the Pre-Hearing Order and Continue Trial (Sept. 27, 2019), RX 8.

<sup>18</sup> Complainant's Third Motion on Compel and Motion to Sanction any Oral Deposition until Responding the Discovery on Interrogatory and Request for Production of 09/23/19 (Dec. 20, 2019), RX19.

<sup>19</sup> Resp. Brief at 3, n.1.

<sup>20</sup> Order Granting Resp. Motion for Sanctions and Order of Dismissal at 1; Resp. Reply in Support of Second Motion for Sanctions and Dismissal of the Case or, Alternatively, Third Motion to Compel Deposition and for Sanctions, and Motion to Modify Deadlines in the Pre-Hearing Order and Continue Trial (Dec. 11, 2019), RX 15.

Complainant further contends he was denied an equal opportunity to participate in discovery because Respondent did not respond to his discovery requests, and the ALJ denied his motions to compel Respondent to reply. The pre-hearing order, dated May 31, 2019, required the parties to complete discovery within 120 days, which made the discovery deadline September 28, 2019.<sup>21</sup> The pre-hearing order also instructed that all requests had to be made thirty days before this deadline.<sup>22</sup> Complainant served his discovery request on September 24, 2019, four days before discovery was to be completed. As his discovery request was not served thirty days before the deadline, it was untimely. Thus, the ALJ correctly denied Complainant's motions.

Lastly, Complainant contends there is a partnership between the ALJ and Respondent. However, there is no evidence of a partnership. Rather, as discussed in the previous paragraph, the ALJ correctly denied Complainant's motions. Further, the ALJ considered Complainant's *pro se* status, explained the discovery rules to him, warned him several times of the potential consequences of failing to participate in discovery, and gave him multiple chances to comply with her orders and Respondent's discovery requests. However, Complainant repeatedly refused to participate in discovery. Thus, Complainant's argument that there is a partnership between the ALJ and Respondent is meritless.

Throughout the entire proceedings, the ALJ acted with extreme patience and professionalism in order to encourage Complainant to act in good faith in the very proceeding he filed seeking to Challenge Respondent's alleged adverse action against him. Therefore, we conclude that the ALJ did not abuse her discretion in dismissing this case with prejudice.

## CONCLUSION

For the above reasons, we **AFFIRM** the ALJ's order granting Respondent's motion for sanctions and order of dismissal.

**SO ORDERED.**

---

<sup>21</sup> Notice of Assignment, Notice of Hearing, and Prehearing Order (May 31, 2019), RX 1.

<sup>22</sup> *Id.*