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Issue Date: 06 June 2022

Case No.: 2018-AIR-00041

In the Matter of
KARLENE PETITT

Complainant

v.

DELTA AIR LINES, INC.
Respondent

ORDER GRANTING COMPLAINANT'S MOTION TO DIRECT RESPONDENT TO PUBLISH AND POST THE TRIBUNAL'S DECEMBER 21, 2020, DECISION AND ORDER

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. *See* 49 U.S.C. § 42121. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 68 Fed. Reg. 14,100 (Mar. 21, 2003).

Procedural Background

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration ("OSHA") on June 6, 2016. In its July 13, 2018 letter, OSHA, acting on behalf of the Secretary, found that the parties are covered under the Act, but there was insufficient evidence to establish reasonable cause that a violation occurred. Accordingly, OSHA dismissed the complaint. On August 1, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges.

Subsequently, on August 27, 2018, this matter was assigned to the undersigned. The Tribunal held a hearing in this matter in Des Moines, Washington from March 25 to March 29, 2019, April 25, 2019, and from May 3 to May 5, 2019. On December 21, 2020, the Tribunal issued a Decision and Order ("D&O") finding for the Complainant and awarded damages. One of the damages awarded was the requirement for Respondent to post a copy of the Tribunal's decision and to disseminate it via email to certain of its employees and to display it at other locations where employment law matters are posted. D&O at 112. Employer appealed the D&O to the Administrative Review Board (hereafter "Board").

On March 29, 2022, the ARB issued an Order of Remand. *Petitt v. Delta Airlines,* ARB Case No. 2021-0014, ALJ Case No. 2018-AIR-00041 (Mar. 29, 2022). In this Order, the Board affirmed this Tribunal's conclusion that Respondent violated AIR 21's employee protection provisions and that Respondent could not meet its same-action defense. *Id.* at 28. The Board also affirmed the Tribunal's award of back pay. However, it vacated the Tribunal's findings as to front pay for legal error and the award of compensatory damages for lack of evidentiary support. *Id.* Important for the matters at issue in this Order, the Board noted that Employer did not challenge the Tribunal's order to publish its December 21, 2020 Decision and Order to pilots and managers in the flight operations department as well as the requirement to post copies of the decisions at various locations. *Id.* at 20 n. 104.

On May 2, 2022, Complainant filed a Motion for an Order Compelling Respondent's Immediate Compliance with Tribunal's Standing Order to Deliver and Post Tribunal's Decision Dated December 21, 2022. Complainant argues that the Tribunal determined that Respondent engaged in unlawful retaliation. As such, the remedial actions directed are not suspended during the pendency of an appeal of an otherwise final judgement. Mot. at 6. Further, Respondent did not raise in its appeal to the Board the Tribunal's mandate to publish the Decision and Order, thus the issue is waived. *Id*. Complainant also argues that such publication "will be the first step in remediating the damage [Respondent] has done to [Complainant's] reputation.…" *Id.* at 7.

On May 6, 2022, Respondent filed a petition with the Eleventh Circuit Court of Appeals for review of the Board's order. *See* Resp. at 3 (citing Bisbee Decl., Ex 3).

On May 16, 2022, Respondent filed a response to Complainant's motion concerning publication of the Tribunal's decision, and, as part of that response, filed a "Cross-Motion to Stay Enforcement of the Tribunal's Decision Dated December 21, 2020."[1] Respondent contends the Tribunal would "seriously abuse its discretion" if it ordered Respondent to publish the Decision and Order because the Tribunal was partially reversed, and a petition for judicial review is pending with the Eleventh Circuit. Resp. at 1. Respondent maintains that Complainant has identified no particular reason why "immediate" publication is warranted until all administrative and judicial proceedings are concluded. *Id.* at 2. As part of its response, it moved to stay enforcement of that portion of the Tribunal's order. Respondent maintains that the entire decision and order is erroneous. *Id.* at 3. Respondent further claims that Complainant's representation that Respondent did not challenge the Tribunal's order of publication is misleading. *Id.* at 4. It counters that it raised several jurisdictional and substantive objections and any one of them would have caused the Tribunal's decision to be vacated. It maintains that the fact that it did not specifically object to publication does not mean Respondent waived the issue.

As part of its motion to stay publication argument, Respondent urges the Tribunal to consider four factors:[2]

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[1] At the conclusion of its response, Respondent requested oral argument on the motion. Resp. at 9. The Tribunal finds oral argument is not warranted as the issues are well-briefed.

[2] The Tribunal notes that these factors were developed within a framework of a final order, and not to an interlocutory appeal of an Order of Remand.

(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
(2) the likelihood that the moving party will be irreparably harmed absent a stay;
(3) the prospect that others will be harmed if the court grants the stay; and,
(4) the public interest in granting the stay.

Resp. at 6 (citations omitted). Respondent argues that, despite the Tribunal's and Board's rulings, it will prevail on the merits on appeal. Respondent claims that it "will be irreparably harmed by publishing any decisions which are subject to reversal, vacatur or modification by the Eleventh Circuit" and that publication would cause Respondent to assail its reputation to its own employees. Finally, it argues "there is a legitimate public interest in allowing the appellate process to play out before requiring publication of a decision." *Id.* at 8.

On May 19, 2022, Complainant filed her response to the cross motion to stay these proceedings. Complainant argues that 49 U.S.C. § 42121(b)(4)(A) creates a presumption favoring implementation of the Tribunal's order upon completion of the ARB review process. Reply at 2. Further, Complainant argues that none of the four factors listed by Respondent in its motion to stay favor granting the request, but support the need for immediate publication/posting of the Tribunal's December 2020 order. Complainant notes that Respondent does not provide any substantive discussion of why it is likely to succeed on the merits in its appeal. It argues that the Eleventh Circuit does not have jurisdiction over the matter, and, when counsel asked for authority for Respondent's position, it provided none. *Id.* at 3-5. Complainant further argues that any concern about "irreparable harm" by publication of the Tribunal's Decision and Order can be ameliorated by Respondent simply advising its pilots that the Tribunal's finding of liability is being appealed. Complainant argues far greater harm will result upon her by not having the decision published. *Id.* at 7. Complainant maintains that a failure to publish the decision would be contrary to the public's interest. It references the FAA's safety management system program that requires – in the public interest – air carriers to promote a reporting culture to facilitate and remediate any air safety issues. *Id.* at 8.

On May 28, 2022, Respondent filed a request to file a reply in support of its cross-motion for stay. On June 3, 2022, the Tribunal denied this request.

The Tribunal understands from the motions that, to date, Respondent has not posted the Tribunal's December 21, 2020 Decision and Order.

Discussion

The mere fact that Respondent filed an appeal of the Board's Order of Remand, does not divest the Tribunal of the authority that the Board duly returned to it within its Order. Respondent's appeal is an interlocutory one rather than an appeal of a final order because the Board has not yet issued a final decision. *See Howell v. Schweiker*, 699 F.2d 524, 526-27 (11th Cir. 1983); *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986). The Board's decision has resolved the merits portion of the case and the section concerning backpay damages, but there remain issues to be resolved concerning other portions of the damages awarded to Complainant; specifically, the issues of any damages associated with lost future earnings and damages related to Complainant's emotional distress, humiliation, and loss of reputation caused by Respondent's

discriminatory actions. That is why the Board titled its decision "Order of Remand"; **there is no final decision to appeal**. Thus, per 49 U.S.C. § 42121(b)(4)(A), the Eleventh Circuit–or any other federal court–does not have jurisdiction because there is no final order. *See generally, Shannon v. Jack Eckerd Corp.*, 55 F.3d 561, 563 (11th Cir. 1995). Jurisdiction remains with the Tribunal.

Assuming, *arguendo*, the Decision is final–and it is not–there is an issue of whether the Eleventh Circuit Court of Appeals even has jurisdiction over this matter once the Board's decision becomes final. Under the express terms of the Act:

> [a]ny person adversely affected or aggrieved by an order . . . may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation.

49 U.S.C. § 42121(b)(4)(A). Here, Complainant lives in Washington State, which is within the jurisdiction of the Ninth Circuit. The hearing was held in Washington State, and arguably several of the discriminatory acts occurred there. Instead of filing in the **Ninth Circuit**, Respondent filed its interlocutory appeal with the **Eleventh Circuit** where, presumably, Respondent's corporate headquarters is located. Thus, there exists an open question as to whether the Eleventh Circuit is even the right appellate court for Respondent's interlocutory appeal of the Board's Order of Remand.

Turning to the four factors proffered by the parties for this Tribunal to consider. The Tribunal does not find a likelihood that Respondent will prevail on the merits of the appeal: both this Tribunal and the Board have found otherwise. Further, mere assertion by a party that they will prevail, as Respondent does here, is not persuasive. On any appeal the standard of review of the Board's decision by a circuit court is whether factual findings and application of law to those facts are "supported by substantial evidence on the record considered as a whole." A court "must uphold the Board's findings if supported by substantial evidence even if 'the court would justifiably have made a different choice had the matter been before it de novo." *Yadav v. L-3Communs. Corp*., 462 Fed Appx. 533, 536 (6th Cir. 2012) (quoting *NLRB v. Gen. Fabrications Corp.,* 222 F.3d 218, 225 (6th Cir. 2000) (AIR-21 case)[3]; *see Jones v. United States Dep't of Labor,* 556 Fed. Appx. 535, 537 (7th Cir. 2014); *Mizusawa v. United States Dep't of Labor,* 524 Fed. Appx. 443, 446 (10th Cir. 2013). Given the high burden, the Tribunal finds this initial factor weighs against issuance of the stay.

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[3] Courts oftentimes have set forth the standard slightly differently.

> We will set aside the ARB's decision only if it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Bechtel v. Admin. Rev. Bd., 710 F.3d 443, 446 (2d Cir. 2013) (quoting *Nat'l Assoc. of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 658, 127 S. Ct. 2518 (2007)). *See also Hoffman v. Solis,* 636 F.3d 262 (6th Cir. 2011).

Respondent next argues that it will be irreparably harmed absent a stay because it allegedly would be assailing its reputation to its own employees. The Tribunal rejects this argument. First, it ignores Complainant's point–supported in large part by the Tribunal's various findings of both fact and law–that she has suffered for years under the cloud of discriminatory actions by Respondent's employees without consequence or accountability. As this Tribunal has found and as the Board has affirmed, any harm done was at the hand of Respondent. Any harm to Respondent's reputation is of its own making: actions dictate consequences. Second, it is disingenuous to say publication of the Tribunal's order is assailing Respondent's reputation to its own employees. The discriminatory actions of the employees identified in the Order have been established; what Respondent is being required to publish **is a matter of public record**. Respondent is not assailing anyone or anything. It is merely publishing the lawful findings of this Tribunal. It is not surprising that Respondent disagrees with those findings. That is its right. However, the fact that those findings do not place Respondent in the best light is a consequence of the Respondent's actions and those of certain of its employees. Again, actions dictate consequences. Third, and of great import, **Respondent waived its objection to the publication requirement by failing to raise the issue with the ARB**. It, therefore, cannot now appeal that requirement since it did not raise the objection during the administrative process. *Advocs. For Hwy. & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1148 (D.C. Cir. 2005) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). "'It is a hard and fast rule of administrative law, rooted in simple fairness, **that *issues* not raised before an agency are waived and will not be considered by a court on review.**'" *Wallaesa v. Fed. Aviation Admin.,* 824 F.3d 1071, 1078, 423 U.S. App. D.C. 60 (D.C. Cir. 2016)(quoting *Nuclear Energy Inst. V. EPA,* 373 F.3d 1221, 1297 (D.C. Cir. 2004) (emphasis added).[4] In this case, Respondent's failure to act dictates the consequence.

Respondent does not directly address the third factor, but does claim that a public interest is served in granting the stay because it allows the appellate process to play out. While this is a public interest, it also affords Respondent the opportunity to distance itself from its own actions. What the Tribunal–and Congress when passing the Act–finds and found an even greater public interest is to **hold accountable those entities that retaliate against an employee for reporting safety issues**. Not only is there an interest to the flying public, but there is the interest of informing those that work within the aviation community of the consequences of retaliatory conduct by an air carrier. Further, there is nothing in the Tribunal's December 2020 Decision and Order that remotely indicates that Respondent is not pursuing its appellate rights. In fact, Respondent is free to simultaneously publish the Tribunal's order along with the Board's Order of Remand to fully inform its employees. **Both are matters of public record.**

In sum, the Tribunal finds that, of the four factors Respondent asks the Tribunal to consider on whether to grant a stay, none support such a remedy.

Finally, the Tribunal fully recognizes that the Eleventh Circuit is a federal court, something this body is not. The Tribunal also recognizes that, if the Eleventh Circuit finds that it does have

[4] That principle "holds special force where, as here, an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case." *Id.* at 1078.

jurisdiction, Respondent is free to seek a stay from **that court**. However, the Tribunal does not find a stay is warranted under the facts of this case.

ORDER

Respondent's motion to stay publication of the Tribunal's December 21, 2020 Decision and Order is hereby DENIED.

Respondent shall publish the Tribunal's December 21, 2020 decision consistent with guidance contained in that Decision and Order, and shall do so within 30 days of the date of this Order. Respondent is free to simultaneously or subsequently publish, to the same extent as required in the December 21, 2020 Decision and Order, the Board's Order of Remand.

Should Respondent not comply with this Order, Complainant is free to seek additional remedies from the Tribunal consistent with a party's failure to obey an order from the Tribunal.

SO ORDERED.

Digitally signed by Scott R. Morris
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SERVICE SHEET

Case Name: **PETITT_KARLENE_v_DELTA_AIR_LINES_INC_**

Case Number: **2018AIR00041**

Document Title: **ORDER GRANTING COMPLAINANT'S MOTION**

I hereby certify that a copy of the above-referenced document was sent to the following this 6th day of June, 2022:

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