FORD & HARRISON LLP

AIRLINE MANAGEMENT LETTER

Federal Appeals Court Lifts Injunction Barring Transfer of Pan Am Flights to Boston-Maine

The First U.S. Circuit Court of Appeals has lifted an injunction issued by a federal trial court that prohibited Pan Am from transferring flights to its non-union subsidiary, Boston-Maine. *See Air Line Pilots Ass'n v. Guilford Transportation Indus., Inc.* (1st Cir. Feb. 28, 2005). (See the discussion of the trial court's decision in the December 2004 issue of the *Airline Management Letter*.) Reversing the trial court's decision, the First Circuit held that the dispute is a minor dispute under the Railway Labor Act (RLA) and should be settled pursuant to the RLA's arbitration procedures.

In 1999, Guilford Transportation Industries, Inc. (Guilford) formed a wholly owned subsidiary, Pan American Airlines, Inc. (PAA) as a repository for the assets of a bankrupt airline. PAA placed those assets in a wholly owned subsidiary, Pan American Airways Corp. (Pan Am), which began offering commercial airline service aboard a fleet of leased Boeing 727 jet aircraft. Due to financial difficulties, Pan Am informed federal regulators in June 2004 that it would cease flight operations on October 31, 2004. Pam Am's pilots were represented by ALPA.

▸ *Continued on page 4*

Ninth Circuit Reinstates Claims of HIV-Positive Flight Attendants

The Ninth U.S. Circuit Court of Appeals has held that three HIV-positive flight attendants who claim American Airlines violated the Americans with Disabilities Act (ADA) when it withdrew their conditional offers of employment should be permitted to take their claims to trial. *See Leonel v. American Airlines*. In this case, the flight attendants were interviewed and, immediately after the interviews, given offers of employment contingent on their successful completion of background checks and medical examinations. The flight attendants were sent to medical examinations at the company's medical department before any background checks were performed.

None of the plaintiffs disclosed their HIV-positive status in the medical history questionnaire or to the personnel administering the medical examinations. When blood tests revealed elevated MCV levels, which could not be explained by any of the information in their medical histories, the company asked the plaintiffs to explain the results. All of the plaintiffs then disclosed their HIV-positive status. The company subsequently withdrew the plaintiffs' conditional offers of employment based on their failure to provide full and correct information during the medical examination process.

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IN THIS ISSUE

Court Finds Airlines Not Subject to Rehabilitation Act

A federal court in Florida has dismissed a complaint by a group of disabled individuals against ten airlines, claiming the airlines violated the Rehabilitation Act of 1973 by refusing to comply with the plaintiffs' requests for accommodation. The plaintiffs claimed that the airlines failed to implement system-wide policies and practices that would make their facilities and services accessible to people with disabilities. The court dismissed the complaint, finding that the airlines' receipt of federal funds under the Air Transportation Safety and System Stabilization Act (Stabilization Act) did not subject the airlines to the Rehabilitation Act and thus the court lacked jurisdiction to hear the claims. *See Shotz v. American Airlines*.

In *Shotz*, the plaintiffs claimed that the defendant airlines violated the Air Carrier Access Act's (ACAA) prohibition against disability-based discrimination. The plaintiffs argued that when the defendant airlines received federal funds under the Stabilization Act, they became subject to the Rehabilitation Act, which then enabled the plaintiffs to sue for violations of the ACAA.

An employer becomes subject to the Rehabilitation Act when it receives federal financial assistance. The Rehabilitation Act does not define the term federal financial assistance, but courts have interpreted it to mean the receipt of a subsidy, not compensation. In finding that the defendant airlines were not subject to the Rehabilitation Act, the court in *Shotz* determined that the funds provided under the Stabilization Act were compensation, not a subsidy. The court held that the language of the Stabilization Act unambiguously states that the funds provided under that Act were intended to compensate air carriers for losses incurred as a result of the terrorist attacks of September 11, 2001.

The court also rejected the plaintiffs' argument that the payments made to the defendants under § 101 of the Stabilization Act should be considered federal financial assistance because Congress used the term "direct financial assistance under this Act" in § 105 of the Stabilization Act (which addresses the Essential Air Services (EAS) program for under-served routes). The court noted that the plaintiffs did not claim that the payments made to the defendants were made pursuant to the EAS program or that the plaintiffs suffered any discrimination on any EAS-subsidized routes. Additionally, the court pointed out that a private entity's receipt of federal funds pursuant to the EAS does not trigger the applicability of the Rehabilitation Act to all operations of the entity if the entity receives such funds only for a specific and limited purpose. Thus, while the plaintiffs could amend their complaint, it is not clear that there would be liability under the Rehabilitation Act if they do so.

The *Shotz* decision is good news for airlines because other disabled individuals or disability advocacy groups may file similar lawsuits. Some groups have attempted to use similar accessibility litigation under the Americans with Disabilities Act to leverage expensive and cumbersome settlement agreements with defendants attempting to avoid even more expensive and time-consuming litigation. These lawsuits can be intimidating because they typically ask courts to order far-reaching remedies as well as damages and attorney fees. For example, in *Shotz,* the plaintiffs asked the court to order the airlines to implement significant changes to their facilities, services, programs, and activities to eliminate the alleged barriers to disabled individuals and to award damages and attorney fees to the plaintiffs. Had the court not dismissed the case early in the proceedings, the litigation would have undoubtedly been prohibitively expensive.

Thus, it is important to be aware of the defense established by the court in *Shotz* because raising this defense early in the case can dispose of the litigation quickly. The attorneys at Ford & Harrison are experienced in this type of litigation and were involved in the *Shotz* case. Should you have any questions about this case or about such claims, please contact the Ford & Harrison attorney with whom you usually work or Pedro Forment, pforment@fordharrison.com, 305-808-2100. ■

Alleged Whistleblower Cannot Prove Violation of Sarbanes-Oxley or AIR21

An airline employee who was placed on a layoff list after he participated in an investigation of another employee accused of making sculptures from aircraft parts was unable to prove a violation of the Sarbanes-Oxley Act or AIR21, according to an Administrative Law Judge (ALJ). *See Hendrix v. American Airlines, Inc*. In Hendrix, the ALJ found in favor of the airline because it demonstrated that Hendrix would have been placed on the layoff list even absent his protected activity, based on his poor performance as a supervisor.

The ALJ held that Hendrix engaged in protected activity under Sarbanes-Oxley and AIR21 by participating in the investigation of the other employee, even though Hendrix did not report the employee's activities himself.

The ALJ also held that Hendrix suffered an adverse employment action by being placed on the layoff list, even though ultimately he was not laid off. In reaching this determination the ALJ adopted the Tenth Circuit's expansive definition of adverse employment action utilized Title VII cases.The Tenth Circuit has held that Title VII plaintiffs are not required to demonstrate that they suffered a tangible injury in order to show an adverse action in a Title VII claim. The ALJ held that the fact that the Hendrix did not lose his job goes to the issue of damages, not liability.

Hendrix argued that he was placed on the layoff list because of a poor performance evaluation he received two months after participating in the investigation of the other employee. He claimed that the temporal proximity between the performance evaluation and his participation in the investigation was evidence that the investigation was a contributing factor in the performance review and his placement on the layoff list.

The judge rejected this argument, holding that the employer demonstrated that Hendrix would have been placed on the layoff list even absent his protected activity, based on his poor performance as a supervisor. The ALJ pointed out that one of Hendrix's own witnesses testified that he had a military management style that was not well received and that he had been counseled for his management style even before he engaged in the protected activity. The ALJ also noted that Hendrix consistently had numerous conflicts with his superiors, peers, and the employees he supervised and that he complained of disparate treatment two years before his protected activity in the investigation. Accordingly, the ALJ ruled in favor of the airline on Hendrix's whistleblower claims. ■

2005 Annual Client Conference

Ford & Harrison's 2005 annual client conference will be held in Atlanta, Georgia, on Friday, May 6, 2005, at the Four Seasons Hotel located in Midtown Atlanta. The theme this year will be: "Riding the Currents of Change in Labor and Employment Law."

There will be a welcome reception on Thursday evening at the Four Seasons beginning at 5:30 pm. Immediately following the reception, there will be a dinner for airline employers at The Peachtree Club (999 Peachtree Street, 28th floor).

The cost to attend is $295 for clients, $395 for non-clients and a $50 discount for multiple registrants from the same airline. For more information, please contact Lee Watts, lwatts@fordharrison.com, 404-888-3981 or to make reservations at the Four Seasons Hotel, call 404-881-9898, request the Reservations Department and ask for the Ford & Harrison group rate. ■

USERRA Poster Available

The notice requirement imposed by the provisions of the Veterans Benefits Improvement Act of 2004 was effective March 10, 2005. The Benefits Improvement Act requires employers to provide employees with notice of the rights, benefits, and obligations of employees and employers under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

To meet the March 10, 2005, deadline imposed by the Benefits Improvement Act, the DOL published the text of the notice as an interim final rule in the Federal Register. Although the interim final rule was effective March 10, the DOL will accept public comment on the notice requirement and the text of the notice for 60 days, after which a final rule will be issued.

The DOL has made the text of the USERRA notice available on its web site, http://www.dol.gov/vets. The DOL previously published the notice and then removed it from its web site for administrative reasons. However, the DOL has indicated that the content of the re-posted notice is the same as the one that was removed.

Employers can fulfill the notice requirement by posting the notice where employee notices are customarily placed or by distributing the notice to employees by hand, mail or e-mail.

If you have any questions about the notice requirement or any other USERRA issue, please contact the Ford & Harrison attorney with whom you usually work or John Lowrie in our Denver office, jlowrie@fordharrison.com, 303-592-8866. ■

Pan Am - *continued from pg. 1*

In 1999, PAA formed a second wholly owned subsidiary, Boston-Maine, which is a commercial airline whose pilots are not presented by a union. Boston-Maine originally operated only Jetstream 31 turboprop aircraft, but in August 2004 began operating B-727 aircraft formerly flown by Pan Am. After Pan Am began transferring the work of flying B-727s to Boston-Maine, ALPA sought an injunction preventing this transfer until the dispute resolution processes under the RLA could be exhausted. The trial court entered the injunction and the First Circuit reversed this decision.

The First Circuit held that Guilford's interpretation that the CBA between ALPA and Pan Am permitted contracting out some of Pan Am's scheduled flights was arguably justified and, thus, the contracting out issue was a minor dispute that must be resolved through arbitration.

The court also held that Guilford's decision to close Pan Am was a management prerogative and that pilots have no right under the RLA to insist that management try to make a go of a unionized business. "Because employees have no right to force a company to remain in business, they lose nothing when, after the company fails, an affiliated company absorbs some (or perhaps all) of the closed company's business operations." The court also held, however, that a union might have an arguable claim if a company that closes its doors would not have done so but for the opportunity to transfer its organized operations to a non-union affiliate. In this case, the court found no evidence in the record that Pan Am was shut down for the purpose of shifting its union work to its non-union affiliate, but held on remand, the union should be entitled to present such evidence. If the union could do so (and the court noted that this is a long shot), a major dispute would exist. ■

Recent Election Results

Allegheny Airlines, Inc. and Piedmont Airlines, Inc.

On January 27, 2005, ALPA filed an application with the NMB to determine whether Allegheny Airlines, Inc. and Piedmont Airlines, Inc. operate as a single carrier. On February 23, 2005, the NMB issued its finding that Allegheny and Piedmont are operating as a single carrier for the craft or class of pilots. As a result, the NMB extended ALPA's certification at Piedmont to include all pilots at the new single carrier.

World Airways, Inc.

The IBT invoked the services of the NMB on February 11, 2005, to determine who may represent the Mechanics and Related Employees. Prior to the NMB's determination, however, Donald R. Treichler, Director of IBT's Airline Division, filed a letter with the NMB withdrawing the IBT's application in this case. (Dismissal - Withdrawn During Investigation, March 16, 2005). ■

Ninth Circuit - continued from pg. 1

The plaintiffs sued, claiming the examinations violated the ADA and California's Fair Employment and Housing Act (FEHA). The trial court granted summary judgment in favor of the airline on their claims, but the Ninth Circuit reversed this decision. The Ninth Circuit held that the ADA and FEHA prohibit medical examinations and inquiries until after an employer has made a "real" job offer. According to the court, to issue a "real" offer under the ADA and FEHA, an employer must have completed all non-medical components of its application process or be able to demonstrate that it could not have done so before making the offer.

In this case, the court held that the job offers were not real because they were subject to both medical and non-medical conditions when they were made. Thus, the medical examination process was premature and American could not penalize the plaintiffs for failing to disclose their HIV-positive status, unless it could show that it could not reasonably have completed the background checks before subjecting the plaintiffs to medical examinations and questioning, which was an issue of fact for trial. ■

If you'd like to receive the Airline Management Letter electronically, or if you need to update your mailing address, please contact Shannon Houghton at shoughton@fordharrison.com.

AIRLINE MANAGEMENT LETTER

FORD & HARRISON LLP
Creative Workplace Solutions

1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309

Airline Management Letter is a service to our clients, providing general information on selected legal topics. Clients are cautioned not to attempt to solve specific problems on the basis of information contained in an article. For more information, please call Shannon Houghton at 404-888-3834 or write to the Atlanta office at the address below.

Editor: Amy W. Littrell
alittrell@fordharrison.com

FORD & HARRISON LLP
Creative Workplace Solutions

1275 Peachtree Street, N.E. • Suite 600
Atlanta, Georgia 30309
404-888-3800 • FAX 404-888-3863

One Town Square • Suite 341
Asheville, North Carolina 28803
828-697-4071 • FAX 828-697-4471

2100 Third Avenue North • Suite 400
Birmingham, Alabama 35203
205-244-5900 • FAX 205-244-5901

1601 Elm Street • Suite 4501
Dallas, Texas 75201
214-256-4700 • FAX 214-256-4701

1675 Broadway • Suite 2150
Denver, Colorado 80202
303-592-8860 • FAX 303-592-8861

225 Water Street • Suite 710
Jacksonville, Florida 32203
904-357-2000 • FAX 904-357-2001

350 South Grand Avenue • Suite 2300
Los Angeles, California 90071
213-237-2400 • FAX 213-237-2401

795 Ridge Lake Blvd. • Suite 300
Memphis, Tennessee 38120
901-291-1500 • FAX 901-291-1501

100 S.E. 2nd Street • Suite 4500
Miami, Florida 33131
305-808-2100 • FAX 305-808-2101

100 Park Avenue • Suite 2500
New York, New York 10017
212-453-5900 • FAX 212-453-5959

300 South Orange Avenue • Suite 1300
Orlando, Florida 32801
407-418-2300 • FAX 407-418-2327

1128 Lamar Ave.
Oxford, Mississippi 38655
662-238-7785 • FAX 662-234-4270

101 North Pine Street • Suite 400
Spartanburg, South Carolina 29302
864-699-1100 • FAX 864-699-1101

101 East Kennedy Blvd. • Suite 900
Tampa, Florida 33602-5133
813-261-7800 • FAX 813-261-7899

1300 19th Street, N.W. • Suite 700
Washington, DC 20036
202-719-2000 • FAX 202-719-2077

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