LETTER

AIRLINE MANAGEMENT

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Hours Spent on Call Reserve by Pilot Do Not Count Toward FMLA Eligibility

The Tenth Circuit Court of Appeals has held that the hours a reserve pilot spends on call should not be counted when determining whether the pilot has worked the required 1,250 hours in the preceding twelve months to be covered under the Family and Medical Leave Act (FMLA). *See Knapp v. America West* (unpublished decision, November 24, 2006). In reaching this decision, the court relied on the analysis used in determining whether on call time should be considered hours worked under the Fair Labor Standards Act (FLSA).

Under the FLSA, on call time may be considered hours worked, depending on whether the time is spent primarily for the employer's benefit or the employee's. Factors considered in making this determination include: the agreement between the parties; the nature and extent of the restrictions; the relationship between the services rendered and the on-call time; and all of the surrounding circumstances. In *Knapp*, the court held that since the pilot was not required to remain on the employer's premises, the critical inquiry is whether the pilot was able to use the time effectively for her own purposes.

The court found that the pilot failed to present sufficient evidence regarding restrictions on her activities during reserve duty hours to enable her to take her claim to a jury. The court held that the restrictions on the pilot's activities during reserve duty hours – the inability to drink alcohol, a requirement that she be available by telephone and able to

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Airline Did Not Perceive Flight Attendant as Disabled Because of Side Effects of Medication

The Eighth Circuit Court of Appeals has reversed a jury verdict in favor of a flight attendant in an Americans with Disabilities Act (ADA) case, finding that the employer did not perceive him as disabled because of medical restrictions based on medications he was taking for depression. *See Pittari v. American Eagle Airlines, Inc.* (8th Cir. Nov. 9, 2006).

In this case, the plaintiff worked for American Eagle and sought leave under the Family and Medical Leave Act (FMLA) to deal with depression. Upon obtaining information regarding the type of medication the plaintiff was taking, the airline requested a psychological evaluation to determine whether he could perform the essential functions of the flight attendant position. The psychologist performing the evaluation recommended the plaintiff be removed from his job because the evaluation revealed certain restrictions on his cognitive abilities. The airline removed him from his job; however, he was subsequently reevaluated and eventually reinstated.

The plaintiff sued American Eagle, claiming the airline perceived him as disabled because of the side effects of his medication, which affected his cognitive abilities.

The plaintiff sued American Eagle, claiming the airline perceived him as disabled because of the side effects of his medication, which affected his cognitive abilities. A jury found in his favor, awarding him $2,001 in damages and approximately $30,000 in costs and attorney fees. The airline appealed and the Eighth Circuit reversed the jury's decision.

The ADA prohibits employers from discriminating against qualified individuals with disabilities. Being "regarded as" having a physical or mental impairment that substantially limits one or more of an individual's major life activities qualifies as a disability under the ADA. An employer may regard an individual as disabled under the ADA if: (1) the employer mistakenly believes the individual has an impairment that substantially limits one or more major life activities, or (2) the employer mistakenly believes an actual, non-limiting impairment substantially limits one or more of the individual's major life activities.

Here, the plaintiff claimed American Eagle perceived him as unable to perform the major life activity of working due to limitations on his cognitive abilities resulting from his antidepressant medication. To be substantially limited in the major life activity of working, an individual must be unable to perform a broad range of jobs. Thus, to be perceived as substantially limited in the major life activity of working, the employer must perceive the employee as being unable to perform a broad range of jobs.

In this case, although the plaintiff could not perform the duties of the flight attendant position, he acknowledged that he could have performed other jobs with American Eagle. The court held that if American Eagle regarded plaintiff as unable to perform "one particular job" rather than a broad range of jobs, it did not consider him to be substantially limited in the major life activity of working. Additionally, the court held that American Eagle regarded the plaintiff's impairment as temporary, since the airline permitted him to be reevaluated and permitted him to return to work as a flight attendant upon successful completion of a neuropsychological exam.

The court also noted that an employer does not perceive an employee as disabled because it imposes restrictions based upon the recommendations of physicians. Such recommendations "are not based upon myths or stereotypes about the disabled and thus do not demonstrate a perception of disability." •

Airline Did Not Violate Title VII by Discharging Muslim Pilot for Being in a Bar in Uniform

The Eighth Circuit Court of Appeals has affirmed a trial court's determination that an airline did not discriminate against a Muslim pilot when it fired him for being in a bar in uniform shortly after the September 11, 2001 attacks. *See EEOC v. Trans States Airlines Inc.* (September 19, 2006). We discussed the lower court's decision in the July 2005 issue of the *Airline Management Newsletter*, which is available at www.fordharrison.com.

In *Trans States*, the airline's Vice President of Flight Operations received an anonymous telephone call reporting that a pilot was seen in a St. Louis bar, drinking while in uniform. It was determined that the pilot was scheduled to be in St. Louis at the time of the alleged incident and that he was a probationary employee. The pilot was terminated on September 18, 2001.

The EEOC subsequently sued Trans States, claiming the airline discriminated against the pilot on the basis of race, religion or national origin in violation of Title VII when it terminated him. The pilot intervened in the lawsuit. A trial court granted summary judgment in favor of Trans State, finding the pilot's termination did not violate Title VII. The Eighth Circuit affirmed the trial court's decision.

The Eighth Circuit held that Trans States' reason for terminating the pilot, violation of company policy by entering a bar while in uniform, was a legitimate, non-discriminatory reason for the discharge. The court also held that to take his claim to a jury, the pilot was required to show that Trans States was motivated by discriminatory animus rather than solely by its belief that the pilot violated company policy.

The court found that the pilot failed to show that Trans States' legitimate, non-discriminatory reason for discharging him was pretext for discrimination. Essentially, the pilot argued that because he was fired a few days after the September 11 attacks and because his name is Middle Eastern, he must have been discharged because the airline assumed that he, like the September 11 attackers, was Muslim. The pilot attempted to bolster this argument by showing that his termination did not comply with Trans States' policies and procedures, which call for progressive discipline, and that other similarly situated probationary pilots were treated more favorably under similar circumstances.

The court rejected these arguments. First, the court held that the policies and procedures in Trans States' handbook, which call for progressive discipline but do not distinguish between probationary and non-probationary employees, conflict with the provisions of the collective bargaining agreement (CBA) governing pilots' employment. The CBA provides that certain rights are not extended to probationary pilots, including a prohibition on discharge without just cause, a right to present information concerning a potential disciplinary matter, and the right to notice of the facts on which discipline is based. The court held that to the extent the employee handbook grants a probationary pilot a right to "progressive discipline", it conflicts with the CBA's provisions limiting probationary pilots' rights, and the provisions of the CBA prevail. Thus, Trans States did not fail to follow its policies and procedures by discharging the pilot without notice and an opportunity to be heard.

The court also found that the pilot failed to present evidence that the airline treated other similarly situated probationary pilots more favorably. The court held that to establish that a similarly situated employee received more favorable treatment, the evidence must show that the similarly situated employee "dealt with the same supervisor, [was] subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances."

The court also held that the case should not go to the jury merely because airline's explanation for terminating the pilot was "inherently incredible", since the airline's reason was not "truly fanciful" and there was no evidence disputing the airline's explanation or creating a genuine dispute about credibility. "Given the appropriately heightened concern in the airline industry about avoiding any public connection between pilots and alcohol, and the specific provisions negotiated by Trans States to allow dismissal of probationary pilots without any notice or cause, we do not believe that [the carrier's] testimony about a quick decision to terminate [the pilot] is the sort of obviously contrived explanation that might on its own permit an inference that race, religion, or national origin was a motivating factor in [the pilot's] termination." •

DOL Clarifies Protected Activity in Sarbanes-Oxley Whistleblower Cases

In an important decision helping to define the Sarbanes-Oxley (SOX) whistleblower provisions, the Department of Labor's Administrative Review Board (ARB) has reversed the decision of an Administrative Law Judge (ALJ), finding that an airline employee did not engage in protected activity under SOX when she complained to her employer about what the ARB described as how the "company spends its money" or its "ability to collect a debt." *See Platone v. FLYi*, ARB Case. No. 04-153. The ARB's decision provides some much needed guidance regarding what constitutes protected activity under SOX.

In this case, the complainant was employed as the manager of labor relations for FLYi (then known as Atlantic Coast Airlines). She was recommended for the position by a pilot who was an influential member of ALPA, the union representing FLYi's pilots. The pilot and the complainant were involved in a romantic relationship when she was hired, but, as the decision reports, neither informed FLYi of this fact.

During the complainant's employment, she became concerned that pilot representatives were abusing the flight pay system by picking up trips on their scheduled days off then dropping them for union business, so they could get paid for attending to union business on days they were not initially scheduled to fly. She brought these concerns to the attention of her supervisor and the

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Recent Election Results

Spirit Airlines

The Board denied IAM's appeal of an investigator's eligibility ruling, finding that Spirit's Tech Pubs, Records Analysts, RSAs and Maintenance Instructors were properly included in the craft or class of Mechanics and Related Employees. IAM's application to represent the Mechanics and Related Employees was dismissed for insufficient showing of interest. (Decision September 20, 2006).

U.S. Airways/America West

The Board extended IAM's certification to cover the entire craft or class of stock clerks on the combined U.S. Airways system. (Decision September 21, 2006).

Continental Airlines

TWU lost an election to represent Fleet Service Workers. Out of 7,641 eligible voters, there were 3,524 votes for TWU and 10 votes for other. (Dismissal October 13, 2006).

Gulfstream International Airlines, Inc.

IAM lost an election to represent Fleet Service Employees. Out of 106 eligible voters, IAM received 21 votes and there was 1 vote for other. (Dismissal November 3, 2006). •

Ford & Harrison Continues National Expansion

Effective January 1, 2007, Ford & Harrison opened an office in Phoenix, Arizona and merged with Chicago labor and employment law firm Matkov Salzman. In the new Phoenix office, Richard S. Cohen, Stephanie M. Cerasano and Troy P. Foster, all partners in the Labor and Employment Section of Lewis and Roca LLP, became partners with Ford & Harrison. In the new Chicago office, all Matkov Salzman partners – **George Matkov, Jim Salzman**, **Larry Hall**, **Mike Duffee**, **Steve Brenneman**, **Chris Johlie**, **Craig Thorstenson**, **Tom Dugard** and **Melissa Mazzeo** have become partners in Ford & Harrison. •

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report to the airport within one hour of being called – were not so extensive as to require reserve duty time to be considered compensable working time. The court also held that the fact that the pilot was compensated for time spent on reserve did not require this time to be considered working time for FMLA purposes. According to the court, compensation is just one factor to be considered.

Because the court found that the pilot's reserve duty hours did not count as hours worked for the purposes of FMLA coverage, it affirmed the trial court's decision granting summary judgment in favor of the airline on the pilot's FMLA claim.

Even though this is an unpublished decision, which means generally it is not binding even in the Tenth Circuit, the analysis is helpful because there are few decisions addressing what counts as hours of work under the FLSA in an airline context and few addressing the issue in the FMLA context. The issue of hours of service can be particularly important for pilots and flight attendants who may spend a significant amount of time on reserve, commuting, or on layover. •

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union. The union denied that this had happened, but assured the complainant and her supervisor that it would reimburse FLYi for flight pay loss incurred on days that were originally scheduled as days off, which satisfied the supervisor.

Around the same time the flight pay issue was being addressed, the complainant's supervisor found out about her relationship with the pilot. FLYi ultimately discharged her because of the conflict of interest that arose from this previously hidden relationship.

The complainant subsequently filed a complaint with the Department of Labor, claiming FLYi violated SOX when it discharged her. She claimed her complaints about the abuse of the flight pay loss system constituted protected conduct under SOX, and that these complaints caused her to be discharged.

According to the ARB, to prevail on her SOX claim, the complainant had to show that: (1) she engaged in protected activity (that is, that she provided information to a covered employer); (2) the employer knew that she engaged in protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.

The ALJ found in favor of the complainant, but the ARB reversed, finding that her complaints about alleged abuse of the flight pay system were not protected activity under SOX. In reaching this determination, the ARB held that SOX does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Instead, under SOX, the employee's communications must "definitely and specifically" relate to any of the listed categories of fraud or securities violations listed in 18 U.S.C.A. § 1514A(a)(1) (these include mail fraud, wire, radio and TV fraud, bank fraud, securities fraud, or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders).

The ARB determined that the complaints involved did not provide information regarding fraud against shareholders, but instead were efforts to resolve a potential billing problem. The ARB noted that the real victim of any alleged impropriety was ALPA. ALPA had assured FLYi that it would reimburse the airline for flight pay loss incurred on days that were originally scheduled as days off. The complainant's supervisor testified that once he received assurance of reimbursement from ALPA, the issue of whether the pilots intentionally violated internal union policy was for ALPA to decide. Accordingly, the ARB dismissed the case.

The ARB decision in this case contains some important clarifications under SOX. First, not all complaints regarding how a company runs its business are protected under SOX. To be protected under SOX whistleblower provisions, the complaint must "definitely and specifically" relate to one of the enumerated types of fraud or securities regulations violations listed in SOX. Additionally, the ARB held that when allegations of mail or wire fraud arise under the employee protection provisions of SOX, the alleged fraudulent conduct must at least be of the type that would be adverse to investors' interest. Finally, the ARB made it clear that when the allegedly protected activity involves fraud against shareholders, the amount of the potential loss is significant.

Ford & Harrison attorney Peter Petesch, a partner in our DC office, along with attorneys from the law firm of Gibson, Dunn & Crutcher LLP represented FLYi in this case. •

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