

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: GERALD W. KELLER

FAA Order No. 2011-8

Docket No. CP06GL0007
FDMS No. FAA-2006-25869¹

Served: June 13, 2011

DECISION AND ORDER²

By FAA Order No. 2011-2, dated January 11, 2011, the Administrator construed Respondent Gerald W. Keller's motion to vacate the ALJ's July 24, 2007, order as an appeal brief and granted the FAA additional time in which to file a reply brief. The FAA filed its reply brief in a timely fashion. After consideration of the briefs and the record in this case, Keller's appeal is granted, and the ALJ's order dismissing the proceedings is modified to be with prejudice in accordance with 14 C.F.R. § 13.215.

I. Background

A summary of the history of this case follows.

9/22/06 The FAA filed a complaint, alleging that Keller violated 49 U.S.C. § 46318³ by pushing and arguing with other passengers

¹ Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. See 14 C.F.R. § 13.210(e)(1).

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ Section 46318 provides that:

An individual who physically assaults or threatens to physically assault a member of the flight crew or cabin crew of a civil aircraft or any other individual on the aircraft, or takes

prior to take off on board an aircraft operated by Air Tran Airways on December 18, 2005, and seeking a \$2,500 civil penalty.

- 6/7/07 The FAA filed an amended complaint as a matter of right under 14 C.F.R. § 13.214,⁴ adding the allegations that Keller violated 14 C.F.R. § 121.580⁵ by interfering with crewmembers in the performance of their duties on that flight because it was necessary for the captain to deviate from his duties to speak with Keller about his disruptive behavior and for the crew to get the local authorities to remove Keller from the flight.
- 7/3/07 The ALJ issued an order striking the amended complaint and instructing the FAA that it could initiate a new proceeding alleging that Keller violated either 49 U.S.C. § 46318 or 14 C.F.R. § 121.580, or both.
- 7/19/07 The FAA filed a motion to withdraw the original complaint without prejudice.
- 7/24/07 The ALJ granted the FAA's motion to withdraw the complaint without prejudice.
- 7/30/07 Keller filed a motion to vacate and set aside the ALJ's July 24, 2007, order granting the FAA's motion to withdraw the complaint without prejudice, arguing that under 14 C.F.R. § 13.215,⁶ the dismissal should have been with prejudice.

any action that poses an imminent threat to the safety of the aircraft or other individuals on the aircraft is liable to the United States Government for a civil penalty of not more than \$25,000.

⁴ Under 14 C.F.R. § 13.214(b)(1), the complainant does not need the consent of the ALJ to amend a complaint and the respondent does not need the consent of the ALJ to amend an answer as long as the amendment is filed not later than 15 days before a scheduled hearing date. In this case, the ALJ had not yet scheduled the hearing.

⁵ Section 121.580 provides that "no person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part."

⁶ Section 13.215 provides:

At any time before or during a hearing, an agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If an agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge shall dismiss the proceedings under this subpart with prejudice.

- 8/21/07 The FAA issued a Notice of Proposed Civil Penalty (NPCP), proposing to find that Keller violated 49 U.S.C. § 46318 and 14 C.F.R. § 121.580, and to assess a \$2,500 civil penalty.

- 3/26/08 The FAA issued a Final Notice of Proposed Civil Penalty (FNPCP), proposing to find that Keller violated 49 U.S.C. § 46318 and 14 C.F.R. § 121.580 and to assess a \$2,500 civil penalty.

- 2/8/10 The FAA issued an Order Assessing Civil Penalty (OACP), finding that Keller violated 49 U.S.C. § 46318 and 14 C.F.R. § 121.580 and assessing a \$2,500 civil penalty.

- 3/10/10 Keller filed his Petition for Review and Dismissal of Order Assessing Civil Penalty with Prejudice and/or Appellant's Brief.

- 1/11/11 The Administrator issued FAA Order No. 2011-2, construing Keller's motion to vacate as a notice of appeal from the ALJ's order dismissing the proceedings without prejudice, as well as an appeal brief, and granting the FAA additional time in which to file a reply brief.

On February 14, 2011, the FAA filed a document entitled "Complainant's Reply in Opposition to Respondent's Motion to Vacate dated July 30, 2007 as Ordered by the Federal Aviation Administration Decision Maker January 11, 2011." In its reply, the FAA requests that Keller's motion to vacate be denied. The FAA argued that after the ALJ struck the amended complaint, the FAA's only option, if it wanted to proceed with the allegations related to Section 121.580, was to file a motion to withdraw the complaint without prejudice and to issue a new NPCP. The FAA asserted that it filed its motion to withdraw the complaint without prejudice under 14 C.F.R. § 13.218(a), which provides that "a party applying for an order or ruling not specifically provided in this subpart shall do so by motion."

The FAA explained that the ALJ "fashioned a relief equitable to both parties," allowing the FAA to withdraw its pending action and to initiate a new civil penalty action

including the allegations related to a violation of Section 121.580 so as to afford Keller due process on the “new” allegations. (Reply at 5.) According to the FAA, while this relief was not explicitly authorized under the Rules of Practice, it “equitably address[ed] the rights of both parties and the public interest in air carrier safety.” (Reply at 5.) The FAA stated that although an “an argument may lie against the statutory allegation [49 U.S.C. § 46318] being recharged since it had been asserted in the previous complaint... that argument does not exist with regard to the Section 121.580 ... violation,” because the ALJ had ruled that it was a new charge. (Reply at 4.)⁷

The FAA concluded its brief by requesting the Administrator to issue a declaratory statement regarding the validity of the OACP issued in the second civil penalty action if the Administrator grants Keller’s appeal. The FAA requested further that if the Administrator finds that the OACP is invalid, that the Administrator:

1. permit the FAA to withdraw its motion to withdraw its original complaint and reverse the ALJ’s initial decision denying the FAA’s request to amend its complaint;
2. or in the alternative, grant the FAA’s “retroactive right to proceed, on its then timely filed allegations relative to the “new” violations of 14 C.F.R. § 121.580.” (Reply at 5.)

⁷ The Administrator does not agree with this contention. Under the doctrine of *res judicata*, a subsequent lawsuit is barred if (1) the two suits involve the same claim or cause of action; (2) the earlier suit reached a final judgment on the merits; and (3) the two suits involve identical parties and privies. *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005). Regarding the first prong, courts consider whether the two suits involve the same transaction. *Id.* If the two suits involve the same core facts and could be conveniently tried in one suit, then the suits involve the same claim or cause of action, satisfying the first prong of the test for *res judicata*. The two civil penalty actions in this case clearly arose from the same transaction, *i.e.*, Keller’s allegedly disruptive behavior on board an Air Trans Airways flight. Regarding the second prong, a dismissal with prejudice is a final judgment on the merits for *res judicata* purposes. *NBN Broadcasting, Inc., v. Sheridan Broadcasting Networks, Inc.*, 105 F.3d 72 (2d Cir. 1997). The parties in both civil penalty actions were identical, thereby satisfying the third prong of the test for *res judicata*.

II. Discussion

While the FAA may be correct that the ALJ's order dismissing the case without prejudice provided relief that was equitable to both the FAA and Keller under the peculiar circumstances of this case, that relief was unavailable under Section 13.215. That rule specifically prescribes that if the FAA withdraws the complaint, the ALJ "shall dismiss the proceedings ... with prejudice." 14 C.F.R. § 13.215. Section 13.218's provision that a party may file a motion requesting an order not specifically provided for in the Rules of Practice does not authorize the ALJ to dismiss a case without prejudice contrary to Section 13.215's explicit requirement that the dismissal be with prejudice when a complaint is withdrawn. Granted, the ALJ created the "inequity" that he tried to fix in this case by ignoring Section 13.214(b)(1)'s explicit language permitting the FAA to amend its complaint without the ALJ's consent.⁸ However, the ALJ's order striking the amended complaint is not on appeal and, therefore, is not before the Administrator at this time. Moreover, the FAA had the option to file an interlocutory appeal from the ALJ's order striking the amended complaint.

In light of the foregoing, Keller's appeal from the ALJ's order dismissing the proceedings without prejudice is modified to be a dismissal with prejudice.

⁸ The ALJ had not yet scheduled the hearing when the FAA filed the amended complaint by right under 14 C.F.R. § 13.214(b)(1). If the ALJ was concerned about the FAA adding allegations regarding Section 121.580, he could have permitted time for discovery and motions regarding the new allegations, rather than taking the draconian step of striking the amended complaint contrary to 14 C.F.R. § 13.214(b)(1).

The FAA has asked for a declaratory ruling regarding the status of its order assessing a \$2,500 civil penalty for violations of 49 U.S.C. § 46318 and 14 C.F.R. § 121.580 in the second civil penalty action against Keller. This request must be rejected because neither 49 U.S.C. § 46301(d)(7) nor 14 C.F.R. § 13.233 authorize the Administrator to issue a declaratory judgment pertaining to an order assessing civil penalty issued by the FAA in a civil penalty action that is not the subject of an appeal.

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration