No. 20-73497

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT KREB,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of the Final Decision and Order of
the United States Department of Labor's Administrative Review Board

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ANSWERING BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

Although the Secretary of Labor ("Secretary") would gladly participate in any oral argument that the Court schedules in this matter, the Secretary does not believe that oral argument is warranted in this case because the issues are well-settled and can be decided on the briefs.

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STATEMENT OF JURISDICTION

This case arises under the employee protection ("whistleblower") provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "Act"), 49 U.S.C. 42121. The Secretary of Labor ("Secretary") had subject matter jurisdiction based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Robert Kreb against his former employer, Jackson Jet Center ("JJC"), on October 7, 2014, pursuant to 49 U.S.C.

42121(b)(1).[1] On September 28, 2020, the Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order affirming the Administrative Law Judge's ("ALJ") Decision and Order holding that Kreb failed to establish a prima facie case that JJC discharged him in violation of AIR 21. Kreb filed a timely petition for review of the Board's decision with this Court on November 27, 2020, pursuant to 49 U.S.C. 42121(b)(4)(A).

This Court has jurisdiction to review the Board's final order because the alleged violation occurred in Idaho. 49 U.S.C. 42121(b)(4)(A) (providing that review of the Secretary's final order may be obtained in the court of appeals for the circuit in which the violation allegedly occurred).

STATEMENT OF THE ISSUES

1. Whether the ALJ's decision, as affirmed by the ARB, that Kreb failed to show that he engaged in protected activity is supported by substantial evidence.

[1] Congress granted the Secretary the authority to adjudicate AIR 21 whistleblower complaints. 49 U.S.C. 42121(b)(1). The Secretary has delegated responsibility for receiving and investigating AIR 21 whistleblower complaints to the Assistant Secretary for Occupational Safety and Health. Sec'y's Order No. 8-2020 (May 15, 2020), 85 Fed. Reg. 58,393-01 (Sept. 18, 2020). The Secretary has delegated the authority to issue final agency decisions in cases arising under AIR 21 to the ARB. Sec'y's Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186-01 (Mar. 6, 2020); *see also* 29 C.F.R. 1979.110(a).

2. Whether the ALJ acted within his discretion in denying Kreb's motion for sanctions due to alleged spoliation, and purportedly limiting testimony concerning the Baldwin Safety Management System.

STATUTORY ADDENDUM

All pertinent statutes are contained in the Addendum.

STATEMENT OF THE CASE

A. Nature of the Case

AIR 21 protects employees who provide information to an employer or the federal government that they reasonably believe relates to a violation, or alleged violation, of any order, regulation or standard of the Federal Aviation Administration ("FAA"). 49 U.S.C. 42121(a)(1). A covered employer may not discriminate against an employee because the employee engages in activity protected by the Act. 49 U.S.C. 42121(a)(1)–(2). An employee who believes they have been subject to retaliation in violation of AIR 21 may file a complaint with the Secretary through OSHA. 49 U.S.C. 42121(b)(1); 29 C.F.R. 1979.103. OSHA investigates the complaint and issues a determination ordering appropriate relief or dismissing the complaint. 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1979.103–.105. Either the employee or the employer may file objections to OSHA's determination and may request a *de novo* hearing before a Department of Labor ALJ. 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1979.106(a). The ALJ's decision is subject to

discretionary review by the Board, which issues the final decision of the Secretary. 29 C.F.R. 1979.112(a).

B. Statement of Facts

Kreb was employed as a fixed wing pilot by Jackson Jet Center ("JJC") from December 27, 2013 until July 10, 2014. 3-SER-201[2] (Tr. 8).[3] He was employed to fly aircraft owned by Life Flight Network ("LFN") to provide air medical transport services. 3-SER-201 (Tr. 8). During the time in question, LFN did not have a Part 135 certificate allowing it to employ pilots directly, so it entered into an agreement whereby JJC pilots operating under JJC's part 135 certificate would fly LFN's medical transport flights until LFN was able to obtain its own certificate. 3-SER-201 (Tr. 8). Kreb was assigned to LFN's Lewiston, Idaho base. 3-SER-201–202 (Tr. 8–9). Due to some delays in opening the base, Kreb's first shift did not occur until February 25, 2014, and his first LFN flight occurred on March 2, 2014. 3-SER-202 (Tr. 9). He was scheduled to work seven days on, seven days off, in 12-hour shifts. 5-SER-751 (Tr. 526).

[2] Pursuant to Ninth Circuit Rule 30-1.6, citations to "__-SER-__" refer to the Secretary of Labor's Supplemental Excerpts of Record.

[3] Conyan Aviation operated under the name Jackson Jet Center. 3-SER-201 (Tr. 8). It stipulated, along with Jackson Food Stores, that it was jointly liable for any violations of AIR 21. 3-SER-201 (Tr. 8).

Kreb was provided with a template Flight Risk Assessment Tool ("FRAT") form on March 6, 2014. 3-SER-202 (Tr. 9). The FRAT is a tool to assist pilots in making good decisions when evaluating aviation risks. 5-SER-759–60 (Tr. 534–35). It requires the pilot to assign a numerical value indicating risk for numerous factors, such as whether the pilot is below a certain experience level or the flight will occur at night. 6-SER-1252 (Joint Ex. ("JX") 23). JJC required pilots to complete a FRAT before each trip, and Kreb followed this policy until July 9, 2014. 1-SER-76 (ALJ Decision and Order ("D&O") 68).

July 8, 2014 was the first day that Kreb worked during the week he was fired. 5-SER-782 (Tr. 557). Ryan Pike, JJC's Chief Pilot, called Kreb around 1:00 p.m. on July 8 to ask if he could begin work early due to a scheduling issue. 3-SER-202; 5-SER-783 (Tr. 9, 558). Kreb began his shift at 7:00 p.m., an hour earlier than scheduled. 5-SER-787 (Tr. 562). JJC kept him on duty until 9:00 a.m. on July 9, a full 14 hours.[4] 1-SER-66 (D&O 58). During that shift, Kreb made a round trip to Seattle, returning to Lewiston around 3:00 a.m., and then took a nap. 1-SER-66 (D&O 58). After ending his shift, he took two additional naps. 1-SER-66 (D&O 58).

[4] Pilots working for a Part 135 operator are limited to a maximum duty period of 14 hours as long as such duty period is preceded and followed by at least 10 consecutive hours of rest time and other regulatory conditions are met. 14 C.F.R. 135.267(c); 1-SER-69 (D&O 61).

On July 9, 2014 at 5:03 p.m., Steve Bower, the Director of Operations for JJC, sent Kreb an assignment email instructing him to make a repositioning flight from Lewiston to the Dallesport Base, after which Kreb would pick up another pilot and then return to Lewiston in the morning. 1-SER-66; 3-SER-202 (D&O 58; Tr. 9). Kreb responded to Bower's email at 6:29 p.m. asserting that the assigned flight would be a "medium to high FRAT" for several reasons, including his lack of familiarity with the Dallesport airport, a "[h]ostile nighttime operational environment" in the Dallesport area, the aircraft's lack of synthetic vision, "[h]eavy encroachment of rest periods yesterday/today book-ending a long duty period last night due to scheduling mix-ups," an anticipation of heavy LFN demand at Dallesport, and "[r]epositioning flights risk increasing fatigue and possible [g]rounding from flight/duty rest requirements." 6-SER-1248; 1-SER-66 (JX 15; D&O 58). He suggested that another pilot could perform the assigned flights instead. 6-SER-1248; 1-SER-67 (JX 15; D&O 59). Kreb also asserted the shift was "guaranteed to exceed" twelve hours and would disrupt LFN service. 6-SER-1248 (JX 15). Lastly, he stated that he was "not yet able to be compensated under LFN [p]ayroll considerations for the extenuations while [Dallesport] [p]ilots [a]re and more familiar to the operating environment or less likely [t]o have been exposed to the rest challenges I have with recent [c]hallenges." 6-SER-1248 (JX

15). Sometime after Kreb sent the email, he had a short phone conversation with Pike, who told him to go ahead as planned. 1-SER-67 (D&O 59).

Kreb reported for duty at Lewiston at 7:00 p.m. on July 9. 1-SER-67 (D&O 59). At about 10:00 p.m., LFN instructed him to fly to Aurora, Oregon, so he began preparing for that flight. 1-SER-67 (D&O 59). Shortly after 10:00 p.m., Kreb called LFN dispatch and spoke with Dominic Pomponio, the manager on duty. 1-SER-18; 1-SER-67–68 (D&O 10, 59–60). Kreb reiterated his concern that the flight would be a medium to high flight risk because he was not familiar with the Dallesport base and would be encroaching on mountains in the dark, and he expressed frustration that JJC was not considering his alternative suggestions. 1-SER-68 (D&O 60). He also stated he expected to become fatigued or run out of flight time, which could cause his aircraft to be grounded in a location that would be inconvenient for LFN. 1-SER-68 (D&O 60). Pomponio told Kreb he would get back to him. 1-SER-68 (D&O 60).

Kreb filled out his FRAT around 10:45 p.m. and emailed it to Bower and Pike at 11:50 p.m. 1-SER-68 (D&O 60). Based on the numerical values he assigned to each category of risk, his "Risk Assessment Total" was 60, which represented a "medium" level of risk (56–79) under the FRAT's metrics. 1-SER-68 (D&O 60). Some of the risks that Kreb identified on the FRAT included "[m]edical crew member has less than 1 year Air Ambulance experience,"

"[n]ew/unfamiliar NAV/radio equipment installed within past 3 months," "[t]urn down by other operators for weather reasons," "[p]ilot has flown 2 or more hours during current shift," "[w]ind greater than 30 kts at TO/landing airport or gust factor 15 kts or more," "[m]oderate turbulence in forecast," and "[w]ind shear +/- 10 or [greater] forecast or reported." 6-SER-1253 (JX 25).

In his email to Bower and Pike, Kreb wrote that the FRAT "does not account for significant considerations [I] outlined late this afternoon," and "[i]f [I] were to fairly calculate an assessment with those points not provided in this Risk Assessment Tool, I would likely approach scores of 80+ requiring mitigation to lower scores or declining the assignments/requests in total." 6-SER-1250 (JX 16). He also reiterated his concerns about the schedule, because he would have to work a shift of 13 or more hours after not receiving adequate rest, having previously worked a 14-hour shift that followed another disrupted rest period. 6-SER-1250; 1-SER-68 (JX 16; D&O 60).

Ten minutes after sending the email, Kreb called Pike to confirm he had received the FRAT. 1-SER-68 (D&O 60). Pike had not seen it, but he told Kreb he could get a hotel if he ran out of duty time or became too tired. 1-SER-68 (D&O 60). Kreb felt relieved to hear this, and he prepared to depart the airport. 1-SER-68 (D&O 60). However, he then received a call from dispatch informing him that LFN had canceled the flight. 1-SER-68 (D&O 60). Kreb offered to fly other flights

that night, but he received no additional assignments. 1-SER-68 (D&O 60). The next day, July 10, 2014, JJC terminated Kreb's employment. 1-SER-68 (D&O 60).

After losing his position with JJC, Kreb had some difficulty finding another job. 5-SER-881–82 (Tr. 656–57). He applied for a job with Corporate Air Center, and in March 2015, the company asked Kreb to take some flights with their chief pilot, Roger Coon, as part of the interview process. 5-SER-883–84; 1-SER-21 (Tr. 658–59; D&O 13). Kreb believed the flights were going well. 5-SER-884–85 (Tr. 659–60). They stopped at the Seattle airport for several hours, and as Kreb was preparing the aircraft for the next flight, he saw a person he did not know give him a strange look; he later learned that person was Wayne Werner. 5-SER-884–86 (Tr. 659–661). Kreb then observed Werner having an animated conversation with Coon, during which both Werner and Coon gestured toward the airplane where Kreb was sitting. 5-SER-886–88 (Tr. 661–63). A few weeks later, Kreb learned that he did not get the Corporate Air Center job. 5-SER-890–91 (Tr. 665–66). Kreb believed that he was not offered the job due to Coon's conversation with Werner. 5-SER-891 (Tr. 666).

C. Procedural History

Kreb filed his AIR 21 complaint against JJC and LFN with OSHA on October 7, 2014, and amended the complaint on June 10, 2015 to include an allegation of blacklisting. 1-SER-9–10 (D&O 1–2). On August 4, 2016 OSHA

issued a decision finding that Kreb timely filed his complaint, JJC is an air carrier within the meaning of the Act, and Kreb was a covered employee, but Kreb did not engage in protected activity and was not blacklisted. 1-SER-10 (D&O 2). Accordingly, OSHA dismissed his complaint. 1-SER-10 (D&O 2). On August 17, 2016, Kreb objected to OSHA's findings and requested a formal hearing before an ALJ. 1-SER-10 (D&O 2).

Following preliminary proceedings before the ALJ, LFN filed a motion for summary decision on April 21, 2017, which the ALJ denied on June 12, 2017. 1-SER-10 (D&O 2). Kreb filed a motion for sanctions due to JJC's alleged spoliation of evidence on May 17, 2017, which the ALJ denied on June 12, 2017. 1-SER-10 (D&O 2). Kreb and LFN requested the ALJ's approval of a settlement agreement between those two parties, which the ALJ approved on June 15, 2017. 1-SER-10–11 (D&O 2–3). Thus, Kreb's claim against LFN was dismissed on August 15, 2017. 1-SER-11 (D&O 3). The ALJ held a hearing on Kreb's claims against JJC in Tacoma, Washington from July 17 to 20, 2017. 1-SER-11 (D&O 3). Following submission of the parties' post-trial briefs, the ALJ issued a decision and order dismissing Kreb's complaint on August 6, 2018. 1-SER-83 (D&O 75).

Kreb petitioned the ARB for review of the ALJ's order on August 20, 2018. CL 78.[5] The ARB issued a decision and order affirming the ALJ's decision on September 28, 2020. 1-SER-2–8 (ARB D&O). Kreb petitioned this Court for review of the ARB's decision on November 27, 2020. Pet. for Review.

D. The ALJ's Order Denying Kreb's Motion for Sanctions

Kreb's Motion for Sanctions for Spoliation, which the ALJ denied on June 12, 2017 prior to the hearing on the merits of Kreb's claim against JJC, was based on JJC's inability to produce Kreb's and other employees' past FRATs, duty logs, and flight manifests, as well as emails from the work email accounts of Kreb, Bower, Pike, and Werner. 6-SER-1176–77 (Complainant's Mot. for Sanctions for Resp'ts Jacksons' Spoliation of Evid. 1–2). Kreb sent a litigation hold letter to JJC on November 12, 2014 informing it of the duty to maintain files related to his employment, and he sent a request for production of documents on December 9, 2016. 6-SER-1187–90, 6-SER-1198–1212 (Pettigrew Decl. in Supp. of Mot. for Spoliation Sanctions Exs. A, C). In addition, OSHA sent a letter to JJC on December 30, 2014 stating that Kreb had filed a whistleblower complaint and instructing JJC to maintain any files related to Kreb's employment. 6-SER-1191–93 (Pettigrew Decl. in Supp. of Mot. for Spoliation Sanctions Ex. B). However,

[5] References to the documents in the certified list of documents filed with this Court by the Department of Labor on February 22, 2021 are indicated by the abbreviation "CL" and the document number in the certified list.

when Kreb sought comparative employees' past flight assessments, duty logs, flight manifests, and his own company emails, as well as Werner's and Mr. Pike's emails in discovery before the ALJ, JJC produced only a few of the requested documents. 1-SER-100–101 (Order Den. Resp'ts' Mot. for Summ. Decision and Den. Complainant's Mot. for Sanctions 14–15 ("Order")). JJC asserted that it could not locate many of the documents and that the relevant email accounts had been inadvertently deleted in a December 2015 conversion of its email system to a cloud-based server. 1-SER-102, 1-SER-106 (Order 16, 20). Kreb asserted that JJC intentionally destroyed this evidence, and he sought an adverse inference against JJC and a $5,000 fine pursuant to Fed. R. Civ. P. 37 and 29 C.F.R. 18.57. 6-SER-1177–78 (Complainant's Mot. for Sanctions for Resp'ts Jacksons' Spoliation of Evid. 2–3).

The ALJ first addressed whether to impose sanctions for the loss of the JJC email accounts. He explained that Fed. R. Civ. P. 37(e) permits the taking of an adverse inference only upon a "finding that the party acted with the intent to deprive another party of the information's use in the litigation." 1-SER-105 (Order 19) (quoting Fed. R. Civ. P. 37(e)). He also explained that Fed. R. Civ. P. 37 allows for a remedy only where a party has failed to take reasonable steps to preserve electronically stored information. 1-SER-106 (Order 20). Further, the ALJ noted that 29 C.F.R. 18.57 does not permit a judge to impose sanctions for a

party's failure to provide electronically stored information lost as a result of the "routine, good-faith operation of an electronic information system," unless "exceptional circumstances" are present. 1-SER-106 (Order 20) (quoting 29 C.F.R. 18.57).

In applying these rules, the ALJ determined that the uncontested evidence showed that JJC took reasonable steps to preserve the email accounts at issue. 1-SER-106 (Order 20). Upon receiving Kreb's November 12, 2014 letter, Susan Rhoades, JJC's Vice President of Human Resources, directed Patrick Abernathy, JJC's IT Manager, to preserve all emails between Kreb and JJC. 1-SER-106 (Order 20) (citing 6-SER-1161–62 (Decl. of Susan Rhoades in Opp'n to Complainant's Mot. for Sanctions)). In December 2015, JJC upgraded its email server, but prior to the upgrade, Rhoades instructed Abernathy to retain the email accounts for Kreb, Pike, and Werner. 1-SER-106 (Order 20). Despite Rhoades' instructions, the email accounts did not survive the upgrade; however, the ALJ determined that the loss of the accounts was the result of a "routine, good-faith operation" of an email system, and JJC took reasonable steps to preserve the accounts. 1-SER-106 (Order 20). Moreover, the ALJ noted that JJC was able to recover copies of some emails from Pike, who had forwarded his work email to a personal account. 1-SER-107 (Order 21). On the other hand, Kreb did not offer "a shred of evidence" to show that JJC selectively destroyed evidence. 1-SER-106–07 (Order 20–21). Thus, the ALJ

determined that JJC did not "act[] with the necessary intent to justify permitting an adverse [inference], or any other sanction, against it." 1-SER-107 (Order 21).

Second, the ALJ also determined that JJC was not obligated to retain the FRATs, duty logs, and flight manifests, and thus the imposition of sanctions was not warranted on that basis. The ALJ determined that Kreb requested those documents for the first time in his December 9, 2016 discovery request. 1-SER-107 (Order 21). He noted that, as JJC explained, Kreb's November 12, 2014 preservation notice to JJC was limited to documents pertaining to Kreb's employment and termination; the letter did not state that JJC was required to retain the FRATs, duty logs, or flight manifests. 1-SER-103; 6-SER-1187–90 (Order 17; Pettigrew Decl. in Supp. of Mot. for Spoliation Sanctions Ex. A). Under the applicable regulations, JJC was only required to maintain records of pilot flight time or pilot duty logs for 12 months, and load and flight manifests for 30 days. 1-SER-107 (Order 21) (citing 14 C.F.R. 135.63). Thus, JJC had no obligation to retain the July 2014 duty logs beyond July 2015, and the July 2014 flight manifests beyond August 2014. 1-SER-107 (Order 21). Accordingly, the ALJ declined to impose sanctions on this basis. 1-SER-107 (Order 21).

E. The ALJ's Final Decision and Order Denying Relief

Following the hearing and the submission of closing briefs, the ALJ issued a thorough, 75-page opinion on August 6, 2018 determining that Kreb did not show

that he engaged in protected activity, and thus he could not establish a prima facie case that he was discharged in violation of AIR 21. 1-SER-83 (D&O 75). As an initial matter, the ALJ found the following elements required to make a prima facie case were uncontested: (1) Kreb filed a timely complaint; (2) JJC was a covered employer as defined by AIR 21; and (3) Kreb was a covered employee under the terms of the Act. 1-SER-62–63 (D&O 54–55). The ALJ's decision focused on analyzing whether Kreb proved that he engaged in protected activity. 1-SER-64–80 (D&O 56–72).

Kreb asserted that he engaged in protected activity through his July 9, 2014 FRAT and related emails, in which he claimed that he identified several potential or actual violations of Federal aviation standards. 1-SER-65 (D&O 57). He specifically referenced the following standards: 14 C.F.R. 135.267(c) (limiting flight crewmembers to 14 hours on duty, followed by at least 10 hours of rest); 14 C.F.R. 91.13 (prohibiting the operation of aircraft in a "careless or reckless manner"); 14 C.F.R. 91.103 (before beginning a flight, pilot in command must become familiar with "all available information concerning that flight," including weather, known traffic delays, and runway information); and 14 C.F.R. 135.329 (crewmember training requirements). 1-SER-65 (D&O 57). The ALJ addressed each alleged violation in turn.

First, Kreb asserted that there was a risk that he would exceed 14 hours on duty on the morning of July 10 before he was able to return to Lewiston. 1-SER-69 (D&O 61). However, the ALJ credited Pike's testimony that Kreb was not scheduled to be on duty for more than 14 hours during his July 9–10 shift. 1-SER-69 (D&O 61) (citing 4-SER-503–04 (Tr. 305–06)). The ALJ reasoned that it is not a violation of the 14-hour duty rule for an employer to try to utilize as much of a pilot's time as possible without exceeding the 14-hour limitation. 1-SER-70 (D&O 62). Furthermore, the ALJ determined that Kreb's belief that he would exceed the limit was not objectively reasonable, because JJC gave its pilots several options when they received an assignment that could exceed duty time limits, including declining the flight. 1-SER-70 (D&O 62) (citing 6-SER-1247 (Email from Bower to JJC Pilots, July 1, 2014, Joint Exhibit 12)). Indeed, Pike reiterated the night of July 9 that Kreb could stop his shift and get a hotel room if he was delayed at another airport. 1-SER-70 (D&O 62) (citing 5-SER-866–80 (Tr. 641–55)). Thus, the ALJ concluded that Kreb did not show he had a reasonable belief that JJC was about to violate the 14-hour duty rule. 1-SER-70 (D&O 62).

Second, Kreb asserted that he reported a potential violation of 14 C.F.R. 91.13 (careless or reckless operation) because he anticipated he might become fatigued as a result of an interrupted rest period following his first shift. 1-SER-70–71 (D&O 62–63). The ALJ determined that this argument was based on Kreb's

"speculation as to what may have happened if he became increasingly fatigued during his night shift on July 9," but Kreb did not assert that he was actually too fatigued to fly. 1-SER-71 (D&O 63). Instead, the ALJ explained, Kreb expressed concern that he might become too fatigued to fly at a location that would be inconvenient for JJC, but this did not rise to the level of protected activity, because inconveniencing JJC would not have violated any FAA standard. 1-SER-71 (D&O 63). Furthermore, Kreb testified that he was ready and able to fly at the beginning of his shift, and he received a full 10-hour rest period prior to his shift. 1-SER-71 (D&O 63). Moreover, the ALJ noted, had Kreb become unfit to fly at any point during his shift, he had an affirmative duty to remove himself from flight duty status, which he did not do. 1-SER-71 (D&O 63). Thus, the ALJ concluded that the evidence did not show Kreb had a good faith, objectively reasonable belief that his flight assignment would have violated 14 C.F.R. 91.13. 1-SER-72 (D&O 64).

Third, Kreb argued that JJC fired him in part for taking time during the evening of July 9 to obtain more information about the flight and discuss it with JJC and LFN. 1-SER-72 (D&O 64). Because Kreb asserted that obtaining this information was necessary to comply with 14 C.F.R. 91.103 (requiring a pilot to review flight information prior to takeoff), he argued that he was fired for complying with this regulation. 1-SER-72 (D&O 64). The ALJ rejected this contention because there was no evidence that JJC pushed Kreb to fly before he

was ready. 1-SER-73 (D&O 65). In addition, Kreb's testimony reflected that he had taken the time to become familiar with the relevant information; his concern related to potential fatigue, not a lack of information. 1-SER-73 (D&O 65). As such, the ALJ determined that Kreb did not show that he had a reasonable, good faith belief that making his scheduled flights would violate 14 C.F.R. 91.103. 1-SER-73 (D&O 65).

Fourth, Kreb asserted that under 14 C.F.R. 135.329 (pilot training requirements), he should have been given more information about the airport to which he was assigned to fly. 1-SER-73 (D&O 65). Kreb asserted he needed to know the location of fuel, rest facilities, and bathrooms, and how to perform duties like filling oxygen and picking up medical staff. 1-SER-73 (D&O 65). The ALJ explained that 14 C.F.R. 135.329 does not require detailed facilities training for every airport where JJC might operate, and because JJC was an on-demand operator under Part 135, it did not have a fixed list of destination airports. 1-SER-73 (D&O 65). Accordingly, the ALJ concluded that Kreb's lack of familiarity with the airport's facilities did not reflect a violation of 14 C.F.R. 135.329. 1-SER-74 (D&O 66).

Next, the ALJ reviewed a host of other alleged safety concerns that Kreb identified, and determined that Kreb did not prove that any of these concerns were objectively reasonable, held in good faith, or related to FAA aviation standards. 1-

SER-74–80 (D&O 66–72). For example, Kreb wrote on the July 9 FRAT that his assigned aircraft had "[n]ew/unfamiliar [n]av/radio equipment installed within past 3 months," however, the ALJ found that Kreb had flown the same aircraft for JJC ten times previously without ever indicating on a FRAT that it had new navigation equipment. 1-SER-74 (D&O 66). This caused the ALJ to question Kreb's honesty. 1-SER-74–75 (D&O 66–67). In addition, Kreb wrote on the July 9 FRAT that the flight had been turned down by other operators for weather reasons, but at the hearing, Kreb acknowledged this was not true. 1-SER-75 (D&O 67). Instead, Kreb asserted it was common during the summer for other operators to turn down flights in the area due to weather or equipment issues. 1-SER-75 (D&O 67). The ALJ reasoned that this constituted "speculat[ion]" at best, and so the entry on the FRAT appeared to be "baseless." 1-SER-75 (D&O 67).

Lastly, the ALJ discussed several specific adverse weather conditions that Kreb noted on the July 9 FRAT. 1-SER-77–80 (D&O 69–72). Kreb wrote that the wind was greater than 30 knots at the takeoff or landing airport, or the gust factor was 15 or more, but the ALJ determined that objective evidence did not support this assertion, because the weather reports for that time period showed that the winds were 15 or 17 knots, and the gust factor did not exceed 15 knots. 1-SER-77 (D&O 69). Similarly, Kreb's FRAT stated that moderate turbulence was present or forecast, but the ALJ found that the only evidence Kreb presented to support that

assertion was his own testimony that "there's always turbulence over the mountains," and the actual forecasts made no mention of moderate turbulence. 1-SER-78 (D&O 70). In addition, Kreb wrote on the FRAT that wind shear "+/- 10 or greater" was forecasted or reported; the ALJ determined this was plausible, but it would not have been a violation of FAA standards to fly in such conditions. 1-SER-78–79 (D&O 70–71).

Accordingly, having reviewed all the alleged violations set forth by Kreb, the ALJ concluded that Kreb failed to show that he engaged in protected activity. 1-SER-80 (D&O 72). The ALJ noted that "a complainant need not identify a specific violation" of FAA rules to engage in protected activity. 1-SER-80 (D&O 72) (citing *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, 2009 WL 2371239, at *4 (ARB July 2, 2009)). The ALJ found that Kreb exaggerated the flight risks on his FRAT, "which tends to show a lack of good faith belief in the substance of his reports." 1-SER-80 (D&O 72). In addition, the ALJ determined that Kreb was not able to show that "his expressed safety concerns were objectively reasonable in light of the conditions present that night." 1-SER-80 (D&O 72). Moreover, the ALJ reasoned, even if Kreb's beliefs had been held in good faith and objectively reasonable, Kreb failed to "relate his concerns to actual or imminent violations of FAA standards." 1-SER-80 (D&O 72). Instead, Kreb's concerns "merely represented *potential issues* that could have arisen during the

course of his duty time, for which [JJC] was prepared to respond with appropriate remedies." 1-SER-80 (D&O 72). Thus, the ALJ determined that Kreb failed to establish that he engaged in protected activity. 1-SER-80 (D&O 72).

The ALJ also found that it was uncontested that JJC's termination of Kreb's employment was an adverse action, but that Kreb had not presented sufficient evidence to prove that JJC blacklisted him. 1-SER-80–83 (D&O 72–75).

Having determined that Kreb failed to prove that he engaged in protected activity, the ALJ did not reach the question of whether protected activity was a contributing factor in JJC's firing of Kreb. 1-SER-83 (D&O 75). Thus, the ALJ dismissed Kreb's complaint. 1-SER-83 (D&O 75).

F. The ARB's Final Decision and Order

The ARB upheld the ALJ's determination that Kreb did not engage in protected activity, finding that the ALJ's decision was supported by substantial evidence. 1-SER-8 (ARB Decision and Order ("ARB D&O") 7). The ARB rejected Kreb's contention that the ALJ had required him to prove an actual violation or cite to specific FAA rules to establish protected activity, because the "ALJ correctly stated more than once that [Kreb] did not need to identify or describe an actual violation or to prove that a violation was certain to occur." 1-SER-6 (ARB D&O 5).

The ARB also rejected Kreb's argument that the ALJ failed to consider the reasonableness of the safety reports at the time they were first made. 1-SER-6–7 (ARB D&O 5–6). The ARB explained that the ALJ applied the correct standard, which requires examining whether the employee's belief was subjectively and objectively reasonable. 1-SER-6 (ARB D&O 5). The ARB stated that the ALJ "thoroughly considered" Kreb's contention that he engaged in protected activity and "carefully went through the federal aviation regulation violations and safety concerns" that Kreb raised. 1-SER-6 (ARB D&O 5). Having done so, "the ALJ found [Kreb] did not have an objectively reasonable belief that a violation existed or was likely to occur considering the knowledge available to a reasonable person in the same factual circumstances." 1-SER-7 (ARB D&O 6). "Critical[ly]," the ARB reasoned, the ALJ made findings, supported by substantial evidence, "that none of the safety concerns were imminent or entirely truthful." 1-SER-7 (ARB D&O 6). Further, the ARB explained that the "record shows that a pilot with the same experience and training would not have thought the cited safety concerns were likely or imminent violations of federal aviation standards, but at most possibilities dependent on factors that were unknown or unlikely at the time [Kreb] raised his concerns." 1-SER-7 (ARB D&O 6). Kreb did not offer any evidence to show "that a pilot with his training and experience would have agreed that accepting the July 9 flight assignment would have posed a safety risk." 1-SER-7

(ARB D&O 6). Thus, the ARB affirmed the ALJ's finding that Kreb did not engage in protected activity and dismissed Kreb's complaint. 1-SER-7–8 (ARB D&O 6–7).

SUMMARY OF ARGUMENT

The ALJ's decision dismissing Kreb's complaint because he failed to show that he engaged in protected activity is supported by substantial evidence. The ALJ carefully considered each alleged instance of protected activity, weighed the relevant evidence, and determined that Kreb did not show that he had a good faith, objectively reasonable belief that he was reporting an actual or imminent violation of FAA standards. In doing so, the ALJ made appropriate credibility determinations and sufficiently explained his reasoning. Kreb argues that the ALJ should have weighed the evidence differently, should have disregarded certain evidence, and should have considered evidence that was not relevant to determining whether Kreb engaged in protected activity, but Kreb's disagreement with the ALJ's weighing of the evidence does not demonstrate that the ALJ's decision is not supported by substantial evidence. Ultimately, the ALJ applied the correct legal standards and appropriately weighed the evidence, and thus, the decision is supported by substantial evidence.

Kreb also objects to the ALJ's denial of his motion for sanctions due to alleged spoliation of evidence, as well as the ALJ's purported decision to limit

testimony concerning the Baldwin Safety Management System, but the ALJ acted well within his discretion in making these decisions, and Kreb has not shown that they were erroneous. Kreb also attempts to question the ALJ's credentials, but he has not provided any reason to doubt the ALJ's qualifications. Accordingly, the ARB was correct to uphold the ALJ's opinion, and this Court should affirm the ARB's decision.

STANDARD OF REVIEW

Judicial review of the ARB's Final Decision and Order in an AIR 21 proceeding is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2). 49 U.S.C. 42121(b)(4)(A). Under this standard, this Court must affirm the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); *Coppinger-Martin v. Solis*, 627 F.3d 745, 748 (9th Cir. 2010). The Court will reverse a decision as arbitrary and capricious "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem," "offered an explanation that runs counter to the evidence before the agency," or reached a conclusion "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010).

The Secretary's findings of fact, moreover, "must be sustained unless they are unsupported by substantial evidence in the record as a whole." *Calmat Co. v. U.S. Dep't of Lab.*, 364 F.3d 1117, 1121 (9th Cir. 2004). "Substantial evidence means more than a mere scintilla but less than a preponderance*." Chu v. U.S. Commodity Futures Trading Comm'n*, 823 F.3d 1245, 1250 (9th Cir. 2016) (internal quotation marks omitted); *NLRB v. Int'l Bhd. of Elec. Workers, Loc. 48*, 345 F.3d 1049, 1053–54 (9th Cir. 2003) (same). It means evidence that "a reasonable mind might accept as adequate to support a conclusion." *Chu*, 823 F.3d at 1250 (internal quotation marks omitted); *Int'l Bhd. of Elec. Workers*, 345 F.3d at 1054 (same). Even "[i]f the evidence is susceptible to more than one rational interpretation," the Court "may not substitute [its] judgment for that of the agency." *Gebhart v. SEC*, 595 F.3d 1034, 1043 (9th Cir. 2010) (citing *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)). "The standard is extremely deferential and a reviewing court must uphold the agency's findings unless the evidence presented would *compel* a reasonable finder of fact to reach a contrary result." *Gebhart*, 595 F.3d at 1043 (emphasis in original) (internal quotation marks omitted).

The ALJ's credibility determinations, furthermore, must be upheld by the ARB and this Court "unless they are inherently incredible or patently unreasonable." *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1063 (9th Cir.

2012) (quoting *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997)); *see also In re Delfour, Inc.*, ARB Case No. 96-186, 1997 WL 303982, at *3 (ARB May 28, 1997) ("[T]he ALJ is in the unique position to judge the quality of testimony and the demeanor of witnesses during a hearing. In the absence of clear error on the part of an ALJ, the Board is reluctant to set aside credibility resolutions and factual findings and the weight accorded to the record evidence.") (internal quotation marks omitted)).

ARGUMENT

I. STATUTORY BACKGROUND.

AIR 21 prohibits a covered air carrier from retaliating against an employee who provides information to the employer or the federal government regarding a violation, or alleged violation, of any order, regulation, or standard of the FAA or any other provision of federal law relating to aviation safety. 49 U.S.C. 42121(a)(1); 29 C.F.R. 1979.102(a).

Not every complaint about workplace safety affecting the employee of an air carrier or contractor is covered by AIR 21. To be protected, a complaint must relate to a violation or alleged violation of air carrier safety laws. 49 U.S.C. 42121(a)(1)–(2); *see also Simpson v. UPS*, ARB No. 06-065, 2008 WL 921123, at *4 (ARB Mar. 14, 2008) ("Although a complainant need not cite to a specific violation, allegations under AIR 21 must at least relate to violations of FAA orders,

regulations, or standards," or to "other violations of federal law relating to aviation safety.").

To prevail on an AIR 21 claim, a complainant must prove the elements of a claim by a preponderance of the evidence, including: (1) the employee engaged in protected activity; (2) the employee suffered an adverse personnel action; and (3) the protected activity was a contributing factor in the adverse action. 49 U.S.C. 42121(b)(2)(B)(iii); 29 C.F.R. 1979.109(a); *see also Hoffman v. Solis*, 636 F.3d 262, 267 (6th Cir. 2011) (same). Once a complainant sustains this burden of proof, the burden shifts to the employer to prove by clear and convincing evidence that it would have taken the same action even if the complainant did not engage in protected activity. 49 U.S.C. 42121(b)(2)(B)(iv); 29 C.F.R. 1979.109(a); *see also Hoffman*, 636 F.3d at 267 (same).

"[A]n employee need not prove an *actual* FAA violation to satisfy the protected activity requirement," however, the employee must show: "(1) the employee's report . . . is related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, and (2) the employee's belief of a violation is subjectively and objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, 2015 WL 1005044, at *5 (ARB Feb. 13, 2015) (internal quotation marks omitted). Determining "whether a subjective belief is objectively reasonable" requires "taking into account the knowledge available to a

reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Burdette v. Expressjet Airlines, Inc.*, ARB No. 14-059, 2016 WL 454190, at *3 (ARB Jan. 21, 2016) (internal quotation marks omitted).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION, AS AFFIRMED BY THE ARB, THAT KREB FAILED TO PROVE THAT HE ENGAGED IN PROTECTED ACTIVITY.

The ALJ issued a thorough, lengthy opinion in which he identified the correct legal principles, evaluated the evidence pertaining to each alleged instance of protected activity, made reasonable credibility determinations, weighed the evidence appropriately, and sufficiently explained his findings. Thus, the ALJ's decision is supported by substantial evidence, and the ARB was correct to affirm it. Most of Kreb's arguments on appeal are waived, including his contentions that the ALJ was not permitted to consider JJC's evidence pertaining to the accuracy of the information on the July 9 FRAT; that the ALJ reused a "boiler plate" decision; that the ALJ failed to consider that JJC did not conduct an investigation before terminating Kreb's employment; that the ALJ incorrectly limited testimony concerning the Baldwin System; and that the ALJ was not qualified. However, even if these arguments were not waived, Kreb has not identified any reason why the ALJ's decision is unsound. Accordingly, this Court should affirm it.

A. The ALJ's Determination That Kreb Did Not Engage In Protected Activity Is Supported By Substantial Evidence.

The ALJ's determination that Kreb did not show that he engaged in protected activity is supported by substantial evidence. After carefully reviewing and weighing the evidence, the ALJ determined that Kreb did not show he had a good faith, objectively reasonable belief that he was reporting actual or imminent violations of FAA standards. 1-SER-80 (ALJ D&O 72). For example, Kreb could not show that a violation of the 14-hour duty rule was imminent, because he was not scheduled to work more than 14 hours, and because on July 1, 2014, JJC had provided its pilots with several mitigation options, including leaving on time without the medical crew or taking 10 hours of rest at the destination before flying home, for circumstances in which pilots encountered delays or unexpected conditions that could cause them to exceed their duty limit. 1-SER-69–70 (ALJ D&O 61–62) (citing 6-SER-1247 (Email from Bower to JJC Pilots, July 1, 2014, JX 12)).[6] Furthermore, in regard to the various weather concerns that Kreb

[6] In his statement of facts, Kreb claims, apparently for the first time, that his flight schedule on July 9–10 required him to work a total of 14 hours and 15 minutes. Pet'r's Br. 14. This assertion, which is not supported by any citation to the record, contradicts Kreb's own hearing testimony, 5-SER-799 (Tr. 574) (stating that he was scheduled to work close to a full 14 hours), and the narrative he presented to the ARB, 2-SER-145 (Complainant's Opening Br. 20) (stating that JJC estimated that "Kreb would have returned to Lewiston at 13.5 hours of duty time," but asserting that "things often did not go as planned"). Thus, this Court should give it no credence.

reported on the FRAT, such as excess wind and turbulence, the ALJ determined that Kreb's own testimony (that, for example, "there's always turbulence over the mountains") did not outweigh the objective evidence showing there was no severe weather in the area on the night of July 9. 1-SER-75, 1-SER-77–78 (ALJ D&O 67, 69–70). In addition, the ALJ noted that Kreb had inaccurately stated on the FRAT that his aircraft had new navigation equipment installed in the last three months, which caused the ALJ to question Kreb's credibility. 1-SER-74–75 (D&O 66–67). And Kreb had further stated on the FRAT that other operators had turned down flights in the area, which the ALJ determined was baseless speculation. 1-SER-75 (D&O 67). Kreb's exaggerations of risks on his FRAT caused the ALJ to infer "a lack of good faith belief in the substance of his reports." 1-SER-80 (D&O 72).[7]

Having considered the evidence pertaining to each alleged safety violation, the ALJ determined that Kreb was not able to show that the safety concerns he identified were objectively reasonable, nor could he relate such concerns to actual

[7] Kreb also asserted in his statement of facts that his FRAT reflected four conditions that prohibited him from conducting his flight at all: weather below takeoff minimums; weather below landing minimums at forecast arrival time; runway not paved; and runway less than 3500 feet. Pet'r's Br. 15. Kreb never made this assertion to the ARB. 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply Br.). Furthermore, it is not supported by the evidence. As discussed *supra*, Kreb's claims concerning poor weather conditions were not consistent with the objective evidence as to the weather in the area on July 9–10. In addition, the only testimony concerning the condition or length of any airport's runway was Bower's testimony that the Dallesport airport "had a fairly long paved runway." 4-SER-598 (Tr. 400).

or imminent violations of FAA standards. 1-SER-80 (D&O 72). Thus, the ALJ concluded that Kreb failed to prove he had a good faith, objectively reasonable belief that he was reporting imminent violations of FAA standards. 1-SER-80 (D&O 72). The ALJ's conclusion, as affirmed by the ARB, was supported by substantial evidence.

Kreb argues that the ALJ abused his discretion because he "allow[ed] [JJC's] unsubstantiated and unsupported testimony . . . to outweigh Kreb's substantial evidence and testimony." Informal Br. for Pet'r. ("Pet'r's Br.") 22. This is not an accurate characterization of the ALJ's decision; the ALJ carefully considered and weighed the evidence as it related to each alleged safety violation before concluding that Kreb did not show that he engaged in protected activity. For instance, the ALJ pointed out that in some cases, the objective evidence, particularly the weather reports, contradicted Kreb's assertions (that, for example, the forecast had predicted moderate turbulence), while Kreb relied entirely on his own testimony to show that these claimed safety hazards were present. 1-SER-74–75, 1-SER-78 (D&O 66–67, 70). The ALJ was not required to credit Kreb's questionable testimony over the objective evidence. In other instances, such as where Kreb asserted that he would likely violate the 14-hour duty rule, the ALJ pointed out that Kreb's own testimony did not show that a violation of the rule was imminent—rather, Kreb merely speculated as to what might happen later in the

evening. 1-SER-69–70 (D&O 61–62). The ALJ was not required to accept such speculative testimony as proof that a violation was about to occur. In addition, the ALJ placed particular significance on the fact that Kreb exaggerated and misrepresented potential risks on his FRAT, which undermined Kreb's credibility. 1-SER-74–75 (D&O 66–67). This was a reasonable credibility determination, supported by the evidence.

Furthermore, the ALJ gave Kreb credit where his testimony was reasonable. For example, in evaluating Kreb's statement on the FRAT that wind shear "+/-10 or greater" was forecast, the ALJ noted that Kreb's assessment was "plausible" before going on to explain that even the presence of wind shear would not have rendered Kreb's scheduled flights in violation of FAA standards. 1-SER-78–79 (D&O 70–71). Ultimately, the ALJ determined that Kreb's evidence as a whole fell short of showing that he engaged in protected activity. The ALJ's analysis of the evidence was thorough and well-reasoned, and Kreb has not identified any aspect of the decision that is not supported by substantial evidence.

Kreb concludes his brief with a heading and four subheadings generally contending that he engaged in protected activity. Pet'r's Br. 37. He asserts that under the "broad[] language" and policy of AIR 21, NTSB guidance, and "other provisions of law relating to air carrier safety," his July 9 report constituted protected activity, particularly his reports relating to potential violations of flight

time limitations and rest requirements. *Id.* These headings and subheadings are not accompanied by any argument explaining why or how the ALJ's decision is not supported by substantial evidence. *Id.* And despite Kreb's general assertions, as explained *supra*, the ALJ's determination that Kreb did not show that he had a good faith, objectively reasonable belief that he was reporting actual or imminent violations of FAA standards is supported by substantial evidence. Accordingly, the ARB was correct to affirm the ALJ's decision, and this Court should do the same.

B. The ALJ Was Permitted To Consider JJC's Evidence.

Kreb argues that the ALJ was not permitted to consider evidence concerning JJC's reasons for terminating him when evaluating whether Kreb engaged in protected activity. Pet'r's Br. 20–22. First, it is not clear that the ALJ did consider JJC's reasons for terminating Kreb in reaching his decision, as the ALJ decided that Kreb failed to provide that he engaged in protected activity, and thus the ALJ did not consider whether any protected activity contributed to JJC's decision to terminate Kreb, or consider JJC's motive for terminating Kreb at all. [8]

[8] In his statement of the issues, the second issue identified by Kreb concerns whether the ALJ erred by not evaluating whether Kreb's protected activity was a contributing factor in his termination. Pet'r's Br. 4. He further states that the ALJ erred in not requiring JJC to show by clear and convincing evidence that it would have fired him absent his safety concerns. Pet'r's Br. 25. However, because the ALJ determined that Kreb did not engage in protected activity, he did not and was not obligated to evaluate whether the alleged protected activity was a contributing factor in Kreb's termination or whether JJC would have taken the same action absent the alleged protected activity. *See, e.g.*, *Majali v. U.S. Dep't of Lab.*, 294 F.

Additionally, Kreb has not pointed to any instance in the decision where the ALJ considered or evaluated JJC's motive, nor is counsel for the Secretary able to locate such a discussion.

Second, to the extent that Kreb is arguing that the ALJ erred in considering JJC's evidence that Kreb's representations on the FRAT and his emails were exaggerated or inconsistent with the actual flight conditions he encountered on July 9, 2014, that evidence is highly relevant to determining whether Kreb had a good faith and reasonable belief that flying the assigned flight would violate FAA rules or regulations, as required to demonstrate that he engaged in activity protected under AIR 21. Kreb repeatedly states or implies in his brief that AIR 21 does not

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App'x 562, 567 (11th Cir. 2008) (holding in AIR 21 whistleblower case that ALJ and ARB were under no obligation to evaluate the "same action" defense where complainant failed to show protected activity contributed to the decision to fire him). And, in any event, because the ALJ and ARB did not reach these causation issues, they are not properly before this Court.

In addition, the third issue listed by Kreb is whether the ALJ's decision that JJC did not engage in blacklisting was arbitrary, capricious, an abuse of discretion, or not supported by substantial evidence. Pet'r's Br. 4. But Kreb does not argue in his brief that the ALJ's decision concerning blacklisting is erroneous or unsupported in some way. Furthermore, the ARB did not reach that issue and so it is not ripe for review in this Court. And, in any event, the only evidence that Kreb offered to support his blacklisting claim was his observation that Werner and the Chief Pilot of Corporate Air had a conversation, which Kreb did not hear, but which he speculated caused Corporate Air not to hire him. 1-SER-82–83 (ALJ D&O 74–75). The ALJ was not required to credit Kreb's speculation, and based on this evidence, it was reasonable for the ALJ to conclude that Kreb failed to prove that JJC engaged in blacklisting. 1-SER-82–83 (ALJ D&O 74–75).

permit the ALJ to evaluate the validity of the safety concerns that he raised in the July 9 FRAT and related conversations and emails. *See, e.g.*, Pet'r's Br. at 2 ("the precedence of an employer subjectively reviewing these required safety reports . . . can bring tremendous harm . . ."); 16 ("[t]he second issue is whether under the Statute, the ALJ improperly allowed Jacksons to 'attack' the credibility of Kreb's Safety Reporting as a Protected Activity"); 20 ("The ALJ and ARB violated the 2-step standard of review by allowing respondents to contest, dispute or dilute Kreb's safety reporting contrary to the statute requirements" (sic)). That contention is simply not correct.

Kreb's AIR 21 claim is based on an allegation that the FRAT and related emails and conversations were protected activity under the statute. Determining whether Kreb engaged in protected activity required evaluating whether Kreb subjectively and reasonably believed that he was raising non-speculative concerns about potential violations of FAA rules. *See Burdette*, 2016 WL 454190, at *3. To assess whether Kreb proved by a preponderance of the evidence that he engaged in protected activity, the ALJ was required to "consider any admissible, relevant evidence." *Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, 2016 WL 5868560, at *9–10 & n.74 (ARB Sept. 30, 2016) (explaining that language of 49 U.S.C. 42121(b)(2)(B)(iii) requires complainant to prove they engaged in protected activity by a preponderance, and does not limit the evidence that can be

considered). Indeed, the preponderance of the evidence standard by its nature requires evaluation of "how convincing the evidence in favor of a fact must be *in comparison* with the evidence against it" and, as a result, requires the ALJ to consider admissible evidence submitted by both parties. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (emphasis added). Thus, the ALJ was required to consider JJC's evidence that Kreb's concerns were exaggerated or inconsistent with prevailing conditions and was permitted to find it more persuasive than Kreb's evidence supporting his safety concerns.

Kreb's citation to *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070 (ARB Oct. 9, 2014) is inapt, because, as he concedes, *Palmer* overturned *Fordham* and reaffirmed the ARB's view that ALJs must consider all relevant, admissible evidence to find that a whistleblower complainant has proved a claim by a preponderance of the evidence. *Palmer*, 2016 WL 5868560, at *8. Moreover, *Fordham* addresses the allocation of the burden of proof to determine whether a complainant's protected activity was a contributing factor in the adverse action taken by the employer. Here, as previously noted, the ALJ did not even reach the contributing factor question, because Kreb did not show that he engaged in protected activity.

Finally and notably, Kreb did not make this argument before the ARB, *see* 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply

Br.), and thus, it is waived. The Department of Labor regulation governing appeals to the ARB requires parties to "specifically identify the findings, conclusions, or orders" of the ALJ to which they object, and provides that "[a]ny exception not specifically urged" to the ARB "ordinarily shall be deemed to have been waived by the parties." 29 C.F.R. 1979.110(a). And where an agency requires issue exhaustion in administrative appeals, "courts reviewing agency action regularly ensure against the bypassing of that requirement by refusing to consider unexhausted issues." *Sims v. Apfel*, 530 U.S. 103, 108 (2000); *see also Bechtel v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 710 F.3d 443, 450 (2d Cir. 2013) (issue not raised before ARB was waived on appeal); *Formella v. U.S. Dep't of Lab.*, 628 F.3d 381, 390 (7th Cir. 2010) (same); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) ("It is a well-known axiom of administrative law that if a petitioner wishes to preserve an issue for appeal," the petitioner "must first raise [the issue] in the proper administrative forum." (internal quotation marks omitted)). Accordingly, this argument is waived.[9]

[9] As part of his argument on this point, Kreb assigns error to the ALJ's comments that the key issues in the case were whether Kreb engaged in protected activity and whether that activity was a contributing factor in his termination, and the ALJ's request that the parties address those issues in their post-trial briefing. Pet'r's Br. 21–22. Kreb did not raise this argument to the ARB, *see* 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply Br.), and thus it is waived. 29 C.F.R. 1979.110(a); *see, e.g., Bechtel*, 710 F.3d at 450; *Barron*, 358 F.3d at 677. Moreover, the ALJ's request to the parties to brief the key issues was

C. The ALJ's Opinion Was Not A "Boiler Plate" Decision.

Kreb also objects to the fact that the ALJ used the "same boiler plate decision language" concerning the ALJ's discretion to weigh evidence in another AIR 21 case, *McMullen v. Figeac Aero North America*, and yet the ALJ came to a different conclusion in *McMullen*. Pet'r's Br. 24–26 (citing *McMullen v. Figeac Aero N. Am.*, ARB No. 2015-AIR-00027 (ARB Jan. 13, 2017)[10]). Kreb did not make this argument to the ARB, *see* 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply Br.), so it is waived. 29 C.F.R. 1979.110(a); *see, e.g., Bechtel*, 710 F.3d at 450; *Barron*, 358 F.3d at 677.

Furthermore, the fact that the ALJ used the same language to describe how an ALJ weighs evidence in an AIR 21 case in both the *McMullen* and Kreb cases is not arbitrary, capricious, or an abuse of discretion. The ALJ's lengthy decisions in *McMullen* and Kreb are predominantly dedicated to setting forth the unique facts and arguments presented in each case, followed by the ALJ's fact-specific analysis of each case. Both decisions are more than 70 pages long, and Kreb has identified

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consistent with the rules of practice of the Office of Administrative Law Judges. *See, e.g.*, 29 C.F.R. 18.91 (ALJ may allow parties to file post-hearing briefs).

[10] The ALJ's *McMullen* decision is not available on Westlaw, but it can be found at the following address: https://www.oalj.dol.gov/DECISIONS/ALJ/AIR/2015/MCMULLEN_VAN_v_FIGEAC_AERO_NORTH_AM_2015AIR00027_(JAN_13_2017)_075038_CADEC_SD.PDF.

only a few paragraphs that are very similar in both. But those paragraphs set forth the well-settled standards describing how an ALJ should make credibility determinations and weigh the evidence. For example, both decisions state that:

> The ARB has stated its preference that ALJs 'delineate the specific credibility determinations for each witness,' though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

1-SER-61 (ALJ D&O 53); *McMullen*, ARB No. 2015-AIR-00027, slip op. at 36. This is the correct standard for making credibility findings and weighing the testimony of witnesses in all AIR 21 cases, and thus the ALJ was right to articulate the same standard in both cases. Indeed, applying a *different* standard to each case could have been arbitrary or capricious. Furthermore, contrary to Kreb's argument, the fact that the ALJ reached a different conclusion in *McMullen*—determining that the complainant in that case showed that he engaged in protected activity—demonstrates that the ALJ weighed the unique evidence in each case and made a decision based the specific facts of each case, rather than applying a standard, "boiler plate" decision. Accordingly, Kreb's assertion that the ALJ applied a "boiler plate" decision in his case is incorrect.

D. Evidence Concerning JJC's Knowledge Is Not Relevant To Determining Whether Kreb Engaged In Protected Activity.

Kreb also points out that three JJC witnesses testified that they did not investigate the truth of the information provided by Kreb on his July 9 FRAT before making the decision to terminate him, and he argues the ALJ erred by failing to take note of that testimony. Pet'r's Br. 28–36. Because Kreb did not make this argument to the ARB, *see* 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply Br.), it is waived. 29 C.F.R. 1979.110(a); *see, e.g., Bechtel*, 710 F.3d at 450; *Barron*, 358 F.3d at 677.

In addition to being waived, this argument conflates the elements that each party must prove at each step of AIR 21's burden-shifting framework. At the first step, Kreb was required to show that he engaged in protected activity, which requires proving that he "reasonably believed in the existence of a violation," and that the belief was both subjectively and objectively reasonable. *Burdette*, 2016 WL 454190, at *3. Proving subjective belief requires showing that Kreb "held the belief in good faith," while evaluating whether a subjective belief is objectively reasonable mandates "taking into account 'the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" *Id.* (quoting *Sylvester v. Parexel Int'l, L.L.C.*, ARB No. 07-123, 2011 WL 2165854, at *12 (ARB May 25, 2011)). Thus, the determination of whether Kreb engaged in protected activity turns entirely on Kreb's knowledge

and beliefs, as compared to what a reasonable person in his position with his training and experience would believe; JJC's knowledge or actions are not relevant to that question. Rather, evidence pertaining to JJC's knowledge at the time it fired Kreb may be relevant at the second step, in evaluating whether protected activity was a contributing factor in Kreb's termination, but the ALJ did not reach the contributing factor analysis because he determined that Kreb did not engage in protected activity. Thus, the ALJ applied the appropriate framework, and he was correct not to consider JJC's knowledge in evaluating whether Kreb engaged in protected activity.

III. THE ALJ ACTED WITHIN HIS DISCRETION IN MAKING APPROPRIATE DISCOVERY AND EVIDENTIARY RULINGS.

In addition to his objections concerning the substance of the ALJ's decision, Kreb raises two objections concerning discovery and evidentiary rulings made by the ALJ, and he also suggests the ALJ did not have the appropriate qualifications. However, he has not shown how any of the ALJ's rulings constituted an abuse of discretion, nor has he offered any reason to doubt the ALJ's credentials. Accordingly, none of these arguments present a reason this Court should not affirm the ALJ's decision.

A. The Denial Of Kreb's Motion For Sanctions Due To Alleged Spoliation Of Evidence Was Not An Abuse Of Discretion.

Kreb claims that the ALJ erred in denying his motion seeking the imposition of sanctions due to JJC's alleged spoliation of evidence. Pet'r's Br. 22–23; *see* 6-SER-1176–82; 1-SER-87–108 (Complainant's Mot. for Sanctions for Resp'ts Jacksons' Spoliation of Evid.; ALJ Order Den. Resp'ts' Mot. for Summ. Decision and Den. Complainant's Mot. for Sanctions). The ALJ's ruling on discovery sanctions is reviewed for abuse of discretion. *Graham v. CFTC*, 849 F.2d 1475 (9th Cir. 1988); *see also Berlin v. Dep't of Lab.*, 772 F.3d 890, 897 (Fed. Cir. 2014) (requiring "a harmful abuse of discretion before overturning" an ALJ's "procedural decision on discovery or admissibility of evidence"); *Consol. Coal Co. v. Williams*, 453 F.3d 609, 620 (4th Cir. 2006) (reviewing ALJ's rulings on discovery motions for abuse of discretion).

The ALJ acted well within his discretion in denying Kreb's motion for sanctions, and Kreb has not explained how the ALJ abused his discretion. Kreb sought sanctions due to JJC's failure to preserve the JJC company email accounts for Kreb, Pike, and Werner, as well as past FRAT forms, duty logs, and flight manifests. 1-SER-100–01 (ALJ Order Den. Complainant's Mot. for Sanctions at 14–15). First, in considering the loss of the email accounts, the ALJ applied the language of the rules invoked by Kreb, Fed. R. Civ. P. 37 and 29 C.F.R. 18.57, which do not permit the imposition of sanctions for the loss of electronically stored

information where the party in possession of the information takes reasonable steps to preserve the information, or where the loss is the result of a "routine, good faith operation of an electronic information system." 1-SER-105–06 (Order 19–20) (quoting 29 C.F.R. 18.57). The ALJ credited JJC's undisputed evidence that it took reasonable steps to preserve the email accounts before they were lost in a routine upgrade of the company's email server, and noted that Kreb failed to produce any evidence to show that that JJC intentionally destroyed the information or that JJC intended to deprive Kreb of the use of this information in the litigation. 1-SER-106 (Order 20). This analysis is a straightforward and reasonable application of the text of Fed. R. Civ. P. 37 and 29 C.F.R. 18.57, and the ALJ was entitled to credit JJC's undisputed evidence showing that it made reasonable efforts to preserve the emails at issue.

Next, as to the FRATs, duty logs, and flight manifests, the ALJ determined that Kreb did not request any of these documents until December 2016. 1-SER-107 (Order 21). He recognized that JJC had pointed out that Kreb's November 12, 2014 letter to JJC requesting the preservation of documents was limited to documents pertaining to Kreb's employment and termination; the letter did not state that JJC was required to retain the FRATs, duty logs, or flight manifests. 1-SER-103; 6-SER-1187–90 (Order 17; Pettigrew Decl. in Supp. of Mot. for Spoliation Sanctions Ex. A). After examining the relevant regulations, the ALJ determined that JJC had

no obligation to preserve these records during the two and a half years that elapsed between Kreb's firing and the December 2016 discovery request. 1-SER-107 (Order 21). This decision is eminently reasonable, and Kreb has not identified any particular fault with the ALJ's decision, aside from the fact that he disagrees with the ALJ's conclusion. That is not enough to show that the ALJ abused his discretion.

B. The ALJ Did Not Limit Testimony Concerning The Baldwin System, Nor Would Such A Ruling Constitute An Abuse Of Discretion.

Kreb also argues that the ALJ erred in limiting his questioning of JJC's witnesses regarding JJC's contractual obligations to LFN to incorporate the Baldwin Safety Management System, as he asserts that the FRAT was a component of the Baldwin system. Pet'r's Br. 27–28. This argument is unavailing for several reasons. First, because Kreb did not make this argument before the ARB, *see* 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply Br.), it is waived. 29 C.F.R. 1979.110(a); *see, e.g., Bechtel*, 710 F.3d at 450; *Barron*, 358 F.3d at 677.

Next, Kreb has not identified a particular ruling to which he objects (by, for example, citing a portion of the hearing transcript where the ALJ declined to permit certain testimony), nor is counsel for the Secretary able to locate a ruling consistent with Kreb's description. At one point, during an exchange concerning

the admissibility of certain exhibits pertaining to the Baldwin system, the ALJ raised a concern: "I'm trying to link— if he—if the Complainant in this case is using some sort of program or software that's not integrated into [JJC], I'm having a hard time figuring out how they would reasonably know that what he's reporting would be—that they would take action against him for reporting something that they would not have knowledge of." However, Kreb's counsel then explained that certain emails show that JJC was aware of the program, to which the ALJ responded, "All right." 3-SER-212–15 (Tr. 19–22). During that exchange, the ALJ did not state that Kreb could not ask certain questions pertaining to the system or impose any other limitations. Kreb also attempted to admit LFN's 2016 Safety Management System Manual (which implicated the Baldwin system) into evidence, but the ALJ observed that the manual was dated 2016, whereas Kreb was terminated in 2014, so he ruled that Kreb would have to show that the 2016 version was the same version in effect in 2014 in order to have it admitted. 3-SER-421–24 (Tr. 228–31). Later, Kreb introduced the version of the manual dated November 2013, which the ALJ admitted. 4-SER-514; 6-SER-1222–44 (Tr. 316; Complainant's Ex. ("CX") 6).[11] This ruling did not limit testimony or evidence

[11] Kreb also sought to admit designated testimony from the deposition of B.J. Miles, which included Miles's testimony that he trained Kreb on the Baldwin system. 6-SER-984 (Tr. 756). The ALJ ruled that because Kreb waited until the second day of trial to introduce Miles's deposition testimony, it was too late for it to be admitted to support Kreb's case in chief, however, the ALJ admitted it for the

concerning the Baldwin system—the ALJ simply ensured that the correct version of the manual was entered into evidence.

Furthermore, contrary to Kreb's assertion that he "was not permitted to enter evidence of the LFN Baldwin Safety Management System on the record," Pet'r's Br. 28, he was permitted to ask numerous questions concerning the Baldwin system during the hearing, and he repeatedly discussed the Baldwin system in his own testimony. *See* 4-SER-725–26 (Tr. 502–03) (Kreb's counsel asks Kreb whether the Baldwin system was a method pilots could use to report concerns; in response, Kreb discusses the Baldwin system); 5-SER-764–66 (Tr. 539–41) (Kreb's counsel asks Kreb what the purpose of the Baldwin system was, whether Kreb was expected to use it, and how it related to the FRAT); 5-SER-756, 5-SER-760, 5-SER-763–64 (Tr. 531, 535, 538–39) (Kreb testifies to his knowledge and use of the Baldwin system); *see also* 3-SER-421, 4-SER-539 5-SER-771 (Tr. 228, 341, 546) (Kreb's counsel asks additional questions concerning the Baldwin system). Moreover, Kreb's post-trial brief cited testimony pertaining to the Baldwin system. 2-SER-173 (Complainant's Closing Argument 14). Thus, Kreb's claim that he was not able to introduce evidence concerning the Baldwin system is simply incorrect.

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limited purpose of rebutting Pike's testimony concerning training, which appeared to satisfy Kreb. 6-SER-987–88 (Tr. 759–60).

Finally, even if the ALJ did make a ruling limiting testimony concerning the Baldwin system, Kreb has not explained how such a ruling would constitute an abuse of discretion. *See Berlin*, 772 F.3d at 897 (ALJ's procedural decision as to admissibility of evidence is reviewed for abuse of discretion); *Graham*, 849 F.2d at 1475 (same). If the ALJ had ruled that evidence concerning LFN's programs should be limited because LFN was no longer a defendant at the time of the hearing, he would have acted well within his discretion. The ALJ had the duty to limit testimony to matters that were relevant to determining whether Kreb engaged in protected activity that was a contributing factor in his firing, and it would have been reasonable for the ALJ to conclude that extended testimony concerning a third party's safety program would not be relevant to that determination. Accordingly, even if the ALJ did limit testimony concerning the Baldwin system in some way, Kreb cannot show that such a ruling would have been an abuse of discretion.

C. There Is No Reason To Doubt The ALJ's Credentials.

Kreb also asserts that the ALJ stated he did not have substantial legal training, and apparently had no credentials beyond holding a pilot's license, and that the ALJ's decision may have been faulty for that reason. Kreb did not raise any concern regarding the ALJ's credentials before the ARB, *see* 2-SER-123–58; 2-SER-111–22 (Complainant's Opening Br.; Complainant's Reply Br.), so this

argument is waived. 29 C.F.R. 1979.110(a); *see, e.g., Bechtel*, 710 F.3d at 450; *Barron*, 358 F.3d at 677.

Even if the argument were not waived, Kreb has not provided any reason to doubt that the ALJ was appropriately qualified. Kreb asserts that the ALJ began the hearing by "disclosing to the parties he was not a learned [j]urist, with substantial legal training, but appointed to the ALJ with unknown credentials beyond holding an FAA Issued Pilot License of unknown experience or background." Pet'r's Br. 25. Kreb has not cited a portion of the hearing transcript where the ALJ made such a statement, and counsel for the Secretary is not able to locate any such statement. During his introductory remarks, the ALJ stated, "if you are going to talk to me about a particular aircraft, . . . I understand . . . I got it. That's all you need to tell me. I know, okay, it's a twin engine, you know, PA 31-350 type aircraft," and "[i]f you filed an ASAP or a VERP or an ASRP, I understand what all of those terms are," so the ALJ explained that if he interrupts a witness to explain abbreviations, "that's more for the record's purposes than for my purposes." 3-SER-203–04 (Tr. 10–11). Later, the ALJ stated that he always asks witnesses about their aviation backgrounds and experience, including experience with particular types of aircraft, in order to appropriately assess credibility. 3-SER-220–21 (Tr. 27–28). These statements indicate that the ALJ had good familiarity with the aviation industry,

and could suggest that the ALJ was a pilot himself, but that does not mean that the ALJ lacked legal training.

Furthermore, contrary to Kreb's assertion, to become a Department of Labor ALJ, an individual must hold a valid license to practice law and have at least seven years of litigation experience, and Kreb has not offered any evidence or argument to suggest that the ALJ lacked those qualifications. At the time the ALJ was assigned to this case, the U.S. Office of Personnel Management was responsible for establishing qualifications for federal ALJs. *Qualification Standard For Administrative Law Judge Positions*, Off. of Pers. Mgmt., https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/ (last visited Apr. 22, 2021). Those qualifications included holding a valid law license, having at least seven years of qualifying litigation experience as a licensed attorney, and the passage of an examination that assessed knowledge, skills, and abilities. *Id.*[12] The ALJ's appointment was ratified on December 21, 2017. Letter from R. Alexander Acosta, U.S. Sec'y of Lab., to Hon. Scott Morris,

[12] In 2008, OPM suspended the requirement that an incumbent ALJ must continue to maintain an active law license while serving as an ALJ, noting potential burdens pertaining to the variation in state bar ethical requirements and other state bar requirements as applied to ALJs. Programs for Specific Positions & Examinations (Miscellaneous), 73 F.R. 41235-01 (issued July 18, 2008).

U.S. Dep't of Lab., Off. of Admin. L. Judges (Dec. 21, 2017).[13] In 2018, the Secretary established criteria for the appointment of ALJs within the Department of Labor. Sec'y's Order No. 07-2018 (Aug. 16, 2018), 83 F.R. 44307-01 (Aug. 30, 2018). The Secretary's order maintains the requirements for adequate legal training and experience: to qualify for an appointment as an ALJ, an individual must have a J.D. from an accredited law school, a valid license to practice law, at least ten years' membership of a state bar in good standing, at least seven years of relevant litigation experience, and knowledge of the statutes enforced by the Department of Labor. *Id.* Thus, the selection of ALJs is limited to individuals who are admitted to a state bar and have extensive legal experience, and Kreb has not offered any reason to believe that the ALJ did not meet this standard. Accordingly, Kreb's suggestion that the ALJ was not qualified lacks any basis.

CONCLUSION

For the foregoing reasons, the ALJ's decision dismissing Kreb's whistleblower complaint, as upheld by the ARB, should be affirmed.

Dated: May 20, 2021

Respectfully submitted,

ELENA S. GOLDSTEIN
Acting Solicitor of Labor

[13] This letter is available at the following address: https://www.oalj.dol.gov/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Secretarys_Ratification_of_ALJ_Appointments_12_21_2017.pdf

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CERTIFICATE OF COMPLIANCE

FORM 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 20-73497

I am the attorney.

This brief contains 12,259 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature: /s/ Sarah M. Roberts **Date:** 05/20/21

CERTIFICATE OF SERVICE

I hereby certify that, on May 20, 2021, I electronically filed the foregoing Answering Brief of the Secretary of Labor via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the appellate CM/ECF system.

s/ Sarah M. Roberts
SARAH M. ROBERTS

ADDENDUM

RELEVANT STATUTORY PROVISIONS

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 40101 *et seq*.

49 U.S.C. 42121

§ 42121. Protection of employees providing air safety information

(a) Prohibited discrimination.—A holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder, may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

* * * * *

(b) Department of Labor complaint procedure.—

(1) Filing and notification.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the

complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) Investigation; preliminary order.—

(A) In general.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) Requirements.—

(i) Required showing by complainant.—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing

evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by Secretary.—The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.—Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

* * * * *

(4) Review.—

(A) Appeal to Court of Appeals.—Any person adversely affected or aggrieved by an order issued under paragraph (3) 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. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

* * * * *

RELEVANT REGULATORY PROVISIONS

Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges,
29 C.F.R. 18.10 *et seq*.

29 C.F.R. 18.57

§ 18.57 Failure to make disclosures or to cooperate in discovery; sanctions.

* * * * *

(e) Failure to provide electronically stored information. Absent exceptional circumstances, a judge may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

* * * * *

Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,
29 C.F.R. 1979.100 *et seq*.

29 C.F.R. 1979.110

§ 1979.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board ("the Board"). The decision of the Administrative Law Judge shall become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions, or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the

decision of the Administrative Law Judge. The date of the postmark, facsimile transmittal, or electronic transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

FEDERAL RULE OF CIVIL PROCEDURE

Fed. R. Civ. P. 37

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

* * * * *