U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SHEIDA HUKMAN,

COMPLAINANT,

v.

U.S. AIRWAYS, INC.,

RESPONDENT.

ARB CASE NO. 2018-0048

ALJ CASE NO. 2015-AIR-00003

DATE: JAN 16 2020

Appearances:

For the Complainant:
Sheida Hukman; *pro se*; Las Vegas, Nevada

For the Respondent:
Nonnie L. Shivers, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Phoenix, Arizona

BEFORE: William T. Barto, *Chief Administrative Appeals Judge* and James A. Haynes, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

PER CURIAM. Sheida Hukman filed a complaint with the United States Department of Labor alleging that her former employer, U.S. Airways, Inc., retaliated against her in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] and its implementing regulations.[2] On April 23, 2015, an Administrative Law Judge (ALJ) issued an Order on Remand Granting Respondent's Motion for Summary Decision and Denying Complainant's Motion for Summary Judgment (Order) because he concluded that Complainant's claims of protected activities failed to state a claim for which relief could be granted. Hukman appealed and we reversed the ALJ's Order, concluding that Hukman's pleadings

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[1] 49 U.S.C. § 42121 (2000) (AIR 21).

[2] 29 C.F.R. Part 1979 (2019).

and submissions showed that there was a genuine issue of material fact as to whether Hukman held a reasonable belief that the circumstances she was reporting as to weight and balance issues on Respondent's airline flights were violations of Federal Aviation Administration (FAA) regulations. Thus, we remanded this case to the ALJ for reconsideration.[3]

On remand, the ALJ granted Respondent's motion for summary decision and again dismissed the complaint because he concluded 1) (based on Respondent's averments) that Respondent had no knowledge of Complainant's protected activity, despite Complainant's allegations that she notified Respondent (because Complainant did not demonstrate by affirmative evidence, affidavit, or sworn statement that her managers had any knowledge of her alleged protected activity),[4] 2) that when Respondent gave Complainant a Performance Level 1 written discipline, it did not constitute adverse action against Complainant because she did not provide any affirmative evidence, affidavit or sworn statement demonstrating that the written discipline had a tangible effect on her employment,[5] 3) that Respondent's request that Complainant submit to an independent medical examination (IME) pursuant to the terms of a collective bargaining agreement (CBA) did not constitute adverse action because Respondent determined that Complainant's mental condition may impair her work performance or pose a safety hazard to others,[6] 4) that Respondent's suspension of Complainant's employment pending her compliance with Respondent's request that she complete the IME return-to-work conditions did not constitute adverse action against Complainant because it was done in accordance with the CBA,[7] 5) that there was no genuine issues of material fact regarding whether Complainant's alleged protected activity was a contributing factor in any adverse employment action because Complainant did not provide any affirmative evidence, affidavit, or sworn statement in support of causation and because it was undisputed that there was no temporal proximity between Complainant's alleged protected activity and her alleged adverse action when Respondent requested Complainant submit to an IME,[8] and 6) that there was no genuine issue of material fact that Respondent would have taken the same action against Complainant absent any alleged protected activity because Complainant did not set forth any argument or affirmative evidence or specific facts

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[3] *Hukman v. U.S. Airways, Inc.*, ARB No. 2015-0054, ALJ No. 2015-AIR-00003 (ARB July 13, 2017).

[4] Order at 50-51, and n.59.

[5] *Id.* at 53.

[6] *Id.* at 57.

[7] *Id.* at 58.

[8] *Id.* at 62.

in an affidavit to the contrary.[9] For the reasons stated below, we again vacate the ALJ's decision and remand for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions on appeal of matters arising nnder AIR 21 and its implementing regnlations.[10] We review a snmmary decision de novo, i.e., under the same standard employed by the administrative law judge.[11] Recognizing that we must be impartial and refrain from advocating "for a pro se complainant, we are equally mindful of our obligation to 'construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude.'"[12]

BACKGROUND

The following facts presented in Complainant's submissions to the ALJ are accepted as true for purposes of our review of the ALJ's order granting summary decision. Respondent hired Complainant on May 22, 2007, to work as a Cnstomer Service Agent in Las Vegas, Nevada.[13] Complainant reported numerous times during her employment to Respondeut's management tbat her coworkers were allowing persons onto Respondent's airplanes improperly either because they were not listed on the flight's manifest at all or because they were incorrectly listed as children when they were adults.[14] She reported that these incidents occurred with "weight restricted flights,"[15] raising weight and balance safety issues on the flights

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9 *Id.* at 63.

10 Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 1979.110(a).

11 *See Office of Federal Contract Compliance Programs v. University of Pittsburgh Medical Center (Braddock) et al*, ARB No. 08-008, ALJ Nos. 2007-OFC-001, 2007-OFC-002, 2007-OFC-003, slip op. at 4 (ARB May 29, 2009).

12 *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 12-110, ALJ No. 2009-AIR-020, slip op. at 3 (ARB Sept. 19, 2012) (quoting *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 4 (ARB Jan. 31, 2011) (quoting *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005))).

13 Order at 13-14.

14 The reports she has alleged include, but are not limited to, reports dated November 24, 2010, April 2011, December 2011, July 25, 2012, and November 15, 2012. *See* Order at 22-23, 48, n.55. Respondent has also indicated that Complainant reported on December 10, 2012, that an unknown and unreported passenger was put onto a flight. *Id.* at 10.

15 *Id.* at 51.

in question.[16] She asserts that these reports were protected activities under AIR 21. One of the reports occurred on July 25, 2012. Respondent took varions adverse actions against Complainant, including giving her a written warning on December 2, 2012, reqniring her to nndergo an IME and suspending her on December 10, 2012, and suspending her again on February 20, 2013.[17] Complainant alleges that Respondent took the adverse actions against her because she made protected reports nnder AIR 21.

In light of these facts, we hold that the ALJ erred when he determined that Complainant had failed to raise a genuine issue of material fact that there was any unfavorable personnel action or contributing factor causation in this case.[18] However, a remand on these bases alone would not necessarily move this case forward because, as discussed below, we also conclude that a nnmber of the other conclusions reached by the ALJ in the course of his decision were in error. Conseqnently, in addition to addressing the propriety of the ALJ's dismissal on summary decision regarding the elements of Complainant's case, we must address the ALJ's improper limitations on the evidence, improper fact finding on summary decision, and failure to view the evidence in the light most favorable to the non-moving party, Complainant.

Discussion

1. Governing Law

To prevail on her whistleblower complaint, Complainant must prove by a preponderance of the evidence that (1) she engaged in activity protected under AIR 21, (2) that an unfavorable personnel action was taken against her, and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against her.[19]

Summary decision is appropriate "if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to decision as a matter of law."[20] When reviewing an ALJ's summary decision, we view the

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16 *Id.* at 10, 22-23, 48, n.55.

17 *Id.* at 52-59.

18 The ALJ appears to have found that Complainant engaged in protected activity in April 2011 when she allegedly reported smuggling issues to Eric Staples because Respondent conceded as much. Order at 49-50. But the ALJ found no "genuine dispute as to any material fact that Complainant did not engage in protected activity" on all other dates alleged by Complainant because there was "no admissible evidence, affidavit, or sworn statement demonstrating" such protected activity. Order at 48, n.55, 49.

19 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

20 29 C.F.R. § 18.72(a).

allegations and evidentiary submissions in the light most favorable to the non-moving party.[21] If the pleadings and documents submitted by the parties demonstrate the existence of a genuine issue of material fact, then summary decision cannot be granted.[22] A denial of summary decision simply indicates that an evidentiary hearing is required to resolve some factual questions relating to the issue at hand and is not an assessment on the merits of any particular claim or defense.[23]

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by at least one of the methods prescribed by the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges*.[24] The party must either cite to particular parts of materials in the administrative record that support her assertion or show that materials cited by an adverse party "do not establish the presence or absence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."[25] The materials in the record that may be cited include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials."[26] Only the facts supported by citation to particular parts of materials in the record must be considered by the ALJ and this Board, but other uncited materials may be considered, as well.[27] And while the facts asserted by a party must be ultimately admissible at hearing, the facts—and the materials containing them—do not have to be in an admissible form when submitted in connection with the summary decision process.[28]

2. The ALJ Erred by Summarily Deciding the Complaint

As a threshold matter, we acknowledge that an ALJ has the authority to regulate the course of the proceedings, rule on offers of proof and receive relevant evidence, dispose of procedural requests and similar matters, issue decisions and orders, and to take any other appropriate action authorized by agency rule or the

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21 *See Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 16-012, 15-076, ALJ Nos. 2015-SOX-013, 2015-ACA-005, slip op. at 2 (ARB Apr. 28, 2017) (citation omitted).

22 *Id.* at 6.

23 *See Hukman*, ARB No. 2015-0054, slip op. at 4.

24 *See* 18 C.F.R. § 18.72(c)(1).

25 *Id.*

26 *Id.* § 18.72(c)(1)(i).

27 *Id.* § 18.72(c)(3).

28 *See id.* § 18.72(c)(2).

Federal Rules of Civil Procedure.[29] An ALJ may also "waive, modify, or suspend any rule . . . when doing so will not prejndice a party and will serve the ends of justice."[30] Failure to comply with a jndge's order may even, in certain circumstances, result in sanctions upon the disobedient party, including dismissal of the proceeding in whole or in part.[31]

A. The ALJ erred by placing limits as to the form of the matters received from Complainant that were not consistent with the Rules of Practice and Procedure

In an apparent effort to "regulate the course of the proceedings," the ALJ issned a March 13, 2018 Order to Show Cause advising Complainant that her response to Respondent's motion for snmmary decision "must identify all the facts stated by the moving party to which she disagreed and mnst set forth her version of the facts by offering affidavits or by filing sworn statements." As described by the ALJ, "Complainant did not provide any affidavits or sworn statements except in her March 29, 2018 Motion to Show Cause" in which she swore "that she has personal knowledge 'of all the facts and Respondent disputed facts and the Federal Aviation Administration Violations and all Exhibits submitted to the court set forth above.'"[32] The ALJ declined to credit this effort by the self-represented Complainant and instead treated Respondent's sworn assertions as unopposed. We hold that this was error under the circumstances of this case.

The first error by the ALJ was his order limiting Complainant's submissions in response to Respondent's motion to affidavits and sworn statements. Affidavits and other sworn statements are permissible methods of establishing that a fact cannot be or is genuinely disputed, but they are not the only authorized methods. The non-exhaustive list of permissible methods promnlgated hy the Secretary of Labor also includes "deposition, documents, electronically stored information . . . . stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or *other materials*."[33] An ALJ may modify the permissible means of proof listed or implied by the rule under the authority granted him by the Secretary at 29 C.F.R. § 18.10(c), but such limitation may only be ordered to serve the ends of justice and without prejudice to either party.[34] Under the instant circumstances, neither requirement was satisfied by the ALJ's order. A self-represented litigant assumes much risk by undertaking litigation and need not be

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29 *See id.* § 18.12(b); 5 U.S.C. § 556(c).

30 *Id.* § 18.10(c).

31 *See, e.g.*, § 18.57(b) (describing a non-exhaustive list of sanctions for failure to obey a discovery order).

32 Order at 43.

33 *See* 29 C.F.R. § 18.72(c)(1)(emphasis added).

34 *Id.* § 18.10(c).

coddled by an ALJ; that being noted, it is seldom in the interests of procednral due process or the "ends of justice" for an ALJ to *reduce* the available means of proof and *increase* the trial bnrden upon a self-represented litigant, whatever the perceived increase in judicial efficiency to be derived from such measnres. As such, the ALJ erred as to a matter of law by restricting the ability of Complainant to snbmit "other materials" in response to Respondent's motion for summary decision withont explaining how the "ends of justice" required such a limitation.

B. The ALJ erred in failing to credit the materials submitted by Complainant

Even if such a constraining order were held to be lawful, the ALJ also erred in his legal analysis of Complainant's submissions. As a threshold matter, it is important to keep in mind that whenever a representative—or an unrepresented party like Complainant—presents to an ALJ "a written motion or other paper—whether by signing, filing, snhmitting, or later advocating it," the presenter implicitly certifies, *inter alia*, that the factual contentions in the document "have evidentiary support."[35] In addition to this implied certification, Complainant in this matter made an express, reasonable, and apparently good faith effort to comply with the ALJ's order in her March 29, 2018 submission in which she swore that she had personal knowledge of all the matters she had asserted in her documentary filings with the ALJ. The cumulative legal effect of these two certifications is largely indistinguishable from that provided by a declaration under penalty of perjury, a method of proof expressly included in the listing at 29 C.F.R. § 18.72(c), which is not necessarily "sworn" and merely asserts that the document is "true and correct to the best of [the declarant's] information and belief."[36] In light of the constraints articulated in the ALJ's Order, it is unclear whether the ALJ would have even credited a formal declaration made under penalty of perjury—a method permissible nnder § 18.72(c)(1) to establish that a fact is at issue—had Complainant satisfied the particular requirements of that docnmentation. In that the analytical framework adopted by the ALJ in this matter would apparently operate to exclude submissions otherwise permissible under § 18.72(c), it is unsustainable. The focus of the ALJ at this stage in the adjudicative process should be upon identifying the factual matters raised by the submissions rather than the particular form of the documents, especially in cases involving self-represented litigants. Under the instant facts, any possible advantage in evidentiary weight that is gained by fact of a document being specifically "sworn" is offset by the requirement that the evidence be viewed in a light most favorable to the non-moving party.

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[35] 29 C.F.R. § 18.35(b).

[36] *Cf.* 28 U.S.C. § 1746 (prescribing the language and legal effect of "Unsworn declarations under penalty of perjury" in United States courts). The quoted language is an example taken from the "Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership" used in the federal courts and available at https://www.uscourts.gov/sites/default/files/b2.pdf.

In this matter, the ALJ refused to credit or even consider several of Complainant's submissions because they were not "affidavits" or "sworn statements." In light of the implied certifications noted above and the nature of the tendered documents, this is a distinction without a legally significant difference. For the purposes of summary decision, an ALJ must consider that the self-represented Complainant could testify on the stand at hearing to explain what she submitted and how it supports her case. Her sworn testimony would thns serve to establish occurrence as described in her submissions. Accordingly, a declaration in brief from a pro se complainant can be sufficient to raise a gennine issue of material fact.

Moreover, summary decision is not to be granted rashly. Both the Federal Rules of Civil Procedure[37] and the ALJ Rules of Practice and Procednre[38] allow for the submission of "other materials" to support a claim. In support of the elements of her claims, Complainant made several snbmissions, which she also cited, that were sufficient to survive a motion for snmmary decision. We acknowledge that a case with a self-represented litigant may involve review of a quantity of potentially relevant paper. But this challenge does not obviate the requirement that the ALJ must look at ***other materials than those specified in the practice rules***. Under the instant circumstances, the ALJ erred in requiring Complainant to provide more specific or particular submissions or citations than that which is required under Rule 56 or 29 C.F.R. §18.72.

The ALJ also excinded some of Complainant's proffered evidence because it was not admissible under rules of evidence.[39] However, formal rules of evidence do

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[37] Rule 56 states that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, *documents*, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, *or other materials* . . ." (emphasis added).

[38] 29 C.F.R. § 18.72(c) requires a nonmoving party "asserting that a fact cannot be or is genuinely disputed" to support its assertions hy "[c]iting to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, *or other materials*; or by "[s]howing that the materials cited do not establish the absence . . . of a genuine dispute . . ." (emphasis added).

[39] ALJ Order Granting Respondent's Objections to Complainaut's Pre-hearing Submission, at 2, n.1, 11 (ALJ Apr. 5, 2019) (stating that the parties "must abide hy the Federal Rules of Procedure and Evidence" and excluding some of Complainant's evidence because "the exhibits did not comport with the Federal Rules of Evidence as identified by Respondent's Objection"); Order at 44.

not apply in hearings under the Administrative Procedure Act (APA).[40] The rules of evidence prescribed at 29 C.F.R. Part 18 are also not applicable unless expressly made so by regulation or when the statute requires a hearing in accordance with the APA.[41] Fnrther, a requirement that evidence be admissible will, as a practical matter, seldom be enforced against a pro se complainant's evidence if that evidence is facially relevant and material to the issues at hand. The applicable rules of practice and procedure do not include complex rules of evidence but instead arc 1) concerned with whether the evidence is relevant and 2) allow for and encourage permissive admission.[42] Furthermore, formal rules of evidence are expressly rejected under the AIR 21 regulations.[43] The applicable regulations instead provide that ALJs shall apply "rules or principles designed to assure production of the most probative evidence" and "may exclude evidence which is immaterial, irrelevant, or unduly repetitious."[44]

For the reasons discnssed, other than the ALJ's evidentiary rulings regarding untimely submissions,[45] the ALJ's evidentiary rulings exclnding evidence are vacated as plainly erroneous.

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40 5 U.S.C. §556(d) ("Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.").

41 29 C.F.R. §18.101.

42 We also note that complainants in cases under our jurisdiction (like this one under AIR 21) are not subject to the formality of federal pleading requirements. *Evans v. Envtl. Prot. Agency*, ARB No. 08-059, 2008-CAA-003, slip op. at 6 (ARB July 31, 2012). As part of the regulatory scheme, a complainant may add allegations before the ALJ that she did not raise at OSHA in her complaint. 29 C.F.R. § 18.36 ("The judge may allow parties to amend and supplement their filings."); 29 C.F.R. §1979.107(b) ("Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted as hearings de novo, on the record.").

43 29 C.F.R. §1979.107(d) ("Formal rules of evidence shall not apply . . .").

44 *Id.*

45 The ALJ excluded some of Complainant's exhibits because Complainant failed to timely produce them during discovery and excluded others related to a Motion to Supplement because Complainant did not explain why the ALJ should permit supplementation. *See* ALJ Order Granting Respondent's Objections to Complainant's Pre-Hearing Submission and Denying Complainant's Motion to Supplement Complainant's Pre-hearing Exchange, slip op. at 8-10, 11-12 (ALJ Apr. 5, 2018). We hold that the ALJ did not abuse his discretion in excluding these exhibits.

B. The ALJ made improper fact findings on summary decision

The ALJ improperly made findings of fact in the course of his summary decision in this matter.[46] When the ALJ makes findings of fact in this context, the ALJ no longer is analyzing the record for summary decision, but is improperly making fact findings on the record alone without having held a hearing on the merits. One of the ALJ's fact findings concerns the temporal proximity between Complainant's protected activity and the alleged adverse action. As discussed below in connection with our causation analysis, a fact finding regarding the temporal proximity between the alleged protected activity and alleged adverse action is fact specific and depends on what constitutes protected activity, which in this case is still contested.

C. The ALJ failed to view the evidence in the light most favorable to Complainant

A judge's task in considering a motion for summary decision is to view the submissions in the light most favorable to the non-moving party. In this case, it appears that the ALJ instead viewed the evidence submitted in favor of the moving party rather than the non-moving party to find and conclude both that there was no protected activity except that which Respondent conceded, no unfavorable personnel action, no contributing factor causation and that Respondent proved its affirmative defense.[47] In this case, all of these findings were adverse to the nonmoving party despite Complainant submissions to the contrary as will be more fully explained below.

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[46] Order at 49, n.57 ("I find Complainant's vague, undated letter to Mr. Yori about the "serious issue" regarding the "Modika case," is insufficient to demonstrate that she informed Respondent or any government agency about a safety or security issue relating to and within the scope of AIR 21."); Order at 57 ("the undersigned finds . . . Respondent determined Complainant's mental condition may impair her work performance or pose a safety hazard to others.").

[47] With regard to causation, the ALJ stated as a part of his analysis that Complainant failed to demonstrate that Respondent's reasons for taking adverse action against her were not true. Order at 62. Likewise, with respect to Respondent's affirmative defense, the ALJ concluded that Respondent proved its affirmative defense by clear and convincing evidence because Complainant did not set forth argument or produce an affidavit, sworn statement, or affirmative evidence disproving Respondent's version of the relevant events. Order at 63. Complainant's burden on Respondent's motion for summary decision does not require her to prove her case, but again, only to set forth with support a prima facie case, which Complainant has done.

D. Protected Activity[48]

In its prior decision, the Board held that when Complainant alleged in her pleadings that she reported violations of weight and balance restrictions and submitted narrative reports about weight and balance violations on Respondent's flights, she succeeded in showing a genuine issue of material fact existed as to whether she thereby raised a reasonable belief that she was reporting violations of FAA regulations.[49] We did not conclude that any of Complainant's specific allegations constituted protected activity because that was not the issue on summary decision and we are not the fact-finder, but the Board did hold that if Complainant had the subjectively and objectively reasonable belief that she was reporting FAA violations or violations of any federal law related to air carrier safety, then she had engaged in protected activity.[50] Because the ALJ did not properly analyze the issue of protected activity on remand as discussed above, we now must remand for a second time.

We begin our protected activity discussion with Complainant's submissions. Relevant to Complainant's burden to prove protected activity are the following documents submitted by Complainant to the ALJ:

- November 24, 2010 PHL Station Employee Statement in which Hukman reported that her coworker, Dwayne Dougherty smuggled Laura Anderson onto an aircraft. The statement is signed by Sheida Hukman and dated November 24, 2010. She asserts in the statement that the incident occurred that day, November 24, 2010. Complainant's Opposition to Summary Judgment, Exhibit 1.

- July 25, 2012 PHL Station Employee Statement in which Hukman reported that her coworkers were indicating that certain people including jumpseat passengers, captains, and flight attendants did not "count" on that day. She

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48 We make clear that our prior decision in no way limited the potential protected activities in this matter. The ALJ set forth Respondent's position that "[p]ursuant to the Board's July 13, 2017 Decision in the instant case, Respondent avers [that there are only two] alleged protected activities at issue because the Board affirmed the undersigned's finding that Complainant's November 15, 2012 "airport rage" incident and Complainant's complaint about a nurse's expired license do not state claims with respect to protected activity under the Act." Order at 8, n.10. However, Respondent is incorrect because the Board simply found that there remained a genuine issue of material fact about whether Complainant engaged in protected activity when she reported issues relating to weight and balance issues and smuggling on several occasions and remanded for the ALJ to consider her several reports about such matters.

49 *Hukman*, ARB No. 2015-0054, slip op. at 7-8.

50 *Id.* at 8.

> stated that the flights were weight restricted and that all jnmpseat passengers should be counted toward weight restrictions. She also indicated that some agents listed adults as children which affected weight restrictions. The statement is signed by Sheida Hukman and dated Jnly 25, 2012. Complainant's Opposition to Summary Judgment, Exhibit 6.

Complainant also asserted to the ALJ in her pleadings that she engaged in protected activity in April 2011 when she told Eric Staples about employees smuggling other employees onto aircraft,[51] when she complained about weight and balance issues to Manager Christine Thompson and Harmony Cleary on an nnknown date,[52] on December 25, 2011, when she reported to the Federal Bureau of Investigation (FBI) that a fugitive named "Modika" was allowed to board an aircraft withont any identification,[53] in February 2012, when she informed "Internal Affairs" about illegal activities,[54] in May 2012 when she spoke with the Department of Homeland Security about smuggling issues,[55] and on November 15, 2015, when she reported that the aircraft left the gate without an accurate passenger count.[56]

Finally, Respondent asserted that Complainant made allegations to Respondent on December 10, 2012, that an unknown passenger had been "smnggled" onto a flight, which it asserts was the first time Complainant made allegations about smuggling to it.[57]

What these submissions and assertions show is that Complainant has

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51 Order at 49-50 (the ALJ found that this occurred because Respondent conceded to it).

52 *Id.* at 50; see Complainant's Opposition to Summary Judgment at 13.

53 *Id.* at 10, 47; Complainant's Opposition to Summary Judgment at 23 (allegiug that the FBI conducted an investigation into and Respondent was fined regarding the incident); see also Respondent's (Resp.) Motion for Summary Decision, Exhibit 19, an undated statement signed by Complainant in which she stated that in December other employees "created a serious issue for U.S. Airways . . . (the Modika case)," and also that she "informed Eric Staples about Laura Williams Anderson asking the employees to smuggle her inside the aircraft." This uusigned document was apparently received by Respondent as Respondent refers to it in its Motion for Summary Decision at 17 and its Brief to the Board at 11.

54 *Id.* at 47, 50, n.58.

55 *Id.*

56 *Id.* at 26. Complainant also alleged in her Opposition to Summary Judgment (Mar. 16, 2018) that on November 15, 2012, a flight left the gate without an accurate passenger count which affected the weight and balance of the flight and that the captain of the flight was not stable and should not have flown that day. Opposition at 8.

57 *Id.* at 10, 51.

sufficiently alleged *and supported with other materials* her allegations of protected activity to survive summary decision. All of these potential protected activities may be further developed on remand in a hearing on the merits. While Complainant's submission of the July 25, 2012 statement in which she alleges she gave to a manager, is perhaps her strongest submission, and most clearly raises a genuine issue of material fact defeating summary decision, all of her allegations of protected activity may be further developed on remand.[58]

E. Unfavorable Personnel Action

Initially, analyzing whether Complainant's pleadings and submissions establish a genuine issue of material fact that Complainant was subject to unfavorable personnel action to survive Respondent's motion for summary decision, we address each of Complainant's three allegations of unfavorable personnel action. Complainant's first allegation concerns when she received a "performance Level 1 written discipline" on December 2, 2012. The written discipline is titled "Employee Contact Report," and is dated November 29, 2012. At the top of the document is a chart which has an "X" indicating that Hukman was given Level I discipline based on her performance and that this was given as part of a verbal coaching discussion. The first two paragraphs describe Hukman's actions of November 15, 2012 in the boarding incident that involved an argument between Hukman and a pilot. The last paragraph of the first page of the three page report states "You are being placed on a Level I for failing to follow company policy and procedure and for unprofessional conduct in the presence of passengers and other employees." The second page appears to be a detailed description of employee responsibilities. On the third page, information is provided if there are any questions about employee responsibilities and included signature blocks which are all blank. Hukman has represented that she refused to sign it at the December 2, 2012 meeting with Staples. See Order at 16. At the bottom of the report it says "cc: Employee personnel file" and "Union Representative."

The ALJ concluded that this action did not constitute an unfavorable personnel action because Complainant did not show how it had a tangible effect on her employment. This was legal error. Written discipline may constitute an unfavorable personnel action under AIR 21, even in the absence of tangible effect, as the Board explained in *Williams v. American Airlines, Inc.*, ARB No. 2009-0018, ALJ No. 2007-AIR-00004, slip op. at 10-11 (ARB Dec. 29, 2010):

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[58] To clarify, we do not view Complainant's potential protected activities to be limited to only those that Respondent has conceded to or those addressed in our decisions or in the ALJ's decisions. Nor do we view any of them as established facts. Rather, the ALJ on remand must decide which of the activities Complainant has alleged, are actually legally protected activities in this case.

> Fundamentals of statutory construction dictate that, in determining whether or not . . . [there is] adverse action within the meaning of AIR 21, the starting point "is the language of the statute itself" and the implementing regulations construing the relevant statutory text, which we are duty bound to follow in AIR 21 cases. As previously discussed, AIR 21 prohibits "discrimination" against an employee with respect to the employee's "compensation, terms, conditions, or privileges of employment." The term "discriminate" is not defined in the statute, but it is further defined in the implementing regulations. By implementing regulation, the Department of Labor has interpreted AIR 21's prohibition against discrimination to include efforts "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because the employee has engaged in protected activity. We view the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, **reprimands (written or verbal)**, as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline.

(emphasis added and citations omitted). Thus, under AIR 21 as applied to the circumstances of this case and in the instant procedural posture, the written discipline alleged by Complainant presents a genuine dispute of material fact as to whether it is an unfavorable personnel action.

Next, in regard to Complainant's other alleged adverse actions, the Board has noted that "the term 'adverse actions'[ ] refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged."[59] One question a fact-finder may ask in deciding whether an action is an unfavorable personnel action under the whistleblower statutes is whether it would tend to dissuade a reasonable employee from engaging in protected activity.[60] However, the Board has held that regardless of whether an action would dissuade a reasonable employee, and excluding "isolated trivial employment actions that ordinarily cause de minimus harm or none at all to reasonable employees, an employer should never be permitted to deliberately single

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[59] *Williams*, ARB No. 2009-0018, slip op. at 15.

[60] *See id.* at 13 (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) ("the Supreme Court in *Burlington Northern* held that 'a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in the protected activity].'")); *see also Williams*, ARB No. 2009-0018, slip op. at 15 (stating "The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee.").

out an employee for unfavorable employment actiou as retaliation for protected whistleblower activity."[61]

With these definitions of discrimination and unfavorable personnel actiou iu mind, we cousider Complainant's second and third allegations of adverse actions — Respondent's requirement that she undergo au independent medical examination on December 10, 2012, and the suspension from her employment on February 20, 2013. Given their evident adverse and material effects on Complainant, a genuine issue of material fact is established as to whether each of these alleged adverse actions constitute unfavorable employment action, are more than trivial, and/or would tend to dissuade a reasonable employee from engaging in protected activity.

We conclude that there is a genuine issue of material fact as to whether Respondent took unfavorable personnel actions against Complainant when it issued her written discipline on December 2, 2012. Furthermore, a genuine issue of material fact has been established as to whether Respondent took adverse action against Complainant in requiring her to undergo an IME and suspended her. Thus, the ALJ's conclusion that Complainant failed to establish a genuine issue of material fact that Complainant was subject to unfavorable personnel actions is vacated.

F. Contributing Factor Causation and Respondent's Affirmative Defense

To prevail against Respondent's motion, Complainant must refer to admissible evidence that would establish a genuine dispute as to whether Complainaut suffered an unfavorable personnel action by Respondent that was caused, in whole or in part, by Complainant's protected behavior or conduct. We have already held that Complainant's submissions are sufficient to establish at least some protected behavior and that there is a genuine dispute of material fact as to whether Respondent took *unfavorable* personnel action against her. As such, we must consider whether Complainant's submissions establish a genuine dispute as to whether her protected activity caused Respondent to take the unfavorable personnel action against her.

Respondent avers that it did not know about any of Complainant's protected activity regarding the smuggling of employees.[62] To the contrary, Complainant avers that she engaged in protected activity when she gave her shift manager Nicole Blanchard the July 25, 2012 statement detailing her weight and balance concerns contemporaneously.[63] Complainant further avers that Blanchard told

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61 *Id.* at 15.

62 Resp. Br. at 11; Resp. Motion for Summary Decision at 15-17.

63 Complainant Response to Order to Show Cause (May 9, 2015) at 3.

Complainant that she gave the statement to Staples. *Id.* at 4. Complainant also asserts that Respondent failed to dispute that her July 25, 2012 violation report was submitted to U.S. Airways about weight and balance and was given specifically to Nicole Blanchard.[64] As discussed above, Complainant provided evidence sufficient to show that Respondent took adverse action against her on December 2, 2012.

Thus, if the July 25, 2012 statement was given to a supervisory employee of Respondent as Complainant alleges, and which we must accept as true on summary decision, the documents show a temporal proximity of less than five months between Complainant's July 25, 2012 report and adverse action taken against her on December 2, 2012. This temporal gap is not remote enough to say Respondent is entitled to summary decision as a matter of law. Because this length of time is neither so short nor so long as to be definitively close or distant temporal proximity, we will further discuss the issue of temporal proximity.

Temporal proximity is an important part of a case based on circumstantial evidence, often the "most persuasive factor."[65] Our analysis of an ALJ's findings and conclusions regarding temporal proximity necessarily depends in large part on the procedural posture of the case. As with any factual issue, we uphold ALJ findings regarding temporal proximity made after hearing if there is substantial evidence in the record to support them. Ascertaining the significance of temporal proximity in a case "involves more than determining the length of the temporal gap and comparing it to other cases. Previous case law can be used as a guideline to determine some general parameters of strong and weak temporal relationships, but context matters."[66] Thus, the Board has affirmed an ALJ's finding that that temporal proximity is close—raising an inference of causation—but that there is no causation in the case, if supported by substantial evidence in the record.[67] Likewise, the Board

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[64] Memorandum in support of Plaintiff's Opposition to Motion for Summary Judgment, at 19 (Mar. 16, 2018).

[65] *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10-11 (ARB Sept. 26, 2012) (quoting *Beliveau v. U.S. Dep't of Labor*, 170 F.3d 83, 87 (1st Cir. 1999)).

[66] *Franchini*, ARB No. 11-006, slip op. at 10-11.

[67] See *Wevers v. Montana Rail Link, Inc.*, ARB No. 2016-0088, ALJ No. 2014-FRS-00062 (ARB June 17, 2019) (affirming as supported by substantial evidence an ALJ finding that four months between his injury report and the adverse action lacked a strong temporal connection where intervening events diminished any causal inference from temporal proximity with the report of an injury); *Zurcher v. S. Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012) (affirming the ALJ conclusion that there was no causation even though temporal proximity was less than two months); *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB Nos. 07-021, -022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (affirming an ALJ decision dismissing the complaint even though complainant claimed temporal proximity of only "weeks.").

has affirmed an ALJ's finding that there is weak or no temporal proximity but that causation is nevertheless established, if supported by substantial evidence.[68]

However, when an ALJ renders a summary decision, our review is de novo, and as such the analysis cannot be simply a matter of comparing the length of the temporal gap and deciding that there is causation or that there can be no causation. This is because the determination must be made in the context of the facts of the case at hand. As we have stated before, "[d]etermining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a 'fact-intensive' analysis."[69] For this reason, we decline to "define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship."[70] We have been cautious in affirming summary decision against a complainant when the complainant has provided prima facie evidence of protected activity, adverse action, and some temporal proximity.[71]

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[68] *Brown v. Lockheed Martin*, ARB No. 10-050, ALJ No. 2008-SOX-049 (ARB Feb. 28, 2011) (affirming an ALJ decision finding for complainant because there was circumstantial evidence of causation including temporal proximity of ten to twenty months); *Willy v. The Coastal Corp.*, Case No. 1985-CAA-001 (Sec'y June 1, 1994) (affirming the ALJ that six months temporal proximity was sufficient to raise inference of causation and finding for the complainant); *Goldstein v. Ebasco Constructors, Inc.*, Case No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992), reversed on other grounds sub nom., *Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993) (affirming an ALJ decision finding for the complainant and holding that seven to ten months temporal proximity was sufficient to raise an inference of causation).

[69] *Franchini*, ARB No. 11-006, slip op. at 10-11.

[70] *Barker v. UBS AG*, 888 F. Supp. 2d 291, 300 (D. Conn. 2012) (suggesting that a range up to eight months in conjunction with other factual circumstances supporting causation could be a sufficiently close temporal gap to support an inference of unlawful discrimination in a SOX whistleblower case).

[71] See *Armstrong v. Flowserve US, Inc.*, ARB No. 14-023, ALJ No. 2012-ERA-017 (ARB Sept. 14, 2016) (reversing an ALJ order granting summary decision noting that "the ALJ failed to credit the inference of causation arising from the close temporal proximity" of the protected activity to the adverse action which was days to a week); *Smith v. CRST Int'l, Inc.*, ARB No. 11-086, ALJ No. 2006-STA-031 (ARB June 6, 2013) (reversing an ALJ grant of summary decision regarding a refusal to hire claim because an inference arising from temporal proximity of six days raised a genuine issue of material fact regarding the element of causation); *Franchini*, ARB Case No. 11-006 (reversing the ALJ grant of summary decision holding that temporal proximity of three months was such that ALJ improperly granted summary decision); *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-064 (ARB Sept. 28, 2011) (reversing an ALJ grant of summary decision in part because the close temporal proximity was sufficient to create a genuine issue of material fact regarding causation). *Cf. Abbs v. Con-Way Freight, Inc.*, ARB No. 12-016, ALJ No. 2007-STA-037 (ARB Oct. 17, 2012) (in which a prior Board affirmed a summary dismissal even though the protected activity and termination occurred only three days apart because the "ALJ's

G. Remand is necessary to resolve these matters

Given that protected activity and adverse action have been established as previously discussed, as well as the potential causal relationship between these elements of entitlement and other potential adverse action, summary decision on the issues of causation and Respondent's affirmative defense is improper. Additionally, the ALJ's improper fact findings and skewed review in favor of Respondent regarding Complainant's alleged protected activity and Respondent's adverse actions, also calls into the question the remaining elements of entitlement. Thus, we conclude that the ALJ's findings and conclnsions as to contributing factor causation and Respondent's affirmative defense have been tainted by his improper analysis regarding the first two elements of Complainant's case.[72]

In sum, we conclude that Complainant has sufficiently pled that she engaged in AIR 21-protected activity with sufficiently close temporal proximity to the adverse action taken against her to allege a prima facie case of contributing factor causation. Thus, she has provided enough to defeat Respondent's motion for summary decision. The ALJ on remand shall consider on the merits whether any of Complainant's alleged protected acts contribnted to any adverse action under AIR 21.[73] We recognize that there may be a disparity in the weight of the evidence supporting each party's contentions, but weighing the evidence is not our role—or that of the ALJ—on summary decision. At this juncture, we must simply view the snbmissions in the light most favorable to the non-moving party to see if she has snpported the elements of her claim sufficiently to move forward to trial, and in this matter, we conclude that Complainant has done so.

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determination that Abbs's falsification of his log book and payroll records broke any inference of causation based on temporal proximity [wa]s supported by the record and consistent with applicable law."). We view the Board's decision in *Abbs* as incorrectly affirming improper ALJ fact findings on a summary decision motion. We decline to follow it and limit it to its facts.

[72] Along with the rest of the ALJ's decision, his finding about when Complainant filed her complaint is also vacated and must also be addressed on remand.

[73] The ALJ also accepted Respondent's assertions as true to find that Respondent had no knowledge of Complainant's protected activity, another finding adverse to the nonmoving party. While the ALJ acknowledged that Complainant alleged that she reported the smuggling of employees onto Respondent's aircraft issue to Eric Staples in April 2011 and complained to other managers of Respondent's at other times, he appears to have found Respondent's averments more persuasive. Order at 51 (". . . I find there are no genuine issues of material fact as to whether Respondent did not have knowledge of Complainant's alleged protected activity at the time Complainant received" adverse action."). This was not permissible on summary decision based on averments by Respondent against the non-moving party.

3. Reassignment on Remand

In light of all of this, we reluctantly conclnde that the ALJ has reached the limit of his judicial temperament. We do not conclude as a matter of law that the ALJ departed from his impartial role in deciding this case, but the nature of the errors augurs toward a fresh pair of eyes for adjudication during a contested hearing. Further, the procedural decision to impose a heightened evidentiary burden on a self-represented litigant causes us to question whether he conld subsequently remain impartial in this matter requiring fact findings and conclusions of law. In an abundance of caution, we will direct that the case be assigned to a different ALJ in another district office for adjudication.

CONCLUSION

Accordingly, the ALJ's Order on Remand Granting Respondent's Motion for Summary Decision and Denying Complainant's Motion for Summary Judgment dismissing Complainant's complaint is **VACATED**, and this case is **REMANDED** to the Chief Administrative Law Judge for reassignment to a different ALJ in another district office for further proceedings consistent with this decision.

SO ORDERED.