U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MICHAEL J. JONES,

COMPLAINANT,

v.

EXCLUSIVE JETS, LLC,

RESPONDENT.

ARB CASE NO. 2023-0035

ALJ CASE NO. 2022-AIR-00003
ALJ SCOTT R. MORRIS

DATE: December 31, 2024

Appearances:

For the Complainant:
Morgan W. Campbell, Esq. and Mark McKinnon, Esq.; *Fox Rothschild LLP*; Washington, District of Columbia

For the Respondent:
Danielle Dobosz, Esq. and Zebulon D. Anderson, Esq.; *Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.*; Raleigh, North Carolina

Before WARREN, Acting Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge

DECISION AND ORDER

WARREN, Administrative Appeals Judge:

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) and its implementing regulations.[1] On May 10, 2023, Administrative Law Judge (ALJ)

[1] 49 U.S.C. § 42121; 29 C.F.R. Part 1979 (2024).

Scott R. Morris issued a Decision and Order Granting Relief (D. & O.) finding that Respondent Exclusive Jets, LLC violated the Act by terminating Complainant Michael J. Jones' employment for engaging in protected activity. Because substantial evidence supports the ALJ's decision, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

On May 23, 2017, Respondent hired Complainant as a first officer (FO). Approximately one year later, in May 2018, Respondent promoted him to captain. On February 27, 2019, Respondent terminated Complainant's employment.[2]

1. Complainant's Reporting of Operational Safety Issues

On multiple occasions during his employment, Complainant raised safety-related concerns with Respondent. Such occasions include: (i) January 2018, when Complainant sent Respondent's management a lengthy email laying out his concerns; (ii) June 2018, when Complainant met with Respondent's management to discuss safety concerns; and (iii) February 2019, during Complainant's final flight rotation.

On January 8, 2018, while serving as an FO, Complainant sent a 17-page email to Mike Guina (President Guina), Respondent's founder and president. The email included a range of safety-related concerns including Complainant's opinion that Respondent's training was defective, that there was a culture of failing to use checklists, that flight crews failed to record mechanical irregularities, and other flight and duty time issues.[3] Complainant's email referenced specific Federal Aviation Administration (FAA) requirements related to aviation safety,[4] although it also contained concerns unrelated to safety.[5]

On June 12, 2018, at the invitation of President Guina, Complainant attended a meeting at Respondent's Kinston, North Carolina headquarters for an "airing of grievances."[6] Respondent's Director of Operations (DO Heuman), Director

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[2] One of the "facts established by the pleadings" included in the ALJ's decision was that Complainant was terminated on February 26, 2019. *See* D. & O. at 4. However, the record indicates that Complainant was informed of his termination on February 27, and the termination was effective on February 28, 2019. *See, e.g.*, D. & O. at 24; Tr. 969-70; Sec'y's Findings, Case #4-3750-19-067, Occupational Safety and Health Admin (Oct. 18, 2021).

[3] D. & O. at 41.

[4] JX 1 at 3 (noting that "14 CFR § 91.9 requires the PIC to comply with the operating limits prescribed by the manufacturer").

[5] D. & O. at 41 n.136.

[6] D. & O. at 15; Tr. at 588, 837.

of Maintenance (DOM Shearer), and Chief Pilot Petersen also attended. The meeting related to maintenance and operations although there was no set agenda.[7] The meeting quickly became strained, leading DO Heuman and Chief Pilot Petersen to leave halfway through.[8] Complainant described the meeting as hostile and unproductive and believed that President Guina and management were upset that he brought photos of various maintenance issues he had identified.[9]

In addition to raising issues in his January 2018 email and during the June 2018 meeting, Complainant consistently logged maintenance issues, some of which resulted in planes being grounded or scheduled flights not taking place. Incidents that occurred after Complainant's promotion to captain included the following.

On June 8, 2018, the wind screen demister on Complainant's aircraft, which prevents the front of the airplane from fogging up when descending from cold conditions, was placarded as inoperable. Respondent told Complainant "it's placarded unavailable. But don't worry. It will work if you need it." The flight proceeded after Complainant informed President Guina he would have to fly at a lower altitude to prevent icing.

On July 24, 2018, Complainant logged an issue related to the cockpit fire extinguisher bracket on aircraft N742JS. After discussing the issue with President Guina and DO Heuman, Complainant repaired the bracket with pliers. Maintenance promised to replace the bracket after the flight.

On August 24, 2018, Complaint logged a mechanical irregularity that caused the stairs on aircraft N716JS to fall out anytime the door was opened because a detent had broken off. Although Respondent's management believed that Complainant "grounded the airplane for a non-grounding event," a mechanic later found the detent under the floorboard and had to reinstall it.

On December 27, 2018, Complainant logged an in-flight malfunction relating to the yaw damper on aircraft N704JS. The aircraft was grounded. Three days later, while preparing to captain aircraft N745JS, Complainant determined during a pre-flight inspection that safety equipment was missing. The FO bought the missing safety equipment at a local retail store and the flight proceeded.

On January 9, 2019, Complainant logged a grinding noise coming from the air conditioning compressor on aircraft N714JS. The aircraft was grounded. Two days later Complainant logged an issue with N715JS's fuel valve fault indicator.

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7 Tr. at 588-90.

8 D. & O. at 15; Tr. at 105, 1036.

9 D. & O. at 16.

Maintenance staff fixed the issue and returned the aircraft to service the following day.[10]

Complainant's final rotation for Respondent began on February 5, 2019, with Complainant flying aircraft N749JS.[11] On February 5, Complainant notified Respondent's management about a "software not compatible" message displayed on the flight management system (FMS) screen.[12] Unsatisfied with Respondent's explanation of what was causing the message, the next day Complainant called the manufacturer of the FMS and discovered that the aircraft had the wrong FMS unit installed. Complainant also realized that the aircraft was missing the autopilot transfer button.[13] Complainant entered nine mechanical irregularities into the aircraft's logbook and emailed a list of the discrepancies to Respondent's Maintenance Control, copying DO Heuman, Chief Pilot Petersen and Fleet Lead Captain Dominic Publico (FLC Publico).[14] Regarding the autopilot transfer issue, Respondent's Maintenance Supervisor replied "Good catch though Mike. I can't believe it's been flying round all this time and nobody else caught it. Begs the question on [sic] how the crews have been flying it from the RH seat." [15]

The following morning, February 7, Complainant made an additional logbook entry for a transient problem he had experienced with the aircraft's anti-ice switch.[16] Aircraft N749JS was grounded as a result of the issues Complainant identified.

That same day, Complainant flew to Bedford, Massachusetts to perform a maintenance test flight on a different aircraft, N716JS.[17] That aircraft was being serviced due to uncommanded rudder movements that could cause the tail and nose of the aircraft to pitch one way (left or right) depending on the amount of power applied.[18] Complainant regarded Respondent's fix—moving the faulty rudder servo to the elevator of the plane—as dangerous since it could cause the plane to uncontrollably pitch up or down, resulting in the plane either stalling out or diving

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10 D. & O. at 18-20; Tr. at 740-41.

11 D. & O. at 20; JX 5 at 3.

12 D. & O. at 20; CX 20 at 7.

13 D. & O. at 20.

14 D. & O. at 20-21; Tr. at 127-28; CX 25 at 1.

15 D. & O. at 21; CX 23 at 1.

16 D. & O. at 21-22; Tr. at 191.

17 D. & O. at 22.

18 *Id.*; Tr. at 198.

toward the ground.[19] The maintenance test flight to Teterboro Airport, one of the busiest general aviation airports in the Northeast, further concerned Complainant.[20] Additionally, the trip sheet indicated that if the rudder issue persisted the flight should continue to Teterboro and get assistance there.[21] Notably, Respondent scheduled the second leg of the maintenance test flight as a Part 135 charter flight departing out of Teterboro.[22]

On the morning of February 8, the day of the maintenance test flight, Complainant emailed Dispatch, DO Heuman, Chief Pilot Petersen, and FLC Publico stating that the weather was not conducive for a maintenance test flight and that he and his FO would only conduct the test flight when they had a cloud ceiling of at least 2000 feet above ground level.[23] President Guina, who received copies of all emails sent to Dispatch, emailed Chief Pilot Petersen fourteen minutes after receiving Complainant's email and stated: "We have to get this under control. Call me if you would like to discuss."[24] Chief Pilot Petersen inadvertently forwarded the email to Complainant, which caused President Guina to remark, "Lucky I didn't say anything."[25]

Shortly after receiving the email from President Guina, Chief Pilot Petersen emailed Complainant telling him "Unless there are [minimum equipment list] restrictions regarding [weather], etc., we have no limitations on the [maintenance] acceptance flight. It is also perfectly acceptable to do [a maintenance] acceptance flight as part of a reposition flight."[26] Ultimately, the test flight did not occur on February 8 because the FO sustained an injury while he was performing a pre-flight inspection of the aircraft.[27] Two days later, another pilot, who was senior to Complainant, came to Bedford to perform the test flight and served as captain while Complainant served as FO.[28] The aircraft did not pass the test flight.[29] Afterwards,

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19 Tr. at 198.

20 D. & O. at 23.

21 *Id.*; Tr. at 199.

22 D. & O. at 23; Tr. at 200.

23 D. & O. at 23; Tr. at 200.

24 D. & O. at 23; CX 2 at 1-2.

25 CX 2 at 1.

26 D. & O. at 23; CX 2 at 1. "Minimum equipment list" relates to 14 C.F.R. § 91.213 and 14 C.F.R. § 135.179, which prescribe minimum equipment requirements that must be satisfied for an aircraft to take off.

27 D. & O. at 24.

28 *Id.*

29 D. & O. at 24; Tr. at 423.

the other pilot sent Complainant home. Complainant never flew for Respondent again.[30]

A little over two weeks later, Chief Pilot Petersen called Complainant and informed him that Respondent had terminated his employment effective the following day. Chief Pilot Petersen told Complainant that management had decided that he was not a good fit for Respondent.[31]

2. Complainant's Alleged Interpersonal Issues

Various interpersonal issues occurred during Complainant's employment. On January 17, 2018, for example, FLC Publico emailed DO Heuman and Chief Pilot Petersen with negative feedback regarding Complainant's interpersonal and flying skills.[32] FLC Publico attached an evaluation of Complainant and recommended firing him.[33] However, FLC Publico did not inform Complainant of the evaluation, did not provide Complainant with any written documentation of the results, and did not notify Complainant that his flying skills, interpersonal skills, and crew resource management (CRM) were lacking.[34] Notably, FLC Publico sent the recommendation a mere week after Complainant sent Respondent the 17-page email laying out his safety concerns.[35]

DO Heuman testified that when Respondent promoted Complainant to captain in May 2018, he hoped commanding an aircraft would help Complainant with what DO Heuman described as his inability "to get along with crew members."[36] At that time, however, management had not informed Complainant about any concerns regarding his relationships with copilots or other employees.[37]

In August 2018, FLC Publico sent DO Heuman and Chief Pilot Petersen an email stating that he had received multiple complaints about Complainant's proficiency.[38] The email included perspectives from two FOs—one of whom had an

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30 D. & O. at 24.

31 D. & O. at 24-25.

32 RX 30 at 1; Tr. at 683.

33 D. & O. at 25; RX 30.

34 D. & O. at 35.

35 D. & O. at 13 n. 40.

36 Tr. at 833-34.

37 D. & O. at 14.

38 D. & O. at 26; RX 6.

issue with Complainant's requirement that the FO perform certain tasks.[39] The ALJ, however, questioned the veracity and significance of these complaints. FLC Publico acknowledged that a pilot in command had discretion to delegate these duties to the FO.[40] And Chief Pilot Petersen could not recall ever speaking to any FO about their relationship with Complainant, nor did he recall ever speaking to Complainant about FOs complaining about him.[41] Similarly, Chief Pilot Petersen never documented these alleged complaints.[42] As a result, the ALJ "did not find Chief Pilot Petersen's testimony particularly credible," describing it as "vague at best."[43] Although Chief Pilot Petersen sometimes made suggestions to flight control about not pairing certain people together because of interpersonal issues, he could not recall doing so with regard to Complainant.[44]

On December 11, 2018, FLC Publico emailed Complainant notifying him that he would serve as an FO during his upcoming rotation "due to the difficulties that have been expressed to management from multiple First Officers that have flown with [him]."[45] By the end of the month, however, Complainant returned to serving as a captain and Respondent noted improvement with Complainant's CRM and interpersonal skills.[46] In early January 2019, FO Wriker sent an email to DO Heuman, Chief Pilot Petersen, and FLC Publico about not wanting to fly with Complainant on consecutive rotations.[47] FO Wriker testified that his objections to flying with Complainant related to safety of flight, command authority, and overall confidence in Complainant as a pilot in command.[48]

3. Post-Termination

Shortly after Complainant's termination, Gama Aviation (Gama), another Part 135 air carrier, provided him an initial job offer but ultimately did not hire him

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39 D. & O. at 26.

40 *Id.*; Tr. at 735-36.

41 D. & O. at 26; Tr. at 978-79.

42 D. & O. at 26; Tr. at 978-79.

43 D. & O. at 37.

44 Tr. at 977-78.

45 D. & O. at 28; RX 4.

46 Tr. at 712-13,169; D. & O. at 47 n.145 (noting that Complainant "actually only served as an FO for a few days, and then was returned to fly additional flights as a captain.").

47 D. & O. at 28; Tr. at 768-69; RX 67.

48 Tr. at 769-70.

because he failed to timely return a training agreement he had questions about.[49] Gama withdrew the offer during the onboarding process before providing Complainant any compensation.[50] Complainant later obtained employment at Walmart and then with the City of Rockledge.[51] In September 2021, Complainant began working as a first officer with JetBlue.[52] By January 2022, his compensation exceeded what he would have earned had Respondent not terminated his employment.[53]

Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 16, 2019, which OSHA dismissed on October 18, 2021. Complainant timely objected and requested a hearing before the Department of Labor's Office of Administrative Law Judges (OALJ). ALJ Morris held a hearing from October 25, 2022 to October 28, 2022, finding for Complainant and ordering Respondent to: (i) reimburse Complainant $196,005.27 in backpay, plus interest; (ii) pay $15,000 in damages for emotional harm; (iii) expunge any mention of Complainant's termination from his personal record; and (iv) reimburse Complainant his litigation costs and attorney fees and costs. Respondent timely appealed the ALJ's decision to the Board.

On appeal, Respondent raises a number of issues, challenging all aspects of the ALJ's decision. Respondent argues that: (i) Complainant's logbook entries and actions during his final rotation were not protected activity; (ii) Complainant's protected activity was not a contributing factor to his termination; (iii) it would have fired Complainant even in the absence of Complainant's protected activity; (iv) its liability for backpay should be tolled as of the date Complainant received a job offer from Gama Aviation; (v) the method the ALJ used to calculate interest on Complainant's backpay award should be revised; and (vi) Complainant is not entitled to compensatory damages for emotional distress. Except for Respondent's interest argument, we disagree.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to hear appeals from ALJ decisions and to issue agency decisions in cases arising under AIR21.[54] In

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[49] D. & O. at 30, 50; RX 46.

[50] D. & O. at 50.

[51] D. & O. at 30.

[52] *Id*.

[53] D. & O. at 51 n.146.

[54] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

AIR21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings that are supported by substantial evidence.[55] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[56] The Board affords great deference to an ALJ's credibility determinations and will only overturn such findings if they "conflict with a clear preponderance of the evidence" or "are inherently incredible or patently unreasonable."[57]

DISCUSSION

1. AIR21 Legal Standards

Under AIR21's whistleblower protection provisions, a complainant engages in protected activity if they:

> [P]rovided, 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 . . . .[58]

To prevail in a retaliation case under AIR21, a complainant must prove by a preponderance of the evidence that they engaged in protected activity and that the protected activity was a contributing factor in the adverse employment action taken against them.[59] If a complainant meets this burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[60]

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55 29 C.F.R. § 1979.110(b); *see also Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 10 (ARB June 18, 2024).

56 *Mazenko*, ARB No. 2021-0032, slip op. at 10 (quoting U*niversal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

57 *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 2009-0057, ALJ No. 2008-ERA-00003, slip op. at 14 (ARB June 24, 2011) (citation omitted); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 2015-0021, ALJ No. 2013-SOX-00042, slip op. 4 n.8 (ARB Feb. 18, 2016).

58 49 U.S.C. § 42121(a)(1).

59 *Mazenko*, ARB No. 2021-0032, slip op. at 12 (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).

60 *Id*. (citing 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)).

2. Complainant's Protected Activity

The ALJ found that the January 8, 2018 email Complainant sent to Respondent's management and the June 12, 2018 meeting between Complainant and Respondent's management, as well as Complainant's logbook entries, were protected activity.[61] Respondent does not challenge that the email and meeting constitute protected activity and we affirm the ALJ's finding as unchallenged on appeal. The ALJ also treated Complainant's actions during his final rotation—which included logbook entries, emails about mechanical issues Complainant identified, and Complainant's refusal to carry out a test flight in inclement weather—as protected activity.[62] Respondent challenges the findings that Complainant's logbook entries and his actions during his final rotation were protected activity.

To constitute protected activity, an employee's belief of a violation must be subjectively held and objectively reasonable.[63] An employee, however, "need not prove an *actual* FAA violation."[64] To prove subjective belief, a complainant must prove that he held the belief in good faith.[65] To determine whether a complainant's belief was objectively reasonable, the ALJ must assess the belief taking into account whether a person of similar training and experience would hold it—or in other words, consider the knowledge available to a reasonable person in similar factual circumstances with similar training and experience as the aggrieved employee.[66]

Respondent argues the ALJ committed reversible error in concluding that Complainant engaged in protected activity anytime he logged mechanical

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61 D. & O. at 41-42. The ALJ did not specify which logbook entries by Complainant constitute protected activity.

62 D. & O. at 45 ("Further, there is temporal proximity between the February 7, 2019 emails concerning N749JS and [Complainant's] termination less than three weeks later.").

63 *Mazenko*, ARB No. 2021-0032, slip op. at 14; *see also Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 7-8 (ARB Feb. 13, 2015).

64 *Mazenko*, ARB No. 2021-0032, slip op. at 14 (emphasis in original).

65 *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 2014-0059, ALJ No. 2013-AIR-00016, slip op. at 5 (ARB Jan. 21, 2016).

66 *DeBuse v. Corr Flight S.*, ARB No. 2023-0036, ALJ No. 2020-AIR-00015, slip op. at 16 (ARB Dec. 6, 2024).

irregularities.[67] Respondent points to *Sievers, v. Alaska Airlines*, in which the Board held that "'competently' and 'aggressively' carrying out duties to ensure safety, though laudable, does not by itself constitute protected activity."[68] Board precedent also makes clear that a "logbook entry in and of itself" does not necessarily constitute protected activity.[69] Respondent thus correctly maintains the ALJ erred to the extent he found a rebuttable presumption that an airman making entries made into an maintenance logbook is protected activity.[70] But even though making logbook entries is not *per se* protected activity, the ALJ's misstatement is harmless error, because Complainant's actions on February 5-8, 2019 went beyond mere logbook entries and unquestionably constitute protected activity.[71]

Although a logbook entry, *in and of itself*, may not be protected activity, Complainant's action during his final rotation consisted of more than simply noting mechanical irregularities in an aircraft's logbook. Between February 5th and February 8th, Complainant (i) notified management about a "software not compatible" message being displayed on FMS screen; (ii) called the manufacturer of the FMS after being told by Respondent's maintenance that the FMS problem was "just a database issue;" (iii) entered nine logbook entries for aircraft N749JS; (iv) emailed a list of logbook entries to Maintenance Control, DO Heuman, Chief Pilot Petersen, and FLC Publico; and (v) made an additional logbook entry the

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[67] However, before the ALJ, Respondent repeatedly referred to logbook entries, provided they were properly made rather than being maliciously held, as protected activity. *See, e.g.*, Resp. Post-Hearing Br. at 31 ("It is clear from Heuman's testimony and his answers to the Tribunal's questions that Heuman was very clearly distinguishing legitimate protected activity (i.e., writing up defects) and illegitimate activity (i.e., malicious compliance and/or 'pocket squawks'")).

[68] *Sievers, v. Alaska Airlines, Inc.*, ARB No. 2005-0109, ALJ No. 2004-AIR-00028, slip op. at 5 (ARB Jan. 30, 2008).

[69] *Luder v. Cont'l Airlines, Inc.*, ARB No. 2010-0026, ALJ No. 2008-AIR-00009, slip op. at 8 (ARB Jan. 31, 2012).

[70] D. & O. at 39.

[71] *See, e.g., McLean v. Am. Eagle Airlines, Inc.*, ARB No. 2012-0005, ALJ No. 2010-AIR-00016, slip op. at 6 n.1 (ARB Sept. 30, 2014) (finding harmless error where the ALJ failed to apply the proper burden of proof because an agency may rely on a harmless error rule when the error does not affect the result); *Forrand v. FedEx Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 4 n. 11 (ARB Jan. 4, 2021) (per curiam) (finding that an ALJ's failure to identify certain actions as protected activity was harmless error because the Board found that the Complainant was not subject to retaliation). Similarly, although the ALJ did not provide any authority for his statement that all logbook entries are "presumed to be made in good faith," this misstatement is harmless error because the ALJ also specifically found that there was "no credible evidence that Complainant's logbook entries that were either maliciously made or maliciously held for a later time." D. & O. at 40.

following morning. Separately, Complainant emailed Dispatch, DO Heuman, Chief Pilot Petersen, and FLC Publico to tell them the weather was not conducive for a maintenance test flight scheduled for February 8 and that he would not fly unless conditions improved.[72]

Complainant thus identified various mechanical irregularities, logged them, and discussed his concerns with management. Settled precedent establishes Complainant's conduct as protected activity.[73]

Further, Complainant's logbook entry and communications with Respondent regarding the inability to transfer the autopilot controls from the right-hand side to the left-hand side had the effect of reporting violations by the aircraft's previous pilots for failing to comply with 14 C.F.R. § 135.65(b), an FAA regulation that requires pilots to report mechanical irregularities that come to their attention. In a decision affirming the Board, the Fifth Circuit recognized this "effective reporting" theory, finding that a pilot who made a logbook entry concerning turbulence experienced on a previous flight flown by a different pilot engaged in protected activity by "effectively reported a violation by the previous pilot for failing to log his encounter with severe turbulence."[74]

Robust evidence establishes that Complainant effectively reported violations of 14 C.F.R. § 135.65(b) by other pilots who previously flew N749JS. After being made aware of the autopilot transfer issue, Maintenance Supervisor Matthew McDermott wrote "Good catch though Mike. I can't believe it's been flying round all this time and nobody else caught it. Begs the question on [sic] how the crews have been flying it from the RH seat."[75] Complainant responded with:

> When I first started here ALL the FO's were flying from the RHS with the Autopilot and FD couple [sic] to the LEFT as standard procedure. Most of the Captains insisted it had to be, even the IOE Captains and some didn't really understand what it meant with some saying it had to do

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[72] D. & O. at 20-24; *see also* Resp. Reply Br. at 10.

[73] This course of behavior is comparable to what the Board found to be protected activity in *Luder v. Continental Airlines* (making a logbook entry and refusing to fly until an inspection was undertaken) and *Sievers* (informing a manager that a plane was not airworthy and that signing off on it would be wrong). *See Luder v. Cont'l Airlines, Inc.*, ARB No. 2010-0026, slip op. at 8; *Sievers*, ARB No. 2005-0109, slip op. at 5.

[74] *Cont'l Airlines, Inc. v. Admin. Review Bd.*, 638 F. App'x 283, 288 (5th Cir. 2016).

[75] D. & O. at 21; CX 23 at 1.

> with FMS 1!" . . . No one seemed to get why it was such a bad idea. It took a long while for it to change.[76]

As this email exchange demonstrates, Complainant's reporting of other pilots' failure to comply with § 135.65(b) did not occur in a vacuum. Rather, Complainant raised this issue in the past, as evidenced by his description of the previous "standard procedure" that "took a long while" to change. The record contains repeated examples of Complainant raising concerns about other pilots failing to properly record mechanical defects or irregularities.[77] For instance, in his January 2018 email, Complainant informed Respondent's management of numerous instances in which captains were reluctant or unwilling to write up defects unless forced to do so.[78] Complainant provided examples including a captain who was "unwilling to write up defects" and described Complainant's insistence on following regulations as "causing trouble," as well as another captain who left a hand-written note on the pilot's seat about mechanical issues that had been observed but were not diagnosed or written up.[79]

On top of this, DO Heuman's unrebutted testimony establishes Respondent assigned Complainant his own dedicated aircraft in December 2018 in part because he complained about prior flight crews not writing up aircraft.[80] DO Heuman also testified at length about Respondent's efforts to investigate Complainant's allegations that other pilots were not properly logging aircraft defects and other mechanical issues.[81] Additionally, the ALJ noted an incident from May 2018 in which Complainant took issue with a previous flight crew failing to log an engine oil pressure warning light.[82] Complainant's logging of the autopilot and FMS software issues that went unaddressed by previous flight crews and his communication with Respondent's maintenance supervisor about the broader problem of pilots flying with improper mechanical setups and failing to note mechanical issues fit squarely within the confines of protected activity. Substantial evidence thus supports the ALJ's conclusion that Complainant held a reasonable belief that he was reporting a safety violation.[83]

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76 D. & O. at 21; CX 23 at 1.

77 Tr. at 886; D. & O. at 17 (noting that one of the reasons DO Heuman "assigned Complainant a specific aircraft was because of his complaining about other flight crews not writing up mechanical irregularities").

78 JX 1 at 8.

79 *Id*. at 8, 10.

80 Tr. at 886.

81 *Id*. at 889-94.

82 D. & O. at 15; Tr. at 97-99.

83 Resp. Reply Br. at 9.

Similarly, substantial evidence supports the ALJ's finding that Complainant's belief was objectively reasonable. Among other things, the email exchange in which Respondent's maintenance supervisor told Complainant "I can't believe that it's been flying around all this time and nobody else caught it," shows that not only did the maintenance supervisor understand the logbook entry and email to mean that previous pilots had failed to log the issue, but he also believed the issue was one that other pilots should have identified.[84] Respondent thus has not met its burden on appeal to demonstrate that a reasonable mind could not find that a pilot with Complainant's experience and expertise would believe Respondent's conduct violated a safety rule based on the numerous logbook entries. Accordingly, Complainant's belief that 14 C.F.R. § 135.65 had been violated was objectively reasonable even though he did not specifically reference that regulation.[85]

Complainant also engaged in protected activity during his final rotation when he pushed back on performing a maintenance test flight to Teterboro due to the weather. FAA regulations state that "[n]o person may operate a civil aircraft unless it is in an airworthy condition," and "[t]he pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight."[86] The flight to Teterboro tested whether the rudder was working properly. Therefore, Complainant's refusal to fly unless weather conditions improved plainly related to aviation safety regardless of whether flying the plane in adverse weather conditions would necessarily violate FAA regulations.[87] Moreover, Chief Pilot Petersen's and President Guina's testimony corroborate Complainant's belief; both described Complainant's decision to delay the flight as prudent.[88]

On appeal, Respondent points out that DO Heuman "fully supported Complainant's prudential judgment to wait for better weather."[89] But that does not change the protected activity analysis. As the Board recognized in *Sewade v. Halo-*

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84 D. & O. at 21; CX 23 at 1.

85 Since an employee need not prove an actual FAA violation to engage in protected activity, Complainant need not demonstrate that the autopilot issue actually came to other pilots' attention, which would be a prerequisite to proving that a violation of 14 C.F.R. § 135.65 occurred.

86 14 C.F.R. § 91.7.

87 *See Evans v. Miami Valley Hosp.*, ARB Nos. 2007-0118, -0121, ALJ No. 2006-AIR-00022, slip op. at 14 (ARB June 30, 2009) (finding that an employee engaged in protected activity when he grounded the aircraft because he reasonably believed that it was unsafe to fly).

88 Tr. at 598, 992.

89 Resp. Br. at 28.

Flight, Inc., "an employer cannot 'cure' protected activity or erase that it occurred by admitting to wrongdoing, by apologizing, or by agreeing with the employee about a safety concern. When an employee makes a protected complaint, the employer's response (positive or negative) does not change that AIR21 protected activity has occurred."[90] When Complainant raised concerns about the safety of carrying out the February 8 test flight with very low cloud cover, Complainant engaged in protected activity—even if Respondent now claims to have agreed with the safety concerns raised by Complainant.[91]

3. Respondent's Adverse Action

AIR21 prohibits an employer from discharging or otherwise discriminating "against an employee with respect to compensation, terms, conditions, or privileges of employment" for engaging in protected conduct.[92] Based on the plain language of the statute, Complainant's termination was an adverse action.[93]

4. Contributing Factor Analysis

Complainant has the burden to prove by a preponderance of the evidence that his protected activity was a contributing factor to Respondent's adverse action.[94] A contributing factor is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[95] Further, "the level of causation that a complainant needs to show is extremely low[.]"[96] To meet its burden, an employee only needs to demonstrate that the protected activity played

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90 *Sewade*, ARB No. 2013-0098, slip op. at 8.

91 Although DO Heuman testified that he supported Complainant's decision to not make the test flight unless weather conditions improved, President Guina testified that he got involved because he "would like the flight to happen if it can." Tr. at 670; *see also id*. at 598.

92 49 U.S.C. § 42121(a).

93 *See, e.g.*, *Forrand v. FedEx Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 5 (Jan 4. 2021) ("The Board has said that adverse action may also include firing[.]").

94 *Mazenko*, ARB No. 2021-0032, slip op. at 26.

95 *Id.*; *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 29 (ARB Dec. 15, 2023).

96 *Printz*, ARB No. 2022-0045, slip op. at 31 (quoting *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-000154, slip op. at 15 (ARB Sept. 30, 2016)).

some role; the protected activity's role "need not be 'significant, motivating, substantial or predominant."[97]

The ALJ found that Complainant's protected activity contributed to Respondent's decision to terminate his employment.[98] In reaching this conclusion, the ALJ noted both direct evidence—DO Heuman's testimony—and circumstantial evidence—temporal proximity—that Complainant's protected activity on February 5-8, 2019 contributed to the decision to terminate him.[99] The ALJ also observed that Complainant's protected activity in January 2018 was "in no way a factor in Respondent's decision to terminate his employment" given that Respondent promoted Complainant to captain after he sent the January 2018 email.[100]

Although not dispositive, "[t]emporal proximity is an important part of a case based on circumstantial evidence, often the 'most persuasive factor.'"[101] Nonetheless, the causal connection that temporal proximity gives rise to "may be severed by the passage of a significant amount of time, or by some legitimate intervening event."[102] Respondent does not, and given Complainant's removal from

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97 *Dick v. USAA*, ARB No. 2022-0063, ALJ No. 2018-STA-00054, slip op. at 14 (ARB Apr. 16, 2024) (quoting *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 9 (ARB May 13, 2020)).

98 D. & O. at 46.

99 *Id.* at 45.

100 *Id.* at 45 n.141. The ALJ based this finding on the fact that Complainant was promoted to captain five months after he sent the 17-page email to President Guina in January 2018. The ALJ also cited the "period that elapsed between Complainant's complaints and the alleged retaliatory action" as evidence that the January 2018 email played no role in Complainant's dismissal. The ALJ did not make any finding as to whether the July 2018 meeting contributed to the decision to terminate Complainant's employment and we do not find it necessary to address that issue on appeal.

101 *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003 slip op. at 17 (ARB Jan. 16, 2020) (quoting *Franchini v. Argonne Nat'l Lab'y*, ARB No. 2011-0006, ALJ No. 2009-ERA-00014, slip op. at 10-11 (ARB Sept. 26, 2012); *see also Ameristar Airways, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 650 F.3d 562, 569 (5th Cir. 2011) (recognizing that temporal proximity carries "significant weight").

102 *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348-49 (4th Cir. 2014); *see also Benniger v. Flight Safety Int'l*, ARB No. 2011-0064, ALJ No. 2009-AIR-00022, slip op. at 2 n.2 (ARB Feb. 26, 2013) (recognizing that intervening events can but do not necessarily break a causal connection between protected activity and adverse action); *May v. AGL Servs. Co.*, ARB No. 2022-0015, ALJ No. 2020-PSI-00001, slip op. at 9 (ARB Sept. 14, 2023) (recognizing that an intervening event occurring between the protected activity and the adverse personnel action can make temporal proximity insufficient to prove causation); *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 14 (ARB Jan. 17, 2023) (same).

the rotation immediately following his protected activity, cannot, point to any intervening event that independently could have caused the adverse action and severed the causal connection between the protected activity and the adverse action.[103]

Respondent cites a January 18 email from FO Wriker indicating that he did not want to fly with Complainant on consecutive rotations. While the email (at best) may show additional factors contributed to Complainant's termination, it does not weaken the inference the ALJ drew from the proximity between Complainant's protected activity and his termination. Respondent similarly cannot show that a significant amount of time passed between the protected activity and the adverse action to discount that temporal proximity. Although the Board has refrained from "defin[ing] the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship," we have recognized that gaps of ten to twenty months could be sufficiently close temporal proximity.[104] In the instant case, less than three weeks elapsed between Complainant's protected activity on February 5-8, 2019, and his termination on February 27. Additionally, Respondent removed Complainant from his current rotation and sent him home only two days after his protected activity—an extremely short temporal gap that provides a strong inference of a causal relationship between Complainant's protected activity and his termination.

Although temporal proximity standing alone does not automatically establish a complainant's protected activity contributed to their dismissal, it can be sufficient when combined with other circumstantial or direct evidence.[105] Here, DO Heuman's testimony supports the ALJ's finding Respondent terminated Complainant's employment, in part, because of his recording of mechanical irregularities.[106]

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[103] *See, e.g.*, *Barber v. Planet Airways, Inc.*, ARB No. 2004-0056, ALJ No. 2002-AIR-00019, slip op. at 6 (ARB Apr. 28, 2006) (recognizing that "inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused the adverse action.").

[104] *Hukman*, ARB No. 2018-0048, slip op. at 18-19; *see also, e.g., Brown v. Lockheed Martin*, ARB No. 2010-0050, ALJ No. 2008-SOX-00049 (ARB Feb. 28, 2011).

[105] *See Ameristar Airways, Inc.*, 650 F.3d at 569 n.21. In *Palmer*, the Board described the "commonsense principle" that "knowledge plus close temporal proximity should nearly always be sufficient to infer contributing factor [causation]." *Palmer*, ARB No. 2016-0035, slip op. at 71 n.280. In a concurring opinion, Judge Desai clarified that an "ALJ may make an inference based on knowledge plus timing, but it is the ALJ's task to determine whether to do so, since the ALJ is the factfinder." *Id*. at 84-85 (Desai, J., concurring).

[106] D. & O. at 29-30.

On appeal, Respondent argues that the ALJ misunderstood DO Heuman's testimony and "fail[ed] to appreciate the clear distinction drawn by Heuman in his testimony" between waiting to log irregularities until it was convenient to do so and timely logging irregularities at the end of a flight.[107] But the ALJ permissibly found the record belies its argument. In his decision, the ALJ cited DO Heuman's admission that Complainant's logbook entries contributed to his termination: "That and—yeah— and then there was his behavior with - yeah, so that's – it's all true, yes."[108]

This admission demonstrates the ALJ understood that DO Heuman terminated Complainant's employment, in part, because Complainant was making logbook entries that DO Heuman believed were being held back until it was convenient to log them. The ALJ, however, rejected DO Heuman's view, finding "no credible evidence that Complainant's logbook entries [] were either maliciously made or maliciously held for a later time."[109] Other evidence corroborates the ALJ's finding: DO Heuman further testified that although other pilots at Exclusive Jets had been counseled about holding back logbook entries, he could not recall ever talking to or counseling Complainant about making inappropriate logbook entries or holding back entries.[110]

Given the lack of evidence that Complainant actually held back logbook entries, Respondent argues that "it is the perception of the decisionmaker which is relevant."[111] But context matters. Although the Board has held that in certain instances the focus should be on the employer's perception of the employee's actions, such as when an employer perceives an employee is about to report a safety violation, we have articulated this principle against the backdrop of statutes that specifically prohibit retaliation based on a perception of future protected activity.[112] Those decisions are easily distinguished from this case where Respondent incorrectly contends that an employer's inaccurate perception that an employee was engaged in unprotected activity can automatically insulate it from liability, a view

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107 Resp. Br. at 27.

108 D. & O. at 29-30.

109 D.& O. at 40.

110 Tr. at 902.

111 Resp. Br. at 25 (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 217 (4th Cir. 2007)).

112 *See Kirschmann v. Hampton Rds. Transit*, ARB No. 2023-0002, ALJ No. 2021-NTS-00006, slip op. at 11 (ARB Feb. 14, 2024) ("Because the statutes specifically prohibit retaliation because of a perception of protected activity, it is immaterial whether a complainant actually engaged in protected activity (or was going to) and the focus must necessarily be on the employer's perception of the employee's actions or potential future actions.").

that would lead to results that do not comport with the AIR21's goal of protecting whistleblowers. Although an employer may be prohibited from retaliating against an employee due to activity the employer perceives to be protected activity, such as when it perceives an employee is going to report a violation, it does not logically follow that an employer is then free to retaliate against an employee anytime it perceives protected activity to be unprotected. The law protects both the employee who has engaged in protected activity that the employer perceives to be unprotected *and* the employee who an employer retaliates against because it perceives they have engaged or will engage in protected activity.

The close temporal proximity between Complainant's protected activity and his termination, coupled with DO Heuman's testimony that Complainant's practice of logging mechanical irregularities was a factor in the decision to terminate Complainant's employment constitutes substantial evidence supporting the ALJ's decision on this element.[113]

5. Respondent's Affirmative Defense

Even if a complainant has made a prima facie showing of retaliation in violation of AIR21, a respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action even in the absence of any protected activity. Clear and convincing evidence "denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain."[114] The ALJ found that Respondent did not meet this burden and failed to show that it was "highly probable that Respondent would have terminated [Complainant] if there was not the perception that he was such a persistent author of mechanical irregularities, a protected activity."[115]

Under Board precedent, it is not enough for an employer to show that it *could* have taken the same adverse action; it must show that it *would* have done

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[113] *See, e.g., Van McMullen v. Figeac Aero North Am.*, ARB No. 2017-0018, ALJ No. 2015-AIR-00027 (ARB Mar. 30, 2020) (affirming an ALJ decision finding for complainant because temporal proximity and testimony of record established causation); *Brown*, ARB No. 2010-0050, slip op. at 11 (affirming an ALJ decision finding for complainant because there was circumstantial evidence of causation including temporal proximity of ten to twenty months)

[114] *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 19 (ARB Mar. 29, 2022) (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 11 (ARB May 26, 2010)).

[115] D. & O. at 54.

so even in the absence of protected activity.[116] Similarly, an employer cannot carry its burden by showing that it *might* have taken the same adverse action against an employee.[117] After all, "the clear and convincing standard is truly a high standard."[118] This higher burden is justified because it is imposed only after it has been established "that protected activity actually contributed to an unfavorable employment action."[119] Substantial evidence supports the ALJ's conclusion that although Respondent *could* have terminated Complainant solely due to his CRM and interpersonal issues, Respondent did not demonstrate that it *would* have done so.

Respondent struggled to meet this high burden largely because the proffered explanation for why Respondent terminated Complainant—that he had significant CRM and interpersonal issues—relates to a problem first documented in January 2018, more than a year before Complainant's employment was terminated.[120] On appeal, Respondent attempts to fill this significant gap by alleging that the timing of the decision was due to "the long history of Complainant's issues and conflicts with other pilots" that "had come to a head."[121] But the evidence adduced at the hearing does not establish that Complainant's performance was progressively worsening and somehow reached the tipping point at the same time he engaged in protected activity. Rather, the ALJ found the evidence demonstrated that Complainant's issues were on-again, off-again problems never properly documented by management, and that they both improved and worsened at various points during the course of Complainant's employment.

Further, the record does not contain any warnings, re-trainings, or progressive discipline that would be expected with an issue that supposedly grew

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116 *Palmer*, ARB No. 2016-0035, slip op. at 57; *Powers v. Union Pacific R.R. Co.*, ARB No. 2013-0034, ALJ No. 2010-FRS-00030, slip op. at 12 (ARB Jan. 6, 2017); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2013-0074, ALJ No. 2005-ERA-00006, slip op. at 11 (ARB Apr. 25, 2014).

117 *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 2008-0070, -0074, ALJ No. 2006-AIR-00014, slip op. at 17 n.108 (ARB Sept. 30, 2009).

118 *Palmer*, ARB No. 2016-0035, slip op. at 66 n.265 (Corchado, J., concurring); *see also Smith v. Duke Energy Carolinas, LLC*, ARB No. 2014-0027, ALJ No. 2009-ERA-00007, slip op. at 12 (ARB Feb. 25, 2015) ("The 'clear and convincing'" phrase is not quite as clear but it obviously suggests a high standard[.]").

119 *Smith*, ARB No. 2014-0027, slip op. at 12 (Corchado, J. concurring).

120 As the ALJ noted, it is curious that Complainant's purported interpersonal issues were first document just a week after Complainant engaged in protected activity by sending a 17-page email with safety and other concerns to Respondent's management. D. & O. at 35.

121 Resp. Br. at 30.

worse over time. Rather, the parties stipulated that Complainant never underwent any remedial CRM or other training.[122] Additionally, after Complainant was evaluated and these issues were noted in January 2018, Complainant was not informed that he been evaluated, let alone that his CRM and interpersonal skills were lacking.[123] Instead, Respondent promoted Complainant to captain five months after the negative evaluation. Respondent's policies require that an employee demonstrate effective CRM in order to be upgraded to captain.[124] When he was made captain, Complainant had never been informed that Respondent's management had concerns about how he got along with other pilots and FOs.[125]

Indeed, the ALJ noted that Respondent did not offer a credible explanation as to why it promoted Complainant to pilot and gave him more authority over the operations of its aircraft if the allegations about his conduct and interpersonal skills were true.[126] Although Complainant was notified in December 2018 that he would have to spend time as a first officer / second in command due to his interpersonal issues and because some FOs were unwilling to fly with him, by the end of that month he was back to flying as a captain again.[127] In his testimony, DO Heuman acknowledged that some improvement in Complainant's CRM had been noted by the time he returned to flying as a captain. Chief Pilot Petersen also testified about Complainant's interpersonal skills, but the ALJ did not find this testimony to be particularly credible, describing it as vague and providing "very little detail," in part because Petersen had limited interaction with Complainant.[128] We find no reason to overturn this credibility determination.

Additionally, Respondent never attempted to switch Complainant to the other flight crew rotation (which contained 10 or 11 additional FOs that Complainant could have been paired with, including at least 6 or 7 who had never flown with Complainant).[129] Respondent's management was not able to explain why Respondent never tried such an approach. This, coupled with the lack of disciplinary actions, retraining, or other corrective measures related to Complainant's CRM and interpersonal issues, supports the ALJ's conclusion that although Respondent *could* have terminated Complainant, Respondent did not

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122 D. & O. at 6.

123 *Id.* at 35.

124 Tr. at 882; JX 13 at 4-5.

125 D. & O. at 14; Tr. at 174.

126 D. & O. at 35.

127 *Id.* at 47 n.145.

128 *Id.* at 37.

129 *Id.* at 46.

demonstrate that it *would* have done so in the absence of Complainant's protected activity.

In support of its affirmative defense, Respondent points to DO Heuman's testimony that, if the only issue with Complainant had been DO Heuman's suspicion of "malicious compliance," he would not have discharged Complainant.[130] This may be true, but it is legally irrelevant. To carry its burden, an employer must show that it would have taken the same adverse action even in the absence of an employee's protected activity; *not* that it would not have taken the adverse action in the absence of other non-protected activity that was also a contributing factor behind the adverse action. This inverted formulation would transform the 'same decision' defense into a sole factor analysis that would wholly undermine the contributing factor analysis required by AIR21's statutory scheme.[131]

6. Respondent's Backpay Liability

A prevailing complainant in an AIR21 case is entitled to reinstatement to their former position, compensation including backpay, and compensatory damages. The ALJ determined that Complainant was entitled to $196,005.27 in backpay for the period between his termination and January 2022, when his compensation began to exceed what he would have earned had he still been employed by Respondent.

Respondent contends that its backpay liability to Complainant should be tolled as of March 25, 2019, the date Complainant received the Gama Aviation job offer, based on the assertion that Complainant's failure to maintain employment with Gama was a failure to mitigate damages.[132] We reject Respondent's argument as counter to binding precedent: "only if the employee's misconduct is gross or egregious, or if it constitutes a willful violation of company rules, will termination resulting from such conduct serve to toll the discriminating employer's back pay

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130 Resp. Br. at 31.

131 *See* 49 U.S.C § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a) ("A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.").

132 *See Cook v. Guardian Lubricants, Inc.*, ARB No. 1997-0055, ALJ No. 1995-STA-00043, slip op. at 5 (ARB May 30, 1997) ("The mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee act reasonably to maintain such employment.").

liability."[133] Respondent urges the Board to overturn more than a quarter century of precedent and adopt a lower standard for tolling an employer's backpay liability. We decline to do so.

Less than a year ago, the Board addressed this same issue in *Ass't Sec'y & Becker v. Smithstonian Materials* and acknowledged that "[w]hile some courts have applied tolling in cases involving less serious conduct . . . the ARB has consistently held that a tolling offset is applicable only in cases involving misconduct which is gross or egregious, or constitutes a wilful violation of company rules."[134] Additionally, the Fourth Circuit has articulated a similar standard to the one adopted by the Board, holding that an "employee who *willfully* loses employment by engaging in deliberate or gross misconduct is not entitled to backpay for a resulting earnings loss."[135] The ALJ applied the correct legal standard and Respondent does not articulate a compelling reason why we should reverse course and adopt a different standard.

Further, substantial evidence supports the ALJ's determination that Complainant did not engage in gross or egregious misconduct, nor a willful violation of company rules, when it came to his efforts to obtain employment with Gama. As part of the onboarding process for Gama, Complainant: (i) studied for and completed 25 online exams;[136] (ii) told a recruiter over the phone that he had questions about a training agreement he was required to sign;[137] (iii) took a pre-employment drug test;[138] (iv) submitted some of the required onboarding documents, including a signed offer letter, application form, background check consent form, confidential agreement;[139] I-9 form and I-9 verification document;[140] (v) sent an email regarding

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133 *Johnson v. Roadway Express, Inc.*, ARB No. 2001-0013, ALJ No. 1999-STA-00005, slip op. at 10 (ARB Dec. 30, 2002) (quoting *Cook*, ARB No. 1997-0055, slip op. at 6); *see also Blackie v. D. Pierce Transp., Inc.*, ARB No. 2013-0065, ALJ No. 2011-STA-00055, slip op. at 15 (ARB June 17, 2014); *Pollock v. Cont'l Express*, ARB Nos. 2007-0073, 2008-0051, ALJ No. 2006-STA-00001, slip op. at 12 (ARB Apr. 7, 2010).

134 *Ass't Sec'y & Becker v. Smithstonian Materials, LLC*, ARB No. 2021-0048, ALJ No. 2013-STA-00050, slip op. at 18-19 (ARB Oct. 18, 2023) (internal markings omitted).

135 *NLRB v. Pessoa Constr. Co.*, 632 F. App'x 760, 763 (4th Cir. 2015) (quoting *NLRB v. Pepsi Cola Bottling Co. of Fayetteville*, 258 F.3d 305, 310 (4th Cir. 2001)).

136 Tr. at 215.

137 *Id.* at 457-59.

138 *Id.* at 452.

139 *See* Tr. at 455-56; RX 46 at 5-7.

140 Based on Complainant's response to the list of outstanding items, the documents submitted on April 3, 2019, were the I-9 form and I-9 verification document. *See* RX 46 at 5.

his questions about the training form;[141] (iv) reiterated in writing that he had outstanding questions regarding the training agreement;[142] and (vii) twice called the recruiter after the job offer was withdrawn to try to smooth things over.[143] Complainant's failure to submit a required document on time, especially when considered alongside the onboarding tasks he successfully completed, does not rise to the level of gross or egregious misconduct. The ALJ did not err in refusing to toll Complainant's backpay as of March 25, 2019.

7. Interest on Backpay

Prevailing complainants are entitled to interest on an award of backpay.[144] The ALJ ordered that Complainant receive pre- and post-judgment interest in an amount determined pursuant to the formula the Board set out in *Doyle v. Hydro Nuclear Services*.[145] Pursuant to this formula, interest compounds quarterly and the proper interest rate is the rate charged on the underpayment of federal income taxes: the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points.[146] In addition to holding that interest on backpay awards should be compounded quarterly, *Doyle* provided "guidance" on how quarterly compounding interest should be calculated:

> The Federal short-term interest rate to be used is the so-called "applicable federal rate" (AFR) for a quarterly period of compounding.
>
> . . . To determine the interest for the first quarter of back pay owed, the parties shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points. To determine the quarterly average interest rate, the parties shall calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage point. . . . We round to the whole number

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141 Tr. at 467; RX 46 at 4.

142 RX 46 at 2.

143 Tr. at 489.

144 *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 1999-0041, 1999-0042, 2000-0012, ALJ No. 1989-ERA-00022, slip op. at 18 (ARB May 17, 2000) ("Back pay is awarded to make the claimant whole, and such relief 'can only be achieved if [prejudgment] interest is compounded.") (quoting *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996)).

145 D. & O. at 54.

146 *Doyle*, ARB Nos.1999-0041, -0042, 2000-0012, slip op. at 18-19.

> because the parties did so in their evidentiary submissions to the ALJ. . . .
>
> To determine the interest for the second quarter of back pay owed, the parties shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter's interest rate as calculated according to the preceding paragraph. This multiplication yields the second quarter interest.
>
> This process shall continue for computing the interest owed on the back pay through the date of the issuance of this decision.[147]

Respondent argues that the guidance provided in *Doyle* incorporates a rate of interest typically used as an *annual* rate of interest (the federal short-term rate) and inappropriately uses it to calculate the amount of interest that accrues on a quarterly basis.[148] This argument is persuasive. Because of this, the *Doyle* formula results in interest calculations that do not comport with AIR21's remedial aim and provides complainants with interest awards that far exceed the interest they would accrue elsewhere.

Here, Complainant was awarded $196,005.27 in backpay and the interest calculations submitted by the parties indicate that backpay plus pre-judgment interest, which was calculated for just under 18 quarters spanning Q1 2019 to partway through Q2 2023, comes out to $322,117. This is an effective annual interest rate of 11.67%. By contrast, the federal short-term rate (rounded to the nearest whole percentage point, as required by the *Doyle* formula) during the period in which interest was calculated, ranged from 0% to 4%. Similarly, the interest charged on the underpayment of federal income taxes (again, rounded to the nearest whole percentage point) during this period ranged from 3% to 7%.

While *Doyle*'s holding that interest on backpay should be "compound" rather than "simple" remains sound, the decision's instructions on how to calculate compound interest is dicta and does not provide appropriate guidance for how to calculate interest in AIR21 whistleblower cases. We also take this opportunity to recognize that daily, rather than quarterly, is the appropriate period of compounding when calculating interest on backpay awards in AIR21 cases.

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147 *Id*. at 19 (internal references removed).

148 Resp. Br. at 40.

The *Doyle* board justified the use of quarterly compounding interest, in part, by observing that in "two recent decisions under the whistleblower provision of the Surface Transportation Assistance Act of 1984 [STAA] . . . we ordered that the interest on back pay should be compounded quarterly."[149] At the time *Doyle* was decided, the regulations implementing STAA (as well as those implementing the whistleblower protection provisions of other federal statutes) were silent as to the frequency with which interest should compound.

Today, the STAA regulations require that interest on backpay be calculated using the interest rate applicable to the underpayment of federal income taxes and be compounded daily.[150] In the Final Rule providing for daily compounding of interest in STAA whistleblower cases, the Secretary of Labor noted that "daily compounding of interest better achieves the make-whole purpose of a backpay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on backpay by the National Labor Relations Board."[151] Similar regulatory reforms have been made to the whistleblower protection provisions of other statutes administered by the Department of Labor, including the National Transit Systems Security Act, the Federal Railroad Safety Act, and Section 806 of the Sarbanes-Oxley Act.[152] Notably, interest on federal tax underpayments—the reference the Board has long used in determining the appropriate interest rate when calculating interest on backpay awards—is compounded daily.[153]

Daily compounding furthers AIR21's remedial aims without producing a windfall for successful complainants. As for how to calculate daily compounding interest, we find the regulations governing interest calculations for backpay awards to federal employees to be instructive: "On each day for which interest accrues, the

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149 *Doyle*, ARB Nos.1999-0041, -0042, 2000-0012, slip op. at 18.

150 29 C.F.R. § 1978.109(d)(1).

151 Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982 (STAA), as Amended, 77 Fed. Reg 44,121, 44,128 (July 27, 2012).

152 *See, e.g.*, Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act, 80 Fed. Reg. 69,115, 69,124 (Nov. 9, 2015) (citing *Jackson Hosp. Corp. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 356 N.L.R.B. No. 8, 2010 WL 4318371, (Oct. 22, 2010)); Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, 76 Fed. Reg. 68,084, 68,088 (Nov. 3, 2011) (recognizing that "[t]his is a change from the way interest has been calculated. *See Doyle v. Hydro Nuclear Servs.*, ARB Nos. 1999-0041, -0042, and 2000-0012, 2000 WL 694384, at *15-16 (ARB May 17, 2000))."

153 26 U.S.C. § 6622.

agency shall compound interest by dividing the applicable interest rate (expressed as a decimal) by 365 (366 in a leap year)."[154]

8. Emotional Distress

Under AIR21, a successful complainant is entitled to compensatory damages in addition to backpay.[155] To recover compensatory damages for emotional harm, a complainant "must show by a preponderance of the evidence that [they] experienced mental suffering or emotional anguish, and that the unfavorable personnel action caused the harm."[156] Although the testimony of medical or psychiatric experts can strengthen the case for awarding compensatory damages, it is not required.[157] We have routinely affirmed compensatory damages awards in cases where no medical or psychiatric evidence was presented, provided that the complainant's evidence was unrefuted and, as determined by the ALJ, credible.[158] Compensatory damages must be "proportionate to the harm inflicted," but there is no specific formula for determining the amount of compensatory damages a complainant is owed and we need not establish one today.[159]

The ALJ awarded Complainant $15,000 in compensatory damages for emotional distress and loss of reputation. The ALJ found that the limited evidence of emotional harm that Complainant presented was unrefuted.[160] During the hearing, Complainant testified that his termination from employment was very difficult for him because it was the first time he had trouble getting a job, and being in the aviation industry had "been [his] life for 20+ years."[161] Complainant stated that he "never thought [he] was going to work again."[162] Following his termination,

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154 5 C.F.R. § 550.806(e).

155 49 U.S.C. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.110(d).

156 *Petitt*, ARB No. 2021-00014, slip op. at 23.

157 *Id.* (quoting *Jones v. EG&G Def. Materials*, ARB No. 1997-0129, ALJ No. 1995-CAA-00003, slip op. at 23 (ARB Sept. 29, 1998)).

158 *Id.* at 23-24 (citing *Hobson v. Combined Transp., Inc.*, ARB Nos. 2006-0016, -0053, ALJ No. 2005-STA-00035, slip op. at 8 (ARB Jan. 31, 2008) (affirming award for emotional distress based on complainant's testimony alone where it was "unrefuted and, according to the ALJ, credible.")).

159 *Id.* at 23 (quoting *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 2009-0081, ALJ No. 2009-AIR-00006, slip op. at 3 (ARB Sept. 2, 2011)).

160 D. & O. at 53.

161 Tr. at 259.

162 *Id.* at 219.

Complainant's wife had to work significant overtime and became exhausted.[163] Having depleted his finances and still needing to support his two school-aged children and multiple pets, Complainant eventually accepted a job stocking shelves at Walmart during the night shift, which resulted in him not spending as much time with his family since he had to sleep during the day.[164] This unrefuted testimony supports the ALJ's determination.

In determining the amount of compensatory damages Complainant is entitled to, a key step is a comparison with awards made in similar cases.[165] As the ALJ noted in his decision, cases arising under AIR21 have provided for compensatory damages ranging from $3,000 to $100,000.[166] Even if we were to limit the universe of comparison cases to those in which the complainant did not provide medical or psychiatric evidence, we have affirmed compensatory damages awards of up to $100,000.[167] In cases arising under other whistleblower protection statutes, we have affirmed awards of up to $250,000 absent any medical or psychiatric evidence.[168]

Those cases involved the same type of evidence of emotional harm that Complainant presented: testimony about the difficulty of finding new employment in a chosen profession, the stress of depleted finances, and needing spouses to take on additional work.[169] The ALJ's decision to award only a fraction of the $200,000 in non-economic damages that Complainant sought reflects his determination that although Complainant's testimony was credible and unrefuted, it also lacked much

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163 *Id*. at 259.

164 D. & O. at 30; Tr. at 218-19, 259.

165 *See, e.g., Fink v. R&L Transfer, Inc.*, ARB No. 2013-0018, ALJ No. 2012-STA-00006, slip op. at 5 (ARB Mar. 19, 2014); *Ferguson v. New Prime, Inc.*, ARB No. 2010-0075, ALJ No. 2009-STA-00047, slip op. at 8 (ARB Aug. 31, 2011); *Evans*, ARB Nos. 2007-0118, -0121, slip op. at 20.

166 D. & O. at 53 n.153.

167 *See Evans*, ARB Nos. 2007-0118, -0121.

168 *Hobby v. Georgia Power Co.*, ARB No. 1998-0166, ALJ No. 1990-ERA-00030 (ARB Feb. 9, 2001).

169 *See Evans*, ARB Nos. 2007-0118, -0121, slip op. at 21-22 (affirming an award of $100,000 where complainant testified that "the biggest upset was that he could no longer provide for his family" and his wife testified that she had to return to teaching for additional income); *Hobby*, ARB No. 1998-0166, slip op. at 31-33 (affirming an award of $250,000 where complainant experienced "difficulty finding work in his chosen profession, and experienced emotional distress tied to his depleted finances, repeated requests of friends and family for money"); *Vieques Air Link, Inc. v. U.S. Dep't of Lab.*, 437 F.3d 102, 110 (1st Cir. 2006) (affirming an award of $50,000 in compensatory damages where complainant testified that "he struggled to support his wife and two infant children while he looked for new full-time employment[.]").

detail. Substantial evidence supports the ALJ's decision to award $15,000 in compensatory damages for emotional distress; it is in line with similar cases, and we will not disturb it.

CONCLUSION

We **AFFIRM** the ALJ's D. & O. in all respects other than the method for calculating interest on the backpay owed to Complainant.

SO ORDERED.

IVEY S. WARREN
Acting Chief Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge