U.S. Department of Labor

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

IN THE MATTER OF:

COLIN DeBUSE,

COMPLAINANT,

v.

CORR FLIGHT S.
***d/b/a* NICHOLAS AIR,**

RESPONDENT.

ARB CASE NO. 2023-0036

ALJ CASE NO. 2020-AIR-00015
ALJ SCOTT R. MORRIS

DATE: December 6, 2024

Appearances:

For the Complainant:
Gary Linn Evans, Esq., George Andrew Coats, Esq., and Ashley Ann Sander, Esq.; *Coats & Evans, P.C.*; The Woodlands, Texas

For the Respondent:
Edwin S. Gault, Jr., Esq.; *Forman Watkins & Krutz LLP*; Jackson, Mississippi; and Wendi Litton, Esq.; *Nicholas Air*; Oxford, Mississippi

Before THOMPSON and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

ROLFE, Administrative Appeals Judge:

This case arises under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21 or Act) and is before the Administrative Review Board (ARB or Board) for the second time.[1]

[1] 49 U.S.C. § 42121 (amended 2020), as implemented by the regulations at 29 C.F.R. Part 1979 (2024).

Complainant Colin DeBuse alleges, among other things, that Respondent Corr Flight S. unlawfully retaliated against him in violation of AIR21's whistleblower protection provisions by suspending him without pay for engaging in protected activity.

In its first decision, the Board vacated an ALJ's award based on Complainant's reporting to his employer of a pilot's inflight cockpit departure and remanded for the ALJ to consider whether Complainant's subsequent refusal to train with the same pilot on future passenger flights constituted protected activity. The Board tabled consideration of the remaining issues in the case pending the resolution of that element. On remand, the ALJ held that the Act also protected Complainant's refusal to train with the pilot and reinstated his award.

Because substantial evidence supports the ALJ's finding that Complainant subjectively held an objectively reasonable belief that training with the pilot would violate a Federal Aviation Administration (FAA) regulation prohibiting the reckless operation of an aircraft -- and none of the other whistleblower elements remain at issue concerning that protected activity -- we affirm the ALJ's award.[2]

PROCEDURAL HISTORY

The posture of this case and the parties' framing of the issues have significantly narrowed the scope of our review. Complainant filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent violated AIR21 by first suspending him without pay and then terminating his employment for engaging in protected activity.[3] On May 28, 2020, OSHA found that Complainant did not establish a reasonable cause

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[2] To prevail in a whistleblower 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. *See, e.g., Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021) (citation omitted). If the 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. *Id.*

[3] Decision and Order Granting Relief (D. & O.) at 1.

to believe Respondent retaliated against him and dismissed the complaint.[4] Complainant appealed.[5]

On December 8, 2021, the ALJ issued a mixed decision, finding that Complainant's protected activity of reporting the in-flight cockpit departure contributed to his unpaid suspension, and that Respondent did not meet its burden to establish an affirmative defense that it would have suspended Complainant whether he reported it or not.[6] But the ALJ further held that Respondent did prove by clear and convincing evidence it would have terminated Complainant's employment absent any protected activity, and the ALJ awarded damages for the unpaid suspension only.[7]

Respondent appealed the award based on the unpaid suspension.[8] *Notably*, Complainant did not cross-appeal his termination, and his termination is no longer at issue.[9]

The Board on appeal vacated the award and remanded, finding, (as Respondent had alleged), that the ALJ never "expressly found whether Complainant's refusal to train with [the pilot] was a protected activity."[10] But it chose not to reach Respondent's remaining argument that substantial evidence did not support the ALJ's finding that reporting the inflight cockpit departure contributed to his suspension.[11]

Instead, the Board found the more efficient approach was to remand the case and have the ALJ first determine each protected activity before examining the

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4 *Id.*; Respondent's Exhibit (RX) 1.

5 D. & O. at 1-2.

6 *Id.* at 32. The ALJ found that Respondent did meet its burden to show by clear and convincing evidence that it would have terminated Complainant in the absence of his protected activity. *Id.*

7 *Id.* at 36 ($2,703.34 in back pay, plus interest, and reimbursement of Complainant's litigation costs and attorneys' fees and costs).

8 Decision and Order on Remand Granting Relief (D. & O. on Remand) at 2.

9 *DeBuse v. Corr Flights S.*, ARB No. 2022-0019, ALJ No. 2020-AIR-00015, slip op. at 11 n.95 (ARB May 13, 2022) (ARB D. & O.).

10 *Id.* at 10.

11 *Id.*

remaining whistleblowing elements.[12] It then instructed "[i]f the ALJ finds on remand that Complainant's refusal to train" with the pilot constituted protected activity the "ALJ would then need to consider whether the refusal alone or together with other protected activities contributed to Respondent's decision to suspend him without pay."[13]

The ALJ on remand found the refusal to train constituted protected activity and that it contributed "*individually and in combination*, to Respondent's decision to suspend him without pay[.]"[14]

Respondent's only remaining arguments in this appeal exclusively dispute the ALJ's finding that Complainant's refusal to train with the pilot constitutes a protected activity. Respondent does not dispute that the refusal contributed to Complainant's unpaid suspension or claim that it would have suspended Complainant regardless of his refusal.

And thus we arrive at the crux of this appeal. FAA regulations, among other things, generally prohibit the operation of an aircraft "in a careless or reckless manner" that "endanger[s] the life or property of another."[15] The sole remaining issues for the purposes of this decision are whether Complainant subjectively believed training with the pilot posed a safety risk that Complainant reported to Respondent and, if so, whether his belief was objectively reasonable. The remaining whistleblower elements regarding the refusal to train are not disputed.

BACKGROUND REGARDING THE FAILURE TO TRAIN

Complainant began working as a first officer pilot for Respondent, a pilot management company, on or around October 15, 2018.[16] Complainant possessed a commercial pilot's license and 2,600 hours of flight time but had little experience piloting passenger flights.[17] In September of 2019, he accepted an opportunity from

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12 *Id.*

13 *Id.* at 10-11.

14 D. & O. on Remand at 9-10 (emphasis added).

15 14 C.F.R. § 91.13(b).

16 D. & O. at 3.

17 *Id.* at 7.

Respondent to receive training to become a qualified second in command for certain types of passenger flights.[18]

On October 15, 2019, Complainant began an eight-day flight rotation with Captain Stacey Lee on a Phenom 300 aircraft, a small jet with limited passenger capacity.[19] Complainant was to serve exclusively as an observer and was not intended to have any official in-flight responsibilities.[20]

It did not go well. On October 16, 2019, they flew from St. Petersburg, Florida, to Chicago, Illinois, and then to Las Vegas, Nevada.[21] Before takeoff on the leg from St. Petersburg to Chicago, the ALJ determined that Captain Lee returned the plane to the ramp, disconnected the aircraft's battery, and rebooted the electronic system to fix an issue with the aircraft's anti-skid system.[22] Yet the ALJ found Lee did not make a single logbook entry.[23] Complainant expressed his view that, under the circumstances, the plane was not safe to fly.[24] The ALJ found, however, that Lee nevertheless "received a 'verbal communication from the maintenance personnel' it was ok to operate the aircraft," disregarded Complainant's objections, and initiated take-off.[25]

Things did not improve in the air. At flight level, Captain Lee indisputably left the cockpit.[26] Complainant contends Lee talked with a passenger for a full twenty to thirty minutes; Lee maintains he left for three or four minutes to use the bathroom.[27]

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18 *Id.* at 4.

19 *Id.* at 4 and 10 n.22.

20 *Id.* at 9.

21 *Id.*

22 *Id.* at 10.

23 D. & O. on Remand at 6 n.9.

24 *Id.*

25 *Id.*; D. & O. at 10.

26 D. & O. at 11.

27 *Id.* at 11-12. The parties stipulated that Captain Lee told Chief Pilot James that he only stepped away for 3-4 minutes to use the restroom. *Id.* at 4.

The cockpit departure, however, was not Complainant's only in-flight concern. The ALJ determined the plane flew at or above 35,000 feet between two and a half to three hours, and that Captain Lee knew that every minute at that altitude required at least one qualified crew member to wear an oxygen mask.[28] The ALJ further determined that Lee also knew if he were to leave the controls at that altitude the other pilot would be required to wear an oxygen mask.[29] But the ALJ found neither pilot ever donned a mask, and that Captain Lee never mentioned the mask requirements -- including when he abandoned Complainant in the cockpit.[30]

After the plane landed, Complainant reported Captain Lee's in-flight behavior to dispatch, and his assigned manager, Respondent's Chief Pilot, Nick James.[31] Complainant subsequently completed two additional flight rotations as an observer with other pilots without incident.[32]

On November 1, 2019, however, Complainant received a text message from Respondent advising his next flight training would be with Captain Lee or another pilot.[33] Complainant responded he would not fly with Captain Lee.[34] Despite Complainant's refusal, Respondent nevertheless scheduled Complainant with Captain Lee for flight instruction beginning November 26, 2019.[35]

On November 22, 2019, Complainant participated in a call to discuss the issue with Director of Operations, Michael Prinzi, Jr. and Executive Vice President of Operations, Fernando Pineda.[36] Complainant told them that Captain Lee "left him at the controls at 45,000 feet to go back and chit chat up [their] customer" and that when he discussed Lee with Chief Pilot James, James questioned whether

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28 *Id.* at 11-12.

29 *Id.* at 11 n.29.

30 *Id.* at 11-12.

31 *Id.* at 12-13.

32 *Id.* at 4.

33 *Id.* at 13.

34 *Id.* Captain Lee did not become a training captain until November 20, 2019; thus, he was not a training captain during the October 16, 2019 flight. *Id.* at 15 n.51.

35 *Id.* at 4.

36 *Id.* at 14.

Complainant was capable of flying the aircraft in Lee's absence.[37] Complainant responded he was "capable" but not "qualified" to fly the plane and that he had no "faith" in an instructor "willing to break the rules in the air with a paying customer on board."[38]

Prinzi told Complainant he would talk to Captain Lee about his concerns but insisted Complainant would still have to train with him.[39] When Complainant again refused, characterizing Captain Lee's behavior as a safety issue, Pineda downplayed his concerns.[40]

At this point, Chief Pilot James joined the call.[41] It became heated. James stated Captain Lee admitted leaving the cockpit to use the restroom but denied talking with customers.[42] When Complainant insisted that Lee was unsafe, James became frustrated and accused Complainant of being the inferior pilot.[43] Prinzi then instructed Complainant that if he refused to fly with Lee he should resign.[44] Complainant replied he would not resign but would instead fly with another instructor.[45] Pineda warned Complainant that Respondent would consider it a resignation if he refused to fly with Captain Lee.[46]

Following the call, Prinzi discussed with the others whether to terminate Complainant's employment but decided against it at the time.[47] Later the same day, however, Prinzi sent Complainant an email with an "Employee Warning Letter" attached that stated:

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37 *Id.*

38 Decision and Order on Remand Granting Relief (D. & O. on Remand) at 7.

39 D. & O. at 14.

40 *Id.*

41 *Id.*

42 *Id.*

43 Joint Exhibit (JX) 4 at 6.

44 D. & O. at 14-15.

45 *Id.* at 15.

46 *Id.*

47 *Id.*

> You participated in a conference call on 22 November 2019, regarding your concern about being scheduled SIC flight training with Capt. Lee the week of 25 November 2019. You stated you were refusing to fly with Capt. Lee. Consequence: **Based on your refusal to fly with Capt. Lee you will be placed on unpaid leave**, effective 25 November 2019, until a simulator training date can be established with CAE for the Phenom 300. This simulator training will alleviate any concerns you have regarding your future training with Capt. Lee. Plan for Improvement: You will be scheduled for SIC simulator training at CAE at the earliest opportunity.
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> Per Nicholas Air policy, a training agreement is required for any employee who attends simulator training. You must comply with this training agreement provision before a simulator date can be scheduled. Consequence of Non-compliance: Grounds for termination and/or demotion.[48]

Prinzi asked Complainant to sign and return the Employee Warning Letter and, in turn, Prinzi would schedule the training.[49]

On November 25, 2019, Complainant called Prinzi and informed him that he had not received the training agreement.[50] During their conversation, Complainant again advised he would fly with another instructor, but refused to fly with Captain Lee because he was "unsafe."[51] Shortly after the call, Prinzi emailed Complainant the training agreement and reiterated that "[i]n order for us to put you in line for a training slot, we need you to either accept or refuse our offer to continue training by the end of the day Wednesday, November 27, 2019."[52]

As of December 10, 2019, Complainant had not provided Respondent with a signed copy of the training agreement or indicated whether he was going to sign the

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48 Joint Exhibits (JX) 2 at 1 (emphasis added).

49 RX 10 at 1.

50 D. & O. at 16; RX 13 at 1.

51 RX 13 at 9-11.

52 D. & O. at 16; RX 7 at 1.

training agreement.[53] And, on December 10, 2019, Respondent terminated his employment.[54]

THE ALJ'S FINDINGS ON REMAND REGARDING THE REFUSAL TO TRAIN

The ALJ had little difficulty on remand concluding Complainant's refusal to fly with Captain Lee was protected activity. The ALJ noted the general FAA regulation prohibiting the reckless operation of an aircraft, 14 C.F.R. § 91.13, as well as regulations requiring pilots to refuse to operate unsafe planes or planes that require two qualified pilots where only one qualified pilot is available.[55] He then found that Complainant's conclusion that Captain Lee "had operated an aircraft in a reckless manner -- and may well operate it in violation of regulations again -- was both subjectively [held] and objectively reasonable."[56]

The ALJ reasoned that Complainant's concerns about Captain Lee leaving the cockpit were justified and that Captain Lee's "flagrant disregard for safety [was] not to be taken lightly."[57] Moreover, the ALJ found it "perfectly reasonable for Complainant to conclude that Captain Lee's willingness to act in such an unsafe manner would not be limited to that singular event."[58] The ALJ then summarily rejected Respondent's argument that Complainant's concerns did not relate to a safety issue and its argument that Complainant did not truly believe Captain Lee was unsafe but was instead solely motivated by a personal dislike for Lee.[59]

Indeed, the ALJ found it "incredible that Respondent's Vice President of Operations and its Director of Operations would opine that it was not a safety issue for the only pilot qualified to operate an aircraft [to leave] the cockpit while the

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53 *Id.* at 16-17.

54 *Id.* at 17; Complainant's Exhibit (CX) 7.

55 D. & O. on Remand at 5-6; *see also* 14 C.F.R. § 91.13(a) ("No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."); 14 C.F.R. §§ 135.3(b), 135.4(a)(1), 135.99(b), 135.101, 135.145(d) (explaining that a pilot may refuse to fly an aircraft that requires two qualified pilots, when only one of the pilots is qualified to operate the aircraft).

56 D. & O. on Remand at 5-6.

57 *Id.* at 5.

58 *Id.*

59 *Id.* at 8-9.

aircraft was above 35,000 feet, during a revenue flight."[60] He further found "Respondent had other instructors that it could have paired with Complainant, yet for some unknown reason chose to force this issue knowing full well Complainant's justified concerns about Captain Lee."[61] Finally, even if it were true (although the ALJ did not find it was) that Complainant held a personal grudge towards Lee, the ALJ still reasoned it "does not mean that legitimate safety concerns cannot co-exist with any personal grievance."[62]

The ALJ thus concluded "Complainant's refusal to fly with Captain Lee, including during training, was protected activity."[63] And since that protected activity contributed "individually and in combination, to Respondent's decision to suspend him without pay," and Respondent did not even attempt to allege it would have suspended Complainant regardless of his refusal, the ALJ reinstated his prior award.[64]

On appeal, Respondent again does not dispute that Complainant's refusal to fly with Captain Lee contributed to his suspension without pay or that it would have suspended him regardless of his refusal. Instead, it solely repeats its prior arguments that Complainant never sufficiently identified an imminent safety violation and that Complainant's concerns were neither subjectively held, because they were motivated by a personal grievance instead of safety concerns, nor objectively reasonable, because the ALJ did not weigh the facts the way it suggested. Regardless, Respondent further alleges it addressed Complainant's concerns, eliminating any liability.

We, however, disagree -- on all points.

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60 *Id.* at 8.

61 *Id.*

62 *Id.* at 9.

63 *Id.*

64 *Id.* at 10.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and to issue agency decisions in cases arising under AIR21.[65] In 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.[66] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[67] In addition, the Board generally defers to an ALJ's credibility findings "unless they are inherently incredible or patently unreasonable."[68]

DISCUSSION

To prevail in a whistleblower case under AIR21, complainants must prove by a preponderance of the evidence that they engaged in protected activity and that the protected activity contributed to the adverse employment action taken against them.[69] If the 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 protected activity.[70]

Here, Respondent does not, and cannot, dispute that it suspended Complainant precisely because of his refusal to fly with Captain Lee: Complainant's suspension letter explicitly listed his refusal as the one and only factor in Respondent's decision. It thus categorically follows that his refusal contributed to

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

66 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019) (citation omitted).

67 *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 30 (ARB Dec. 15, 2023) (citation omitted); *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 7 (ARB June 29, 2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citations omitted)).

68 *Klinger v. BNSF Ry. Co.*, ARB No. 2023-0003, ALJ No. 2016-FRS-00062, slip op. at 5 (ARB July 23, 2024) (citations and internal quotations omitted).

69 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4 (citation omitted).

70 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4-5 (citations omitted).

his suspension, and that Respondent cannot prove it would have suspended him without that refusal. And because substantial evidence supports the ALJ's finding that refusing to fly with Captain Lee was a protected activity, we affirm the ALJ's decision.

1. Substantial evidence supports the ALJ's decision Complainant engaged in protected activity when he refused to fly with Captain Lee.

A complainant engages in protected activity if they:

> [P]rovided, caused to be provided, or [are] 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 air carrier safety . . . .[71]

Protected activity under AIR21, as a matter of law, has only two elements: (1) the information the complainant provides must involve a purported violation of a regulation, order, or standard of the FAA or federal law relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be subjectively held and objectively reasonable.[72]

Both elements are met here.

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71 49 U.S.C. § 42121(a)(1) (amended 2020). In the Consolidated Appropriations Act, 2021 (CAA), Congress replaced the language about providing information "relating to air carrier safety" to "relating to aviation safety." 49 U.S.C. § 42121. The pre-amendment language applies to the events in 2019 that gave rise to Complainant's claim and therefore we use the term "air carrier" herein. We note, however, that our analysis also applies to the amended text.

72 49 U.S.C. § 42121(a)(1); *McMullen v. Figeac Aero N. Am.*, ARB No. 2017-0018, ALJ No. 2015-AIR-00027, slip op. at 4 (ARB Mar. 30, 2020).

A. Complainant sufficiently provided information relating to the violation of an FAA regulation.

Before the ALJ, Complainant explained that he refused to fly with Captain Lee because he witnessed Lee operating the aircraft in a manner that violated FAA regulations -- which, among other things, generally prohibit the reckless operation of an aircraft -- and that he was concerned that Lee would likely do so again.[73] The ALJ, in turn, found AIR21 both "protects employees who, in part, refuse to perform work assignments they reasonably believe *would* cause them to violate aviation safety regulations" or that "**could** reasonably result in a violation of aviation safety regulations."[74]

The ALJ then found Complainant repeatedly advised Respondent of his legitimate safety concerns concerning Captain Lee, that AIR21 required no more, and that Respondent's assertion Complainant "communicated no safety concern" was "disingenuous at best."[75] The ALJ therefore rejected Respondent's argument that the information Complainant provided did not sufficiently relate to an imminent or likely future safety violation to be protected.[76]

Respondent on appeal repeats the same rejected argument. But it cites no authority establishing AIR21 requires a particular degree of specificity regarding an imminent violation such that Complainant's numerous warnings do not suffice.[77] And with good reason: the Board has repeatedly explained that "information only has to be *related* to any violation or alleged [safety] violation" and that a complainant need not wait "for an FAA violation to occur in order to report the [safety concern] and have whistleblower protection."[78] Likewise, as a matter of

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73 Complainant's (Comp.) Post-Remand Brief (Br.) at 15-16.

74 D. & O. on Remand at 6 (emphasis in original).

75 *Id.* at 8.

76 *Id.* at 9.

77 D. & O. on Remand at 6 (AIR21 "does not require an aircraft accident to occur, or for an actual violation of a regulation to occur, before protections are afforded to the employee.").

78 *McMullen*, ARB No. 2017-0018, ALJ No. 2015-AIR-00027, slip op. at 5 (emphasis added).

settled law, AIR21's "whistleblower statute does not require that protected activity relate 'definitively and specifically' to a safety issue."[79]

The ALJ thus correctly determined Complainant satisfied the standard by repeatedly informing Respondent that he observed Captain Lee operating the aircraft in an unsafe manner and further warning Respondent he was concerned Lee would do so again in the future. Counter to Respondent's argument, the ALJ thus committed no error of law, and we affirm his finding.

B. *Substantial evidence supports the ALJ's determination Complainant established he believed an FAA violation could reoccur if he flew with Captain Lee.*

To satisfy the subjective component, a complainant must simply "prove that [they] held the belief in good faith."[80] The ALJ rationally determined Complainant held his belief in good faith both by Complainant's observations and his statements.

First, the ALJ permissibly credited Complainant's observations of Captain Lee's behavior that shaped his view Lee was an unsafe pilot. Before they even took flight on their first training run, Captain Lee returned the aircraft to the gate for a number of corrective procedures, without making a single logbook entry -- which the ALJ found likely violated FAA violations.[81] Once in the air, the ALJ further found Captain Lee left Complainant alone in the cockpit, despite the fact Complainant was unqualified to fly the plane. During the same flight, Lee did not instruct Complainant to wear an oxygen mask while he was away from the cockpit even though he knew it was mandatory. As the ALJ determined, such "flagrant disregard" for safety cannot "be taken lightly." And it logically provides a sound basis for Complainant's subjective beliefs.

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79 *Petitt v. Delta Airlines*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 13 (ARB Mar. 29, 2022) (citing *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 8 (ARB Feb. 13, 2015)); *see also Occhione v. PSA Airlines*, ARB No. 2013-0061, ALJ No. 2011-AIR-00012, slip op. at 8 (ARB Nov. 26, 2014) ("more recent ARB precedent as well as Fourth Circuit law leads us to conclude that this specificity standard is inappropriate and inconsistent with the AIR 21 whistleblower statute.").

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

81 D. & O. on Remand at 6 n.9.

Second, the ALJ further found Complainant was far from shy in explicitly telling Respondent on numerous occasions he regarded Captain Lee as an unsafe pilot. Among several blunt examples, Complainant explicitly stated Captain Lee "has no regard for the rules" and directly admonished Respondent's management that Captain Lee "is not a safe captain to fly with, he is hazardous, and I refuse to fly with him."[82] Complainant never equivocated from that position, further establishing he held his position in good faith.

Respondent does not dispute the content of Complainant's statements, focusing instead on the motivation behind them. It argues that a personal grievance caused by their age differences and Captain Lee's supervisory authority, not safety, inspired Complainant's objections.[83] The ALJ rejected the argument below, finding even if there was a mixed motive (without actually finding one), it would not diminish Complainant's safety concerns: "if animosity did exist here, it can be just as likely that any justifiable grievance stems from being placed in an unsafe situation[.]"[84]

We agree and reject Respondent's contention that the ALJ erred. It is the ALJ's function to weigh the evidence and determine witness credibility.[85] The ALJ was well within his wide discretion in crediting Complainant's testimony regarding his beliefs, and those beliefs easily comport with the facts as the ALJ determined them. Far from being inherently incredible, the ALJ's crediting of Complainant's testimony is eminently reasonable. And because a reasonable person evaluating the record could likewise find Complainant subjectively believed Captain Lee could violate an FAA regulation, substantial evidence supports the ALJ's decision. We thus affirm it.[86]

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82 *Id.* at 9.

83 Respondent (Resp.) Opening Br. at 22.

84 D. & O. on Remand at 9.

85 The ARB generally defers to an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable." *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 2006-0035, ALJ No. 2004-AIR-00030, slip op. at 13 (ARB Feb. 29, 2008)), *aff'd* 524 F. App'x 443 (10th Cir. 2013).

86 *Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 13-18 (ARB June 18, 2024) (reviewing the ALJ's subjective belief findings under the substantive evidence standard).

C. The ALJ rationally determined Complainant's subjective belief was objectively reasonable.

A complainant's belief is objectively reasonable if it is one that a person of similar training and experience would hold.[87] The ALJ demonstrably stated and applied this standard below, and, as a threshold matter, we reject Respondent's cursory and unsupported allegation otherwise.[88]

Under this standard, the ALJ correctly found Complainant to be an experienced professional pilot who holds a commercial pilot license.[89] The ALJ further permissibly found Complainant witnessed Captain Lee displaying a "flagrant disregard for safety" based on his pre-flight and in-air activities on the one flight they piloted together.[90] It thus was reasonable for the ALJ to determine a similarly situated pilot with comparable experience, training, and observations would have harbored the same beliefs regarding Captain Lee.

Respondent on appeal does not point to any overt legal or factual error in those findings. Instead, it merely bullet points a list of facts it contends the ALJ should have given more weight. Respondent's sole argument thus amounts to a simple request to reweigh the evidence, which is beyond our authority under our substantial evidence standard of review of AIR21 cases. The relevant evidence is such that a reasonable mind can find it adequate to support the ALJ's conclusion. No more is required.[91]

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87 *Forrand v. Fedex Express*, ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 4 (ARB Jan. 4, 2021) (citation omitted).

88 On appeal, Respondent argues the ALJ applied an incorrect standard for objective reasonableness. Resp. Opening Br. at 26. But the ALJ applied the correct standard for objectivity by considering whether a person of similar training and experience would hold the same belief of a violation.

89 D. & O. at 7.

90 D. & O. on Remand at 5.

91 The Board "must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we 'would justifiably have made a different choice had the matter been before us de novo.'" *Sharpe v. Supreme Auto Transp.*, ARB No. 2017-0077, ALJ No. 2016-STA-00073, slip op. at 5 (ARB Dec. 23, 2019) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)); *see also Biestek v. Berryhill*, 587 U.S. 97, 103 (2019) ("[T]he threshold for [substantial evidence] is not high . . . . It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal citations and quotations omitted)); *Bonet ex rel. T.B. v. Colvin*, 523 F. App'x 58, 59 (2d Cir. 2013) ("It may well be

Substantial evidence supports the ALJ's finding that Complainant established his subjective belief was objectively reasonable. We therefore affirm it.

D. Protected activity is not rendered unprotected simply because the employer addresses the complained of condition or situation.

Finally, we reject Respondent's argument that even if Complainant's refusal constituted protected activity, the refusal lost its protected status once Respondent addressed his concerns.[92] Respondent misinterprets the law.

The plain language of the AIR21 protects complainants without regard to an employer's corrective measures.[93] All the Act requires is that a person provide "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 air carrier safety[.][94] The Board has thus unambiguously held that protected activity does not lose its status if the employer simply addresses or corrects the issue. Instead, if the complainant "demonstrates a reasonable belief at the time he made the complaints, his complaints are protected[.]"[95] As we have established, Complainant did so here.

Respondent's cited authority does not change this analysis. In support of its argument, Respondent generally points to *Pensyl v. Catalytic, Inc.*[96] and *Sitts v. Comair, Inc.*[97] Respondent broadly claims -- without providing any context -- that *Pensyl*, a case that arose under the Energy Reorganization Act of 1974 (ERA), stands for the universally broad proposition that "'[r]efusal to work loses its protection after the perceived hazard has been investigated by responsible

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that reasonable minds would disagree as to [the finding], but it is clear from the record that the ALJ . . . simply reached a conclusion, supported by substantial evidence . . . .").

92 Resp. Opening Br. at 26-27.

93 *See* 49 U.S.C. § 42121(a)(1).

94 *Id.*

95 *Halliday v. Transp. Express, Inc.*, ARB No. 2023-0024, ALJ No. 2020-STA-00067, slip op. at 17 (ARB Oct. 7, 2024).

96 *Pensyl v. Catalytic, Inc.*, No. 1983-ERA-00002 (Sec'y Jan. 13, 1984).

97 *Sitts v. Comair, Inc.*, ARB No. 2009-0130, ALJ No. 2008-AIR-00007 (ARB May 31, 2011).

management officials' and the refusing employee is made aware."[98] It likewise baldly claims that *Sitts* establishes that when a pilot "expresses a [specific and subjectively and objectively reasonable] safety concern that relates to the aircraft, and that safety concern is not addressed by the company, the refusal to work remains protected activity."[99]

But Respondent does not provide any context for the untethered language it cites. And the relevance of those two cherry-picked quotes does not survive a cursory review of the cases, which are readily distinguishable.

Pensyl concerned the clean-up of Three Mile Island nuclear plant where the workers were informed they could no longer wear respirators when working in contaminated areas.[100] After a meeting to address concerns, management decided the workers would temporarily be allowed to voluntarily wear the respirators.[101] The workers were later counseled by the Nuclear Regulatory Commission (NRC) on why the respirators were detrimental and disallowed.[102] Pensyl's employment nevertheless was, at some point, terminated for refusing to work without a respirator.[103]

But the Secretary did not announce the broad exculpatory rule Respondent claims it did in response. It instead remanded the case to the ALJ to determine basic facts about the timing of the termination, the nature of the NRC investigation, how the results were communicated and received, the content of the counseling the employees received, and how employee concerns were addressed.[104] Only after all of those material facts were determined could it be established whether Pensyl was justified at the time of his refusal to work. The case simply has no relevance here where the ALJ had all the relevant facts he needed to determine Complainant subjectively held an objectively reasonable belief in a safety violation at the time he reported it.

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98 Resp. Opening Br. at 26 (citing *Pensyl*, No. 1983-ERA-00002, slip op. at 3).

99 *Id.* at 26-27 (citing *Sitts*, ARB No. 2009-0130, slip op. at 15-16 (internal quotations omitted)).

100 *Pensyl*, No. 1983-ERA-00002, slip op. at 1.

101 *Id.*

102 *Id.* at 2.

103 *Id.*

104 *Id.* at 3.

Sitts, in turn, fully supports the ALJ's decision here. Sitts refused to pilot an aircraft with what he considered to be a faulty mechanism that regulated the opening and closing of the passenger cabin door.[105] The ALJ concluded, and the Board affirmed, that the employer's subsequent "efforts to convince Sitts that working conditions were safe were insufficient to undermine the continuing reasonableness of Sitts' safety concerns" and therefore "Sitts' activity did not lose its protected status at any time."[106] So too here: Respondent's subsequent efforts to undermine Complainant's concerns after he made them does not cause his activity to lose protected status.

The plain text of 49 U.S.C. § 42121 protects complaints even if the employer subsequently addresses and remedies the concerns; Complainant's refusal to train with Captain Lee did not lose its protected status because Respondent's management advised they simply discussed or would discuss Complainant's concerns with Captain Lee.[107]

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105 *Sitts*, ARB No. 2009-0130, slip op. at 7-8.

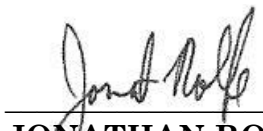
106 *Id.* at 16.

107 To be sure, in circumstances not at issue here, adequately addressing a complainant's concerns may render subsequent complaints unreasonable. But even in those circumstances, the resolution does not render the *original concerns* unprotected. Regardless, the recording of the November 22, 2019 phone conference in this case supports the ALJ's finding that "conduct by Respondent's management telegraphed to Complainant that management did not seriously consider this a safety issue" and Complainant "rightly had skepticism about the extent to which Respondent's management might 'talk to' Captain Lee to ameliorate the problem." D. & O. on Remand at 8.

CONCLUSION

Substantial evidence supports the ALJ's finding that Complainant engaged in protected activity when he refused to train with Captain Lee. Because Respondent does not appeal the ALJ's determination that Complainant's refusal contributed to the unpaid suspension, and Respondent did not meet its burden to establish that it would have suspended Complainant without pay in the absence of his refusal, we **AFFIRM** the ALJ's decision and order on remand.

SO ORDERED.



JONATHAN ROLFE
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge