U.S. Department of Labor

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

In the Matter of:

ROGER REED, **ARB CASE NO. 2021-0044**

COMPLAINANT, **ALJ CASE NO. 2020-AIR-00001**

v. **DATE: December 16, 2021**

AMERICAN AIRLINES, INC.

RESPONDENT.

Appearances:

For the Complainant:
Stacey Vucko, Esq.; *Vucko Law LLP*; Oak Brook, Illinois

For the Respondent:
Nancy Holt, Esq. and Jacquelyn L. Thompson, Esq.; *FordHarrison LLP*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Stephen M. Godek and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Roger Reed (Complainant) filed a complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] (AIR 21), and its implementing regulations,[2] alleging that his employer, American Airlines (Respondent), had unlawfully discriminated against him under the AIR 21's whistleblower protection provisions. After a hearing, an Administrative Law Judge (ALJ) denied the claim. Complainant appealed the ALJ's decision to the Administrative Review Board (Board). For the reasons discussed below, we affirm the ALJ's decision.

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[1] 49 U.S.C. § 42121 (2000).

[2] 29 C.F.R. Part 1979.

BACKGROUND

Respondent employs Complainant as an Airline Maintenance Technician (AMT) at Chicago O'Hare International Airport.[3] Complainant has worked for Respondent for about thirty years and performs line maintenance including general inspection and repairs.[4]

Respondent has a collective bargaining agreement (CBA) with the Transport Workers Union of America (Union), which covers its mechanics.[5] In the instance of an investigation of a matter that may lead to discipline of a mechanic, Section 29(f)(2) of the CBA provides that Respondent may hold a mechanic "out of service pending the investigation, provided that the employee will be paid for all regularly scheduled hours while held out of service."[6] Interviews conducted as part of a 29(f) investigation are not disciplinary but are fact-finding in nature.[7]

Based upon a memorandum of understanding between the Union, Respondent, and the FAA, Respondent established a confidential, but not anonymous, program for reporting safety issues called the Aviation Safety Action Program (ASAP).[8] ASAP reports go to a secure system where personal identifying information on a submission is redacted.[9] However, the person investigating the report is given the employee's name and telephone number so they know who to contact to conduct the investigation.[10] The employee is notified when the investigation is closed.[11] The core purpose of the program is to maintain the confidentiality of an employee's identity so that employees can report a potential safety violation without fear of reprisal from the FAA or Respondent.[12] Under the

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3 Decision and Order (D. & O.) at 3.
4 *Id.* at 7-8.
5 *Id.* at 5.
6 *Id.*
7 *Id.* at 15, 22.
8 *Id.* at 6.
9 *Id.*
10 *Id.*
11 *Id.* at 7.
12 *Id.*

ASAP program, Respondent cannot take disciplinary action against an employee who files an ASAP report.[13]

On approximately March 2, 2018, Complainant walked by Respondent's aircraft 8AC.[14] Although he had not been assigned to perform maintenance on this aircraft, Complainant noticed what he suspected was impact damage on the aircraft's left engine cowling.[15] He notified his crew chief who then notified management.[16] The manager became angry at Complainant and denied Complainant's offer to perform the repairs himself.[17] Complainant took pictures of the damage.[18] On May 8, 2018, Complainant spoke with an FAA inspector about the damage to the aircraft that he had observed in March.[19]

On Friday April 6, 2018, three mechanics, Anthony Callahan, Bob Maag, and Walter Lorenzo-Dani, were performing maintenance on aircraft 8AK in one of Respondent's hangars and later conducted a pre-departure inspection of the aircraft.[20] Complainant was working at the terminal gate area performing maintenance on other aircraft between flights.[21] While Complainant was sitting in the routing room, a fellow mechanic, Chris Vinci, told him that the pressure relief door of aircraft 8AK was hanging down and not flush with the fuselage as required.[22] The three mechanics were aware that this was a potential maintenance issue because several aircraft had similar problems in recent weeks.[23] Vinci told Complaint that he did not inform the three mechanics about the problem because he did not want to deal with them, so Complainant volunteered to tell them.[24]

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13 *Id.* at 6 n.10.
14 *Id.* at 8.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* at 10.
24 *Id.*

Complainant walked to the aircraft and saw a gap in the pressure relief door and speed tape coming off the hump seal that should have been flush.[25] Complainant then walked under the aircraft for a few seconds where the door is located and confirmed Vinci's observation that the pressure relief door was down.[26] While he was under the door, Complainant reached up with one hand.[27] Complainant then walked to the truck where the three mechanics were sitting to tell them what he saw.[28] They did not roll down the window, so Complainant opened the passenger door to roll it down.[29] He told them about the open pressure relief door and the loose windshield speed tape and said these problems needed to be addressed.[30] Complainant testified that the mechanics replied that they did not care and were only there for overtime pay.[31] Complainant walked away from the truck and returned to the routing room where he told the mechanics what happened.[32] One of the mechanics in the room, Derek Clemens, contacted a Union steward who advised him to have Complainant file an ASAP report.[33] After Complainant learned the aircraft had left the gate early without the mechanical irregularities being addressed, he filed an ASAP report that same day.[34]

All three mechanics then left the truck and walked over to the pressure door.[35] Callahan observed that the panel was almost flush but not completely flush.[36] Maag similarly reported that the door was "near flush and appeared to be within limits."[37] Callahan pushed the panel back up flush to the aircraft.[38] Callahan subsequently texted Edith Miller, a maintenance shift manager, and told her that she needed to watch surveillance video footage of Complainant at the aircraft that

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25 *Id.*
26 *Id.* at 10-11.
27 *Id.* at 11.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 11, 17.
34 *Id.* at 12.
35 *Id.* at 11-12.
36 *Id.*
37 *Id.* at 12.
38 *Id.*

day.[39] Callahan also asked why Complainant was there.[40] However, Callahan did not tell Miller that Complainant had sabotaged or caused any damage to the aircraft or that he had attempted to delay the aircraft's departure.[41] Miller observed the video but did not see anything concerning.[42] Miller then called Richard Williams, a senior manager, and informed him Complainant was at the aircraft that day and there was "some type of hostility" between Callahan and him.[43] Miller never used the word "sabotage" during her phone call with Williams, and she did not report any safety concerns to Williams.[44]

Complainant testified that fellow mechanics had told him a few days later that they heard a rumor that he damaged an aircraft or pulled on the pressurized door.[45] A crew chief told Complainant the three mechanics told Romme that Complainant was hanging on the door.[46] Complainant testified that he had heard that he was being called a snitch.[47] Complainant subsequently filed a second ASAP report on April 16, 2018. In his ASAP report, Complaint stated that he believed the program had been compromised and that persons with access to the April 6 ASAP report were sharing confidential information with other mechanics.[48]

On May 2, 2018, Romme received a signed written statement via email from the three mechanics.[49] The statement said the mechanics saw Complainant attempt to create a departure delay by "sabotaging" the pressure relief door and that they had pushed the door back into place.[50] Callahan wrote the statement after Romme asked him for one, which Callahan also sent to Williams.[51] Williams first learned about allegations that Complainant may have sabotaged the aircraft after reading

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39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.* at 13.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at 14.
50 *Id.*
51 *Id.*

this statement.[52] Williams testified that the use of the word "sabotage" in this statement caused him to realize that the incident was more serious than Miller had initially explained. Williams then showed the statement to his director, David Orban.[53] Orban also reviewed some video footage that Williams had given him.[54] Orban instructed Williams to contact Human Resources about the matter.[55] HR recommended that Orban start an investigation.[56]

Orban initiated a "Section 29(f)" investigation and assigned Williams to conduct it because he had oversight of terminal operations.[57] Williams in-turn asked Brian Ray, a shift manager, to conduct some of the investigative interviews.[58] Ray had been Complainant's supervisor for several years and had conducted numerous Section 29(f) investigations.[59] Williams told Ray about allegations that Complainant had attempted to delay the departure of aircraft A8K by damaging the pressure relief door but did not provide Ray with a copy of the May 2 statement from the mechanics.[60] Williams also told Ray that Respondent was going to withhold Complainant from service during the pendency of the investigation.[61]

On May 10, 2018, Complainant was called into a conference room for a Section 29(f) hearing, in which Ray and two Union stewards were present.[62] Ray informed Complainant that he was being accused of damaging an airplane and was being walked off the premises pending the results of an investigation.[63] During the hearing, Complainant informed Ray that he had filed two ASAP reports related to the matter and asked him to review the video footage.[64] Ray was not aware of the reports before the meeting.[65] Respondent suspended Complainant with pay and

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52 *Id.*
53 *Id.* at 14-15.
54 *Id.* at 15.
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.* at 15 n.53.
62 *Id.* at 15.
63 *Id.*
64 *Id.* at 15-16.
65 *Id.* at 16.

removed his access to the maintenance facility.[66] Complainant expressed concern about limiting his access to JetNet, a program used to monitor pay and benefits, but Ray allegedly assured Complainant he would still have access to it.[67] However, Complainant lost access to the program and was locked out until he returned to service.[68]

Williams read Ray's investigative notes from the May 10 meeting and learned about the ASAP reports for the first time.[69] Sometime after the May 10 meeting, Williams obtained the video footage of the area where the aircraft was being prepared on April 6, 2018.[70] When he saw the videos, Williams was not concerned with the allegations of sabotage against Complainant. However, after comparing the video footage showing Complainant inspecting the pressure door with Ray's notes, Williams was concerned with Complainant's statement to Ray that he did not go underneath the aircraft.[71]

On May 17, 2018, Ray interviewed Derek Clemens, an AMT, who said Vinci had told him he saw the pressure panel hanging down and wanted to tell the mechanics about the issue, but decided not to do so when he saw who they were.[72] After Complainant informed the mechanics about the issue, he returned to the routing room and told Clemens he had examined the pressurized door and informed the mechanics what he had found.[73] Clemens then contacted a Union official who told Complainant to file a report.[74] Ray provided this information to Williams.[75]

On May 19, 2018, Williams interviewed Callahan.[76] Callahan stated that he saw no issue with the pressure panel during the inspection of aircraft 8AK on April 6, and that Complainant had reached up and pulled on the panel while his crew was

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66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.* at 17.
70 *Id.* at 16-17.
71 *Id.* at 17; Hearing Transcript (Tr.) at 366.
72 D. & O. at 17.
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*

waiting in their truck.[77] Complainant then came over and told them about the loose speed tape and the pressure panel.[78] Callahan then checked the panel and found it was "almost flush but not completely flush."[79] Afterward, Callahan texted Miller asking why Complainant was inspecting an aircraft when he was not assigned to it.[80] Williams then interviewed Lorenzo-Dani and Maag, who had told him that Maag observed Complainant "look[] around to see if anyone was around" and "reach up with his arm and pull down on the pressure relief door."[81]

On May 30, 2017, Williams told Complainant to report to the management conference room.[82] During the meeting, Complainant was asked additional questions about the incident and was shown the security video footage of his actions around aircraft 8AK on April 6.[83] The video footage shows that Complainant approached aircraft 8AK, looked underneath it for about three seconds, and walked away from the aircraft towards a truck with the three mechanics assigned to the aircraft.[84] The video confirmed Complainant had one hand in his pocket while approaching the aircraft.[85] However, the video does not show Complainant hanging on the pressurized door.[86] Complainant admitted that he had walked under the airplane to go to the truck and that he had told the mechanics about the pressure door and speed tape issues.[87] Complainant claims that during the meeting he asked Williams when he would be coming back to work and that Williams replied "we'll see if you come back."[88] Williams denies making this statement.[89]

On June 13, 2018, Respondent reinstated Complainant and closed its investigation, finding the allegations against him were unfounded.[90] Respondent did

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77 *Id.*
78 *Id.*
79 *Id.* at 18.
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.* at 18-19.
88 *Id.* at 19.
89 *Id.*
90 *Id.*

not add discipline or documentation of the investigation to Complainant's personnel file.[91] Complainant claims Williams told him that he had returned to duty because he did not do anything wrong.[92] Complainant further claims Williams told him that if Respondent did not bring him back to work his fingerprints were going to expire, and Respondent would have to continue to pay him with no work pending his background clearance.[93] Complainant requested his name be cleared, which Williams said he did not have authority to do.[94]

Complainant and a Union steward then went to Orban's office.[95] Orban testified that Complainant wanted him to conduct "town halls" and/or crew meetings and make a statement clearing him of the accusations.[96] Orban later told the Union steward that Respondent was not going to do anything specific to clear Complainant's name because "being back is good enough."[97] Since Complainant's reinstatement, Respondent has not issued any statement to neutralize the rumors about him damaging an aircraft.[98]

Upon returning to work, Respondent assigned Complainant to service engine oil more often than normal for mechanics after returning, which is a tedious and undesirable job.[99] Complainant claims oil servicing is used as a disciplinary action if a mechanic finds too many problems with an aircraft.[100] Complainant stated he has performed oil service most days after returning to work.[101] Clemens testified that management would not let Complainant perform pre-departure checks.[102] On July 7, 2018, Ray called Complainant to his office for a 29(f) meeting to ask about him "over-servicing" aircraft engines.[103] Complainant explained that one cannot over-

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91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.* at 20.
102 *Id.*
103 *Id.*

service an engine with oil and received no discipline.[104] Ray testified that this was not a formal investigation. Nevertheless, Complainant considers the meeting to be a disciplinary action.[105]

Complainant also alleged that management told his supervisors not to assign him overtime because he was too thorough.[106] He claimed that Respondent's staff only let the phone ring two or three times when calling him for overtime before hanging up.[107] Complainant claimed that he frequently was told the spot had already been filled when he called back.[108] Complainant testified that he worked between 400 and 500 hours of overtime in 2017 but worked only about 250 to 300 hours in 2018.[109] Complainant filed several Union grievances about the issue.[110] Orban testified that being bypassed for overtime is a very common grievance.[111]

The process for offering overtime hours is governed by the CBA.[112] Managers would notify administrative staff of the need for overtime work.[113] Staff would print out a computer generated list of the names of mechanics who signed up to be available for overtime and how many overtime hours they had already earned.[114] The list is ordered from the mechanic with the least amount of hours to those with more hours.[115] Staff would call the mechanic and would leave a message if there is no answer.[116] Only one staff member calls the mechanics to prevent a mechanic being called twice.[117] If the staff member goes through the list of available individuals and has not filled all of the spots, the staff member would wait for mechanics to call back.[118]

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104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.* at 21.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*

Kimberly Pett was an administrative staff member who was responsible for calling mechanics for overtime hours from 2018 through 2020.[119] Pett testified that staff would not intentionally skip a mechanic and denied that management ever asked her to bypass Complainant.[120] Margarita Marti, an executive assistant who handled requests for overtime, verified that Respondent's policies prevented them from skipping over any mechanic to work overtime.[121] Most importantly, Orban testified that neither he, nor any other management personnel, directed anyone to bypass Complainant.[122]

James Weel, Respondent's managing director of labor relations, testified that Respondent had a disciplinary policy that a manager is to "[f]ully investigate the more serious infractions immediately to determine all the facts and document findings" in a counseling record.[123] Weel was not aware of any specific guidance about how to address allegations of maintenance sabotage and whether to take the statement of the accused, but he testified that it would not be the norm to delay in taking a statement until seven weeks after a suspension.[124] Weel further testified that a Section 29(f) interview is not considered discipline and that investigators have discretion over conducting investigations.[125]

THE ALJ'S DECISION

On July 27, 2018, Complainant filed an AIR 21 retaliation complaint with the Occupational Safety and Health Administration (OSHA).[126] On September 18, 2019, OSHA found no AIR 21 violation occurred and dismissed the complaint.[127] Complainant objected to OSHA's findings and requested a hearing before the Office of Administrative Law Judges.[128] On November 19 to 20, 2020, and January 12 to

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119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.* at 22.
124 *Id.*
125 *Id.*
126 *Id.* at 1.
127 *Id.*
128 *Id.*

15, 2021, an ALJ held a hearing on the matter.[129] The ALJ issued a Decision and Order Denying Relief on June 4, 2021.

The ALJ first addressed the credibility of certain witnesses at the hearing. Notably, the ALJ found that Shannon Flanary, a former aircraft maintenance supervisor for Respondent from February 2016 until June 2018, was a neutral witness and "very credible."[130] The ALJ remarked that her testimony was insightful regarding the tensions between Respondent's different maintenance crews at the pertinent time and had the perspective of a supervisor who had oversight of the maintenance being performed.[131] As someone who no longer worked for Respondent, the ALJ found her persuasive and gave her testimony greater weight to "the extent that her testimony supported or detracted from the testimony of other witnesses."[132] The ALJ also notably did not find Marti's testimony to be credible and gave it no weight because her testimony was vague, disjunctive, and rambling and because she only participated in the proceedings because she was compelled to do so by subpoena.[133] Marti testified in the December portion of the hearing after failing to comply with a subpoena for her testimony in the November portion.[134] The ALJ found Orban, Ray, Pett, and Complainant to be credible.[135]

Next, the ALJ considered the several protected activities alleged by Complainant. The ALJ found Complainant engaged in three protected activities by (1) reporting his concern about the condition of the pressure relief door and windshield speed tape on aircraft 8AK to the mechanics assigned to perform maintenance on the aircraft, (2) filing the April 6, 2018 ASAP report, and (3) reporting the potential damage to aircraft 8AC's engine inlet to an FAA inspector.[136] The ALJ, however, found Complaint's filing of the April 16 ASAP report was not a protected activity.[137]

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129 *Id.* at 2.

130 *Id.* at 5, 26.

131 *Id.* at 26.

132 *Id.*

133 *Id.*

134 *See* Tr. at 1463, 1493.

135 D. & O. at 26-27.

136 *Id.* at 29-32.

137 *Id.* at 30.

The ALJ then considered the several adverse actions alleged by Complainant. The ALJ found that merely participating in a 29(f) investigatory interview was not an adverse action because there is no harm associated with being called as a witness or being afforded the opportunity to present one's version of events, even if being interviewed by management was not a comfortable experience.[138] The record showed that Complainant had Union support at the private meeting, and the meeting was not adversarial in nature.[139] The ALJ, however, found that Respondent placing Complainant on leave with pay after the 29(f) interview constituted an adverse action.[140] The ALJ also found the actions Respondent took after notifying Complainant of his suspension were adverse, including taking his ID badge, escorting him to his locker and out of the facility, and rescinding his access to JetNet.[141]

The ALJ, however, found that Respondent's assigning oil work to Complainant was not an adverse action because the work was within the scope of Complainant's duties and the unpleasantness of oil servicing was not enough to make it an adverse action.[142] The ALJ also found no credible evidence to support Complainant's claim that management took affirmative steps to prevent him from obtaining overtime work. The record demonstrated that the process of offering overtime was a regimented system set forth in the CBA, monitored by both the Union representatives and the mechanics themselves.[143] Additionally, the staff was not capable of excluding particular mechanics.[144] Further, Complainant did not present any evidence showing his overtime hours decreased after his protected activity or that his hours were out of sync with other mechanics.[145]

The ALJ found that Complainant's allegation that Respondent, in particular Romme, disclosed his April 6 ASAP report to other AMTs in violation of company policy was only based on rumors.[146] The ALJ noted that Complainant disclosed the events on April 6, 2018, to other mechanics shortly after inspecting the aircraft and

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138 *Id.* at 33.
139 *Id.*
140 *Id.*
141 *Id.* at 33, 38.
142 *Id.* at 34.
143 *Id.* at 34-35.
144 *Id.* at 35.
145 *Id.*
146 *Id.*

that a Union representative encouraged him to file the report.[147] The ALJ observed that at least seven other people knew about the general facts of the incident and at least two more individuals knew that he was going to file an ASAP report about it.[148] The ALJ concluded that it was virtually impossible to keep his report secret.[149] Romme, who was charged with investigating the report, interviewed the mechanics who Complainant accused of impropriety and those mechanics could easily discern who filed the report.[150] Similarly, the ALJ found Complainant's claim that he was subject to a "continuous bombardment" of accusations that he was a "snitch" had no corroborating evidence.[151]

The ALJ also addressed Complainant's claim that he was subject to a hostile work environment. The ALJ found minimal evidence of a hostile work environment being perpetuated or tolerated by Respondent, noting there was little evidence of pervasive or constant name calling.[152] The ALJ also dismissed his interview about over-servicing an aircraft and the oil servicing assignments as part of a hostile work environment. The ALJ found Ray was merely gathering information from Complainant, and no adverse action was taken.[153] Complainant did not show how often other mechanics service oil to prove the assignments were adverse.[154] The ALJ noted that the most persuasive evidence of hostile work environment was Flanary's testimony that a manager asked her to keep a file on Complainant and email reports about him to management.[155] However, the ALJ concluded the evidence was insufficient to establish a hostile work environment.[156]

The ALJ then considered whether Complainant's protected activities contributed to his suspension.[157] The ALJ concluded the "triggering event" for Respondent's action occurred when Romme received the letter from the three

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147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.* at 36.
151 *Id.*
152 *Id.* at 37.
153 *Id.*
154 *Id.* at 37-38.
155 *Id.* at 38.
156 *Id.*
157 *Id.* 38-42.

mechanics on May 10, 2018.[158] The letter was the first time the allegation of sabotage had been raised against Complainant. The ALJ found that Respondent knew of Complainant's protected activity of reporting the pressure door issue to the three mechanics because it was noted in their written statement accusing Complainant of sabotaging the aircraft.[159] The ALJ found based on that point alone that Complainant had established by a preponderance of the evidence the reporting of a mechanical issue was a contributing factor to his suspension and the related measures.[160]

However, the ALJ did not find any additional protected activity contributed to Respondent's adverse action against Complainant. For example, the ALJ found no evidence showed that Complainant's discussion with an FAA inspector played a role in the adverse action.[161] The ALJ also found Complainant's April 6 ASAP report did not contribute to the adverse action because Williams, the person who decided to suspend him, was unaware of the report when he made the decision prior to the May 10, 2018 initial 29(f) meeting.[162] When Ray met with Williams in early May 2018, Williams told Ray, who was also unaware of the report, that they were going to conduct an investigation due to the allegation that Complainant damaged the aircraft and that they were going to suspend him pending the outcome.[163]

The ALJ found Williams decided to suspend Complainant because of the seriousness of the allegations, not from his protected activity related to the April 6 ASAP report.[164] Williams testified that a suspension during an investigation was a rather common practice and that the seriousness of the allegations warranted the suspension.[165] Thus, the ALJ found Complainant failed to prove the April 6 ASAP report contributed to his suspension because no manager in the decision or investigatory chain knew of the report prior to the decision to suspend him.

Because the ALJ found that Complainant established a prima facie case, the ALJ then discussed whether Respondent established that it would have taken the

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158 *Id.* at 41.
159 *Id.* at 42.
160 *Id.*
161 *Id.* at 40.
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.* at 40-41.

adverse action absent the protected activity. The ALJ noted that Complainant was accused of serious misconduct, and that Respondent has the ultimate responsibility for air safety on its aircraft.[166] The ALJ stressed the utmost importance of safety in Respondent's business, and that mechanics are an essential part of aviation safety.[167] The ALJ found that Respondent proceeded with caution when it received the complaint, and that is not for an ALJ to question the way Respondent conducted an investigation in its complex business.[168] The ALJ found Respondent reasonably kept an alleged saboteur from accessing the sensitive parts of its operations during the investigation.[169] Given the seriousness of the allegation, the ALJ supported Respondent's decision to promptly suspend Complainant and take extreme caution when investigating the matter.[170] The ALJ found that Respondent proved it would have suspended Complainant absent the protected activity. Accordingly, the ALJ dismissed the complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[171] In AIR 21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.[172] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[173]

DISCUSSION

Section 42121 of the AIR 21 provides that an air carrier "may not discharge an employee or otherwise discriminate against an employee with respect to

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166 *Id.* at 43.

167 *Id.* at 43-44.

168 *Id.* at 44.

169 *Id.*

170 *Id.* at 45.

171 29 C.F.R. § 1979.110(a).

172 *Yates v. Superior Air Charter, LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

173 *Hoffman v. NetJets Aviation, Inc.*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 4 (ARB Mar. 24, 2011) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

compensation, terms, conditions, or privileges of employment because the employee . . . 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."[174]

To prevail in a retaliation case under AIR 21, the complainant must prove by a preponderance of the evidence that he or she engaged in protected activity that was a contributing factor in the adverse employment action taken against them.[175] If the complainant meets his or her 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.[176]

Complainant asks the Board to reverse the ALJ's decision. In essence, Complainant argues the ALJ erred as a matter of law by failing to conduct a complete, thorough, and separate pretext analysis in denying his requested relief. Complainant also challenges the ALJ's finding that Respondent proved by clear and convincing evidence that it would have taken the same adverse action against him absent his protected activity and several of the ALJ's other factual findings. We address each of Complainant's arguments below.

1. Pretext Analysis

We begin with Complainant's challenge of the ALJ's analysis of Respondent's stated reason for the adverse personnel action. The gravamen of Complainant's argument before us is the ALJ should have provided Complainant a "full and separate opportunity" to prove the provided reasons for his suspension was pretext. We disagree. The ALJ fully considered whether Respondent's stated reasons for the adverse action were pretext, as we further address in the affirmative defense discussion section.[177] Complainant alleges that a "failure to shift the burden to

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[174] 49 U.S.C. § 42121(a)(1).

[175] *Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021); 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

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

[177] *See* D. & O. at 43.

[Complainant] to allow him to present evidence of pretext" is "prejudicial to AIR 21 complainants and contrary to the policy set forth in *McDonnell Douglas*." Under the *McDonnell Douglas*[178] burden-shifting framework, a complainant bears the burden of presenting a prima facie case of retaliation, which then shifts to the employer to show a legitimate, non-retaliatory reason for the adverse action.[179] If the employer makes a showing, the burden goes back to the complainant to show that a respondent's reason was merely pretext.[180] The employer's evidentiary burden is only one of production, and the burden of proof for demonstrating contribution remains with the complainant.[181]

The Board has held under this framework that an ALJ may consider whether an employer's proffered reasons are pretextual "in the course of concluding whether a complainant" has proved that the "protected activity contributed to the dismissal."[182] The Board, however, has not suggested that the pretext analysis is mutually exclusive and is separate from the contribution or affirmative defense analyses. Instead, the Board has held that pretext may serve as circumstantial evidence of contribution or that the employer would not have taken the same unfavorable personnel action in the absence of the complainant's protected behavior.[183] A complainant is not required to prove pretext to prove contribution, and an ALJ may, but is not compelled to, find retaliation based on a showing of pretext.[184] The ALJ appropriately considered the entire record on this issue in the

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[178] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[179] *Ameristar Airways, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 650 F.3d 562, 566-67 (5th Cir. 2011) (citing *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255-56 (1981)). "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254.

[180] *Id.* at 567 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

[181] *Id.*

[182] *Peck v. Safe Air Int'l, Inc.*, ARB No. 2002-0028, ALJ No. 2001-AIR-00003, slip op. at 10 (ARB Jan. 30, 2004) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

[183] *See Bechtel v. Competitive Techs., Inc.*, ARB No. 2009-0052, ALJ No. 2005-SOX-00033, slip op. at 13 (ARB Sept. 30, 2011); *Armstrong v. Flowserve US, Inc.*, ARB No. 2014-0023, ALJ No. 2012-ERA-00017, slip op. at 15 (ARB Sept. 14, 2016).

[184] *Nelson v. Energy Nw.*, ARB No. 2013-0075, ALJ No. 2012-ERA-00002, slip op. at 19 (ARB Sept. 30, 2015); *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 7 (ARB May 26, 2010).

context of determining whether the Respondent met its evidentiary burden for its affirmative defense. Thus, we discern no legal error in the ALJ's pretext analysis.[185]

2. Overtime Blacklisting Allegation

Complainant contests the ALJ's finding that he produced no credible evidence that management took affirmative steps to prevent him from obtaining overtime. Complainant points to evidence that AMTs like Callahan, who he claims is a similarly-situated employee, received more overtime and Flanary's testimony that other AMTs like Callahan received special treatment in several matters including overtime. However, this evidence, while relevant, is not significantly probative. First, Flanary's testimony noted that Respondent did "[n]ot necessarily" ask her to provide "preferential treatment" to the other AMTs and that it was "[j]ust [her] opinion" that certain job assignments were given to other AMTs for the purpose of overtime.[186] Second, Respondent notes that Complainant and Callahan worked on different shifts and crews, and that no evidence showed that the two AMTs signed up for overtime at similar rates.

Additional evidence supports the ALJ's finding that Complainant failed to prove he was blacklisted from overtime. Notably, Complainant earned more overtime in the year after he engaged in protected activities.[187] Further, Orban and Pett testified that no one ordered them to block Complainant from working overtime, and the evidence demonstrated that the process of assigning overtime work is fairly regimented and leaves little opportunities for preferential treatment.[188] We conclude the ALJ's decision is supported by substantial evidence.

3. Adverse Inference against Witness

Complainant contends that the ALJ should have made an adverse inference against Margarita Marti for her failure to comply with Complainant's subpoena for the November portion of the hearing and her uncooperative testimony. The ALJ found that Marti, who Complainant claims had told him that he was blacklisted for overtime, was a reluctant witness, and that her "vague, disjunctive, and rambling"

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185 We further note that Complainant did not argue to the ALJ that his claim of pretext needed to be considered separately.

186 Tr. at 580-82.

187 In 2018, Complainant worked 341 overtime hours. In 2019, Complainant worked about 420 hours. He worked 287 and 338 hours in 2016 and 2017. Tr. at 1355-60.

188 D. & O. at 35; Tr. at 1265-66, 1352.

testimony deserved no weight. Marti testified that she never saw anything indicating that Respondent bypassed Complainant for overtime and had never told Complainant that management instructed to skip over him for overtime.[189] However, Complainant seemingly argues that the ALJ should have found that Marti told him that he was blacklisted because of her recalcitrant behavior.

Complainant cites caselaw providing that a factfinder may make an adverse inference against a party when it fails to produce a witness that was either physically or pragmatically available to only that party.[190] The Board has recognized that "an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge" if the "party fails to call a witness who may reasonably be assumed to be favorably disposed to the party."[191] This principle does not apply if "through neither party's fault the witness was physically unavailable to both parties."[192] Complainant alleges that Marti was unavailable because of her failure to initially appear to testify and her uncooperative testimony. However, Marti eventually testified and provided "limited information of value" on whether Complainant was blacklisted for overtime.[193] We conclude that the ALJ did not abuse his discretion in not making an adverse inference against Marti's testimony.

4. Disclosure of ASAP Reports and Hostile Work Environment

Complainant contests the ALJ's finding that he presented no credible evidence that management engaged in an adverse employment action by improperly disclosing his ASAP reports. Complainant cites the testimony of Flanary and Carpenter that their own ASAP reports had been leaked and his testimony that Romme had told the other AMTs about his reports. Complainant's testimony was based on a crew chief telling him "Romme was talking to the crew that worked that airplane and said that you were hanging on the door."[194] However, the crew chief did not testify at the hearing or expressly tell Complainant that Romme disclosed the ASAP report to the other AMTs. The only other evidence Complainant provides

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189 Tr. at 970, 986-87.

190 *See United States v. Mahone*, 537 F.2d 922, 926-27 (7th Cir. 1976).

191 *Barrett v. e-Smart, Techs., Inc.*, ARB Nos. 2011-0088, 2012-0013, ALJ No. 2010-SOX-00031, slip op. at 8 (ARB Apr. 25, 2013) (quoting *Underwriters Labs., Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998)).

192 *United States v. Pizarro*, 717 F.2d 336, 346 (7th Cir. 1983).

193 D. & O. at 5, n.8.

194 Tr. at 92-93.

is testimony from coworkers that their own reports had been disclosed. This evidence is not sufficient to support a finding that Respondent improperly disclosed Complainant's ASAP reports. We conclude the ALJ's finding is supported by substantial evidence.

Complainant also contends that substantial evidence does not support the ALJ's finding that Complainant failed to prove a hostile work environment as an adverse action. Complainant claims several pieces of evidence demonstrate that he was subject to a hostile work environment, including the 29(f) interview for over-servicing an aircraft, name-calling, the denied access to JetNet during his suspension, the frequent oil servicing assignments, and other work assignments that deviated from normal business practices. We agree with the ALJ that the alleged conduct, however, is not "extremely serious or serious and pervasive" enough to meet the high bar of proving hostile work environment.[195] The ALJ's finding is therefore supported by substantial evidence.

5. Respondent's Affirmative Defense

Complainant last contests the ALJ's finding that Respondent proved by clear and convincing evidence that it would have suspended Complainant absent his protected activity. Complainant describes several pieces of evidence that he argues shows pretext and that Respondent was not actually concerned that Complainant had intentionally damaged an aircraft. In support of his argument, Complainant cites to the following evidence:

- Miller's lack of concern after viewing the surveillance footage a month before the suspension;
- The three mechanics' reputation for untruthfulness;
- The motives of the mechanics to retaliate against Complainant for filing an ASAP report implicating them;
- The unlikelihood that Complainant could have pulled the pressure relief door down quickly with one hand;
- Flanary's testimony that management was out to get Complainant; and
- Complainant's positive reputation.

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[195] *Brune v. Horizon Air Indus., Inc.*, ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 10 (ARB Jan. 31, 2006) (quotation omitted) ("Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable.").

Complainant claims that he never denied going under the aircraft, and that it was not a reason for suspending him.[196] Although the evidence Complainant cites may be probative and potentially undermine Respondent's explanation that it suspended him because of serious concerns that he had engaged in sabotage, it is not definitive that it had reached a conclusion to the contrary. *Any allegation* that a mechanic may have jeopardized the safety of their aircraft may, and should, reasonably elicit a substantial reaction from an airline, because safety is a legitimate, paramount concern.[197] Williams and Orban both testified they were concerned about safety when they first learned about the seriousness of the allegation against Complainant based upon the mechanics' statement on May 2, 2018.[198] Williams also testified that Respondent regularly suspends employees with pay during the course of an investigation.[199]

We agree with the ALJ's statement that, other than the pilots, mechanics comprise the very heart and soul of the process to maintain the public confidence in the safety of air travel and, more specially, the safety of passengers on any particular plane.[200] Indeed, the core purpose of the ASAP program encourages mechanics to report potential safety violations without fear of reprisal. This further underscores that Respondent acted to protect public safety because of the seriousness of the sabotage allegations raised against Complaint.[201] We also agree with the ALJ that it was not unreasonable, when viewing the facts in their totality, for Respondent to temporarily suspend with pay an individual accused of sabotaging an aircraft, revoke the use of an identification badge, monitor him while removing items from his locker, and escort such an individual from its facilities.[202] We further agree that Respondent's actions were prudent at the time because of the

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196 Complainant contends that management asked him a two part question, "[D]id you walk under the airplane to pull on the door?" Complainant testified that he answered no, but that Respondent interpreted it as him denying going under the airplane at all. Tr. at 1428.

197 Ray and Williams testified that safety is of the utmost importance in aircraft maintenance. D. & O. at 44 n.108.

198 Tr. at 329-31, 1339.

199 D. & O. at 14 n.60.

200 *Id*. at 44.

201 *Id*. at 41.

202 *Id*. at 44.

pending investigation of the incident.[203]

In sum, we conclude that the ALJ's factual findings are supported by substantial evidence. Although Respondent may have been rather cautious when addressing the allegation, and we understand Complainant's frustration with his employer's handling of the matter (particularly where, as here, he was completely cleared of the serious allegations of sabotage), it is not our role to decide the correct personnel decision.[204] Therefore, we decline to disturb the ALJ's decision.

Accordingly, we **AFFIRM** the ALJ's Decision and Order Denying Relief.

SO ORDERED.[205]

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[203] *Id.* at 44-45.

[204] "Courts do not sit as a super-personnel department that re-examines an employer's disciplinary decisions." *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 12 (ARB Nov. 25, 2019) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014)).

[205] In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).