Aviation Investment and Reform Act for the 21st Century (AIR21)

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I. STATUTE AND REGULATIONS

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) was signed into law on April 5, 2000. The Act includes a whistleblower protection provision found at 49 U.S.C. 42121.

- *Final AIR21 Regulations*

On March 21, 2003, the Occupational Safety and Health Administration published a Final Rule implementing the whistleblower provision of AIR21. Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, *Final Rule*, 68 Fed. Reg. 14099 (Mar. 21, 2003). Among the changes found in the Final Rule are (1) clarifications in the definitions section, (2) a clarification of the complainant's burden of proof, (3) a change to lengthen the time provided for a respondent to file a response with OSHA, (4) a clarification that an order of reinstatement is not appropriate when it is established that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), (5) a clarification that a respondent may seek attorneys' fees incurred during the OSHA investigation (up to $1,000) in a hearing before an ALJ if it alleges that the complaint was frivolous or brought in bad faith, and (6) a provision that appeals to the ARB are not a matter of right, but accepted at the discretion of the ARB.

- *Consolidated Appropriations Act of 2021*

AIR21 was amended by the Consolidated Appropriations Act, 2021, H.R. 133, Section 118 of the Aircraft Certification, Safety, and Accountability Act. The Consolidated Appropriations Act expanded coverage from air carriers and their contractors and subcontractors to holders of certificates and their contractors, subcontractors, and suppliers. A summary of changes is below.

49 U.S.C. 42121(a)

- **Old language**: "**Discrimination against airline employees.** No **air carrier or contractor or subcontractor of an air carrier** may discharge an employee or otherwise discriminate against an employee . . ."

- **New language: "Prohibited discrimination. A holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder**, may not discharge an employee or otherwise discriminate against an employee . . ."

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49 U.S.C. 42121(d)

- **Old language:** "Subsection (a) shall not apply with respect to **an employee of an air carrier, contractor, or subcontractor** who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to **air carrier safety** under this subtitle or any other law of the United States."

- **New language**: "Subsection (a) shall not apply with respect to **an employee of a holder of a certificate issued under section 44704 or 44705, or a contractor or a subcontractor thereof**, who, acting without direction from such certificate-holder, contractor, or subcontractor (or such person's agent), deliberately casues a violation of any requirement relating to **aviation safety** under this subtitle or any other law of the United States."

49 U.S.C. 42121(e)

- **Old language:** "In this section, the term **"contractor" means a company that performs safety-sensitive functions by contract for an air carrier**.
- **New language:** "In this section, the term **'contractor' means –**

> **(1) a person that performs safety-sensitive functions by contract for an air carrier or commercial operator; or**
> **(2) a person that performs safety-sensitive functions related to the design or production of an aircraft, aircraft engine, propeller, appliance, or component therof by contract for a holder of a certificate issued under section 44704.**

II. JURISDICTION

- *Extraterritoriality*

AIR21 DOES NOT APPLY EXTRATERRITORIALLY; KEY FACTOR FOR DECIDING WHETHER A CLAIM IS DOMESTIC OR EXTRATERRITORIAL IN APPLICATION IS THE LOCATION OF THE EMPLOYEE'S PERMANENT OR PRINCIPAL WORKSITE

In ***Shi v. Moog Inc.***, ARB No. 2017-0072, ALJ No. 2016-AIR-00020 (ARB Dec. 5, 2019) (per curiam), the ALJ dismissed Complainant's AIR21 complaint because its adjudication would require impermissible extraterritorial reach. On appeal, the ARB looked to the Supreme Court's decision in *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010) and the ARB's SOX decision applying *Morrison in Hu v. PTC Inc.*, ARB No. 2017-0068, ALJ No. 2017-SOX-00019 (ARB Sept. 18, 2019). The ARB noted that the *Morrison* analysis has two steps: "(1) whether the statute at issue extends extraterritorially and, if not, (2) whether the activity comprising the focus of the statute occurred within the United States or outside of it." Slip op. at 3 (citations omitted). The ARB further noted: "If the activity identified under Step 2 occurred within the U.S., then there

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is a permissible domestic application of the statute. . . . If the activity occurred outside the U.S., then there is an impermissible extraterritorial application and the complaint must be dismissed." *Id.* at 3-4 (citations omitted).

The ARB reviewed the text of AIR21 and determined that "the employee protection provisions of AIR 21 are not extraterritorial." *Id.* at 4. The ARB thus ruled that "to allow the adjudication of the complaint before us, it must be a domestic application of the employee protection provision of AIR 21." *Id.* The ARB determined that, although the overarching purpose of AIR21 may be air carrier safety, the primary focus of the employee protection provisions of AIR21 "are necessarily connected to the employee's compensation, terms, conditions, or privileges of employment." *Id.* at 5. Accordingly, the ARB determined that the key factor for deciding whether a claim is domestic or extraterritorial in application is the location of the employee's permanent or principal worksite—and that the location of other conduct is less critical, if not irrelevant. The ARB stated:

> [A]n AIR 21 complaint concerning an adverse action that affects an employee at a foreign principal worksite does not become territorial because the alleged misconduct occurred in the U.S., or because it had, or would have, effects on U.S. air carrier safety, or because the alleged retaliatory decision was made in the U.S.

Id. In the instant case, it was undisputed that:

> . . . Complainant's primary worksite was in China, he was employed under a Chinese contract, he was paid in Chinese currency, and his direct employer was a Chinese corporation. The only alleged domestic contacts in this matter are that Complainant 1) took a few work-related trips to the U.S., 2) believes that some of the people responsible for the adverse action taken against him may be U.S. citizens, and 3) complained about counterfeit parts that were used to manufacture aircraft in the U.S. which were flown in the U.S.

Id. The ARB stated that such allegations, even if true, would not by themselves create a domestic application of AIR21. The ARB thus affirmed the ALJ's dismissal of the complaint.

The ARB noted that the FAA, which has primary responsibility for protecting aviation safety, had been notified of and had investigated the matter.

EXTRATERRITORIAL APPLICATION OF AIR21 WHISTLEBLOWER PROVISION; DISTRICT COURT DISMISSED RESPONDENT'S REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF FROM DOL PROCEEDING ON THEORY THAT THE ADMINISTRATIVE ADJUDICATION OVER A FOREIGN COMPANY WAS ULTRA VIRES; RATHER THE AIR21 STATUTORY REVIEW SCHEME ALLOWS A RESPONDENT TO SEEK REVIEW OF AN ADVERSE FINAL DOL ORDER BEFORE A U.S. COURT OF APPEALS

In ***Bombardier, Inc. v. USDOL***, 145 F. Supp. 3d 21 (D.D.C. Nov. 12, 2015) (case below 2014-AIR-00017), the Plaintiff, a Canadian company that designs and manufactures aircraft and which does not provide air transportation to the public, sought declaratory and injunctive relief on the ground that DOL acted ultra vires by exercising jurisdiction over it in an impermissible

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extraterritorial application of the AIR21 whistleblower protection provision. The complainant in the administrative action alleged that the Plaintiff discriminated against him by terminating his employment in retaliation for reporting safety of flight issues on an aircraft that had been flight tested in Wichita, Kansas. OSHA had dismissed for lack of jurisdiction, finding that the Plaintiff was not an air carrier, the complainant was not an employee, within the meaning of the applicable provisions of AIR21. Before the ALJ, the complainant argued that the Plaintiff was covered as an air carrier, or contractor of an air carrier, for AIR21 purposes, and that he was thus an employee under AIR21. The Chief ALJ issued an order to show cause why the complaint should not be dismissed for lack of jurisdiction, but ultimately declined to dismiss because the complainant met the "fair notice" minimal pleading requirements for a DOL whistleblower protection proceeding. The case was then assigned to a presiding ALJ who denied the Plaintiff's (i.e., Bombardier) motion for summary decision, finding that the record showed a significant nexus between the Plaintiff and the U.S. The ALJ denied the Plaintiff's request for leave to file an interlocutory appeal to the ARB, request to stay discovery, and alternative request for the ALJ to reconsider the denial of summary decision. The ALJ also affirmed the earlier denial of summary decision, noting that the standard for consideration of such a motion required viewing the evidence in the light most favorable to the complainant. As the Plaintiff continued to resist the administrative proceedings, it filed the district court action. The ALJ had not yet held a hearing on the merits.

Statutory review scheme

DOL argued before the district court that (1) the Plaintiff failed to exhaust its administrative remedies, and (2) "the existing administrative scheme, which allows Bombardier to seek review of a final Department order in a United States Court of Appeals, precludes review by a district court now." Slip op. at 13. The district court found the second argument persuasive and thus did not address the exhaustion argument. The court first examined the statutory scheme's text, structure and purpose and found that it has "much in common with other review schemes that preclude premature district court review." *Id.* at 15. The court found that the AIR21 whistleblower review scheme "carries a fairly discernible congressional intent to preclude extrastatutory district court suits." *Id.* at 19 (footnote omitted). The court then examined whether the complainant's AIR21 claims are of the type Congress intended to be reviewed within the statutory structure. The court found that the Plaintiff did not lack meaningful administrative review of its claims, noting that DOL had adjudicated its jurisdictional challenge and that the jurisdictional issue was an open issue that, if found adversely to the Plaintiff's position, could be appealed to a court of appeals. The court found that the burden of discovery was not constitute irreparable injury. The Plaintiff's objection that the U.S. government's administrative process is "out of line" merely highlights what that process is trying to determine: whether the Plaintiff's actions fall under U.S. regulatory authority. The court noted that the Plaintiff might, after a hearing on merits, convince the ALJ that AIR21 could not apply to the Plaintiff – or the ARB could rule in the Plaintiff's favor on review of the ALJ's decision. The court stated:

> Bombardier's situation shows us precisely why courts tend to "await the termination of agency proceedings:" so that the agency proceedings may "obviate all occasion for judicial review." *Jarkesy v. SEC*, 803 F.3d 9, 27 (D.C. Cir. 2015)

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> (quoting *Standard Oil*, 449 U.S. at 244 n.11). This is "a feature" of the administrative process, "not a bug." *Id.*

Id. at 28. The court was not persuaded that its claims were wholly collateral to the AIR21 review provisions, or that the claims were outside DOL's expertise. The court summarized:

> In sum, Bombardier's claims are of the type intended to be reviewed within the AIR21 statutory structure. Pursuing these claims administratively will not foreclose later meaningful judicial review, the claims are not wholly collateral to AIR21 review provisions, and those claims do not fall outside the Department's expertise. For these reasons, and because the AIR21 statutory structure has a fairly discernible intent to preclude premature suits in federal court, Bombardier's complaint must be dismissed. Holding otherwise would continue the parallel litigation of identical issues in this Court and in the Department of Labor, leaving open the possibility of future inconsistent judgments. See generally Jarkesy v. SEC, 803 F.3d 9, 30 (D.C. Cir. 2015) (discussing this possibility). To avoid that unwelcome result, the Court will dismiss Bombardier's complaint for lack of jurisdiction.

Id. at 33 (footnote omitted).

> *Administrative Procedure Act*

The court was no more persuaded by the Plaintiff's APA claim, noting that the APA's review provisions are not jurisdictional. The court noted that "[e]xisting statutory review procedures are adequate when they offer relief of the "same genre" as APA review" . . . and that here, once the Plaintiff "obtains a final order from the Department, AIR21 grants it the right to judicial review in a court of appeals and specifies that appellate review must conform to the APA. *See* 49 U.S.C. § 42121(b)(4)(A) . . . ." Slip op. at 38 (citations omitted). The court summarized:

> In other words, AIR21's statutory review procedures do not just offer relief of the "same genre" as APA review; judicial review under AIR21 exactly parallels review otherwise available under the APA. Because the AIR21 statutory scheme establishes separate and adequate procedures for judicial review of the Department's actions, the APA cannot create an escape hatch for Bombardier. Bombardier must complete administrative proceedings in the Department before seeking judicial review. And, even then, it must seek judicial review in the courts of appeal, not before this Court.

Id. at 39 (footnote omitted).

[Editor's note: The administrative action was concluded by the ALJ's approval of a settlement agreement. *See Sobhani v. Bombardier Aerospace Corp.*, 2014-AIR-00017 (ALJ Oct. 7, 2016).**]**

U.S. CITIZEN STATIONED IN FRANCE; ALJ FINDS THAT BECAUSE KEY ELEMENTS OF COMPLAINT DEMONSTRATED A SUBSTANTIAL CONNECTION WITH THE U.S. DOMESTIC AVIATION SYSTEM, THE COMPLAINT WAS A

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TERRITORIAL CLAIM FOR RELIEF, AND THEREFORE IT WAS NOT NECESSARY TO REACH THE ISSUE OF WHETHER AIR21 WHISTLEBLOWER PROVISION HAS EXTRATERRITORIAL APPLICATION

In ***Dos Santos v. Delta Airlines, Inc.***, 2012-AIR-20 (ALJ Jan. 11, 2013), the Complainant was a U.S. citizen working as an aircraft maintenance technician at Charles de Gaulle airport in Paris, France. He filed an AIR21 whistleblower complaint, and an amended complaint, alleging that he suffered a hostile work environment and was denied numerous promotions in retaliation for reporting to his employer and the FAA that his supervisor had falsified FAA safety clearance documents. Before the ALJ, the Respondent filed a motion to dismiss on the ground that the AIR21 whistleblower provision does not apply extraterritorially to employees employed outside the U.S.

The ALJ noted that issue of whether AIR21's whistleblower provision protects employees of a covered air carrier when they are stationed outside the territorial United States is a question of first impression. The ALJ found that the parties appeared to agree that the two-part test announced in *Morrison v. National Australian Bank, Ltd.*, 130 S. Ct. 2869 (2010) applied: (1) does the statutory provision reach extraterritorial claims? (2) given the facts alleged, is extraterritorial application of the statute required to enforce the complaint? The ALJ reviewed *Morrison* and the subsequent application of that standard, and found particularly instructive the ARB's decision in *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011) (en banc), in which the ARB reordered the analysis and adopted a multifactor approach to the second *Morrison* step. The ALJ, following the Villanueva method of applying the *Morrison* test, found that the Complainant's complaint falls within the focus of AIR21 as a whole and Section 42121 specifically, and that enforcement of the complaint does not require extraterritorial application of the statute.

The ALJ, looking to statutory sources, found that the general focus of AIR21 is to ensure the safety of the air traveling public by strengthening the United States' aviation system. Moreover, the legislative history both supported that the general focus of AIR21 is to bring about fundamental improvements in air safety, and that Congress intended to achieve that goal by regulating the air carriers that operate within the domestic aviation system and under the purview of FAA regulations. In regard to Section 42121's purpose, the ALJ found it is not primarily a "labor law," but rather as a means for incentivizing airline employees to speak up when they observe violations of Federal aviation safety laws. The ALJ concluded:

> Upon review of the factors identified in Villanueva and assuming all facts asserted by Complainant to be true, I find that the instant complaint alleges a claim that falls squarely within both focuses of congressional concern, and therefore the complaint can be enforced without applying Section 42121 extraterritorially. The instant complaint concerns an employee of a U.S.-based air carrier that is subject to FAA regulations who reported to the FAA and company officials that his manager violated Federal aviation safety laws by fraudulently clearing aircraft as safe for air travel. Other than the location of the employee's position, each key element of Complainant's complaint has significant interaction with the United States aviation system, and, heedful of Section 42121's role as a means for safeguarding the U.S.

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> aviation system, it is clear that circumstances of the complaint place it within the scope of claims that Congress intended to enforce.

Slip op. at 26. In regard to the location of the protected activity and the underlying violation, the ALJ found that although some of the recipients of the Complainant's protected communications were located in Europe, several others, including the FAA and the Respondent's safety and compliance department, were located in the U.S. Although the complained of conduct (falsification of aircraft release forms) occurred abroad, those actions directly implicated Federal aviation safety regulations. Those actions put the Respondent in violation of an FAA regulation and presented a potential safety hazard for any U.S. passengers and for persons near the path of the aircraft as it entered U.S. airspace upon returning from France.

In regard to the location of the retaliatory actions, the complaint alleged that the denials of the Complainant's promotion applications were made by officials of the Respondent based in the U.S. The harassment that allegedly occurred at Charles de Gaulle airport was repeatedly reported to officials both at the airport and in the U.S. The ALJ rejected the Respondent's contention that the place where the adverse action impacts or affects the employee is where the adverse action occurs, and found that an adverse action occurs where the employer makes the decision to take the action.

In regard to the location of the employer and employee, the ALJ found that "[n]either the location of the employee's job, nor the location of the employer, is conclusive of the territoriality of this complaint, because ... Section 42121 is not chiefly a labor law." Slip op. at 28. The ALJ explained:

> In contrast to Title VII ..., Section 42121 is not principally focused on regulating labor relationships, standards or conditions, and to the extent that AIR21 exhibits a domestic focus, it is the domestic aviation system (and the actors within it) that are the objects of the statute's solicitude. Consequently, because Section 42121's regulation of employment relationships is a secondary means for achieving the statute's primary ends, the physical locations of the employee and the employer are relevant, but not determinative, factors. Their value in my analysis depends on the extent that they evidence whether the instant complaint falls within or outside the focus of congressional concern in enacting AIR21 and Section 42121. And, as explained fully above, the primary focus of AIR21 is safeguarding the United States' aviation system, while Section 42121 furthers this purpose by strengthening airlines' compliance with Federal aviation safety laws by incentivizing airline employees to speak out when evidence of violations arise. So while it is relevant that Complainant worked and observed violations of Federal Aviation Administration safety laws and regulations at an overseas location, it is even more relevant that Complainant works for, and reported the legal failings of, a major American air carrier that is a key participant in the American aviation system. It is significant that Respondent is, and Complainant is an employee of, a U.S.-based, FAA-certified air carrier under 14 C.F.R Part 121, the activities of which are subject to Federal aviation safety regulations, and whose compliance with said regulations is the very reason Congress enacted Section 42121.

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Slip op. at 28-29 (footnote omitted).

Because the ALJ found that enforcement of the instant complaint did not require extraterritorial application of Section 42121, he found that he did not need to assess whether Section 42121 extends to extraterritorial claims.

JURISDICTION; COVERAGE IS NOT A JURISDICTIONAL ISSUE

In ***Broomfield v. Shared Services Aviation***, 2004-AIR-20 (ALJ Aug. 9, 2004), the ALJ observed that the issue of whether the Respondent is an air carrier covered by AIR21 is an issue of coverage rather than jurisdiction.

- *Authority of ALJ and ARB to invalidate employer policy*

THE ALJ AND ARB DO NOT HAVE THE AUTHORITY TO INVALIDATE EMPLOYER POLICY OR DECLARE IT UNLAWFUL. HOWEVER, THE ALJ CAN INSTRUCT EMPLOYERS TO ABATE VOLITATIONS WHEN THE COMPANY'S POLICY VIOLATES THE STATUTE WHEN APPLIED.

In ***Hoffman v. NetJets Aviation, Inc.***, ARB No. 09-021, ALJ No. 2007-AIR-7 (ARB Mar. 24, 2011), the Complainant argued on appeal that the ALJ erred when he refused to consider whether a policy of the Respondent's Flight Operation Manual requiring pilots to inform management before writing up safety issues violated a federal aviation regulation, or whether a policy barring recordings by employees relating to the Respondent's business was unlawful because it did not specifically exclude protected activity under AIR21. Rather, the ALJ only considered whether the Respondent had applied its policies to the Complainant in a manner that violated AIR21. The ARB agreed with the ALJ's analysis. The ARB stated that under AIR21, it can hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, order the employer to take affirmative action to abate the violation. Because the Complainant failed to prove a violation of AIR 21, it had no power to declare the policies invalid or unlawful. The ARB thus agreed with the ALJ that he had to determine only whether the Respondent discriminated or retaliated in applying its policies to the Complainant. One dissenting member indicated that she would have declared the Respondent's recordation policy, as written, illegal as a means of affirmative relief.

- *Employer's interests and protection of pilots*

AIR21 POLICIES: EMPLOYER'S MANAGEMENT INTERESTS; PILOT RECORD IMPROVEMENT ACT

In ***Hirst v. Southeast Airlines***, 2003-AIR-47 (ALJ May 26, 2004), the ALJ found that the Complainant was discharged in violation of the employee protection provision of AIR21 when he called the Respondent's dispatcher to question an increase in the maximum gross weight of the aircraft he was to fly from 105,000 to 108,000 pounds. Complainant was referred to a Captain who assured the Complainant that he was confident that the increase was correct and in compliance

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with FAA regulations. Complainant requested that appropriate written documentation be faxed to him, but the Captain directed Complainant to fly the aircraft. Complainant refused and the Captain directed Complainant to report to Respondent's offices the next day to turn in his manuals and identification. Although the Respondent disputed whether the Complainant was thereafter discharged, the ALJ found that the record established that he was. The ALJ's decision contains a discussion of the statutory history of the whistleblower provision of AIR21 and of the inherent conflict of the interests protected by that law with an airline management's goals. The ALJ wrote:

> Regulations obliging pilots to record or report irregularities engender conflicts with managers trying to ensure on time performance, and maximize the number of revenue legs flown; management goals suffer when recorded deficiencies have to be corrected. *See generally*, John J. Nance & Charles David Thompson*, The Pilot Records Improvement Act of 1996: Unintended Consequences*, 66 J. Air L. & Com. 1225 (2001). Traditionally, a pilot facing the dilemma of reporting irregularities or antagonizing management could resign or accept termination rather than comply with pressure to overlook dangerous conditions. Before 1996, a pilot who resigned or was terminated in these circumstances could apply to another air carrier and give his explanation for the previous job separation or loss. *See* Nance & Thompson, supra, at 1226-28. The Pilot Record Improvement Act of 1996 (PRIA) complicates the pilot's situation, for PRIA requires air carriers to report the records of former employees to prospective airline employers. 49 U.S.C.A. § 44703(h)(1) (2003). An unfavorable entry in the employment record, especially one that an air carrier terminated the pilot for "unsatisfactory performance," becomes permanent and public, with little meaningful opportunity for explanation, and potentially ruinous consequences for honest and competent pilots.

Id.; Nance &Thompson, *supra* at 1236.

The statutes and regulations governing air commerce assign safety the highest priority. *See* 49 U.S.C.A. § 40101(a)(1) and (3), (d)(1) (2003). PRIA minimizes the possibility that a pilot with dangerously flawed judgment may obtain employment with an airline that does not know about earlier instances of incompetence, by making pilots' personnel files available to later potential employers. AIR 21 serves as a sort of counterbalance. It promotes safe air commerce by protecting pilots (and other airline employees) from implicitly or overtly coercive memoranda placed in their personnel files to discourage reports about deficiencies in operations or equipment. Both PRIA and AIR 21 reflect the central position pilots occupy in implementing the Congressional policy of making air travel as safe as possible.

Federal law confers great responsibility on a pilot in command, and commensurate authority. "The pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of that aircraft." FAR 91.3. The pilot has a non-delegable duty to ensure an aircraft is airworthy.... *Id.*

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III. BURDEN OF PROOF AND PRODUCTION

- *Prima facie case*

SPLIT ARB PANEL HOLDS THAT ALJ ERRS BY NOT CONSIDERING SOX CLAIM IN TERMS OF PRIMA FACIE CASE

In ***Fordham v. Fannie Mae***, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014), a split panel of the ARB indicated that an ALJ errs in not analyzing the case in terms of a prima face case. The ARB panel indicated that the ALJ's error was understandable because the ARB had been inconsistent in speaking about the showing required at the investigatory and the adjudicatory stages of a SOX case. The panel, quoting *Bechtel v. Administrative Review Board, USDOL*, 710 F.3d 443 (2d Cir. 2013), indicated that a prima facie case is merely a term referring to the four elements of a whistleblower complaint, and that "'[T]he same basic four-part framework of the complainant's *prima facie* case applies not only when deciding whether the allegations are legally sufficient, *see* 29 C.F.R. § 1980.104(e)(2), but also when an ALJ considers whether the complainant has satisfied his or her evidentiary burden under 49 U.S.C.A. § 42121(b)(2)(B)(iii).'"

The ARB panel made a distinction between a showing sufficient to raise a prima facie *inference* at the investigatory stage, and the elements of a prima facie *case* at the adjudicatory stage. The *Fordham* panel stated: "at the evidentiary stage the complainant is required to *prove* the four *prima facie* elements by a preponderance of the evidence." *Id*., USDOL/OALJ Reporter at 19. *See also id*. at 17 (ALJ's failure to analyze the evidence in terms of a prima facie case may be due, at least in part, to the ARB's confusing and inconsistent use of terms); *id*. at 20 (for a complainant to prove at hearing before an ALJ a *prima facie* case of retaliation through circumstantial evidence, that evidence must establish by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action.).

[Editor's Notes: In earlier statements from the ARB, it was indicated that an ALJ errs analytically when considering whether a complainant made out a prima facie case following an evidentiary hearing on the merits - the question at that stage only being whether the complainant met his or her burden of proof by a preponderance of the evidence. *See, e.g, Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB June 29, 2006), slip op. at 16 ("Merely presenting a prima facie case does not entitle a complainant to prevail, but merely forces a respondent to articulate its reason or reasons for an unfavorable personnel action. Once a respondent has done so, and a full hearing has been held, the prima facie case analysis is no longer relevant."); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007) (ALJ erred in analytical approach by considering whether the complainant proved a prima facie case by a preponderance of the evidence; rather, once a case has proceeded to hearing, a complainant's burden is to prove by a preponderance of evidence ("demonstrate") that the protected activity was a contributing factor in the alleged adverse action); *Adornetto v. Perry Nuclear Power Plant*, 1997-ERA-16 (ARB Mar. 31, 1999) (once a case has been tried fully on the merits, it no longer serves any analytical purpose to address and resolve the question of whether the complainant presented a prima facie case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability).

The *Fordham* decision was primarily about what evidence should be weighed in determining whether a complainant had established "contributing cause" by a preponderance of the evidence. In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30 (ARB Oct. 17, 2014), the ARB provided notice that it will review, en banc, the "contributory factor" analysis addressed in *Fordham*. Although *Fordham* was a SOX case, and *Powers* is a FRSA case, both are analytically grounded in the burdens of proof specified in AIR21.**]**

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ALJ DECISION; FACT THAT ALJ ERRONEOUSLY COMMENCED DECISION WITH DISCUSSION OF PRIMA FACIE CASE DOES NOT RENDER THE DECISION UNREVIEWABLE WHERE THE ALJ APPLIED THE CORRECT PROOF STANDARDS IN THE REMAINDER OF THE DECISION

In ***Luder v. Continental Airlines, Inc.***, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), the Respondent argued on appeal that the ALJ committed reversible error by holding the Complainant responsible for producing only prima facie evidence of retaliation, rather than proving such retaliation by a preponderance of the evidence. The ARB found that the ALJ had commenced his legal analysis under AIR 21 with an erroneous statement of the respective burdens of proof, but used the proper proof standards in the remainder of the decision. "Thus, unlike the situation in *Clemmons v. Ameristar Airways*[, ARB No. 05-048, ALJ No. 2004-AIR-11 (ARB June 29, 2007)] cited by Continental, the ALJ's initial misstatement of the burdens of proof standard in this case does not present a situation where the ARB is unable to ascertain whether the ALJ properly applied AIR 21's burden of proof requirements."

- *ALJ errors in analytical framework or credibility determinations*

ALJ'S LACK OF PRECISION IN ANALYTICAL FRAMEWORK COMPELLED REMAND

In ***Clemmons v. Ameristar Airways, Inc.***, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007), the ARB remanded for additional proceedings where the ALJ made four errors of law in analyzing the Complainant's AIR21 whistleblower complaint. Specifically, the ALJ erred when he (1) appeared to have merged the Respondent' burden of production with its later burden to prove by clear and convincing evidence that it would have taken the adverse action absent protected activity; (2) held that the Complainant proved a prima facie case by a preponderance of the evidence (rather, once a case has proceeded to hearing, a complainant's burden is to prove by a preponderance of evidence ("demonstrate") that the protected activity was a contributing factor in the alleged adverse action); (3) appeared to have found that a finding of pretext compels a finding of discrimination; and (4) failed to consider whether the Respondent proved that it would have terminated the Complainant absent protected activity. The ARB acknowledged that the ALJ's errors may have been simply imprecision; but that imprecision created uncertainty about the ALJ's findings that compelled a remand.

BURDEN TO SHOW THAT ALJ'S CREDIBILITY DETERMINATIONS WERE INCREDIBLE OR UNREASONABLE

Where an ALJ credits the testimony of the respondent's witnesses, a complainant who maintains on ARB review that those witnesses were not truthful has the burden of demonstrating that the ALJ's credibility determinations were incredible or unreasonable. ***Gary v. Chautauqua Airlines***, ARB No. 04-112, 2003-AIR-38 (ARB Jan. 31, 2006) (citing *Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 519 (9th Cir. 1989).

- *Burdens of proof in AIR21 whistleblower complaint; general outline*

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In ***Brune v. Horizon Air Industries, Inc.***, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the ARB restated the procedures and burdens of proof applicable to an AIR21 whistleblower complaint, which had earlier been detailed in *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-18 (ARB Jan. 30, 2004). The Board distinguished the procedure followed at the OSHA investigatory stage and at the hearing stage before the OALJ and the ARB, with the essential difference being that to secure an investigation, a complainant needs only to raise an inference of unlawful discrimination (i.e., establish a prima facie case), while at the adjudicatory stage a complainant must prove unlawful discrimination. The ARB wrote that:

This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR21 cases. The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.

Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Brune*, *supra*, slip op. at 13-14 (footnotes omitted). In *Brune*, the ALJ erred in that he required the Complainant to prove his case according to the prima facie case standard, rather than the preponderance of the evidence standard. It is not enough at the hearing phase for a complainant merely to establish a rebuttable presumption that the employer discriminated. Rather, a complainant must prove by a preponderance of the evidence protected activity, adverse action and causation.

The ALJ also erred because, once the Complainant established a prima facie case, the ALJ assigned the Respondent the burden of demonstrating by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of his employee's protected activity. Rather, a respondent's burden upon a complainant's establishment of a prima face case is one of *production*, not proof -- the respondent needs only to articulate some legitimate, non-discriminatory reason for its actions -- the respondent's "clear and convincing evidence" burden of proof only arises if the complainant has proven discrimination by a preponderance of the evidence.

- *Applicable decisional law; burdens of proof and production*

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), the ALJ reviewed the legislative history of AIR21's whistleblower provision, and concluded that the decisional law developed under the ERA, the Whistleblower Protection Act, and the whistleblower provisions of federal environmental statutes, provide the framework for litigation arising under AIR21.

The ALJ then set out a statement of the burden of proof standards, similar to the statement of such by the ALJ in *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Feb. 15, 2002) , with some additional clarifications. For example, the ALJ noted that the "contributing factor" element is only applicable to the establishment of a *prima facie* case.

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BURDEN OF PROOF AND PRODUCTION IN AIR21 CASES; TITLE VII METHODOLOGY

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB outlined the scope of coverage, procedures, and burdens of proof under the AIR21 whistleblower provision. The Board emphasized that the law imposes a "gatekeeper" standard prior to hearing during the preliminary stage of the proceeding -- the required "prima face showing" of section 42121(b)(2)(B)(i). The standard that ALJs apply at hearing and that the ARB applies on review, however, is as follows: "If a complainant 'demonstrates,' i.e., proves by a preponderance of the evidence, that protected activity was a 'contributing factor' that motivated a respondent to take adverse action against him, then the complainant has established a violation of AIR21 section 519(a). 49 U.S.C.A. § 42121(b)(2)(B)(iii)." (citation omitted). The Board wrote that the distinction, then, between standards applied for purposes of investigation and adjudication of a complaint concerns the complainant's burden: To secure investigation a complainant merely must raise an inference of unlawful discrimination; to prevail in an adjudication a complainant must prove unlawful discrimination.

The ARB also observed that the AIR21 whistleblower provision was modeled on section 211 of the ERA, and that the ARB had found in *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003), that the Title VII methodology for analyzing and discussing evidentiary burdens of proof was appropriate to use in ERA section 211 cases. The ARB, quoting its decision in *Kester*, wrote:

"[T]he Title VII burden shifting pretext framework [is] warranted in [the] typical [ERA] whistleblower case where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence." *Id*. at 7 n.17. The ARB may thus examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant in an ERA case has proved by a preponderance of the evidence that protected activity contributed to the dismissal. *Id. See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Unless a complainant proves that the employer fired him in part because of his protected activity, it is unnecessary to proceed to determine whether the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Kester*, slip op. at 8.

The Board then held that the same approach is applicable under AIR21 section 519. *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii)-(iv).

IV. PROTECTED ACTIVITY

- *In general*

PROTECTED ACTIVITY; ARB SUMMARIZES CURRENT STATE OF THE LAW ON WHAT CONSTITUTES PROTECTED ACTIVITY UNDER AIR21; INFORMATION PROVIDED MUST BE SPECIFIC AS TO AIRCRAFT SAFETY; AIR21 IS NOT A GENERAL REMEDY FOR EMPLOYMENT GRIEVANCES

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PROTECTED ACTIVITY; WHERE EMPLOYER ACCEPTED COMPLAINANT'S SUGGESTION TO IMPROVE CLARITY OF POLICY ON AVOIDING DAMAGE TO PLANE DOORS, THE ARB FOUND THAT THE SUBJECTIVE AND OBJECTIVE REASONABLENESS OF COMPLAINANT'S BELIEF WAS UNDISPUTED

PROTECTED ACTIVITY; COMPLAINANT'S PRINTING OF DOCUMENTS TO PROVIDE TO OSHA WAS PROTECTED ACTIVITY UNDER AIR21'S ELEMENT OF "ABOUT TO PROVIDE" ANY INFORMATION ABOUT AN ALLEGED VIOLATION OF FEDERAL LAW RELATED TO AIR SAFETY

In ***Forrand v. FedEx Express***, ARB No. 2019-0041, ALJ No. 2017-AIR-00016 (ARB Jan. 4, 2021) (per curiam), the ARB affirmed the ALJ's Decision and Order denying Complainant's AIR21 retaliation claim in a per curiam decision in which the ARB limited its discussion to Complainant's arguments on appeal and to clarification of certain of the ALJ's rulings.

In regard to protected activity, the ARB initially summarized the legal standard under AIR21:

> Protected activity under AIR 21 has two elements: (1) the information that 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 also objectively reasonable. The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety. A complainant's belief is objectively reasonable if it is one that a person of similar training and experience would hold.

Slip op. at 3-4 (footnotes omitted). In regard to the reasonableness of the complainant's belief, the ARB noted "the obvious fact that the text of the statute directs us to consider whether the safety of the flying public is, or might be, enhanced by the whistleblower's behavior. Air 21 is not a general remedy for employment grievances unrelated to air safety." *Id*. at 3, n.8.

The ALJ found that Complainant established one instance of protected activity. The ARB, however, found three instances. The ARB only discussed the two additional instances in its decision.

First, the ARB noted that—although the ALJ had discussed an incident in which Complainant had e-mailed his supervisor about the wording of a policy statement on avoiding damage to plane doors by moveable elevators that resulted in the policy being modified to improve clarity based on Complainant's feedback—the ALJ had not considered whether this was protected activity. The ARB determined that "Complainant's e-mail to his supervisor about the policy is protected activity because it relates to protecting the airplane's doors and, obviously, to air safety. The Complainant's subjective belief and objective reasonableness of that belief are undisputed because Respondent accepted Complainant's suggestion and took action in response to it." *Id*. at 4.

Second, the ALJ found that Complainant's printing of documents at one of Respondent's facilities for the purpose of supplying them to OSHA was "not protected activity because Complainant's

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'individual steps' of printing the documents were not discreet protected activity under the Act." *Id.* at 4-5 (footnote omitted). The ARB, however, found that this was protected activity under the "about to provide" element of AIR21:

> Th[e ALJ's finding] is correct as far as it goes, but AIR 21 protects an employee from retaliation when the employee is "about to provide" any information about an alleged violation of Federal law related to air safety. The Board has held that "an employee engages in protected activity if he attempts to provide information of retaliation that violates AIR 21." In this instance, Complainant printed documents. In printing the specific documents he did, Complainant was "about to provide" relevant information for his AIR 21 complaint, which concerned an alleged violation of Federal law related to air safety. Complainant therefore engaged in protected activity.

Id. at 5 (footnotes omitted). The ARB noted, however, that this was harmless error by the ALJ because Complainant had not been subjected to retaliation.

PROTECTED ACTIVITY; DIFFICULTIES EXPERIENCED BY COMPLAINANT IN MAKING TRIP TO DRUG TESTING FACILITY FOR RANDOM DRUG TEST, ALTHOUGH ARDUOUS, DID NOT FALL WITH AIR21 PROTECTIONS

In ***Antonellis v. Republic Airways***, ARB No. 2019-0046, ALJ No. 2018-AIR-00024 (ARB Feb. 8, 2021) (per curiam), Complainant, who worked as a First Officer for Respondent, filed an AIR21 complaint alleging that Respondent retaliated against her after she submitted Aviation Safety Action Program (ASAP) report concerning a flight related concern, and after she provided notice of intent to file an ASAP related to difficulties she experienced in traveling to a drug testing facility.

Prior to the flight in question, Complainant had been among 350-400 employees who could be selected for a random drug test by a third-party drug testing administrator through its random-generator program. Complainant was informed of her selection for a random drug test two days after the flight-related ASAP report. Complainant experienced difficulties on her way to the drug testing facility, and informed Respondent that she was going to file an ASAP report concerning the trip conditions. Upon arriving at the facility, she was unable to produce a sufficient specimen, and although informed that she needed to stay to follow the "shy bladder" procedure, she informed Respondent that she could not produce a sufficient specimen and needed medical attention. Although Respondent did not give her permission to leave the drug test, she left. Respondent suspended Complainant, and later terminated her employment for the test refusal. A union grievance was filed, and Complainant was reinstated pending the outcome of a FAA investigation. After the FAA completed the investigation and revoked Complainant's license and medical certificate, Respondent issued a second letter of termination.

The ALJ found that the flight-related ASAP was protected activity under AIR21, but not the notice of intent to file an ASAP related to the trip to the drug testing facility. The ALJ found that Complainant failed to prove by a preponderance of the evidence that flight related ASAP was a contributing factor in her selection for a random drug test, in Respondent reporting her as a drug test refusal, or in Respondent's decision to terminate her employment.

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On appeal, Complainant argued that the ALJ erred in finding that the notice of intent to file an ASAP about the travel conditions to the drug testing facility was not protected activity, and in finding that the other ASAP report was not a contributing factor in the adverse employment actions. Complainant also challenged the ALJ's findings of fact and credibility determinations.

The ARB found that the ALJ's decision was supported by substantial evidence, and that Complainant had not shown an abuse of discretion or reversible error by the ALJ. The ARB summarized: "We recognize that the trip to the testing facility was arduous but those activities and conditions do not fall within the statute's protections. Most importantly, there was simply no evidence that Complainant's protected conduct was at all linked to her selection to be drug tested. They were wholly separate, to put it simply, incidences. The record is clear on this point. Accordingly, we summarily AFFIRM the ALJ's D. & O." Slip op. at 6.

PROTECTED ACTIVITY; COMPLAINANT'S RENEWED RAISING OF CONCERNS THAT PUBLIC POSTING OF FLIGHT AND PACKAGE TRACKING DATA COULD ASSIST TERRORISTS WAS NOT SUBJECTIVELY OR OBJECTIVELY REASONABLE WHERE THE ISSUE WAS LONG KNOWN, AND AIR SAFETY AGENCIES HAD NOT TAKEN ACTION ON THE QUESTION; IT IS THE FAA, AND NOT THE AIRLINES, THAT POSTS THE DATA; ALTHOUGH AIRLINES MAY OPT OUT OF SUPPLYING THE DATA, TO DO SO WAS NOT ILLEGAL; MERE POTENTIAL FOR IMPROVING SECURITY DOES NOT MEAN AIRLINE WAS VIOLATING A LAW OR REGULATION

In ***Estabrook v. Administrative Review Board, USDOL***, No. 19-60716 (5th Cir. June 30, 2020) (per curiam), the Fifth Circuit held that substantial evidence supported the ALJ's finding that AIR21 protected activities had not contributed to Respondent FedEx's decisions to ground Estabrook and to require a compulsory medical evaluation.

The court first addressed the ALJ's findings that comments made by Estabrook, who was an experienced pilot, during an August 9, 2013 meeting were not protected activity. Estabrook had demanded a meeting with FedEx's CEO to report "something related to 9-11." A meeting with senior FedEx officials (but not the CEO) took place on August 9. During the meeting Estabrook recommended that FedEx stop making flight- and package-tracking data available to the public because terrorists could make use of that data to detonate a bomb. Estabrook had raised the same claim in 2002. Estabrook also brought up that he had heard that a former colleague who had attempted to hijack a plane had converted to Islam while in jail. Estabrook thought that FedEx should go to DOJ to request eavesdropping on the former colleague, but offered no other basis for this view than his belief that the former colleague was Muslim.

Because Estabrook had not challenged DOL's contention that to be protected, an employee's statements indicating a belief that air-carrier safety rules exist must be subjectively and objectively reasonable, the court assumed, without deciding, that this was the correct standard. The court noted OSHA's observation that this standard was in line with the Fifth Circuit's interpretation of the SOX whistleblower provision, but also noted that the statutory language was different—SOX referring to reports that a complainant "reasonably believes constitutes a violation" of certain securities law—whereas AIR21 only describes the reporting of "any violation or alleged violation."

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The ALJ found that Estabrook's comments were not subjectively reasonable because he had known about the public availability of tracking data for over 10 years, and that for several years U.S. intelligence agencies had been aware of terrorist's plans to use such data, but the agencies had taken no steps to curtail it. As to objective reasonableness, the ALJ found that the availability of tracking information was well known to the general public, and yet aviation safety agencies had not taken action on the question. The court observed: "it is the FAA—not FedEx—that makes flight-tracking data available to the public. True, carriers can opt out of public disclosure. But all that matters is that the FAA permits disclosure of the data, so that disclosure does not violate the law. And, as the ALJ noted, the mere potential for improving security 'does not mean that [FedEx] was violating any law or regulation.'" Slip op. at 7. The court thus did not disturb DOL's conclusion that the August 9 comments were not protected activity under AIR21.

PROTECTED ACTIVITY; ALJ ERRED IN FINDING THAT RETALIATORY ACTIONS NOT INVESTIGATED BY OSHA WERE NOT BEFORE HIM FOR THE DE NOVO HEARING

In ***Swint v. NetJets Aviation, Inc.***, ARB No. 2017-0051, ALJ Nos. 2014-AIR-00021, 2016-AIR-00011 (Apr. 27, 2020) (per curiam), the ARB summarily affirmed the ALJ's conclusion that none of the employment actions described in Complainant's AIR21 complaint were taken in retaliation for protected activity. The ARB, citing 29 C.F.R. § 1979.107(b), stated that the ALJ erroneously concluded that two of the alleged retaliatory actions were not before him because they were not investigated by OSHA. The ARB, however, found the error harmless because those claims failed on alternative grounds.

PROTECTED ACTIVITY; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S DETERMINATION THAT COMPLAINANT DID NOT HAVE AN OBJECTIVELY REASONABLE BELIEF THAT A VIOLATION EXISTED OR WAS LIKELY TO OCCUR, WHERE NONE OF SAFETY CONCERNS RAISED BY COMPLAINANT WERE IMMINENT OR ENTIRELY TRUTHFUL

In ***Kreb v. Jackson Jet Center***, ARB No. 2018-0065, ALJ No. 2016-AIR-00028 (ARB Sept. 28, 2020) (per curiam), the ARB found that the ALJ's determination that Complainant did not engage in protected activity under AIR21 was supported by substantial evidence. The ALJ had found that Complainant did not have an objectively reasonable belief that a violation existed or was likely to occur considering the knowledge available to a reasonable person in the same factual circumstances. The ARB stated: "Critical in this regard are the ALJ's findings, supported by the substantial evidence of record, that none of the safety concerns were imminent or entirely truthful. The record shows that a pilot with the same experience and training would not have thought the cited safety concerns were likely or imminent violations of federal aviation standards, but at most possibilities dependent on factors that were unknown or unlikely at the time Complainant raised his concerns. Complainant offered no evidence that a pilot with his training and experience would have agreed that accepting the July 9 flight assignment would have posed a safety risk."

PROTECTED ACTIVITY; INFORMATION PROVIDED BY COMPLAINANT ONLY HAS TO BE RELATED TO ANY VIOLATION OR ALLEGED VIOLATION; COMPLAINANT NEED NOT HAVE WAITED FOR AN FAA VIOLATION TO OCCUR FOR A REPORT TO BE PROTECTED ACTIVITY

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PROTECTED ACTIVITY; RULINGS OF *HINDSMAN* AND *MALMANGER*—FINDING THAT REPORTS IN THOSE CASES WERE NOT PROTECTED ONCE COMPLAINANTS' KNEW THAT REPORTED MATTER WAS NOT A VIOLATION OR HAD BEEN RESOLVED —WERE DISTINGUISHABLE IN INSTANT CASE WHERE AT TIME REPORTS WERE MADE THE MATTER HAD NOT BEEN RESOLVED AND COMPLAINANT'S REPORTS WERE NOT MADE SIMPLY TO "CLOAK" COMPLAINANT WITH WHISTLEBLOWER PROTECTION

In ***McMullen v. Figeac Aero North America***, ARB No. 2017-0018, ALJ No. 2015-AIR-00027 (ARB Mar. 30, 2020) (per curiam), Complainant, the General Manager of Respondent's Wichita airline components plant, filed an AIR21 retaliation complaint alleging that his employer terminated his employment in retaliation for reporting safety violations. The ALJ found in favor of Complainant. The ARB affirmed.

In regard to protected activity, the ARB stated:

> Protected activity under AIR 21 has two elements: (1) the information that 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.4 "The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 5 (ARB June 30, 2010).

Slip op. at 4. In the instant case, the ALJ found that Complainant engaged in protected activity when he informed the CEO of Respondent's parent company that Respondent's vice-president of sales threatened Respondent's quality assurance manager because she refused to falsify First Article Inspection Report (FAI) documentation in violation of a FAA regulation. Although in the first report Complainant had not cited to a specific regulation, the ALJ found that was not necessary and that Complainant's concerns were well-based and reasonable.

The ALJ also found that the quality assurance manager had raised concerns about proper paperwork, which Complainant reported to the parent company's CEO by email, informing that omitting information on the FAI could be considered fraud and a violation of FAA regulations. The ARB affirmed that this communication qualified as protected activity. The ARB stated: "Moreover, information only has to be related to any violation or alleged violation and Complainant need not have waited for an FAA violation to occur in order to report the omission and have whistleblower protection." *Id*. at 5.

On appeal, Respondent contended that the Board's holdings in *Hindsman, supra*, and *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-008 (ARB July 2, 2009), required a different outcome. The Board disagreed:

> In *Hindsman*, the Board held that the complainant could not have had a reasonable belief that flying with the portable oxygen concentrator on board violated air safety

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> regulations once she had confirmed that the item was permitted by the FAA. These facts are not analogous to those in this case as McMullen was reporting potential violations, which the ALJ found were objectively reasonable. In addition, in *Malmanger*, the Board affirmed an administrative law judge's finding that the complainant did not have a reasonable belief that the company violated an order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. At the time he reported his concerns to management, the complainant knew the problems had been resolved and the ALJ found that his complaints were insincere and made to forestall what he believed would be an adverse performance evaluation. In this case, the ALJ found that McMullen's concerns were sincere and not made to "cloak himself" with whistleblower protection. Moreover, the concerns had not been resolved by the time the Complainant reported his concerns to [the parent company's CEO]. Thus, we affirm the ALJ's finding that McMullen engaged in protected activity on July 26 and 28, as well as when he filed the report to the FAA on July 30, 2014 as they are supported by substantial evidence.

Id. 5-6.

PROTECTED ACTIVITY; TO CONSTITUTE PROTECTED ACTIVITY, COMPLAINANT NEED NOT ESTABLISH AN ACTUAL VIOLATION OF A FEDERAL RULE OR REGLUATION RELATED TO AIR SAFETY, BUT MUST HAVE BOTH A SUBJECTIVELY AND OBJECTIVELY REASONABLE BELIEF THAT A VIOATION OCCURRED OR WAS ABOUT TO OCCUR

In ***Cerny v. Triump Aerostructures-Vought Aircraft Division***, ARB No. 2019-0025, ALJ No. 2016-AIR-00003 (ARB Oct. 31, 2019), Complainant filed a complaint alleging that Respondent retaliated against him in violation of AIR21's whistleblower protection provisions for raising air transportation safety concerns. On appeal, the only instance of protected activity preserved for ARB review concerned an engineering report submitted by Complainant. The lead engineer had returned the report to Complainant with a heavy set of redlines and a directive to make changes. Complainant made some changes, but submitted a checklist of changes he refused to make.

On appeal, the Complainant argued that the ALJ erred in finding that—although Complainant had a subjective belief that the change refusals were based on engineering science and Respondent's manual—it was not an objectively reasonable belief that Complainant's checklist of declined changes was protected activity. Complainant argued that that he need not show that a law was actually violated, but need only prove that he had a reasonable belief that his report related to Air carrier safety. Complainant also argued that the ALJ failed to take into account that another person had reviewed the report after Complainant's termination and did not have objections to Complainant's work. Complainant further challenged the ALJ's credibility finding concerning the lead engineer.

The ARB, however, affirmed the ALJ's ALJ findings on protected activity. The ARB acknowledged that Complainant need not prove an actual violation to engage in protected activity under AIR 21, but only a reasonable belief that a violation of a federal rule or regulation related to air safety occurred or was about to occur. The ARB stated that nonetheless "an employee's

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reasonable belief is comprised of both a subjective and an objective component…." Slip op. at 8. The ARB found that the ALJ's findings were supported by substantial evidence. Testimony showed that the lead engineer had another engineer review Complainant's report, and that engineer provided negative feedback concerning Complainant's refusal checklist. In addition, Complainant had not been proficient in using analytical software and there were issues throughout the report.

PROTECTED ACTIVITY; WHERE COMPLAINANT ASSISTED AND PARTICIPATED IN NTSB INVESTIGATION OF CRASH, THIS WAS SUFFICIENT TO ESTABLISH PROTECTED ACTIVITY UNDER § 42121(a)(4), AND IT WAS NOT NECESSARY ON APPEAL TO DETERMINE WHETHER THE MATTTERS REPORTED WERE ALSO PROTECTED ACTIVITY UNDER § 42121(a)(1) OR (2)

In ***Yates v. Superior Air Carrier LLC***, ARB No. 2017-0061, ALJ No. 2015-AIR-00028 (ARB Sept. 26, 2019) (per curiam), Respondent argued on appeal that Complainant had not established that he engaged in protected activity when he emailed an NTSB investigator about concerns with the NTSB's report concerning a crash in which Complainant had been the First Officer (second-in-command), as Complainant had not identified any FAA or other air safety order, regulations or standard that was allegedly violated. The ARB, however, agreed with the ALJ that, regardless of whether Complainant's reports were themselves protected activity under 49 U.S.C. § 42121(a)(1) or (2), both Complainant's interview with the NTSB and his later email to the NTSB qualified as assistance or participation in a proceeding relating to carrier safety as described in 49 U.S.C. § 42121(a)(4). Because this finding was sufficient to resolve the question of protected activity, the ALJ had correctly resolved the matter with this basic finding despite the parties' zealous arguments on additional facts and theories of law.

PROTECTED ACTIVITY; COMPLAINANT'S RAISING OF SECURITY CONCERNS ABOUT FEDEX'S ONLINE PACKAGE TRACKING SYSTEM WAS NOT PROTECTED ACTIVITY; REASONABLE BELIEF ELEMENT NOT ESTABLISHED BECAUSE COMPLAINANT KNEW THAT THE COMPLAINED OF ACTIVITY WAS PERMITTED BY THE FAA

In ***Estabrook v. Federal Express Corp.***, ARB No. 2017-0047, ALJ No. 2014-AIR-00022 (ARB Aug. 8, 2019) (per curiam), Complainant was a pilot for FedEx. His refusal to fly in bad weather and associated OSHA complaint (later withdrawn when FedEx took no disciplinary action) were both protected activity under AIR21. However, the ARB agreed with the ALJ that, although AIR21 protects providing information about "security" even though security is not specifically mentioned in the status, the security concerns expressed by Complainant during a meeting with management officials did not constitute protected activity in this case. The ARB cited its decision in *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 5 (ARB June 30, 2010), in which it was found that a "complainant did not engage in protected activity when the complainant knew that the FAA permitted the complained of activity." The ARB stated that in the instant case, Complainant "could not have had a reasonable belief that publishing low-level flight or tracking information constituted a *violation* of federal air carrier safety or security laws. Publishing some level of tracking data is an industry-wide practice and not prohibited. . . . The FAA and other related entities had received complaints from Estabrook and others expressing concern about this practice in 2001 and 2002, but did not prohibit the activity. Estabrook was only suggesting a policy change for FedEx to voluntarily or proactively withdraw publishing data to

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make its safety or security procedures more effective." Slip op. at 10 (emphasis as in original) (footnote omitted).

PROTECTED ACTIVITY; ALLEGATION THAT COWORKERS HAD SMUGGLED OTHER EMPLOYEES ONTO FLIGHTS WITHOUT LISTING THEM ON THE MANIFEST SUFFICIENT TO WITHSTAND A FRCP 12(b)(6) MOTION TO DISMISS BECAUSE THE COMPLAINANT, A CUSTOMER SERVICE REPRESENTATIVE, COULD REASONABLY HAVE PERCEIVED THIS TO BE A SAFETY ISSUE

PROTECTED ACTIVITY; WHERE COMPLAINANT SUBMITTED MATTERS OUTSIDE THE PLEADINGS IN RESPONSE TO A MOTION TO DISMISS, THE ARB RULED THAT THE ALJ SHOULD HAVE CONSIDERED THE MOTION AS A MOTION FOR SUMMARY DECISION RATHER THAN A FRCP 12(b)(6) MOTION

In ***Hukman v. U.S. Airways, Inc.***, ARB No. 15-054, ALJ No. 2015-AIR-3 (ARB July 13, 2017), the ALJ had granted the Respondent's motion to dismiss for failure to state a claim upon which relief can be granted. The ALJ applied FRCP 12(b)(6). The Complainant had alleged that she engaged in protected activity "when she reported 1) that coworkers were smuggling co-workers onto planes without listing them on the manifest (and that this was unsafe because of weight and balance issues), 2) that co-workers engaged in an altercation with her (which she calls the airport rage incident), and 3) that a nurse was practicing with an expired license. The ALJ concluded that none of these activities were protected." Slip op. at 5. The ARB reiterated the law concerning what constitutes protected activity under AIR21:

> For activity to be protected under 49 U.S.C.A. § 42121(a)(1), a complainant must provide information relating to a violation of a Federal Aviation Administration (FAA) order, regulation, or standard or of any federal law relating to air carrier safety. A complainant must have a reasonable belief in a violation and this reasonable belief has both objective and subjective components. To prove subjective belief, a complainant must prove that she actually "believed that the conduct [s]he complained of constituted a violation of relevant law." To determine whether a subjective belief is objectively reasonable, one assesses a complainant's belief taking into account "'the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'"

Id. at 4-5 (citations omitted).

The ARB affirmed the ALJ's findings that the airport rage incident and the report about a nurse's expired license did not state claims with respect to protected activity because these reports did not purport to involve violations of FAA orders, regulations, or standards, or any federal laws relating to air carrier safety. The ARB, however, reversed the ALJ's conclusion that the Complainant did not state a claim with respect to the allegation that coworkers were smuggling other employees onto planes.

The ARB first noted that it appeared that because the ALJ had ruled on the Respondent's motion to dismiss under FRCP 12(b)(6), the ALJ had not considered materials submitted by the

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Complainant outside of her pleadings including materials attached to her request for hearing and her response to the Order to Show Cause. The ARB found that the pleadings would have survived a 12(b)(6) motion to dismiss because the allegation that "flights were taking off with incorrect numbers and types of people listed on the manifest because the incorrect information touched on the safety of the flights and because weight on a flight could reasonably be perceived to be a safety issue to one such as [the Complainant], a customer service representative." *Id*.at at 6. The ARB also noted that, although not required to do so, the Complainant had cited 14 C.F.R. Part 121 in her first prehearing statement in regard to weight and balance limitations.

The ARB, citing FRCP 12(d), also found that the ALJ should have considered the motion as a motion for summary decision and considered the outside-the-pleadings submissions. The ARB reviewed the submissions, which included many reports by the Complainant of smuggling people onto aircraft, not counting jumpseaters, and counting adults as a children; an accident description of a plane crash caused in party by weight and balance issues; and a CBS news article about a FAA fine against a carrier for failing to calculate baggage weight on dozens of flights. The ARB found that the Complainant's pleadings and submissions showed a genuine issue of material fact as to whether the Complainant held a reasonable belief that the weight and balance issues were violations of the FAA regulations.

PROTECTED ACTIVITY; AIR21 DOES NOT REQUIRE PROTECTED ACTIVITY TO RELATE "DEFINITIVELY AND SPECIFICALLY" TO SAFETY

In ***Hukman v. U.S. Airways, Inc.***, ARB No. 15-054, ALJ No. 2015-AIR-3 (ARB July 13, 2017), in granting the Respondent's motion to dismiss, the ALJ had found that the alleged protected activity must implicate safety definitively and specifically. The ARB, however, cited *Sewade v. HaloFlight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9, slip op. at 8 (ARB Feb. 13, 2015), in which the ARB held that AIR 21 does not require protected activity to relate "definitively and specifically" to safety.

PROTECTED ACTIVITY; FAILURE TO STATE A CLAIM; SOX COUNT DISMISSED WHERE PLAINTIFF FAILED TO ALLEGE THAT HIS COMPLAINTS ABOUT FAILURE TO COMPLY WITH FAA REGULATIONS INCLUDED A REPORT OF A BELIEF THAT SUCH FAILURES WERE A FRAUD ON SHAREHOLDERS

In ***Neely v. Boeing Co.***, No. 16-cv-1791 (W.D. Wash. May 15, 2018) (2018 U.S. Dist. LEXIS 81771; 2018 WL 2216093) (related to 2018-AIR-00019), the district court granted the Defendant's motion to dismiss for failure to state a claim on the count of the Plaintiff's complaint that was based on the SOX whistleblower provision. The court found that the Plaintiff's second amended complaint only stated that the Plaintiff made complaints regarding the Defendant's alleged failure to comply with FAA regulations, and did not contain an allegation that he reported his belief that these actions were defrauding shareholders to the Defendant or to any federal agency. The Plaintiff alleged that he filed complaints that he was being retaliated against for being a whistleblower, but did not specifically allege that he raised any allegations of shareholder fraud prior to any alleged retaliation. The court thus found that the Plaintiff failed to allege that he engaged in protected activity under SOX.

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PROTECTED ACTIVITY; REPORT OF TURBULENCE ON PREVIOUS FLIGHT NOT LOGGED BY PREVIOUS PILOT; CHALLENGE OF REFUSAL TO CONDUCT INSPECTION

In ***Cont'l Airlines, Inc. v. Admin. Review Bd., USDOL***, No. 15-60012 (5th Cir. Jan. 7, 2016) (unpublished) (2016 U.S. App. LEXIS 324; 2016 WL 97461)(case below ARB No. 10-026, ALJ No. 2008-AIR-00009), the Fifth Circuit found that substantial evidence supported the ARB's decision that "Continental [the Petitioner] retaliated against Luder [the AIR21 Complainant] when it suspended him for logging turbulence on an earlier flight reported to him by a member of the previous flight crew and triggering an inspection which resulted in a delayed flight." Slip op. at 1-2.

The court noted: "To establish protected conduct, the employee must show that he reported a violation of federal safety law. Specifically, activity is protected 'because the employee provided…information relating to any violation or alleged violation of any order, regulation, or standard of the [FAA].' Moreover, the employee's belief that a violation of federal law occurred must be reasonable." Slip op. at 5 (footnotes omitted).

The court found that substantial evidence supported the ARB finding that Luder reported an alleged violation of federal law. Because he believed that the airplane went through severe turbulence, Luder's actions implicated federal regulations in two ways. First, by logging the turbulence, he effectively reported a violation by the previous pilot for failing to log his encounter with severe turbulence. Second, by challenging Continental's refusal to conduct the inspection and refusing to acquiesce in Continental's objection to an inspection he reasonably believed was required, Luder reported that Continental tried to cause him to violate FAA regulations.

The court also found that Luder's belief that the airplane encountered severe turbulence was reasonable. A crewmember who was on the first flight had described winds so strong they nearly tore the wings off, sent a person to the medical clinic, and appeared on the radar as pink—the greatest degree of turbulence. Defendant was found to have known that Luder logged the severe turbulence and requested an inspection, as the logbook entry and triggered inspection by Luder was the subject of a heated telephone conversation between him and Continental officials.

PROTECTED ACTIVITY IN AIR21 CASE; COMPLAINANT NEED NOT ACTUALLY CONVEY REASONABLE BELIEF TO HIS OR HER EMPLOYER

PROTECTED ACTIVITY IN AIR21 CASE; COMPLAINANT'S INTERNAL REPORTING TO MANAGEMENT OF POTENTIAL FAA RULES VIOLATION MAY BE SUFFICIENT AND THE FAA NEED NOT ALSO BE INFORMED

In ***Bondurant v. Southwest Airlines, Inc.***, ARB No. 14-049, ALJ No. 2013-AIR-7 (ARB Feb. 29, 2016), the ARB vacated the ALJ's decision and order granting summary judgment in favor of the Respondents in an AIR21 whistleblower case where a genuine issue of material fact existed that precluded summary decision. The ALJ found that the Complainant may have had a reasonable concern that the Respondent was failing to comply with a requirement to report shipping incidents to the FAA, but that the Complainant must have communicated that concern and that the record showed that the Complainant did not raise concerns about reporting until he was being discharged.

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The ARB determined that the ALJ erred in focusing on the lack of communication of the concerns. The ARB wrote:

> We hold that the ALJ unduly limited his consideration of protected activity to whether Bondurant communicated to Respondent his reasonable belief that Respondent was failing to report a FAA violation. The ALJ stated: "However, it is not enough that a complainant honestly and reasonably believed there was or would be a violation. He must also have communicated that concern and the essence of Respondent's Motion is that there is nothing in the record to allow a finding of fact to decide that he did so." This was error for two reasons. First, we have repeatedly held that a complainant need not actually *convey* reasonable belief to his or her employer'; "[t]he reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." Second, Bondurant presented evidence that on February 22, 2012, he reported to upper management that Respondent had transported lithium batteries in an unsafe manner. This is sufficient to raise a genuine issue of material fact with respect to protected activity. Protection under the statute may be afforded to reports of information relating to air carrier safety—a complainant need not also report the air carrier's failure to report such information to the FAA.

USDOL/OALJ Reporter at 5 (footnote omitted) (emphasis as in original).

NO PROTECTED ACTIVITY UNDER AIR21 WHERE EMPLOYEE OPPOSED FEDERAL FLIGHT DECK OFFICER (FFDO) PROGRAM GENERALLY BUT DID NOT DEMONSTRATE GOOD FAITH BELIEF THAT FLYING WITH FFDO PILOT WOULD POSE SAFETY RISK

In ***Burdette v. ExpressJet Airlines, Inc.***, ARB No. 14-059, ALJ No. 2013-AIR-16 (ARB Jan. 21, 2016), the Complainant filed a complaint alleging that he was terminated from his position as a pilot based on his protected activity of refusing to alternate flight legs with a Federal Flight Deck Officer (FFDO), an individual authorized and trained to carry a firearm in aircraft cockpits to defend against acts of criminal violence. The Complainant alleged that he felt unsafe flying in the presence of an FFDO, and over the course of several years he engaged in a number of actions indicating his opposition to the FFDO program, including sending complaint letters and refusing to fly with FFDOs. These actions culminated in his being required to sign a "Last Change Agreement" and being issued a warning letter from his employer. On the date of the alleged protected activity, the Complainant was assigned to fly as co-pilot with an FFDO. After learning that his request for a replacement pilot had not been granted, the Complainant designated the FFDO to be the flying pilot for each flight leg of the multi-day trip, stating that the assignment was necessary for him to safely manage the cockpit in the presence of the FFDO. After refusing the on-call chief pilot's request that he alternate flying legs of the trip with the FFDO, the Complainant was terminated from his position.

The Board found that substantial evidence in the record supported the ALJ's finding that the Complainant failed to prove that he engaged in AIR21 protected activity. The Board agreed with the ALJ that the Complainant did not demonstrate a good faith belief that flying with an FFDO

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would have been too great a distraction for him to fly safely, given that the Complainant testified that his previous flights with FFDOs had been conducted safely and that he was not distracted as a flying pilot on these flights. The Board stated that, while Complainant opposed the FFDO program and believed it to be unsafe generally, his testimony indicated that he believed he could fly safely with FFDOs. Further, the Board found that the Complainant put forth no evidence that individuals with his training and experience would have believed that safety would have been a risk had he acted as flying pilot.

PROTECTED ACTIVITY; COMPLAINANT NEED NOT ESTABLISH AN ACTUAL VIOLATION WHERE THE REPORTED MATTER RELATED TO A VIOLATION OR ALLEGED VIOLATION OF FAA REQUIREMENT OR OTHER FEDERAL LAW RELATED TO AIR CARRIER SAFEETY, AND EMPLOYEE'S BELIEF OF VIOLATION WAS SUBJECTIVELY AND OBJECTIVELY REASONABLE

PROTECTED ACTIVITY; RESPONDENT CANNOT "CURE" OR ERASE PROTECTED ACTIVITY BY ADMITTING TO WRONGDOING, APOLOGIZING, OR AGREEING WITH THE COMPLAINANT ABOUT A SAFETY CONCERN

PROTECTED ACTIVITY; FINDING THAT RESPONDENT DID NOT CONDONE SAFETY PROBLEMS OR FAA VIOLATIONS IS NOT RELEVANT TO QUESTION WHETHER COMPLAINANT ENGAGED IN PROTECTED ACTIVITY

PROTECTED ACTIVITY; AIR21 DOES NOT REQUIRE THAT PROTECTED ACTIVITY RELATE "DEFINITELY AND SPECIFICALLY" TO A SAFETY ISSUE

In ***Sewade v. Halo-Flight, Inc.***, ARB No. 13-098, ALJ No. 2013-AIR-9 (ARB Feb. 13, 2015), the Complainant was a helicopter pilot for the Respondent. The ALJ determined that the Complainant had not engaged in protected activity, finding that none of the issues that the Complainant raised involved safety issues or that the Respondent was "condoning" safety issues in violation of FAA rules or regulations. Regarding a fuel system transfer light issue, the ALJ found that the aircraft's safe operation was not involved, and that the Respondent's Director of Operations "cured any alleged improper conduct" when he admitted wrongdoing and apologized for pressuring the Complainant to fly when she was not comfortable doing so. Regarding an aircraft pitching issue, the ALJ found that the problem did not involve an FAA violation. The ALJ did not address two other allegations of protected activity by the Complainant.

The ARB reversed the ALJ's determination on the fuel system transfer light issue. The ARB wrote:

> The ALJ incorrectly analyzed the issue whether Sewade engaged in protected activity. First, an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement where (1) the employee's report or attempted report is "related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, and (2) the employee's belief of a violation is subjectively and objectively reasonable." Second, 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

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> negative) does not change that AIR 21 protected activity has occurred. Third, finding protected activity does not depend on whether an employer "condoned" safety problems or FAA violations as the ALJ seems to have required. Finally, the AIR 21 whistleblower statute does not require that protected activity relate "definitely and specifically" to a safety issue.

USDOL/OALJ Reporter at 8 (footnotes omitted). Reviewing the evidence of record, the ARB found that the transfer lights were designed to indicate that the aircraft was ready to fly, but had not been turning on consistently; that the Complainant was the pilot in command and did not feel that the helicopter was safe to fly and had so reported; and that it was undisputed that the lights were not working and that the Complainant had reported about them because she subjectively believed that there was a safety violation. The ARB also found that the Director of Operations' statement that there would be no violation of FAA rules or regulations for the Complainant to fly the helicopter "once the fuel transfer lights [turned] on and off as expected" suggested that there may have been a violation *before* the lights worked as expected. The ARB found that the Complainant's report and refusal to fly were each protected activity under AIR21, even if the Director of Operations agreed with the Complainant's concern and her decision not to fly unless the lights came on. The ARB further found that the Director of Operations apology for pressuring the Complainant to fly was additional evidence of the objective reasonableness of the Complainant's belief about the safety issue. Thus, the ARB reversed the ALJ and found that the record established that the Complainant's report of the faulty fuel transfer lights, and related refusal to fly, were protected activity under AIR21.

The ARB remanded for further factfinding on the other alleged instances of protected activity.

PROTECTED ACTIVITY; FIRST OFFICER WHO HAD BEEN FAILED ON A CHECK FLIGHT TEST AND STATED THAT HE WOULD GO TO THE FAA; "ABOUT TO PROVIDE" LANGUAGE FROM THE STATUTE PROTECTS EMPLOYEES WHO THREATEN TO FILE COMPLAINTS WITH FEDERAL AUTHORITIES; ALJ ERRED IN FINDING STATEMENT WAS TOO VAGUE TO CONSTITUTE PROTECTED ACTIVITY; ALL THAT IS REQUIRED IS THAT THE COMPLAINANT REASONABLY BELIEVED THAT HE WAS ABOUT TO PROVIDE COVERED INFORMATION REGARDLESS OF WHETHER HE CONVEYED HIS REASONABLE BELIEF TO HIS EMPLOYER

In ***Occhione v. PSA Airlines, Inc.***, ARB No. 13-061, ALJ No. 2011-AIR-12 (ARB Nov. 26, 2014), the Complainant was a first officer seeking to upgrade to captain. As part of the upgrading process, a candidate must go through a "check ride" test in a simulator. Check rides are administered by "Aircrew Program Designees" (ADP), who are pilots approved to act for the FAA. Check rides must adhere to federal regulations and "Practical Test Standards" (PTS), and the FSIMS inspector's handbook. If a first officer fails a first attempt to upgrade to captain, the FAA requires retraining and rechecking before the candidate can return to work as a first officer. The candidate may make a second attempt after six months. According to the applicable collective bargaining agreement, if a first officer fails the second attempt, the company has discretion on how to deal with the situation. The Respondent's policy is to terminate the first officer's employment or allow him to resign in lieu of termination.

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The Complainant failed his first check ride, and informed the Respondent that he intended to contact the FAA. The Complainant failed his second check ride but later re-qualified as a first officer. The Complainant sent a letter to Respondent grieving how the check rides had been administered, copying the letter on FAA officials. Months later, the Complainant submitted an FAA Hotline complaint asserting that the check rides had not been administered in accordance with the PTS. The FAA made inquiries.

The Complainant entered a new upgrade class. The Complainant was failed on his third and fourth check ride attempts, and was therefore terminated from employment. The Complainant filed an AIR21 complaint with DOL.

The ARB affirmed the ALJ's findings that the Complainant engaged in protected activity on several occasions. The ALJ found, however, that the Complainant had not engaged in protected activity when he merely informed officials with the Respondent that he was going to the FAA because the statements failed to allege any specific safety violations and were vague. The ARB reversed this finding. The ARB noted that AIR21 protects employees "about to provide" information, and that such language in other whistleblower statutes had been interpreted as protecting employees who threaten to file complaints with federal authorities regardless of whether the employee has actually filed a complaint. The ARB recognized that the ALJ had relied on prior ARB authority holding that complaints must be specific under AIR21 to be protected (*e.g.*, *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-31, slip op. at 5 (ARB Mar. 14, 2008); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 13 (ARB Jan. 30, 2004)), but stated that "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." USDOL/OALJ Reporter at 8 (footnote omitted). *See Sylvester v. Paraxel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39, -42; slip op. at 17-19 (ARB May 25, 2011) ("reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities"); *Knox v. U.S. Dep't of Labor*, 434 F.3d 721, 725 (4th Cir. 2006) (inquiry into the "reasonable belief" of a complainant does not require that the complainant *convey* his reasonable belief to management). The ARB concluded:

> As long as [the Complainant] "reasonably believed" that he was "about to provide" the FAA with "information relating to any violation or alleged violation of any [FAA] order, regulation, or standard," his communications to [the ADP who administered the check ride and the Director of Flight Standards] were protected regardless of whether [the Complainant] conveyed his reasonable belief to his employer. The relevant question is whether [the Complainant] reasonably believed that the check ride [the ADP] administered violated an FAA standard when he told both [the ADP and the Director of Flight Standards] that he was "going to the FAA."

USDOL/OALJ Reporter at 9. The ARB also determined that when the Complainant informed his supervisors of his intent to go to the FAA, it would be logical to assume that it was for the same reasons as specified in his protected communication from a month earlier.

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PROTECTED ACTIVITY; FACT THAT EMPLOYER AGREES WITH SAFETY CONCERN DOES NOT NEGATE THE RAISING OF THE CONCERN AS PROTECTED ACTIVITY

PROTECTED ACTIVITY; FACT THAT EMPLOYER GROUNDS A PLANE BASED ON SAFETY CONCERN RAISED BY COMPLAINANT CONFIRMS THAT RAISING OF COMPLAINT WAS REASONABLE

PROTECTED ACTIVITY; ATTEMPT TO TAPE RECORD MEETING TO DOCUMENT RETALIATION UNDER AIR21 IS PROTECTED ACTIVITY

In ***Benjamin v. Citationshares Management, LLC***, ARB No. 12-029, ALJ No. 2010-AIR-1 (ARB Nov. 5, 2013), the Complainant was a pilot who flew passenger jets for CitationAir's private clients. Prior to the beginning of a tour of duty, he saw the plane he was to fly being serviced and undergoing a Continued Service Inspection. The mechanics confirmed in writing that the plane passed inspection, including the landing gear struts. The next day, the Complainant observed a problem with one of the landing gear struts, and the pilot in command agreed that it should be reported. The Complainant contacted the Flight Duty Officer and was referred to the company's Chief Pilot. The Chief Pilot advised on steps to bring the strut into compliance, but when those were unsuccessful, agreed that the plane must be grounded. The Chief Pilot then instructed the Flight Duty Officer to remove the Complainant from the flight and assign another pilot for the tour of duty. CitationAir then summoned the Complainant for a face-to-face meeting at its headquarters relating to the report of the landing gear strut. The next day the Complainant filed an Aviation Safety Action Program (ASAP) report with CitationAir's Vice President of Safety alleging that indirect pressure was being placed on pilots to keep planes flying, and that this was a dangerous and unsafe situation. The Complainant, expecting to be fired, purchased a pocket-size audio recorder. At the meeting, an HR employee was present, which confirmed for the Complainant that he needed to record the meeting to protect himself. The meeting began with a discussion of the wing strut incident. When the recorder noisily malfunctioned, the Complainant was asked by the Chief Pilot why he was recording the meeting, to which the Complainant stated he was afraid the Chief Pilot would yell at him. The Chief Pilot immediately had the Complainant turn in his company key and ID card, and had him escorted from the building. Several days later the Complainant received a termination letter. CitationAir subsequently denied the Complainant's request to have the termination decision peer reviewed. The Complainant then filed an AIR21 complaint. Following a hearing, the ALJ concluded that the Complainant had not engaged in protected activity. The ARB reversed that finding.

Report of landing gear strut concern -- fact that Respondent agreed with Complainant's safety report did not negate the report as protected activity

The ALJ found that the grounding of the plane was not protected activity because everyone concerned agreed that the plane had to be grounded. The ARB found that the ALJ focused too narrowly on the grounding and overlooked the safety report regarding the landing gear strut. The ARB stated that "The fact that management agrees with an employee's assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee's disclosure was objectively

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reasonable." USDOL/OALJ Reporter at 6. The ARB found that this report was protected activity as a matter of law, even if CitationAir agreed with the concern and decided to ground the plane.

Filing of ASAP report -- fact that Respondent grounded the plane based on safety concern raised by Complainant confirmed that Complainant's safety concerns were reasonable

The ALJ did not make an express ruling on whether the ASAP report was protected activity, but the ARB found that it was protected activity as a matter of law because (1) it expressly raised specific safety concerns about the landing gear strut incident, and (2) CitationAir's management agreed that the plane needed to be grounded thereby confirming that the Complainant's safety concerns were reasonable.

Attempting recording of meeting

The ALJ acknowledged that ARB authority holds that under the proper circumstances, the lawful taping of conversations to obtain information about safety-related conversations is protected activity and should not subject an employee to any adverse action. *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-7 (ARB Mar. 24, 2011). The ALJ, however, found that the Complainant's attempted recording in the instant case was not protected activity because "such a 'recording was not expected or intended to preserve evidence of a compromise of safety.'" USDOL/OALJ Reporter at 8 (quoting ALJ's decision). The ARB disagreed. The ARB found that protected activity under AIR21 includes an attempt to provide information of retaliation that violates AIR21. Thus, if the Complainant held a reasonable belief of retaliation at the meeting he was summoned to, then his attempted recording of such retaliation was protected activity. The ARB stated: "The ALJ held that "the recording was not expected or intended to preserve evidence of a compromise of safety." But the ALJ should have also considered whether [the Complainant] had a subjectively and objectively reasonable belief that he would suffer unlawful whistleblower retaliation at the meeting, including discipline, intimidation, threats, or coercion." USDOL/OALJ Reporter at 8 (citation omitted). The ARB found that the ALJ had resolved all the material facts on the issue, leaving only the legal question as to whether the attempted recording in this case was protected activity. The ARB found that it could resolve the legal question without a remand to the ALJ. The record showed that the Complainant held a reasonable belief that the purpose of the meeting was to fire him. Moreover, the Complainant had filed his ASAP complaint alleging that the CitationAir uses indirect pressure to avoid writing up maintenance issues, and reasonably believed that the meeting would be such an instance. Thus, under the facts of the case, the ARB found that the Complainant's attempt to record the "yelling" he expected was a protected attempt to document the unlawful intimidation he raised in his ASAP.

PROTECTED ACTIVITY; WORK REFUSAL AND REITERATING SAME COMPLAINTS AFTER EARLIER COMPLAINTS HAD BEEN SUFFICIENTLY RESOLVED FOUND NOT TO BE OBJECTIVELY REASONABLE AND NOT PROTECTED ACTIVITY UNDER AIR21

In ***Shactman v. Helicopters, Inc.***, ARB No. 11-049, ALJ No. 2010-AIR-4 (ARB Jan. 25, 2013), the Complainant's protected whistleblower concerns all related to another pilot. The ALJ found that the Respondent sufficiently addressed all of the Complainant's concerns, and that the Complainant's subsequent refusal to fly with that other pilot was not objectively reasonable as that

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refusal rested entirely on the same complaints he had previously raised. Consequently, given the Respondent's previous communications with the Complainant, the ALJ found that the Complainant's refusal was unreasonable and not protected whistleblower activity. The Complainant produced no evidence of any safety incidents involving the other pilot between the date the Respondent had sufficiently addressed the prior concerns and the Complainant's termination. The ALJ also found that the Complainant's FAA complaint during that gap of time was objectively unreasonable and not protected activity because it merely repeated the previously resolved complaints. The ALJ credited the Respondent's reasons for terminating the Complainant's employment, including claims of misconduct and a "confrontational attitude and poor working relationship with co-workers." The ALJ specifically found that the Complainant's safety complaints had not factored into the decision to terminate his employment, and that the Complainant failed to establish that any protected activity was a contributing factor in his termination. The ARB found that substantial evidence supported the ALJ essential factual findings and summarily affirmed the ALJ's Decision and Order dismissing the complaint.

PROTECTED ACTIVITY; COMPLAINT ABOUT CO-WORKER'S DRUG ABUSE

Where the work involves safety-sensitive functions, a complainant engages in protected activity under the AIR21 whistleblower provision when complaining to management about a co-worker's drug abuse on the job. FAA regulations contain extensive drug testing provisions and prohibitions pertaining to illegal drug use by aviation industry workers who perform "safety-sensitive" functions. ***Nagle v. Unified Turbines, Inc.***, ARB No. 11-004, ALJ No. 2009-AIR-24 (ARB Mar. 30, 2012).

PROTECTED ACTIVITY; LOGBOOK ENTRY IS PROTECTED ACTIVITY WHERE COMPLAINANT ALSO DEMANDED A MECHANICAL INSPECTION BEFORE HE WOULD PILOT THE PLANE

The ARB in ***Luder v. Continental Airlines, Inc.***, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), found that the ALJ properly found that the Complainant engaged in protected activity when he wrote up in the aircraft logbook an incident of severe turbulence based on information received from the prior flight crew, and demanded inspection of the aircraft before he would pilot the plane. The ARB stated that although the logbook entry in and of itself may not have constituted protected activity, the Complainant's actions forced the required mechanical inspection following a situation involving severe turbulence. Thus, his actions were thus distinguishable from *Fabre v. Werner Enters.*, ARB No. 09-026, 2008-STA-010 (ARB Dec. 22, 2009), cited by the Respondent in which the ARB held that action taken as "an integral part of compliance with the regulations," without more, does not constitute protected activity. The Respondent had argued that the logbook entry was simply an integral part of compliance with the regulations.

PROTECTED ACTIVITY; SUBJECTIVE AND OBJECTIVE BELIEF; CHECKING OFF ON CREW MEMBER VERIFICATION LIST

In ***Blount v. Northwest Airlines, Inc.***, ARB No. 09-120, ALJ No. 2007-AIR-9 (ARB Oct. 24, 2011), the Complainant was a part-time probationary customer service agent. His mentor, who was trying to provide the Complainant with the experience of being a lead gate agent, asked him

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to sign off on a crew verification list after she and another agent had checked in the crew members. The Complainant refused because he had not seen any of the crew and had not verified their identities personally. The Complainant continued to refuse even after a supervisor informed him that signing off on the paperwork did not indicate that the he had checked each crew member personally, but only that other agents had done so as evidenced by their initials next to each crew member's name. Later, supervisors and a safety director met with the Complainant to try to get him to understand the procedure, but after the Complainant insisted that it would be fraudulent for him to check off the paperwork without personally checking the crew's identification, the Complainant was discharged for insubordination. The Complainant then filed an AIR21 whistleblower complaint.

On appeal, the ARB found that verification of crew members' identities is on its face an air safety concern, but that protected activity under AIR 21 has two elements: (1) the information the complainant provides must involve a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's subjective belief that a violation occurred must be objectively reasonable. The ARB found that substantial evidence supported the ALJ's finding that while the Complainant firmly believed that signing the crew list without verifying crew members' identities personally would violate an FAA regulation, his belief was not objectively reasonable in light of the testimony of his mentor, the person who had drafted the Respondent's policy on crew verification; the Complainant's classroom trainer, and the customer service manager who fired the Complainant. Consequently, the Complainant had not engaged in protected activity.

One member of the Board concurred with the result, but found that the problem was not that the Complainant's actions were not objectively reasonable - the member finding that the Complainant had an objectively rational basis for his confusion as a new trainee. The member stated that "I believe it is a dangerous precedent to say that an initially objective reason for an airport security concern loses its protected activity status because a team of veteran employees insists that a policy does not say what it appears to say." USDOL/OALJ Reporter at 12 (footnote omitted). Rather, the concurring member found that the Complainant did not have a subjectively reasonable belief that a violation had occurred, having been more worried about personal liability than raising of a safety concern.

PROTECTED ACTIVITY; PILOT'S OBLIGATION TO DEEM HIMSELF UNFIT FOR FLIGHT BASED ON MEDICAL CONDITION; UNION REPRESENTATIVE'S ADVOCACY THAT RESPONDENT'S POLICIES CONTRAVENED THE FEDERAL AVIATION REGULATIONS

CLEAR AND CONVINCING EVIDENCE STANDARD; RESPONDENT COULD NOT MEET STANDARD WHERE IT FAILED TO ESTABLISH THAT IT HAD A PRE-EXISTING POLICY OF REQUIRING MEDICAL DOCUMENTATION TO SUPPORT A PILOT'S SICK LEAVE OR THAT THE PILOT HAD ADVANCE NOTICE OF SUCH A REQUIREMENT

In ***Furland v. American Airlines, Inc.,*** ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11 (ARB July 27, 2011), the Complainant, a pilot, had been counseled about the Respondent's belief that his sick leave use was excessive. About six weeks later, on June 27, 2007, the Complainant took

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himself off a scheduled flight on sick leave due to gastrointestinal effects from airline food on a prior flight. The next day the Employer advised the Complainant that if he did not provide a doctor's note, he could be subjected to corrective action including reversal of his paid sick leave to unpaid. [The parties disagreed about whether the Complainant had been previously informed of the medical verification requirement; the ALJ found that the Complainant had not been so previously informed.] A union representative then, on July 9, 2007, sent a letter to the Respondent on the Complainant's behalf protesting the request for a medical note, and asserting that the request for documentation was harassment and constituted unlawful "pilot pushing," i.e., pressuring a pilot to fly when unfit in violation of the Federal Aviation Regulations (FARs). The letter further stated that the Respondent had not told the Complainant that he would be under observation or that he would be required to provide medical documentation for sick leave use.

Later the Complainant and his union representatives met with a company representative to discuss the sick leave use on June 27, 2007, and the Complainant's failure to provide medical documentation for that leave. The company representative stressed that the Complainant called in sick after the Respondent warned him against calling in sick, while the union representative argued that the Respondent's demand for medical documentation pressured the Complainant to fly when he was sick, in violation of his legal obligations under the FARs. After the meeting, the Respondent deducted the amount it had paid for the June 27th sick leave from a later paycheck. The Complainant filed an AIR21 complaint.

Protected Activity

The ARB found that substantial evidence supported the ALJ's finding that the Complainant engaged in protected activity when he complained through the July 9, 2007 union letter and at the August 27, 2008 meeting that the Respondent's actions pressuring him to fly even when sick contravened the FARs. The ARB also found that the Complainant's taking himself off the June 27, 2007 flight was protected activity. The ARB found that the Complainant reasonably exercised his authority under the FARs in deeming himself unfit for flight based on his medical condition.

Contributing Factor and Clear and Convincing Evidence

The ARB found it abundantly clear that the Complainant proved that his protected activities contributed to the decision to dock his pay. It also found that substantial evidence supported the ALJ's finding that the Respondent failed to prove by clear and convincing evidence that it would have deducted the paid sick leave amount from the Complainant's pay absent protected activity. The ALJ had noted that the Respondent failed to present evidence of a company-wide policy requiring pilots to present medical documentation to support requests for sick leave, and had found that the Complainant had not been informed in the earlier counseling session that his future sick leave requests would require medical documentation and prior approval. The ARB elaborated:

> We agree with the ALJ that employers have a compelling business interest in requiring proof that their employees' absences based on illness are legitimate. However, without pilots having prior notice of such a requirement -- whether through company policy requiring such proof or advance notice that such proof will be required -- such a requirement can prove retaliatory in violation of AIR 21. Indeed, had Furland had prior notice that medical documentation was required to

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> support a request for sick leave, then the contributing factor behind the decision to dock his pay might have been a failure to supply medical documentation and the results in this case might be different. However, in light of the ALJ's findings that Furland had no such prior notice, we find that the ALJ's conclusion that American Airlines failed to prove by clear and convincing evidence that it would have docked Furland's pay notwithstanding his protected activity is fully supported by the substantial evidence of record and in accordance with applicable law.

USDOL/OALJ Reporter at 9-10.

PROTECTED ACTIVITY; REASONABLENESS OF BELIEF OF SAFETY VIOLATION; FACT THAT EQUIPMENT IS DEFERRED UNDER THE AIRCRAFT'S MINIMUM EQUIPMENT LIST DOES NOT NEGATE PILOT'S OVERALL RESPONSIBILITY FOR SAFETY OF FLIGHT OPERATIONS; THAT RESPONSIBILITY INCLUDES THE SAFETY OF PERSONNEL WHO ASSIST IN DEPLANING

In ***Sitts v. COMAIR, Inc.***, ARB No. 09-130, ALJ No. 2008-AIR-7 (ARB May 31, 2011), the Complainant, a pilot, was terminated from employment with the Respondent after he reported a malfunctioning passenger power door assist system that he believed affected aircraft safety, and when the Respondent did not address the safety concern, refused to fly the plane. The inoperable system appeared on the aircraft's Minimum Equipment List (MEL). An FAA regulation permits operation of an aircraft under specified conditions with inoperative equipment on the MEL. The door could be operated manually, but required ground crew who knew how to do safely. Improper manual operation could result in injury to both the crew and the door.

The ARB first analyzed whether the Complainant reasonably believed that his report of the inoperable system involved a violation of aircraft safety. The ARB found that FAA regulations would lead a pilot to reasonably believe that he or she has direct responsibility for determining whether an aircraft is in safe condition, and the duty to report such concerns. The ARB found credible testimony in the record that the pilot's obligations over flight safety includes the moments prior to takeoff, and the moments after landing and deplaning. Thus, the pilot's safety obligations reasonably extend to the safety of the personnel who assist in deplaning. The ARB noted that the Complainant's past experiences with inoperable passenger power door assist systems supported a finding that his safety concerns were genuine. The Respondent contended that the pilot in command regulations conflict with the MEL regulation and that MEL-deferrals should take priority. The ARB found that ". . . these two regulations do not necessarily conflict. While the MEL regulation authorizes pilots to fly aircraft with malfunctioning equipment, there is *nothing in the regulation requiring that pilots do so*. Indeed, there is no language in the MEL regulation mandating that aircraft with MEL-deferred equipment be flown. Rather, the MEL regulation permits pilots to fly such aircraft by carving an exception to the general rule that "no person may take off an aircraft with inoperative instruments or equipment installed unless" certain conditions are met." USDOL/OALJ Reporter at 112 (emphasis as in original) (footnote omitted). The ARB found that substantial evidence supported the ALJ's finding that the Complainant had an objectively reasonable belief that flying an aircraft with a malfunctioning passenger power door assist system, even though MEL-deferred, was unsafe. The ARB also agreed with the ALJ that the Respondent's efforts to convince the Complainant that the working conditions were safe, were insufficient to undermine the continuing reasonableness of the Complainant's safety concerns.

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Thus, the Complainant's subsequent decision not to fly the aircraft was reasonable and protected activity under the AIR21 whistleblower provision.

PROTECTED ACTIVITY; TAPING OF CONVERSATIONS TO SUPPORT AIR21 CLAIM NOT PROTECTED WHERE THEY HAD BECOME INDISCRIMINATE AND EXCESSIVE

In ***Hoffman v. NetJets Aviation, Inc.***, ARB No. 09-021, ALJ No. 2007-AIR-7 (ARB Mar. 24, 2011), the ARB affirmed the ALJ's finding that the Respondent placed the Complainant on paid administrative leave because it was concerned that the Complainant was recording confidential information and non-safety related conversations, rather than because of the protected activity of gathering evidence of air safety violations and discovery for an ongoing AIR21 whistleblower proceeding. The record established that the Complainant had made over 750 recordings, and the Respondent had a reasonable belief that some of the recordings did not involve protected activity. Moreover, there was evidence that the Respondent had been concerned about recordings of confidential financial information, and had scaled back the amount of confidential information it disclosed to employees. The Complainant admitted that he had recorded portions of meetings during which the company's financial status and business strategy were discussed, and the evidence established that at least 37 recordings were not related to safety concerns.

The ARB emphasized that the lawful taping of conversations to obtain information about safety-related conversations is protected activity and should not subject an employee to any adverse action. Nonetheless it distinguished earlier decisions holding that tape recording to gather evidence of activities that are protected under the whistleblower statutes is protected, on the ground that the Complainant in the instant case had engaged in indiscriminate and excessive recording of topics unrelated to air safety, including the company's business strategy and finances.

One member of the Board dissented on the ground that under the facts of the case, it was impossible to separate legal from illegal motives. Thus, the dissenter would have proceeded to mixed motive analysis and found the Respondent liable for illegally placing the Complainant on administrative leave while the tapes were reviewed by the Employer. Because the Complainant had been paid while on leave, and had only suffered negligible loss of flight time due to protected activity, the dissenter would not have awarded damages. The dissenter, however, would have declared the Respondent's recordation policy, as written, illegal as a means of affirmative relief.

PROTECTED ACTIVITY; LACK OF REASONABLE BELIEF OF AIR SAFETY VIOLATION ONCE DETERMINATION MADE THAT SUSPICIOUS DEVICE WAS FAA FLIGHT APPROVED; MERE WORDS DO NOT CREATE VIOLATION OF AIR SAFETY REGULATIONS WHERE THERE WAS NO VIOLATION IN FACT

In ***Hindsman v. Delta Air Lines, Inc.***, ARB No. 09-023, ALJ No. 2008-AIR-13 (ARB June 30, 2010), the Complainant, a lead flight attendant, noticed, before departure of a flight, a suspicious portable oxygen device. She asked the gate agent and captain about it. Both replied that they thought that devices such as portable oxygen concentrators were allowed on board. A lead agent told the Complainant that the Respondent would not delay the flight and that she would have to decide whether to take the passengers who owned the device, or to deplane them. The Complainant consulted a manual and determined that the device was approved for flight by the FAA. Upon

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being informed by another flight attendant that the device was FAA-approved, the caption told that attendant to "shut the door and let's go." The flight left 8 minutes late. Two days later the Complainant wrote to the Respondent's flight safety director to report the incident, alleging that the Respondent was going to dispatch the flight before she found out that the device was flight approved. Several months later the Complainant was discharged on grounds of excessive absenteeism. The Complainant filed an AIR21 complaint.

The ALJ granted summary decision in favor of the Respondent on the ground that, although the Complainant had been aggressively carrying out her duties to ensure safety, once she discovered that the device was flight approved she could not have had a reasonable belief that flying with the device on board violated air safety regulations, and therefore she had not engaged in protected activity. The ARB agreed. On appeal the Complainant argued that her memo to the flight safety director was protected activity. The ARB, however, found that the memo demonstrated that no violation of air safety regulations occurred, and that according to the Complainant's own account of the incident , she, the captain, and the flight attendant all knew that the device was acceptable before the plane took off. The Complainant also argued that there had been a violation because ground personnel put on-time departure over safety by attempting to dispatch the flight without investigation of the device. The ARB agreed with the ALJ, however, that "mere words do not create an FAA violation when the parties' actual conduct does not violate the FAA regulations." USDOL/OALJ Reporter at 6, quoting ALJ decision at 6. Moreover, while the lead agent did say that the flight would not be delayed, she also told the Complainant to decide whether the passengers and the device or to deplane them; the Complainant chose to determine whether the device was FAA-approved and did so.

PROTECTED ACTIVITY; PILOT'S AUTHORITY TO DECLARE HIMSELF AND HIS CREW UNFIT TO FLY

In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the ARB found that substantial evidence supported the ALJ's finding that the Complainant engaged in protected activity when he declared himself and his crew unfit to fly, and informed his supervisors. The ALJ found that the Complainant genuinely believed that he would be violating air safety regulations if he flew, and that belief was objectively reasonable. In regard to the fitness of the crew, the ALJ pointed to federal regulations conferring final authority and responsibility on the pilot in control of the aircraft. Although the Employer argued that this ruling would permit crewmembers to refuse assignments based on the mere speculation that they will not get sufficient rest and might be unfit later when the flying is to take place, the ARB found that substantial evidence supported the ALJ's finding that the Complainant was unfit at the time he so declared. The Complainant had discomfort from a recent medical procedure, and had just endured an arduous three-hour flight in inclement weather.

PROTECTED ACTIVITY; REQUIREMENT THAT COMPLAINANT REASONABLY BELIEVE IN EXISTENCE OF VIOLATION RELATING TO AIR CARRIER SAFETY

In order to be protected under the whistleblower provision of AIR21, the complainant must reasonably believe in the existence of a violation of a regulation, order, or standard relating to air carrier safety. Once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation. In ***Malmanger v. Air Evac EMS, Inc.***,

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ARB No. 08-071, ALJ No. 2007-AIR-8 (ARB July 2, 2009), the Complainant alleged three instances of protected activity. The ARB, however, agreed with the ALJ that none of the instances were based on a "reasonable belief" that the Respondent had violated any provision of Federal law relating to air safety.

First, the Complainant had sent an e-mail to the Respondent's CEO and Board of Directors alleging that several years before, a friend of the CEO had taken a joyride in one the Respondent's helicopters and had returned the helicopter in an unairworthy condition, and that the CEO had caused pressure to be put on the Complainant - a regional mechanic - to keep his mouth shut about the incident. The "joyriding" incident had occurred years before, and the e-mail had been sent shortly before a scheduled evaluation of the Complainant. The Complainant anticipated that the evaluation process would be used to get rid of him. The ARB found that the e-mail was not protected activity because when the Complainant sent the e-mail, he knew that his concerns about the joyriding incident had been resolved. The Complainant himself had signed off on the safety of the helicopter before it was returned to service, and had never raised concerns relevant to this issue in the three years that elapsed before he sent his e-mail.

Second, the Complainant did not demonstrate that he reasonably believed that another mechanic had violated an air safety rule when the two disagreed about which maintenance manual was applicable to determine whether a tail rotor assembly was out of limits. The matter had been resolved because the Complainant had ignored the other mechanic's advice and changed the rotor assembly. Moreover, the Complainant did not pinpoint an air safety violation.

Third, the Complainant did not reasonably believe that a supervisor had violated an air safety rule when he allowed a base mechanic to keep a helicopter in service pending delivery of a new oil tank. By the time the Complainant complained to management, he knew that the oil tank had been replaced, and it was no longer reasonable for the Complainant to continue claiming a safety violation.

Finally, the Complainant argued that the ALJ improperly relied on the Complainant's motivation for the complaints (the ALJ finding that the complaints were made to forestall a probable adverse performance evaluation). The ARB agreed with the proposition that there is no requirement that a whistleblower's actions be motivated by safety concerns. Nonetheless, the ARB found that the ALJ's finding that the Complainant "was insincere [was] a finding that [the Complainant] did not actually believe that violations existed at the time he made his complaints."

PROTECTED ACTIVITY; COMPLAINANT'S LACK OF REASONABLE BELIEF IN VERACITY OF ALLEGATION

CONTRIBUTING CAUSE; EVIDENCE THAT SOLE MOTIVATING FACTOR WAS FALSE ALLEGATION MADE BY COMPLAINANT

In ***Walker v. USDOL***, No. 07-72072 (9th Cir. Dec. 4, 2008) (unpublished) (case below ARB No. 05-028, ALJ No. 2003-AIR-17), the Ninth Circuit found that the ARB did not err in affirming the ALJ's finding that the Complainant had not engaged in protected activity when he called the company employee hotline to make an allegation against three supervisors where the allegation was false and the Complainant did not have a reasonable belief in its veracity. While the

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Complainant may have engaged in other protected activity, the ARB did not err in concluding that substantial evidence supported the ALJ's finding that the falsehood solely motivated the termination.

PROTECTED ACTIVITY; MUST RELATE TO A REGULATION OR ORDER, MUST BE SPECIFIC, AND MUST BE REASONABLY BELIEVED BY THE COMPLAINANT

To constitute protected activity under AIR21, a complainant's complaints must relate to a regulation or order, must be specific, and must be reasonably believed by the complainant. In ***Simpson v. United Parcel Service***, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008), one of the Respondent's aircraft was taken out of service to correct a problem with the cabin pressurization system. After the Complainant and a co-worker reported that the system had been fixed, and signed the logbook to confirm the correction, the Complainant was found still working in the cockpit. She explained that there had been too many deferrals with that aircraft, and that something was "illegal." According to an acting supervisor, when pressed to explain, the Complainant did not point to anything in particular but just stated that something didn't feel right. The ARB held that this was not protected activity because the Complainant (1) was never able to indicate to any supervisor a concern related to a violation of any safety regulation or order other than the pressurization system problem which had already been corrected, (2) failed to communicate any specific safety defect that her employer could take corrective action on, and (3) did not demonstrate a reasonable belief that a violation of an air safety regulation or order existed given that she had signed off on the logbook.

PROTECTED ACTIVITY; MERELY PERFORMING SAFETY-RELATED DUTIES, STANDING ALONE, DOES NOT CONSTITUTE PROTECTED ACTIVITY

A maintenance supervisor's carrying out of his required, safety-related duties -- supervising the maintenance of the Respondent's aircraft and reporting, repairing, or deferring the repair of any documented defects -- is not, standing alone, protected activity under AIR21. Rather, to be protected, the employee must provide information to the employer or to the federal government that relates FAA orders, regulations or standards, or other provision of law related to air carrier safety. While laudable, competently and aggressively carrying out duties to ensure safety does not, standing alone, constitute protected activity. Thus, in ***Sievers v. Alaska Airlines, Inc.***, ARB No. 05-109, ALJ No. 2004-AIR-28 (ARB Jan. 30, 2008), the ARB found that the Complainant did not engage in protected activity regarding incidents in which information was not provided to the employer or to a Federal entity, but that he did engage in protected activity when he refused to override a maintenance crew's decision to take a plane out of service because it would have been "wrong" (i.e., it would have violated the FAA rule at 14 C.F.R. § 135.443).

PROTECTED ACTIVITY; FILING OF DISCOVERY IN A PRIOR WHISTLEBLOWER PROCEEDING

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the ALJ erred in concluding that serving a discovery request could not constitute protected activity. The ARB held that "it is possible that serving a discovery request potentially could constitute protected activity if the request was part of a whistleblower complaint." Slip op. at 10 (footnote omitted).

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PROTECTED ACTIVITY; UNDER AIR21, THE PROVISION OF INFORMATION ABOUT SAFETY IS PROTECTED ONLY WHEN THE COMPLAINANT ACTUALLY BELIEVES IN THE EXISTENCE OF A VIOLATION

In ***Walker v. American Airlines, Inc.***, ARB No. 05-028, ALJ No. 2003-AIR-17 (ARB Mar. 30, 2007), the Complainant, a level 4 maintenance supervisor, made a call to the Respondent's hotline primarily complaining about a change in policy regarding how overtime work would be credited, but also including a statement charging that several higher level supervisors had been intimidating the Complainant into signing off on tasks that had not been completed or were not safe just so they could get the plane out. The Complainant later signed a statement retracting the charge that the supervisors had been intimidating him. Following a hearing, the ALJ found that the Complainant had not had a good faith and reasonable basis for making the allegation about supervisor pressure to sign off on items. The ALJ's finding was largely based on credibility determinations, which the Complainant challenged on appeal, but which the ARB found were supported by substantial evidence. The ARB also affirmed the ALJ's finding that the hotline call was not protected activity because it was not made in good faith. Assuming for purposes of argument that the hotline call implicated safety, the ARB held that the provision of information is protected activity only when the complainant actually believes in the existence of a violation.

PROTECTED ACTIVITY; COMPLAINANT'S REASONABLE BELIEF THAT FLYING WITH A FATIGUED CREW WOULD VIOLATE A FEDERAL AVIATION REGULATION

In ***Rooks v. Planet Airways, Inc.***, ARB No. 04-092, ALJ No. 2003-AIR-35 (ARB June 28, 2006), the ARB affirmed the ALJ's finding that the Complainant engaged in protected activity when he refused to complete a delayed flight because the flight crew was fatigued, and the Complainant believed that flying with a fatigued crew was a hazard covered by the federal aviation regulation ("FAR") at 14 C.F.R. § 121.553. The ARB noted that the Complainant did not have to prove that flying with fatigued crew members actually violated the FARs, as long as his belief that it did was reasonable.

PROTECTED ACTIVITY; GENUINE BELIEF IN VIOLATION OF FEDERAL AIR CARRIER SAFETY LAW; OBJECTIVE REASONABLENESS OF BELIEF; SPECIFICITY OF CONCERN

In ***Rougas v. Southeast Airlines, Inc.,*** ARB No. 04-139, ALJ No. 2004-AIR-3 (ARB July 31, 2006), the ARB remanded to the ALJ for further fact finding where the ALJ had overlooked several circumstances alleged by the Complainant in his post-hearing brief to constitute protected activity. The ARB instructed that the ALJ only needed to look at the activities that the Complainant raised in the post-hearing brief because arguments made for the first time on appeal are waived. The ARB also instructed the ALJ that the governing law for determining whether an activity is protected under AIR21 requires findings on whether:

- the complainant genuinely believed that there was or would be a violation or alleged violation of an FAA order, regulation or standard, or a Federal law relating to air carrier safety
- the concern was objectively reasonable in the circumstances, and

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- the complainant expressed his concern "in a manner that was 'specific' with respect to the 'practice, condition, directive or event' giving rise to the concern."

Slip op. at 14.

PROTECTED ACTIVITY; PRETEXTUAL REASON AS EVIDENCE OF DISCRIMINATION

In ***Lebo v. Piedmont-Hawthorne***, ARB No. 04-020, ALJ No. 2003-AIR-25 (ARB Aug. 30, 2005), where the evidence established that the Respondent's stated reason for discharging the Complainant -- that it discovered that the Complainant's work was much worse that it first suspected when it suspended him -- was pretext, the ARB found such pretext was evidence of discrimination.

PROTECTED ACTIVITY; CARRYING OUT AGGRESSIVE AND COMPETENT INSPECTIONS REQUIRED OF A MAINTENANCE SUPERVISOR; SUCH ACTIVITIES DO NOT REQUIRE A FORMAL COMPLAINT TO THE FAA OR A COMPANY HOT-LINE TO BE PROTECTED

In ***Sievers v. Alaska Airlines Inc.***, 2004-AIR-28 (ALJ May 23, 2005), the ALJ found that the Complainant, an aviation line maintenance supervisor, engaged in protected activity when he carried out his required, safety-related duties competently and aggressively, even though some of the defects identified by the Complainant and his staff did not implicate serious safety concerns. *Mackowiak v. Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004), at 23; *Szpyrka v. American Eagle Airlines, Inc.*, 2002-AIR-9 (ALJ July 8, 2002). The ALJ rejected the Respondent's argument that inspection duties were not protected activity because they did not involve a complaint to the FAA or the Respondent's safety "hot line." The ALJ wrote: "For a finding of protected activity, it is sufficient that Complainant carried out his required, safety-related duties: supervising the maintenance of Respondent's aircraft and reporting, repairing, or deferring the repair of any documented defects." Slip op. at 24. The ALJ observed that the Complainant's aggressive performance of his duties was not conducted out of malice, but in an atmosphere of concern over the appropriate balance between safety and economics given a tragic crash of one of the Respondent's flights in January of 2000. The crash was linked to a maintenance issue. Moreover, the Respondent had commissioned a report on its safety procedures in the wake of that crash; the report warned care must be take not to permit economic pressures on the aviation industry to allow a "culture creep" away from an emphasis on safety. These circumstances were well known to the Complainant and his staff.

PROTECTED ACTIVITY; REPORT OF BELIEF OF EXPOSURE TO PESTICIDE SPRAYING MANDATED BY FOREIGN GOVERNMENTS, BUT NOT SUBJECT TO ANY LAW OF THE U.S., IS NOT PROTECTED ACTIVITY WITHIN THE MEANING OF THE WHISTLEBLOWER PROVISION OF AIR21

In ***Mehan v. Delta Air Lines***, ARB No. 03-070. ALJ No. 2003-AIR-4 (ARB Feb. 24, 2005), the ARB granted summary judgment in favor of the Respondent because the Complainant had failed to articulate a viable factual basis for her claim that she had engaged in protected activity. Specifically, the Board wrote: "Reporting to Delta her belief that she had been injured by pesticide

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spraying that was mandated by foreign governments, but that was not subject to any law of the United States, does not fall within the plain language of § 42121 -- providing information or filing a proceeding relating to a violation of Federal air carrier safety laws."

PROTECTED ACTIVITY; COMPLAINTS ABOUT CALL SIGNS AND COMMERCIAL ACTIVITIES

In ***Barker v. Ameristar Airlines, Inc.***, 2004-AIR-12 (ALJ Oct. 7, 2004), the ALJ found that the Complainant's complaints about the Respondent's use of an affiliated company's call signs and its alleged commercial transactions outside the scope of its Part 125 certification were not protected activity because neither allegation related to air carrier safety.

PROTECTED ACTIVITY; PARTICIPATION IN INVESTIGATION OF ACTIVITY REASONABLY PERCEIVED TO BE IN VIOLATION OF FAA REGULATIONS

In ***Hendrix v. American Airlines, Inc.***, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2003), the ALJ found that the Complainant engaged in protected activity under the AIR21 when he participated in the investigation of an employee who was creating art objects out of company material where the Complainant had the reasonable belief that FAA regulations on the disposal of scrap aircraft parts were not being following. There was no dispute that the manager who initiated the investigation reported specific violations. Thus, even if the Complainant himself did not articulate specific violations, his conduct was protected activity because he was assisting that manager in the investigation, and the AIR21 protects employees who provide or "cause to be provided" information relating to the relevant violations.

PROTECTED ACTIVITY; HOTLINE COMPLAINT MADE WITHOUT A REASONABLE BASIS

In ***Walker v. American Airlines***, 2003-AIR-17 (ALJ Nov. 16, 2004), the ALJ found that the Complainant was not engaged in protected activity when he made a call to the company hotline. The ALJ found that the evidence showed that although the Complainant might have had a good faith belief and reasonable basis for making a hotline complaint about understaffing and deadline pressures, the complaint he actually lodged -- alleging that managers were intimidating him into signing off on tasks that they knew had not been completed or were not safe just so they could get planes off the ground -- was not grounded in good faith or a reasonable belief. The ALJ recognized that the distinction may not seem great, but it was the difference between accusing managers of unknowingly causing safety problems by pushing too hard and intentionally disregarding known safety problems.

PROTECTED ACTIVITY; THREE ELEMENTS; REGISTERING OF COMPLAINT WITH LOCAL AUTHORITIES FOLLOWING CONSULTATION WITH FEDERAL AUTHORITY

In ***Svendsen v. Air Methods, Inc.***, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB adopted the ALJ's finding that the Complainant was engaged in protected activity when he reported a dust cloud near the airport at which he was assigned for air ambulance flights. The dust cloud had been produced by a car race organized by a local Indian tribe, and the Complainant feared that

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it reduced visibility, especially for incoming flights. In the ALJ's decision, he found that "a protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government." ***Svendsen v. Air Methods, Inc.*****,** 2002-AIR-16 (ALJ Mar. 3, 2003), slip op. at 48. The ALJ found that the complaint touched on air carrier safety and represented an objectively reasonable flight safety hazard. *Id.* at 49. The ALJ noted that the Complainant registered his complaint with the local tribe police and government, which were neither the Federal government nor the Complainant's employer. The Complainant had done so, however, after first reporting the visibility issue to a Federal flight service station, which concluded that it did not have the ability to act on the complaint and directed the Complainant to local authorities.

PROTECTED ACTIVITY; ALLEGED ACT MUST IMPLICATE SAFETY DEFINITIVELY AND SPECIFICALLY

In ***Fader v. Transportation Security Administration*****,** 2004-AIR-27 (ALJ June 17, 2004), the Complainant's AIR21 complaint stated only that he had reported violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud. The ALJ, citing caselaw to the effect that protected activity under AIR21 must raise safety definitively and specifically, granted the Respondent's motion to dismiss for failure to state claim upon which relief can be granted.

PROTECTED ACTIVITY; PENDING FAA REGULATION

In ***Weil v. Planet Airways, Inc.***, 2003-AIR-18 (ALJ Mar. 16, 2004), the ALJ found that the Complainant engaged in protected activity when he forcefully advocated for implementation of the Advanced Passenger Information System (APIS) imposed after September 11 to obtain and monitor information about people entering the United States. The ALJ found that a protected activity under AIR21 has three components: "First, the report or action must involve a purported violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least 'touch on' air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer or the Federal Government (49 U.S.C. § 42121 (a) (1))."

At the time the Complainant engaged in his advocacy on APIS, the FAA had only announced the intention to implement such a system. The ALJ, however, found that an APIS rule was "imminent" and that given that whistleblower laws are to be given a broad interpretation, found that the Complainant met the first component of protected activity under AIR21. The ALJ found that the Complainant had a reasonable concern that the Respondent would not meet the APIS compliance deadline, and that he had clearly communicated that concern to Respondent's management. The Complainant, however, was ultimately found by the ALJ not to be entitled to relief under the AIR21 whistleblower provision because he was unable to prove that his protected activity contributed to his termination from employment.

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PROTECTED ACTIVITY; MUST BE SPECIFIC IN RELATION TO GIVEN PRACTICE, CONDITION, DIRECTIVE OR EVENT; COMPLAINANT MUST REASONABLY BELIEVE IN EXISTENCE OF VIOLATION

In ***Peck v. Safe Air International, Inc***., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB described protected activity under the whistleblower provision of AIR21 as follows:

> Air carriers are prohibited under AIR21 section 519 from discharging or otherwise discriminating against any employee because the employee, inter alia, provided the employer or Federal Government with information "relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety . . . ." 49 U.S.C.A. § 42121(a). While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Envtl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Leach v. Basin 3Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).

PROTECTED ACTIVITY; PERFORMING DUTIES AS A QUALITY CONTROL INSPECTOR INHERENTLY INVOLVE PROTECTED ACTIVITY

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the Respondent maintained that the Complainant's reporting of damaged and missing bin latch shrouds did not constitute protected activity because such did not implicate safety. The ALJ agreed that the record tended to show that broken or missing shrouds did not implicate a serious safety concern, but nonetheless found the Complainant, as a quality control inspector, was engaged in protected activity when he reported the damaged or missing bin latch shrouds, citing *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) and *Richter v. Baldwin Associates*, 1984-ERA-9 (Sec'y Mar. 12, 1986), and FAA regulations imposing a duty on inspectors to report such discrepancies.

PROTECTED ACTIVITY; WORK REFUSAL; REASONABLE BELIEF THAT WORK ASKED TO BE PERFORMED WOULD VIOLATE FAA REGULATIONS OR QUALITY CONTROL PROCEDURES

In ***Kinser v. Mesaba Aviation, Inc***., 2003-AIR-7 (ALJ Feb. 9, 2004), the Complainant alleged that his refusals to sign off on several C-checks were protected activity. The ALJ observed that AIR21 does not specifically list a refusal as protected activity, whereas section 5851 of the ERA does. The ALJ found, however, that caselaw in existence prior to the amendment of the ERA to expressly include work refusals as protected activity nonetheless categorized refusals as such. *Durham v. Georgia Power Co.*, 1986-ERA-9 (ALJ Oct. 24, 1986). Thus, the ALJ found that if the Complainant's "refusal was based on a reasonable belief that he was being asked to violate FAA regulations and quality control procedures by signing off on the C-check, his actions could represent instituting proceedings under AIR21." The ALJ, however, ultimately found that the Complainant did not have a reasonable belief that signing off on the checks would violate the law, and therefore there refusals were not protected activity.

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PROTECTED ACTIVITY; FILING A WHISTLEBLOWER COMPLAINT

Filing a complaint or charge of employer retaliation because of safety and quality control activities is protected activity under 49 U.S.C. § 42121(a)(1)-(4) (2002). ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004).

PROTECTED ACTIVITY; OBJECTIVELY REASONABLE BELIEF OF VIOLATION OF FAA REGULATION OR OTHER AVIATION LAW

In ***Parshley v. America West Airlines*****,** 2002-AIR-10 (ALJ Aug. 5, 2002), the ALJ reviewed the principles developed in environmental whistleblower cases, and found that a protected activity under AIR 21 similarly has two elements: (1) the complaint must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; (2) the complainant's belief about the purported violation must be objectively reasonable.

The ALJ noted that there is a caselaw mandate to broadly interpret the meaning of protected activity. The ALJ nonetheless concluded that Complainant's reporting to her supervisor that she had received a report that an individual had made improper computer entries indicating the completion of an inspection step for 800 incoming aircraft parts, without verifying completion of an inspection for documenting serviceability, was not protected activity. The ALJ found that this was not protected activity because Complainant had failed to identify any FAA regulation or aviation statute that requires such a computer inventory system. The ALJ was unwilling to drawn an inference that such a process was required for FAA mandated inspections and certifications. The ALJ, however, did find that Complainant engaged in protected activity when she reported to her supervisor that some aircraft parts in the warehouse did not have an FAA- required serviceable tag, based on credible testimony that such tags were required by the FAA.

PROTECTED ACTIVITY; MAINTAINING AIRCRAFT MAINTENANCE LOGS

In ***Szpyrka v. American Eagle Airlines, Inc.***, 2002-AIR-9 (ALJ July 8, 2002), Complainant alleged that Respondent reprimanded and suspended him in retaliation for recording safety-related mechanical deficiencies in aircraft maintenance logs causing the removal of aircraft from passenger transport service and necessitating costly repairs. Respondent alleged that Complainant was disciplined for purposely waiting to make those records in locations where Respondent would have to pay a contractor rather than Respondent's own mechanics to make any needed repairs, at a greater cost to Respondent, for the purpose of voicing his dislike of the company.

Respondent filed a motion for summary decision based, *inter alia*, on the argument that mere entry of observations in aircraft maintenance logs does not, in and of itself, constitute either violations of federal regulations or a "proceeding" within the meaning of AIR21. The ALJ declined to grant summary decision on this basis, finding:

> To be sure, it is not the existence of the pre-flight discrepancy which constitutes a violation, and a crew member's notation in a maintenance log is not a proceedings. Yet, an attempt to retaliate for, interfere with, or improperly influence the performance of a duty required by the FAR may trigger the protections of AIR 21.

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> Consequently, if an airline seeks retribution against an aircrew member for performing required safety-related missions or if it engages in harassment, intimidation, or coercion in an attempt to interfere with an aircrew member's duty in the future, honestly and objectively, to carry out pre-flight inspection and reporting obligations, the airline's action may implicate the broad, remedial protections afforded by AIR 21. Since the circumstances which may constitute such interference are fact-specific, summary decision would be inappropriate.

PROTECTED ACTIVITY; MAINTAINING AIRCRAFT MAINTENANCE LOGS; OBJECTIVELY REASONABLE PERCEPTION STANDARD

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), the ALJ applied ERA whistleblower caselaw to find that a report of any objectively reasonable perceived violation of federal laws or standards relating to air carrier safety is protected activity, even if the allegation is not ultimately substantiated.

PROTECTED ACTIVITY; COMPLAINANT'S MOTIVE MAY INFLUENCE WHETHER CONDUCT WAS PROTECTED

In ***Szpyrka v. American Eagle Airlines, Inc.,*** 2002-AIR-9 (ALJ July 8, 2002), Complainant alleged that Respondent reprimanded and suspended him in retaliation for recording safety-related mechanical deficiencies in aircraft maintenance logs causing the removal of aircraft from passenger transport service and necessitating costly repairs. Respondent alleged that Complainant was disciplined for purposely waiting to make those records in locations where Respondent would have to pay a contractor rather than Respondent's own mechanics to make any needed repairs, at a greater cost to Respondent, for the purpose of voicing his dislike of the company.

Complainant filed a motion for summary decision, arguing that, even if he acted maliciously, AIR21 protects behavior (the pre-flight inspection) that was a contributing factor in the unfavorable personnel action. The ALJ declined to grant summary decision, finding that although AIR21 might impose a lightened burden in establishing a prima facie case, the caselaw suggests that the circumstances of the case necessitate a fact-dependent inquiry focusing on the true impulses motivating the employee's actions, *citing Zurenda v. J&K Plumbing & Heating Co. Inc.*, 1997-STA-16 (ARB June 12, 1998).

PROTECTED ACTIVITY; COMPLAINTS MADE TO EMPLOYEES WITHOUT CONTROL OVER COMPLAINANT'S EMPLOYMENT; COMPLAINTS TAKEN TO THE PILOT DESPITE AINTENANCE SUPERVISOR'S CONCLUSION THAT THE AIRCRAFT WAS FLIGHT WORTHY

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), the ALJ rejected Respondent's contention that complaints which touch on aircraft safety made internally to those without control over the complainant's employment are not protected activities. The ALJ held that the established law is that even complaints to co-workers as well as "informal" complaints to supervisors can be protected activities and that the form of the "complaint" is not critical. The ALJ held that at the point where on-duty maintenance supervisors and the pilots were informed by Complainant of

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potential safety defects, the reports became protected activity -- the ALJ finding that both the supervisors and pilots were in a position to act on safety related complaints.

The ALJ also held that "[e]ven though United might believe supervisors may be better at balancing the potential for delay versus a repair requirement, the broad purpose of the Act would best be served by protecting mechanics, particularly those with A&P licenses, who have such differences of opinion with supervisors regarding a safety issue and who take the matter to the flight crew." (footnote omitted).

V. ADVERSE EMPLOYMENT ACTION

ADVERSE EMPLOYMENT ACTION; WHERE EVIDENCE ESTABLISHED THAT COMPLAINANT WAS NOT QUALIFIED FOR THE POSITION TO WHICH APPLIED, RESPONDENT'S "REFUSAL TO REHIRE" WAS NOT AN ADVERSE EMPLOYMENT ACTION

In ***Aityahia v. Mesa Airlines***, ARB No. 2019-0068, ALJ No. 2018-AIR-00044 (ARB June 9, 2020) (per curiam), the ARB summarily affirmed the ALJ's dismissal of Complainant's refusal to rehire AIR21 complaint. The ARB stated that the ALJ had thoroughly considered whether the refusal to rehire was an adverse employment action, and the facts readily demonstrated that it was not, as extensive evidence established that Complainant was not qualified for the position to which he applied in 2017. Complainant had alleged an adverse employment action of termination in 2013. The timely filed contention was limited to a 2017 refusal to rehire Complainant. In this regard, the ALJ credited the training pilots' assessment of Complainant's flying proficiency, which was corroborated by the reviewing officials in 2013.

ADVERSE ACTION; ARB SUMMARIZES CURRENT STATE OF THE LAW ON WHAT CONSTITUTES ADVERSE ACTION UNDER AIR21

ADVERSE ACTION; SUPERVISOR'S ALLEGED STATEMENT TO BE CAREFUL BECAUSE "THEY ARE WATCHING YOU" FOUND NOT TO ESTABLISH ADVERSE ACTION UNDER THE FACTS OF THE CASE WHERE RESPONDENT MAINTAINED THAT THE COMMENT RELATED TO THE FACT THAT COMPLAINANT WAS WEARING A HAT, MAKING IT DIFFICULT TO DETERMINE WHETHER HE WAS WEARING THE CORRECT SAFETY HEAD GEAR, AND WHERE ANOTHER MANAGER HAD ASSURED COMPLAINANT THAT HE WAS NOT UNDER SURVEILLANCE

In ***Forrand v. FedEx Express***, ARB No. 2019-0041, ALJ No. 2017-AIR-00016 (ARB Jan. 4, 2021) (per curiam), the ARB affirmed the ALJ's Decision and Order denying Complainant's AIR21 retaliation claim in a per curiam decision in which the ARB limited its discussion to Complainant's arguments on appeal and to clarification of certain of the ALJ's rulings.

In regard to adverse action, the ARB initially summarized the legal standard under AIR21:

> AIR 21 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. It is illegal "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" who engages in protected activity." The Board has said that adverse action may also include firing, failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. An adverse action is "more than trivial" when it is "materially adverse" so as to "dissuad[e] a reasonable worker" from protected activity.

Slip op. at 5 (footnotes omitted). The ARB affirmed the ALJ's finding that Complainant suffered adverse actions as supported by substantial evidence and consistent with the law. The ARB, however, addressed an additional allegation by Complainant that Respondent surveilled him or threated him when a supervisor told him to "be careful, they are watching you." The ALJ had not addressed this allegation specifically in his opinion as adverse action, although he had made credibility findings on the relevant events. The ARB found that the record did not establish that this was protected activity, stating:

> Respondent claims it was difficult to tell if Complainant was wearing the correct safety gear on his head because he was wearing a hat, which prompted the comment. Subsequently, Complainant met with another manager about the conversation and said he felt threatened. The manager assured Complainant that he was not under surveillance. Afterwards, Complainant filed a workplace violence complaint. We find that a supervisor's comment of this kind, without more, is not an adverse action.

Id. at 5-6.

- *Hostile work environment*

HOSTILE WORK ENVIRONMENT; ARB SUMMARIZES CURRENT STATE OF THE LAW ON WHAT CONSTITUTES A HOSTILE WORK ENVIRONMENT UNDER AIR21; CLAIM MUST ESTABLISH INTENTIONAL HARASSMENT RELATED TO PROTECTED ACTIVITY, WHICH IS SUFFICIENTLY SEVERE OR PERVASIVE AS TO ALTER THE CONDITIONS OF EMPLOYMENT, AND TO CREATE AN ABUSIVE WORKING ENVIRONMENT SUCH THAT IT WOULD HAVE DETRIMENTALLY AFFECTED A REASONABLE PERSON AND DID DETRIMENTALLY AFFECT COMPLAINANT

HOSTILE WORK ENVIRONMENT; ALJ SHOULD HAVE ACKNOWLEDGED AND CONSIDERED ALL INCIDENTS ALLEGED BY COMPLAINANT AS SHOWING A HOSTILE WORK ENVIRONMENT—BUT—FAILURE TO DO SO WAS HARMLESS ERROR WHERE SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S CONCLUSION THAT COMPLAINANT FAILED TO ALLEGE SUFFICIENTLY SEVERE AND PERVASIVE HARASSMENT

In ***Forrand v. FedEx Express***, ARB No. 2019-0041, ALJ No. 2017-AIR-00016 (ARB Jan. 4, 2021) (per curiam), the ARB affirmed the ALJ's Decision and Order denying Complainant's

AIR21 retaliation claim in a per curiam decision in which the ARB limited its discussion to Complainant's arguments on appeal and to clarification of certain of the ALJ's rulings.

In regard to hostile work environment, the ARB initially summarized the legal standard under AIR21:

> Our final issue is Complainant's hostile work environment claim. To prevail, Complainant must prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.
>
> Proving a hostile work environment is a high bar. Discourtesy or rudeness is not harassment, nor are the ordinary tribulations of the workplace, such as sporadic use of abusive language, joking about protected status or activity, and occasional teasing. Relevant circumstances to consider in assessing whether conduct amounts to a hostile work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."

Slip op. at 6 (footnotes omitted).

In his decision, the ALJ had addressed the circumstances surrounding Complainant's earlier AIR21 complaints and other ongoing incidents detailed in the AIR21 complaint. The ARB also noted a few "smaller events" alleged by Complainant as contributing to a harassing environment, such as—among other examples—a discussion about a possible transfer to a department where Complainant had a negative history, and a supervisor's offer to drive Complainant home rather than provide a cab ride when Complainant had been upset. The ARB noted: "In sum, he argues his employer has retaliated against him in ways both large and small, and that the alleged retaliation is sufficiently pervasive to create a hostile work environment." *Id*. at 7. The ARB determined that the ALJ should have acknowledged and considered the "smaller incidents," but that the failure to do so was harmless error. The ARB stated:

> The ALJ correctly held that Complainant failed to prove that he was subject to a hostile work environment. He held that Complainant only satisfied the first prong—engaging in protected activity—of the four prong test. However, the ALJ failed to specifically acknowledge the smaller incidents Complainant alleged. Because a hostile work environment is an alternative theory of relief, those small incidents should be noted and given consideration. Despite a less than complete analysis, the ALJ's conclusion is sound—Complainant makes no allegations that amount to a sufficiently severe and pervasive harassment. The ALJ's conclusion here, as elsewhere, is supported by substantial evidence and is consistent with the law.

Id. (footnote omitted).

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ADVERSE ACTION; EMPLOYER'S DIRECTIVE TO A PILOT TO UNDERGO A PSYCHOLOGICAL EVALUATION IS NOT, IN ITSELF, AN ADVERSE EMPLOYMENT ACTION; REQUIRING AN EVALUATION IN A RETALIATORY FASHION, HOWEVER, MIGHT BE ACTIONABLE AS ADVERSE ACTION

In ***Estabrook v. Federal Express Corp.***, ARB No. 2017-0047, ALJ No. 2014-AIR-00022 (ARB Aug. 8, 2019) (per curiam), Complainant was a pilot for FedEx. The ALJ concluded that two "Not Operationally Qualified" (NOQ) determinations grounding Complaint from flight duty, and a directive to comply with a 15D fitness for duty examination, were adverse actions under AIR21. Because FedEx did not challenge this conclusion on appeal, the ARB affirmed these findings. However, the ARB included an explanatory footnote:

> While we do not disturb the ALJ's findings and conclusions, we note that an employer's directive to a pilot to undergo a psychological evaluation, in and of itself, is not an adverse action. *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 11 (ARB May 8, 2017) (an adverse action is "more than trivial" when it is "materially adverse" so as to "dissuad[e] a reasonable worker" from protected activity). FedEx's 15D evaluation is part of an air carrier's safety responsibility for employing a pilot. A requirement of periodic and "for cause" psychological assessments for aircraft pilots is beneficial to the airline community and to the public. For example, it is not an adverse action to require a pilot to undergo physicals and vision and hearing tests to ensure the pilot's physical competency to operate an aircraft. Second, a psychological assessment may benefit a pilot who actually needs counseling. The 15D evaluation is a desirable tool to protect the public and the employer from the foreseeable danger of an accident. Estabrook knew of the 15D process and it was part of the collective bargaining agreement with FedEx. The parties do not dispute that Estabrook continued to be paid during his grounding.
>
> We do not suggest that a directive to undergo a 15D examination, in itself, could never be an adverse action. If selectively implemented or utilized in a retaliatory fashion, subjecting an employee to a 15D evaluation might be actionable as an adverse action.

- *Suspension without pay*

ADVERSE EMPLOYMENT ACTION; SUSPENSION WITHOUT PAY

In ***Cont'l Airlines, Inc. v. Admin. Review Bd., USDOL***, No. 15-60012 (5th Cir. Jan. 7, 2016) (unpublished) (2016 U.S. App. LEXIS 324; 2016 WL 97461) (case below ARB No. 10-026, ALJ No. 2008-AIR-00009), The court stated that, because suspension without pay is a way to dissuade employees from engaging in protected conduct, the Defendant's suspension of the Complainant for two weeks without pay was an adverse employment action.

ADVERSE EMPLOYMENT ACTION; AN INVESTIGATION THAT IS A NECESSARY STEP PRIOR TO POSSIBLE CORRECTIVE OR DISCIPLINARY ACTION IS PRESUMPTIVELY ADVERSE

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In ***Zavaleta v. Alaska Airlines, Inc.***, ARB No. 15-808, ALJ No. 2015-AIR-16 (ARB May 8, 2017), the ALJ ruled, in granting summary decision in favor of the Respondent, that an investigation into the Complainant's timekeeping practices was not adverse employment action because the investigation ended with no disciplinary action and with no additions to the Complainant's personnel file. The stated that it did "not necessarily reject the ALJ's reliance upon the *Burlington Northern* ['materially adverse'] test. However, when properly applied within the context of the AIR 21's whistleblower protection provision and its implementing regulations, a different result is reached." USDOL/OALJ Reporter at 9, citing *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010). In *Williams*, the ARB had found that "a written warning or counseling session will be considered 'presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.'" *Zavaleta*, USDOL/OALJ Reporter at 10, quoting *Williams*, slip op. at 11.

In the instant case, the Complainant had submitted in response to the motion for summary decision a copy of the investigative report, which referred to "discipline up to and including discharge" and the possibility of "prosecution under the law" among potential ramifications for violations of company rules of conduct pertaining to timekeeping practices. The ARB stated that "[g]iven the conditional nature of disciplinary action against Zavaleta along with the requirement of an Investigation Report, we see no distinction between the investigation of Zavaleta and the written warning or counseling session the Board viewed in *Williams* as 'presumptively adverse' when constituting a necessary step in a progressive discipline policy or where potential discipline is implicitly or expressly referenced." *Id*. (footnote omitted). The ARB held: "Thus, notwithstanding that Zavaleta was not disciplined as a result of the investigation, and notwithstanding that he did not provide any evidence specifying how he was threatened by or as a result of the investigation, we find that Zavaleta demonstrated a genuine issue of material fact that the investigation to which he was subjected constituted adverse employment action within the meaning of AIR 21. Consequently, the ALJ's ruling to the contrary is reversed." *Id*. at 11.

- *Discipline and constructive discharge*

ADVERSE ACTION; LIST OF ADVERSE ACTIONS IS BROAD AND INCLUDES REPRIMANDS AND COUNSELING SESSIONS THAT INCLUDE REFERENCES TO POTENTIAL DISCIPLINE

ADVERSE ACTION; REMAND TO ALJ TO CONSIDER WHETHER UNDER AIR21 CO-WORKER HARASSMENT LINKED TO WHISTLEBLOWING ACTIVITY CAN SUPPORT A FINDING OF CONSTRUCTIVE DISCHARGE; ARB NOTES THAT AIR21 CONTAINS LANGUAGE SIMILAR TO THAT OF TITLE VII AND THAT TITLE VII CASELAW SUGGESTS THAT EMPLOYER KNOWLEDGE OR CONSTRUCTIVE KNOWLEDGE OF RETALIATORY CONDUCT CAN LEAD TO LIABILITY

In ***Sewade v. Halo-Flight, Inc.***, ARB No. 13-098, ALJ No. 2013-AIR-9 (ARB Feb. 13, 2015), the Complainant was a helicopter pilot for the Respondent. A meeting was held with management to discuss the Complainant's concerns about a mechanic who was allegedly angry because of the Complainant's protected activity. The Complainant was afraid for her safety. She had reported the

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mechanic's abusive conduct toward her and alleged that he had threatened her. The Respondent's Director of Operations asked the Complainant what she thought would resolve the situation, and the Complainant suggested a shift change so she would not be working with the mechanic. The Director of Operations told the Complainant that she could switch schedules with her husband (who was also a pilot for the Respondent). The Director of Operations then engaged the Complainant in a counseling session about her negative and complaining attitude, inconsistent behavior toward regulatory items, and other matters. The Director of Operations ended by giving the Complainant a verbal warning, later memorialized in writing in the Complainant's personnel file because of the Complainant's threat to get a lawyer and bring a claim against the Respondent. After the meeting, the Complainant emailed a resignation, stating that the verbal reprimand had been discriminatory and retaliatory, and that she had been singled out. The Complainant pointing out that all of the infractions noted were attributable to all of the pilots at the base where she worked. She stated that the schedule change would not help because the mechanic would still have access to work on her helicopter. The Director of Operations was shocked by the email, and told the Complainant's husband that if the Complainant wanted to rescind the resignation, he would consider it. The Complainant never asked to return to work, and emailed the Board of Directors to state that she had initiated litigation against the Respondent for creating a hostile work environment.

After a hearing, the ALJ determined that the Complainant had not established that she had suffered adverse employment action, finding that the warning had not affected the terms, conditions or privileges of employment, and did not indicate that the Complainant would be subjected to progressive discipline that would lead to discharge. The ALJ also found that the Respondent did not constructively discharge the Complainant -- that there was no evidence of abusive treatment, a reduction in pay, badgering, harassment or humiliation. On appeal the Complainant alleged three adverse actions: the shift change, which would have cost her a week's worth of pay; the warning letter; and constructive discharge.

List of adverse actions under AIR21 is broad, and includes reprimands and counseling sessions where coupled with reference to potential discipline

The ARB first noted that it "regards 'the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline.'" USDOL/OALJ Reporter at 10, quoting *Williams v. Am. Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 (ARB Dec. 29, 2010)).

In regard to the shift change, the ARB noted that the ALJ had not addressed the issue, though it had been raised before him, and remanded for the ALJ to consider whether it was adverse action. In regard to the verbal warning, the ARB found that substantial evidence did not support the ALJ's finding that the warning did not include a suggestion that the Complainant would be subjected to progressive discipline that would lead to discharge. Rather, the ARB noted that a tape of the counseling session established that the Director of Operations stated that the Complainant was not going to be fired, but that "if things don't change, of course we might go to a different level." USDOL/OALJ Reporter at 11 (footnote omitted; the footnote provided additional text of the recording). The ARB found that the meaning of "things" and "different level" were unclear, and that if the ALJ found "that these statements constituted coercion, threats or intimidation, then these

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statements would constitute a sufficient unfavorable employment action falling within the whistleblower statute as a matter of law." *Id*.

Constructive discharge; liability for coworker harassment

In regard to constructive discharge, the ARB noted that the ALJ had summarily disposed of the allegation, and that they would have understood this if the Complainant's constructive discharge claim rested solely on the direct conduct of the Respondent's managers. The claim, however, included the way the mechanic had allegedly mistreated her, and how the Director of Operations handled this situation. The Complainant had feared for her safety based on the mechanic's access to her aircraft. The ARB wrote: "Thus, the question becomes whether co-worker harassment linked to whistleblowing activity can support a finding of constructive discharge under AIR 21. We see insufficient guidance under ARB precedent to decide this matter now, especially where the parties have not had sufficient opportunity to address this issue." *Id*. at 12.

The ARB noted that Title VII caselaw suggest that "the employer's knowledge or constructive knowledge of retaliatory conduct and culpable failure to stop the retaliatory conduct could result in employer liability under Title VII's anti-discrimination and anti-retaliation laws." *Id*. (footnote omitted). The ARB noted that the relevant statutory language from Title VII and AIR21 were similar. The ARB remanded for the ALJ to consider the matter.

- *"Check ride" tests*

ADVERSE EMPLOYMENT ACTION; "CHECK RIDE" TEST GIVEN TO FIRST OFFICER DURING APPLICATION TO BECOME A CAPTION IS ADVERSE ACTION WHERE IT LEADS TO SOMETHING UNFAVORABLE TO EMPLOYEE, REGARDLESS OF WHETHER THE ADMINISTRATION OF THE TEST WAS FAIR

ADVERSE EMPLOYMENT ACTION; WHERE UNDER RESPONDENT'S POLICY, CUMULATIVE EFFECT OF FOUR FAILURES OF "CHECK RIDE" TESTS WAS TERMINATION OF EMPLOYMENT, TWO CHECK RIDES THAT OCCURRED OUTSIDE THE LIMITATIONS PERIOD FOR FILING AIR21 COMPLAINT WERE FOUND TO BE PART OF A SINGLE ACTIONABLE EMPLOYMENT ACTION; EVEN IF CONSIDERED DISCRETE EVENTS NOT ACTIONABLE BECAUSE THEY OCCURRED OUTSIDE THE LIMITATIONS PERIOD, THE FIRST TWO CHECK RIDES MAY BE USED AS BACKGROUND EVIDENCE RELATING TO THE TIMELY CLAIMS

In ***Occhione v. PSA Airlines, Inc.***, ARB No. 13-061, ALJ No. 2011-AIR-12 (ARB Nov. 26, 2014), the Complainant was a first officer seeking to upgrade to captain. As part of the upgrading process, a candidate must go through a "check ride" test in a simulator. Check rides are administered by "Aircrew Program Designees" (ADP), who are pilots approved to act for the FAA. Check rides must adhere to federal regulations and "Practical Test Standards" (PTS), and the FSIMS inspector's handbook. If a first officer fails a first attempt to upgrade to captain, the FAA requires retraining and rechecking before the candidate can return to work as a first officer. The candidate may make a second attempt after six months. According to the applicable collective bargaining agreement, if a first officer fails the second attempt, the company has discretion on how to deal with the situation.

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The Respondent's policy is to terminate the first officer's employment or allow him to resign in lieu of termination.

The Complainant failed his first check ride, and informed the Respondent that he intended to contact the FAA. The Complainant failed his second check ride but later re-qualified as a first officer. The Complainant sent a letter to Respondent grieving how the check rides had been administered, copying the letter on FAA officials. Months later, the Complainant submitted an FAA Hotline complaint asserting that the check rides had not been administered in accordance with the PTS. The FAA made inquiries. The Complainant entered a new upgrade class. The Complainant was failed on his third and fourth check ride attempts, and was therefore terminated from employment. The Complainant filed an AIR21 complaint with DOL.

The ARB affirmed the ALJ's finding that the Complainant suffered an adverse employment action when the Respondent terminated his employment, and the ALJ's finding that the only actionable adverse actions where those that occurred within the 90 days limitations period for filing an AIR21 complaint. The ARB, however, disagreed with the ALJ that the third and fourth check rides were not adverse actions because they were fairly administered. The ARB wrote:

> An adverse action, however, is simply something unfavorable to an employee, not necessarily unfair, retaliatory or illegal. The ALJ improperly imported a notion of fairness into his analysis of "adverse action." However, the question of whether the check rides were administered fairly has no bearing on whether they may be considered "adverse." While the *administration* of a performance appraisal (or check ride) is not in itself an "adverse action," when an employee receives a low or unsatisfactory evaluation of his performance appraisal (or check ride), it is clearly an unfavorable employment action and should be considered an "adverse action" within the meaning of AIR 21.
>
> Each of Occhione's four check ride failures were adverse actions and, though his first and second check rides were not actionable given that they occurred outside AIR 21's limitations period for filing a claim, they may provide background evidence. In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002), the Supreme Court held that discrete adverse actions that occur outside the statutory filing period are not actionable. Nevertheless, the Court explicitly stated that such acts may be used as background evidence in support of a timely claim.
>
> Under the circumstances of the case before us, each of the four single check rides has attributes constituting both discrete adverse actions as well as part of a single actionable act. Certainly, like a poor performance appraisal, the failure of a check ride is a single actionable act. However, given PSA's automatic termination (or involuntary resignation) policy whereby two failures to upgrade to captain leads to automatic discharge, each of the four check rides provided to Occhione were part and parcel of the single adverse action constituting his termination. In any event, it is clear that at least the last two check ride failures, whether as discrete actions or as part of the ultimate termination of Occhione's employment, occurred within the AIR 21 statute of limitations period.

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USDOL/OALJ Reporter at 10-12 (footnotes omitted) (emphasis as in original).

- *Voluntary resignation or employer termination*

IN NON-PRECEDENTIAL DECISION, SECOND CIRCUIT GIVES *SKIDMORE* DEFERENCE TO ARB'S INTERPRETION THAT A "DISCHARGE" INCLUDES SITUATIONS WHERE AN EMPLOYEE DOES NOT ACTUALLY RESIGN, BUT AN EMPLOYER DECIDES TO INTERPRET AN EMPLOYEE'S ACTIONS AS A QUIT OR RESIGNATION

In ***Unified Turbines v. USDOL***, No. 13-3124 (2d Cir. Sept. 16, 2014) (non-precedential summary order) (2014 WL 4548305)(case below ARB No. 13-010, ALJ No. 2009-AIR-24), the Second Circuit summarily affirmed the ARB's affirmance of the ALJ's decision finding that the Petitioner discharged the complainant in violation of AIR21, after the complainant had informed the Petitioner that he suspected that another employee was abusing prescription medicine. On appeal, the Petitioner challenged, *inter alia*, the ARB's interpretation of the statutory term "discharge," and the ARB's finding that the Petitioner discharged the Complainant when it did not follow up after the Complainant failed to report to work following an altercation with the other employee. The court wrote:

> The ARB interprets the term "discharge" in the whistleblower retaliation context to include situations in which an employee has not actually resigned, but "an employer . . . decides to interpret an employee's actions as a quit or resignation." *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, 2010 WL 3878518, at *5 (ARB Sept. 30, 2010). While this reading does not mirror the definition that we have applied to similar terms in other employment laws, the ARB has a significant expertise in handling whistleblower claims, *cf. Community Health Center v. Wilson-Coker*, 311 F.3d. 132, 138 (2d Cir. 2002), and has consistently deployed this definition of discharge, *see Klosterman*, 2010 WL 3878518, at *5, which furthers the statute's purpose of protecting employees from retaliation. Accordingly, we defer to the ARB's reasonable interpretation. *See Skidmore*, 323 U.S. at 140. Moreover, we find that the agency's conclusion that Unified discharged Nagle was, under this standard, amply supported by substantial evidence in the record. Although Unified's position that Nagle voluntarily quit is not without some support in the record, that is insufficient to overturn the agency's conclusion under our deferential standard of review. *See Bechtel*, 710 F.3d at 446 (requiring a finding of no abuse of discretion where, *inter alia*, "the decision was based on a consideration of the relevant factors and . . . there has been [no] clear error of judgment").

Slip op. at 4-5.

ADVERSE EMPLOYMENT ACTION; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDING THAT IT WAS RESPONDENT'S BEHAVIOR RATHER THAN A RESIGNATION BY THE COMPLAINANT THAT ENDED THE EMPLOYMENT RELATIONSHIP; RESPONDENT'S DEPARTURE FROM NORMAL PROTOCOL

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In ***Nagle v. Unified Turbines, Inc.***, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB May 31, 2013) (reissued with corrected caption on June 12, 2013), the ARB affirmed the ALJ's finding that it was the Respondent's behavior rather than a resignation by the Complainant, that ended the employment relationship. The Respondent sent the Complainant home following a work altercation. When the Complainant called one of the Respondent's owners to talk about what happened, he got the owner's voicemail and left a message. The owner never returned the call. The owner failed to call the Complainant back even after the owner found out that the Complainant thought he had been fired, and, that another employee was the aggressor in the altercation. The ALJ found that it was the Respondent's protocol to call employees if they did not come to work as planned, and that the Respondent departed from this protocol in this case and decided instead to interpret the Complainant's failure to report for work on the following work day as a voluntary quit. The ALJ reasoned that it was thus the Respondent's behavior that ended the employment relationship. The ARB found that substantial evidence supported the ALJ's findings of fact, and that the Respondent terminated the Complainant under controlling ARB precedent (*Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007); *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 20, 2010)).

ADVERSE ACTION; QUESTION OF WHETHER COMPLAINANT WAS FIRED OR VOLUNTARILY RESIGNED; *MINNE* AND *KLOSTERMAN* APPLY IN AN AIR21 CASE

In ***Nagle v. Unified Turbines, Inc.***, ARB No. 11-004, ALJ No. 2009-AIR-24 (ARB Mar. 30, 2012), the ALJ concluded that the Complainant's assumption that the Respondent had terminated his employment was not objectively reasonable, and that the Complainant voluntarily resigned. In drawing this conclusion, the ALJ applied Vermont law. The ARB, however, ruled that caselaw developed under the whistleblower provision of the STAA -- which essentially mirrors the provisions of AIR21 -- should have been applied. *See Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007) and *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-19 (ARB Sept. 30, 2010). The ARB wrote:

> In these cases, "discharge" has been interpreted to include the situation where the employment relationship "was ended by one-sided or perhaps mutual assumption by the parties -- i.e., by means of behavior from which the parties deduced that the employment relationship was at an end." In the absence of an actual resignation by the employee, "an employer who decides to interpret an employee's actions as a quit or resignation has in fact decided to discharge that employee." *Minne*, ARB No. 05-005, slip op. at 14 (footnotes omitted). The determination on remand may require additional findings of fact as it is unclear from the D. & O. what importance the ALJ gave to the evidence that [the Complainant] called [one of the Respondents' owners] to discuss his continued employment, that [the owner] did not call him back, and that, during the OSHA investigation, [the owner] denied that [the Complainant] called him. The ALJ also did not analyze the importance of the evidence that [one of the Complainant's coworkers] told [the owner] that [the Complainant] believed he was fired and that [the owner] took no action when he learned that [the Complainant] believed he was fired . . . .

USDOL/OALJ Reporter at 5 (footnote omitted).

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- *Materially adverse standard*

ADVERSE ACTION; MATERIALLY ADVERSE STANDARD; WARNING LETTER

In ***Luder v. Continental Airlines, Inc.***, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), the ARB found that the ALJ correctly determined that the Respondent's four-day suspension of the Complainant (a pilot) from flying, which deprived him of about $3,000.00 in pay, and 18-month termination warning letter, constituted adverse action under the "materially adverse" standard. The ARB stated that loss of wages was obviously an adverse personnel action. In regard to the warning letter, the ARB noted that while it has held that a corrective "warning letter" in and of itself may not constitute adverse action, in the instant case substantial evidence supported the ALJ's finding that the warning letter affected the terms, conditions, and privileges of the Complainant's employment because the Respondent had a policy that an employee with an active warning letter in his file is ineligible for voluntary transfer to another position within the company. The ARB found even more important the ALJ's finding that the warning letter imposed on the Complainant the threat of additional disciplinary action, up to and including termination of employment, and consequently the Complainant "'would be extremely reluctant to question airline safety' because engaging in 'similar unacceptable behavior' could result in his being fired." USDOL/OALJ Reporter at 9 (quoting ALJ decision).

ADVERSE EMPLOYMENT ACTION; ARB CLARIFIES IT INTERPRETATION OF WHEN WRITTEN WARNINGS CONSTITUTE ADVERSE EMPLOYMENT ACTION; FINDS THAT BURLINGTON NORTHERN STANDARD SUPPORTS CLEAR REGULATORY DEFINITION; REJECTS SIXTH CIRCUIT AUTHORITY IN MELTON V. YELLOW TRANSP. INC. REGARDING RELEVANCY OF APPEAL PROCESS ON WARNINGS; REJECTS ITS OWN DECISION IN SIMPSON V. UNITED PARCEL SERVICE; ADOPTS "MORE THAN TRIVIAL" STANDARD

In ***Williams v. American Airlines, Inc.,*** ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010), the Complainant, an aviation maintenance mechanic, argued with a supervisor about whether a second inspection was required after a brake change operation had taken longer than normal. The second inspection eventually was made, but management believed there was a job performance issue. The fallout from the incident escalated and the Complainant reported the incident to the FAA. While a committee considered the report, a counseling session was held with the Complainant, and a counseling record was entered into the Complainant's personnel file. This record was often the first step in the Respondent's disciplinary process. It was a permanent record and could not be grieved. Later, the record was revised to delete references to the inspection, but other negative references about the Complainant's job performance remained. The ALJ found that the report to the FAA was protected activity and the counseling report was a retaliatory adverse action.

ALJ did not err in applying Burlington Northern "Materiality" Standard to AIR21 whistleblower complaint

In finding that the personnel file constituted adverse personnel action, the ALJ relied upon ARB decisions that have embraced the "materiality" standard articulated in *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006), a case decided under Title VII of the Civil Rights

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Act of 1964. On appeal, the Respondent objected that the ALJ's analysis allegedly contradicted ARB precedent, and that *Burlington Northern* did not change the meaning of "adverse action" in ARB cases, despite the substitution of the "materially adverse" test for the "tangible job consequences" test. The ARB held that the ALJ correctly applied ARB precedent, and that the ALJ's "totality of circumstances" approach was correct and is supported by substantial evidence and sound legal reasoning.

Written warning or counseling session is presumptively adverse in certain circumstances

The ARB observed that AIR 21 prohibits "discrimination" against an employee with respect to the employee's "compensation, terms, conditions, or privileges of employment," and that the term "discriminate" is not defined in the statute, but that in implementing regulation, the Department of Labor has interpreted AIR 21's prohibition against discrimination to include efforts "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because the employee has engaged in protected activity. 29 C.F.R. § 1979.102(b). The ARB stated:

> We view the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline. In fact, given this regulation, we believe that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.

Slip op. at 10-11 (footnotes omitted). In the instant case, the ARB found that the entry that had been made in the Complainant's personnel record memorialized the supervisor's recitation of the Employer's Rules of Conduct with the Complainant and "encouraged" the Complainant to correct his performance as any future performance issues or violations of the Employer's Rules of Conduct could result in corrective action up to and including termination." The ARB found that the revised record stated that performance issues or violation of the Rules of Conduct could result in corrective action. The ARB found that this "warning" clearly fell within the list of prohibited retaliatory actions under 29 C.F.R. § 1979.102(b), particularly the prohibitions against intimidation and threatening an employee for engaging in protected activity.

Availability of appeal process for written warning is irrelevant; ARB expresses disagreement with Sixth Circuit in Melton v. Yellow Transp. Inc.

The ARB stated that:

> We believe it is irrelevant whether the employer's personnel policies allow its employees to appeal or formally challenge a written warning. A great number of workers are "at will" employees who have no right to appeal a suspension or termination, much less a written warning. Personnel policies are often drafted solely by the employer and hinge on the employer's unilateral assessment as to the extent of appellate procedures it can address given limited resources. Consequently, we

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> respectfully disagree with the Sixth Circuit Court's statement that it is "counterintuitive" to declare a written warning a "materially adverse" employment action where the employee had no right to appeal it pursuant to internal employment policies. *See Melton v. Yellow Transp., Inc.*, 2010 WL 1565494, at *6 (6th Cir. 2010) (it seems "counterintuitive" to declare illegal an employment action that cannot be appealed internally).

Slip op. at n.52.

ARB decision in Simpson v. United Parcel Serv. Rejected as controlling precedent

The Respondent cited the ARB's decision in *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008), to support its contention that the "warnings" memorialized in the Complainant's personnel record did not constitute adverse employment action. The ARB found that *Simpson*'s discussion of whether warning letters constituted adverse action was dicta, and that it relied on ARB precedent that pre-dated the Supreme Court's decision in *Burlington Northern,* and which arose under the STAA whose implementing regulations did not specify intimidation or threats as prohibited activity. The ARB held that because *Simpson* failed to address the binding AIR21 regulations, it must be rejected as controlling precedent.

Burlington Northern standard merely reinforces clear mandate of AIR21 regulations

The ARB stated that "Given the clear mandate in Section 1979.102(b), it is unnecessary in this case to turn to Title VII cases like *Burlington Northern*. Nevertheless, the ALJ's resort in this case to *Burlington Northern's* "materially adverse" test does not change the result and, if anything, lends support for the conclusion that the [written warnings memorialized in the Complainant's personnel record] constitute adverse employment action under AIR 21." Slip op. at 12 (footnote omitted). The ARB noted that it has often looked to Title VII authority in adjudicating whistleblower cases under its jurisdiction, but cautioned that the use of Title VII principles must be done with careful and critical examination and keeping in mind the backdrop of AIR21 safety issues. Reviewing the ruling the *Burlington Northern*, the ARB concluded:

> Even under *Burlington Northern*, we believe that the supervisor's warning and threatening counseling session in this case constitutes a materially adverse action (more than trivial). Employer warnings about performance issues are manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*. Such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them. We simply doubt that the Court intended to consider a supervisor's written warning or reprimand or threatened discipline as "trivial." To the contrary, we are of the opinion that they are patently not trivial and, therefore, presumptively "material" under *Burlington Northern*.

Slip op. at 14.

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ARB provides definition of "adverse action" as "more than trivial" to clarify confusion caused by use of terms "materially adverse" and "tangible consequences"

The ARB stated that in some previous decisions it used the terms "materially adverse" and "tangible consequence" interchangeably, that in Title VII jurisprudence the terms are not always accepted as interchangeable, and that mixing the terms in whistleblower cases may cause unnecessary confusion. Thus,

> To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.

Slip op. at 15 (footnotes omitted).

In the instant case, the ARB agreed with the ALJ's ultimate legal conclusion that the notations made in the Complainant's personnel record were materially adverse employment actions either standing alone or under the totality of the circumstances. However, the ARB found that the written warnings issue had been raised sua sponte by the ALJ after the conclusion of the hearing, resulting in lack of a fair opportunity for the Respondent to present additional evidence and legal argument on the issue, and therefore remanded for further proceeding before the ALJ.

ADVERSE ACTION; ARB FINDS THAT THE *BURLINGTON NORTHERN* "MATERIALLY ADVERSE" STANDARD APPLIES TO THE STAA AND ALL OF THE EMPLOYMENT PROTECTION STATUTES ADJUDICATED BY THE DEPARTMENT OF LABOR

In ***Melton v. Yellow Transportation, Inc.***, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB addressed the Complainant's request on appeal to abandon the "tangible employment consequence" test, and to adopt instead the deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). In *Melton*, the Complainant had been issued a warning letter in which the Respondent admonished the Complainant not to use fatigue as a subterfuge to avoid work. Both the Respondent and union witnesses testified that a single warning letter was corrective action, and although it was a pre-condition to most discipline, it was not itself discipline. The letter had no effect on hours, work assignments, pay, opportunities for advancement, or retirement benefits. All members of the Board agreed that under ARB precedent, such a warning letter would not be considered adverse employment action. The panel, however, spilt on the issue of whether the *Burlington Northern* "materially adverse" standard should now

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apply to an STAA whistleblower case (as well as all of the other anti-retaliation laws adjudicated before the DOL). A two-member majority found that it does. The majority wrote:

> *Burlington Northern* held that for the employer action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." For purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. According to the Court, a "reasonable worker" is a "reasonable person in the plaintiff's position."

USDOL/OALJ Reporter at 19-20 (footnotes omitted). The majority stated that "the purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes." *Id.* at 20. Moreover, it stated that both ARB and federal case law demonstrated that the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action." *Id*. The majority summarized:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. The employee protections that the Labor Department administers are not "general civility codes," nor do they make ordinary tribulations of the workplace actionable. Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse" rather than "tangible consequence," or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent. Like the *Burlington Northern* Court, our task has always been, and will continue to be, to separate harmful employer action from petty, minor workplace tribulations.

Id. at 23 (footnotes omitted). Applying the standard, the majority held that the warning letter in the instant case "was not materially adverse because the record demonstrates that it did not affect his pay, terms, or privileges of employment, did not lead to discipline, and was removed from his personnel file without consequences. Therefore, under the particular facts and circumstances presented here, the warning letter at issue would not dissuade a reasonable employee from refusing to drive because of fatigue." *Id.* at 24.

ADVERSE EMPLOYMENT ACTION; WARNING LETTERS; COMPLAINANT MUST SHOW THAT LETTER AFFECTED TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT

Warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have any tangible job consequences. Written reprimands under a progressive discipline system do not have tangible job consequences and could lead to corrected performance. The burden rests on the complainant to demonstrate that the personnel action in question is adverse.

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The complainant must show that the warning letter affected the terms, conditions or privileges of employment. ***Simpson v. United Parcel Service***, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008).

ADVERSE ACTION; REJECTION OF TANGIBLE CONSEQUENCE STANDARD; ADOPTION OF MATERIALLY ADVERSE STANDARD

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE),*** ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the ARB retreated from the "tangible consequence" standard for actionable adverse employment action. Rather, the ARB stated that the correct standard, as clarified by the Supreme Court in *Burlington Northern Ry. Co. v. White*, 548 U.S. 53 (2006), is whether the actions were "materially adverse": "that is, 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" Slip op. at 12, quoting *Burlington*. The ARB noted that it had already applied this standard to AIR21 cases, and that it is also appropriate to apply it to cases arising under SOX and the environmental acts. In the instant case, the ARB found that it was possible that the Complainant's allegations meet the *Burlington* standard, even if they did not rise to the level of a "tangible consequence" (which was the standard applied by the ALJ in her 2004 decision).

ADVERSE ACTION; ADOPTION OF *BURLINGTON NORTHERN* "MATERIALLY ADVERSE" STANDARD; EMPLOYER'S IMMEDIATE RESCINDING OF DISCHARGE

In ***Hirst v. Southeast Airlines, Inc.***, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ARB found that it was bound to accept the ALJ's finding that the Complainant had been discharged because it was supported by substantial evidence.

Applying a recent Supreme Court Title VII decision to STAA whistleblower provision, however, the ARB held that the Complainant had not established that he suffered adverse employment action. *See Burlington Northern & Santa Fe Ry. Co. v. White*, --- U.S. ----, 126 S. Ct. 2405 (June 22, 2006). The ARB cited the Supreme Court's ruling that a Title VII plaintiff must show that a reasonable employee or job applicant would find the employer's action "materially adverse," *i.e.*, "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." USDOL/OALJ Reporter at 10-11, quoting 126 S. Ct. at 2409.

In *Hirst*, the ARB found that a reasonable employee would have concluded that though the Respondent's Director of Operations acted hastily and retaliated against the Complainant for refusing to pilot a flight, the Respondent's officials, including the Director of Operations:

> quickly recognized this mistake, promptly corrected it, immediately informed Hirst that he was still employed, confirmed that fact in writing, and made sure that Hirst suffered no economic loss. A reasonable worker would see that SEAL [Southeast Airlines] corrected its mistake within two days and that Hirst, at most, suffered only temporary unhappiness. In the wake of Malone's decision to discharge Hirst, SEAL's actions certainly sent a message that management will respect and protect employees who are concerned with safety. That, of course, is the right message. Therefore, based solely on these particular facts, we find that a reasonable SEAL

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> employee would not be afraid to make management aware of safety concerns, or, in *White* terminology, would not be "dissuaded" from engaging in protected activity.

USDOL/OALJ Reporter at 12.

AIR21 IS NOT RETROACTIVE TO COVER ADVERSE ACTIONS THAT OCCURRED BEFORE ITS EFFECTIVE DATE

THE CONTINUING VIOLATION THEORY HAS BEEN REJECTED IN ENVIRONMENTAL WHISTLEBLOWER CASES, AND THIS REJECTION ALSO APPLIES TO AIR21 CASES

HOSTILE WORK ENVIRONMENT; ALJ MUST APPLY CRITERIA ENUNCIATED IN *SASSE v. U.S. OFFICE OF THE UNITED STATES ATTORNEY,* AS CLARIFIED BY *BELT v. USDOL*

In ***Brune v. Horizon Air Industries, Inc.***, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the Complainant had alleged a series of adverse actions from 1999-2001 in retaliation for activity protected under AIR21, and timely filed his AIR21 complaint following a May 7, 2001 "write-up" memorandum. The ALJ found that all of the alleged actions were actionable because (1) the May 7, 2001 memorandum incorporated all "previous counseling," (2) there had been a "continuing violation," and (3) there had been a hostile work environment.

The ARB found that the ALJ misapplied the law. First, AIR21 became effective on October 1, 1999. Two of the alleged actions occurred before this date and were therefore outside the reach of AIR21.

Second, although some older decisions recognized the continuing violation theory, the Supreme Court in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 114-115 (2002) rejected that theory in Title VII cases. The ARB had previously held a number of times that *Morgan* applies to the environmental whistleblower statutes, and found no reason that those holdings should not apply to AIR21.

Third, the ALJ did not apply the criteria for applying the hostile work environment theory that the ARB had recently enunciated in *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 34-35 (ARB Jan. 30, 2004), *aff'd sub nom Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005). Specifically -- assuming that the hostile work environment theory applied because the alleged acts were not discrete and were in fact adverse employment actions -- the ALJ had failed to make findings on whether the Respondent intentionally harassed the Complainant, the extent of the harassment, whether the alleged harassment was severe or pervasive enough to change the conditions of the Complainant's employment and create an abusive working environment, or whether the harassment would have had any detrimental effect on a reasonable person and whether it did have such an effect on the Complainant.

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In a footnote, the ARB clarified the *Sasse* standard based on the recent ruling in ***Belt v. United States Dept. of Labor***, 2006 WL 197385 (6th Cir. Jan. 25, 2006). The ARB had stated in *Sasse* that "[t]o prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive." The ARB agreed with the Sixth Circuit that "the more precise articulation of the standard is whether the objectionable conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, rather than whether the conduct was 'extremely serious or serious and pervasive.' 2006 WL 199735 *6."

CONSTRUCTIVE DISCHARGE; REASSIGNMENT RESULTING IN DRASTIC INCREASE IN COMMUTING TIME AND UNREIMBURSED COSTS

In ***Vieques Air Link, Inc. v. USDOL***, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed the ARB decision adopting the ALJ's recommended decision, finding that substantial evidence supported the ALJ's findings. In regard to the adverse employment action element of the cause of action, the court affirmed the ALJ's finding that the Complainant had been constructively discharged. The Respondent, an island air service, reassigned the Complainant - a pilot -- with the result that he would have to begin his flight schedule from an island other than where he lived. The Complainant repeatedly requested assistance from the Respondent in getting to the work station but received no response. The Complainant showed up for work at a local airport with the hope that the airline would assist him in getting to the work station, but was not assisted. The Respondent argued that the Complainant could have secured overnight accommodations near the new assignment, but the ALJ credited the Complainant's testimony that he could not afford the additional costs associated with the overnight accommodations given that he had to maintain his original residence for his young family. The court quoted *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 120 (1st Cir. 1977) (footnote omitted): "Doubtless a drastic increase in commuting time and unreimbursed costs might at some point become sufficiently onerous to justify an employee in quitting." The court found that substantial evidence supported the ALJ's conclusion that the transfer imposed such conditions on the Complainant and amounted to a constructive discharge.

ADVERSE EMPLOYMENT ACTION; THREAT UNRELATED TO COMPENSATION, TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT RELATIONSHIP

The Respondent's letter to the Complainant threatening to report him for the unauthorized practice of law if he appeared as a representative in a worker's grievance proceeding was not adverse action under AIR 21; the letter was not related to the Complainant's compensation, terms, conditions, or privileges as a medically-retired former employee of the Respondent. ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

ADVERSE EMPLOYMENT ACTION: MERE THEORETICAL POSSIBILITY OF ADVERSE ACTION DOES NOT CONSTITUTE A COGNIZABLE COMPLAINT

The Complainant, a medically disabled retiree, was banned from the Respondent's property and argued that the ban was related to compensation, terms, conditions, or privileges of his employment relationship with the Respondent because it would prevent him from returning to work. The ALJ found that this was not a cognizable ground to establish an adverse employment

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action, being based on "a theoretical argument based on a theoretical fact which may never occur." The ARB affirmed. ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

ADVERSE EMPLOYMENT ACTIONS IN THE CONTEXT OF A RETIRED EMPLOYEE

In ***Friday v. Northwest Airlines, Inc.***, 2003-AIR-19 and 20 (ALJ June 27, 2003), errata (ALJ July 17, 2003), the Complainant, an airline pilot who had voluntarily taken a disability retirement, contended that the Respondent had threatened him with arrest for the unlicensed practice of law and banned him from its property in retaliation for a prior AIR21 complaint and for acting as a witness in another employee's labor grievance arbitration proceeding. The ALJ observed that the AIR21 regulations define "employee" to mean "an individual presently or formerly working for an air carrier...." 29 C.F.R. § 1979.101. Citing case law decided under similar whistleblower laws, the ALJ concluded that in AIR21 cases "complainants who are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way." Slip op. at 8 (citations omitted). Thus, in the instant case, the Complainant's burden was to establish that the Respondent's actions "were in some way related to the 'compensation, terms, conditions, or privileges' which arise from [the Complainant's] relationship with [the Respondent] as a medically retired former employee." Slip op. at 9. The ALJ found that the threat to inform a county attorney of a possible unlicensed practice of law had not been shown to constitute an adverse personnel action. The ALJ also agreed with the Respondent that the property ban was unrelated to a present employment relationship or to the compensation, terms, conditions, or privileges owed to a retired employee.

ADVERSE EMPLOYMENT ACTION; TEMPORARY AND MINIMAL CHANGES IN CONDITIONS OF EMPLOYMENT DURING PERSONNEL INVESTIGATION

In ***Majali v. Airtran Airlines***, 2003-AIR-45 (ALJ Aug. 10, 2004), the Complainant asserted that when he went to work on an unscheduled work day following a vacation, his key would not permit access to the building, he found his desk occupied, and his access to the computer was denied when he attempted to log on. Later that day, the Complainant was directed not to report to work as regularly scheduled but instead to report the following day to a meeting to discuss his failure to report for work for three days following the end of the vacation. Although denied by his supervisor, the Complainant alleged that on the day he returned to work he was directed to wait outside the building to be escorted. Following the meeting, the Complainant believed that he would be contacted by the human resources department the following day, but he was not. The Complainant had also heard rumors that his job was in jeopardy. The Complainant alleged before the ALJ that these circumstances were tantamount to a constructive discharge or an actionable change in the conditions of employment.

The ALJ found that neither ground was actionable. The ALJ found that it was not clear that the Respondent had intentionally prevented the Complainant's entry or access, that desks were frequently shared and the Complainant had not been scheduled to work the day that it was occupied, and there was no indication that the restricted access was more than temporary. The ALJ found that although the Complainant reasonably may have believed that his job was in jeopardy, he may have been able to straighten out the situation if he had allowed the internal disciplinary process to work. The ALJ found that the conditions of employment had only been temporarily and

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minimally changed during the course of a personnel investigation in a manner consistent with the Respondent's usual procedures. The ALJ also noted that the Complainant had remained in pay status.

ADVERSE EMPLOYMENT ACTION; COMPLAINANT PLACED IN UNPAID STATUS AFTER FAILURE TO RETURN TO WORK

In ***Majali v. Airtran Airlines***, 2003-AIR-45 (ALJ Aug. 10, 2004), the Complainant was directed to attend a meeting with human resources following an absence. At the meeting the Complainant indicated that he would like to return to work for the Respondent; however, two days later the Complainant's attorney wrote to the Respondent informing that the Complainant believed that he had been constructively discharged, was seeking a severance package, and was unwilling to accept reinstatement as a solution. The Employer replied to the attorney inviting the Complainant to return to work by a stated date, and denying the existence of a constructive discharge. When the Complainant did not return to work on the date specified, the Respondent put the Complainant on unpaid leave.

The ALJ noted that these circumstances were similar to those in *Smith v. Western Sales & Testing*, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004), and that it could not be found, therefore, that the Complainant had been constructively discharged by the Respondent. Nonetheless, the ALJ observed that the AIR21 regulations defined adverse action broadly to include "*any* change with respect to compensation, terms, conditions, or privileges of employment." The ALJ found that a suspension placing an employee in nonpay status is an adverse action under this broad definition.

ADVERSE ACTION; FILING A MOTION FOR SANCTIONS AGAINST COMPLAINANT IS NOT, IN ITSELF, ADVERSE EMPLOYMENT ACTION

In ***Powers v. Pinnacle Airlines, Inc.***, 2004-AIR-6 (ALJ Dec. 16, 2003), Complainant alleged, *inter alia*, that Respondent retaliated against her by "illegally" asking for monetary sanctions against her in another case pending at the time (2003-AIR-12). The ALJ ruled that requesting sanctions for Complainant's refusal to cooperate in discovery did not in itself constitute an adverse employment action, and that where Complainant had not alleged any tangible job consequences, Complainant had not stated a claim of action against Respondent with respect to this allegation.

ADVERSE EMPLOYMENT ACTION AND THE TANGIBLE CONSEQUENCES EXCEPTION

In ***Daniel v. TIMCO Aviation Services, Inc.***, 2002-AIR-26 (ALJ June 11, 2003), the ALJ noted caselaw in DOL whistleblower proceedings indicating that" absent a showing of 'tangible consequences' such as demotion, neither discriminatory oral criticism nor negative written evaluations can be considered actionable adverse actions." The ALJ observed that the the source of this DOL caselaw is Title VII race discrimination cases, and analyzed whether such cases truly provide valid guidance in whistleblower protection cases. Pointing out differences between the purposes of race discrimination cases and whistleblower cases, the ALJ observed that:

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> considering the objectives of the whistleblower enactments, it seems appropriate to suggest that a "tangible consequence" in these types of cases is not merely one which impacts the worker's narrow pecuniary interests, but one which is likely to stifle precisely the sort of behavior Congress intended to encourage, i.e. a "tangible consequence" in a whistleblower context is one which is reasonably likely to dissuade potential whistleblowers from getting involved in allegedly protected activity; a "consequence" which not only impacts the worker's economic interests immediately as in a Title VII setting, but one designed to counteract a worker's incentive to engage in activities Congress sought to encourage.
>
> In *Daniel*, however, the evidence adduced at the hearing established that Respondent's written reprimand was a non-discriminatory application of a policy designed to hold employees accountable for their inspections, and therefore not actionable.

[Editor's note: *Compare* the "tangible consequences" rulings in this newsletter, *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002) [Nuclear & Environmental Whistleblower Digest XIII B 17]; *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003) [Nuclear & Environmental Whistleblower Digest XIII A and XIII B 18]; *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002) [STAA Whistleblower Digest VI B 4].**]**

CONSTRUCTIVE DISCHARGE IN TITLE VII CASES; PLAINTIFF'S BURDEN OF PROOF; AVAILABILITY OF THE *ELLERTH/FARAGHER* AFFIRMATIVE DEFENSE

In ***Pennsylvania State Police v. Suders***, 542 U.S. 129 (2004), the U.S. Supreme Court rejected a Third Circuit decision under Title VII that a constructive discharge, if proven, constitutes a tangible employment action that renders an employer strictly liable and precludes recourse to the *Ellerth/Faragher* affirmative defense. Justice Ginsburg wrote:

> Plaintiff-respondent Nancy Drew Suders alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (PSP), of such severity she was forced to resign. The question presented concerns the proof burdens parties bear when a sexual harassment/constructive discharge claim of that character is asserted under Title VII of the Civil Rights Act of 1964.
>
> To establish hostile work environment, plaintiffs like Suders must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment." *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57, 67 (1986) (internal quotation marks omitted); see *Harris* v. *Forklift Systems, Inc.,* 510 U. S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality."). Beyond that, we hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily

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> accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, and *Faragher* v. *Boca Raton,* 524 U.S. 775.

See also ***Williams v. Administrative Review Board, USDOL***, __ F.3d __, No. 03-60028 (5th Cir. July 15, 2004), 5th Cir. decision on applicability of *Ellerth/Faragher* hostile work environment analysis to ERA whistleblower complaints

VI. CAUSATION / CONTRIBUTING FACTOR

SUMMARY DECISION; TEMPORAL PROXIMITY IS A FACT INTENSIVE INQUIRY; ARB HAS DECLINED IN THE PAST TO DEFINE OUTER LIMITS OF WHEN THE PROXIMITY IS TOO ATTENUATED TO ESTABLISH A CAUSAL RELATIONSHIP; IF OTHER ELEMENTS OF PRIMA FACIE CASE ARE MET, "SOME" TEMPORAL PROXIMITY MAY BE SUFFICIENT TO SURVIVE SUMMARY DECISION

In ***Hukman v. U.S. Airways, Inc.***, ARB No. 2018-0048, ALJ No. 2015-AIR-00003 (ARB Jan. 16, 2020), the ARB in its de novo review the ALJ's grant of summary decision accepting as true Complainant's allegations, found that there was a five month gap between her protected activity and the adverse action taken against her. The ARB then examined the import of that gap in the context of deciding a motion for summary decision:

> This temporal gap is not remote enough to say Respondent is entitled to summary decision as a matter of law. Because this length of time is neither so short nor so long as to be definitively close or distant temporal proximity, we will further discuss the issue of temporal proximity.
>
> Temporal proximity is an important part of a case based on circumstantial evidence, often the "most persuasive factor." Our analysis of an ALJ's findings and conclusions regarding temporal proximity necessarily depends in large part on the procedural posture of the case. As with any factual issue, we uphold ALJ findings regarding temporal proximity made after hearing if there is substantial evidence in the record to support them. Ascertaining the significance of temporal proximity in a case ''involves more than determining the length of the temporal gap and comparing it to other cases. Previous case law can be used as a guideline to determine some general parameters of strong and weak temporal relationships, but context matters.'' Thus, the Board has affirmed an ALJ's finding that that temporal proximity is close—raising an inference of causation—but that there is no causation in the case, if supported by substantial evidence in the record. Likewise, the Board

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

Slip op. at 16-17 (footnotes omitted).

CAUSATION; TEMPORAL PROXIMITY AND CHAIN OF CAUSAL LINKS SUFFICIENT TO PROVE THAT PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN DISCHARGE

In ***Nagle v. Unified Turbines, Inc.***, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB May 31, 2013) (reissued with corrected caption on June 12, 2013), the ARB affirmed the ALJ's finding that the Complainant proved by a preponderance of the evidence that his protected activity under AIR 21 was a contributing factor to his discharge. Temporal proximity between the protected activity and termination was a factor. In addition, there were identifiable links in a chain of causation from the protected activity to the adverse action establishing that the Complainant's protected activity was a factor in the termination of his employment. The Complainant had reported to the Respondent that a coworker was abusing prescription narcotic medication while on the job and was drug dealing outside of the Respondent's shop. This was protected activity. The ALJ reasoned that the reports of the drug dealing were intertwined with the Complainant's reports about the coworker's problem with drugs. The Respondent informed the coworker that the Complainant was the source of the complaint. The coworker started an altercation with the Complainant. It was the altercation that caused one of the Respondent's owners to angrily order the Complainant to leave the premises, and that caused the owner not to return the Complainant's post-altercation phone call and instead let the Complainant believe that he had been fired. The ARB found that substantial evidence supported the ALJ's findings of fact regarding causation.

CAUSATION; COMPLAINANT'S USE OF PROFANITY AND RUDENESS TOWARD CO-WORKERS

In ***Zurcher v. Southern Air, Inc.***, ARB No. 11-002, ALJ No. 2009-AIR-7 (ARB June 27, 2012), the Complainant failed to prove by a preponderance of the evidence that his protected activity was a contributing factor in his termination from employment where the record supported the ALJ's finding that the decision to terminate the Complainant was based on the Complainant's use of profanity and rudeness toward co-workers. The use of profanity was considered by the Respondent

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to be serious misconduct and was expressly forbidden; the Chief Operating Officer who terminated the Complainant witnessed the telephone exchange in which the profanity was used and, although he learned about the Complainant's probationary status from a Chief Pilot who knew about the Complainant's protected activity, the Chief Operating Officer did not himself know about the protected activity; although there was temporal proximity between the termination and some protected activity, there was even closer temporal proximity to the use of profanity.

CAUSATION; DELAY BETWEEN PROTECTED ACTIVITY AND TERMINATION DOES NOT, STANDING ALONE, ESTABLISH THAT THE RESPONDENT USED DELAY AS A PLOY

In ***Majali v. Airtran Airlines***, ARB No. 04-163, ALJ No. 2003-AIR-45 (ARB Oct. 31, 2007), the ARB rejected the Complainant's argument that the Respondent delayed the termination purposely so that it could argue that there had been a time lapse between the protected activity and termination, where aside from the delay itself, the Complainant provided no evidence to support his theory that the Respondent's delay was a mere ploy to provide immunity from suit. The ARB stated that "[a] long delay between protected activity and termination does not prove causation, but rather generally makes causation less likely. Absent any evidence to support [the Complainant's] theory, we conclude that the long delay is not itself evidence of causation." USDOL/OALJ Reporter at 13.

TEMPORAL PROXIMITY; INFERENCE NOT LOGICAL WHEN INTERVENING EVENT INDEPENDENTLY COULD HAVE CAUSED THE ADVERSE ACTION

In ***Mizusawa v. USDOL***, No. 12-9563 (10th Cir. Apr. 26, 2013) (unpublished) (2012 WL 1777421), the ARB had affirmed the ALJ's highly fact- and credibility-intensive determination that the Complainant had not established that protected activity was a contributing factor in the Respondent's decision to terminate the Complainant's employment. On appeal, the Tenth Circuit denied the Complainant's petition for review, finding that substantial evidence supported the ARB's determination and that nothing suggested that the ARB's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court of appeals addressed the Complainant's several arguments as to why the ARB's decision was purportedly wrong, but found none of them persuasive. The ARB had not expressly discussed the temporal proximity between the Complainant's reports of safety violations and his termination, but the ALJ found that temporal proximity alone was insufficient to show retaliation because intervening events (two failed audits and the Complainant's violation of the Respondent's strict policy not to authorize videos at its facility) could have independently caused the Complainant to lose his job. The ALJ relied on the ARB decision in *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, 2006 WL 1151953, at *5 (ARB Apr. 28, 2006), for the proposition 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'"). The Tenth Circuit agreed that temporal proximity in this case was insufficient to show a causal connection between the Complainant's safety reports and his termination.

TEMPORAL PROXIMITY; INTERVENING EVENT REBUTS PRESUMPTION

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In ***Clark v. Pace Airlines, Inc.***, ARB No. 04-150, ALJ No. 2003-AIR-28 (ARB Nov. 30, 2006), the ARB summarized the law concerning proof of causation through temporal proximity:

> Retaliatory motive may be inferred when an adverse action closely follows protected activity. An inference of discrimination, i.e., the protected activity contributed to the adverse action, is less likely to arise as the time between the adverse action and the protected activity increases. But if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.

USDOL/OALJ Reporter at 12 (footnotes omitted).

In *Clark*, the ARB found that the Complainant's conduct during a flight in which the aircraft had been out of radio contact with Air Traffic Control (the event which the Respondent proffered as the legitimate non-discriminatory reason for firing the Complainant) was an independent intervening event that rebutted the Complainant's argument that he proved discrimination because of temporal proximity. The ARB also found that substantial evidence supported the ALJ's finding that the Complainant had not established pretext.

CAUSATION; BURDEN TO SHOW THAT PERSON WHO FIRED THE COMPLAINANT KNEW ABOUT THE PROTECTED ACTIVITY

In ***Gary v. Chautauqua Airlines***, ARB No. 04-112, 2003-AIR-38 (ARB Jan. 31, 2006), the ARB found that substantial evidence supported the ALJ's finding that the Complainant did not adequately prove that the Respondent's Director of Pilot Training knew about the Complainant's protected activity (filing a prior whistleblower lawsuit against another airline) when he fired the Complainant for inadequate performance in a training program. The Complainant alleged that he had told the Respondent's recruiter about his prior whistleblower suit at an interview (which the recruiter denied), and that the Respondent must have been aware of it because it had contacted the prior airline when conducting a background investigation. The ARB found that even if the recruiter knew about the prior whistleblower suit, the Complainant's burden was to show that the Director of Training knew about it. The Director of Training had testified that he did not know about the prior lawsuit until after the Complainant filed the instant AIR21 suit, and the recruiter testified that she had not told the Director of Training anything about the prior airline's response to the background investigation. The Complainant argued that it was improbable that the Respondent did not know of the prior suit because it was "standard practice" for airline companies to divulge such information. The ARB, however, observed that the Complainant had offered no proof to support these assertions. Moreover, the ALJ had found the recruiter and Director of Training to be credible witnesses, and the Complainant had not demonstrated that the ALJ's credibility determinations were incredible or unreasonable. Finally, the Complainant did not assert until the hearing that he had told the recruiter about the prior lawsuit.

CAUSATION; SIX MONTH INTERVAL BETWEEN PROTECED ACTIVITY AND ADVERSE ACTION; INTERVENING EVENTS MAY BREAK INFERENCE OF LINK

In ***Robinson v. Northwest Airlines, Inc.***, ARB No. 04-041, ALJ No. 2003-AIR-22 (ARB Nov. 30, 2005), the Complainant argued that the timing of the decision to refer him for a medical

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examination established a causal connection between this action and his protected activity. The ARB found, however, that events occurring in the six-month interval could have independently supported the adverse action. The Board wrote:

> While an inference of discrimination may arise when the adverse action closely follows protected activity, temporal proximity is not always dispositive. *Thompson v. Houston Lighting & Power Co.,* ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001); *cf. Svendsen v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 02-AIR-16, slip op. at 8 (Aug. 26, 2004). For example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action. *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001).

USDOL-OALJ Reporter at 9.

RETALIATORY INTENT; EVIDENCE ESTABLISHING THAT COMPLAINANT'S MANNER OF RAISING THE COMPLAINT, RATHER THAN THE FACT THAT HE HAD RAISED THE COMPLAINT, CAUSED THE ADVERSE EMPLOYMENT ACTION

In ***Svendsen v. Air Methods, Inc.***, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB adopted the ALJ's finding that the Complainant's safety concern was protected activity, but that a preponderance of the evidence established that it was the belligerent and unprofessional manner in which the Complainant raised the concern -- and not the report of safety concern itself -- that caused the Complainant's firing. The ARB noted that the issue of retaliatory intent requires careful examination. Although temporal proximity supported the Complainant's case, the Respondent had established a history of complaints about the Complainant's poor interpersonal skills and unprofessional conduct, and established that it was the Complainant's loud and belligerent manner in which he raised the concern rather than the fact that he had raised a safety concern that caused his termination.

CAUSATION; INCONSISTENCIES BETWEEN FORMAL PERFORMANCE APPRAISALS AND ULTIMATE SELECTION FOR LAYOFF DOES NOT CARRY BURDEN OF PROOF WHERE PROTECTED ACTIVITY DID NOT FACTOR INTO THE LAYOFF DECISION

In ***Parshley v. America West Airlines***, 2002-AIR-10 (ALJ Aug. 5, 2002), the Complainant was selected for layoff during a company-wide cost reduction program based on performance issues. The ALJ found that both Complainant and her supervisor gave mostly credible testimony about the circumstances leading to the layoff. Ultimately, Complainant was unable to show by a preponderance of the evidence that her protected activity contributed in any manner to the decision to layoff Complainant. Although Respondent's articulated reason for termination -- the cost reduction program -- seemed to be undercut by evidence that Complainant's position was filled by a new employee within a few weeks, the ALJ also found credible evidence that Respondent had been able to obtain payroll savings in other areas to offset the new hire. With the initiation of the cost reduction program, Complainant's supervisor had been under pressure to improve the business

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effectiveness and customer service on his financial group. The record was well-documented that Complainant's supervisor had received repeated complaints about Complainant's difficulties in interacting with the financial group's "customers" within the company. Thus, in spite of the fact that there were inconsistencies between Complainant's formal performance appraisals, advancement in the company, and subsequent selection for termination on the basis of performance, the ALJ found that Complainant had not carried her burden of proof. In sum, the ALJ found that although Complainant had mentioned an issue to her supervisor about a problem with FAA-required serviceable tags for aircraft parts in inventory, she did not highlight the problem as a safety issue, and that from the supervisor's perspective, the conversation was an ordinary business exchange -- not involving safety issues -- which played no part in his decision to terminate Complainant's employment.

INSUBORDINATION; FACTS OF INDIVIDUAL CASES IMPORTANT

In ***Herchak v. American West Airlines, Inc.***, 2002-AIR-12 (ALJ Jan. 27, 2003) and ***Lawson v. United Airlines, Inc***., 2002-AIR-6 (ALJ Dec. 20, 2002), two different ALJs considered the issue of whether an employee's behavior during the raising of safety concerns was the cause of adverse employment action, and came to very different conclusions based on the individual facts of the cases.

In *Herchak*, the Complainant, a pilot, had raised concerns since 1995 about fatigue, fatigue pairing, inaccurate timekeeping, and other matters with both Respondent's management and the FAA. The ALJ heard testimony of at least 10 active pilots other than Complainant who all made numerous safety complaints but were not disciplined for expressing such concerns. Complainant, however, had a disciplinary letter placed in his personnel record based on a finding that he continued to pursue a complaint about a scheduling error for no purpose other than to "accuse, intimidate and abuse" the employee who had made the mistake, even after the problem had been remedied and an apology issued. Based on a review of the entire record, the ALJ concluded that it was not Complainant's message that had gotten him into trouble, but the confrontational style he used in delivering the message, with the event leading up to issuance of the disciplinary letter being the "final straw."

In contrast, in *Lawson*, Complainant, a mechanic, refused to drop a concern he had about a supervisor's actions during a mechanical repair that had resulted in a dangerous situation for Complainant's work partner. Convinced that Respondent had failed to seriously respond to the concern and based on his belief that the supervisor made misrepresentations, Complainant persisted in seeking answers. On several occasions, Complainant used offensive, abrasive and foul language directed at the supervisor. The matter culminated with Complainant's termination from employment following an encounter in a break room when Complainant swore at and insulted the supervisor, and Complainant later refused to leave the break room for between three to five minutes to attend an "investigation" of the encounter. The ALJ found that Complainant had established that protected activity was a contributing factor to the termination, and that Respondent's articulated legitimate non-discriminatory rationales were not credible when assessed under the clear and convincing evidence standard. First, although Complainant used foul language, the punishment was disparate, the record being replete with evidence that such language was common in the workplace, and that worse abuses by others had not been disciplined. Second, although Respondent alleged intimidation of a supervisor as a ground for the termination, the ALJ found that the

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incidents were not objectively intimidating, and discounted the supervisor's subjective assertions of intimidation based on his finding that the supervisor was a marginally credible witness. The ALJ also observed that intimidation was not documented as a basis for the discipline at the time. Third, although Respondent alleged insubordination as a rationale, the ALJ found that the brief 3 to 5 minutes during which Complainant resisted leaving the break room for an "investigation" was more indicative of disagreement over the conditions of the investigation or confusion over its purpose than a refusal to participate; that there was no evidence that Complainant explicitly refused a direct order; and that Respondent did not follow its own guidelines on responding to insubordination.

- *Contributing factor generally; Palmer's Two Step Burden of Proof*

ARB ISSUES FINAL VERSION OF EN BANC DECISION PROVIDING THE STATE OF THE LAW ON THE TWO-STEP BURDEN OF PROOF IN CASE TYPES THAT EMPLOY THE AIR21 STANDARD (*i.e.*, ACA, AIR21, CFP, CPS, ERA, FDA, FRSA, MAP21, NTS, PSI, SPA, SOX, AND STAA)

ARB PLURALITY REJECTS *FORDHAM/POWERS* LIMITATIONS ON WHAT EVIDENCE ALJ MAY CONSIDER ON CONTRIBUTING FACTOR ELEMENT

LEAD OPINION SUGGESTS THAT CONFUSION CAN BE LESSENED IF STEPS ARE VIEWED AS FOLLOWS:

- **STEP ONE IS THE COMPLAINANT'S BURDEN TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT PROTECTED ACTIVITY PLAYED SOME ROLE IN THE ADVERSE PERSONNEL ACTION.**
- **STEP TWO IS THE RESPONDENT'S "*SAME-ACTION DEFENSE*"**

In ***Palmer v. Canadian National Railway***, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc), *reissued with full separate opinions* (Jan. 4, 2017), *erratum with caption correction* (Jan. 4, 2017), the ARB considered, en banc, how to interpret the FRSA's burden-of-proof provision. The FRSA incorporates by reference the AIR21 standard of proof. The four-judge opinion was a plurality decision, with a two-judge lead opinion, and three separate opinions.

Lead opinion of Judges Desai and Igasaki

—Rejection of *Fordham* and *Powers*

The ARB rejected the interpretation set forth in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) and *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, slip op. at 24 (ARB Mar. 20, 2015) (en banc), *reissued with full dissent* (Apr. 21, 2015), and *vacated* (May 23, 2016), in the panels concluded that the factfinder

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was precluded from considering evidence of an employer's non-retaliatory reasons for its adverse action in determining the contributing-factor question. In *Palmer*, the ARB held that:

> nothing in the statute precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no limitations on the evidence the factfinder may consider at all. Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action.

USDOL/OALJ Reporter at 15.

—Palmer applies to 13 DOL-administered whistleblower provisions

The *Palmer* decision interprets the language of the AIR-21 burden-of-proof provision, which is found in at least twelve other DOL-administered whistleblower provisions, either incorporated though a cross-referencing incorporation, or directly through the same linguistic formulation. The ARB's interpretation in *Palmer*, therefore applies equally to the following thirteen "whistleblower" statutes within the jurisdiction of OALJ and the ARB:

AIR21:

(1) (AIR21) - Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 20109(d)(2)(A)(i)
ERA:

(2) (ERA) - Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 1992, 42 U.S.C. § 5851(b)
Statutes incorporating AIR21 by cross-reference:

(3) (SOX) - Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802 (2002) (codified at 18 U.S.C. § 1514A(b)(2)(C))
(4) (FRSA) - Federal Rail Safety Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, 121 Stat. 266, 444 (2007) (codified as amended at 49 U.S.C. § 20109(d)(2)(A)(i))
(5) (STAA) - Surface Transportation Assistance Act, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1536, 121 Stat. 266, 464 (2007) (codified as amended at 49 U.S.C. § 31105(b)(1))
Statutes using the same linguistic formulation as the AIR-21:

(6) (PSI) - Pipeline Safety Improvement Act of 2002, Pub. L. No. 107–355, § 6, 116 Stat 2985, 2989 (2002) (codified at 49 U.S.C. § 60129(b)(2)(B))
(7) (NTS) - National Transit Systems Security Act of 2007, Title XIV of the Implementing

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Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1413, 121 Stat. 266, 414 (2007) (codified at 6 U.S.C. § 1142(c)(2)(B))
(8) (CPS/CPSIA) - Consumer Product Safety Act, as amended by Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 219(a), 122 Stat. 3016, 3062, 3063-64 (2008) (codified at 15 U.S.C. § 2087(b)(2)(B))
(9) (CFP) - Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1057(c)(3)(C), 124 Stat. 1376, 2031 (2010) (codified at 12 U.S.C. § 5567(c)(3)(C))
(10) (FDA) FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 402, 124 Stat. 3885, 3968, 3969 (2011) (codified at 21 U.S.C. § 399d(b)(2)(C))
(11) (MAP21) Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405, 765, 767 (2012) (codified at 49 U.S.C. § 30171(b)(2)(B))
Statutes cross-referencing another provision with similar language:

(12) (ACA) - Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558, 124 Stat 119, 261 (2010) (codified as amended at 29 U.S.C.A. § 218c(b)(1)) (incorporating by reference the burdens of proof in the CPSIA)
(13) (SPA) - Seaman's Protection Act, as amended by the Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 611(a), 124 Stat. 2905, 2969-70 (2010) (codified as amended at 46 U.S.C. § 2114(b)) (incorporating by reference the burdens of proof in the STAA)
—Textual analysis supported by statutory framework; best to think of step two as the "same-action defense," and not as the "clear and convincing" defense
In rejecting the *Fordham/Powers* interpretation, the ARB lead opinion in *Palmer* focused on the text of the AIR21 two-step burden-of-proof framework. The ARB found that "the text of [§ 42121(b)(2)(B)(iii)]—'the complainant demonstrates that [protected activity] was a contributing factor in the unfavorable personnel action'—is best interpreted to require a complainant to prove by a preponderance of the evidence that protected activity played some role in the adverse personnel action and to permit the factfinder to consider any admissible, relevant evidence in making that determination." USDOL/OALJ Reporter at 18. The ARB also found support for this interpretation in the structure of the AIR21 framework. The ARB noted that "[t]he phrase 'contributing factor' describes the substantive factual issue to be decided while the phrase 'clear and convincing' only describes the standard of proof, not the factual issue to be decided. The two are thus not analogous monikers [and thus] … it may thus help cement this crucial aspect of the two-step test to refer to step two as the 'same-action defense,' not as the 'clear and convincing' defense." *Id*. at 22 (footnotes omitted).

—Support in the legislative history of the ERA whistleblower provision
The ARB found that the legislative history demonstrated that the AIR21 two-step burden-of-proof derived from the burden-of-proof provision in the 1992 amendments to the ERA's whistleblower provision, which in turn derived the test first announced by the United States Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The ARB noted that the *Fordham* panel interpreted the legislative history of the Whistleblower Protection Act's (WPA) burden-of-proof provision as supporting its interpretation of the ERA and AIR21. The ARB explained in an extended discussion why the *Fordham* panel's reliance on the WPA's legislative history was error. Finally, the ARB noted that its interpretation in *Palmer* was supported by at least two decades of consistent jurisprudence in the ARB and the federal courts of appeal.

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— How the AIR burden of proof provision is applied

The ARB next summarized how the AIR-21 burden-of-proof provision is applied. The ARB wrote:

> The obvious reason an ALJ must consider both sides in deciding "c The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance.[215] For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.
>
> The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

———

[215] The complainant must also of course prove that he engaged in protected activity and that the respondent took an adverse action against him. …
USDOL/OALJ Reporter at 52-53.

The ARB elaborated:

> *A. The ALJ must determine whether it is more likely than not that protected activity was a contributing factor in the adverse personnel action, and to do so, the ALJ must consider all relevant, admissible evidence.*
>
> We have said it many a time before, but we cannot say it enough: "A contributing factor is '*any* factor, which alone or in combination with other factors, tends to affect in *any* way the outcome of the decision.'" We want to reemphasize how low the standard is for the employee to meet, how "broad and forgiving" it is. "Any" factor really means *any* factor. It need not be "significant, motivating, substantial or predominant"—it just needs to be a factor. The protected activity need only play some role, and even an "[in]significant" or "[in]substantial" role suffices.
>
> Importantly, if the ALJ believes that the protected activity *and* the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question. Thus, consideration of the employer's nonretaliatory reasons at step one will effectively be premised on the employer pressing the factual theory that nonretaliatory reasons were the *only* reasons for its adverse action. Since the employee need only show that the retaliation played some

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role, the employee necessarily prevails at step one if there was more than one reason and one of those reasons was the protected activity.

This is why we have often said that the employee does not need to disprove the employer's stated reasons or show that those reasons were pretext. Showing that an employer's reasons are pretext can of course be enough for the employee to show protected activity was a "contributing factor" in the adverse personnel action. Indeed, at times, the factfinder's belief that an employer's claimed reasons are false can be precisely what makes the factfinder believe that protected activity was the real reason. That is why a categorical rule prohibiting consideration of the evidence of the employer's nonretaliatory reasons for its adverse action might actually in some circumstances *undermine* a complainant's ability to establish that protected activity was a contributing factor.

Fordham appears to have expressed the worry that permitting consideration of the employer's nonretaliatory reasons at step one would amount to requiring the employee to disprove the employer's nonretaliatory reasons. But because "unlawful retaliatory reasons [can] co-exist with lawful reasons," and because, in such cases, protected activity would be deemed a contributing factor, consideration of evidence of the employer's nonretaliatory reasons when determining the contributing factor issue does *not* require the employee to disprove the employer's reasons.

That is also why the term "weigh" when describing the ALJ's task may well have added to the confusion. Since the "contributing factor" standard requires only that the protected activity play some role in the adverse action, the employer's nonretaliatory reasons are not "weighed against" the employee's protected activity to determine which reasons might be weightier. In other words, the ALJ should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. As long as the employee's protected activity played some role, that is enough. But the evidence of the employer's nonretaliatory reasons must be *considered* alongside the employee's evidence in making that determination; for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct. But, the ALJ never needs to compare the employer's nonretaliatory reasons with the employee's protected activity to determine which is more important in the adverse action.

Moreover, as we have repeatedly emphasized, an employee *may* meet her burden with circumstantial evidence. One reason circumstantial evidence is so important is that, in general, employees are likely to be at a severe disadvantage in access to relevant evidence. When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ should thus be aware of this differential access to evidence. Key, though, is that the ALJ must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee's protected activity played some role in the adverse action. So, for example, even though we reject any notion of a per se knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant

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decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

We cannot emphasize enough the importance of the ALJ's role here: it is to find facts. The ALJ must consider all the relevant, admissible evidence and make a factual determination, under the preponderance of the evidence standard of proof, about what happened: is it more likely than not that the employee's protected activity played a role, any role whatsoever, in the adverse personnel action? If yes, the employee prevails at step one; if no, the employer prevails at step one. If there is a factual dispute on this question, as is usually the case, the ALJ must sift through the evidence and make a factual determination. This requires the ALJ to articulate clearly what facts he or she found and the specific evidence in the record that persuaded the ALJ of those facts.

B. The ALJ must determine whether the employer has proven, by clear and convincing evidence, that, in the absence of any protected activity, the employer would have taken the same adverse action.

If the complainant proves that protected activity was a contributing factor in the adverse personnel action, the ALJ must then turn to the hypothetical question, the employer's same-action defense: the ALJ must determine whether the employer has proven, by clear and convincing evidence, that, "in the absence of" the protected activity, it would have taken the same adverse action. It is not enough for the employer to show that it *could* have taken the same action; it must show that it *would* have.

The standard of proof that the ALJ must use, "clear and convincing," is usually thought of as the intermediate standard between "a preponderance" and "beyond a reasonable doubt"; it requires that the ALJ believe that it is "highly probable" that the employer would have taken the same adverse action in the absence of the protected activity. "Quantified, the probabilities might be in the order of above 70% . . . ."

Again, as when making a determination at step one, the ALJ must consider all relevant, admissible evidence when determining whether the employer has proven that it would have otherwise taken the same adverse action; and again, it is crucial that the ALJ *find* facts and clearly articulate those facts and the specific evidence in the record that persuaded the ALJ of those facts.

USDOL/OALJ Reporter at 53-57 (emphasis as in original) (footnotes omitted).

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Concurring opinion of Judge Corchado

—Expansion on lead opinion; notation that causation question inherently involves delving into the respondent's "metaphysical mental process"

Judge Corchado wrote a separate concurring opinion that reiterated and expanded on the lead opinion's analysis. He also noted that the causation issue necessarily involves assessing the respondent's "metaphysical mental process":

> The obvious reason an ALJ must consider both sides in deciding "causation" is because the employer's decision-making is a metaphysical mental process and neither the complainant nor the employer can show the ALJ the actual mental processes that occurred. The invisible influences on the decision-maker's thoughts cannot be displayed on a movie screen or downloaded as computer data onto a computer monitor. Instead, at the evidentiary hearing, the ALJ faces a complainant trying to prove he was the victim of unlawful mental processes and the employer who denies that protected activity influenced any part of the mental process that led to the employment action in question. The complainant might rely on temporal proximity, inconsistent employer policies, disparate treatment, e-mails, and witness testimony, among other evidence, to prove circumstantially that protected activity contributed. The employer will do the same to prove that protected activity did not contribute. It is this evidence battle that the ALJ must evaluate together to decide as best as possible what the truth is. But whether the causation evidence consists of memoranda, documents, depositions, hearing testimony, etc., all causation evidence presented to the ALJ will be about the influences that did or did not factor into *the employer's mental processes* that led to the ultimate decision against an employee.

USDOL/OALJ Reporter at 67.

Concurring and dissenting opinion of Judge Royce

—Disputes that WPA legislative history was not applicable; Fordham was intended to prevent inaccurate analysis

Judge Royce wrote a concurring and dissenting opinion. She disputed the majority's conclusion that the statutory text was clear and that the WPA legislative history was not applicable. This member conceded that "[i]n an effort to properly effectuate the remedial purposes of the statute, and avoid too narrowly construing the statute, *Fordham* may have overstated what the statutory language dictates" but maintained that "[n]evertheless *Fordham*'s categorical formula for applying the statute to the facts is ultimately the surest method for factfinders to accurately analyze both parties' evidence consonant with the overall goal of whistleblower provisions to protect employees who risk careers to speak up concerning violations of law.' USDOL/OALJ Reporter at 81 (footnotes omitted).

Concurring opinion of Judge Desai

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— If ALJ determines that protected activity was one of the reasons for the adverse action, the ALJ must not weigh that reason against the employer's nonretaliatory reasons to determine how important the retaliatory reason was

Finally, although Judge Desai signed the lead opinion, he also wrote separately to specify the points on which the ARB panel members agreed and on which he explained his understanding of the principal disagreements. He summarized: "if the ALJ determines that the protected activity was one of the reasons for the adverse action, the ALJ must not weigh that *reason* against the employer's nonretaliatory reasons to determine how important the retaliatory reason was: the whole point of Congress lowering the causation standard from 'substantial' to 'contributing' in step one was to say that if a retaliatory reason is a factor at all, the employee prevails at step one."

CONTRIBUTING FACTOR CAUSATION; ARB REJECTS *FORDHAM v. FANNIE MAE*

In ***Palmer v. Canadian National Railway***, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (en banc), the ARB rejected the holding from *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) in which the panel indicated that "after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a 'contributing factor' in the adverse action taken against him … the Administrative Law Judge (ALJ) [is] required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action." The ARB ruled that "ALJs are *not* required to disregard any of the evidence the respondent might offer to show that the protected activity did not contribute to the adverse action. Moreover, there are *no* limitations on the types of evidence an ALJ may consider when determining whether a complainant has demonstrated that protected activity was a contributing factor in the adverse action (other than limitations found in the rules of evidence)." The ARB also stated that this interpretation applies equally to all DOL-administered whistleblower provisions incorporating the AIR-21 burden-of-proof provision

The ARB summarized its decision as follows:

> We divide our analysis into three sections.
>
> Section 1 concludes that the first step of the AIR-21 whistleblower protection provision's burden-of-proof framework requires the complainant to prove, by a preponderance of the evidence, that protected activity was a contributing factor in the unfavorable personnel action. It further concludes that there are no limitations on the evidence the factfinder may consider in making that determination. Section 1 contains a comprehensive analysis of AIR-21's burden-of-proof provision and its provenance, and explains in significant detail why this Board's decision in *Fordham v. Fannie Mae* was wrong. Readers who are not interested in the details of the analysis of the statutory text, structure, and background may skip straight to Section 2.
>
> Section 1's bottom line is that *Fordham*'s interpretation is wrong, and we hereby overturn *Fordham*: nothing in the statute precludes the factfinder from considering evidence of an employer's nonretaliatory reasons for its adverse action in determining the contributing-factor question. Indeed, the statute contains no

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limitations on the evidence the factfinder may consider at all. Where the employer's theory of the case is that protected activity played no role whatsoever in the adverse action, the ALJ must consider the employer's evidence of its nonretaliatory reasons in order to determine whether protected activity was a contributing factor in the adverse action.

Section 2 lays out the legal standard for cases involving whistleblower protection provisions with the AIR-21 burden-of-proof framework and explains how to apply that standard to this and other cases arising under AIR-21, the FRSA, or any other whistleblower protection provision with the same burden-of-proof framework. It explains that the level of causation that a complainant needs to show is extremely low: the protected activity need only be a "contributing factor" in the adverse action. Because of this low level, ALJs should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons. Since in most cases the employer's theory of the facts will be that the protected activity played *no* role in the adverse action, the ALJ must consider the employer's nonretaliatory reasons, but only to determine whether the protected activity played any role at all.

Finally, Section 3 explains why, under the proper legal standard, we remand this case and what the ALJ should do on remand.

CONTRIBUTORY FACTOR CAUSATION; COMPLAINANT FAILED TO ESTABLISH BY A PREPONDERNCE OF THE EVIDENCE THAT HER SELECTION FOR A RANDOM DRUG TEST WAS LINKED TO PROTECTED ACTIVITY UNDER AIR21

In ***Antonellis v. Republic Airways***, ARB No. 2019-0046, ALJ No. 2018-AIR-00024 (ARB Feb. 8, 2021) (per curiam), Complainant, who worked as a First Officer for Respondent, filed an AIR21 complaint alleging that Respondent retaliated against her after she submitted Aviation Safety Action Program (ASAP) report concerning a flight related concern, and after she provided notice of intent to file an ASAP related to difficulties she experienced in traveling to a drug testing facility.

Prior to the flight in question, Complainant had been among 350-400 employees who could be selected for a random drug test by a third-party drug testing administrator through its random-generator program. Complainant was informed of her selection for a random drug test two days after the flight-related ASAP report. Complainant experienced difficulties on her way to the drug testing facility, and informed Respondent that she was going to file an ASAP report concerning the trip conditions. Upon arriving at the facility, she was unable to produce a sufficient specimen, and although informed that she needed to stay to follow the "shy bladder" procedure, she informed Respondent that she could not produce a sufficient specimen and needed medical attention. Although Respondent did not give her permission to leave the drug test, she left. Respondent suspended Complainant, and later terminated her employment for the test refusal. A union grievance was filed, and Complainant was reinstated pending the outcome of a FAA investigation. After the FAA completed the investigation and revoked Complainant's license and medical certificate, Respondent issued a second letter of termination.

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The ALJ found that the flight-related ASAP was protected activity under AIR21, but not the notice of intent to file an ASAP related to the trip to the drug testing facility. The ALJ found that Complainant failed to prove by a preponderance of the evidence that flight related ASAP was a contributing factor in her selection for a random drug test, in Respondent reporting her as a drug test refusal, or in Respondent's decision to terminate her employment.

On appeal, Complainant argued that the ALJ erred in finding that the notice of intent to file an ASAP about the travel conditions to the drug testing facility was not protected activity, and in finding that the other ASAP report was not a contributing factor in the adverse employment actions. Complainant also challenged the ALJ's findings of fact and credibility determinations.

The ARB found that the ALJ's decision was supported by substantial evidence, and that Complainant had not shown an abuse of discretion or reversible error by the ALJ. The ARB summarized: "We recognize that the trip to the testing facility was arduous but those activities and conditions do not fall within the statute's protections. Most importantly, there was simply no evidence that Complainant's protected conduct was at all linked to her selection to be drug tested. They were wholly separate, to put it simply, incidences. The record is clear on this point. Accordingly, we summarily AFFIRM the ALJ's D. & O." Slip op. at 6.

CONTRIBUTING FACTOR CAUSATION; TEMPORAL PROXIMITY OUTWEIGHED BY INTERVENING EVENT OF COMPLAINANT'S OWN BEHAVIOR

In ***Estabrook v. Administrative Review Board, USDOL***, No. 19-60716 (5th Cir. June 30, 2020) (per curiam), the Fifth Circuit held that substantial evidence supported the ALJ's finding that AIR21 protected activities had not contributed to Respondent FedEx's decisions to ground Estabrook and to require a compulsory medical evaluation.

Estabrook alleged that a refusal to fly in April 2013, and his filing of an earlier OSHA complaint, contributed to FedEx's decision to ground him and subject him to a mandatory medical evaluation in August 2013. The court, however, found that substantial evidence supported the ALJ's finding that the grounding and medical evaluation were motivated by Estabrook's unusual behavior, such as demanding a meeting with the CEO with a cryptic reference to the 911 terrorist attacks, and the recommendation during the August 9 meeting to seek monitoring of a former colleague based only on the belief that he had converted to Islam. Estabrook contended that even if his August 2013 outburst had been the principal motivating factor, lingering anger from the April 2013 event contributed to the adverse actions in August. The court reviewed the facts and found that substantial evidence supported the ALJ's finding that the two events were not related. The court noted that any ill-feeling toward Estabrook from the April event were due to his failure to arrive at the airport, and not the refusal to fly. The failure to arrive was not protected activity. The court also noted that the demand to talk with the CEO was not protected activity. The court was not persuaded by Estabrook's temporal proximity argument, noting that the record indicated that the intervening event of Estabrook's behavior in August was what resulted in his grounding and mandatory evaluation. Estabrook argued that the ALJ relied on testimony unworthy of belief, but the court noted that credibility determinations and resolution of conflicting evidence are the prerogative of the fact finder.

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CONTRIBUTORY FACTOR CAUSATION; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDING THAT COMPLAINANT FAILED TO PROVE THAT HIS ALLEGED PROTECTED ACTIVITY CONTRIBUTED TO HIS TERMINATION WHERE (1) CREDIBLE TESTIMONY SHOWED THAT THE DECISION MAKERS DID NOT TAKE INTO ACCOUNT THE PROTECTED ACTIVITY, (2) THE PROTECTED ACTIVITY WAS NO MORE TEMPORALLY PROXIMATE THAN AN INVESTIGATION INTO WHETHER COMPLAINANT WAS IN VIOLATION OF A LAST CHANCE AGREEMENT, AND (3) COMPLAINANT DID NOT ESTABLISH PRETEXT AS MANAGEMENT HAD CLEARLY BEEN UNHAPPY WITH COMPLAINANT'S PERFORMANCE PRIOR TO THE PROTECTED ACTIVITY AND HAD WAITED UNTIL THE "LAST CHANCE" INVESTIGATION WAS OVER BEFORE MAKING A TERMINATION DECISION

In ***Bondurant v. Southwest Airlines, Inc.***, ARB No. 2017-0050, ALJ No. 2013-AIR-00007 (ARB Sept. 2, 2020), Complainant alleged that Southwest Airlines terminated his employment in response to complaints he made regarding violations of FAA regulations and standards. Complainant had been placed on a "Last Chance Agreement," and thereafter reported alleged transport of hazardous material without proper notification of the FAA. About the same time, a manager had opened an investigation into whether Complainant was violating company travel policy and was not fostering a team atmosphere. Eventually, management concluded that Complainant had violated the Last Chance Agreement, and terminated his employment.

The ARB found that substantial evidence supported the ALJ's finding that Complainant failed to prove that his alleged protected activity was a contributing factor to the termination decision. The ALJ credited testimony that management personnel with whom Complainant interacted regarding the alleged protected activity were not involved in the termination decision. In addition, the ARB noted the ALJ's crediting of testimony that the subject of a report of hazardous materials transport never came up in the decision makers' discussion of whether to terminate Complainant's employment.

The ARB noted the ALJ's findings that temporal proximity did not establish causation, and did not provide circumstantial evidence of causation. The ARB cited the ALJ's finding that—the timing of the Last Chance Agreement, a complaint related to Complainant from another employee, and the manager's investigation—were all as close in time to the termination as any alleged protected activity. The ARB also noted that the ALJ found a lack of pretext, as management had been unhappy with Complainant's performance since at least the issuance of the Last Chance Agreement. The ARB also cited the ALJ's finding that "[i]t was not until the end of the investigation and the presentation of the findings to upper management that Respondent made the decision to terminate Bondurant's employment."

CONTRIBUTING FACTOR CAUSATION; ALTHOUGH CAUSATION MAY NOT BE PROVABLE BASED SOLELY ON AN INFERENCE BASED ON TEMPORAL PROXIMITY, TEMPORAL PROXIMITY SUPPORTED BY OTHER FORMS OF CIRCUMSTANTIAL EVIDENCE MAY BE SUFFICIENT

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In ***McMullen v. Figeac Aero North America,*** ARB No. 2017-0018, ALJ No. 2015-AIR-00027 (ARB Mar. 30, 2020) (per curiam), Complainant, the General Manager of Respondent's Wichita airline components plant, filed an AIR21 retaliation complaint alleging that his employer terminated his employment in retaliation for reporting safety violations. The ALJ found in favor of Complainant. The ARB affirmed.

In regard to contributing factor causation, the ALJ found it significant that the adverse action occurred with five days of a first email reporting a potential FAA regulation violation, and within three days of a second email. The ALJ also based his finding of contributory factor causation on an email chain between Complainant and the official who decided to terminate Complainant's employment, credibility determinations, and a finding that Respondent had not established that there were legitimate reasons for the termination. The ARB found that the ALJ's finding of temporal proximity was supported by substantial additional evidence. The ARB also determined that the evidence of record supported the ALJ's finding of contributory factor causation. The ARB observed that this case was distinguishable from another recent ARB decision:

The Board recently issued *Acosta v. Union Pacific Railroad Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020). In *Acosta*, the Board held that the ALJ erred in concluding that an "inference" of contribution can be established with temporal proximity alone.

> We stated that "[t]he mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two." *Acosta*, slip op. at 8 (citations omitted). The facts in *Acosta* are dissimilar to the case at hand because in *Acosta*, the nature of complainant's job involved almost daily protected activity, and there were intervening events between the protected activity and the adverse action. Importantly, the Board did clarify that "temporal proximity may be supported by other forms of circumstantial evidence establishing the evidentiary link between the protected act and the adverse action." *Id*. Such is the case before us, where, the ALJ credited Complainant's testimony, which is supported by the evidence of record, the emails between Complainant and [Respondent's parent company's CEO], and did not exclusively rely on temporal proximity.

Slip op. at 7, n.8.

CONTRIBUTORY FACTOR CAUSATION; EVIDENCE THAT DECISION TO TERMINATE COMPLAINANT'S EMPLOYMENT WAS MADE PRIOR TO PROTECTED ACTIVITY

In ***Cerny v. Triump Aerostructures-Vought Aircraft Division***, ARB No. 2019-0025, ALJ No. 2016-AIR-00003 (ARB Oct. 31, 2019), Complainant filed a complaint alleging that Respondent retaliated against him in violation of AIR21's whistleblower protection provisions for raising air transportation safety concerns. The ARB affirmed the ALJ's finding that Complainant had not engaged in protected activity when he filed a checklist of changes he refused to make to an engineering report he had submitted.

The ARB also found that, even if submission of the checklist was protected activity, substantial evidence supported the ALJ's finding that Complainant was fired for inability or unwillingness to

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use computer programs and inability to produce useful work, and that the refusal checklist had not contributed to the decision to terminate Complainant's employment—the termination decision having been made prior to Complainant's submission of the checklist. Although Complainant argued on appeal that certain emails and a draft termination document indicating that management was preparing to fire Complainant prior to submission of the refusal checklist were forgeries due to certain irregularities, the ARB found that substantial evidence supported the ALJ's determination finding that these arguments were not compelling, and that there was another email that independently confirmed the prior decision to terminate Complainant's employment.

CONTRIBUTORY FACTOR CAUSATION; LEVEL OR QUANTUM OF CAUSATION THAT A COMPLAINANT IS REQUIRED TO SHOW SHOULD NOT BE CONFUSED WITH A COMPLAINANT'S BURDEN OF PROOF TO ESTABLISH THE REQUIRED CAUSATION EXISTS; EVEN IF *PALMER* DECISION WAS UNSUCCCESFUL IN EXPLAINING THIS DIFFERENCE, WHERE THERE WAS DIRECT EVIDENCE OF CAUSATION AND SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S DECISION, ARB MUST AFFIRM EVEN IF ANOTHER ALJ LOOKING AT SAME RECORD MIGHT DECIDE FOR RESPONDENT

In ***Yates v. Superior Air Carrier LLC***, ARB No. 2017-0061, ALJ No. 2015-AIR-00028 (ARB Sept. 26, 2019) (per curiam), Respondent argued on appeal that the ALJ applied an incorrect burden of proof as to contributing factor causation, and that the ARB's decision in *Palmer v. Canadian Nat'l Ry. I Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 14-15 (ARB Sept. 30, 2016, reissued Jan. 4, 2017) misstates the burden of proof. The ARB observed that Respondent appeared to be confusing in this regard "what level or quantum of causation that a complainant is required to show with a complainant's burden of proof to establish the required causation exists. These two burdens are distinct, as *Palmer* attempted to explain, with an apparently questionable degree of success." Slip op. at 7 (footnote omitted). The ARB stated that "[r]egardless of *Palmer's* explanations about contributing factor causation or the ALJ's recitations of them, we conclude that the ALJ correctly analyzed causation in this case." *Id*. (footnote omitted; in the footnote, the ARB conceded that *Palmer* may have created confusion rather dispelling it). Here, the ALJ found direct evidence of causation based on Respondent's statements and actions about Complainant's protected activity. Respondent had found fault with Complainant's email to an NTSB investigator about the NTSB's report on a crash which Complainant had been the First Officer (second-in-command), "questioned his decision to write it and then suspended and terminated his employment because of his email." *Id*. The ARB found that substantial evidence supported the ALJ's finding on causation even if a different ALJ could have looked at the same record and drawn a different conclusion.

CONTRIBUTING FACTOR CAUSATION; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDING THAT INVESTIGATION INTO COMPLAINANT'S NOT REPORTING AT SCHEDULED TIME FOR FLIGHT THAT HAD BEEN WEATHER DELAYED WAS NOT PROMPTED BY A CONCERN ABOUT A REFUSAL TO FLY BUT RATHER A CONCERN ABOUT FLIGHT REPORTING PROTOCOL

In ***Estabrook v. Federal Express Corp.***, ARB No. 2017-0047, ALJ No. 2014-AIR-00022 (ARB Aug. 8, 2019) (per curiam), Complainant was a pilot for FedEx. His refusal to fly in bad weather and associated OSHA complaint (later withdrawn when FedEx took no disciplinary action) were

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both protected activity under AIR21. The ARB, however, found that substantial evidence supported the ALJ's finding that FedEx management was not concerned with Complainant's refusal to fly, but rather had investigated whether Complainant had breached protocol when he stayed at the hotel and did not report to the airport an hour before his flight. The ARB also found that substantial evidence supported the ALJ's finding that Complainant's subsequent behavior, and not the refusal to fly, was the reason Complainant was subjected to a psychological fitness for duty evaluation (which resulted in a return to flight duty with no change in pay or status, albeit apparently resulting in Complainant having to participate in training to obtain recertification because the length of the Not Operationally Qualified (NOQ status)).

CONTRIBUTING FACTOR; COMPLAINANT'S LOGBOOK ENTRY CALLING FOR INSPECTION FOUND TO HAVE CONTRIBUTED TO DEFENDANT'S DECISION TO SUSPEND THE COMPLAINANT

In ***Cont'l Airlines, Inc. v. Admin. Review Bd., USDOL***, No. 15-60012 (5th Cir. Jan. 7, 2016) (unpublished) (2016 U.S. App. LEXIS 324; 2016 WL 97461)(case below ARB No. 10-026, ALJ No. 2008-AIR-00009), the Fifth Circuit found that substantial evidence supported the ARB's decision that "Continental [the Petitioner] retaliated against Luder [the AIR21 Complainant] when it suspended him for logging turbulence on an earlier flight reported to him by a member of the previous flight crew and triggering an inspection which resulted in a delayed flight." Slip op. at 1-2. The court found that Luder's protected conduct contributed to the adverse employment action, as Luder's logbook entry affected Continental's decision to suspend him. In its letter advising Luder of his sanctions, Continental acknowledged that he "requested an aircraft inspection" and that it punished him for "calling for the inspection," and as such, his "actions were unprofessional."

CONTRIBUTING FACTOR CAUSATION; ALJ'S GRANT OF SUMMARY DECISION DENYING COMPLAINT AFFIRMED WHERE COMPLAINANT FAILED TO SHOW A GENUINE ISSUE OF MATERIAL FACT SHOWING THAT THE DECISION MAKERS KNEW ABOUT THE PROTECTED ACTIVITY OR THAT TERMINATION WAS ORCHESTRATED OR THAT AN INTERVENING EVENT HAD NOT BROKEN A WEAK INFERENCE BASED ON TEMPORAL PROXIMITY

In ***Cobb v. FedEx Corporate Services, Inc.***, ARB No. 16-030, ALJ No. 2010-AIR-24 (ARB Sept. 29, 2017), the ARB affirmed the ALJ's grant of the Respondent's motion for summary decision because the record did not show a genuine issue of material fact that permitted a finding that the Respondent terminated the Complainant's employment, in whole or in part, because of protected activity under AIR21. The record did show that the Complainant communicated concerns about the safety of a runway to FedEx executives. The Complainant, however, failed to provide evidence or argument that any of the persons, who had received those concerns were involved in the decision to terminate his employment or communicated protected activity to the decision makers prior to the Complainant's termination for abuse of a discount mailing privilege.

The Complainant speculated that the Respondent's vice-president of security orchestrated the termination, and sought emails in discovery to establish a link between the termination and protected activity. The ALJ allowed limited production and reviewed the emails in camera. After in camera review, the ALJ agreed with the Respondent that the emails were not connected to the Complainant's case. The ARB found that the Complainant produced no direct or circumstantial

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evidence that the VP had orchestrated the termination, and noted that the VP had provided a declaration stating that he had no recollection of any role in the termination decision and did not remember receiving the Complainant's study or complaint or sending notice of it to anyone.

The ALJ also found that the abuse of the mailing privilege was an intervening event that broke any inference of causation stemming from the Complainant's dissemination of his study on the runway's safety. The ARB clarified that the ALJ had erred in finding a three year break between the protected activity and the termination because the Complainant had at least mentioned or refreshed the issue in the interim. The ARB, however, still found that the inference was weak because there was a long gap with no protected reports, and the Complainant had received a promotion and award in the interim. But, even more importantly, the shipping privilege violation was an intervening event with a strong causal connection to the termination, and the HR department and the Complainant's supervisor testified that they did not know of the protected activity prior to the termination for the shipping privilege violation.

CAUSATION; CONTRIBUTING FACTOR SHOWN WHERE COMPLAINANT'S PROTECTED ACTIVITY WAS INEXTRICABLY INTERTWINED WITH THE UNFAVORABLE EMPLOYMENT ACTION

In ***Benjamin v. Citationshares Management, LLC,*** ARB No. 12-029, ALJ No. 2010-AIR-1 (ARB Nov. 5, 2013), the Complainant was a pilot who flew passenger jets for CitationAir's private clients. Prior to the beginning of a tour of duty, he saw the plane he was to fly being serviced and undergoing a Continued Service Inspection. The mechanics confirmed in writing that the plane passed inspection, including the landing gear struts. The next day, the Complainant observed a problem with one of the landing gear struts, and the pilot in command agreed that it should be reported. The Complainant contacted the Flight Duty Officer and was referred to the company's Chief Pilot. The Chief Pilot advised on steps to bring the strut into compliance, but when those were unsuccessful, agreed that the plane must be grounded. The Chief Pilot then instructed the Flight Duty Officer to remove the Complainant from the flight and assign another pilot for the tour of duty. CitationAir then summoned the Complainant for a face-to-face meeting at its headquarters relating to the report of the landing gear strut. The next day the Complainant filed an Aviation Safety Action Program (ASAP) report with CitationAir's Vice President of Safety alleging that indirect pressure was being placed on pilots to keep planes flying, and that this was a dangerous and unsafe situation. The Complainant, expecting to be fired, purchased a pocket-size audio recorder. At the meeting, an HR employee was present, which confirmed for the Complainant that he needed to record the meeting to protect himself. The meeting began with a discussion of the wing strut incident. When the recorder noisily malfunctioned, the Complainant was asked by the Chief Pilot why he was recording the meeting, to which the Complainant stated he was afraid the Chief Pilot would yell at him. The Chief Pilot immediately had the Complainant turn in his company key and ID card, and had him escorted from the building. Several days later the Complainant received a termination letter. CitationAir subsequently denied the Complainant's request to have the termination decision peer reviewed. The Complainant then filed an AIR21 complaint. The ALJ denied the complaint on the ground that the Complainant had not engaged in protected activity.

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The ARB reversed, finding that the Complainant engaged in protected activity when he (1) made safety reports about the landing gear struts, (2) submitted the ASAP report, and (3) attempted to record expected retaliatory conduct at the meeting to which he had been summoned.

The ALJ had not specifically reached causation, but the ARB found that the ALJ's finding and the undisputed facts permitted it to find that that each of the protected actions contributed to one or more unfavorable employment actions. There was no dispute that the attempted recording was not only a contributing factor, but the decisive factor in the Respondent's termination of the Complainant's employment and denial of the peer review request.

The ARB found moreover that the reporting of safety concerns and the filing of the ASAP were inextricably intertwined with the Respondent's decision to remove the Complainant from the flight and to call the face-to-face meeting. The ARB reviewed the applicable law:

> A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Smith v. Duke Energy Carolinas*, LLC, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012). A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the Respondent's "reason, while true, is only one of the reasons for its conduct, another [contributing] factor is the Complainant's protected" activity. *Hoffman*, ARB No. 09-021, slip op. at 4. An employee may prove causation through indirect or circumstantial evidence, which requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.
>
> The ARB has repeatedly found that protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012), the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Smith*, ARB No. 11-003, slip op. at 4, the employee reported a rule violation and was fired for reporting the violation late. Similarly, in *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. Where protected activity and unfavorable employment actions are inextricably intertwined, causation is established without the need for circumstantial evidence; however, such evidence may certainly bolster the causal relationship.

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USDOL/OALJ Reporter at 11-12 (footnote omitted). The ARB reviewed the record in the instant case and found that the meeting had been called based on the very discrepancy that the Complainant had reported, and known to CitationAir only because the Complainant reported it. The ARB found those facts similar to those in *Smith* and *Henderson*.

The ARB remanded the case to the ALJ to consider whether the Employer meet its burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of protected activity, and if not, to determine damages. The ARB acknowledged that, in view of its finding on the link between the protected activity and the unfavorable employment actions, this may be an impossible burden:

> Typically, respondents meet this burden of proof by showing what they would have done if protected activity had never actually occurred. Arguably, that is an impossible burden in this case. Here, Benjamin's report of safety concerns arguably was the single catalyst for the adverse actions taken against him. Consequently, in remanding this case, we leave open the question of whether the statute permits CitationAir to meet its burden under AIR 21 by showing with clear and convincing evidence that it would have taken the same action based solely on non-retaliatory and legitimate reasons, rather than proving what it would have done if protected activity had never occurred.

USDOL/OALJ Reporter at 13.

CONTRIBUTING CAUSE; BUSINESS JUDGMENT RULE; ALJ DOES NOT VIOLATE THE RULE MERELY BY REVIEWING THE RESPONDENT'S ACTIONS AND FINDING THAT THE COMPLAINANT WAS SINGLED OUT

In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the Respondent argued that the ALJ violated the "business judgment" rule by second-guessing the Respondent's actions in using hand-writing analysis to determine whether the Complainant was responsible for obscene graffiti posted in the crew lounge. The ARB found that the ALJ had found that the Respondent had singled out the Complainant based on a sequence of events leading up to the firing of the Complainant, including the fact that the only the Complainant's handwriting samples were provided to the Respondent's expert. The ALJ had not decided whether the experts were wrong or right or whether the Respondent reasonably relied on their opinions. The ARB cited prior authority to the effect that an ALJ does not run afoul of the business judgment rule where finding that protected activity contributed to a termination decision based on a variety of factors.

CONTRIBUTING CAUSE; FINDING OF PRETEXT IS NOT A PREREQUISITE

In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the ARB rejected the Respondent's argument that, since the Complainant did not prove pretext, he could not have proved by a preponderance of the evidence that protected activity contributed to his discharge. The ARB stated that it had not held that pretext must be proven to establish that protected activity was a contributing factor, but only that an ALJ may employ, if

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appropriate, Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR21 cases.

CONTRIBUTING FACTOR; ONCE COMPLAINANT ESTABLISHES THAT PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN ADVERSE ACTION, RESPONDENT'S BURDEN IS TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT IT WOULD HAVE TAKEN THE ADVERSE ACTION IN THE ABSENCE OF THE PROTECTED ACTIVITY

In ***Patino v. Birken Manufacturing Co.***, ARB No. 06-125, 2005-AIR-23 (ARB July 7, 2008), once the Complainant established by a preponderance of the evidence that his protected activities were a contributing factor in his firing, the ALJ imposed the wrong analysis when she stated that the Respondent could rebut by producing evidence of a legitimate, non-discriminatory reason for the firing. Rather, the Respondent's burden was to prove by clear and convincing evidence that it would have fired the Complainant in the absence of his protected activity. The ARB remanded for the ALJ to apply the correct legal standard.

CONTRIBUTING CAUSE; DELAY IN PAYMENT OF WORKERS' COMPENSATION BENEFITS NOT SHOWN TO BE ATTRIBUTABLE TO AN INTENT TO RETALIATE

In ***Hafer v. United Airlines, Inc.***, ARB No. 06-017, ALJ No. 2005-AIR-8 (ARB Jan. 31, 2008), the ARB found that the Complainant failed to meet his burden of proving that his protected activity was a contributing factor in a delay in the payment of certain workers' compensation payments. The ARB found that substantial evidence supported the ALJ's findings that the delay was not attributable to any intentional efforts by employees of the Respondent (the payments were the responsibility of an independent, third party workers' compensation administrator), that deliberately delaying such payments would have been an illogical way to retaliate because it only would result in increasing the Respondent's liability to the Complainant, and that the delay was likely due to inadvertence and clerical errors.

CONTRIBUTING CAUSE; INFERENCE BASED ON TEMPORAL PROXIMITY IS NOT NECESSARILY DISPOSITIVE

In ***Barker v. Ameristar Airways, Inc.***, ARB No. 05-058, ALJ No. 2004-AIR-12 (ARB Dec. 31, 2007), the ARB found that the only evidence that connected the Complainant's protected activity and his discharge under a reduction-in-force was temporal proximity, and agreed with the ALJ's ultimate conclusion that the temporal proximity alone was insufficient to establish that the Complainant's protected activity was a contributing cause to the Respondent's decision to discharge him. The ARB wrote:

> Temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation. 29 C.F.R. § 1979.104(b)(2). While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). For example, if an employer has established one or more legitimate reasons for the

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> adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action. *Barber v. Planet Airways, Inc*., ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

CONTRIBUTING FACTOR; TEMPORAL PROXIMITY AND INTERVENING EVENTS

In ***Barber v. Planet Airways, Inc.***, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006), the ALJ properly found that the Complainant had not carried his burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the Respondent's decision to fire him. Although there was temporal proximity between the protected activity and the adverse action, substantial evidence supported the ALJ's finding of no nexus: (1) the evidence showed that the Respondent had been making preparations to fire the Complainant for months; (2) there was credible testimony by the Respondent's HR manager that he received numerous complaints about the Complainant's sexual harassment, poor management and retaliation against employees; (3) the Complainant had been behind the firing of two captains who had voiced safety complaints to the FAA, and the Respondent had settled, over the Complainant's objection, whistleblower cases filed by those captains because it did not have a defense; (4) the Complainant maintained an "inappropriate" and "unusual" relationship with a FAA inspector, which the ALJ correctly found played a role in the firing -- but not based on safety concerns reported to the FAA. The Board wrote:

> [W]hile a temporal connection between protected activity and an adverse action may support an inference of retaliation, *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005), the inference is not necessarily dispositive. For example, 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. *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.

In the instant case, there had been intervening events. Moreover, the Complainant gave testimony that tacitly agreed with many of the non-discriminatory reasons given by the Respondent for the discharge.

CAUSATION; TEMPORAL PROXIMITY MAY BE SUFFICIENT TO ESTABLISH CONTRIBUTING FACTOR ELEMENT

In ***Vieques Air Link, Inc. v. USDOL***, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit held that the ALJ permissibly treated the temporal proximity between the Complainant's reports and his suspensions by the Respondent as sufficient to show the requisite causal relationship to establish that his protected activity was a contributing factor in the adverse employment action he suffered.

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CAUSATION; CONTRIBUTING FACTOR; LETTER TO FAA REPORTING SAFETY CONCERN; FAILURE TO SHOW THAT IT WAS THE SUBSTANCE OF THE LETTER RATHER THE MANNER OF DISTRIBUTION OF THE LETTER THAT LED TO THE ADVERSE ACTION

In ***Robinson v. Northwest Airlines, Inc.***, ARB No. 04-041, ALJ No. 2003-AIR-22 (ARB Nov. 30, 2005), the Complainant, a pilot, had written a letter to the FAA complaining that that the Respondent had failed to remove the checked luggage of two passengers who had been detained for currency violations. Later, the Complainant copied five pilots and Osama bin Laden "in absentia" with a "continuation" of the letter. Because of this, and other prior and subsequent events, the Complainant was taken out of service and placed on paid status pending the results of a psychological evaluation. Eventually the Complainant was placed on long term sick leave. The ARB affirmed the ALJ's finding that the Complainant had failed to establish by a preponderance of the evidence that the protected activity of communicating the baggage removal violation to the FAA letter was a contributing factor in the Respondent's adverse actions. The ARB found that substantial evidence supported the ALJ's finding that it was the addendum purporting to copy bin Laden rather than the safety complaint that concerned Respondent's managers. The ARB agreed with the ALJ's finding that, although the Complainant had shown no performance problems, it was his pattern of conduct over time that caused the Respondent to be concerned about his potential conduct in the cockpit once under stress and to refer him for the psychological evaluation.

CONTRIBUTING FACTOR; UNPROTECTED HOTLINE COMPLAINT SHOWN TO BE SOLE MOTIVE FOR SELECTION OF COMPLAINANT FOR LAYOFF

In ***Walker v. American Airlines***, 2003-AIR-17 (ALJ Nov. 16, 2004), the ALJ found that the Complainant was not engaged in protected activity when he made a call to the company hotline that was not made in good faith or with a reasonable basis. Following investigation, the Complainant was given a "career decision day" for making an admittedly false hotline complaint. Although the Complainant engaged in other protected activity, the preponderance of the evidence demonstrated that the Complainant was selected for layoff entirely on the basis of there being a "career decision day" discipline in his record. The ALJ also found that there was clear and convincing evidence that the Respondent would have made this decision even if the Complainant had not engaged in protected activities: the company was making layoffs in the immediate wake of September 11, and the Complainant was the only supervisory employee with a record of recent discipline in his file.

CONTRIBUTING FACTOR; CIRCUMSTANTIAL EVIDENCE STANDING ALONE MAY NOT BE SUFFICIENT PROOF TO INVOKE RESPONDENT'S CLEARN AND CONVINCING BURDEN OF PROOF WHERE IT ARTICULATES A LEGITIMATE NON-DISCRIMATORY REASON AND THE COMPLAINANT DOES NOT SHOW THAT REASON TO BE PRETEXTUAL

Under the whistleblower provision of AIR21, the complainant must prove by a preponderance of the evidence, that protected activity was a contributing factor that motivated the respondent to take adverse action against him. In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB indicated that even though temporal proximity between the protected activity and the adverse employment action circumstantially creates an

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inference of a violation of the Act, such may not be sufficient to prove the case. The ARB indicated that if the Respondent establishes that the adverse action was taken for legitimate, nondiscriminatory reasons alone, and the Complainant does not establish that such reasons were pretextual, the Complainant may be found to have failed to show that his protected activity was a contributing factor in the adverse employment decision. If so, it is unnecessary to proceed to the next stage of proof (whether the Respondent demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity). In other words: "It is not necessary for the Respondent to produce clear and convincing evidence of a legitimate non-discriminatory reason to rebut the Complainant's prima facie case. .... That heightened burden of proof does not come into play until the Complainant has demonstrated that protected activity was a contributing factor in the termination, see 49 U.S.C.A. § 42121(b)(2)(B)(iii)-(iv) . . . ."

- *Respondent's knowledge of protected activity*

COMPLAINANT IS NOT REQUIRED TO SHOW THAT THE RESPONDENT HAD SPECIFIC KNOWLEDGE THAT THE COMPLAINANT'S COMPLAINTS INVOLVED PROTECTED ACTIVITY UNDER AIR21

In ***Occhione v. PSA Airlines, Inc.***, ARB No. 15-090, ALJ No. 2011-AIR-12 (ARB July 26, 2017), the ALJ erred when he found that the Respondent's knowledge of the Complainant's protected activity required "specific knowledge of [the Complainant's] complaints and whether the complaints involved protected activity." USDOL/OALJ Reporter at 4 (quoting from ALJ's decision). The ARB stated that "[a]pplicable precedent does not support this specificity requirement for a finding of knowledge," and wrote the following in a footnote:

> The ALJ conceded that the APDs [Aircrew Program Designees, i.e., "check airmen"] were aware of Occhione's complaints about the check rides but were not aware that the complaint involved a specific violation of an FAA regulation. The ALJ wrongly concluded that this distinction precluded a finding that the APDs knew of Occhione's "protected activity." In *Knox v. DOL*, 434 F.3d 721, 725 (4th Cir. 2006), the Fourth Circuit ruled, in a case arising under the Clean Air Act, that when a complainant has to prove that she had a reasonable belief that she was engaging in protected activity, she does not have to prove that she conveyed her reasonable belief to management. Further, a complainant is not required to cite to a specific rule or regulation for her disclosure to be protected. *See Simpson v. United Parcel Svc.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008) ("A complainant need not cite to a specific violation, [but] allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety))." Similarly, a respondent's knowledge of the protected activity need not be specific, and a complainant need not prove that a respondent knew that the complaint involved a violation of a particular FAA regulation.

USDOL/OALJ Reporter at 4, n.16. The ALJ's error, however, was harmless because he made an alternative finding in which he assumed the Respondent's knowledge of the protected activity.

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COMMUNICATION REQUIREMENT; THEORY THAT COERCION MAY EXCUSE FAILURE TO COMMUNICATE PROTECTED ACTIVITY

In ***Rougas v. Southeast Airlines, Inc.,*** ARB No. 04-139, ALJ No. 2004-AIR-3 (ARB July 31, 2006), the Complainant appeared to argue on appeal to the ARB that he should be excused from the requirement that the protected activity (in this case, refusal to fly based on illness) be communicated to the Respondent because he was coerced to fly by a threat (which had been immediately retracted) by the Respondent's operations director that the Complainant would be fired if he did not fly. The ARB observed that all the facts had not yet been determined, and that the Complainant had not cited any case law on point as to whether coercion could excuse the failure to comply with the communication requirement. Because it was remanding the case, the ARB did not decide the issue of whether the excuse theory could succeed.

KNOWLEDGE OF PROTECTED ACTIVITY; COINCIDENCES AND INFERENCES ALONE DO NOT CARRY COMPLAINANT'S BURDEN OF PROOF

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB stated that an element of an AIR21 whistleblower case is that the employer knew about the protected activity. The Board wrote:

> Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. *Bartlik v. TVA,* 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd,* 73 F.3d 100 (6th Cir. 1996) (ERA employee protection provision). This element derives from the language of the statutory prohibitions, in this case that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity. 49 U.S.C.A. § 42121 (a). Section 519 provides expressly that the element of employer knowledge applies even to circumstances in which an employee "is about to" provide, or cause to be provided, information about air carrier safety or "is about to" file, or cause to be filed, such proceedings. 49 U.S.C.A. § 42121(a)(1) and (2); H.R. Conf. Rep. No. 106-513, at 216-217 (2000), *reprinted in* 2000 U.S.C.C.A.N. 80, 153-154 (prohibition against taking adverse action against an employee who provided or is about to provide (with any knowledge of the employer) any safety information).

The ARB noted that the ALJ had found that, although circumstantial evidence pointed toward a case of unlawful discrimination under AIR21, contravening evidence undermined the circumstantial evidence case. The ARB found that substantial evidence supported the ALJ's conclusion that the managers who terminated the Complainant's services did not know about his protected activity. Thus, where the Complainant's proof consisted merely of coincidental timing and inferences, but there was uncontroverted testimony of the lack of employer knowledge, the Complainant failed to meet his burden of establishing by a preponderance of the evidence that the relevant decision makers knew about his FAA complaint.

- *Pretext*

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PRETEXT; PILOT'S IMPOLITE CONVERSATION AND FAILURE TO FOLLOW PROCEDURES REJECTED AS JUSTIFICATION FOR SUSPENSION WHERE PILOT HAD AUTHORITY UNDER 14 C.F.R. § 91.3 TO DECIDE HAT THE PLANE WAS UNSAFE TO OPERATE

In ***Cont'l Airlines, Inc. v. Admin. Review Bd., USDOL***, No. 15-60012 (5th Cir. Jan. 7, 2016) (unpublished) (2016 U.S. App. LEXIS 324; 2016 WL 97461)(case below ARB No. 10-026, ALJ No. 2008-AIR-00009), the Fifth Circuit found that substantial evidence supported the ARB's decision that "Continental [the Petitioner] retaliated against Luder [the AIR21 Complainant] when it suspended him for logging turbulence on an earlier flight reported to him by a member of the previous flight crew and triggering an inspection which resulted in a delayed flight." Slip op. at 1-2. The court found that substantial evidence supported the ARB's finding that the alternative reasons presented by the Defendant were pretextual. The court rejected the Defendant's argument that Luder's impolite conversation and failure to follow procedures justified his suspension. Instead, the court found that Luder had the authority to decide that the plane was unsafe to operate under 14 C.F.R. § 91.3, which provides that "[t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." Similarly, Luder followed Continental procedures for reporting his concern for the safety of the aircraft. Therefore, the ALJ was entitled to find that the real reason for Luder's refusal to agree with them that an inspection was not required under Continental's flight operations manual.

PRETEXT; FINDING THAT RESPONDENT ARTICULATED NON-DISCRIMATORY REASONS FOR ADVERSE ACTION MERELY SHIFTS BURDEN TO COMPLAINANT TO ESTABLISH PRETEXT, AND DOES NOT MEAN THAT ARTICULATED REASONS WERE FOUND TO BE CREDIBLE

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010), the ALJ had found that the Respondent had articulated four facially non-discriminatory reasons for firing the Complainant, and therefore the burden shifted to the Complainant to establish pretext. On appeal, the Respondent argued that substantial evidence did not support the ALJ's finding that the proffered reasons were pretext because the ALJ initially found then to be legitimate. The ARB rejected this argument, noting that the ALJ's finding that the reasons were facially non-discriminatory did not mean that the ALJ also found the reasons to be credible.

PRETEXT; SHIFTING AND AFTER-THE-FACT EXPLANATIONS

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010), in affirming the ALJ's finding that the Respondent had offered new and differing reasons for firing the Complainant after the fact, the ARB noted that it

> ...has held that shifting explanations for an employer's adverse action often indicate that its asserted legitimate reasons are pretext. Also, the credibility of an employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision. Finally, contradictions in the circumstances surrounding an employer's termination of employment can also indicate that the employer's real motive was unlawful retaliation.

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USDOL/OALJ Reporter at 9-10 (footnotes omitted).

PRETEXT SHOWN; ALLEGATIONS THAT THE COMPLAINANT HAD MADE FRAUDULENT STATEMENTS TO IMPORTANT CUSTOMER NOT SUPPORTED BY THE EVIDENCE; RELIANCE BY RESPONDENT ON EMPLOYEE MANUAL SUGGESTS PRETEXT WHERE THE RESPONDENT DID NOT ITSELF FOLLOW MANUAL'S PROCEDURE FOR TERMINATION OF EMPLOYEE

In ***Florek v. Eastern Air Center, Inc.***, ARB No. 07-113, ALJ No. 2006-AIR-9 (ARB May 21, 2009), the Complainant was a line crewman for a company that leased a private jet to its primary customer, a medical flight company owned by seven area hospitals. In July 2004, the Complainant was asked to clean a plane; the plane was considerably soiled by human waste. The Complainant cleaned as best he could, and when the Complainant complained to his supervisor about the condition of the plane, he was told that the plane had been used to transport a cancer patient who had been in "rough shape." The Complainant was told that the medical flight company would clean the plane. After the plane was used for three more charters, the Complainant called the medical flight company and was told that it did not know about the soiled plane and that the Respondent should be taking care of the cleaning. The Complainant called an official of the Respondent about the phone conversation and later sent a memo about the problem to the official. The Complainant called the FAA about the condition fo the plane. The FAA visited the Respondent's facility while the Complainant was absent. Upon his return, the Complainant's security badge had been deactivated, and he was handed a letter of termination. The reason given for the termination was making fraudulent statements to customers and others.

Because the Respondent did not contest the issue on appeal, the ARB affirmed the ALJ's assumption that the Complainant's raising of concerns about the condition of the airplane implicated protected activity under AIR21 even though violation of no specific FAA order, regulation or standard, or any other law relating to air carrier safety had been identified. The ARB found that the Respondent had waived a challenge to the protected activity element of the complaint.

The Respondent's main defense was the contention that the Complainant's memo about the phone call showed that the Complainant made fraudulent statements to the Respondent's primary customer. The ARB, however, found that substantial evidence supported the ALJ's findings that each of the allegedly fraudulent statements were instead the Complainant's expressed opinions and questions in trying to rectify what he considered to be a safety and health hazard. The ARB also agreed with the ALJ that pretext was shown by the Respondent's claim that the Complainant was fired for violating the employee manual, but the Respondent had disregarded the employee manual's procedures when firing the Complainant. The same evidence showed that the Respondent had not proved by clear and convincing evidence that it would have fired the Complainant in the absence of the protected activity.

PRETEXT/CONTRIBUTING CAUSE NOT ESTABLISHED MERELY BY TEMPORAL PROXIMITY OR SOME CIRCUMSTANTIAL EVIDENCE; RATHER COMPLAINANT'S BURDEN IS TO SHOW CONTRIBUTING CAUSE BY THE PREPONDERANCE OF THE EVIDENCE

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In ***Sievers v. Alaska Airlines, Inc.***, ARB No. 05-109, ALJ No. 2004-AIR-28 (ARB Jan. 30, 2008), the ARB found that the record supported some, but not all, of the ALJ's findings on circumstantial evidence which led the ALJ to find that the Respondent had used time card violations as a pretext to fire the Complainant, a maintenance supervisor, over protected activity, and that the protected activity contributed to the firing. The ARB agreed with the ALJ that the protected activity and the termination occurred closely in time; that the managers were upset when out-of-service delays occurred; that a manager had recommended that another employee who had also been discharged, but not the Complainant, be eligible for rehire; and that the Respondent did not investigate the allegations that the facility's maintenance manager knew about and condoned timecard fraud. However, the ARB found that these findings did not constitute a preponderance of the evidence that the Complainant's protected activity contributed to his firing. Rather, the ARB found that the weight of the evidence demonstrated that the Respondent terminated the Complainant because of timecard fraud. Specifically, the ARB found that the Respondent had a clear, legitimate reason to discipline the Complainant over the time card violations; that employees had been warned about such violations; that the investigation of time card violations and subsequent disciplinary action was not contrived; and that the record demonstrated that managers -- though occasionally having passing impatience over delays -- had harbored no animus toward the Complainant when he insisted on safety.

PRETEXT; ONCE COMPLAINANT ESTABLISHES THAT PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR TO THE ADVERSE ACTION, THE RESPONDENT'S BURDEN IS TO ARTICULATE A LEGITIMATE NON-DISCRIMINATORY REASON; THE CLEAR AND CONVINCING EVIDENCE BURDEN ONLY ARISES IF THE COMPLAINANT ESTABLISHES DISCRIMINATION BY A PREPONDERANCE OF THE EVIDENCE

In ***Barker v. Ameristar Airways, Inc.***, ARB No. 05-058, ALJ No. 2004-AIR-12 (ARB Dec. 31, 2007), the ALJ made an analytical error regarding pretext under the whistleblower provision of AIR21 when she merged the Respondent's burden of producing a legitimate non-discriminatory reason for its adverse action with its later burden of proving by clear and convincing evidence that it would have taken the adverse action absent protected activity. Rather, once a complainant establishes that protected activity was a contributing factor to the adverse action, the respondent's burden is to articulate a legitimate non-discriminatory reason. The burden then shifts back to the complainant to establish that the articulated reason was pretext. The Respondent's clear and convincing evidence burden to show that it would have taken the same adverse action even in the absence of the complainant's protected activity arises only once the complainant establishes discrimination by a preponderance of the evidence.

PRETEXT; EVEN IF THE ALJ REJECTS THE RESPONDENT'S PRIMARY REASON ARTICULATED FOR THE ADVERSE ACTION, THE ALJ IS NOT REQUIRED TO FIND THAT DISCRIMINATION WAS A CONTRIBUTING FACTOR IF THE TOTALITY OF THE EVIDENCE SHOWS THAT DISCRIMINATION DID NOT PLAY A PART

In ***Majali v. Airtran Airlines***, ARB No. 04-163, ALJ No. 2003-AIR-45 (ARB Oct. 31, 2007), the ARB found that -- although the ALJ had rejected the Respondent's primary articulated reason for termination of the Complainant's employment, and had erroneously based her decision partly on a

reason not articulated by the Respondent -- substantial evidence supported the ALJ's finding that the Complainant had failed to demonstrate that the Respondent's alternate reason for the adverse action -- the Complainant's unreasonable demands in settlement negotiations and the consequent failed negotiations -- was a pretext for discrimination. The ARB observed that although the ALJ, being aware that the Complainant had proven the Respondent's primary reason to be false, might have determined from that falsity that discrimination was at least a contributing factor in the termination, the "ALJ was not required to do so." Rather, the ALJ could, based upon the totality of the evidence, find that discrimination did not play a part in the Respondent's termination decision. *See Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 146-47 (2000) (clarifying that a false explanation by the employer permits, but does not require, a finding that discrimination played a part in the decision); *Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999) (noting that the falsity of one explanation may at times justify judgment for the plaintiff, even if the employer's other reasons are not proven false).

LEGITIMATE NON-DISCRIMINATORY MOTIVE; COMPLAINANT'S UNREASONABLE AND EXCESSIVE SETTLEMENT DEMANDS

In ***Majali v. Airtran Airlines***, No. 07-15872 (11th Cir. Sept. 26, 2008) (unpublished) (case below ARB No. 04-163, ALJ No. 2003-AIR-45), the court found that substantial evidence supported the ALJ and ARB's determination that the Complainant was discharged because his demands in settlement negotiations while on leave were unreasonable and excessive and created an acrimonious relationship between the petitioner and the airline. The court noted that the making of settlement demands is not protected activity under the whistleblower provision of AIR21. Although the ARB disbelieved one of the airline's proffered legitimate reasons for its actions, the court stated that such did not require it to disbelieve another or to infer a retaliatory motive.

NONDISCRIMINATORY REASONS FOR ADVERSE ACTION NOT ARTICULATED BY DEFENDANT, BUT CONCLUSIVELY REVEALED BY THE RECORD; ARB SUGGESTS THAT CASELAW INDICATING THAT TRIAL COURT MAY NOT BASE A DECISION ON A REASON NOT ARTICULATED BY THE DEFENDANT MAY NEED TO BE RECONCILED WITH LANGUAGE FROM THE SUPREME COURT'S DECISION IN *REEVES*

In ***Majali v. Airtran Airlines***, ARB No. 04-163, ALJ No. 2003-AIR-45 (ARB Oct. 31, 2007), the ARB found that there was no evidence to support the ALJ's finding that the Respondent had articulated that it terminated the Complainant's employment based in part on his ten-month absence from work. In a footnote, the ARB reviewed caselaw to the effect that a trial judge cannot find the existence of a non-discriminatory reason that was not articulated by the defendant. Because it affirmed the ALJ's dismissal of the complaint on other grounds, the ARB did not determine the interaction between these decisions and the Supreme Court's statement in *Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 147 (2000), that "there will be instances where, although the plaintiff . . . set forth sufficient evidence to reject the defendant's explanation, . . . the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Reeves*, 530 U.S. at 148.

PRETEXT; SHIFTING EXPLANATIONS CAN THEMSELVES BE EVIDENCE OF PRETEXT

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The fact that an employer offers shifting explanations for its challenged personnel action can itself serve to demonstrate pretext. ***Vieques Air Link, Inc. v. USDOL***, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10) (the employer had not offered lack of seniority as the reason for a disadvantageous transfer until the time the hearing).

VII. AFFIRMATIVE DEFENSE / CLEAR AND CONVINCING EVIDENCE STANDARD

CLEAR AND CONVINCING EVIDENCE; STANDARD OF PROOF

In ***Clark v. Airborne, Inc.***, ARB No. 08-133, ALJ No. 2005-AIR-27 (ARB Sept. 30, 2010), the ARB affirmed the ALJ's findings that the Complainant failed to establish that his protected activity contributed to his layoff, and alternatively, that even if the Complainant's protected activity was a contributing factor to his layoff, the Respondent's reasons for the layoffs constituted clear and convincing evidence that it would have laid off the Complainant absent his protected activity. The Respondent's financial straits were well documented, the Complainant's position had been part time prior to Complainant's promotion to the position, the Respondent also laid off other employees, and the Complainant had recently requested a 20 percent raise which was unwise and untimely given the Respondent's circumstances. In making the finding on the "clear and convincing evidence" element, the ARB explained:

> Clear and convincing evidence denotes a conclusive demonstration; it indicates "that the thing to be proved is highly probable or reasonably certain." This standard of proof is more rigorous than the preponderance-of-the-evidence standard but lower than the beyond-a-reasonable-doubt criterion of criminal cases. Thus, clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.

USDOL/OALJ Reporter at 9-10 (footnotes omitted).

DEFINITION OF CLEAR AND CONVINCING EVIDENCE

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010), the ARB cited Black's Law Dictionary 577 (7th ed. 1999) for the definition of "clear and convincing evidence":

> Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain. Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.

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USDOL/OALJ Reporter at 9-11 (footnotes omitted).

AFFIRMATIVE DEFENSE; ARB AFFIRMS ALJ'S FINDING THAT RESPONDENT DID NOT CARRY ITS CLEAR AND CONVINCING EVIDENCE BURDEN WHERE ITS WITNESS' TESTIMONY THAT COMPLAINANT WAS A POOR PERFORMER WAS NOT SUPPORTED BY ANY SUBSTANTIATING OR CORROBORATING EVIDENCE

In ***McMullen v. Figeac Aero North America***, ARB No. 2017-0018, ALJ No. 2015-AIR-00027 (ARB Mar. 30, 2020) (per curiam), Complainant, the General Manager of Respondent's Wichita airline components plant, filed an AIR21 retaliation complaint alleging that his employer terminated his employment in retaliation for reporting safety violations. The ALJ found in favor of Complainant. The ARB affirmed.

In regard to its affirmative defense, Respondent contended that it would have terminated Complainant's employment even absent protected activity based on performance problems; disclosure of confidential information; seeking legal advice without authorization; and making a false claim against Respondent's vice-president of sales to cloak himself with whistleblower protection. The ALJ found that Respondent had not established these affirmative defenses by clear and convincing evidence. On appeal, Respondent focused only the performance problem and the belief that Complainant made false claims against the vice-president of sales.

The ALJ's findings were based on credibility and specifically the absence of evidence to substantiate or corroborate Respondent's witnesses' testimony that Complainant's performance was poor and that he did not work very hard. The ARB found that attacks on the ALJ's weighing of the evidence did not raise reversible error.

AFFIRMATIVE DEFENSE; ARB CLARIFIES MEANING OF "INEXTRICABLY INTERTWINED"; IT MEANS THAT TWO CHARACTERIZATIONS OF THE SAME EVENT CANNOT BE DISCUSSED OR UNDERSTOOD SEPARATELY; THAT IS DISTINCT FROM A SITUATION WHERE PROTECTED ACTIVITY LED DIRECTLY TO THE ADVERSE ACTION

In ***Yates v. Superior Air Carrier LLC***, ARB No. 2017-0061, ALJ No. 2015-AIR-00028 (ARB Sept. 26, 2019) (per curiam), the ARB affirmed the ALJ's finding that Respondent had not shown by clear and convincing evidence that it would have taken the same action against Complainant absent protected activity. The ALJ found that the meeting at which Respondent fired Complainant was called to address Complainant's protected activity (sending an email to an NTSB investigator about the NTSB's report on a crash which Complainant had been the First Officer (second-in-command)). The ALJ did not find it credible that Respondent lost faith in Complainant's ability as a pilot during the meeting — the ALJ noting that Respondent had already printed out Complainant's last paycheck prior to the meeting. The ALJ found that Respondent did not prove that it would have fired Complainant because of allegedly new information derived from the NTSB report. The ALJ found that Respondent had treated Complainant differently based on the fact that the company's CEO—who was not normally involved in pilot discipline—was involved in Complainant's firing. The ARB rejected Respondent's argument on appeal that there was clear and convincing evidence that it fired Complainant because he refused to accept any responsibility

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for the crash—the ARB noting that Complainant had acknowledged pilot error during the NTSB investigation interview in the presence of Respondent's VP of Operations.

In a footnote, the ARB clarified the meaning of the phrase "inextricably intertwined" in the context of analyzing an employer's affirmative defense to an AIR21 retaliation claim. The ARB wrote:

> At one point the ALJ stated that Complainant's protected activity was "inextricably intertwined with the adverse employment action." . . . We take the ALJ to mean that he found that Complainant's protected activity directly led to the adverse action, rather than that the protected activity and the adverse action were essentially the same event. The Board has used the term "inextricably intertwined" in the past when the reason the employer gives for taking an adverse action arises out of the same occurrence which the employee cites as protected activity and when the two characterizations of the same event cannot be discussed or understood separately. *See Speegle v. Stone & Webster Constr. Inc.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at 12-13 (ARB Jan. 31, 2013) (holding that complainant's protected activity was inextricably intertwined with the employer's reasons for taking adverse action against complainant because complainant used profane language while making protected statements). In this case, it is more appropriate to conclude merely that the protected activity (Complainant's report to the NTSB the day after the accident and the June 26, 2013 email) directly led to the adverse action. These protected actions are not, however, "inextricably intertwined" with Respondent's stated reasons for the adverse action. Respondent asserted that Complainant's attitude and expressions *during the July 2nd meeting with Wilcox and Coulter* caused Respondent to decide to terminate Complainant. On a different set of facts, had Respondent alleged as its stated reason for terminating Complainant that his protected activity had violated a company policy about reporting unsafe situations or that he had made false statements, then our previous decisions would support a description that the evidence was "inextricably intertwined." But even if the protected activity in a given case and the stated basis for the adverse action were legally and factually "intertwined," the ALJ must still thoroughly examine and analyze the evidence proffered in connection with any affirmative defense. Evidence that shows that protected activity and adverse action are sufficiently intertwined to establish that protected activity was, inescapably, a cause of an adverse employment action may nevertheless be insufficient to undermine clear and convincing counter evidence that Respondent would have taken the same action even in the absence of the protected activity.

Slip op. at 8, n.9 (emphasis as in original) (Wilcox was Respondent's CEO, and Coulter was Respondent's VP of Operations; Wilcox had called Complainant to ask him why he would send an email to the NTSB that would hurt the company further than it had already been hurt by the crash, and on the call had suspended Complainant; the July 2 meeting was called to discuss the email to the NTSB).

CLEAR AND CONVINCING EVIDENCE; RESPONDENT ESTABLISHED THAT IT WOULD HAVE FIRED THE COMPLAINANT IN THE ABSENCE OF PROTECTED

ACTIVITY BECAUSE THE COMPLAINANT PERMITTED A TRAINEE PILOT TO UNDERTAKE A DANGEROUS HELICOPTER TAKEOFF IN INCLEMENT WEATHER

In ***Berroa v. Spectrum Health Hospitals***, ARB No. 15-061, ALJ No. 2013-AIR-21 (ARB Mar. 9, 2017), the ALJ found that the Complainant's AIR-21 protected activity about pilot trainee's aeronautical competencies was a contributing factor in the Complainant's termination from employment, but also found that the Respondent established by clear and convincing evidence that it would have terminated the Complainant's employment for permitting the trainee pilot under his supervision to undertake a dangerous helicopter takeoff in inclement weather even if the Complainant had not engaged in protected activity. The ARB found that substantial evidence supported the ALJ's ultimate conclusion that the Respondent established an affirmative defense. The ARB noted the ALJ's crucial finding that the pilot trainee flight that the Complainant allowed to take place was "unnecessary for training purposes, demonstrated poor judgment, and placed at risk both the flight crew and a patient who was being transported." Slip op. at 4.

CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WOULD HAVE TERMINATED COMPLAINANT'S EMPLOYMENT ABSENT PROTECTED ACTIVITY; COMPLAINANT FAILED FOUR ATTEMPTS TO UPGRADE FROM FIRST OFFICER TO CAPTAIN, AND RESPONDENT'S POLICY WAS TO TERMINATE OR PERMIT RESIGNATION OF PILOT WITH THAT MANY UPGRADE FAILURES

In ***Occhione v. PSA Airlines, Inc.***, ARB No. 15-090, ALJ No. 2011-AIR-12 (ARB July 26, 2017), the ARB, although observing that it may have viewed the evidence differently, found that substantial evidence supported the ALJ's finding that the Respondent ["PSA"] proved that it would have terminated the Complainant's ["Occhione"] employment absent his protected activity. Occhione had attempted to pass a test to upgrade as a pilot from a First Officer to a Captain four times and PSA did not upgrade him after any of these attempts. The ALJ found:

> . . . 1) that PSA had a policy that was applied to all pilot employees who attempted to upgrade from First Officer to Captain such that pilots who fail two upgrade attempts (of two attempts each) are always terminated or permitted to resign, 2) Occhione's employment termination was automatic after he failed his fourth and final attempt, and 3) that Occhione's unsatisfactory grades on the four attempts to upgrade to Captain were objectively supported.

USDOL/OALJ Reporter at 5 (footnote omitted).

CLEAR AND CONVINCING EVIDENCE BURDEN OF PROOF MET BY PROOF THAT THE COMPLAINANT WAS NOT DOING HIS JOB ADEQUATELY

In ***McLean v. American Eagle Airlines, Inc.***, ARB No. 12-005, ALJ No. 2010-AIR-16 (ARB Sept. 30, 2014), the ARB affirmed the ALJ's dismissal of the Complainant's AIR21 complaint in a spilt decision. Two members of the Board agreed with the ALJ that the Respondent had shown by clear and convincing evidence that it would have issued a "Career Decision Day" letter in the absence of protected activity. The lead decision did not determine whether the Complainant engaged in protected activity, finding that it was not necessary to resolve this difficult issue

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because of the clear and convincing evidence that the Complainant had not adequately performed his work duties. The evidence showed that the Complainant, a quality control inspector, had not accurately measured the size and location of a nick on an impeller blade; had not photographed the damage as required by company policy; and had not viewed a photograph taken during a prior inspection. Moreover, the Complainant's placement of the nick in an area of the impeller requiring the plane to be taken out of operation within 10 flight hours was not because the nick was required to be placed in that area because the manual required it, but only because the Complainant wanted to impose an extra margin of safety. The evidence also showed that the Complainant had failed to notify the MOC as required of a quality control inspector whose inspection causes a borescope time constraint change. The lead opinion stated:

> The AIR 21 statute "renders whistleblowers no less accountable than others for their infractions or oversights." *Daniel v. Timco Aviation Svcs., Inc.*, ALJ No. 2002-AIR-026, slip op. at 25 (June 11, 2003). "It ensures only that they are held to no greater accountability and disciplined evenhandedly." *Id*. Based on the evidence in this case, the ALJ reasonably concluded that McLean's failure to adequately perform his duties was clear and convincing evidence that the Company would have taken the same adverse action against him even absent protected activity. Protected activity will not shield an under-performing worker from discipline. *See, e.g., Formella v. U.S. Sec'y of Labor*, 628 F.3d 381, 392 (7th Cir. 2010); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) ("We have consistently held that an employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination."). See also 135 Cong. Rec. H747 (daily ed. Mar. 21, 1989) (under the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, *see* 5 U.S.C.A. § 1221(e) (1), Congress explained in the Explanatory Statement on Senate Amendment S. 20 that "this new test will not shield employees who engage in wrongful conduct merely because they have at some point 'blown the whistle' on some kind of purported misconduct."). Here, McLean's failure to follow proper procedures in measuring the nick on the impeller blade of the N399AT aircraft, and failure to notify MOC as required by the Company's General Procedures Manual warranted the Company's disciplinary action.

USDOL/OALJ Reporter at 9. One member of the Board concurred with the lead opinion, but wrote separately because he would have reached the protected activity issue and affirmed the ALJ's finding that the Complainant had not engaged in protected activity. A third member of the Board concurred with dismissal of the appeal on procedural grounds -- failure to respond sufficiently to the Board's order to why the matter was properly before the Board while the parties disputed the Complainant's proof of claim in bankruptcy court. This member of the Board dissented from the protected activity and clear and convincing evidence findings of the majority.

CLEAR AND CONVINCING EVIDENCE; SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S FINDING THAT SUPERVISOR WHO FIRED THE COMPLAINANT DID NOT KNOW ABOUT PROTECTED ACTIVITY AND THAT COMPLAINANT HAD REPEATEDLY VIOLATED RULE AGAINST FLYING WITHOUT AN UP-TO-DATE MANUAL

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In ***Jones v. USDOL***, No. 13-2970 (7th Cir. June 4, 2014) (2014 WL 2506298) (unpublished) (case below ARB No. 12-055, ALJ No. 2011-AIR-7), the court denied the Petitioner's petition for review on his AIR21 whistleblower complaint on the ground that substantial evidence supported the ARB's affirmance of the ALJ's finding that the Complainant's employer had shown by clear and convincing evidence that it would have terminated the Petitioner absent any alleged whistleblower activity. Specifically, substantial evidence supported the ALJ's finding that the Petitioner's supervisor did not know about the Petitioner's communications to the FAA and that the supervisor decided to fire the Petitioner for repeatedly flying with an outdated manual. Crew members were required, by regulation, to keep their manuals up to date. The Employer's articles of conduct had similar requirements. Under the Employer's system of progressive discipline, the Petitioner was on a warning level such that any further infractions could lead to discharge.

CLEAR AND CONVINCING EVIDENCE STANDARD; EMPLOYER UNABLE TO ESTABLISH ITS BURDEN WHERE IT FIRED COMPLAINANT FOR LYING ABOUT RECORDING A MEETING WHERE RECORDING WAS ITSELF PROTECTED ACTIVITY; COMPLAINANT NOT REQUIRED UNDER AIR21 TO SHOW THAT REASON GIVEN FOR FIRING WAS PRETEXT

In ***Benjamin v. CitationShares Management, LLC***, ARB No. 14-039, ALJ No. 2010-AIR-1 (ARB July 28, 2014), the ARB had remanded the case to the ALJ to permit the Respondent to present clear and convincing evidence, if any, to avoid damages on the Complainant's AIR21 claim, by showing that it would have terminated the Complainant's employment absent the protected activity. The ALJ found that the Respondent did not making this showing, and on appeal the ARB summarily affirmed, applying the discussion of the "clear and convincing" evidence standard from *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6 (ARB Apr. 25, 2014).

[***Editor's note:*** According to the ALJ's decision on remand, during a meeting to discuss the Complainant's reporting of a wing strut problem, the Complainant brought a tape recorder. During the meeting, the tape recorder began making noise, and the Complainant's immediate supervisor demanded to know what it was. The Complainant at first claimed it was a cell phone, but eventually admitted that it was recording device. The Complainant was then escorted off site and later terminated effective the day of the meeting. The ALJ noted that the ARB had found in the remand order that the recording of the meeting was protected activity that contributed to the adverse employment actions, and that it would be arguably impossible for the Respondent to meet the clear and convincing evidence burden. *Benjamin v. CitationShares Management, LLC*, 2010-AIR-1 (ALJ Mar. 7, 2014).**]**

On appeal, the ARB noted that the Employer repeatedly stated that the attempted recording was the reason for the adverse employment actions. The company's chief pilot testified that it was his decision to terminate the Complainant's employment and that he did so based on the Complainant's attempt to record a conversation without his consent and subsequently lying about it. The ALJ found that the protected activity of attempting to record the meeting and the subsequent lie were inextricably intertwined under the facts of the case. The ARB stated that "[w]e understand the ALJ's ruling to mean that the subject of the lie and the timing makes the recording and the lie inseparable," found that this was a reasonable conclusion, and affirmed the ALJ's finding. The ARB was not persuaded by the Respondent's contention that the Complainant could not show any

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other motive for the termination because the Complainant's burden under AIR21 did not include showing pretext.

RESPONDENT'S CLEAR AND CONVINCING EVIDENCE BURDEN OF PROOF; WHERE COMPLAINANT'S PROTECTED ACTIVITY WAS INEXTRICABLY INTERTWINED WITH THE UNFAVORABLE EMPLOYMENT ACTION, IT MAY NOT BE POSSIBLE FOR THE RESPONDENT TO MEET THE CLEAR AND CONVINCING EVIDENCE BURDEN OF PROOF

In ***Benjamin v. CitationShares Management, LLC***, ARB No. 12-029, ALJ No. 2010-AIR-1 (ARB Nov. 5, 2013), the Complainant was a pilot who flew passenger jets for CitationAir's private clients. Prior to the beginning of a tour of duty, he saw the plane he was to fly being serviced and undergoing a Continued Service Inspection. The mechanics confirmed in writing that the plane passed inspection, including the landing gear struts. The next day, the Complainant observed a problem with one of the landing gear struts, and the pilot in command agreed that it should be reported. The Complainant contacted the Flight Duty Officer and was referred to the company's Chief Pilot. The Chief Pilot advised on steps to bring the strut into compliance, but when those were unsuccessful, agreed that the plane must be grounded. The Chief Pilot then instructed the Flight Duty Officer to remove the Complainant from the flight and assign another pilot for the tour of duty. CitationAir then summoned the Complainant for a face-to-face meeting at its headquarters relating to the report of the landing gear strut. The next day the Complainant filed an Aviation Safety Action Program (ASAP) report with CitationAir's Vice President of Safety alleging that indirect pressure was being placed on pilots to keep planes flying, and that this was a dangerous and unsafe situation. The Complainant, expecting to be fired, purchased a pocket-size audio recorder. At the meeting, an HR employee was present, which confirmed for the Complainant that he needed to record the meeting to protect himself. The meeting began with a discussion of the wing strut incident. When the recorder noisily malfunctioned, the Complainant was asked by the Chief Pilot why he was recording the meeting, to which the Complainant stated he was afraid the Chief Pilot would yell at him. The Chief Pilot immediately had the Complainant turn in his company key and ID card, and had him escorted from the building. Several days later the Complainant received a termination letter. CitationAir subsequently denied the Complainant's request to have the termination decision peer reviewed. The Complainant then filed an AIR21 complaint. The ALJ denied the complaint on the ground that the Complainant had not engaged in protected activity.

The ARB reversed, finding that the Complainant engaged in protected activity when he (1) made safety reports about the landing gear struts, (2) submitted the ASAP report, and (3) attempted to record expected retaliatory conduct at the meeting to which he had been summoned.

The ALJ had not specifically reached causation, but the ARB found that the ALJ's finding and the undisputed facts permitted it to find that that each of the protected actions contributed to one or more unfavorable employment actions. There was no dispute that the attempted recording was not only a contributing factor, but the decisive factor in the Respondent's termination of the Complainant's employment and denial of the peer review request.

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The ARB found moreover that the reporting of safety concerns and the filing of the ASAP were inextricably intertwined with the Respondent's decision to remove the Complainant from the flight and to call the face-to-face meeting. The ARB reviewed the applicable law:

> A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Smith v. Duke Energy Carolinas*, LLC, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012). A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, another [contributing] factor is the complainant's protected" activity. *Hoffman*, ARB No. 09-021, slip op. at 4. An employee may prove causation through indirect or circumstantial evidence, which requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee's claim that his protected activity was a contributing factor. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence.
>
> The ARB has repeatedly found that protected activity and employment actions are inextricably intertwined where the protected activity directly leads to the unfavorable employment action in question or the employment action cannot be explained without discussing the protected activity. In *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 3 (ARB Feb. 29, 2012), the employee's suspension was directly intertwined with his protected activity because the employer investigated the reason for the reported injury and blamed the employee for the injury. In *Smith*, ARB No. 11-003, slip op. at 4, the employee reported a rule violation and was fired for reporting the violation late. Similarly, in *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 4 (ARB Oct. 26, 2012), the employee was also fired for an allegedly late reporting of an injury as well as for causing the injury. Where protected activity and unfavorable employment actions are inextricably intertwined, causation is established without the need for circumstantial evidence; however, such evidence may certainly bolster the causal relationship.

USDOL/OALJ Reporter at 11-12 (footnote omitted). The ARB reviewed the record in the instant case and found that the meeting had been called based on the very discrepancy that the Complainant had reported, and known to CitationAir only because the Complainant reported it. The ARB found those facts similar to those in *Smith* and *Henderson*.

The ARB remanded the case to the ALJ to consider whether the Employer meet its burden to show by clear and convincing evidence that it would have taken the same personnel actions in the absence of protected activity, and if not, to determine damages. The ARB acknowledged that, in

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view of its finding on the link between the protected activity and the unfavorable employment actions, this may be an impossible burden:

> Typically, respondents meet this burden of proof by showing what they would have done if protected activity had never actually occurred. Arguably, that is an impossible burden in this case. Here, Benjamin's report of safety concerns arguably was the single catalyst for the adverse actions taken against him. Consequently, in remanding this case, we leave open the question of whether the statute permits CitationAir to meet its burden under AIR 21 by showing with clear and convincing evidence that it would have taken the same action based solely on non-retaliatory and legitimate reasons, rather than proving what it would have done if protected activity had never occurred.

USDOL/OALJ Reporter at 13.

CLEAR AND CONVINCING EVIDENCE; WHERE COMPLAINANT FAILS TO ESTABLISH THAT PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN THE ADVERSE ACTION, RESPONDENT IS NOT REQUIRED TO ESTABLISH A CLEAR AND CONVINCING EVIDENCE DEFENSE

In ***Mizusawa v. USDOL***, No. 12-9563 (10th Cir. Apr. 26, 2013) (unpublished) (2012 WL 1777421), the ARB had affirmed the ALJ's highly fact- and credibility-intensive determination that the Complainant had not established that protected activity was a contributing factor in the Respondent's decision to terminate the Complainant's employment. On appeal, the Tenth Circuit denied the Complainant's petition for review, finding that substantial evidence supported the ARB's determination and that nothing suggested that the ARB's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The court of appeals addressed the Complainant's several arguments as to why the ARB's decision was purportedly wrong, but found none of them persuasive. One argument made by the Complainant was that the Respondent did not support its defense with clear and convincing evidence. The court, however, found that the Respondent was not required to establish that defense because the Complainant had not meet his initial burden to demonstrate that his protected activity was a contributing factor in the adverse personnel decision. *See* 49 U.S.C. § 42121(b)(2)(B)(iii), (iv); *see also Hoffman v. Solis*, 636 F.3d 262, 267-68 (6th Cir. 2011).

AIR21 COMPLAINT DISMISSED; COURT OF APPEALS FOUND SUBSTANTIAL EVIDENCE SUPPORTING THE ARB'S FINDING THAT THE DEFENDANT PRODUCED CLEAR AND COVINCING EVIDENCE THAT IT TERMINATED THE PLAINTIFF FOR POOR PERFORMANCE, NOT BECAUSE THE PLAINTIFF COMPLAINED ABOUT POTENTIAL NONCOMPLIANCE WITH FAA REGULATIONS

In ***Yadav v. L-3 Communications Corp.***, No. 10-3249, 462 Fed. Appx. 533 (6th Cir. 2012) (unpublished) (case below ARB No. 08-090, ALJ No. 2006-AIR-16), the plaintiff, an engineer that oversaw the defendant's development of and compliance with engineering requirements for airplane navigation systems, complained to his supervisor that the defendant had misrepresented how it developed software for its navigation system in its reports to the FAA. The plaintiff and his supervisor exchanged emails about the problem, and the plaintiff's supervisor forwarded his

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complaints on to the defendant's Ethics Officer and the Director of Human Resources. After an investigation by the defendant's Ethics Office found no ethical deficiencies in its descriptions of the development process, the plaintiff arranged a meeting with the defendant's Chief Operations Officer (COO) to discuss his concerns in detail. A week after the meeting, the plaintiff sent the COO a PowerPoint presentation describing how he envisioned overhauling the avionics division. The next day, the plaintiff was fired by way of a lengthy "Termination Memo" that listed a host of the plaintiff's performance failures, both related and unrelated to the software development process dispute.

The plaintiff filed an AIR 21 whistleblower complaint with OSHA, which alleged that he was terminated in retaliation for reporting suspected noncompliance with FAA regulations. After OSHA dismissed his complaint, an ALJ found that the employer produced clear and convincing evidence that it would have terminated the plaintiff absent any protected activity, and the ARB affirmed that decision. The plaintiff then appealed the Secretary of Labor's decision to Sixth Circuit Court of Appeals.

The Sixth Circuit denied the plaintiff's appeal, finding that substantial evidence supported the ARB's finding that the defendant terminated the plaintiff "for refusing direct orders, failing to perform his clearly assigned duties, and falling well below legitimate performance expectations." *Yadav* at 537. After reviewing the evidence submitted by the defendant explaining its rationale for terminating the plaintiff, the Court noted that the plaintiff's emails to his supervisors clearly demonstrated his performance deficiencies, including his use of a "condescending tone toward his supervisor 'inappropriate comments' and repeated threats to resign or otherwise abstain from his duties." *Id.*

PROTECTED ACTIVITY AND ADVERSE ACTION UNDER AIR 21; EMPLOYER PROVED BY CLEAR-AND-CONVINCING-EVIDENCE THAT ABSENT THE PROTECTED ACTIVITY THE EMPLOYER WOULD NOT HAVE PROMOTED THE PLAINTIFF

In ***Hoffman v. Solis***, 636 F.3d 262 (6th Cir. 2011) (case below ARB No. 09-021, ALJ No. 2007-AIR-7), the plaintiff, a pilot, filed a complaint alleging that his employer had violated 49 U.S.C. § 42121, Aviation Investment and Reform Act for the 21st Century (AIR 21), by failing to promote him in retaliation for reporting safety and regulatory compliance concerns to his employer and the Federal Aviation Administration (FAA). The ALJ denied the plaintiff's complaint and the ARB affirmed. The plaintiff did not contest the ALJ and ARB's findings on protected activity and adverse action on appeal. Instead, the plaintiff appealed the ALJ's finding that the defendant had produced clear-and-convincing-evidence of its non-discriminatory rationale. Specifically, the plaintiff argued that the court failed to apply the heightened burden of proof required under AIR 21's "clear and convincing evidence" standard, and that the evidence in the record could not support the ALJ's finding that the employer had satisfied its burden.

The Court of Appeals held: (1) substantial evidence supported finding that the employer proved by clear and convincing evidence that it would have declined to promote the pilot even absent the pilot's safety and regulatory reports; (2) the ALJ did not abuse its discretion in denying the pilot's motion to supplement his complaint; and (3) any error committed by the ARB in striking objected-to matters was harmless.

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The Court of Appeals found that AIR 21 provides for judicial review pursuant to the standards of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. See 49 U.S.C. § 42121(b)(4)(A). The standard of review provided by the APA is whether the ALJ's findings, as affirmed by the ARB, are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence in a case otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706(2)(A), (E). Furthermore, other courts have held that judicial review of the ARB's AIR 21 determinations are conducted using a substantial-evidence standard. Contrary to the plaintiff's argument, the court concluded that the deferential substantial-evidence standard of review is not inconsistent with the clear-and-convincing evidence standard delineated in AIR 21. The plaintiff's argument conflated the ARB's and the federal court's standard of review with the burdens of proof that are applicable to AIR 21 complaints at the ALJ level.

PROTECTED ACTIVITY; PILOT'S OBLIGATION TO DEEM HIMSELF UNFIT FOR FLIGHT BASED ON MEDICAL CONDITION; UNION REPRESENTATIVE'S ADVOCACY THAT RESPONDENT'S POLICIES CONTRAVENED THE FEDERAL AVIATION REGULATIONS

CLEAR AND CONVINCING EVIDENCE STANDARD; RESPONDENT COULD NOT MEET STANDARD WHERE IT FAILED TO ESTABLISH THAT IT HAD A PRE-EXISTING POLICY OF REQUIRING MEDICAL DOCUMENTATION TO SUPPORT A PILOT'S SICK LEAVE OR THAT THE PILOT HAD ADVANCE NOTICE OF SUCH A REQUIREMENT

In ***Furland v. v. American Airlines, Inc.***, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11 (ARB July 27, 2011), the Complainant, a pilot, had been counseled about the Respondent's belief that his sick leave use was excessive. About six weeks later, on June 27, 2007, the Complainant took himself off a scheduled flight on sick leave due to gastrointestinal effects from airline food on a prior flight. The next day the Employer advised the Complainant that if he did not provide a doctor's note, he could be subjected to corrective action including reversal of his paid sick leave to unpaid. [The parties disagreed about whether the Complainant had been previously informed of the medical verification requirement; the ALJ found that the Complainant had not been so previously informed.] A union representative then, on July 9, 2007, sent a letter to the Respondent on the Complainant's behalf protesting the request for a medical note, and asserting that the request for documentation was harassment and constituted unlawful "pilot pushing," i.e., pressuring a pilot to fly when unfit in violation of the Federal Aviation Regulations (FARs). The letter further stated that the Respondent had not told the Complainant that he would be under observation or that he would be required to provide medical documentation for sick leave use.

Later the Complainant and his union representatives met with a company representative to discuss the sick leave use on June 27, 2007, and the Complainant's failure to provide medical documentation for that leave. The company representative stressed that the Complainant called in sick after the Respondent warned him against calling in sick, while the union representative argued that the Respondent's demand for medical documentation pressured the Complainant to fly when he was sick, in violation of his legal obligations under the FARs. After the meeting, the Respondent deducted the amount it had paid for the June 27th sick leave from a later paycheck. The Complainant filed an AIR21 complaint.

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Protected Activity

The ARB found that substantial evidence supported the ALJ's finding that the Complainant engaged in protected activity when he complained through the July 9, 2007 union letter and at the August 27, 2008 meeting that the Respondent's actions pressuring him to fly even when sick contravened the FARs. The ARB also found that the Complainant's taking himself off the June 27, 2007 flight was protected activity. The ARB found that the Complainant reasonably exercised his authority under the FARs in deeming himself unfit for flight based on his medical condition.

Contributing Factor and Clear and Convincing Evidence

The ARB found it abundantly clear that the Complainant proved that his protected activities contributed to the decision to dock his pay. It also found that substantial evidence supported the ALJ's finding that the Respondent failed to prove by clear and convincing evidence that it would have deducted the paid sick leave amount from the Complainant's pay absent protected activity. The ALJ had noted that the Respondent failed to present evidence of a company-wide policy requiring pilots to present medical documentation to support requests for sick leave, and had found that the Complainant had not been informed in the earlier counseling session that his future sick leave requests would require medical documentation and prior approval. The ARB elaborated:

> We agree with the ALJ that employers have a compelling business interest in requiring proof that their employees' absences based on illness are legitimate. However, without pilots having prior notice of such a requirement -- whether through company policy requiring such proof or advance notice that such proof will be required -- such a requirement can prove retaliatory in violation of AIR 21. Indeed, had Furland had prior notice that medical documentation was required to support a request for sick leave, then the contributing factor behind the decision to dock his pay might have been a failure to supply medical documentation and the results in this case might be different. However, in light of the ALJ's findings that Furland had no such prior notice, we find that the ALJ's conclusion that American Airlines failed to prove by clear and convincing evidence that it would have docked Furland's pay notwithstanding his protected activity is fully supported by the substantial evidence of record and in accordance with applicable law.

USDOL/OALJ Reporter at 9-0.

CLEAR AND CONVINCING EVIDENCE THAT COMPLAINANT WOULD HAVE BEEN FIRED IN THE ABSENCE OF HIS PROTECTED ACTIVITY; COMPLAINANT FAILED TO PERFORM HIS MANAGERIAL DUTIES TO PROVIDE CORRECTIONS OR IMPROVEMENTS TO ADDRESS THE CONCERN HE HAD RAISED

In ***Yadav v. L-3 Communications Corp.***, ARB No. 08-090, ALJ No. 2006-AIR-16 (ARB Jan. 7, 2010), the ARB affirmed the ALJ's finding that the Complainant engaged in protected activity under the AIR21 whistleblower provision when he complained to his supervisor about the extent to which reverse engineering (from a prototype) was being used in the development of an integrated flight information computer that the Respondent was developing for small aircraft cockpits ("SmartDeck"). The Complainant also complained that the development plan had been

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misrepresented to the FAA. The ARB noted that the Respondent had stipulated that the Complainant engaged in protected activity and that it was aware of this activity. The ARB affirmed the ALJ's finding that the protected activity was a contributing factor in the Complainant's discharge. The ARB further affirmed the ALJ's finding, however, that the Respondent had shown by clear and convincing evidence that it would have fired the Complainant absent the protected activity that the Complainant was fired because he refused to perform his managerial duties and not because he raised safety issues regarding the SmartDeck development plan. The ALJ found, for example, that the Complainant had threatened to stop performing the duties of his position if the project was not scrapped, and failed to provide his managers with specific corrections or improvements to the plan. The Complainant had not produced requested information, talked with other managers as directed, and did not validate his concerns.

The ARB noted that it was without question that the SmartDeck software was an important aircraft part, and that failure to resolve potentially inherent design flaws could contribute to system failure and potential disaster. Nonetheless, the ARB found that the evidence showed that the Complainant had done little or nothing to implement solutions beyond outlining the problem and criticizing other managers. The ARB wrote that "[i]n sum, Yadav became part of the problem instead of using his expertise and experience to find solutions and make the SmartDeck project ready for FAA certification."

CLEAR AND CONVINCING EVIDENCE; EVIDENCE OF PRETEXT PREVENTS RESPONDENT FROM MEETING BURDEN; EVIDENCE THAT RESPONDENT "COULD" HAVE FIRED THE COMPLAINANT DOES NOT REFLECT RESPONDENT'S BURDEN OF PROOF

In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the Complainant proved that his protected activity was a contributing cause of his termination, and the burden then shifted to the Respondent to show by "clear and convincing" evidence that it would have terminated the Complainant absent his protected activity. The ARB found that where the Employer's shifting explanations for its adverse action and its disparate treatment of the Complainant for the conduct of which he was accused evidenced pretext, the Respondent could not prove that it would have terminated the Complainant even if he had not engaged in protected activity. Clear and convincing evidence that the Respondent "could" have fired the Complainant for an incident failed because the Respondent's burden is to show that it "would have" terminated the Complainant for the incident -- not that it "might have" or "could have."

CLEAR AND CONVINCING EVIDENCE; WHERE REASONS FOR FIRING WERE PRETEXTUAL, EMPLOYER FOUND NOT TO HAVE MET CLEAR AND CONVINCING EVIDENCE STANDARD

In ***Evans v. Miami Valley Hospital***, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), the ARB concluded that where substantial evidence supported the ALJ's finding that the reasons given by the Respondents for firing the Complainant were pretext, the Respondents therefore did not prove by clear and convincing evidence that they would have fired the Complainant absent his protected activity.

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CLEAR AND CONVINCING EVIDENCE; DENIAL OF PROMOTION; EVIDENCE THAT COMPLAINANT DID NOT POSSESS IMPORTANT INTERNATIONAL EXPERIENCE, HAD SCORED POORLY, AND HAD NOT INTERVIEWED WELL

In ***Hoffman v. NetJets Aviation, Inc.***, ARB No. 06-141, ALJ No. 2005-AIR-26 (ARB July 22, 2008), the ARB affirmed the ALJ's finding that the Respondent had established by clear and convincing evidence that it would have denied the Complainant a promotion even in the absence of protected activity. First, the Complainant did not have international experience being sought by the Employer, and possessed by most of the persons who were awarded the position. The Complainant alleged that the experience criterion was made up, but the Respondent countered with testimony noting the need for international experience prior to the bid. Second, the Complainant ranked 27th out of 30 applicants, and more than 13 applicants scored higher than Complainant. The ARB found that substantial evidence supported the ALJ's view that the point system was not pretext. Third, testimony indicated that several interviewers found that the Complainant had not interviewed well for the position.

CLEAR AND CONVINCING EVIDENCE; RATHER THAN DOING HIS JOB AND ASSISTING IN VERIFYING A SAFETY ISSUE AND RECOMMENDING SOLUTIONS, THE COMPLAINANT INSISTED THAT THE MANAGEMENT FIRST CORRECT THE PROBLEM BEFORE HE PROCEEDED WITH HIS VALIDATION AND VERIFICATION DUTIES

In ***Yadav v. L3 Communications Corp.***, 2006-AIR-16 (ALJ Apr. 30, 2008), the Complainant was an Engineering Manager for Validation and Verification for an avionics company. He had been hired in relation to a flight display software project. During his tenure the Complainant was responsible for the verification stage of the engineering Life Cycle. He became concerned about the Respondent's overuse of reverse engineering during the validation stage to establish a code for design requirements. Although acceptable on a limited basis, overuse of reverse engineering had the potential for misleading the FAA and potential customers about the engineering of the software. After he was terminated from employment, the Complainant filed an AIR21 whistleblower complaint. The ALJ, following a thorough review of the record, found that the Complainant established by a preponderance of the evidence that his objections to the Software Development Plan (SDP) to a company Vice-President was a contributing factor in his discharge. The ALJ found that the Complainant's concerns had been the catalyst for an Ethics Investigation on the SDP, and that the manner in which the investigation had been initiated -- with the company president listing herself as the originator of the ethics complaint -- indicated that the independence of the investigation was jeopardized (the investigation found sufficient safeguards to produce a safe software product), and affected the president's determination to continue consideration of the Complainant's termination.

Because the Complainant had carried his burden under AIR21, the ALJ then turned to question of whether the Respondent established by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. The ALJ found that it did. The ALJ found that the Complainant had given the Respondent's vice-president an ultimatum: do what the Complainant recommended (which would have essentially destroyed the software project), or he would no longer perform his validation and verification function on the project, or he would resign, or the Respondent could remove him from his job and/or terminate him. Although

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there had been temporal proximity between the protected activity and the adverse action, the ALJ found that it did not defeat the Respondent's clear and convincing evidence that the Complainant not only threatened to stop working, but in fact did stop performing his validation and verification duties; that he had not produced information requested by the Director of Engineering; and that he had not talked to managers as directed by the vice-president nor produced information necessary to support his non-support of the SDP process. The ALJ found that the Complainant used a very large part of the time he should have been working on validation and verification duties to create a 48 page PowerPoint presentation, the goal of which was to present a plan for the total reorganization of the facility doing the SDP, and to illustrate that the Respondent's facility was operating illegally. The ALJ indicated that the Complainant was fired because, rather than doing his job and providing management with an analysis of specific corrections or improvements required for the SDP Life Cycle phases, or planning or pointing out validation and verification requirements that could be initiated or adopted to correct safety issues, the Complainant persistently expressed the conviction that he could not perform his job unless management first addressed his perceived safety concerns, which he refused to verify other than by invoking philosophical engineering principles.

CLEAR AND CONVINCING BURDEN OF PROOF; NO NEED TO CONSIDER IF THE COMPLAINANT FAILED TO MEET THE CONTRIBUTING CAUSE BURDEN

In an AIR21 case, where the complainant does not prove that the respondent took adverse action in part because of the complainant's protected activity, it is not necessary to proceed to an analysis of whether the respondent could demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of any protected behavior. ***Hafer v. United Airlines, Inc.***, ARB No. 06-017, ALJ No. 2005-AIR-8 (ARB Jan. 31, 2008).

CLEAR AND CONVINCING EVIDENCE; IN FACE OF POST-SEPTEMBER 11 LAYOFFS, COMPLAINANT WAS THE ONLY EMPLOYEE AT HIS LEVEL TO HAVE RECENT DISCIPLINE IN HIS FILE

See the case of ***Walker v. American Airlines***, 2003-AIR-17 (ALJ Nov. 16, 2004), in the "Contributing Cause" section *supra*.

CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WOULD HAVE TAKEN SAME ADVERSE EMPLOYMENT ACTION IN ABSENCE OF PROTECTED ACTIVITY; EVIDENCE THAT DELAY PERFORMANCE DETERIORATION WAS LINKED TO JOB ACTION TO SUPPORT CONTRACT NEGOTIATION

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ALJ July 25, 2002), although the ALJ found that the Complainant engaged in protected activity when he reported safety concerns directly to the flight crew after the maintenance supervisor had dismissed the concerns, the ALJ nevertheless found that Respondent had established by clear and convincing evidence that it would have taken the same adverse employment actions against the Complainant even in the absence of those incidents where Respondent's stated reason for the action was Complainant's unsatisfactorily explained deterioration in delay performance following expiration of the union contact. In the 13 days following the expiration of the contract, Complainant had more delays attributed to him than in the entire first 6 months of the year. Respondent believed this to be an illegal job action, and

terminated Complainant solely for this reason. The ALJ expressly found that Respondent had not taken into consideration whether the maintenance writeups made by Complainant were safety-related, but in a footnote observed that termination for consistently failing to dispatch in time might be a violation of the Act if the delays were associated with reports of safety concerns. The ALJ, in his conclusion, emphasized that he was not determining whether Complainant was engaged in an illegal job action -- rather, all that was relevant was Respondent's motivation, and it was established that Respondent fired Complainant because it believed he was engaged in an illegal job action.

VIII. TIMELINESS OF COMPLAINT

- *Ninety-day limitation*

TIMELINESS OF COMPLAINT; 90 DAY LIMITATIONS PERIOD FROM DATE OF FINAL, DEFINITIVE AND UNEQUIVOCAL NOTICE OF ADVERSE ACTION

In ***Lempa v. Hawthorne Global Aviation***, ARB No. 2018-0046, ALJ No. 2017-AIR-00008 (ARB July 23, 2019) (per curiam), the ARB found that substantial evidence supported the ALJ's determination that the AIR21 complaint was untimely because Complainant was terminated on May 31, 2016, and he did not file a complaint with OSHA until September 12, 2016, over 100 days after adverse action had been taken against him. AIR21 sets a 90-day filing period for filing a complaint. 49 U.S.C. § 42121(b). The ARB adopted the ALJ's decision as the final decision of the Secretary of Labor.

[Editor's note: The dispute before the ALJ was over when Complainant received final, definitive and unequivocal notice of his termination. The ALJ also rejected Complainant's assertion that the date Complainant was removed from the payroll database constituted a separate and discrete adverse employment action, finding that "a ministerial act that effectuates a prior communicated termination-such as formally removing Complainant from Respondent's payroll-is not a separate and discrete adverse employment action." ALJ's decision at 53 (citations omitted). The ALJ also was not persuaded by Complainant's claim that he discussed his allegations with and OSHA investigator prior to his termination because Complainant produced no evidence to support this contention. *See Lempa v. Hawthorne Global Aviation*, ALJ No. 2017-AIR-00008 (ALJ May 1, 2018).**]**

AIR21 CLAIM UNTIMELY FILED

In ***Sullivan v. Pinnacle Airlines, Inc.***, No. 10-208 (D. Minn. May 28, 2010), the District Court dismissed an employee's AIR21 claim as untimely where the employee alleged that he was terminated due to his whistleblower status but did not file a lawsuit until three years after his termination date. The court rejected the employee's argument that his whistleblower claim fell within the scope of the Sarbanes-Oxley Act.

TIMELINESS OF COMPLAINT; RESIGNATION DATE TRIGGERS LIMITATIONS PERIOD IN CONSTRUCTIVE DISCHARGE CASE; EVENTS SUBSEQUENT TO RESIGNATION FOUND NOT TO EXTEND LIMITATIONS PERIOD UNDER THE FACTS OF THE CASE

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In ***Peters v. American Eagle Airlines, Inc.***, ARB No. 08-126, ALJ No. 2007-AIR-14 (ARB Sept. 28, 2010), the ARB agreed with the ALJ that the trigger date for the AIR21 limitations period was the date the Complainant resigned (i.e., was constructively discharged), and that because he did not file his complaint with OSHA until after the 90 day limitations period, the complaint was not timely. The Complainant argued that the Respondent's attempts, after the resignation, to collect wages improperly paid during his unpaid leave should be considered adverse actions within the limitations period. The ARB, however, found that the Complainant was already on notice that Respondent would attempt to collect on its repayment demand prior to the resignation, and under these facts the 90-day limitations period would not be extended. Similarly, the ARB found that subsequent actions such as the Complainant changing the effective date of his resignation to the Respondent's later "processing" of the resignation could not extend the limitations period on the facts of this case. The ARB wrote that "[w]hether or not Eagle considered him to be an employee beyond the date of his resignation or when Eagle accepted the resignation is immaterial. As the ARB held in *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 34 (ARB Apr. 30, 2001), the date a complainant discovers that he has been injured is the date the claim accrues. Peters was well aware of the loss of his position because he stated that he was resigning under duress on both March 7 and March 10." USDOL/OALJ Reporter at 5.

TIMELINESS OF COMPLAINT: LETTER THAT MERELY CONFIRMS THAT ADVERSE ACTION STILL IN EFFECT

A complaint that revocation of the Complainant's retirement travel pass was in retaliation for safety complaints was not timely where the revocation occurred two years prior to the complaint; a more recent letter merely confirmed that the travel pass revocation was still in effect. ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

- *Equitable tolling*

TIMELINESS OF COMPLAINT; GROUNDS FOR EQUITABLE TOLLING NOT ESTABLISHED BASED ON ALLEGATION THAT ATTORNEY FAILED TO INFORM COMPLAINANT OF LIMITATIONS PERIOD (A LITIGANT BEING ULTIMATELY RESPONSIBLE FOR ACTS AND OMISSIONS OF THEIR ATTORNEYS)

TIMELINESS OF COMPLAINT; GROUNDS FOR EQUITABLE TOLLING NOT ESTABLISHED BASED ON COMPLAINANT'S BIPOLAR DISORDER WHERE THE RECORD SHOWED THAT COMPLAINANT WAS NONETHELESS CAPABLE OF MANAGING HIS PERSONAL AFFAIRS

In ***Tardy v. Delta Air Lines***, ARB No. 16-077, ALJ No. 2015-AIR-26 (ARB Oct. 5, 2017), the ARB affirmed the ALJ's determination that the Complainant was not entitled to equitable tolling of the limitations period for filing his AIR21 complaint due to incompetence of counsel and his own mental illness. The Complainant had hired an attorney, but that attorney subsequently withdrew, and the Complainant appeared before the ALJ pro se. The Complainant alleged that the counsel failed to inform him of AIR21's 90 day limitations period. The ARB noted that it has consistently held that held that clients are accountable for the acts and omissions of their attorneys, that that ignorance of the law is neither a sufficient basis for granting equitable tolling by itself or as an independent ground. The ARB found nothing in the record in this case that suggested that

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the initially retained counsel, or the Complainant's subsequent lack of legal representation contributed to the failure to timely file the AIR21 complaint.

The ARB also found that substantial evidence supported the ALJ's finding that the Complainant's bipolar disorder did not render him unable to pursue the complaint. The ARB found that medical records showed that the Complainant's speech and thought processes were intact during the AIR21 limitations period; that the Complainant had testified that he would have immediately gone to OSHA if he had known of limitations period; that the Complainant had testified that his mental condition did not prevent him from working or managing his own affairs; and that the testimony of a witness who testified on the Complainant's behalf supported a finding that the Complainant suffered from bipolar disorder but confirmed that the Complainant still possessed mental acuity.

TIMELINESS OF AIR21 COMPLAINT; EQUITABLE TOLLING; FILING IN WRONG FORUM NOT ESTABLISHED BY FILING OF FOIA REQUEST SEEKING INFORMATION ON HOW TO FILE A COMPLAINT; IGNORANCE OF THE LAW IS NOT A SUFFICIENT BASIS FOR EQUITABLE TOLLING

TIMELINESS OF AIR21 COMPLAINT; EQUITABLE TOLLING; FILING IN WRONG FORUM; FAILURE TO PRODUCE EARLIER COMPLAINT OR DECLARATION DESCRIBING THAT COMPLAINT SUPPORTS AN ADVERSE INFERENCE THAT THE EARLIER COMPLAINT DID NOT CONSTITUTE AN AIR21 COMPLAINT

In ***McAllister v. Lee County Board of County Commissioners***, ARB No. 15-011, ALJ No. 2013-AIR-8 (ARB May 6, 2015), the Complainant did not timely file his AIR21 complaint with OSHA, but made reference to an earlier complaint filed with the FAA. The ALJ ordered the Complainant to submit a copy of that earlier complaint, or, if he did not have a copy of that complaint, to submit a declaration or affidavit describing the complaint in detail, and specifying the date on which he filed the whistleblower complaint and the date on which he learned that the complaint should have been filed with OSHA. In response, the Complainant argued that he was entitled to equitable tolling based on a FOIA request and an online complaint both filed with the FAA the same date. The ALJ found that the FOIA request was not an AIR21 complaint because it was explicitly styled as a FOIA request and not as a complaint of retaliation; the Complainant stated only that he "will be seeking" whistleblower protection; the Complainant stated that he was seeking information on how to report relation; the FOIA request was filed with the FAA's FOIA coordinator who was not charged with responsibility for whistleblower complaints; and the recitation of alleged retaliatory acts in the FOIA request was not a complaint of retaliation, but a request for background information to support a future claim of retaliation. The Complainant did not produce a copy of an online complaint filed with the FAA, and only stated that filed such a complaint. He did not describe any specifics of the complaint. The ARB affirmed the ALJ's finding that the Complainant failed to establish that he was entitled to equitable tolling of the limitations period for filing the AIR21 complaint with OSHA. Specifically, the ARB found that the Complainant's appellate brief failed to establish a genuine issue as to a material fact relevant to the question whether he filed an AIR complaint in the wrong forum. The ARB stated:

> In essence, McAllister is relying on an ignorance of the law defense and lack of prejudice to Respondent. However, the Board has held that ignorance of the law is not a sufficient basis for granting equitable tolling and that prejudice to the

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> opposing party will only be considered, once the party has established a factor supporting tolling and that it is not by itself an independent ground establishing entitlement to equitable tolling. Further the fact that McAllister failed to submit a copy of the alleged complaint or a detailed description of it, as the ALJ ordered him to do, could support an adverse inference that the complaint did not meet the qualifications for an AIR 21 retaliation complaint.

USDOL/OALJ Reporter at 7 (footnotes omitted).

ALTHOUGH ALJ ON REMAND FOCUSED ON TOLLING ISSUES REGARDING TIMELINESS OF BLACKLISTING CLAIM AND DID NOT MAKE A SPECIFIC FINDING ON WHETHER SUCH A CLAIM HAD BEEN FILED, ARB DISMISSED THE CASE BECAUSE COMPLAINANT FAILED TO ESTABLISH THAT A BLACKLISTING COMPLAINT HAD BEEN FILED

In ***Woods v. Boeing-South Carolina***, ARB No. 13-035, ALJ No. 2011-AIR-9 (ARB Mar. 20, 2014), the ARB had affirmed the ALJ's determination that the Complainant's AIR21 complaint was untimely as to termination of employment, but remanded for the ALJ to address whether the Complainant had also filed a timely blacklisting complaint. On remand, the ALJ and the Complainant focused on tolling issues, and the ALJ did not make a specific finding on whether a blacklisting claim had been filed. Nonetheless, the ARB found that both before the ALJ and the Board, the Complainant failed to point to any admissible evidence that he filed a complaint for blacklisting. Thus, the ARB dismissed the case.

TIMELINESS OF AIR21 WHISTLEBLOWER COMPLAINT; THE AIR21 STATUTE DOES NOT REQUIRE AN EMPLOYER TO NOTIFY AN EMPLOYEE OF HER RIGHT TO FILE AN OSHA COMPLAINT

TIMELINESS OF AIR21 WHISTLEBLOWER COMPLAINT; PURSUIT OF A CBA GRIEVANCE FOUND NOT TO TOLL THE LIMITATIONS PERIOD

In ***Barrett v. Shuttle America***, ARB No. 12-075, ALJ No. 2012-AIR-10 (ARB Feb. 28, 2014), the Complainant, a flight attendant, filed her AIR21 complaint outside the 90 day limitations period. The Complainant alleged an unlawful suspension for reporting irregular behavior by a flight captain. The Complainant alleged that her in-flight manager purposely delayed sending a certified copy of the suspension notice so that so could not file her complaint in time. The ARB found that the Complainant had received a definitive and unequivocal notice of the adverse action in ample time to file a timely AIR21 complaint, that the whistleblower provision of AIR 21 does not require that an employer notify an employee of her right to file an OSHA complaint in the context of disciplinary matters, and that even if the manager had procrastinated in sending the letter, there was no evidence that she did so to prevent the Complainant from filing an AIR 21 complaint.

The Complainant also contended that the union caused the late filing of her OSHA complaint by failing to pursue her grievance promptly under the collective-bargaining agreement. Citing *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980), the ARB found that the pursuit of a grievance did not toll the limitations period. The ARB stated: "The grievance procedure by its very nature is a remedy for a prior decision, not an opportunity to influence that decision."

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USDOL/OALJ Reporter at 5-6 (footnote omitted). The ARB found that nothing precluded the Complainant from filing a complaint with OSHA before she filed a grievance or while the grievance was pending.

Accordingly, the ARB agreed with the ALJ that the Complainant "failed to show good cause for her failure to file her AIR 21 complaint within the limitations period or to meet her burden of proof to demonstrate that equitable modification principles should apply." USDOL/OALJ Reporter at 6.

TIMELINESS; SUA SPONTE DISMISSAL BY ALJ WHERE COMPLAINANT'S ALLEGATION THAT RESPONDENT DELAYED A CONTRACTUAL GRIEVIANCE HEARING CAUSING HER TO FILE OBJECTIONS TO SECRETARY'S FINDINGS IN A TIMELY FASHION DID NOT ESTABLISH EQUITABLE GROUNDS FOR TOLLING OF LIMITATIONS PERIOD

In ***Udvari v. US Airways, Inc.***, ALJ No. 2014-AIR-9 (ALJ Jan. 17, 2014), the ALJ dismissed as a matter of law the *pro se* Complainant's appeal and new claim *sua sponte* because both were facially noncompliant with applicable limitations periods and because equitable tolling did not apply. The Complainant alleged that US Airways delayed a contractual grievance hearing, which caused her to file objections to the Secretary's findings beyond the 30-day period set forth at 29 C.F.R. § 1979.106(b)(2). The Complainant further alleged that she was unaware that she could request OALJ review. The ALJ noted that 29 C.F.R. § 18.40 provides for summary decision if no material facts are in dispute and the court, acting of its own initiative, finds against the party as a matter of law. Noting that (i) the appeal and new claim were facially noncompliant with AIR 21 limitations periods, (ii) equitable tolling did not apply on the alleged facts, and (iii) ignorance of the law generally does not support a finding of entitlement to equitable tolling, the ALJ summarily dismissed the appeal and new claim pursuant to 29 C.F.R. § 18.40.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; RESPONDENT'S PROVISION OF AN EEO AND ETHICS PROCEDURE FOR HARASSMENT CLAIMS DOES NOT, IN ITSELF, ESTABLISH THAT THE RESPONDENT IMPROPERLY MISLED OR INDUCED THE COMPLAINANT TO DELAY FILING AIR21 COMPLAINT

In ***Woods v. Boeing-South Carolina.***, ARB No. 11-067, ALJ No. 2011-AIR-9 (ARB Dec. 10, 2012), the Complainant argued that equitable tolling should apply to his AIR21 whistleblower complaint because the Respondent allegedly induced him to take advantage of internal processes, none of which found in his favor, but all of which culminated in dismissal of his harassment complaint exactly one day after the 90 day AIR21 limitations period had run. The ARB noted that "the Secretary of Labor had ruled in an ERA case that the deadline for filing claims is not tolled when an employee engages in the employer's internal review proceedings. Furthermore, the Secretary has recognized, that courts 'generally have held that unless the employer has acted deliberately to deceive, mislead or coerce the employee into not filing a claim in a timely manner, equitable estoppel will not apply.'" USDOL/OALJ Reporter at 9 (footnotes omitted). The ARB found that the mere fact that the Respondent provided an EEO and Ethics procedure for harassment claims did not establish that the Respondent improperly misled or "induced" the Complainant to make use of this procedure to his detriment. Moreover, the fact that the EEO and Ethics Office did not find in the Complainant's favor was not in itself sufficient for tolling purposes. The ARB found

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that the Complainant had alleged no facts even suggesting that the Respondent attempted to improperly induce, much less coerce, the Complainant into forgoing the filing of an AIR 21 complaint. The ARB also found that the Complainant's assertion that his harassment complaint was dismissed one day after the AIR21 fling period had expired was incorrect, and that the Complainant actually had 10 days after being informed that this harassment complaint had been denied to file a timely AIR21 complaint.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; FILING OF EEO COMPLAINT IS NOT, STANDING ALONE, SUFFICIENT TO INVOKE WRONG FORUM GROUND FOR EQUITABLE TOLLING

In ***Woods v. Boeing-South Carolina***, ARB No. 11-067, ALJ No. 2011-AIR-9 (ARB Dec. 10, 2012), the Complainant argued that equitable tolling of his AIR21 complaint based on filing in the wrong forum should apply to his AIR21 whistleblower complaint because he had filed a harassment complaint under the Respondent's EEO and ethics procedures. The ARB noted that neither of these complaints could have been the precise AIR21 complaint based on the Complainant's termination of employment because they both had been filed before the termination. The ARB held that even if there had been overlap between the EEO complaint and the whistleblower complaint, this overlap was not sufficient to establish that the Complainant attempted to file the precise complaint under a whistleblower statute under the EEO process.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; ABSENCE OF PREJUDICE TO RESPONDENT IS A FACTOR ONLY IF THE COMPLAINANT IS OTHERWISE ENTITLED TO EQUITABLE TOLLLING

In ***Woods v. Boeing-South Carolina***, ARB No. 11-067, ALJ No. 2011-AIR-9 (ARB Dec. 10, 2012), the Complainant argued that the ALJ erred by failing to take into account the probable lack of prejudice to the Respondent if equitable tolling were applied to his untimely AIR21 whistleblower complaint. The ARB rejected this argument, stating that "while an absence of prejudice to the non-moving party will be considered in determining whether to toll the limitations period if such tolling is otherwise justified, such a factor is not relevant in determining whether [the Complainant] presented a sufficient justification for doing so in the first instance."

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; MENTAL ILLNESS; ADA-PROTECTED INDIVIDUAL

In ***Woods v. Boeing-South Carolina***, ARB No. 11-067, ALJ No. 2011-AIR-9 (ARB Dec. 10, 2012), the Complainant argued that the ALJ erred in overlooking, when ruling on whether the filing date for his untimely AIR21 whistleblower complaint should be equitably tolled, the Complainant's disabilities which were allegedly exacerbated by the Respondent's toleration for his harassment. The ARB rejected this argument. The ARB wrote: "The Board has recognized that mental incapacity could qualify for tolling as an extraordinary reason that the petitioning party was prevented from filing, but the party must make a particularly strong showing. Further, the Board has adopted the traditional rule that mental illness tolls the limitations period only if the illness in

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fact prevents the petitioning party from managing his affairs and thus from understanding his legal rights and acting upon them." USDOL/OALJ Reporter at 11 (footnotes omitted). The ARB found that the Complainant had not raised any material issue of fact in response to the Respondent's motion to dismiss adequately addressing the issue of whether he was capable of understanding and addressing his legal rights during the filing period. In fact, such a contention was in contradiction to other arguments the Complainant had made on appeal, and to the fact that the Complainant had filed and pursued numerous complaints during this period. The Complainant asserted that he had requested accommodations under the ADA for several conditions, and that an administrative bar would prevent an ADA-protected individual from exercising rights. The ARB also rejected this argument noting that the Complainant had cited no precedent holding that the status of being an ADA-protected individual in itself entitles that individual to tolling of a limitations period.

UNTIMELY APPEAL; EQUITABLE TOLLING FOUND NOT TO BE WARRANTED BASED ON ATTORNEY ERROR, LACK OF PREJUDICE TO OPPOSING SIDE, OR JUDICIAL ECONOMY AND PUBLIC INTEREST IN AIR SAFETY

In ***Patino v. Birken Manufacturing Co.***, ARB No. 09-054, ALJ No. 2005-AIR-23 (ARB Nov. 24, 2009), the Respondent failed to timely file its petition for ARB review of the ALJ's decision on the merits, and failed to establish grounds for equitable tolling. The ARB thus declined to review the ALJ's decision on remand in favor of the Complainant. The first proffered ground for equitable tolling was that the Respondent misunderstood the notice of appeal rights attached to the ALJ's decision. The ARB, however, found that attorney error does not support equitable tolling. The second ground was that the Complainant waited three months before arguing to the ARB about the untimely appeal, and therefore the Complainant would suffer no prejudice if the ARB reviewed the ALJ decision. The ARB, however, held absence of prejudice is not an independent basis for tolling, and is only a consideration once a party identifies a factor that might justify such tolling. The ARB also rejected arguments based on judicial economy by reviewing both ALJ decisions (the Respondent having timely filed a petition for review of the ALJ's decision on attorney's fees) and public interest in resolving issues concerning air safety, where the Respondent offered no precedent or any other legal rationale to support the arguments.

TIMELINESS OF COMPLAINT; DATE COMPLAINANT WAS PRESENTED WITH "CAREER DECISION DATE" CHOICES RATHER THAN LATER DATE OF TERMINATION IS DATE THAT LIMITATIONS PERIOD BEGINS

In ***Rollins v. American Airlines, Inc.***, ARB No. 04-140, ALJ No. 2004-AIR-9 (ARB Apr. 3, 2007), a whistleblower complaint arising under both AIR21 and SOX, the Respondent issued to the Complainant a "Career Decision Day Advisory Letter" providing three choices: (1) commit to comply with the Respondent's rules and regulations (including satisfactory work performance and personal conduct) and accept reassignment, (2) voluntarily resign with transitional benefits and agree not to file a grievance, or (3) accept termination with grievance options. Five days later the Complainant informed the Respondent that he would not agree to any of the options, and on that same day the Complainant was provided a letter of termination. The whistleblower complaint would be timely if measured from the date of the termination letter, but untimely if measured from the date of the advisory letter. The ARB found that advisory letter provided final and unequivocal notice to the Complainant that the Respondent had decided to terminate his employment. The ARB

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observed that under *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988), *rev'd on other grounds*, 496 U.S. 72 (1990) and *Wagerle v. The Hosp. of the Univ. of Pa.*, 1993-ERA-1, slip op. at 3-6 (Sec'y Mar. 17, 1995), the possibility that the Complainant could have avoided the effects of the advisory letter by resigning voluntarily or accepting employment in another division did not negate the effect of the advisory letter's notification of intent to terminate the Complainant's employment. Thus, the complaint was untimely.

EQUITABLE TOLLING; PRECISE STATUTORY CLAIM IN THE WRONG FORUM; STATE LAW COMPLETELY PREEMPTED BY AIR21

In ***Turgeau v. Administrative Review Board, USDOL***, No. 05-9503 (10th Cir. Apr. 27, 2006) (case below ARB No. 04-005, ALJ No. 2003-AIR-41), the Complainant, who worked for a aircraft repair and parts contractor for air carriers, filed suit in state court asserting state law claims for wrongful discharge and failure to pay wages in retaliation for complaining to the Respondent about its manufacturing processes. The Respondent removed to federal court where the district court held that the Complainant's suit was "completely preempted" by AIR21. The district court dismissed the suit based on failure to exhaust administrative remedies. The Complainant then filed a virtually identical AIR21 complaint with DOL. The state court action had been filed within the AIR21 limitations, but by the time of the filing with OSHA the limitations period had expired. OSHA, the ALJ and the ARB all dismissed the complaint as untimely. The ALJ and the ARB ruled that the complaint was not eligible for equitable tolling under the precise-statutory-claim/wrong-forum analysis because the claim filed in state court was not pleaded as arising under AIR21. On appeal, the Tenth Circuit held that because AIR21 completely preempted the state complaint, the state claim was an AIR21 complaint. Thus, the Complainant had stated the precise statutory claim in the wrong forum, and was entitled to equitable tolling.

TIMELINESS OF COMPLAINT; EQUITABLE MODIFICATION - PRECISE CLAIM IN WRONG FORUM; PASSING REFERENCE TO FRAUD, WASTE AND ABUSE REGULATION IN A COMPLAINT FILED WITH THE DEPARTMENT OF DEFENSE FOUND NOT TO BE AN AIR21 COMPLAINT AS A MATTER OF LAW

In ***Ferguson v. Boeing Co.***, ARB No. 04-084, ALJ No. 2004-AIR-5 (ARB Dec. 29, 2005), the issue before the ARB was whether the Complainant had established that there were any material facts relevant to the issue whether he mistakenly filed the precise statutory claim in the wrong forum when he filed a "Fraud, Waste, and Abuse Complaint" with the Department of Defense pursuant to 10 U.S.C.A § 2409 alleging, among other things, that a Boeing manager's fraud could put airmen's lives and others in jeopardy. The Board concluded that the Complainant's passing reference to putting lives in jeopardy is not sufficient, as a matter of law, to establish that the complaint filed with the Department of Defense constituted the precise statutory claim (i.e. an AIR 21 claim) filed in the wrong forum.

TIMELINESS OF COMPLAINT; ASSOCIATE SOLICITOR OF LABOR'S REFUSAL TO PERMIT OSHA TO PROVIDE AFFIDAVIT OR PERMIT TESTIMONY OF INVESTIGATOR CONCERNING DATE OF RECEIPT

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In ***Hafer v. United Airlines***, 2005-AIR-8 (ALJ Nov. 9, 2005), the Complainant had been awarded state workers' compensation benefits, and the Respondent - which was self-insured - failed to pay those benefits within the period allowed under state law. The Complainant testified that he filed in early August 2004 - both by fax and certified mail - a timely complaint with the San Francisco OSHA office alleging that the delay was in retaliation for whistleblower activity under AIR21. The Complainant testified that about five days after sending his complaint to OSHA, he received payment for the workers' compensation benefits, and about the next day he received a call from an OSHA investigator stating that he had received the AIR21 complaint. The Complainant testified that he told the OSHA investigator that he had received the payment and the investigator asked whether there was anything else that OSHA could help him with. The Complainant replied that he had still not received reimbursement for certain out-of-pocket medical expenses and that the Respondent was using incorrect wage-base data to compute his weekly disability benefits. According to the Complainant, the OSHA investigator told him to set forth those complaints in another letter and backdate it to date of the initial complaint. The Complainant testified that he followed that instruction and mailed the backdated letter in early September. OSHA investigated the matter, and when it issued its determination letter dismissing the complaint, it did not mention the workers' compensation issue and indicated that its determination was related to the letter received from the Complainant in September 2004.

Before the ALJ, the Respondent filed a motion to dismiss based on the contention that the state workers' compensation based complaint was time barred under AIR21.

Because the Complainant had submitted various documents indicating that he had mailed and faxed the workers' compensation based complaint to OSHA in August 2004, the ALJ wrote to the OSHA investigator asking that the OSHA file be checked. The ALJ also noted that the Complainant had alleged that the investigator had called him in August 2004 about the complaint. Because the investigator had accepted a new position, the Acting Regional Supervisory Investigator answered the ALJ's letter. She stated that OSHA's files contained no evidence that the Complainant had raised a workers' compensation based complaint until he had responded to an OSHA letter in October 2004. The ALJ found that there was a genuine issue of material fact concerning the date that the workers' compensation based complaint was first filed with OSHA, denied the Respondent's motion for summary decision, and scheduled a hearing. The Respondent named the Acting Regional Supervisory Investigator as a witness, and the Complaint named the original OSHA investigator as a witness. The ALJ therefore wrote to OSHA's regional administrator asking that the two OSHA officials be directed to appear as trial witnesses as their testimony would be "crucial." The ALJ offered to accommodate the witnesses by taking their testimony by telephone or in San Francisco (the hearing was to be in Long Beach). In addition, the ALJ requested a complete copy of OSHA's files concerning the matter.

The Acting Associate Solicitor for the Division of Management and Administrative Legal Services responded to the ALJ's request. Citing the "*Touhy*" regulations, the Acting Associate Solicitor denied the request for either OSHA official to testify. The letter stated that the rule when considering whether to permit DOL employee to furnish information in response to a subpoena or demand, it is necessary to balance a litigant's need for the testimony against the adverse effects on DOL's concerns (such as "centralizing the dissemination of information of the agency (e.g. restricting investigators from expressing opinions on policy matters), minimizing governmental involvement in controversial matters unrelated to official business and avoiding the expenditure

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of government time and money for private purposes"). The letter noted that the OSHA investigator's testimony was sought in response to the Complainant's allegation that the investigator had called in August about the workers' compensation based complaint, but without further explanation decided against permitting him to testify.

OSHA provided the portions of the Complainant's file that it found to be disclosable. That portion of the file did not show any filing by the Complainant in August 2004. OSHA was therefore asked to review the file again for any inadvertent omissions; the Acting Associate Solicitor thereafter sent an additional 201 pages of documents, which likewise contained no information indicating OSHA received any faxes or certified mail from the Complainant during August 2004.

At the hearing the Respondent contended that the information provided by OSHA showed that the Complainant did not timely file a state workers' compensation based complaint. The ALJ, however, found that a considerable amount of documentary evidence supported the Complainant's contention that he had timely filed such a complaint, including phone bills and certified mails receipts. The ALJ found the Complainant's testimony about the filing credible, noting that the Complainant would have been strongly motivated to file the workers' compensation based complaint because it involved a considerable amount of money and that the aforementioned documentation established that the Complainant sent something to OSHA in August 2004. Although the September filing bore an August 2004 date and did not mention the workers' compensation claim, the ALJ found that this was the letter sent backdated as suggested by the OSHA investigator. The ALJ found the Complainant's demeanor when testifying about this issue to be entirely credible, and enhanced by the fact that no one from DOL denied the Complainant's assertion that he discussed the workers' compensation based complaint with the OSHA investigator in August 2004. The ALJ wrote:

> Indeed, the failure of the Acting Associate Solicitor for the Division of Management and Administrative Legal Services to provide an affidavit from Mr. Ricci or to even give a specific reason for refusing to permit Mr. Ricci to testify in this proceeding provides further justification for concluding that OSHA's San Francisco office simply does not want to admit that the Complainant has been telling the truth about when he first sent his VRMA complainant to OSHA. Obviously, OSHA would not want to verify the accuracy of the Complainant's testimony because any such verification would amount to an admission that OSHA has lost, hidden, or destroyed the Complainant's original complaint. Unfortunately, OSHA's refusal to acknowledge its deficiencies in its handling of this matter has imposed substantial and unnecessary burdens on the Complainant, the Respondent, and the Office of Administrative Law Judges. Even more significantly, it created an unconscionable risk that the Complainant's AIR21 complaint could have been unjustly rejected on the grounds that it was barred by the 90-day statute of limitations.

Slip op. at 12. Although the ALJ concluded that the workers' compensation based complaint had been timely filed, he ultimately found that the Complainant failed to show by a preponderance of the evidence that the reason for the delay in the payment was attributable to retaliatory motives rather than mere inadvertence and clerical errors.

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TIMELINESS OF FILING; EQUITABLE TOLLING; PRECISE STATUTORY CLAIM; MUST INDICATE INTENT TO PURSUE AN AIR21 COMPLAINT

In ***Turgeau v. The Nordam Group***, ARB No. 04-005, ALJ No. 2003-AIR-41 (ARB Nov. 22, 2004), the ARB found that the Complainant was not entitled to equitable tolling of his untimely filling of his AIR21 complaint with OSHA under the "precise statutory claim" ground for such tolling. Complainant had filed a wrongful termination and a "failure to page wages" suit under Oklahoma state law. After removal to federal district court, the suit was dismissed on the ground that it was preempted by AIR21. The Complainant then filed a complaint with OSHA, well beyond the AIR21 limitations period, asserting that "[a]lthough filed in state court, [the Complainant's] Petition raised the identical claim at issue here, i.e., that he was fired from employment with [the Respondent] for reporting matters of FAA compliance and safety." The Board rejected this theory, finding that the Complainant had filed specific state claims, neither of which contained any indication that the Complainant intended to pursue a complaint pursuant to AIR 21.

TIMELINESS OF COMPLAINT; CONTINUING VIOLATIONS STANDARD FOR INCLUSION OF EVENTS OUTSIDE LIMITATIONS PERIOD; EVIDENTIARY VALUE OF EVENTS THAT ARE NOT ACTIONABLE BECAUSE THEY WERE NOT THE SUBJECT OF A TIMELY COMPLAINT

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the ALJ found that the continuing violations standard stated in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002) was applicable for considering whether events outside the limitations period may be considered as timely raised in an AIR21 whistleblower complaint. Applying this standard, the ALJ found that events pleaded by the Complainant that occurred outside the 90 day limitations period were not actionable, as they each were isolated and disconnected events. The ALJ, however, held that those events contributed to the complete picture of the working relationship between the Complainant and his immediate supervisor, and therefore was relevant evidence pertaining to the timely-filed claims.

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; WRONG FORUM

In ***Turgeau v. The Nordam Group, Inc.***, 2003-AIR-41 (ALJ Oct. 30, 2003), the Complainant filed a retaliatory termination petition in Oklahoma state court, which the Respondent successfully removed to federal district court. The District Court thereafter granted the Respondent's motion to dismiss on the ground that AIR21 preempted the Complainant's original state law cause of action. Shortly thereafter the Complainant filed an AIR21 complaint with OSHA. Although the original state complaint had been filed within 90 days after the Complainant's discharge by the Respondent, almost 6 months had passed before the AIR21 complaint was filed with OSHA. Accordingly, the Respondent filed a motion for summary decision based on lack of timeliness.

In defense, the Complainant relied on the "precise statutory claim in the wrong forum" ground for equitable tolling. *See Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981). The ALJ observed that the wrong forum equitable tolling standard has two corollaries: (1) that the claim filed in the wrong forum must have been filed within the time limits that would have applied had the complaint been filed in the correct forum, and (2) that the plaintiff must have used the same statutory foundation when filing both the original claim and the subsequently filed claim. In

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the instant case, the Complainant's filing in State court was well within the AIR21 90 day limitations period. In regard to the second corollary, the Complainant proffered that his AIR21 complaint is identical to the retaliatory termination complaint he filed in State court, both contending that he was fired by the Respondent because he reported violations of FAA requirements. The ALJ, however, found that the relevant case law "holds that more than the underlying facts must be identical. Rather, both claims must have been made under the same statute." The ALJ noted that the ARB had ruled on this very issue in *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2000-STA-12 (ARB Mar. 22, 2001). Because the original complaint was based on Oklahoma law and not AIR21, the "wrong forum" equitable tolling defense failed. The Complainant noted that another ALJ had ruled differently in *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 (ALJ Oct. 18, 2002), but the ALJ respectfully disagreed with that decision.

Similarly, in *Ferguson v. Boeing Co.,* 2004-AIR-5 (ALJ Apr. 5, 2004), the Complainant had filed a complaint with the Department of Defense OIG. When the Complainant later pursued his complaint with OSHA, the Deputy Regional Administrator applied the wrong forum equitable estoppel principle to find that the complaint was timely filed. The ALJ found:

> [T]he Deputy Regional Administrator applied the third condition for collateral estoppel incorrectly. Among other things, he failed to consider that the initial complaint must have been filed in the wrong forum for equitable estoppel to be applicable. But the May 8, 2002 complaint was not filed in the wrong forum. Rather, the DoD IG was a proper forum for the complaint of retaliation due to whistleblowing, as the DoD IG took jurisdiction over the case and recently issued a decision denying the claim .... This is not a case where a complaint was filed in a forum where it was dismissed for lack of jurisdiction or improper venue. Instead, the complainant has had his claim adjudicated on the merits, and it was determined by the DoD IG that the complainant was disciplined for engaging in misconduct and violating Boeing's Expected Code of Conduct for its employees ..., not for the complaints he made regarding his supervisor's actions. Since the initial complaint was filed in a proper forum, equitable estoppel is inapplicable. Therefore, the complaint filed with OSHA was untimely, and this case must be dismissed.

- *Continuing violation doctrine inapplicable*

TIMELINESS OF COMPLAINT; COLLECTION LETTER FOUND NOT TO BE A SEPARATE, ACTIONABLE ADVERSE ACTION; CONTINUING VIOLATION DOCTRINE DOES NOT APPLY TO AIR21 WHISTLEBLOWER CASES

In ***Sassman v. United Airlines***, ARB No. 05-077, ALJ Nos. 2005-AIR-4 (ARB Sept. 28, 2007), the Complainant had financed a loan for a van through an employee credit union. The Complainant filed an AIR21 whistleblower complaint after his discharge, which was dismissed because it had been discharged as part of the Respondent airline's bankruptcy reorganization. While that complaint was pending, the credit union repossessed the van, sold it at auction, and sought to collect the balance of the loan from the Complainant. After receiving a collection letter from the credit union several years after the repossession, the Complainant filed a new whistleblower

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complaint alleging that the Respondent airline caused the credit union to treat him more harshly upon default than other credit union members because of his protected activity. Assuming for purposes of deciding the appeal that the credit union was a properly named respondent under AIR21 (the airline having been discharged in bankruptcy), the ARB found that the complaint should have been filed within 90 days of when the Complainant was informed that the van had been repossessed and that he would be liable for any deficiency on the loan balance after a sale at auction. The collection letter several years later was a consequence of the repossession, and not a separate, actionable adverse action. The ARB rejected the Complainant's argument that his complaint was timely under the "continuing violation" doctrine, because he continued to engage in protected activity during the period of the repossession and collection efforts. The ARB found that continuing violation doctrine has nothing to do with when the protected activity took place, and that in any event, continuing violation doctrine does not apply to AIR21 whistleblower cases.

- *Blacklisting*

TIMELINESS; BLACKLISTING

Applying *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the ALJ in ***Ford v. Northwest Airlines, Inc.***, 2002-AIR-21 (ALJ Oct. 18, 2002), determined that, where Complainant applied for jobs on separate, identifiable occasions, each occasion where Respondent allegedly made a blacklisting remark (and arguably on each occasion that a prospective employer remembered a prior blacklisting remark made by Respondent in refusing to hire Complainant) constituted a discrete act of blacklisting. Even if the events were interrelated and connected, there is no actionable "serial violation." The ALJ, however, remanded the case for an investigation into other, timely, allegations of blacklisting activity (OSHA had not earlier investigated these allegations, finding that the complaints were time barred).

- *Timeliness of hearing request*

TIMELINESS OF REQUEST FOR HEARING; ASKING OSHA TO FORWARD LETTER TO OALJ DOES NOT PROVIDE EQUITABLE GROUNDS FOR TOLLING

In ***Mancinelli v. Eastern Air Center, Inc.***, ARB No. 06-085, ALJ No. 2006-AIR-8 (ARB Feb. 29, 2008), the ALJ dismissed the Respondent's request for a hearing as untimely. On appeal, the Respondent for the first time argued that it had showed sufficient diligence to warrant equitable tolling of the limitations period (having sent a letter with objections to the OSHA office that issued the preliminary findings and requesting that OSHA forward the letter to the Chief ALJ). The ARB refused to consider the argument, stating that its "function is to review ALJ recommended decisions for error; it is not to provide litigants with a forum where they can retry their cases with new theories." The ARB also stated that the Respondent did "not cite, nor do we know of any legal basis, allowing a party to unilaterally transfer its duty to comply with written procedural requirements from itself to the Regional Administrator."

TIMELINESS OF REQUEST FOR HEARING; DATE OF RECEIPT BY COMPLAINANT IS DATE OF DELIVERY TO LAST KNOW MAILING ADDRESS RATHER THAN ACTUAL RECEIPT

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In ***Robinson v. Northwest Airlines, Inc.***, 2004-AIR-37 (ALJ Oct. 28, 2004), the ALJ interpreted the time period in which the Complainant must file any request for an ALJ hearing on an AIR21 complaint to be triggered by the date of delivery of the OSHA determination. The ALJ noted that the regulation requires a hearing request to be made within 30 days of receipt of the findings and preliminary order, but does not define the term "received." The ALJ concluded, however, date of delivery to the Complainant's address was the correct trigger given the regulatory requirement that OSHA send its decision by certified mail, and given the fact that a complainant could avoid service and hold open his ability to demand a hearing indefinitely if actual delivery was required. The ALJ also ruled that OSHA only needed to send the determination letter to the last known address.

[Editor's note: ***Compare Richards v. Lexmark International, Inc.*** 2004-SOX-49 (ALJ Oct. 1, 2004), which the ALJ found under similar SOX regulations that receipt rather than actual or constructive notice is the regulatory standard. In that case, the ALJ also considered whether presumptive receipt or actual or constructive notice was applicable and concluded that it was not under the facts of the case**.]**

TIMELINESS OF HEARING REQUEST; 30 CALENDAR DAYS NOT EXTENDED BY 29 C.F.R. § 18.4(c)(3); LACK OF TIMELINESS NOT JURISDICTIONAL BAR BUT SUBJECT TO EQUITABLE TOLLING; LACK OF PREJUDICE STANDING ALONE DOES NOT SUPPORT EQUITABLE TOLLING

In ***Swint v. Net Jets Aviation, Inc.***, 2003-AIR-26 (ALJ July 9, 2003), *appealed dismissed on basis of settlement*, ARB No. 03-124, ALJ No. 2003-AIR-26 (ARB Nov. 25, 2003), the ALJ found that the OALJ Rules of Practice at 29 C.F.R. § 18.4(c)(3) did not operate to allow five additional days for the mailing of an objection to OSHA's findings on an AIR21 whistleblower complaint. In *Swint*, Complainant's objection was postmarked on the 32d day following receipt of OSHA's findings (which was one day outside the 30 day period provided for under the statute and regulation, as the 30th day fell on a Sunday). Complainant contended that section 18.4(c)(3) operated to allow five additional days for mailing. The ALJ, however, found that the plain language of both the statute and the regulation require objections and requests for hearings must be filed "within 30 days" or "not later than 30 days." Moreover, 29 C.F.R. § 1979.106(a) explicitly states that the date of postmark is considered the date of filing. The ALJ therefore found that the hearing request was untimely. The ALJ, however, rejected Respondent's contention that an untimely filing deprives OALJ of subject matter jurisdiction. Rather, the ALJ proceeded to consider whether grounds existed for equitable tolling and found that the circumstances of the case did not justify equitable relief. The ALJ rejected Complainant's argument that there would be no prejudice to Respondent to apply equitable tolling, noting caselaw to the effect that lack of prejudice cannot be the determining factor in permitting a late filing.

REQUEST FOR HEARING; TIMELINESS OF

In ***Bodine v. International Total Services***, 2001-AIR-4 (ALJ Nov. 20, 2001), the ALJ recommended dismissal of the appeal as untimely where Respondent failed to submit objections to OSHA's Findings and Preliminary Order until over 35 days after OSHA's findings were served by certified mail. The AIR21 statute provides:

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> not later than 30 days after the date of notification of findings... either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record.

49 U.S.C. § 42121(B)(2)(a). If a party fails to request a hearing within the 30-day period, the preliminary order is deemed a final order that is not subject to judicial review. *Id*. In calculating the period for requesting review, the ALJ applied 29 C.F.R. § 18.43(c)(3) to add five days to the statutory filing period to account for mailing. The ALJ also provided Respondent the opportunity to state a ground for equitable tolling of the filing period, but it failed to respond.

- *Request for formal hearing*

REQUEST FOR HEARING; FAILURE TO TIMELY SERVE OPPOSING PARTY

In ***Robinson v. Northwest Airlines, Inc.***, 2004-AIR-37 (ALJ Oct. 28, 2004), the ALJ found that the Complainant's representative's failure to serve a letter to OALJ (which had been docketed as a request for hearing even though a hearing was not specifically requested in the letter) had caused no significant prejudice to the Respondent, and therefore did not provide sufficient grounds to dismiss the case. The ALJ, however, dismissed the case because the Complainant's response to the ALJ's order to show cause was that he did not want a hearing but only wanted the OSHA to do its job and investigate the complaint. The ALJ found that the response showed that the Complainant had not simply missed a technical nuance -- he never requested a hearing.

IX. PROCEDURE BEFORE OALJ

- *Amendment of complaint*

ALJ'S AUTHORITY TO REQUIRE COMPLAINANT TO CLEARLY ARTICULATE HER CASE

When confronted with a prolix, rambling complaint, an ALJ has the authority to require the complainant to produce a clear articulation of her case. ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007).

AMENDMENT OF COMPLAINT; ARB AFFIRMED ALJ'S DENIAL OF LEAVE TO AMEND WHERE THE AMENDMENT WAS VAGUE AND DIFFICULT TO UNDERSTAND, AND WAS MADE AFTER THE DISCOVERY DEADLINE

In ***Hukman v. U.S. Airways, Inc.***, ARB No. 15-054, ALJ No. 2015-AIR-3 (ARB July 13, 2017), the Complainant challenged before the ARB the ALJ's denial of her request to amend her AIR21 complaint. The ARB, however, held that the ALJ did not abuse his discretion in denying leave to amend. The ARB noted that it is reluctant to interfere with an ALJ's control over procedural and discovery issues, and that the ALJ had not allowed the amendment because the Complainant's submission was vague and difficult to understand, and because it was after the discovery deadline

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had passed, thus, putting the Respondent "at a disadvantage in attempting to seek clarification and defend its case." Slip op. at 4.

ALJ SHOULD PERMIT LIBERAL AMENDMENTS TO WHISTLEBLOWER COMPLAINTS; PROBABLY ERROR FOR ALJ TO HAVE DENIED MOTION TO AMEND TO ADD RESPONDENTS IN AIR21 CASE

In ***Cobb v. FedEx Corporate Services, Inc.***, ARB No. 12-052, ALJ No. 2010-AIR-24 (ARB Dec. 13, 2013), the Complainant originally named FedEx Express Corp. in his AIR21 complaint filed with OSHA. The Complainant was employed by a subsidiary, FedEx Corporate Services, Inc. At some point during the investigation, OSHA substituted FedEx Services as the Respondent. Before the ALJ, the Complainant moved to amend the complaint to include FedEx Corp., FedEx Express and FedEx Office as Respondents. The Respondent objected because the Secretary's Findings were only against FedEx Services and no other entities. The ALJ denied the motion to amend, and the Complainant did not appeal that ruling. On appeal, the ARB declined to formally rule on ALJ's ruling on the motion to amend because the Complainant had not appealed it, but wrote:

> We note however that we have ruled that ALJs should liberally grant whistleblower complainants leave to amend their complaints. *Evans v. U.S. Envtl. Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 11 (ARB July 31, 2012) (citations omitted). Especially given that Cobb initially named FedEx Corp. as the respondent, the ALJ may have erred in disallowing Cobb to amend his complaint to allege direct liability by FedEx Corp.

USDOL/OALJ Reporter at 4, n.4.

POST-HEARING AMENDMENT OF PLEADINGS DENIED WHERE IT WAS BASED ON DIFFERENT FACTS AND OCCURRENCES THAN THE MATTERS IN LITIGATION

In ***Hoffman v. NetJets Aviation, Inc.***, ARB No. 06-141, ALJ No. 2005-AIR-26 (ARB July 22, 2008), the ARB found that the presiding ALJ did not abuse his discretion in denying the Complainant's post-hearing motion to supplement the pleadings. The ARB stated that "[w]hile the ALJ rules allow for liberal amendment under 29 C.F.R. § 18.5(e), [the Complainant] has identified a post-hearing adverse action arising under a different set of facts and occurrences than the matters in litigation. The post-hearing consideration of the new evidence would prejudice [the Respondent]."

- *Findings on complaint still before OSHA*

WHERE, DESPITE STATING THAT A LATER AIR21 COMPLAINT ALLEGING REDUCED HOURS AND RETALIATORY DISCHARGE WAS NOT BEFORE HIM, THE ALJ PERMITTED ALL EVIDENCE AND TESTIMONY ON THOSE MATTERS, AND HAD FOUND A LACK OF NEXUS BETWEEN PROTECTED ACTIVITY AND THE TERMINATION ON A RECORD THAT WAS CLEAR ON THE POINT, THE ARB FOUND THE ALJ'S STATEMENT WAS HARMLESS ERROR

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In ***Dolan v. Aero Micronesia, Inc.***, ARB Nos. 2020-0006 and -0008, ALJ No. 2018-AIR-00032 (ARB June 30, 2021) (per curiam), Complainant was a pilot who filed an AIR21 complaint in 2015 alleging retaliation for several protected activities. The ARB summarily affirmed the ALJ's Decision and Order where it was supported by substantial evidence, and none of the parties' arguments demonstrated abuse of discretion or reversible error by the ALJ. The ALJ had dismissed some of the AIR21 retaliation claims as untimely raised, or because Complainant had not carried his burden of proof – but found that Complainant had carried his burden on one incident.

In the Decision and Order, the ALJ had stated that the complaint before him was limited to Complainant's 2016 filing, and that the Decision and Order would not materially discuss allegations made by Complainant in a 2017 filing with OSHA in which Complainant alleged reduction of flight hours and a retaliatory termination. Complainant argued on appeal that the ALJ should have considered the 2017 complaint, while Respondent noted that Complainant had not introduced the 2017 complaint during the hearing, and it was still pending before OSHA. OSHA filed an amicus brief recommending a remand for a clear ruling by the ALJ on the 2017 retaliatory termination claim.

The ARB determined that the ALJ's statement about the 2017 complaint was harmless error, and that the ALJ had in fact resolved the termination issue on a clear record. The ARB stated:

> Throughout the proceedings, the ALJ permitted all evidence and testimony concerning Complainant's reduced hours and termination into the record, and his analysis fully considered both adverse employment actions. Ultimately, he found that the termination had no nexus to an activity protected under AIR 21. As such, we find that the record is clear on this point, and a remand for the ALJ to consider Complainant's termination from employment is unnecessary. Accordingly, we summarily **AFFIRM** the ALJ's D. & O.

Slip op. at 7.

- *Recusal of ALJ*

MOTION FOR RECUSAL; ARB DENIES INTERLOCUTORY REVIEW WHERE ALJ CONSIDERED COMPLAINANT'S ALLEGATIONS OF BIAS AND CORRECTLY DETERMINED THAT THEY WERE NOT GROUNDS FOR RECUSAL

In ***Kossen v. Empire Airlines***, ARB No. 2021-0017, ALJ No. 2019-AIR-00022 (ARB Feb. 25, 2021), Complainant's appeal was interpreted by the ARB as a petition for interlocutory review. Complainant's petition was based on the assertion that the presiding ALJ was biased against him because the ALJ did not rule in his favor in a prior case and because the ALJ's son is employed by an airline.

The ARB found that the ALJ had considered these allegations and correctly concluded that neither was grounds for recusal. The ARB found that Complainant failed to allege exceptional

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circumstances sufficient to merit interlocutory review under the "collateral order" exception. The ARB thus denied the petition.

See also Kossen v. Empire Airlines, No. 2019-AIR-00022 (ARB Feb. 3, 2021) (Order Denying Motion to Recuse).

- *Summary decision*

  - **Self-represented litigants**

SUMMARY DECISION; ALJ IS NOT OBLIGATED UNDER *ZAVALETA* TO NOTIFY COMPLAINANT OF RIGHT TO IDENTIFY NECESSARY DISCOVERY WHERE COMPLAINANT WAS REPRESENTED — *ZAVALETA* APPLIES ONLY TO CASES INVOLVING SELF-REPRESENTED LITIGANTS

In ***Green v. Opcon, Inc.***, ARB No. 2018-0007, ALJ No. 2017-TSC-00002 (ARB Apr. 9, 2020) (per curiam), Complainant argued that the ALJ erred by entering summary decision without first allowing time for discovery. The ARB noted that under 29 C.F.R. § 18.72(d), Complainant had the opportunity to submit an affidavit or declaration identifying his need to conduct discovery to present facts essential to his claim, but he did not do so. The ARB noted that it generally does not consider arguments raised for the first time on appeal, but that even if it considered the argument, it lacked merit. The ARB noted that an ALJ has the discretion to limit the scope of discovery, and that to establish an abuse of that discretion an "appellant must, at a minimum, articulate what materials he hoped to obtain during discovery and how he expects those materials would have helped him avoid dismissal of his case." Slip op. at 7 (citations omitted). Here, Complainant only made a general proffer that he needed to complete discovery without stating why or identifying what discovery was necessary.

Complainant cited *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 2015-0080, ALJ No. 2015-AIR-00016 (ARB May 8, 2017) for the proposition that the ALJ was obligated to make sure Complainant was aware of his right to discovery before entering summary decision. The ARB, however, stated that this requirement from *Zavaleta* arose in the context of a pro se litigant and that it did not apply for represented litigants, like Complainant in the instant case.

SUMMARY DECISION; ALJ ERRED BY LIMITING SELF-REPRESENTED COMPLAINANT TO AFFIDAVITS OR SWORN STATEMENTS FOR RESPONSE TO MOTION FOR SUMMARY DECISION; SELF-REPRESENTED COMPLAINANT'S DECLARATION IN BRIEF THAT SHE HAD PERSONAL KNOWLEDGE OF THE FACTUAL CONTENTIONS MAY BE SUFFICIENT TO RAISE A GENUINE ISSUE OF MATERIAL FACT

SUMMARY DECISION; ALJ ERRED BY EXCLUDING CERTAIN OF COMPLAINANT'S EVIDENTIARY SUBMISSIONS ON GROUNDS OF INADMISSIBILTY UNDER FORMAL RULES OF EVIDENCE

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In ***Hukman v. U.S. Airways, Inc.***, ARB No. 2018-0048, ALJ No. 2015-AIR-00003 (ARB Jan. 16, 2020), the ARB had remanded the case to the ALJ for reconsideration of a grant of summary decision. On remand, the ALJ again granted summary decision, this time finding—based on Defendant's averments—that Defendant was not on notice of Complainant's protected activity. The ARB vacated the ALJ's dismissal.

ALJ may not constrain the methods for opposing a motion for summary decision without explaining how such a limitation serves the ends of justice

The ARB found that the ALJ erred under the circumstances of the case when he directed the self-represented Complainant to respond to Defendant's motion for summary decision with affidavits or by filing sworn statements—and found that Complainant failed to oppose the motion when she did not submit an affidavit or sworn statement, other than swearing in a motion that she had personal knowledge of the facts, the FAA violations, and all exhibits. The ARB noted that affidavits and sworn statements are not the only means by which a party may respond to a motion for summary decision supported by affidavits and sworn statements. Rather, the regulation at 29 C.F.R. § 18.72(c)(1) states that "other materials" are a permissible method for responding to a motion for summary decision. The ARB noted that an ALJ may modify the permissible means of proof under 29 C.F.R. § 18.10(c), but that only to serve the ends of justice and without prejudice to either party. The ARB wrote:

> Under the instant circumstances, neither requirement was satisfied by the ALJ's order. A self-represented litigant assumes much risk by undertaking litigation and need not be coddled by an ALJ; that being noted, it is seldom in the interests of procedural due process or the "ends of justice" for an ALJ to *reduce* the available means of proof and *increase* the trial burden upon a self-represented litigant, whatever the perceived increase in judicial efficiency to be derived from such measures. As such, the ALJ erred as to a matter of law by restricting the ability of Complainant to submit "other materials" in response to Respondent's motion for summary decision without explaining how the "ends of justice" required such a limitation.

Slip op. at 6-7 (emphasis as in original).

A declaration in a self-represented litigant's brief asserting personal knowledge can be sufficient to raise a genuine issue of material fact

The ARB also found that Complainant's statement in the motion swearing that she had personal knowledge of all the matters she had asserted in her documentary filings with the ALJ could be sufficient to raise a genuine issue of material fact, and held that the ALJ erred in refusing to credit it or even consider it because they were not "affidavits" or "sworn statements." First, the ARB, citing 29 C.F.R. § 18.35(b), noted that when a representative or unrepresented party presents a written motion to the ALJ, the presenter is implicitly certifying that the factual contentions in the motion have evidentiary support. Second, the ARB found that Complainant's swearing that she had personal knowledge of the matters was "express, reasonable, and apparently good faith effort to comply with the ALJ's order." *Id*. at 7. The ARB concluded that the cumulative legal effect of

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the two certifications was largely indistinguishable from a declaration made under perjury. The ARB also stated:

> For the purposes of summary decision, an ALJ must consider that the self-represented Complainant could testify on the stand at hearing to explain what she submitted and how it supports her case. Her sworn testimony would thus serve to establish occurrence as described in her submissions. Accordingly, a declaration in [a] brief from a pro se complainant can be sufficient to raise a genuine issue of material fact.

Id. at 8. The ARB further stated that summary decision is not to be granted rashly, and that the challenge of reviewing quantities of potentially relevant papers submitted by a self-represented litigant does not obviate an ALJ's obligation to "look at ***other materials than those specified in the practice rules.***" *Id*. (emphasis as in original).

Formal rules of evidence do not apply to AIR21 cases; inadmissibility of self-represented complainant's evidence seldom enforced if that evidence is facially relevant and material

The ARB also found that the ALJ erred in excluding some of Complainant's proffered evidence because it was not admissible under rules of evidence. The ARB stated that formal rules of evidence to not apply to APA hearings and that formal rules of evidence are expressly rejected under the AIR21 regulations. The ARB stated: "Further, a requirement that evidence be admissible will, as a practical matter, seldom be enforced against a pro se complainant's evidence if that evidence is facially relevant and material to the issues at hand." *Id*. at 9.

Other errors; ARB finds that Complainant plead a prima facie case sufficiently to defeat a motion for summary decision

The ARB found additional errors by the ALJ in ruling on the motion for summary decision, including making findings of fact, failing to view the evidence in the light most favorable to the complainant, failure to analyze several of the elements of an AIR21 complaint. In reviewing the case, the ARB concluded that Complainant plead a prima facie case sufficiently to defeat a motion for summary decision, and directed that the ALJ on remand consider the case on the merits. The ARB also concluded that, although the ALJ had not departed from his impartial role in deciding the case, the nature of the errors required a fresh pair of eyes on remand. The ARB thus directed that the Chief ALJ reassign the case to different ALJ in a different district office.

SUMMARY DECISION; NOTICE TO PRO SE LITIGANT OF THE NONMOVING PARTY'S RIGHTS AND OBLIGATIONS IN RESPONDING TO A MOTION FOR SUMMARY DECISION MUST INCLUDE NOTICE OF RIGHT TO CONDUCT DISCOVERY OR TO PRESENT FACTS IN OPPOSITION TO THE MOTION

In ***Zavaleta v. Alaska Airlines, Inc.***, ARB No. 15-808, ALJ No. 2015-AIR-16 (ARB May 8, 2017), the ALJ granted summary decision in favor of the Respondent finding, inter alia, that the pro se Complainant had not demonstrated a genuine issue of material fact on his claims that he was subject to adverse actions when he was recalled to work under less favorable conditions, and when his applications for a management position were rejected.

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The ARB stated: "In the review of summary decisions, the Board has adopted federal precedent requiring notice to a *pro se* litigant of the requirements for opposing a motion for summary judgment, in a form sufficiently understandable to apprise the *pro se* litigant of what is required, along with the text of the rule governing summary decisions." USDOL/OALJ Reporter at 11-12 (citing, *inter alia*, *Motarjemi v. Metro. Council Metro Transit Div.*, ARB No. 08-135, ALJ No. 2008-NTS-002, slip op. at 4 (ARB Sept. 17, 2010); *Hooker v. Washington Savannah River Co*., ARB No. 03-036, ALJ No. 2001-ERA-016, slip op. at 8 (ARB Aug. 26, 2004)). In the instant case, the ALJ issued a notice with the text of 29 C.F.R. § 18.40, which governed summary decisions at the time the ALJ issued the notice (the current rule being 29 C.F.R. § 18.72). The ALJ, however, had omitted Subsection 18.40(d), "which essentially afford[ed] the nonmoving party the opportunity to conduct discovery to respond to a summary decision motion by providing that the presiding ALJ 'may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.'" USDOL/OALJ Reporter at 13. The ARB stated that discovery by the Complainant could have proven highly relevant to the unique contextual settings of his recall and the subsequent rejections of his applications for management positions. The ARB held:

> that the ALJ should have advised Zavaleta, as a *pro se* litigant, of his right to conduct discovery and should have afforded him the opportunity to do so if Zavaleta found that he was unable, in the absence of discovery, to present facts justifying his opposition to Alaska Airlines' motion for summary decision. The failure of the ALJ to so advise Zavaleta constitutes reversible error in the same manner that we have previously held that an ALJ is obligated to advise *pro se* litigants in a sufficiently understandable form of the requirements for opposing a motion for summary decision.

Id. at 14 (footnote omitted).

- ***Weighing evidence***

SUMMARY DECISION; REVERSIBLE ERROR FOR ALJ, IN RULING ON A MOTION FOR SUMMARY DECISION, TO WEIGH THE EVIDENCE OR DETERMINE THE TRUTH OF THE MATTERS ASSERTED

In ***Zavaleta v. Alaska Airlines, Inc.***, ARB No. 15-808, ALJ No. 2015-AIR-16 (ARB May 8, 2017), the ALJ granted summary decision in favor of the Respondent finding, inter alia, that the pro se Complainant had not demonstrated a genuine issue of material fact on his claim that he was subjected to adverse action when his applications for management positions were rejected. The ALJ had found in regard to one of the positions that the Complainant "did not offer anything more than his own allegations to refute" the evidence the Respondent submitted indicating that he was not selected for the position "because he did not have experience overseeing vendor workflow or managing vendor relationships, while the individual ultimately selected had experience as a liaison between an airline and vendors." The ARB found that the ALJ had "essentially weighed [the Complainant's] qualifications for the position against the qualifications of the individual that Alaska Airlines ultimately selected for that position." USDOL/OALJ Reporter at 14. This, the ARB held, was reversible error, citing *Ciofani v. Roadway Express*, ARB No. 05-020, ALJ No.

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2004-STA-046 (ARB Sept. 29, 2006) ("[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . . ."); *Stauffer v. Wal-Mart Stores*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 6-7 (ARB Nov. 30, 1999).

- ***Relevancy***

ALJ'S IN CAMERA REVIEW TO DETERMINE RELEVANCY

In ***Cobb v. FedEx Corporate Services, Inc.***, ARB No. 16-030, ALJ No. 2010-AIR-24 (ARB Sept. 29, 2017), the ARB affirmed the ALJ's grant of the Respondent's motion for summary decision because the record did not show a genuine issue of material fact that permitted a finding that the Respondent terminated the Complainant's employment, in whole or in part, because of protected activity under AIR21. The record did show that the Complainant communicated concerns about the safety of a runway to FedEx executives. The Complainant, however, failed to provide evidence or argument that any of the persons, who had received those concerns were involved in the decision to terminate his employment or communicated protected activity to the decision makers prior to the Complainant's termination for abuse of a discount mailing privilege.

The Complainant speculated that the Respondent's vice-president of security orchestrated the termination, and sought emails in discovery to establish a link between the termination and protected activity. The ALJ allowed limited production and reviewed the emails in camera. After in camera review, the ALJ agreed with the Respondent that the emails were not connected to the Complainant's case. The ARB found that the Complainant produced no direct or circumstantial evidence that the VP had orchestrated the termination, and noted that the VP had provided a declaration stating that he had no recollection of any role in the termination decision and did not remember receiving the Complainant's study or complaint or sending notice of it to anyone.

The ALJ also found that the abuse of the mailing privilege was an intervening event that broke any inference of causation stemming from the Complainant's dissemination of his study on the runway's safety. The ARB clarified that the ALJ had erred in finding a three year break between the protected activity and the termination because the Complainant had at least mentioned or refreshed the issue in the interim. The ARB, however, still found that the inference was weak because there was a long gap with no protected reports, and the Complainant had received a promotion and award in the interim. But, even more importantly, the shipping privilege violation was an intervening event with a strong causal connection to the termination, and the HR department and the Complainant's supervisor testified that they did not know of the protected activity prior to the termination for the shipping privilege violation.

SUMMARY DECISION; WHERE RESPONDENT SUBMITTED ADMISSIBLE EVIDENCE IN SUPPORT OF A MOTION FOR SUMMARY DECISION AND COMPLAINANT, DESPITE BEING NOTIFIED OF THE SPECIFIC REQUIREMENTS FOR RESPONDING TO SUCH A MOTION, FAILED TO SUBMIT ANY AFFIDAVITS OR EVIDENCE IN OPPOSITION, THE ARB AFFIRMED THE GRANT OF SUMMARY DECISION ON THE ISSUES OF PROTECTED ACTIVITY, EMPLOYER'S KNOWLEDGE OF THE PROTECTED ACTIVITY, AND CONTRIBUTING CAUSE

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In ***Alexander v. Atlas Air, Inc.***, ARB No. 12-030, ALJ No. 2011-AIR-3 (ARB Sept. 27, 2012), following extensive discovery the Respondent filed a motion for summary decision supported by multiple affidavits and deposition testimony to support its argument that the Complainant had not engaged in protected activity, and even if he had, the Respondent had no knowledge of the Complainant's activities and therefore there was no causal relationship between those activities and any adverse personnel action. The ARB noted that the ALJ had, consistent with federal practice, notified the pro se Complainant of the specific requirements for opposing the Respondent's motion. The ARB noted that "[w]here the moving party presents admissible evidence in support of a motion for summary decision, as occurred in this case, the nonmoving party must submit admissible evidence to raise any genuine issue of material fact and, again, cannot rely on the allegations of his complaint alone." USDOL/OALJ Reporter at 5 (footnote omitted). The Complainant, however, failed to submit any affidavits or evidence in opposition to the Respondent's motion. Thus, notwithstanding that the evidence of record was viewed in the light most favorable to the Complainant for purposes of ruling on the motion for summary decision, the ARB found that the evidence of record neither supported the Complainant's contention that he engaged in AIR 21 protected activity nor created issues of material fact that would warrant denying the Respondent's motion for summary decision. Similarly, the evidence of record did not support the contention that the Respondent was aware of the Complainant's his concerns or create a genuine issue of material fact with respect to such awareness; nor did the evidence of record support a finding that those concerns were a contributing factor in the purported employment action or create a genuine issue of material fact with respect to the matter of causation.

LIMITATION TO ISSUE RELATED TO SUMMARY DECISION MOTION

The ALJ did not abuse his discretion in ***Friday v. Northwest Airlines, Inc.***, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005), in denying the Complainant's motion for additional discovery filed after the ALJ had limited discovery to the issues presented in the Respondent's motion for summary decision.

- *Motion to Dismiss*

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; *BELL ATLANTIC*/FRCP 12(b)(6) STANDARD

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the ARB held that proper standard for determining whether a whistleblower complaint states a claim is FRCP 12(b)(6). The ARB noted that the Supreme Court had recently clarified 12(b)(6) in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Thus, a complaint does not need detailed factual allegations, but it must provide factual allegations that indicate the grounds for the complaint. While the standard remains very charitable, a 12(b)(6) dismissal is no longer reserved for cases in which the allegations of the complaint itself demonstrate the lack of a valid claim. Rather, the complaint itself must contain enough factual matter to suggest that the alleged violation is plausible. Because a complainant does not need to prove her factual allegations in response to a 12(b)(6) motion, a decision that the complaint states a claim does not mean that the complainant has proven the elements of her claim.

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AUTHORITY OF ALJ ON HER OWN MOTION TO ORDER COMPLAINANT TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION

In ***Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE)*****,** 2004-AIR-19 (ALJ May 7, 2004), the ALJ issued a preliminary order and order to show cause directing the Complainant to show cause why her complaint should not be dismissed for failure to state a cause of action under the whistleblower provisions of AIR21, the SOX, and the environmental statutes. In response, the Complainant alleged that the ALJ must first issue a notice of hearing, and only thereafter, on motion of a party, consider whether a summary disposition is appropriate. The ALJ, referencing caselaw interpreting FRCP 12(b)(6), found that "it has been uniformly held that a Court may dismiss a claim for failure to state a claim upon which relief can be granted when it is patently obvious that the claimant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mirza,* 869 F. Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F. Supp. 1224 (M.D. Pa. 1983); *Johnson v. Baskerville,* 568 F. Supp. 853 (E.D. Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981)." The ALJ noted that the relevant inquiry is whether, assuming that all the Complainant's allegations are true, she has stated a cause of action upon which relief can be granted. The ALJ also noted that she had liberally construed the complaint and not held the *pro se* litigant to the same standard as would be required of an attorney. The Complainant's 36 page complaint, however, only raised issues over which DOL OALJ has no jurisdiction, such as disputes with her union over interpretation of a CBA or a union's duty of representation, whether FAA rules had been violated, the activities of the NLRB, and constitutional rights. The one potential complaint over which DOL OALJ jurisdiction might attach showed no adverse employment action with tangible consequences, it being merely an allegation of a verbal threat of a written warning. The ALJ, therefore, dismissed the complaint.

- *Due process*

DUE PROCESS; FAILURE TO PROVIDE OPPORTUNITY FOR RESPONDENT TO PRESENT EVIDENCE AND ARGUMENT ON THEORY OF LIABILITY NEVER EXPRESSLY CLAIMED BY COMPLAINANT

In ***Williams v. American Airlines, Inc.***, ARB No. 09-018, ALJ No. 2007-AIR-4 (ARB Dec. 29, 2010), the Complainant filed an AIR21 whistleblower complaint based on a disagreement concerning the correct wrench to use to repair a thrust reverser problem. Following a hearing, the ALJ did not find illegal retaliation in relation to the torch wrench incident, but sua sponte, found that the Respondent had retaliated against the Complainant in regard to a different incident involving whether a second inspection was required when a brake change operation took longer than normal. The Respondent argued on appeal that the ALJ violated its due process rights by inserting a new theory of liability. The ARB agreed that a due process violation had occurred.

The ARB noted that: "When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Implied consent cannot be automatically attached to every potential issue related to evidence introduced at trial." Slip op. at

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17-18. The Complainant was able to point to many instances in the administrative investigation and litigation proceedings where reference had been made to the second incident; but the ARB found that the Complainant had never claimed or expressly argued that the second incident involved protected activity and was a contributing factor to the allegedly illegal retaliation. The ARB found that the Respondent had never been given notice or an opportunity to defend against the second theory of liability. The ARB, however, found that the proper remedy was to remand the case to the ALJ to take additional evidence and argument on the issue. The ARB found that the Respondent could not claim complete surprise by the ALJ's finding of illegal retaliation on the issue given the Complainant's discovery responses, that a substantial part of the Complainant's case and a motion in limine involved the second incident and associated written warnings, and that OSHA had investigated the second incident. The ARB urged the ALJ and the parties on remand to work together to ensure a full and fair hearing on the issue, and stated that after such, the ALJ was free to reconsider whether the second incident was a contributing factor to the written warnings as part of illegal retaliation.

DUE PROCESS; FAILURE TO PROVIDE ADEQUATE OPPORTUNITY FOR ALL NAMED RESPONDENTS TO RESPOND TO COMPLAINANT'S FILING BASED ON MISTAKEN BELIEF THAT THEY HAD BEEN DISCHARGED AS RESPONDENTS

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the Complainant named ten organizations and seven individuals as respondents in her AIR21, SOX and environmental whistleblower complaint. OSHA concluded that the complaint related factually only to PACE (which had not been named as a respondent), dismissed the named Respondents, and seemingly substituted PACE as the Respondent. However, the OSHA decision was mailed to a PACE Local, and not to PACE itself. After a hearing had been requested, the ALJ issued an order directing PACE (but not the originally named Respondents) to respond to any pleadings filed by the Complainant. It was clear that the ALJ treated PACE as the sole Respondent, although she served the Local. The ALJ ultimately concluded that the Complainant's complaint did not state a claim upon which relief could be granted. When the appeal was docketed before the ARB, the issue of whether all of the named parties were properly served became apparent when PACE filed a letter stating that it had not been served with the ARB's briefing order. The ARB concluded that (together with some analytical flaws in the ALJ's analysis) the cumulative impact of the failure to permit all named respondents to have an opportunity to respond to the Complainant's pleadings necessitated a remand. The Board stated that "[w]e think it preferable to avoid any due process issue by deferring any ruling on whether the complaint states a claim until an opportunity to respond has been extended to all those respondents who remain in the action." Slip op. at 7. The ARB observed that the ALJ may have believed that OSHA's dismissal of the originally named Respondents had eliminated them from the proceeding. This was a mistake because upon the filing of a hearing request, the OSHA determination became inoperative.

- *Remands*
    - ***ALJ reassignment***

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ASSIGNMENT OF DIFFERENT ALJ ON REMAND DUE TO RETIREMENT OF ALJ WHO PRESIDED OVER ORIGINAL HEARING; COMPLAINANT FOUND TO HAVE WAIVED RIGHT TO OBJECT TO REASSIGNMENT WHEN HE FAILED TO REQUEST ADDITIONAL HEARING OPPORTUNITY IN RESPONSE TO ALJ'S ORDER ASKING WHETHER SUCH A HEARING WAS NEEDED

In ***Occhione v. PSA Airlines, Inc.***, ARB No. 15-090, ALJ No. 2011-AIR-12 (ARB July 26, 2017), the matter had been previously before the ARB, and remanded for further proceedings. The ALJ who originally heard the matter had retired by the time of the remand, and a different ALJ was assigned to the case. The newly assigned ALJ issued an order asking the parties whether additional hearing dates were needed to admit additional evidence. The Complainant replied that ample evidence had already been adduced. The ALJ then issued a decision finding that the Respondent produced clear and convincing evidence that it would have terminated the Complainant's employment absent protected activity. On appeal the Complainant contended that the newly assigned ALJ could not fairly evaluate the evidence since he was not at the hearing and therefore a de novo hearing should be granted. The ARB rejected this contention finding that the Complainant should have raised any concerns about the reassignment of his case to a different ALJ following the order asking whether an additional hearing was needed. The ARB found that the Complainant "waived any right he may have had to request additional hearing opportunities." USDOL/OALJ Reporter at 3, n.6.

- ***New hearing***

ALJ'S REFUSAL TO GRANT NEW HEARING ON REMAND FOUND NOT TO BE AN ABUSE OF DISCRETION WHERE AMPLE TESTIMONY AND EVIDENCE HAD BEEN SUBMITTED AT THE ORIGINAL HEARING, ALJ PERMITTED SUBMISSION OF ADDITIONAL EVIDENCE, AND NO SPECIFIC ABUSE BY THE ALJ WAS RAISED

In ***Benjamin v. CitationShares Management, LLC***, ARB No. 14-039, ALJ No. 2010-AIR-1 (ARB July 28, 2014), the ARB had remanded the case to the ALJ to permit the Respondent to present clear and convincing evidence, if any, to avoid damages on the Complainant's AIR21 claim, by showing that it would have terminated the Complainant's employment absent the protected activity. On appeal from the ALJ's decision on remand, the Respondent contended that it should have been granted a hearing to present evidence on the issues on remand. The ARB found that the ALJ did not abuse his discretion in this regard. The regulation at 29 C.F.R. § 18.54(c) provides that once the ALJ closes the record, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." The ALJ found that evidence had been taken at the original hearing, with every decision maker having testified at length, and a great deal of documentary evidence having been submitted. The ALJ did allow the parties to submit additional documentary evidence and to respond to evidence offered by the opposing party. The ARB noted that the Respondent had not raised any specific abuse of discretion by the ALJ.

- ***Inadequacy of complaint***

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SUA SPONTE DISMISSAL BY ALJ WHERE COMPLAINANT'S CLAIMS WERE FACIALLY NON-COMPLIANT WITH APPLICABLE LIMITATIONS PERIOD

In ***Udvari v. US Airways, Inc.***, ALJ No. 2014-AIR-9 (ALJ Jan. 17, 2014), the ALJ dismissed as a matter of law the *pro se* Complainant's appeal and new claim *sua sponte* because both were facially noncompliant with applicable limitations periods and because equitable tolling did not apply. The ALJ noted that 29 C.F.R. § 18.40 provides for summary decision if no material facts are in dispute and the court, acting of its own initiative, finds against the party as a matter of law. The ALJ wrote:

> A trial court may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim. 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1357 at 593 (1969); *Cummings v. USA Truck, Inc.*, 2003-STA-47 (ALJ Jan. 9, 2004) (dismissing a whistleblower claim *sua sponte* for failure to state a claim pursuant to 29 C.F.R. 18.1(a) and F.R.C.P. 12(b)(6)). If a party produces outside evidence in addition to its pleadings, then an ALJ's determination is tantamount to a decision for summary judgment. *Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, ALJ No. 95-CAA-15, slip op. 3 (ARB Nov. 27, 1996); 29 C.F.R. 18.40(d). Section 18.40(d) is derived from Rule 56 of the Rules of Civil Procedure and provides for summary decision if no material facts are in dispute and the court, acting of its own initiative, finds against the party as a matter of law. *See Prybys*, ARB No. 96-064, slip op. at 3.

Slip op. at 4-5 (footnote omitted).

- ***Different service methods for ALJ and opposing party***

SERVICE OF ALJ BY FAX AND REGULAR MAIL, BUT COMPLAINANT ONLY BY REGULAR MAIL IS NOT SANCTIONABLE, AND IS NOT EX PARTE COMMUNICATION

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), the ARB denied the Complainant's motion to sanction a Respondent and its attorney for allegedly engaging in ex parte communications when it filed a motion to dismiss with the ALJ by fax and regular mail, while serving the Complainant only by regular mail. The ARB found that the Complainant had pointed to no applicable authority to establish that an ex parte communication occurs merely because the same type of service was not used on all parties.

X. ARB REVIEW

- *Scope of review*

ARB REVIEW; DELEGATION UNDER SECRETARY'S ORDER 2-96, ¶ 4.c.(39)

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In ***Bodine v. International Total Services,*** 2001-AIR-4 (ALJ Nov. 29, 2001), the ALJ concluded that under Secretary's Order 2-96, ¶ 4.c.(39), 61 Fed. Reg. 19978 (1996), the Administrative Review Board has review authority delegated from the Secretary of Labor for laws, such as AIR21, which by statute provide for final decisions by the Secretary of Labor upon review of recommended decisions issued by ALJs. Noting that regulations had not yet been promulgated by the Department of Labor to implement the AIR21 whistleblower provision, the ALJ forwarded the administrative file to the ARB for review.

SCOPE OF ARB REVIEW AUTHORITY; ARB IS NOT AUTHORIZED TO RULE ON CONSTITUTIONALITY OF DOL REGULATIONS

In ***Nagle v. Unified Turbines, Inc.***, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB May 31, 2013) (reissued with corrected caption on June 12, 2013), the Respondent argued on appeal that the regulation at 29 C.F.R. § 1979. 109(c) requiring that an ALJ's order of reinstatement be effective immediately is unconstitutional. The ARB declined to address this issue, stating it is not authorized to rule on the constitutionality of Department of Labor regulations. *See* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.").

SCOPE OF ARB REVIEW; ARGUMENT NOT RAISED IN PETITION FOR REVIEW IS WAIVED

An argument not raised in a petition for review of an ALJ's AIR21 whistleblower decision is waived before the ARB. ***Majali v. Airtran Airlines***, ARB No. 04-163, ALJ No. 2003-AIR-45 (ARB Oct. 31, 2007) (ALJ had found that an informal suspension was not adverse action; Complainant did not contest that finding in his initial brief before the ARB, and first addressed it in a reply brief).

SCOPE OF ARB REVIEW; ARGUMENT NOT MADE BEFORE THE ALJ

An argument not made before the ALJ cannot be raised for the first time on appeal to the ARB. ***Majali v. Airtran Airlines***, ARB No. 04-163, ALJ No. 2003-AIR-45 (ARB Oct. 31, 2007) (Complainant first raised on appeal a contention that a letter sent by one of Respondent's managers to an FAA investigator urging sanctions against the Complainant was an adverse action; ARB found that the argument had been forfeited because it had not been made before the ALJ).

SCOPE OF REVIEW; FAILURE OF RESPONDENT TO FILE EXCEPTIONS TO ALJ'S ATTORNEY FEE AWARD

Under the AIR21 regulations, failure of the Respondent to file exceptions to the ALJ's attorney fee award renders the award final and unreviewable by the ARB or Court of Appeals. ***Vieques Air Link, Inc. v. USDOL***, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10).

ARB REVIEW; MOTION FOR SUMMARY REVERSAL

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In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 04-035, ALJ No. 2003-AIR-12 (ARB Mar. 31, 2004), the ARB denied the Complainant's motion for summary reversal of the ALJ's recommended decision, where, although it was clear that the Complainant disagreed with the ALJ's recommendation, she failed to establish that the ALJ's decision was so obviously incorrect that further briefing would not benefit the Board. The ARB also denied the Complainant's motion for default judgment on her motion for summary reversal because the Respondent had not responded to her motion. The ARB stated that it would have sought the Respondent's position if it thought it would have been helpful, but that in the instant case it had not been necessary to request a response. The Board observed in this regard that it had not adopted as Board procedure either 29 C.F.R. § 18.6(a), 18.5(b) or FRCP 3-7, 10-12, and 55.

- *Ability of ALJ to correct mistakes in appealed decisions*

CORRECTION OF CLERICAL ERROR IN ALJ DECISION AFTER REQUEST FOR ARB REVIEW ALREADY FILED; APPLICABILITY OF FRCP 60(a)

In ***Negron v. Vieques Air Link, Inc.,*** ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004), the ARB addressed how an ALJ may correct a mistake in an initial decision. In *Negron*, the "Remedies" section of the ALJ decision had included a finding that the Complainant was entitled to a $10,000 award of compensatory damages, but in the Order section directed that the Respondent pay the Complainant $50,000 in compensatory damages. The Respondent filed a petition for review with the ARB, which issued a Notice of Appeal and Order Establishing Briefing Schedule. The same day as the ARB's Notice, the ALJ issued three documents: a motion for leave to correct clerical error, an erratum, and a corrected Decision and Order. In the Motion, the ALJ requested that the Board permit him to correct the clerical error under the authority of FRCP 60(a). The ALJ averred that, due to clerical oversight, the Remedies section should have stated that the Complainant was entitled to $50,000 in compensatory damages. In addition, the ALJ requested that he be permitted to insert additional text following the corrected sentence to replace text in the original decision. The Respondent objected.

The ARB held that FRCP 60(a) was applicable. It then stated that to determine whether FRCP 60(a) permits correction, the Board had to "determine whether the correction is intended to conform the order to reflect the intent of the ALJ when he entered the original order or whether the correction has been requested in an attempt to correct a factual or legal error in the original decision. *American Fed'n of Grain Millers v. Cargill, Inc.*, 15 F.3d 726, 728 (7th Cir. 1994)." The Board cited *Blanton v. Anzalone*, 813 F.2d 1574, 1577 n.2 (1987) to the effect that "blunders in execution" can be corrected, whereas "changes in mind" cannot.

The ARB held that the ALJ erred by issuing the motion, the erratum and the corrected decision simultaneously, indicating that he should have first filed the motion for leave to correct and permitted the ARB to rule. The Board, however, found the error harmless because under the circumstances it would have remanded the case. The Board noted that the latitude to correct clerical errors is very wide; that the ALJ had unequivocally stated that the $10,000 figure was in error, which was supported by the fact that the Order directed the payment of $50,000. Although the Board indicated that it would have liked a fuller explanation, it had absolutely no basis for disbelieving the ALJ's assertion of clerical error. The Board took into account that the ALJ had

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acted expeditiously and that it reviews ALJ's legal conclusions de novo. Thus, the Board granted the ALJ's motion to correct error, and recognized the ALJ's corrected decision as the decision on appeal.

- *Pro se complainants*

PRO SE COMPLAINANTS; ADJUDICATIVE LATITUDE; ADEQUATE OPPORTUNITY TO TESTIFY

In ***Peck v. Safe Air International, Inc.,*** ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the Complainant alleged before the ARB that the ALJ had prevented him from testifying. The ARB first described an ALJ's and the ARB's obligations toward a pro se litigant:

> We construe complaints and papers filed by pro se complainants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe,* 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." *Id.* We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." *Griffith v. Wackenhut Corp.,* ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. *See Young v. Schlumberger Oil Field Serv.,* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9, *citing* Jessica Case, Note: *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law and Excuse?*, 90 KY. L. J. 701 (2002). We accordingly have scrutinized the ALJ's treatment of the parties, mindful of the balance properly maintained between accommodation and evenhanded administration.

The ARB then analyzed whether the ALJ provided the Complainant with a meaningful opportunity to testify and otherwise to present his complaint, and found that the ALJ had accorded the Complainant such an opportunity. The Board wrote: "Whether the ALJ's recommendation would have been better informed had Peck testified is not at issue. Peck did not testify despite having had the opportunity to do so, and the record for consideration is the one before us."

- *Interlocutory Review*

***PLUMLEY* STANDARD**

In ***Ford v. Northwest Airlines, Inc.***, 2002-AIR-21 (ARB Jan. 24, 2003), the ARB determined that it would apply the ***Plumley v. Federal Bureau of Prisons***, 1986-CAA-6 (Sec'y Apr. 29, 1987), interlocutory review procedures to AIR21 whistleblower cases. The ARB rejected Respondent's

contention that the ALJ's having placed a notice of appeal rights on a remand order converted the ALJ's decision into a final appealable rather than an interlocutory order "because the Order of Remand does not 'end[ ] the litigation on the merits and leave[ ] nothing for the court to do but execute the judgment.' *Catlin v. United States*, 324 U.S. 229, 233 (1945)." The ARB, however, did find that the ALJ's notice of appeal rights was, in effect, a certification of the question for ARB review. Nonetheless, the ARB declined to depart from its strong policy against piecemeal appeals and strict construction of the collateral appeal exception.

ALJ DECISION ON MOTION FOR SUMMARY DECISION WHERE SOME CLAIMS ARE DISMISSED BUT OTHERS SET FOR HEARING; ARB CONSIDERS SUCH AN APPEAL TO BE INTERLOCUTORY, AND WILL GENERALLY NOT ENTERTAIN APPEALS OF ALJ DECISIONS THAT ARE NOT FINAL DISPOSITIONS OF THE MATTER

In ***Swint v. Net Jets Aviation, Inc.***, ARB No. 17-012, ALJ Nos. 2014-AIR-21, 2016-AIR-11 (ARB Feb. 8, 2017), the ALJ issued a "Decision and Order Granting in Part, and Denying in Part, Respondent's Motion for Summary Decision. " In this order, the ALJ dismissed twelve of the Complainant's claims, but denied summary decision on two remaining claims, and notified the parties that at the hearing he would hear evidence only on the two remaining claims. The ALJ's order included a Notice of Appeal Rights. The Complainant filed an appeal with the ARB. The ARB dismissed the appeal because the ALJ's disposition of the matter was not final. The ARB wrote:

> The Secretary of Labor has delegated authority to issue final agency decisions in cases arising under AIR-21 to the Board. This authority also includes the consideration and disposition of interlocutory appeals, "in exceptional circumstances, provided such review is not prohibited by statute."
>
> Because the ALJ has not fully and finally disposed of consolidated ALJ case nos. 2014-AIR-021 and 2016-AIR-011, it could be argued that Swint's petition is for interlocutory review (i.e., review of a non-final decision). But although the Board may accept interlocutory appeals in "exceptional" circumstances, it is not the Board's general practice to accept petitions for review of non-final dispositions issued by an ALJ.
>
> The ARB understands that because the ALJ provided a notice of appeal rights, it was prudent of Swint to file a petition for review. Nevertheless, it is incumbent upon Swint to demonstrate why the Board should depart from its usual practice and accept his interlocutory appeal. Accordingly, the Board ordered Swint to show cause no later than January 18, 2017, why the Board should not dismiss his appeal as interlocutory. We cautioned Swint that "Failure to timely respond to this Order may result in dismissal of the appeal without further order."
> Swint did not file a response to the Board's Show Cause Order. Accordingly, he has failed to carry his burden of demonstrating why the Board should accept his interlocutory appeal.

Slip op. at 2 (footnotes omitted).

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INTERLOCUTORY APPEAL; CONTENTIONS THAT ALJ'S DEFERRAL OF HEARING ON REMAND UNTIL ARB RULED ON A RELATED CASE WAS A DENIAL OF DUE PROCESS, AND THAT ALJ HAD ENGAGED IN EX PARTE COMMUNICATIONS, FOUND NOT TO CONSTITUTE GROUNDS FOR INTERLOCUTORY APPEAL TO THE ARB

In ***Mawhinney v. Transportation Workers Union***, ARB No. 15-013, ALJ No. 2012-AIR-14 (ARB Jan. 21, 2015), the ARB dismissed the Complainant's petition for an interlocutory appeal for failure to reply to the ARB's order to show cause why the petition should not be dismissed.

It was subsequently determined that the Complainant had, in fact, filed a timely response, and the ARB issued a decision on reconsideration denying the petition based on the Complainant's failure to obtain certification from the ALJ of the issue for interlocutory appeal and failure to demonstrate exceptional circumstances sufficient to invoke the ARB's interlocutory review of the issues presented. *Mawhinney v. Transportation Workers Union*, ARB No. 15-013, ALJ No. 2012-AIR-14 (ARB Feb. 3, 2015). The matter had been remanded to the ALJ, who deferred scheduling a hearing until the ARB ruled on a related pending appeal. The ALJ had ordered, however, that discovery proceed in the interim. The Complainant contended that the ALJ's order denied him due process to reiterate or amend arguments concerning whether the named Respondents could be held individually liable, and had excluded the Complainant from input regarding ARB remand orders. The Complainant also alleged that the ALJ had engaged in ex parte communications with the Respondent and the Board. The ARB found that it could fully consider and dispose of both issues upon appeal of the ALJ's final order in the case, should that be necessary. The ARB noted too that it is "very reluctant to interfere with an ALJ's control over procedural and discovery issues." USDOL/OALJ Reporter at 3, n.11 (citations omitted).

INTERLOCUTORY REVIEW; ISSUE OF COVERAGE UNDER WHISTLEBLOWER STATUTE IS FULLY REVIEWABLE ON APPEAL SHOULD THE COMPLAINANT PREVAIL, AND THEREFORE DOES NOT QUALIFY FOR THE COLLATERAL ORDER EXCEPTION

In ***Thompson v. BAA Indianapolis, LLC***, ARB No. 06-061, ALJ No. 2005-AIR-32 (ARB June 30, 2006), the ALJ denied the Respondent's motion for summary decision seeking dismissal on the ground that an airport is not subject to AIR21's whistleblower provision. The ALJ certified the issue for an interlocutory appeal. The ARB denied interlocutory review on the grounds that (1) the issue presented was one of coverage rather than subject matter jurisdiction, and (2) should the Complainant prevail before the ALJ, the issue of whether the Respondent is a covered Employer will be fully reviewable on appeal. Thus, the request for interlocutory review did not meet the collateral order exception.

NEW COMPLAINT; FILING DIRECTLY WITH OALJ WHILE OLDER COMPLAINT PENDING ADJUDICATION

In ***Ford v. Northwest Airlines, Inc.,*** 2002-AIR-21 (ALJ Oct. 18, 2002), while his initial complaint was pending before an ALJ, Complainant filed a new complaint about blacklisting with the ALJ, arguing a right to amend his complaint to include new evidence of retaliatory adverse action. The ALJ reasoned that Congress had provided for a two-tier scheme for handling whistleblower

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complaints that begins with an OSHA investigation. Thus, the ALJ concluded that "[a] better procedure is to make the initial complaint to OSHA and then move to consolidate the complaint with litigation pending before the OALJ." The ALJ remanded the case for an OSHA investigation into complaints that had originally been determined by OSHA to be untimely and therefore not investigated.

Respondent appealed to the ARB. *Ford v. Northwest Airlines, Inc.*, ARB No. 03-014, ALJ No. 2002-AIR-21 (ARB Jan. 24, 2003) The ARB declined interlocutory review, and, applying the collateral order test wrote:

> The purpose of the [ALJ's] remand order is to conduct an investigation into the complaints of blacklisting that allegedly form a basis of Ford's complaint. Thus the subject matter of the remand is not completely separate from the merits. In fact, it is possible that as a result of the investigation, the complaint will be resolved and no further adjudication by the ALJ or Board will be required. In any event, if ultimately Northwest is dissatisfied with either the results of the investigation or, if the complaint is upheld, with the ALJ's determination regarding the alleged protected activities falling within the ambit of the complaint, Northwest may raise these issues with Board upon the filing of a timely petition for review of the ALJ's final order.

POST-COMPLAINT ADVERSE EMPLOYMENT ACTIONS; LITIGATION BY EXPRESS OR IMPLIED CONSENT

In ***Kinser v. Mesaba Aviation, Inc.***, 2003-AIR-7 (ALJ Feb. 9, 2004), the Complainant presented evidence on the contention that he suffered retaliatory adverse employment actions in the months following the filing of his AIR21 complaint. The Complainant had not amended his complaint and the newly raised events had not been investigated by OSHA. The Respondent objected. The ALJ held that:

> An administrative law judge may decide an issue raised by express or implied consent and fairly, fully litigated on the merits even though that issue was not contained in the pleadings. 29 C.F.R. § 18.43(c) (2003); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353 (6th Cir. 1992). The record must show that the parties "understood the evidence to be aimed at the unpleaded issue." *Yellow Freight*, 954 F.2d at 358.
>
> These alleged retaliatory actions took place in October of 2002, almost two months after the complaint was filed. The parties thoroughly explored these events at the hearing and the record contains documentary evidence regarding the events. Respondent took the opportunity to question its own witnesses and cross-examine Complainant's witnesses about these events. Respondent's questions to the witnesses about these events reveal an understanding that these events would be included in the claim. By including these events, Complainant does not seek to introduce a new theory into this case. The parties fairly and fully litigated the issues arising from the events of October of 2002, and they will be treated as if Complainant had included them in his original complaint.

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[Editor's note: *But see* ***Sasse v. Office of the U.S. Attorney, USDOJ,*** ARB No. 02-077, ALJ No. 1998-CAA-7 (ARB Jan. 30, 2004) (merely probing Complainant's evidence does not establish trial by consent).**]**

INTERLOCUTORY REVIEW DENIED WHERE ALJ CONSIDERED COMPLAINANT'S ALLEGATIONS OF BIAS AND CORRECTLY DETERMINED THAT THEY WERE NOT GROUNDS FOR RECUSAL

In ***Kossen v. Empire Airlines***, ARB No. 2021-0017, ALJ No. 2019-AIR-00022 (ARB Feb. 25, 2021), Complainant's appeal was interpreted by the ARB as a petition for interlocutory review. Complainant's petition was based on the assertion that the presiding ALJ was biased against him because the ALJ did not rule in his favor in a prior case and because the ALJ's son is employed by an airline.

The ARB found that the ALJ had considered these allegations and correctly concluded that neither was grounds for recusal. The ARB found that Complainant failed to allege exceptional circumstances sufficient to merit interlocutory review under the "collateral order" exception. The ARB thus denied the petition.

INTERLOCUTORY APPEAL; EXCEPTIONAL CIRCUMSTANCES FOR INTERLOCUTORY APPEAL NOT ESTABLISHED WHERE ALJ CONSIDERED AND CORRECTLY DENIED COMPLAINANT'S MOTION TO RECUSE

In ***Kossen v. Empire Airlines***, ARB No. 2021-0033, ALJ No. 2019-AIR-00022 (ARB May 12, 2021) (per curiam), the ARB denied Complainant's interlocutory appeal. The ARB explained:

> Kossen has failed to allege exceptional circumstances sufficient to merit interlocutory review in this case. He asserts that the ALJ is biased against him because the ALJ did not rule in his favor in a prior case and because the ALJ's son is employed by an airline. The ALJ considered these allegations and correctly concluded that neither was grounds for recusal. Accordingly, the request for interlocutory review is **DENIED**.

Slip op. at 2 (footnotes omitted) (emphasis as in original).

XI. SUBPOENAS

FEDERAL COURT SUBPOENA AGAINST NON-PARTY FOR PERSONNEL RECORDS OF CERTAIN OF ITS EMPLOYEES QUASHED WHERE, INTER ALIA, INFORMATION SOUGHT WAS NOT SHOWN TO HAVE A BEARING ON PLAINTIFF'S NATIONAL ORIGIN SUIT AND WHERE THE PRIVACY RIGHTS OF THE EMPLOYEES OUTWEIGHED ANY NEED FOR THE INFORMATION IN THE INSTANT LITIGATION; COURT TOOK INTO CONSIDERATION NON-PARTY'S ARGUMENT THAT THE INFORMATION WAS LIKELY FOR USE IN OTHER LITIGATION, SUCH AS PLAINTIFF'S AIR21 ADMINISTRATIVE ACTION PENDING BEFORE THE ADMINISTRATIVE REVIEW BOARD

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In ***Hukman v. Southwest Airlines Co.***, No. 18-cv-1204 (S.D. Cal. May 28, 2019) (2019 U.S. Dist. LEXIS 90001; 2019 WL 2289390), non-party American Airlines, Inc. (American), filed a motion to quash a subpoena duces tecum issued by Plaintiff for the production of documents on a broad range of personal and confidential information of American's employees. The instant case related to Plaintiff's national origin discrimination suit against Southwest Airlines Co. The court granted American's motion in part because Plaintiff failed to oppose the motion, but also because the subpoena was overbroad on its face as it sought information not relevant to the claims and was not narrowly tailored to the needs of the instant litigation.

The court found that the privacy rights of American's employees "in their employment applications, leaves of absence, performance reviews, complaints, workplace injuries, and the like greatly outweigh any need for [Plaintiff] to have these documents, particularly given that this information has no bearing on [Plaintiff's] allegations against Southwest in this case." Slip op. at 5-6.

American also argued that Plaintiff "likely intends to use the information sought in the subpoena in her separate lawsuit or administrative charge against American, currently pending in the United States District Court, Eastern District of Pennsylvania and the United States Department of Labor Administrative Review Board, respectively." *Id.* at 6. The court stated: "A party is not permitted to exploit the liberal federal discovery rules to obtain information for purposes unrelated to the case at hand, including for use in other lawsuits. 6 James Wm. Moore et al., Moore's Federal Practice § 26.101[1][b] (3d ed. 2017). Therefore, [Plaintiff] cannot use a subpoena in this case to obtain information for use in her separate actions against American." *Id.*

[Editor's note: The ALJ's decision in the referenced administrative action was *Hukman v. U.S. Airways, Inc.*, ALJ No. 2015-AIR-3; as noted by the court, the ALJ's decision was pending before the ARB at the time of this court order granting American's motion to quash.**]**

SUBPOENAS; ARB DECLINES TO REVISIT CHILDERS DECISION

See ***Administrator, Wage and Hour Div., USDOL v. Integrated Informatics, Inc.***, ARB No. 08-127, ALJ No. 2007-LCA-26 (ARB Jan. 31, 2011), a case arising under the H-1B nonimmigrant alien labor certification regulations, in which the ARB declined the Wage and Hour Division Administrator's request that the ARB reexamine and reject *Childers v. Carolina Power & Light*, ARB No. 98-077, ALJ No. 1997-ERA-032 (ARB Dec. 29, 2000).

SUBPOENAS; ALJ FOUND NOT TO HAVE ERRED IN REFUSING TO ISSUE SUBPOENAS

In ***Hafer v. United Airlines, Inc.,*** ARB No. 06-017, ALJ No. 2005-AIR-8 (ARB Jan. 31, 2008), the Complainant contended that the ARB should "reconsider" the ALJ's ruling denying issuance of subpoenas. A two member panel of the ARB held that the ALJ "did not err by concluding that [the Complainant] was not entitled to the subpoenas he requested." USDOL/OALJ Reporter at 6 (footnote omitted).

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[Editor's note: The ARB referenced in this regard a ruling made by the ALJ in a letter to the Complainant declining to issue requested subpoenas. The ALJ had written:

> Although Congress has authorized Administrative Law Judges to issue subpoenas in various kinds of proceedings, it has not given Administrative Law Judges the authority to issue subpoenas in any type of whistleblower proceeding, including proceedings under the AIR21 statute. In other whistleblower cases, some other Administrative Law Judges have on occasion decided to issue subpoenas based upon the decision of the Administrative Review Board (ARB) in Childers v. North Carolina Power & Light ARB Case 98-77 (2000). However, the ARB's decision in the Childers case is inconsistent with the opinion of the Solicitor of the Department of Labor, who would be responsible for enforcing any such subpoena, and with a decision issued in 2003 by the Federal District Court for the District of Columbia. See Bobreski v. U.S. Environmental Protection Agency, 284 F.Supp.2d 67 (DC DC 2003) As a result, I have concluded that the subpoenas you request would in all likelihood be unenforceable. For that reason, I have further concluded that they should not be issued.

The content of this letter, however, is not recited in the ARB's decision, and it is not entirely clear that the Board was affirming the ALJ's analysis. Childers was an important precedent, and it seems unlikely that the Board would overturn it in this way.**]**

SUBPOENA POWER OF ALJ; CONFLICT BETWEEN *CHILDERS* DECISION AND POLICY DIRECTIVE OF ACTING SOLICITOR OF LABOR

In ***Peck v. Island Express***, 2001-AIR-3 (ALJ Aug. 20, 2001), the ALJ was faced with a motion to quash a subpoena issued by the Chief Administrative Law Judge. In ruling on the motion to quash, the ALJ noted that the subject of administrative subpoenas had recently engendered a legal debate within DOL. The latest ruling from the ARB on the subject was made in in ***Childers v. Carolina Power & Light Co.***, ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), in which ARB rejected the requirement for "express authorization" by Congress for ALJ subpoena power, reasoning that such power was inherent given that the whistleblower provision of the ERA required DOL to issue an adjudicative order on the record.

The ALJ observed that in a July 2001 directive, the Acting Solicitor for DOL concluded that the reasoning of the ARB in *Childers* was "erroneous" and dictum which is "legally indefensible." According to the Acting Solicitor's directive, the agency should resist complying with subpoenas not specifically authorized by statute in whistleblower cases. The ALJ, however, concluded that, considering the ARB would review his rulings and not the Solicitor, he was bound to apply the *Childers* ruling on subpoena authority. Moreover, the ALJ stated that he agreed with the legal analysis of the ARB in *Childers* in regard to subpoena power where the agency is required to conduct formal hearings.

See also BNA, Daily Labor Report No. 157, Wednesday, August 15, 2001, "Labor Solicitor Rejects Subpoena Use By ALJs in Certain Whistleblower Cases."

SUBPOENA; MOTION TO QUASH; COMPLAINANT'S NEED FOR TESTIMONY OF FAA SAFETY INSPECTOR

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In ***Peck v. Island Express***, 2001-AIR-3 (ALJ Aug. 20, 2001), Complainant subpoenaed an FAA aviation safety inspector. FAA regulations do not permit its employees to testify in proceedings involving private litigants unless the request for testimony or documents is submitted in accordance with 49 C.F.R. Part 9. Under this provision, the request for testimony and documents is sent to the FAA General Counsel who determines whether the FAA will produce the requested documents and permit the requested individual to testify. In *Peck*, the FAA filed a motion to quash because Complainant's subpoena did not comply with the FAA regulations.

In denying the motion to quash, the ALJ initially determined that subpoenas are available to litigants in AIR21 cases. (*see* casenote above). Turning to the Complainant's need to depose the FAA employee, the ALJ found that the employee's testimony would be necessary because she was the Complainant's contact at the FAA, and her testimony would go directly to the issue of whether Respondent was aware of Complainant's protected activity. The ALJ also determined that the employee's testimony would assist him in determining whether Complainant's discrimination complaint was frivolous or brought in bad faith The ALJ found that the subpoena was reasonably specific and not unreasonably burdensome. Finally, the ALJ commented that for the FAA to refuse to provide witnesses, and documents essential to whistleblowers' efforts to prove their employment discrimination complaints would be contrary to the purposes of AIR21.

XII. PROCEDURE BEFORE ARB

- *Timeliness of request for ARB review*

TIMELINESS OF PETITION FOR REVIEW; FAILURE TO FILE TIMELY PETITION IDENTIFYING OBJECTIONS TO ALJ DECISION AFTER BEING GRANTED AN EXTENSION; MERE SEARCH FOR LEGAL REPRESENTATION FOUND TO BE INSUFFICIENT EXPLANATION

In ***Seuring v. Delta Air Lines, Inc.*** ARB No. 2019-0082, ALJ No. 2018-AIR-00033 (ARB Oct. 30, 2019), Complainant had been granted an extension of time to file a Petition for Review, but warned that he needed to specifically identify the findings, conclusions or orders to which he was objecting, and that failure to timely comply with the order granting an extension would result in dismissal of the petition for review. Complainant missed the deadline by one day, offering no explanation other than an ongoing search for counsel. The ARB waited an additional 18 days, but having received no notice of appearance by counsel or an explanation for the status of a search for counsel, the ARB dismissed the petition as untimely.

In ***Seuring v. Delta Air Lines, Inc.***, No. 19-73334 (9th Cir. Dec. 11, 2020) (unpublished) (2020 U.S. App. LEXIS 38816) (case below ARB No. 2019-0082, ALJ No. 2018-AIR-00033), the Ninth Circuit denied Seuring's petition for review, finding that he had not demonstrated that the ARB abused its discretion when it dismissed Seuring's pro se petition for ARB review for non-compliance with 29 C.F.R. § 1979.110(a). That regulation requires that such a petition specifically identify the findings, conclusions, or order to which exception is taken. The ARB gave Seuring an opportunity to file an amended petition, but Seuring filed it one date late. In a separate motion, Securing indicated to the ARB that he was close to retaining counsel who would seek to file a

further amended complaint. The ARB waited another 18 days after the untimely filing before denying the original petition and declining to accept the amended petition because it was untimely.

On appeal, Seuring argued that he was not given the opportunity to argue equitable tolling before the ARB. The Ninth Circuit rejected this argument, noting that ARB Seuring had not requested an extension of time from the ARB or explained why the untimeliness should be excused.

TIMELINESS OF PETITION FOR ARB REVIEW; ILL HEALTH MAY CONSTITUTE GROUNDS FOR EQUITABLE TOLLING, BUT BURDEN IS ON MOVANT TO PROVE THAT THE CONDITION PREVENTED THE FILING OF A TIMELY APPEAL

In ***Wallum v. Bell Helicopter Textron, Inc.***, ARB No. 12-110, ALJ No. 2009-AIR-20 (ARB Sept. 19, 2012), the Complainant (who had been substituted as the Complainant after her husband's death) filed a motion seeking to reinstatement of a complaint that been dismissed by the ALJ for failure to respond to orders to show cause, and had not been timely appealed to the ARB. The ARB noted that the limitations period for requesting ARB review was not jurisdictional and may be tolled for equitable reasons. The Complainant relied on 29 C.F.R. § 1979.114, which provides for waiver of rules under special circumstances, to ask that the ARB take into consideration that her husband had been hospitalized with declining health during the timeframe of the ALJ's orders to show cause and the ALJ's order of dismissal. The ARB noted that a medical condition that prevents a complainant from timely pursuing his or her legal rights has been held to be an "extraordinary" circumstance justifying equitable tolling, but found that the Complainant had failed to carry her burden of proving that her husband's ill health or death (six months after the petition for review was due) prevented the filing of a timely appeal.

TIMELINESS OF PETITION FOR ARB REVIEW; FAILURE OF COMPLAINANT TO CORRECTLY NOTE THE FILING DATE

In ***Cooley v. Hyannis Air Service***, ARB No. 09-126, ALJ No. 2005-AIR-14 (ARB Dec. 10, 2009), the Complainant requested an extension of time to file his petition for review of the ALJ's AIR21 whistleblower decision because his counsel had been suspended from practicing law. The ARB granted the extension, ordering the Complainant to file his petition for review "on or before September 18, 2009," and warning that failure to timely file the petition could result in dismissal of the appeal without further notice. The Complainant did not sign or mail his petition until September 19, 2009, and the Board did not receive it until September 28, 2009. The Board found that the petition was untimely, and ordered the Complainant to show cause why the appeal should not be dismissed. The Complainant's response to the Order to Show Cause was also untimely. Nonetheless, in recognition of the severity of dismissal in these circumstances, the Board considered the untimely response.

The ARB found that it is within its discretion, under the proper circumstances, to accept an untimely-filed petition for review. The Complainant's response to the Order to Show Cause was that he had been in disbelief that he had missed the deadline, and had been operating with the wrong information that "days" meant business days, excluding holidays, and that the postmark was considered the filing date. The ARB found that this argument was irrelevant because the petition for review had been due on a date certain - September 18, 2009 - and not after a specified number

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of days. The Board found that the Complainant's failure to note the correct deadline did not excuse his failure to exercise due diligence in filing the petition for review, especially given that the Board had granted him an extension to do so, and had warned him of the consequences of failure to timely file the petition.

TIMELINESS OF PETITION FOR ARB REVIEW; POSTMARK IS CONSIDERED DATE OF FILING

In ***Robinson v. Northwest Airlines, Inc.***, ARB No. 04-041, ALJ No. 2003-AIR-22 (ARB Nov. 30, 2005), the ARB found that under the AIR21 regulation at 29 C.F.R. § 1979.110(a), the Complainant's petition for ARB review was timely where it was postmarked on the 10th business day following the ALJ's decision, even though the ARB did not receive the mailing until 11 days later.

TIMELINESS OF PETITION FOR ARB REVIEW; LACK OF PROOF OF INVOCATION OF OVERNIGHT DELIVERY GUARANTEE AND LACK OF DILIGENCE IN VERIFYING DELIVERY

In ***Herchak v. USDOL***, No. 03-72203 (9th Cir. Dec. 9, 2004) (unpublished) (case below ARB No. 03-057, ALJ No. 2002-AIR-12), the Complainant had appealed the ARB's finding that the Complainant's failure to file a timely appeal of the ALJ's decision was not excused based on an argument that Airborne Express had failed to deliver the document in a timely matter where the Complainant had not established that he had delivered the document to Airborne Express in time to invoke the overnight delivery guarantee and the Complainant had not been diligent in checking to see if the delivery had been timely made. The Ninth Circuit affirmed the ARB's dismissal of the appeal rejecting the Complainant's contention that the dismissal had been arbitrary and capricious. The court noted that courts have routinely affirmed agencies' strict application of internal regulatory deadlines, and that the "extraordinary circumstances" standard employed by DOL for equitable relief from untimely filings is a high threshold. The case was decided under the Interim Rules.

TIMELINESS OF APPEAL TO THE ARB; PERIOD FOR APPEAL COMMENCES ON DATE ALJ DECISION IS ISSUED RATHER THAN THE DATE THE DECISION IS SIGNED

In ***Svendsen v. Air Methods, Inc.***, ARB No. 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB observed that the ALJ had signed his Recommended Decision and Order on February 26, 2003, but that the service sheet indicated that the decision was issued on March 3, 2003. The Board observed that under the regulations in effect at the time, "issuance of the ALJ's decision" triggered the period for appealing the ALJ's decision to the Board.

[*Editor's note*: For both the current regulations and the interim final regulations in effect at the time, it is the preamble in the Federal Register notice, and not the text of section 1979.110 itself, that refers to the "issuance" of the ALJ's decision as being the trigger date for the time period for an appeal to the to ARB. *See* 68 Fed. Reg. 14,100 (Mar. 21, 2003) and 67 Fed. Reg. 15453 (Apr. 2, 2002).**]**

REQUEST FOR ARB REVIEW; TIMELINESS; EQUITABLE TOLLING

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Where Complainant failed to file a request for ARB review within the 15 day period provided for in 29 C.F.R. § 1979.110(a), the ARB dismissed the appeal in ***Stoneking v. Avbase Aviation***, ARB No. 03-101, ALJ No. 2002-AIR-7 (ARB July 29, 2003). Complainant had filed a letter with the OALJ about one month after the due date for the appeal stating that he was requesting review of the ALJ's decision and order, and that he had not received the ALJ's decision until a week earlier as it was not sent to the correct address for timely delivery. The OALJ forwarded the letter to the ARB. Respondent opposed the petition for review, and the ARB issued an order to show cause to which Complainant did not reply. The ARB stated that 29 C.F.R. § 1979.100(b) is an internal procedural rule that is within the ARB's discretion to equitably relieve a party. The ARB stated that it was guided by the principles of equitable tolling applied in statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. The ARB dismissed the appeal because Complainant had failed to explain the untimely filing. The ARB found that the note to the ALJ that the decision had not been sent to the correct address was insufficient to support tolling of the limitations period, especially because Complainant was represented by counsel.

REQUEST FOR REVIEW BY ARB; TIMELINESS; INAPPLICABILITY OF PART 18; EQUITABLE CONSIDERATIONS

In ***Herchak v. America West Airlines, Inc.***, ARB No. 03-057, ALJ No. 2002-AIR-12 (ARB May 14, 2003), the Complainant filed a petition for review with the ARB that arrived on the 16th day after the ALJ's decision. Under the regulations in effect at the time, such a petition had to "be received within 15 days of the date of the decision of the administrative law judge" to be effective. 29 C.F.R. § 1979.110(a) (2002). Complainant argued that he had 20 days to file his petition by operation of 29 C.F.R. §§ 18.4(c)(3) and 1979.107(a) (incorporating the OALJ rules of practice at 29 C.F.R. Part 18 except as provided in Part 1979). The ARB found that the plain language of section 1979.110(a) admitted no room for debate that the petition had to be received by the 15th day, that sections 1979.110(a) and 18.58 both establish that Part 18 applies to hearing procedures and not appellate procedures, that section 1979.110(a) is a rule of specific application and therefore applies instead of section 18.4(c)(3), and finally that on its face, section 18.4(c) did not apply as it refers to calculations from service, not dates of documents.

The ARB then considered whether equitable tolling applies, citing the now familiar three situations in which tolling is proper: (1) when the defendant actively misleads the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. The ARB indicated that the inability to satisfy one of these elements would not necessarily be fatal but that due diligence is important. Further, the ARB stated that absence of prejudice to the other party could be considered, but only after some other factor justifying equitable tolling is identified. It is the party seeking to invoke equitable principles who bears the burden of justifying their application.

In the instant case, the only ground for equitable tolling was the claim that Airborne failed to deliver on time. The ARB, however, faulted Complainant for failing to establish that he delivered the package to Airborne in time to invoke the overnight package guarantee, and for failing to determine whether Airborne timely delivered the package, either by inquiring of the Board or

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Airborne as to whether the package had been received, noting that failure of timely delivery could have been rectified by faxing a copy of the petition.

[Editor's note: This decision appears to make it crucial to obtain confirmation of delivery of overnight delivery packages to the ARB if timeliness is a concern.**]**

- *Petition for review*

FAILURE TO IDENTIFY BEFORE THE ARB THE FINDINGS, CONCLUSIONS OR ORDER TO WHICH EXCEPTION IS TAKEN AS REQUIRED BY 29 C.F.R. § 1979.110(a); FAILURE TO FILE TIMELY AMENDED PETITION

In ***Seuring v. Delta Air Lines, Inc.***, No. 19-73334 (9th Cir. Dec. 11, 2020) (unpublished) (2020 U.S. App. LEXIS 38816) (case below ARB No. 2019-0082, ALJ No. 2018-AIR-00033), the Ninth Circuit denied Seuring's petition for review, finding that he had not demonstrated that the ARB abused its discretion when it dismissed Seuring's pro se petition for ARB review for non-compliance with 29 C.F.R. § 1979.110(a). That regulation requires that such a petition specifically identify the findings, conclusions, or order to which exception is taken. The ARB gave Seuring an opportunity to file an amended petition, but Seuring filed it one date late. In a separate motion, Securing indicated to the ARB that he was close to retaining counsel who would seek to file a further amended complaint. The ARB waited another 18 days after the untimely filing before denying the original petition and declining to accept the amended petition because it was untimely.

On appeal, Seuring argued that he was not given the opportunity to argue equitable tolling before the ARB. The Ninth Circuit rejected this argument, noting that ARB Seuring had not requested an extension of time from the ARB or explained why the untimeliness should be excused.

PETITION FOR ARB REVIEW; EXCEPTION NOT SPECIFICALLY URGED IN PETITION FOR REVIEW DEEMED WAIVED

In ***Rougas v. Southeast Airlines, Inc.***, ARB No. 04-139, ALJ No. 2004-AIR-3 (ARB July 31, 2006), the ARB observed in a footnote that because the Respondent had not filed a petition for review, it was likely that it was precluded from pursuing on appeal its argument that the Complainant's "admission" that he flew while unfit precluded him from asserting an AIR21 claim. *See* 29 C.F.R. § 1979.110(a) (any exception not specially urged in petition for review is deemed waived). The ARB also observed that it did not appear based on the facts found thus far that the Complainant had actually admitted to flying while unfit. Because it was remanding the case, however, the ARB deemed it premature to address the Respondent's contention.

PROCEDURE BEFORE THE ARB; SPECIFICITY NECESSARY TO RAISE ASSIGNMENT OF ERROR; WAIVER OF ARGUMENTS RAISED IN PETITION FOR REVIEW BUT NOT DISCUSSED IN APPELLATE BRIEF

The ARB ruled in ***Walker v. American Airlines, Inc.***, ARB No. 05-028, ALJ No. 2003-AIR-17 (ARB Mar. 30, 2007), that under the regulations implementing AIR21, a petition for review must specifically identify the findings, conclusions or orders to which exceptions are taken. 29 C.F.R. § 1979.110(a). General assignments of error do not meet this standard. Moreover, the ARB stated

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that it was disinclined to consider as argument passing references and commentary in the factual summary section of a petition. The ARB also stated that an argument raised in a petition but not discussed in a brief is considered abandoned and thereby waived.

PROCEDURE BEFORE THE ARB; MOTION TO EXPAND THE RECORD

In ***Rollins v. American Airlines, Inc.,*** ARB No. 04-140, ALJ No. 2004-AIR-9 (ARB Jan. 7, 2005), the ARB denied the Complainant's motion to submit an expanded administrative record on appeal. The Complainant argued that the expanded record was necessary because the ALJ allegedly had made rulings outside the bounds of the matters briefed and raised in the Respondent's pleadings. The Board noted that the Complainant sought to show that he had presented a prima facie case, but that the basis of the ALJ's decision was that the complaint had not been timely filed.

- *Briefing*

BRIEFING ON APPEAL; APPELLANT IS REQUIRED TO DEVELOP ARGUMENT WITH CITATION TO LAW AND AUTHORITY TO AVOID WAIVER OR FORFEITURE

In ***Cerny v. Triump Aerostructures-Vought Aircraft Division***, ARB No. 2019-0025, ALJ No. 2016-AIR-00003 (ARB Oct. 31, 2019), Complainant filed a complaint alleging that Respondent retaliated against him in violation of AIR21's whistleblower protection provisions for raising air transportation safety concerns. The ALJ found that Complainant had not engaged in protected activity on the four classes of actions alleged. On appeal, Complainant limited his briefing to only one of the instances of alleged protected activity, and only summarily objected to the ALJ's findings on the other three classes. The ARB found that Complainant waived objections as to the three classes not briefed. The ARB stated:

> Cerny wrote the following in his opening brief:
>
> While Cerny strenuously disagrees with the determination that these acts did not constitute protected conduct under AIR 21, due to space constraints on briefing on appeal, this brief's arguments are limited to the issue of whether the ALJ erred in not finding that Cerny's refusal to make requested changes on his APU/Tailcone report constituted protected conduct.
>
> Br. 2 n.1. Other than this general claim, Cerny's brief did nor argue that the ALJ erred in finding that the other three categories did not meet the definition of protected activity. Further, Cerny did not assert and argue that those categories of alleged protected activity contributed to his termination. An appellant is required to develop argument, with citation to law and authority to avoid waiver or forfeiture. *See Dev. Res., Inc.*, ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) *citing Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (noting that in the Federal Courts of Appeals, it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995) ("It is not our function to craft an appellant's arguments."} *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A

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skeletal 'argument,' really nothing more than an assertion, does not preserve a claim [for appellate review].").

Slip op. at 7, n.2.

ARB BRIEFING REQUIREMENTS; DELIBERATE FAILURE TO COMPLY WITH DOUBLE-SPACING, FONT SIZE AND MARGIN SIZE REQUIREMENTS

In ***Evans v. Miami Valley Hospital and CJ Systems Aviation Group, Inc.***, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-22 (ARB Mar. 11, 2008), the ARB granted the Complainant's motion to strike one Respondent's rebuttal brief where that Respondent had previously been warned about failure to follow the ARB's briefing rules, but had nonetheless filed its rebuttal brief with about one-half the text in tiny print of single spaced footnotes, and the margins smaller than permitted by the briefing order. The ARB agreed with the Complainant that the brief demonstrated "outrageous disrespect to the Board and disregard for the integrity of the briefing process. It is cheating. It is quite obviously deliberate. It should not be overlooked or excused."

ARB BRIEFING REQUIREMENTS; CONTUMACIOUS REFUSAL TO FILE CONFORMING BRIEF RESULTS IN DISMISSAL OF APPEAL

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 06-078, ALJ Nos. 2006-AIR-4 and 5 (ARB June 28, 2007), the ARB dismissed the Complainant's appeal because "even after the Board gave Powers explicit instructions concerning the Board's format and page limitation requirements, gave her ample opportunities to file a brief conforming to these requirements and limitations and unambiguously warned her that if she failed to file a conforming brief her appeal would be subject to dismissal without additional order, she nevertheless filed a brief that is not double-spaced and exceeds the Board's page limitations." The Complainant had two previous ARB appeals dismissed because she refused to file conforming briefs, both upheld by the Sixth Circuit. The ARB thus found that "there is not the slightest doubt that Powers had notice that if she refused to file a conforming brief, the Board would dismiss her appeal. Furthermore, in light of these previous dismissals, Powers's intransigent refusal to file a conforming brief could properly be described as nothing less than 'contumacious.'"

ARB TECHNICAL BRIEFING REQUIREMENTS; SIZE OF FONT IN FOOTNOTES

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the Complainant moved to strike the Respondent's brief because it included footnotes that were not in 12-point size. Although not ruling on this motion because it found that the outcome of the case would have been no different if the brief had been struck, the Board stated that it "would not countenance any attempt to subvert the Board's page limit for briefs through the use of an inordinate number of undersized footnotes." Slip op. at n.58.

- *Exceptional circumstances: interlocutory review of ALJ decision*

ARB GRANTS INTERLOCUTORY REVIEW OF ALJ ORDER STAYING HEARING AND REQUIRING AIR21 COMPLAINANT TO ARBITRATE PURSUANT TO EMPLOYMENT CONTRACT

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In ***Willibanks v. Atlas Air Worldwide Holdings, Inc.***, ARB No. 14-050, ALJ No. 2014-AIR-10 (ARB July 17, 2014), the ARB granted the Complainant's petition for interlocutory review of the ALJ's order staying the hearing on the Complainant's AIR21 complaint and requiring the Complainant to arbitrate her AIR21 complaint pursuant to the arbitration provision of her employment agreement with the Respondent, and the Federal Arbitration Act. The ARB found that the interlocutory appeal met the "exceptional circumstances" standard for entertaining such appeals because, should the ARB delay consideration of the question, "there exists the distinct prospect that not only will Willbanks be precluded from further Department of Labor or court consideration of her AIR21 claim, but we well may be thwarting the underlying purposes and policies Congress sought to achieve by affording whistleblower protection under AIR 21." AIR21, the ARB noted, is more than just a means for vindication of employee rights — it has the underlying purpose of ensuring the safety of the traveling public.

The ARB also found that "the circumstances presented in this case meet the collateral order exception to the finality requirement set out in *Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)." Slip op. at 3 (citation omitted). The ALJ's decision conclusively determined the disputed question; the ALJ's decision resolved an important issue completely separate from the merits of the action; and the ALJ's order may become effectively unreviewable if interlocutory review is not granted.

- *Record not before ALJ*

WHERE PRO SE COMPLAINANT MISSED DUE DATE FOR RESPONSE TO ALJ'S ORDER TO SHOW CAUSE BY ONE DAY, BUT PRESENTED MATERIAL EVIDENCE WITH POTENTIALLY SIGNIFICANT PROBATIVE VALUE, THE ARB EXERCISED ITS DISCRETION TO REMAND FOR THE ALJ TO CONSIDER THAT EVIDENCE

In ***McAllister v. Lee County Bd. of County Commissioners***, ARB No. 13-073, ALJ No. 2013-AIR-8 (ARB May 15, 2014), the ALJ had ordered the parties to show cause why the Complainant's AIR21 whistleblower case should be dismissed or allowed to proceed to hearing on three issues, one of which was whether the Respondent, the Lee County Bd. of County Commissioners, is an "air carrier" as defined under AIR21. The ALJ found that the Complainant had not timely replied to the Order to Show Cause, and proceeded to decide the "air carrier" issue, finding that it was determinative that the Respondent was not a "citizen of the United States" under 49 U.S.C. § 40102(a)(15). On appeal, the ARB found the Complainant's response to the Order to Show Cause in the Administrative Record. It was postmarked one date late according to the deadline set by the ALJ's Order to Show Cause. Upon the Complainant's request, the ARB treated this response as the Complainant's opening brief. The response alleged that the FAA had issued the Respondent an Air Carrier Certificate. The Complainant's reply to the ARB's briefing order included a copy of the purported Air Carrier Certificate. The Respondent did not admit or deny in its response brief that the FAA had issued it an Air Carrier Certificate. The ARB stated:

> The ARB is an appellate body whose review is generally limited to the record that was before the ALJ when he or she decided the case. But the Board may consider remanding a case to an ALJ to re-open a record where a party establishes that the party has submitted new and material evidence that was not readily available prior

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> to the closing of the record. Given McAllister's pro se status and the potentially significant probative value of an FAA Air Carrier Certificate in a case in which the employer is denying that it is in fact, an air carrier, we do not feel that it would be appropriate to consider the issue whether the ALJ properly found that LCBCC was not an air carrier when the ALJ has not had the opportunity to consider the ramifications, if any, of the Air Carrier Certificate that the FAA allegedly issued to LCBCC.

USDOL/OALJ Reporter at 5 (footnotes omitted). The ARB thus remanded the case to the ALJ for additional proceedings.

RECORD ON REVIEW BEFORE THE ARB; DOCUMENTS SUBMITTED TO OSHA BUT NOT IN THE DE NOVO PROCEEDING BEFORE THE ALJ

In ***Woods v. Boeing-South Carolina***, ARB No. 11-067, ALJ No. 2011-AIR-9 (ARB Dec. 10, 2012), the Respondent moved to strike certain documents appended to the Complainant's appellate brief before the ARB. The Complainant conceded that two of the documents were not the record before the ALJ, but argued that the other documents were submitted with his complaint to OSHA (or in a supplement thereto) and that he had assumed that they were part of the record on appeal. The ARB granted the motion to strike, stating: "The Assistant Secretary for the Occupational Safety and Health Administration (OSHA) is only required to forward to the ALJ the original complaint and the findings and order. Thus whatever records were submitted [before OSHA], were not included in the record before the ALJ (nor subsequently before the Board)." USDOL/OALJ Reporter at 3 (footnotes omitted). The ARB noted that it "is an appellate body whose review is generally limited to the record that was before the ALJ when he or she decided the case." *Id*. at 4. (footnote omitted). The ARB noted that it "may consider remanding a case to an ALJ to re-open a record where a party establishes that the party has submitted new and material evidence that was not readily available prior to the closing of the record." *Id*. (footnote omitted). In the instant case, however, the Complainant had made no such showing.

- *Issues on appeal*

SCOPE OF ARB REVIEW; ISSUES NOT RAISED BEFORE THE ALJ

In ***Rougas v. Southeast Airlines, Inc.***, ARB No. 04-139, ALJ No. 2004-AIR-3 (ARB July 31, 2006), the ARB declined to consider the Complainant's argument that AIR21 is unconstitutional because it does not provide a statutory right to a jury trial. The ARB declined to consider the issue because it had not been raised before the ALJ.

ISSUES ON APPEAL; ARB WILL NOT CONSIDER ISSUES RAISED IN A BRIEF THAT WERE NOT INCLUDED IN THE PETITION FOR REVIEW

In ***Robinson v. Northwest Airlines, Inc.***, ARB No. 04-041, ALJ No. 2003-AIR-22 (ARB Nov. 30, 2005), the ARB declined to consider arguments made by the Respondent in its appellate brief on the issues of subject matter jurisdiction and res judicata where the Respondent had not petitioned for review of those aspects of the ALJ's decision.

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ISSUES FOR APPEAL; WAIVER OF ISSUE WHERE ALJ'S FINDING IS NOT CONTESTED

In ***Florek v. Eastern Air Center, Inc.***, ARB No. 07-113, ALJ No. 2006-AIR-9 (ARB May 21, 2009), the Complainant was a line crewman for a company that leased a private jet to its primary customer, a medical flight company owned by seven area hospitals. In July 2004, the Complainant was asked to clean a plane; the plane was considerably soiled by human waste. The Complainant cleaned as best he could, and when the Complainant complained to his supervisor about the condition of the plane, he was told that the plane had been used to transport a cancer patient who had been in "rough shape." The Complainant was told that the medical flight company would clean the plane. After the plane was used for three more charters, the Complainant called the medical flight company and was told that it did not know about the soiled plane and that the Respondent should be taking care of the cleaning. The Complainant called an official of the Respondent about the phone conversation and later sent a memo about the problem to the official. The Complainant called the FAA about the condition of the plane. The FAA visited the Respondent's facility while the Complainant was absent. Upon his return, the Complainant's security badge had been deactivated, and he was handed a letter of termination. The reason given for the termination was making fraudulent statements to customers and others.

Because the Respondent did not contest the issue on appeal, the ARB affirmed the ALJ's assumption that the Complainant's raising of concerns about the condition of the airplane implicated protected activity under AIR21 even though violation of no specific FAA order, regulation or standard, or any other law relating to air carrier safety had been identified. The ARB found that the Respondent had waived a challenge to the protected activity element of the complaint.

- *New arguments on appeal*

NEW ARGUMENT ON APPEAL; ARB'S FUNCTION IS TO REVIEW ALJ'S DECISION FOR ERROR, NOT TO PROVIDE FORUM TO TRY OUT NEW THEORIES

In ***Mancinelli v. Eastern Air Center, Inc.***, ARB No. 06-085, ALJ No. 2006-AIR-8 (ARB Feb. 29, 2008), the ALJ dismissed the Respondent's request for a hearing as untimely. On appeal, the Respondent for the first time argued that it had showed sufficient diligence to warrant equitable tolling of the limitations period (having sent a letter with objections to the OSHA office that issued the preliminary findings and requesting that OSHA forward the letter to the Chief ALJ). The ARB refused to consider the argument, stating that its "function is to review ALJ recommended decisions for error; it is not to provide litigants with a forum where they can retry their cases with new theories." The ARB also stated that the Respondent did "not cite, nor do we know of any legal basis, allowing a party to unilaterally transfer its duty to comply with written procedural requirements from itself to the Regional Administrator."

NEW ARGUMENT ON APPEAL; ARGUMENT NOT MADE BEFORE THE ALJ DEEMED WAIVED ARGUMENT MADE WITHOUT SUPPORTING ARGUMENT WILL NOT BE CONSIDERED BY THE ARB

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In ***Mancinelli v. Eastern Air Center, Inc.***, ARB No. 06-085, ALJ No. 2006-AIR-8 (ARB Feb. 29, 2008), the Employer argued for the first time on appeal that the Complainant's whistleblower complaint was barred by res judicata based on a state law judgment. The ARB found that this argument had been waived because it had not been raised before the ALJ, and that even if not waived, it would not be be considered due to lack of supporting argument, the Respondent having not identified even one aspect of the state proceeding that was identical to the instant proceeding.

- *Reconsideration of ARB decision*

MOTION FOR RECONSIDERATION OF ARB's FINAL DECISION; FILING OF PETITION FOR REVIEW IN COURT OF APPEALS EXTINGUISHES ARB's AUTHORITY TO RECONSIDER

In ***Leon v. Securaplane Technologies, Inc.***, ARB No. 11-069, ALJ No. 2008-AIR-12 (ARB May 22, 2013), the Complainant filed a motion with the ARB requesting reconsideration of its Final Decision and Order. Upon learning that the Complainant had petitioned the Ninth Circuit Court of Appeals for review of the Board's decision prior to the filing of the request for reconsideration, the Board dismissed the motion for reconsideration. The Board held that its authority to reconsider was pre-exempted by the Complainant's appeal to the appellate court.

RECONSIDERATION BY THE ARB; APPLICATION OF FRAP 40

In considering a motion for reconsideration, the ARB looks for guidance to FRAP 40. *See* ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 06-078, ALJ Nos. 2006-AIR-4 and 5 (ARB Jan. 30, 2008).

RECONSIDERATION BY THE ARB; REHASHING OF PREVIOUSLY REJECTED ARGUMENTS AND IMMATERIAL ALLEGATIONS DO NOT SUPPORT RECONSIDERATION

Reconsideration will be denied by the ARB where the motion for reconsideration is merely a rehashing of arguments already considered and rejected by the Board, and allegations not material to the basis for the Board's Final Decision and Order. *See* ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 06-078, ALJ Nos. 2006-AIR-4 and 5 (ARB Jan. 30, 2008).

RECONSIDERATION BY THE ARB; AUTHORITY TO RECONSIDER UNDER AIR21

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Dec. 21, 2007), the ARB held that it has the authority to reconsider its decisions under AIR21. In this regard, the ARB concluded that reconsideration of AIR21 decisions would not adversely affect accomplishment of the purposes and goals of AIR21, and thus AIR21 did not limit the ARB's inherent authority to reconsider.

RECONSIDERATION; MUST BE FILED WITHIN A REASONABLE TIME, WHICH MUST BE WITHIN A SHORT TIME AFTER THE DECISION OR RAISE A RULE 60(b)-TYPE GROUND OR SHOW GOOD CAUSE FOR THE DELAY; 27 DAYS IS NOT A SHORT TIME; BOARD'S CASELAW ON RECONSIDERATION IS ADEQUATE TO ESTABLISH RECONSIDERATION PROCEDURE; LOSS OF SOX JURISDICTION

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UPON REMOVAL TO FEDERAL COURT DOES NOT NEGATE ARB'S JURISDICTION OVER OTHER WHISTLEBLOWER LAWS RAISED IN THE APPEAL

In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Dec. 21, 2007), the ARB applied its ruling in *Henrich v. Ecolab, Inc.,* ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB May 30, 2007), that a motion for reconsideration must be filed within a "reasonable time." In applying this requirement, the motion must be filed within a "short time" after the decision, or, after a longer period if the petition raises Rule 60(b)-type grounds or showed "good cause" for the delay. In ***Powers***, the Board found that 34-days for the filing of the Complainant's motion for reconsideration was too long to be characterized as a "short time." In a footnote, the Board also suggested that the 27 days from the date that the Complainant alleged she received the Board's decision was also not a short time, but did not reach the issue of whether the time frame begins upon issuance or receipt of the decision.

The Board found that the Complainant did not show good cause for the delay based on the absence of applicable procedures, the Board finding ample caselaw precedent for its "short time" requirement. It also found that it was under no obligation to inform the Complainant about the requirement and that a pro se litigant bears the risk of foregoing expert assistance. The case had been remanded, and the Complainant observed that the ALJ had not issued any orders on remand; but the Board found the ALJ's schedule of communications to be irrelevant.

The Board then reviewed a series of other grounds raised by the Complainant for reconsideration, and found that only one of them raised a Rule 60(b)-type ground warranting a longer period for the filing of a motion to reconsider -- namely, that the Complainant had removed her SOX complaint to federal district court prior to the ARB's decision. The Board observed that it was not aware of the filing of the SOX complaint in federal court, but found that the issue of subject matter jurisdiction cannot be waived. The Board then screened the jurisdictional ground for reconsideration to determine whether there existed a reason to reconsider, and found that its assuming that it had jurisdiction over the SOX complaint when it actually did not constituted manifest error. The ARB, however, rejected the Complainant's contention that the entire remand order was void, the ARB finding that it still had jurisdiction over the portions of the complaint raising AIR21 and various environmental whistleblower laws. Accordingly, the Board modified those portions of the remand order that referenced the SOX complaint, and reissued the order.

MOTION FOR RECONSIDERATION OF ARB DECISION

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB July 27, 2007), the ARB denied the Complainant's motion for reconsideration where it was merely a rehashing of arguments that the Board had already considered and rejected, and a presented allegations not material to the basis for the Board's Final Decision and Order. The Board also indicated, but did not rule, that a motion for reconsideration filed 41 days after issuance of the Final Decision and Order might be considered untimely.

- *Jurisdiction of federal courts*

FEDERAL CIRCUIT COURT LACKS JURISDICTION TO REVIEW ARB DECISIONS

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In *Williams v. U.S. Dep't of Labor*, No. 2010-3029 (C.A. Fed Mar. 23, 2010), the Federal Circuit Court ruled that under 28 U.S.C. § 1295 it lacked jurisdiction to review Administrative Review Board decisions and transferred the case to the regional 9th Circuit pursuant to 49 U.S.C. § 42121(b)(4)(A).

WAIVER OF ISSUE BASED ON FAILURE TO RAISE AN EXCEPTION IN THE PETITION FOR ARB REVIEW; ARB CONSIDERED ISSUE NOT TO BE WAIVED WHERE COMPLAINANT HAD BEEN OTHERWISE DILIGENT IN RAISING THE ISSUE THROUGHOUT THE LITIGATION

In ***Furland v. v. American Airlines, Inc.***, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11 (ARB July 27, 2011), the Respondent argued that the Complainant waived the issue of whether his initial decision to call in sick was protected activity under AIR21 because he had not raised it in his petition, but only in his responsive pleadings. The Respondent cited 29 C.F.R. § 1979.110(a), which provides that any exception not raised in a petition for review "ordinarily shall be deemed to have been waived by the parties."

The ARB rejected this argument, stating that "[t]he plain language of the regulations provides for exceptions to the general rule. Therefore because Furland prevailed before the ALJ and has been diligent in arguing that his refusal to fly by calling in sick was protected activity throughout this litigation, including in his initial complaint, his objections to OSHA's findings, his post-hearing brief to the ALJ, and his reply brief on appeal to the Board, we do not consider Furland to have waived the issue. Moreover, the Board is not bound by an ALJ's conclusions of law but reviews them de novo." USDOL/OALJ Reporter at 8 and n.5 (citations omitted).

JURISDICTION OF THE ARB; NOTICE OF COMPLAINANT OF INTENT TO FILE A SOX COMPLAINT IN FEDERAL COURT; ARB RETAINS JURISDICTION TO DISPOSE OF AIR21 COMPLAINT

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the Complainant indicated an intent to file a consolidated complaint under the SOX regulations in district court. The ARB observed that the AIR21 does not include a SOX-type election to file in district court and that OSHA and the ALJ had treated the complaint as only stating a claim under AIR21. The ARB found that regardless of whether the district court assumed jurisdiction over any SOX claims that the Complainant may have raised, the district court would not have jurisdiction over the AIR21 claim, and therefore the ARB retained jurisdiction to dispose of the AIR21 complaint.

ALJ'S FAILURE TO MAKE SPECIFIC CREDIBILITY DETERMINATIONS IS NOT, IN ITSELF, GROUNDS FOR FINDING ERROR WHERE THERE IS NO SHOWING OF HOW IT AFFECTED THE OUTCOME OF THE CASE

In ***Malmanger v. Air Evac EMS, Inc.,*** ARB No. 08-071, ALJ No. 2007-AIR-8 (ARB July 2, 2009), the Complainant argued on appeal that the ALJ erred in not making specific credibility determinations. The ARB rejected this argument because the Complainant had not explained how this factor affected the outcome of the case. The ARB wrote: "While it is preferable that the ALJ delineate the specific credibility determinations for each witness, an 'arguable deficiency in

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opinion-writing technique' does not require us to set aside an administrative finding if that deficiency had no bearing on the outcome." USDOL/OALJ Reporter at 10 (footnote omitted).

- *Standard of review*

ALJ'S CREDIBILITY DETERMINATIONS NOT BASED ON DEMEANOR; IN AIR21 AND SOX CASES, SUCH DETERMINATIONS ARE REVIEWED UNDER THE SUBSTANTIAL EVIDENCE STANDARD RATHER THAN DE NOVO

In ***Walker v. American Airlines, Inc.***, ARB No. 05-028, ALJ No. 2003-AIR-17 (ARB Mar. 30, 2007), the Complainant argued on appeal that the ARB should overturn the ALJ's credibility determinations. According to the Complainant, because the ALJ determination was not demeanor based it should be reviewed de novo. The ARB rejected the argument that de novo was the appropriate standard of review, noting that the caselaw cited by the Complainant was all from environmental whistleblower cases. In contrast, in AIR21 and SOX cases the ARB is required to review an ALJ's fact determinations under the substantial evidence standard. Because the ALJ's credibility determinations were not explicitly based on demeanor, the Board would not afford those determinations the "great deference" that a demeanor-based determination would receive. Nonetheless, because they were factual findings, the ARB was required to uphold them if supported by substantial evidence.

ARB EMPLOYS AN ABUSE OF DISCRETION STANDARD OF REVIEW OF ALJ'S DISMISSAL OF COMPLAINT AS SANCTION FOR REFUSAL TO COOPERATE IN DISCOVERY

In ***Ho v. Air Wisconsin Airlines***, ARB No. 2020-0027, ALJ No. 2019-AIR-00009 (ARB June 30, 2021) (per curiam), the ARB affirmed the ALJ grant of Respondent's motion to dismiss Complainant's AIR21 complaint as a sanction for failing to cooperate in discovery. The ARB stated, in regard to how it reviews such dismissals: "The Board reviews an ALJ's imposition of discovery sanctions, including the sanction of dismissal, under an abuse of discretion standard." Slip op. at 4, citing *Jenkins v. EPA*, ARB No. 2015-0046, ALJ No. 2011-CAA-00003 (ARB Mar. 1, 2018); *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001 (ARB June 15, 2012); *Saporito v. Florida Power & Light Co.*, ARB Nos. 2009-0009, -0010, ALJ No. 2008-ERA-00014 (ARB Feb. 28, 2011); *Waechter v. J.W. Roach & Sons Logging & Hauling*, ARB Nos. 2004-0167, -0183, ALJ No. 2004-STA-00043 (ARB Jan. 9, 2006).

- *Attorney's fees*

WHEN ALJ'S DECISION BECOMES APPEALABLE; DECISION ON ATTORNEY'S FEES RESERVED

In ***Merritt v. Allegheny Airlines, Inc.***, 2004-AIR-13 (ALJ Feb. 14, 2005), the ALJ had issued a Decision and Order Granting Relief and attached a notice of appeal rights. The ALJ, however, had not yet determined the amount of attorney fees to be awarded. The ALJ granted the Respondent's motion for clarification of the notice of rights of appeal. The ALJ found that, in light of *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004)

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(ALJ's decision must be final before it is eligible for appeal), the earlier decision would be amended to not include the notice of appeal rights, but that such notice would accompany his decision on attorney's fees. The ALJ, however, ruled that his order of reinstatement was still in effect.

XIII. PROCEDURE BEFORE THE FEDERAL COURTS

- *Federal district court jurisdiction*

DISTRICT COURT LACKS JURISDICTION TO REVIEW DOL DECISION ON AIR21 WHISTLEBLOWER COMPLAINT

In ***Williams v. Perez***, 110 F. Supp. 3d 1 (D.D.C. June 16, 2015) (case below ARB No. 08-063, ALJ No. 2008-AIR-3), the District court found that it lacked jurisdiction to entertain the Plaintiff's action challenging certain DOL actions pertaining to his AIR21 whistleblower complaint. The court stated that the AIR21 statute "is clear: there is no collateral review of orders of the Secretary of Labor regarding whistleblower claims through any civil or criminal action, other than through the specified procedure for obtaining review in the Courts of Appeals. *See* 49 U.S.C. 42121(b)(4)(B)." Slip op. at 6. The district court also found that the Plaintiff's action was neither a civil action to enforce an order of the Secretary of Labor, nor a petition for mandamus. The district court further found that the judicial review provisions of the APA are inapplicable because the statute established a scheme for judicial review.

The D.C. Court of Appeals summarily dismissed the Plaintiff's appeal, finding that the Ninth Circuit had already determined, in the context of the Plaintiff's case, that a district court lacks jurisdiction to hear a claim under the AIR21 whistleblower provision—and therefore the Plaintiff's new claim attempt in district court is barred by res judicata. ***Williams v. Perez***, No. 15-5228 (D.C. Cir. Feb. 1, 2016) (2016 U.S. App. LEXIS 1708), *cert. denied* 2016 U.S. LEXIS 4770, 137 S. Ct. 60, 196 L. Ed. 2d 32 (U.S. Oct. 3, 2016) (No. 15-5228). The Ninth Circuit decision was *Williams v. UAL, Inc.*, No. 13-15299 (9th Cir. Dec. 31, 2013) (unpublished), *cert. denied* Nov. 18, 2013.

DISTRICT COURT DOES NOT HAVE JURISDICTION OVER AIR21 WHISTLEBLOWER CHALLENGE AGAINST DOL DEFENDANTS; SUCH JURISDICTION LIES WITH COURT OF APPEALS

In ***Williams v. UAL, Inc.***, No. 13-15299 (9th Cir. Dec. 31, 2013) (unpublished) (case below ARB No. 08-063, ALJ No. 2008-AIR-3), the Ninth Circuit held that the district court properly dismissed the Plaintiff's claims against various federal circuit and district judges and the clerk of the court on the basis of judicial and quasi-judicial immunity. The district court properly dismissed the Plaintiff's claims against UAL, Inc. and the International Association of Machinists and Aerospace Workers defendants as time-barred. *See* 18 U.S.C. § 1514A(b)(2)(D). The court held that the district court lacked subject matter jurisdiction over the Plaintiff's claims against the Department of Labor ("DOL") defendants because he alleged that the DOL improperly denied his complaint under the AIR21 whistleblower provision, and jurisdiction to review the DOL's decision under AIR21 is vested in the Court of Appeals. *See* 49 U.S.C. § 42121(b)(4)(A); *see also Williams v. U.S. Dep't of Labor*, 447 F. App'x 853, 854 (9th Cir. 2011) (sustaining the DOL's denial of Williams's complaint as untimely). The Ninth Circuit further held that:

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> the DOL administrative law judges are protected by quasi-judicial immunity. *See Hirsh v. Justices of the Supreme Court*, 67 F.3d 708, 715 (9th Cir. 1995) (per curiam) ("Administrative law judges . . . are entitled to quasi-judicial immunity so long as they perform functions similar to judges . . . in a setting like that of a court.").

Slip op. at 2.

DISTRICT COURT DOES NOT HAVE JURISDICTION TO REVIEW AN ARB DECISION AFFIRMING DISMISSAL OF AN AIR21 COMPLAINT

In ***Williams v. U.S. Dept. of Labor***, No. C 11-6653 CW, 2012 WL 1536338 (N.D. Cal. May 1, 2012) (case below ARB No. 08-063, ALJ No. 2008-AIR-3), the plaintiff first filed an AIR21 complaint in district court, which the district court dismissed for lack of subject matter jurisdiction, and the Court of Appeals for the Ninth Circuit affirmed, because the plaintiff failed to exhaust his administrative remedies. *See Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1021-25 (9th Cir.2007). The plaintiff then filed a complaint with OSHA, which both OSHA and the ALJ dismissed as untimely, and the ARB affirmed. *See Williams v. United Airlines*, ARB No. 08-063, ALJ No.2008-AIR-003 (ARB Sept. 21, 2009). The ARB also denied his subsequent motion for reconsideration. *Williams v. United Airlines*, ARB No. 08-063, ALJ No.2008-AIR-003 (ARB June 23, 2010). Next, the plaintiff attempted to appeal that decision to the Federal Circuit, but it did not have jurisdiction to review the decision, and instead transferred the case to the Ninth Circuit. *See Williams v. U.S. Dept. of Labor*, 370 Fed. Appx. 97, 97-98 (Fed.Cir. 2010). Finally, the Ninth Circuit found that it had jurisdiction to review the decision, but upheld the ARB's decision as properly denying the complaint as untimely.

The plaintiff then returned to the district court seeking further review. The district court explained that it does not have jurisdiction to review an ARB decision, because "such jurisdiction is vested in the Court of Appeals under 49 U.S.C. § 42121(b)(4)(A)." *Williams* at *2. Additionally, it is bound to follow the Ninth Circuit's previous finding that the ARB's decision to deny the complaint as untimely was proper.

FEDERAL DISTRICT COURT SUBJECT MATTER JURISDICTION; NO PRIVATE RIGHT OF ACTION TO INITIATE AIR21 COMPLAINT BEFORE DISTRICT COURT

In ***Neely v. Boeing Co.***, No. 16-cv-1791 (W.D. Wash. May 15, 2018) (2018 U.S. Dist. LEXIS 81771; 2018 WL 2216093) (related to 2018-AIR-00019), the district court granted the Defendant's motion to dismiss for lack of subject matter jurisdiction a count of the Plaintiff's complaint that was based on the AIR21 whistleblower provision. The Defendant argued that AIR 21 claims must proceed before DOL, and that DOL decisions are appealable to federal courts of appeal. Moreover, AIR21 does not contain a mechanism to bring an AIR 21 claim in federal district court. The court noted that the 9th Circuit had held that AIR 21 does not create a private right of action in federal district court, finding that "the plain language of [AIR 21] and its statutory scheme counsel against implying a right of action in federal district court." *Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1024 (9th Cir. 2007). In the instant case, the Plaintiff argued only that the district court should ignore 9th Circuit law because of the "unique factual circumstances" of this case.

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- *Possible preclusive effect of ALJ's factual findings*

PROCEDURE BEFORE DISTRICT COURT; MOTION FOR STAY BASED ON POTENTIAL PRECLUSIVE EFFECT OF ALJ'S FACTUAL FINDINGS IN AIR21 CASE WHICH WAS PENDING REVIEW BY THE ARB; COURT DENIES STAY OF TRIAL PREPARATION IN VIEW OF THE UNCERTAINTY OF THE RESOLUTION OF THE DOL PROCEEDINGS, BUT WOULD ALLOW A MOTION FOR APPROPRIATE RELIEF ONCE THE ALJ'S DECISION IS FINAL AND THE CONTOURS OF THE ISSUES ARE MORE CLEARLY DEFINED, OR, FOR DEFENDANTS TO RENEW REQUEST FOR A STAY IF THE ARB HAS NOT RULED BY THE TIME THE TRIAL IS SCHEDULED TO BEGIN

In ***Kreb v. Jacksons Food Stores***, No. 16-cv-00444 (D. Idaho Jan. 30, 2020) (2020 U.S. Dist. LEXIS 16542; 2020 WL 497156), Defendants moved to stay the proceedings in federal district court on the ground of the potential preclusive effect of a DOL ALJ's decision in a related AIR21 retaliation case. In that case the ALJ found that Plaintiff had not made a certain safety report in good faith and that it was objectively reasonable. The ALJ's decision was pending on appeal before the ARB, and Defendants argued that if the ALJ's decision is upheld it will have preclusive effect on critical issues in the matter before the district court. The district court denied the motion. The court stated:

> Here, the potential preclusive effect of ALJ Morris's decision is naturally dependent upon the outcome of Plaintiff's currently-outstanding Petition for Review. Those potential shifting sands are good reason for the Court to not issue a conditional ruling premised on an assumption that the ARB upholds ALJ Morris's decision, especially as to possible evidentiary implications arising therefrom, including whether portions of Plaintiff's expert's opinions are (or would be) improper in light of such an assumed outcome. Once the review of ALJ Morris's decision is final and the contours of these issues are more clearly defined, the parties may move the Court for appropriate relief on the more certain landscape.
>
> It is true that a stay would permit things to unfold without the parties having to prepare for trial while awaiting the ARB's consideration of Plaintiff's Petition for Review. But, the practical effect of all this is that, since July 2019 when the Jackson Defendants filed their Motion, there has been a de facto stay of sorts with virtually nothing happening in the interim. Moreover, the claimed wrongs occurred in July 2014. And, regardless of how the ARB decides, Plaintiff's underlying claims will proceed — this is not a situation where his case completely dissolves if the ARB rules a certain way.
>
> This is to say that the controversy between the parties needs to move forward toward a resolution, regardless of what forum it moves forward in and regardless of the potential for some unevenness along the way. The alternative is for nothing to move forward at all, while awaiting the uncertain date when there is a decision from the ARB. Such a course is not appropriate under FRCP 1. *See* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be construed, administered, and

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> employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").
>
> The Court therefore concludes that the balance of equities weigh against the Jackson Defendants' request under the existing circumstances. If the ARB has not acted on Plaintiff's Petition for Review by the time trial is scheduled to begin, the Jackson Defendants' may renew their request for a stay; until then, the Court will not postpone trial preparation simply due to the Petition for Review.

Slip op. at 3-4.

- *Compelling arbitration*

DECISION CONFIRMING AN ARBITRATION AWARD AFFIRMED WHERE APPELLANT'S ONLY CHALLENGE WAS TO PROPRIETY OF DISTRICT COURT'S DECISION TO COMPEL ARBITRATION, WHERE THAT DECISION TO COMPEL HAD PREVIOUSLY BEEN AFFIRMED ON APPEAL

In ***Am. Airlines, Inc. v. Mawhinney*****,** No. 19-55566 (9th Cir. June 5, 2020) (2020 U.S. App. LEXIS 17754) (Memorandum) (unpublished) (related to ARB No. 14-060, ALJ No. 2012-AIR-17), Respondent-Appellant appealed pro se from the district court's grant of American Airline's petition to confirm an arbitration award. Respondent-Appellant only challenged the propriety of the district court's decision to compel arbitration of his claim for whistleblowing retaliation under AIR21. Reviewing the question de novo, the court affirmed the district court, stating that "the order compelling arbitration of [Respondent-Appellant's] AIR21 claim has already been affirmed in *American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. 2018)." Slip op. at 2. The court noted that it would not consider matters not specifically and distinctly raised and argued in the opening brief.

XIV. EMPLOYER / EMPLOYEE / OTHERS

- *Amendment of 49 U.S.C. § 42121*

CONSOLIDATED APPROPRIATIONS ACT, 2021, H. R. 133; COVERED ENTITIES EXPANDED

The Consolidated Appropriations Act, 2021, H.R. 133, Section 118 of the Aircraft Certification, Safety, and Accountability Act, amended 49 U.S.C. 42121(a) to include "[a] holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder...." The Act struck subsection (d) and inserted in its place:

‘‘(d) NONAPPLICABILITY TO DELIBERATE VIOLATIONS.—Subsection

(a) shall not apply with respect to an employee of a holder of a certificate issued under section 44704 or 44705, or a contractor or subcontractor thereof, who, acting without direction from such certificate-holder, contractor, or subcontractor (or such person's agent), deliberately causes a

violation of any requirement relating to aviation safety under this subtitle or any other law of the United States.'
It also amended 42121(e) to define "contractor as:

''(1) a person that performs safety-sensitive functions by contract for an air carrier or commercial operator; or
''(2) a person that performs safety-sensitive functions related to the design or production of an aircraft, aircraft engine, propeller, appliance, or component thereof by contract for a holder of a certificate issued under section 44704.''.

- *Covered employers*

COVERED EMPLOYER; BROAD DEFINITION OF "AIR CARRIER" IS NECESSARY TO GIVE FULL EFFECT TO THE PURPOSE UNDERLYING SECTION 42121; FEDEX CORP. SUBSIDIARY THAT PROVIDED INFORMATION TECHNOLOGY, SUPPLY CHAIN, AND OTHER SERVICES, FOUND TO PROVIDE INDIRECT AIR CARRIER SERVICES, AND THEREFORE WAS AN AIR CARRIER UNDER AIR21

In ***Cobb v. FedEx Corporate Services, Inc.***, ARB No. 12-052, ALJ No. 2010-AIR-24 (ARB Dec. 13, 2013), the Complainant was an employee of FedEx Services, a subsidiary of FedEx Corp. The ALJ found that FedEx Services was not an air carrier because it does not own or operate any aircraft, and was not a contractor of an air carrier covered by AIR21 because it did not conduct "safety-sensitive functions for an air carrier." The ARB found that FedEx Services was an air carrier because, while it does not directly provide air transportation, its services are integral to FedEx's provision of air transportation, and therefore is an "air carrier" for purposes of 49 U.S.C. 42121. Under AIR21, an "'air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C.A. § 40102(a)(2) (Thomson/West 2007 & Supp. 2013); 29 C.F.R. § 1979.101.

The ARB looked to the historical definition of air carrier in federal aviation law, found that Congress intended a broad definition of "air carrier" in AIR21, found that neither the statute nor the regulations require ownership or operation of aircraft for coverage, and noted that its decision in *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-2 (ARB June 30, 2009) was instructive. In *Evans*, the ARB held that a hospital that owned three helicopters and contracted with another company to provide pilots and mechanics for the hospital air ambulance service, was indirectly providing air carrier services, and therefore was an air carrier within the meaning of AIR21. In the instant case, the ARB found that the facts showed that FedEx Services' operations were essential for the air transportation services conducted by FedEx Express. It coordinated information technology and worldwide supply chain services for the FedEx brand. It coordinated data management and networking expertise behind FedEx Express's packing tracking. It also provided disaster and security planning. The ARB noted that FedEx Corp. had formed at least seven operating companies that were each potentially vital to FedEx Corp.'s role as an air carrier. The Board stated: "The technicalities of corporate structure may not act to shield operating 'segments' of an air carrier from their air safety obligations as an air carrier under AIR 21." USDOL/OALJ Reporter at 12. The ARB found further support for its decision in the statutory history of AIR21 generally and section 42121 specifically. The Board summarized:

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> [A Congressional statement about the intent to provide strong whistleblower laws to protect aviation employees from retaliation for stepping forward to assist in the enforcement of safety laws] is no less true when it comes to workers like Cobb whose jobs directly involve airline safety -- whether it is disaster planning, detecting package bombs, cargo tracking, or drafting runway vulnerability studies. Cobb, and other employees of FedEx's companies, may be "in the best position to recognize breaches in safety regulations and can be the critical link in ensuring safer air travel." Congress cannot have intended that a FedEx Express employee working side by side with a FedEx Services employee in the SuperHub at Memphis International Airport, each seeing an air safety violation and reporting it, would result in the former employee being protected by Section 42121 and the latter not. A broad definition of "air carrier" is necessary to give full effect to the purpose underlying Section 42121 of encouraging reporting of air safety concerns. For all these reasons, we find that FedEx Services is a covered air carrier under AIR 21.

USDOL/OALJ Reporter at 13 (footnotes omitted). The Board thus reversed the ALJ's holding, and remanded for further proceedings. One member of the Board concurred, stating that there was not enough information in the record to determine whether FedEx Services indirectly supports the provision of air transportation, and therefore he would have remanded the coverage issue for further consideration.

COURT RECONSIDERED ITS DISMISSAL OF STATE RETALIATION SUIT BASED ON AIR21 PREEMPTION, WHERE ARB ISSUED RULING THAT DOL DOES NOT HAVE JURISDICTION OVER FLIGHT SCHOOLS THAT DO NOT ENGAGE IN COMMERCE WITHIN MEANING OF AIR21

In ***Stonecypher v. Iasco Flight Training, Inc.***, No. 2:17-cv-02409 (E.D. Cal. May 20, 2020) (2020 U.S. Dist. LEXIS 89069), the court had previously granted Defendant's motion to strike Plaintiff's state law claims for retaliation and wrongful termination based preemption, leaving only state law claims for wage and hour concerns. Plaintiff filed for reconsideration based on the ARB's decision in *Aityahia v. Aviation Academy of America*, ARB No. 2018-0028, ALJ No. 2017-AIR-00029 (ARB Sept. 12, 2019) (per curiam), in which it found that the defendant was not subject to AIR21 retaliation protection because it (like the Defendant in the present case) was a flight school that contracted only with foreign air carriers and did not otherwise move passengers, cargo or mail for profit. The ARB found that the defendant in that case did not engage in commerce and did not fit within AIR21's definition of an "air carrier of contractor or subcontractor of an air carrier" for which employees are granted federal protection from retaliation. The court agreed to reconsider, noting that "If the federal agency enforcing FAA regulations determined, as it did here, that it lacked any basis for regulating the retaliation that Plaintiff claims to have endured, it makes no sense whatsoever to defer to that agency's determination by way of field preemption." Slip op. at 5. The court granted the motion to reconsider and gave leave to Plaintiff to amend his complaint.

COVERED EMPLOYER UNDER AIR21; FLIGHT SCHOOL FOUND NOT TO BE A DIRECT OR INDIRECT AIR CARRIER OR CONTRACTOR OR SUBCONTRACTOR OF AN AIR CARRIER

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In ***Aityahia v. Aviation Academy of America***, ARB No. 2018-0028, ALJ No. 2017-AIR-00029 (ARB Sept. 12, 2019) (per curiam), the ARB affirmed the ALJ's dismissal of Complainant's AIR21 on the ground that there was no evidence that Respondent was a direct or indirect air carrier or a contractor or subcontractor of an air carrier.

The ALJ had found that Respondent was an aviation flight school that the sole purpose of aircraft pilot training, and although it utilized corporate IT and support services, such services were not provided to Respondent to enable it to engage in air transportation activities. *See Aityahia v. Aviation Academy of America*, 2017-AIR-00029 (ALJ Feb. 7, 2018).

COVERED EMPLOYER; AIR OPERATOR THAT CARRIES AN EXTERNAL LOAD IS NOT AN AIR CARRIER COVERED BY AIR21

In ***Marsh v. Erickson Air-Crane, Inc.***, 2004-AIR-33 (ALJ May 13, 2005), the Respondent owned helicopters that performed specialized operations such as fire-fighting, logging, construction and hydroseeding, rather than transportation activities. The Respondent held a Part 133 certification, rather than an operating certification under 14 C.F.R. Part 119, making it an air operator rather than an air carrier under FAA regulations. The Complainant argued that because the helicopters have a belly tank, they carry cargo and therefore are air carriers under AIR21. The ALJ, however, was not convinced by the belly tank argument, finding that the Respondent was an air operator that carries only external loads and not an air carriers which transports passengers, cargo or mail.

COVERAGE; PRIVATE AIRCRAFT THAT CARRIED LETTERS TO AND FROM OILFIELD NOT ON A POSTAL ROUTE ARE NOT "AIR CARRIERS" WITHIN THE MEANING OF AIR21

In ***Broomfield v. Shared Services Aviation***, 2004-AIR-20 (ALJ Aug. 9, 2004), the ALJ concluded that the Respondent, which partially funds an aviation service to transport workers by aircraft to its oilfields in the North Slope of Alaska, and which often carries mail in cooperation with (but not under contract with) the USPS, is not a covered "air carrier" within the meaning of the whistleblower provision of AIR21. Considered collectively, 49 U.S.C. §§ 40102(a)(2), 40102(a)(5) and 40201(a)(30), and 42121(a) indicate that transportation of U.S. mail is covered by AIR21's whistleblower provision. Under the facts of the case, however, the ALJ found that in the absence of a contractual relationship with the Postal Service, the letters carried by Respondent were not part of the postal system and hence are not mail. There was no evidence of a postal route between Anchorage and the North Slope, and the Respondent's aircraft were merely carrying mail to post offices for mailing, and picking it up for delivery.

LIABILITY OF EMPLOYER OTHER THAN COMPLAINANT'S IMMEDIATE EMPLOYER; HOSPITAL THAT CONTRACTED FOR PILOTS FOR ITS AIR AMBULANCE SERVICE AND EXERCISED CONTROL OVER THE TERMS AND CONDITIONS OF THE COMPLAINANT'S EMPLOYMENT

In ***Evans v. Miami Valley Hospital***, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), the Miami Valley Hospital (MVH) owned three helicopters and provided an air ambulance service called CareFlight. MVH contracted with CJ Systems to furnish pilots and mechanics. In determining whether MVH was liable for the Complainant's termination, the ARB

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recited caselaw to the effect that an employer alleged to have violated AIR 21 need not be the complainant-employee's immediate employer, but may be liable if it exercised control over the terms, conditions, or privileges of the complainant's employment.

MVH argued that the Complainant was not one of its employees and that it had no control over the Complainant's employment or termination. The ARB, however, closely reviewed the record and found that MVH exercised significant control over and directly influenced the terms and conditions of the Complainant's employment. For example, MVH's program manager for CareFlight interviewed the Complainant before he was hired, was "very involved" with how mechanics and pilots conducted business, and participated in the discipline of the Complainant.

LIABILITY OF UNION UNDER AIR21 DEPENDS ON WHETHER A COLLECTIVE BARGAINING AGREEMENT OR OTHER CONTRACT IMPOSES SAFETY SENSITIVE FUNCTIONS ON THE UNION OR ITS MEMBERS

RELIEF AGAINST UNION FOR VIOLATION OF AIR21 DEPENDS OF ROLE OF UNION IN REGARD TO COMPLAINANT'S EMPLOYMENT

In ***Mawhinney v. Transportation Workers Union***, ARB No. 12-108, ALJ No. 2012-AIR-14 (ARB Sept. 18, 2014), the Complainant filed an AIR21 complaint against American Airlines, the Transportation Workers Union (TWU), several named members of the union, and an American Airlines employment. The ALJ severed the case against American Airlines (which was in bankruptcy) and placed that case in abeyance. In regard to the case against TWU and the named individuals, the ALJ issued an order to show cause why that case should not be dismissed. After reviewing the responses, the ALJ found that neither TWU nor the named individuals were "air carriers" for the purposes of AIR21; that neither the TWU nor its members could be held liable as a contractor or subcontractor; and that AIR21 does not provide for individual liability. The ARB vacated and remanded.

> In regard to individual liability, the ARB found that the Complainant had not raised the issue of personal liability under AIR21. The ARB found that the complaint named the individuals in the context of their roles as agents of, or on behalf of, the company or the union. The ARB wrote: "Mawhinney did not thereby seek to pursue personal liability against the named individuals. Although Mawhinney may name individuals as respondents in their official capacities, individual respondents are unnecessary since Mawhinney also sued American and the Union."

USDOL/OALJ Reporter at 4.

In regard to contractor liability, the ARB rejected the ALJ's conclusion that a union is not a "company" and therefore could not be a contractor or subcontractor under AIR21. The ARB noted that it has an obligation to interpret AIR21 broadly to facilitate critical air safety policies, and that Black's Law Dictionary's definition of "company" is "a corporation – or, less commonly, an association, partnership, or union – that carries on a commercial or industrial enterprise." Black's Law Dictionary at 318 (9th ed. 2009). The ARB also found that the common legal definition of "contractor" includes labor unions, and that a collective bargaining agreement is by definition a contract. Under AIR21 contractors that perform safety-sensitive functions by contract for an air

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carrier are subject to suit, and thus the inquiry is whether the CBA (or any other contract) between TWU and American Airlines in effect during the period of the Complainant's employment provided for TWU or its members to perform safety-sensitive functions.

The ARB noted that if on remand the ALJ found that TWU is liable under AIR21, the ALJ must consider the appropriate remedy given the role of a union with regard to the Complainant's employment. The ARB provided as an example the question of whether employment with American Airlines is dependent on being a member in good standing with the union.

COVERAGE; INDIRECT PROVISION OF AIR CARRIER SERVICES; HOSPITAL THAT OWNED HELICOPTERS, BUT CONTRACTED FOR PILOTS

In ***Evans v. Miami Valley Hospital***, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), the Miami Valley Hospital (MVH) owned three helicopters and provided an air ambulance service called CareFlight. MVH contracted with CJ Systems to furnish pilots and mechanics. The Complainant was a helicopter pilot. MVH argued that it was not an air carrier under the AIR21 definition because it did not directly employ pilots or have an aviation certificate. The ARB found that those circumstances were not determinative, because neither the statute nor the regulations require that an air carrier hire pilots to be covered, and because an FAA certificate is not a requirement for coverage. Rather, the ARB found substantial evidence to establish that MVH indirectly provided air carrier services, which made it an air carrier within the meaning of AIR21.

- *Covered employees*

COVERED EMPLOYEE; FEDERAL AVIATION ADMINISTRATION EMPLOYEE'S REMEDY LIES WITH OFFICE OF SPECIAL COUNSEL AND NOT UNDER AIR21 WHISTLEBLOWER PROVISION

In ***McGarr v. Federal Aviation Administration***, 2013-AIR-5 (ALJ June 3, 2013), OSHA had dismissed the Complainant's AIR21 whistleblower complaint on the ground that that neither the Complainant nor the Respondent were covered under the AIR21 whistleblower provision. The ALJ issued an order to show cause whether the matter should be dismissed for failure to state a claim upon which relief may be granted and lack of jurisdiction. The Respondent asserted that the Complainant was an Airspace Inspection Pilot under the FAA's Flight Inspection Services Office, and that AIR21 only prohibits discrimination against airline employees, which the Complainant was not. Rather, as a federal employee, the Complainant's remedy was to file with the Office of Special Counsel. The Complainant did not file a response to the Order to Show Cause. The ALJ found that the Complainant did not meet the AIR21 whistleblower provision's definition of "employee" and dismissed the complaint.

COVERAGE; HELICOPTER REPAIR; COMPLAINANT'S BURDEN TO PROVE COVERAGE BY PREPONDERANCE OF THE EVIDENCE

In ***LeRoy v. Keystone Helicopter, Inc.***, ARB No. 07-056, ALJ Nos. 2006-AIR-3 and 24 (ARB Mar. 31, 2009), following two hearings on the Complainant's AIR21 whistleblower complaint the Respondent raised the issue of coverage in a post-hearing brief. The Complainant responded with

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the argument that the Respondent had waived the issue of coverage, pursuant to the Supreme Court's ruling in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), because the Respondent had not raised the coverage issue at the first hearing. In *Arbaugh* the Court had ruled that when an employer seeks to defend against a Title VII claim on the basis that it is not covered because it does not employ 15 or more persons, it must do so by pleading or filing a motion to dismiss under FRCP 12(b)(6), failure to state a claim, not by pleading or moving to dismiss under FRCP 12(b)(1), lack of subject matter jurisdiction. A 12(b)(6) motion must be filed no later than the conclusion of the trial on the merits.

The ARB rejected the waiver argument because the Respondent had not filed a motion to dismiss, but merely argued in a post-hearing brief that the Complainant had not adduced sufficient evidence that the Respondent was an AIR 21 covered employer. The ARB declined to construe "*Arbaugh*, as applied to AIR 21, to mean that an employer waives the right to argue to the ALJ after an evidentiary hearing that the complainant did not sufficiently prove an essential element of his claim...."

Nothing in the record showed that the Respondent engaged in the air transportation of passengers for compensation or contracts with air carriers to do so. The ARB stated that while helicopter repair is undoubtedly a safety sensitive function, the record contained no evidence that the Respondent's repair contracts on which the Complainant worked were made with air carriers.

DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; FAILURE TO PLEAD ADEQUATE FACTS SHOWING EMPLOYER-EMPLOYEE RELATIONSHIP OR THAT THE AIRLINE TOOK, OR CAUSED TO BE TAKEN, ADVERSE ACTION

In ***Fullington v. AVSEC Services, LLC***, ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005), the ARB observed that since 29 C.F.R. Parts 18 and 24 do not contain a rule governing motions to dismiss for failure to state a claim upon which relief can be granted, it is appropriate to apply FRCP 12(b)(6). In the instant case, the ARB affirmed the dismissal of the complaint for failure to state of claim upon which relief could be granted against the Respondent airline where the Complainant, a supervisor for a company that had a cleaning services contract with the airline, failed to allege facts sufficient, if proved, to establish that the airline was her employer within the meaning of AIR21 and that it took or caused the cleaning services contractor to take adverse action against her.

The Board held that to state a cause of action under AIR21 "there must be an employer-employee relationship between an air carrier, contractor or subcontractor employer who violates the Act and the employee it subjects to discharge or discrimination, but that the violator need not be the employee's immediate employer under the common law. * * * The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant's employment. . . . Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. ... If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail." USDOL/OALJ Reporter at 6-

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7 (citations omitted). In the instant case, the Complainant alleged facts showing that the Respondent airline controlled the quality of a contract employee's work performance, but did not claim that the airline had the ability to hire or fire her, or take any unfavorable personnel actions against her.

The ARB also ruled that to the extent that the ALJ and the ARB reviewed more than just the allegations of the complaint, the airline's motion to dismiss would be handled as a motion for summary decision under 29 C.F.R. §§ 18.40, 18.41. The Complainant's mere conclusory allegation in her filings with the ALJ and the ARB that the airline had control over her work and had illegally terminated her were not sufficient under the summary decision standard to overcome the airline's denials that it played any part in the termination of the Complainant's employment. The ARB noted that the Complainant had opportunities to present facts demonstrating that the airline actually played a role in the adverse action taken by the cleaning service contractor, but failed to do so.

COVERED EMPLOYEE; FORMER EMPLOYEE; ALLEGED BREACH OF SETTLEMENT AGREEMENT

In ***Davidson v. Miami Air International, Inc.***, 2005-AIR-3 (ALJ May 20, 2005), the Complainant charged that the Respondent released personnel documents to another airline in response to subpoenas from that other airline in violation of an earlier AIR21 settlement agreement. The ALJ granted summary judgment to the Respondent on the ground that the Complainant was not a covered employee under AIR21. The ALJ acknowledged that AIR21 coverage can extend to former employees, but only in regard to actions by the Respondent which affect the benefits the Complainant is entitled to as a former employee, his possible re-employment, or his ability to seek other employment. The ALJ found that the complaint did not allege any such actions. The ALJ noted that to the extent that the complaint was seeking enforcement of the settlement agreement, the Complainant was in the wrong forum.

EMPLOYEE COVERAGE; FORMER EMPLOYEE

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the Complainant had once been employed by the Respondent as its Director of Maintenance, but by the time of his protected activity had a relationship with the Respondent where he continued to perform maintenance work for the employer, but no longer on a salary basis. Rather, the Complainant -- who also owned and operated a business servicing and maintaining aircraft for other airlines -- started performing labor in exchange for hanger space. Applying the *Darden* and *Reid* tests for delineating employment relationships, the ARB found, essentially, that substantial evidence supported the ALJ's finding that the relationship between the Complainant and the Respondent was not as employer-employee at the time the Complainant's services were terminated. However, the ARB noted that when the ALJ issued his recommended decision, DOL had not yet promulgated AIR21 regulations. When those regulations were published, they defined the term "employee" at 29 C.F.R. § 1979.101 as "an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier." In other words, under the AIR21 regulations "[c]overage . . . could extend, depending on the surrounding factual circumstances, to former and current employees of air carriers and their

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contractors and subcontractors, applicants for employment by these entities, and individuals whose employment could be affected by these entities."

The ARB observed that the relationship between the parties in the instant case was not amenable to ready demarcation, and because of uncertainty regarding the application of section 1979.101, it would assume, without deciding, that the Complainant was an employee covered by the AIR21 whistleblower provision. Rather, the ARB decided the case based on its finding that the Complainant had failed to prove that the managers who decided to terminate his services knew about his protected activity, and had failed to prove that his protected activity was a contributing factor in his discharge.

EMPLOYEE/EMPLOYER; AIRPORT SCREENER IS NOT A COVERED EMPLOYEE UNDER AIR21; TSA IS NOT A COVERED EMPLOYER UNDER AIR21

In ***Fader v. Transportation Security Administration***, 2004-AIR-27 (ALJ June 17, 2004), the ALJ determined that an airport screener's recourse for statutory whistleblower protection, as a TSA employee, is with the Office of Special Counsel under the Whistleblower Protection Act, and not the whistleblower provision of AIR21. Moreover, the ALJ found that "[n]o basis has been shown, which would establish that the TSA qualifies as an air carrier, directly or indirectly, under AIR21, or that TSA's statutorily and regulatorily defined federal mission to provide aspects of air carrier safety is dependent upon a contractual relation with an air carrier."

FORMER EMPLOYEE; EMPLOYEE ON DISABILITY RETIREMENT; IMPACT ON SCOPE OF AIR21 REMEDIES

In ***Friday v. Northwest Airlines, Inc.***, 2004-AIR-16 and 17 (ALJ June 16, 2004), the ALJ found that a pilot who had taken a disability retirement, and had been adjudicated to have voluntarily terminated his employment with the Respondent in both federal court proceedings and before another ALJ, was not an "employee" for purposes of AIR21 and the regulation at 29 C.F.R. § 1979.101. The Complainant argued that because he was included on the Respondent's seniority list, he was still an employee. The ALJ, however, reviewed the collective bargaining agreement and found that it only established that the Complainant continued to accrue seniority for seven years while on a disability pension, and not that the Complainant was still an employee. The ALJ then described the impact of the Complainant's status as a former employee on AIR21 whistleblower coverage:

> Since the Complainant was not a current employee of the Respondent's at the time of many of the various alleged retaliatory actions, the scope of the personnel actions prohibited by AIR 21 is more limited. The general rule, applied in other whistleblower and retaliation contexts is that complainants who are former employees are subject to unfavorable personnel actions when the alleged retaliatory act is related to or arises out of the employment relationship in some way. *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994) (Title VII anti-retaliation provision); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (anti-retaliation provisions of the Fair Labor Standards Act); *Delcore v. Northeast Utilities*, 90-ERA-37 (Sec'y Mar. 24, 1995) (whistleblower protections of the Energy Reorganization Act).

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> As a former employee who is on disability retirement, only those actions by the Respondent which affect the benefits the Complainant is entitled to as a former employee, his possible re-employment, or his ability to seek other employment (such as a blacklisting claim), are covered as a personnel action under AIR 21. This includes those rights under the Pilots' Pension Plan provided to pilots whose services with the Respondent have been severed but who are receiving a disability retirement pension under the Pilots' Pension Plan. (RX 35.)

Slip op. at 8.

- *Others*

DERIVATIVE WHISTLEBLOWER PROTECTION FOR SPOUSES

In ***Davis v. United Airlines, Inc***., 2001-AIR-5 (ALJ Apr. 23, 2002) (ruling on motion for summary judgment), the ALJ found that "the plain language of the AIR Act does not expand its protection to spouses of whistleblowers, where the spouse did not personally engage in a protected activity."

XV. EVIDENCE

INTERLOCUTORY REVIEW; ARB DENIES INTERLOCUTORY REVIEW OF ALJ'S ORDER DENYING RESPONDENT'S MOTION FOR A PROTECTIVE ORDER CONCERNING COMPLAINANT'S COUNSEL'S POSTING ON YOUTUBE OF VIDEO DEPOSITIONS OF RESPONDENT'S CEO AND ITS SENIOR VP OF FLIGHT OPERATIONS, WHERE THOSE DEPOSITIONS HAD BEEN ADMITTED INTO THE PUBLIC RECORD AT THE HEARING BEFORE THE ALJ; ARB NOTES THAT VIDEO HAS BECOME UBIQUITOUS

In ***Petitt v. Delta Airlines, Inc.*** ARB No. 2019-0087, ALJ No. 2018-AIR-00041 (ARB Aug. 26, 2020) (per curiam), Respondent sought interlocutory review by the ARB of the ALJ's order denying Respondent's motion for a protective order concerning Complainant's counsel's posting on YouTube of videotaped depositions of Respondent's CEO and its Senior VP of Flight Operations.

Those depositions had been entered into evidence before the ALJ by stipulation of the parties because of the deponents' lack of availability for the hearing. The ALJ had carefully pointed out that admission of the depositions into the record waived any privilege as to the contents of the transcripts, and noted that the depositions were admitted in lieu of live testimony for the convenience of Respondent. The YouTube posting of the depositions by Complainant's counsel occurred after the conclusion of the hearing. Counsel's law firm website had hyperlinks to the YouTube postings. Respondent's counsel wrote to Complainant's counsel requesting that the videos be taken off the Internet. Complainant's counsel declined. Respondent then filed a request for a protective order with the ALJ. The ALJ denied the request, noting that the party's confidentiality agreement specified that it would not carry forward if the depositions were admitted into the record. The ALJ also denied a motion for reconsideration and for certification of an

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interlocutory appeal. Respondent then petitioned the ARB directly for interlocutory review. The ARB reviewed the petition under the collateral order doctrine.

Respondent argued that the "collateral order doctrine was met because of the need for clear rules preventing abuse of video and other manipulable media. According to Respondent, the publication of the videos on the law firm's website and on YouTube subjects the individuals to unwanted exposure and chills participation in the judicial process. Further, a delay while the merits opinion is issued and appealed to the ARB would render relief from the posted videos unattainable." Slip op. at 4. The Office of the Solicitor filed an amicus brief urging denial of the petition on the ground that "Respondent's fears of embarrassment are too speculative to warrant interlocutory review." *Id*. at 5.

The ARB determined that the standard for review of an ALJ's ruling on a motion for a protective order is abuse of discretion. The ARB found that Respondent's strongest argument was that having video deposition testimony posted to the internet is embarrassing. The ARB noted that Respondent was not objecting to public release of a written transcript of the depositions, but "to the release of video images where the viewer can see the deponent speak the words." *Id*.

The ARB denied the petition. The ARB wrote:

> Respondent's Protective Order is insufficient to warrant interlocutory review under the collateral order exception.[4] Respondent has not shown how the law firm's distribution has caused Respondent any harm beyond the kind of unwelcome attention that accompanies litigation. Respondent's own glowing characterization of the testimony critically undercuts the claim of embarrassment, noting, "both Mr. Bastian and Captain Graham testified truthfully and competently . . . ." *Id*. at 25. We note that the deposition transcripts are available and the case has received significant publicity. This theme is also restated in the introduction to Respondent's Petition thusly: "Delta's leaders testified truthfully and frankly about Delta's absolute commitment to safety as a complete review of those transcripts demonstrates." *Id*. at 4. The added embarrassment in this case is the video component of the deposition. The fact that a party suffers embarrassment does not make the matter unreviewable upon final review. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108-09 (2009) ("The crucial question . . . is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders. We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system."). As a result, Respondent's claim that this "truthful," "competent," and "frank" testimony becomes embarrassing as soon as the public views the deponent is neither compelling nor persuasive to satisfy the Cohen exception and warrant interlocutory review. As the Supreme Court in Carpenter recognized "[p]ermitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals . . . 'Routine appeal from disputed discovery orders would disrupt the orderly progress of the litigation, swamp the courts of appeals, and substantially reduce the district court's ability to control the discovery process.'" 558 U.S. at 112-13.

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> [4] Importantly, we note that video has become a ubiquitous part of society permeating all aspects of public life. With the explosive growth of video cameras, it is no longer possible to avoid security cameras, dashcams, bodycams, webcams, phonecams, nannycams, minicams, spycams, and doorbell cams. We also note that it is routine for senior corporate officers to appear on business news programs, communicate by video teleconference, and appear in television advertising as the lead pitchman for their brand. Although this experience is not controlling, it does inform our analysis when contrasting it with claims of "embarrassment" discussed in legacy decisions through the years.

Id. at 6.

ATTORNEY-CLIENT PRIVILEGE NOT WAIVED BASED ON ALJ'S OVERRULING OF OBJECTION TO CROSS-EXAMINATION DESIGNED TO ELICIT INFORMATION CLAIMED TO BE PRIVILEGED; ALJ PROPERLY LATER WITHHELD EMAIL RELATED TO THE TESTIMONY WHERE, UPON IN CAMERA REVIEW, ALJ FOUND THAT IT WAS COVERED BY ATTORNEY-CLIENT PRIVILEGE OR WORK-PRODUCT DOCTRINE

In ***Estabrook v. Administrative Review Board, USDOL***, No. 19-60716 (5th Cir. June 30, 2020) (per curiam), Respondent FedEx had called its in-house counsel (Tice) to testify at the hearing before the ALJ concerning a meeting with Petitioner Estabrook. On cross-examination, Tice indicated that the meeting took place because there were concerns about whether Estabrook should be on the jumpseat. Tice was asked what the concerns were, and FedEx's counsel objected to the extent that the question called for attorney-client privileged information. The ALJ overruled the objection, and Tice answered the question referring to a communication from FedEx's vice-president of flight operations. During discovery, FedEx had withheld as privileged an email about that communication. Based on Tice's hearing testimony, Estabrook's counsel sought production of the email. FedEx reasserted the privilege, and the ALJ ordered submission of the email to him for in camera review—upon which the ALJ determined that it was covered by attorney-client privilege or the work-product doctrine.

On appeal, Estabrook's argued that FedEx waived the privilege when Tice testified about the content of the email. The court rejected this argument, holding that "[a] party prevents the waiver of attorney-client privilege at trial by asserting that privilege whenever the opposing party asks 'questions designed to elicit information about privileged communications.' Nguyen v. Excel Corp., 197 F.3d 200, 207 (5th Cir. 1999)." Here, FedEx raised the objection Tice when was presented with a question that might elicit privileged information, and thus did not waive the privilege.

The court also determined that the privilege was not waived when the ALJ overruled the objection and required Tice to answer the question. The court cited authority that privilege is not waived where the disclosure was compelled erroneously. The court found that the ALJ's initial ruling on the privilege objection must have been erroneous given that he later determined that the email was privileged. The court thus found that the ALJ correctly withheld the email from Estabrook.

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EVIDENCE; ALJ'S EXCLUSION OF TESTIMONY OF COWORKER WHOSE TESTIMONY WAS INTENDED TO SHOW A PATTERN OF RETALIATION WHERE THAT COWORKER WAS NOT SIMILARLY SITUATED

In ***Barker v. Administrative Review Board, USDOL***, No. 08-60128 (5th Cir. Dec. 8, 2008) (per curiam) (unpublished) (case below ARB No. 05-058, ALJ No. 2004-AIR-12), the Petitioner contended that the ARB was arbitrary and capricious in affirming the ALJ's decision to bar portions of a coworker's testimony that described the coworker's theory that he had been fired in retaliation for reporting the company's unsafe aviation practices to the FAA. The Petitioner asserted that the coworker's excluded testimony would have established a pattern of retaliatory firings. The Fifth Circuit, however, observed that the coworker was a manager who was fired individually months earlier, whereas the Petitioner was one of six pilots (out of a total of 10) who were laid off just months before the company went under. The court found that the ARB was not acting in an arbitrary and capricious manner when upheld the ALJ's conclusion that the coworker was not similarly situated to the Petitioner, rendering the subject portion of the coworker's testimony irrelevant. The ALJ had permitted the coworker to provide other relevant testimony.

STATEMENT OF EMPLOYEES WHO DID NOT TESTIFY AT THE HEARING; WHETHER THE STATEMENTS WERE HEARSAY; FAILURE OF COMPLAINANT TO DEPOSE OR SUBPOENA POTENTIAL WITNESSES

In ***Barber v. Planet Airways, Inc.***, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006), the Complainant argued that the ALJ improperly relied on hearsay evidence when he credited the statements of employees who had not testified at the hearing. The ARB found that the ALJ acted within his discretion in admitting the statements because they were not hearsay, as they were admitted -- not to establish the truth of the complaints -- but only to corroborate the testimony of an HR manager that he had received a large number of employee complaints about the Complainant. The ARB also held that even if they were hearsay, the ALJ could determine under 29 C.F.R. § 1979.17(d) that the statements in themselves had some probative value and were therefore admissible.

The Complainant also argued that the ALJ should have required certain of the Respondent's witnesses who signed statements to testify. The ARB found that the burden of deposing or subpoenaing potential witnesses is on the parties, and not the ALJ.

EVIDENCE; HEARSAY

In ***Weil v. Planet Airways, Inc.***, ARB No. 04-074, 2003-AIR-18 (ARB Oct. 31, 2005), the ARB affirmed the ALJ's finding that the Complainant was fired because of his disruptive behavior rather than his protected activity. The ARB found that the Complainant's argument on appeal that the ALJ improperly admitted hearsay evidence was meritless because (a) the Complainant did not show that, in fact, any hearsay evidence was admitted, (b) he failed to object to the admission of hearsay during the hearing, and (c) formal rules of evidence do not apply at hearings brought under AIR21. 29 C.F.R. § 1979.107(d).

EVIDENCE; ADMISSIBILITY OF TAPE RECORDING

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In ***Hirst v. Southeast Airlines***, 2003-AIR-47 (ALJ May 26, 2004), the ALJ rejected the Respondent's argument that a tape recording made by the Complainant, allegedly in violation of state law because it was without the consent of all parties, was inadmissible as evidence in an AIR21 whistleblower proceeding. The ALJ acknowledged that an electronic recording without consent of all parties is illegal in Florida, but nonetheless found that the recording was admissible. The recordings did not substantially differ from the recollections of the conversation and both parties' witnesses proved the content of the conversation. The ALJ also noted that his decision would have been the same without the tapes given his credibility determination about the Respondent's witness.

ADMINISTRATIVE NOTICE; COURT OF APPEALS DECISION

In ***Davis v. United Airlines, Inc.***, 2001-AIR-5 (ARB Apr. 25, 2002), Respondent submitted a Motion for Court to Take Administrative Notice of a Seventh Circuit Opinion to establish that Complainant participated in a union-orchestrated, systematic, work slowdown or work-to-rule action which resulted in flight delays, conducted in the midst of contentious contract negotiations. In the Seventh Circuit opinion, the court found "clear proof" of the union's complicity. Respondent argued before the ALJ that the present whistleblower dispute must be viewed through the lens of this larger national context."

The ALJ reviewed the law relative to the doctrine of taking administrative notice in administrative proceedings, and accepted Respondent's argument that it is broader in administrative cases than in traditional cases. The ALJ found, however, that

> The general rule is that courts can and do take judicial notice of related proceedings in their own jurisdictions and the fact of and procedural history of litigation in other courts. However, while courts can take notice that certain facts were found in another proceeding, they are not bound to accept those facts as true. Weinstein & Berger, Weinstein's Federal Evidence, § 201.12[3], pages 201-33 - 201-37 (2d Ed. 1998) and cases cited therein, at notes 40-40.1. The theory is that such findings are disputable.

With this background, the ALJ ruled:

> The Seventh Circuit's opinion makes it clear that the union and UAL disputed the facts of the case. The Seventh Circuit matter is collateral to the issues in the present case. However, it may be both helpful and relevant to establish the factual background in the case sub judice. Relitigating the facts of the earlier dispute between UAL and the union, in this case, would precipitate an untenable and unnecessary burden on the parties and this court. The law is such that I may take administrative notice of the facts found in that proceeding and I do so. However, I will not accept those facts as true, but rather only to show what the work atmosphere at UAL was and the premises UAL was operating under during the time frame surrounding the allegations in the present matter.

(footnotes omitted).

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DISCOVERY AND EVIDENCE; PROTECTING SENSITIVE, BUT UNCLASSIFIED INFORMATION POTENTIALLY RELATING TO HOMELAND SECURITY

In ***Blackburn v. Mesaba Aviation, Inc.***, 2002-AIR-22 (ALJ Sept. 20, 2002), the ALJ concluded that due to the nature of the case, it might be possible that a party may seek to discover or use sensitive, but unclassified, material regarding weapons of mass destruction or other sensitive records relating to Homeland Security. Thus, the ALJ issued an order directing counsel to bring to the ALJ's immediate attention the potential use of such information so that steps could be take to handle the information appropriately.

XVI. DAMAGES

REMEDIES; WHEN REINSTATEMENT WAS NOT APPROPRIATE, COMPLAINANT WAS PROPERLY AWARDED SEVERANCE BENEFITS TO WHICH COMPLAINANT WOULD HAVE BEEN ENTITLED IN THE EVENT OF DISCHARGE WITHOUT CAUSE

In ***McMullen v. Figeac Aero North America***, ARB No. 2017-0018, ALJ No. 2015-AIR-00027 (ARB Mar. 30, 2020) (per curiam), Complainant, the General Manager of Respondent's Wichita airline components plant, filed an AIR21 retaliation complaint alleging that his employer terminated his employment in retaliation for reporting safety violations. The ALJ found in favor of Complainant. The ARB affirmed.

As to remedies, Respondent appealed the ALJ's award of severance pay pursuant to the parties' employment agreement. The ALJ found that the employment contract provided for a six month severance package and that this clause was not subject to any conditions or restrictions. The ARB affirmed the award, and held that "a severance provision such as this was a negotiated term, condition and privilege of employment, and thus should be fulfilled." Slip op. at 8 (footnote omitted). The Board distinguished cases cited by Respondent because in those cases the complainant had been reinstated and thus not entitled to severance benefits. The Board stated: "Rather, the Board has held that an employee is entitled to both back pay and previously contracted severance pay to which he would be entitled in the event of discharge without cause when reinstatement was not appropriate. *See Loftus v. Horizon Lines, Inc.*, ARB No. 16-082, ALJ No. 2014-SPA-004 (ARB May 24, 2018)."

COMPENSATORY DAMAGES FOR MENTAL DISTRESS CAUSED BY RETALIATION; UNREFUTED STATEMENTS OF PSYCHIATRIST AND PSYCHOLOGIST ATTRIBUTING MENTAL CONDITION TO RETALIATION; PARAMETERS OF AWARD

In ***Luder v. Continental Airlines, Inc.***, ARB No. 13-009, ALJ No. 2008-AIR-9 (ARB Nov. 3, 2014), in an earlier decision the ARB had affirmed the ALJ's decision finding that the Respondent violated AIR21 when it suspended the Complainant for four days and issued an 18 month termination warning letter after the Complainant refused to fly a plane he believed may have been damaged due to turbulence experienced during the preceding flight with a different flight crew.

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The ARB, however, had remanded for further consideration of a compensatory damages award the ALJ had imposed requiring the Respondent to make a monthly pay award until the date the Complainant reached the mandatory retirement age. The award had been based on the ALJ's finding that the Complainant experienced PTSD, depression and anxiety following the refusal to fly incident and subsequent related events, such that he that could no longer fly and consequently experienced a 50% loss in income. The ARB found that the ALJ's analysis was so lacking in specificity and supporting findings of fact as to make it not possible to conduct appellate review. The ARB's remand order indicated that the ALJ was to clarify the legal basis for the award, and gave the ALJ discretion how to address the issue in further proceedings. On remand the ALJ allowed the submission of additional evidence. The ALJ found that the evidence showed that prior to the adverse employment action, the Complainant was functioning as a responsible pilot, and that following the adverse action he experienced deteriorating symptoms, indicating causation. The ALJ ordered front pay.

On appeal, the Respondent argued that the ALJ erred in reopening the record. The ARB, however, noted that its remand order did not foreclose reopening of the record, and that the OALJ procedural regulation at 29 C.F.R. 18.54(a) affords an ALJ discretion to reopen a record on remand. The ARB also found no prejudice as both parties were permitted to submit additional evidence.

Applying a preponderance of the evidence standard, the ARB found that substantial evidence supported the ALJ's determination that the Respondent's retaliatory actions caused the Complainant's mental decline. This evidence included a declaration and deposition of a psychiatrist and the deposition of a psychologist, both of whom had treated the Complainant. The psychiatrist opined that the trauma of being treated unfairly at work was a trigger for the mental deterioration, and the psychologist opined that the trigger was the retaliation the Complainant suffered at work. The ARB noted that the Respondent had not proffered any independent medical evidence to directly refute the opinions of the psychiatrist and psychologist. The ARB also noted that in a neuropsychological evaluation conducted at the Respondent's request also attributed the Complainant's psychological symptoms to the retaliatory events and the Complainant's refusal to fly.

The ARB, however, modified the parameters of the ALJ's compensatory damages award, finding that the undisputed medical evidence showed that the Complainant's psychiatric/psychological treatments had ended, and that there was no evidence the Complainant continued to suffer from psychiatric or psychological conditions after the conclusion of treatment that would prevent a return to work. The ARB therefore ordered that the monthly payment end as of the date of the last psychiatric treatment.

One member of the ARB panel dissented on the ground that the medical evidence was only generalized and conclusory. The dissenter criticized the majority opinion for failing to cite an objective standard for evaluating the Complainant's medical evidence and for failing to point to evidence of record containing an articulated explanation of medical causation. The dissenter would not go so far as to require an ALJ to perform an *Daubert* style gatekeeping function on the admissibility of expert testimony, but recommended that ALJs look to FRE 702 for principles designed to foster objectivity in reviewing medical expert evidence concerning medical causation. The dissenter stated: "In the end, where complex and long-term psychological injury (e.g., major depression) is an issue, the employee's evidence should include some articulated, rationalized

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medical opinion evidence that explains with some level of specificity how the unlawful employment action caused or substantially contributed to the psychological injury and how the expert ruled out more temporally proximal stressors." USDOL/OALJ Reporter at 17.

AFTER-ACQUIRED E-MAIL INSULTING COMPANY PRESIDENT AND ENCOURAGING RESIGNATION OF PILOTS DOES NOT MEET EMPLOYER CLEAR AND CONVINCING BURDEN OF PROOF

COURT OF APPEALS FOR FIFTH CIRCUIT UPHOLDS ARB RULING THAT CLEAR AND CONVINCING EVIDENCE BURDEN (§ 42121(B)(2)(B)(IV)) APPLIES TO ANY ISSUE RELATING TO DAMAGES, INCLUDING AFTER-ACQUIRED EVIDENCE, AND NOT MERELY LIABILITY

COURT OF APPEALS FINDS SUBSTANTIAL EVIDENCE IN THE RECORD FOR ALJ FINDING THAT E-MAIL DID NOT MEET CLEAR AND CONVINCING EVIDENCE TEST INASMUCH AS AMERISTAR RELIED ON E-MAIL ALONE WITHOUT ANY EXPLANATORY TESTIMONY, OFFERED "SHIFTING AND CONTRADICTORY" REASONS FOR ITS TERMINATION DECISION, AND ITS MANAGERS ' TESTIMONY HAD ALREADY BEEN COMPLETELY DISCREDITED BY ALJ

In ***Ameristar Airways, Inc. v. Administrative Review Board, USDOL***, No. 14-60061 (5th Cir. Nov. 12, 2014) (2014 WL 5861808; 2014 U.S. App. LEXIS 21726) (case below ARB No. 12-105, ALJ No. 2004-AIR-11), the Court of Appeals for the Fifth Circuit denied the appellant company's petition for review objecting to an ARB decision affirming an ALJ decision in an AIR 21 whistleblower retaliation case. The complainant was hired as the Director of Operations. Pilots complained to him that the company engaged in practices violating FAA regulations, including pressuring them to violate duty-time restrictions. The Director brought the complaints to other upper management officials and also raised concerns about the company's practice of sharing another airline's call signal without FAA approval and requiring pilots to confer with company officials before recording maintenance problems in their logbooks. In response, the VP of Operations instructed complainant not to request a new signal for the company's flights from the FAA. The complainant thereafter met with the FAA about these matters. Management was aware of the meeting. Shortly thereafter, the VP of Operations recommended to the company's President, Thomas Wachendorfer, that complainant be terminated. Complainant was terminated.

Litigation followed, including unemployment proceedings and the instant whistleblower reprisal litigation. Two months after Complainant was terminated, the Company discovered an e-mail that complainant had sent out to pilots in which he referred to the Company President as "Wachmeoffendorfer," informed them that the schedule he was sending to them to follow was not one of his making, but came from the President, and complainant knew it was inconsistent with the terms offered the pilots at hiring. The e-mail also noted that Complainant had already received a few resignations, expected more, and indicated he would support pilots' unemployment claims as well as provide them other support.

The case proceeded through litigation. The Fifth Circuit held in the initial petition for review by Ameristar that substantial evidence supported the ARB findings but remanded to the ALJ for the sole reason of considering whether the back-pay should be adjusted in light of the after-acquired

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evidence. On remand, the ALJ applied the clear and convincing test and did not adjust its back pay determination. The ARB affirmed.

While recognizing that its earlier decision (650 F. 3d 562 at 570 (5th Cir. 2011)) noted that "'where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it,' (quoting *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 362-63 (1995)) back pay should be limited to the period 'from the date of the unlawful discharge to the date the new information was discovered [.]'", the Court found that the ALJ applied the standard correctly. It found the ALJ had supported his findings that Ameristar had provided "shifting and contradictory responses" for the complainant's discharge throughout the proceedings, failed to rely on the e-mail in its filings with the Texas Workforce Commission in the unemployment proceedings, and generally "completely discredited the testimony of Ameristar's managers." *Id*., slip op. at 6.

BACK PAY LIABILITY; AFTER-ACQUIRED EVIDENCE; ARB ADOPTS "CLEAR AND CONVINCING EVIDENCE" STANDARD IN DETERMINING WHETHER THE RESPONDENT WOULD HAVE FIRED THE COMPLAINANT BASED ON THE AFTER-ACQUIRED EVIDENCE

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 12-105, ALJ No. 2004-AIR-11 (ARB Nov. 25, 2013), the Fifth Circuit Court of Appeals had affirmed the ARB's decision on the merits finding that the Respondent violated the whistleblower provision of AIR21, but remanded for determination of the proper amount of the back pay award in light of after-acquired evidence potentially showing that the Complainant may have been discharged for wrongdoing. Specifically, the Complainant -- who was the Respondent's Director of Operations -- had sent an email to the Respondent's pilots voicing complaints about management, mocking the Vice President of Operations, stating that he intended to leave the company soon, and offering to support any pilots who wished to quit the company. The Complainant conceded that the email was insubordinate, unprofessional and grounds for termination; however, the Respondent had not been aware of the email until two months after the Complainant's termination from employment.

On remand, the ALJ applied a standard suggested by the ARB in its remand order requiring the Respondent to show that it would have fired the Complainant because of the after-acquired email under the AIR21 "clear and convincing evidence" standard. The ALJ found that the Respondent had not met that standard.

On appeal, the Respondent argued that the ALJ erred in (1) applying the clear-and-convincing burden of proof, (2) ignoring undisputed, significant, material facts, and (3) subverting the principles of the after-acquired evidence doctrine.

The ARB affirmed the ALJ's use of the clear-and-convincing burden of proof, finding that it was the express standard set forth in AIR21 governing whether a complainant is entitled to relief, 49 U.S.C.A. § 42121(b)(2)(B)(iv), and that even if AIR21 was found to be silent on the question, the purposes and policies underlying AIR21's whistleblower protection provision would lead to the same result.

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The ARB further found that substantial evidence supported the ALJ's finding that the Respondent failed to establish that it would have fired the Complainant based on the email. The Respondent failed to offer any additional proof beyond the content of the email to establish that it would have first the Complainant based solely on the email. A bald assertion based on the "context, substance, and intent" of the email did not suffice. Moreover, substantial evidence supported the ALJ's conclusion that the Respondent made shifting and contradictory statements regarding the reason for the discharge. In a footnote, the ARB stated even if the preponderance-of-the-evidence standard applied, the Respondent failed to meet that lesser standard.

In regard to the Respondent's argument that the ALJ's decision subverts the fundamental principle of the after-acquired evidence doctrine -- that an employee's wrongdoing must be taken into account "lest the employer's legitimate concerns be ignored" -- the ARB found that the Respondent's characterization of the Complainant's email as "unpardonable wrongdoing" and "perhaps the most disloyal and destructive e-mail in the annuals of American business" was a hyperbolic description that itself did not establish that the Respondent would have fired the Complainant solely on the basis of the email. USDOL/OALJ Reporter at 10 (quoting the Respondent's appellate brief). The ARB quoted the Supreme Court for the proposition that "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1982). The ARB further noted that the Complainant had been prompted to send the email based on the actions of superior officers, one of whom had adopted a policy that "had pilots flying excess hours with unsafe aircraft that needed maintenance and had engaged in non-authorized common carriage on 112 separate occasions, all in violation of Federal Aviation Administration (FAA) regulations." USDOL/OALJ Reporter at 11 (quoting the ALJ's Feb. 20, 2008 decision).

AFTER ACQUIRED EVIDENCE IN AIR21 WHISTLEBLOWER CASES AS A LIMIT ON A BACK PAY AWARD

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the Fifth Circuit Court of Appeals had affirmed the ARB's decision on the merits and award of back pay, but remanded for a determination of whether the back pay award should have ended on the date that managers learned of an insubordinate and offensive email that the Complainant had sent to other pilots prior to his discharge. In this regard, the Fifth Circuit cited *McKennon v. Nashville Banner Publ'g Co*., 513 U.S. 352, 362 (1995), for the proposition that "where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it," back pay should be limited to the period "from the date of the unlawful discharge to the date the new information was discovered."

Prior to remanding to the ALJ for further factfinding, the ARB first considered whether *McKennon* applies to AIR21's whistleblower provision, and concluded that it did. The ARB, however, found it an open question whether the proper burden of proof on this issue is a "preponderance of the evidence," or "clear and convincing evidence." The ARB noted that it would be strange to impose a lesser burden on a respondent in determining the extent of damages in view of after-acquired evidence than the burden imposed on a respondent in the liability phase of a mixed-motive case, but left the issue for briefing before the ALJ on remand. The ARB directed the ALJ on remand to determine whether the email at issue was of such severity that the Respondent would have fired the Complainant on those grounds alone.

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COMPENSATORY DAMAGES FOR LOST EMPLOYMENT DUE TO EMOTIONAL DISTRESS; ARB CLARIFIES WHEN MEDICAL EVIDENCE MAY BE NECESSARY TO PROVE CAUSATION

EXPERTS; *DAUBERT* APPLIES, BUT ALJ DOES NOT PERFORM THE ROLE OF GATEKEEPER

In ***Luder v. Continental Airlines, Inc.***, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), the ALJ had awarded lost wages for the Complainant, a pilot, up until the time he had sufficiently recovered from disabling mental conditions to permit him to continue flying or to perform other suitable alternative employment. On appeal, the parties did not dispute that the Complainant was medically unfit to fly, but the question arose whether the Employer's retaliatory actions caused the Complainant's long term disability. The ARB indicated that it would attempt to clarify the law with respect to establishing when medical evidence may be necessary to prove causation in the range of emotional distress cases (some of which stem from specific medical conditions), arising under AIR 21.

The ARB noted that the Complainant has the burden to prove damages and entitlement to the remedies he seeks, and that damages must be causally related to the unlawful conduct and cannot be presumed. The ARB also noted that reinstatement is the express and presumptive statutory remedy; front pay may be used as a substitute when reinstatement is not possible. The ARB wrote:

> Within the context of determining a complainant's entitlement to compensatory damages based on the complainant's mental suffering or emotional distress, the ARB has held that the complainant "must show by a preponderance of the evidence that the unfavorable personnel action caused the harm." Moreover, a respondent may be held liable for compensatory damages where the complainant proves that the respondent's unlawful conduct aggravated a preexisting psychiatric condition. A complainant's burden of proof is no different when the claim is for lost wages based on the complainant's medical or psychological condition. Thus, the circumstances of the case and lay testimony about physical or mental consequences of retaliatory action may support such awards. The ARB has held that while the testimony of medical or psychiatric experts "can strengthen the case for entitlement to compensatory damages, it is not required." The ARB has affirmed compensatory damage awards for emotional distress, even absent medical evidence, where the lay witness statements are "credible" and "unrefuted."
>
> However, in other cases, such as *Gutierrez* [*v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-19, slip op. at 11 (ARB Nov. 13, 2002)] for example, where the claim for an award of damages for emotional stress is based solely on the complainant's testimony that he suffered a specific and diagnosable medical condition, the ARB has reasonably required "medical or other competent evidence" showing that the complainant suffered from the medical condition and that it "was causally related to the unfavorable personnel actions" the respondent took. Absent such evidence, the ARB held in *Gutierrez* that complainant "failed to meet his burden of proving a causally-related condition, even under the generous evidentiary standards of 29 C.F.R. § 24.6(e)."

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USDOL/OALJ Reporter at 16-17 (footnotes omitted). The ARB found that in the instant case, because the Complainant's condition involved a medical diagnosis that included possible PTSD and/or depression reliance on a qualified medical expert's opinion in determining causation may nevertheless prove critical. In this regard, the Board noted:

> In other ARB decisions discussing expert evidence, we have referred to the principles announced in *Daubert v. Merrill Dow Pharms., Inc.,* 509 U.S. 579 (1993) and *Kumho Tires, Inc. v. Carmichael*, 526 U.S. 137 (1999). *See, e.g., Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 00-062, ALJ No. 1999-STA-021 (ARB July 31, 2001). However, we do not suggest that hearings under the AIR 21 whistleblower statute require the ALJ to engage in the "gatekeeper" role required under Rule 702 of the Federal Rules of Evidence. Under that rule, it may be error for a federal court to admit testimony without ensuring that expert testimony is based on "sufficient facts or data" and "reliable principles and methods." Rule 18.702 in the OALJ's rules of evidence does not contain the same gatekeeper requirements. Moreover, the administrative process is deliberately less formal than federal court litigation, making the "gatekeeper" requirements of the Federal Rules of Procedure unduly onerous for administrative hearings.

USDOL/OALJ Reporter at n.69. In the instant case, the ARB remanded the case to the ALJ for further proceeding because the ALJ's original decision had not adequately explained his findings. The ARB noted that two doctors who the parties had implicitly accepted as qualified psychiatric experts had rendered medical reports supporting the ALJ's finding that the Complainant suffered from major depression, but which did not express any conclusion on the question of causation.

One member of the Board wrote a concurring opinion stating her view that the majority decision does not necessarily impose a requirement that medical evidence proffered by the Complainant demonstrate that other possibilities for his depression are excluded. Rather, for the Complainant "to succeed in establishing causation in addition to the ample evidence already in the record, he need only solidify his assertion with medical evidence (either verbal or documentary evidence from an individual 'qualified as an expert by knowledge, skill, experience, training, or education,' 29 C.F.R. 18.702) that the retaliation he suffered caused his subsequent depression that precluded him from being reinstated to his piloting duties." USDOL/OALJ Reporter at 24.

MOOTNESS; RESPONDENT'S RESTORATION OF PAID SICK LEAVE DOES NOT MOOT THE CASE WHERE THE COMPLAINANTS ALSO SOUGHT COMPENSATORY DAMAGES AND WHERE ATTORNEYS FEES WOULD BE COMPENSABLE IF THE COMPLAINTS WERE FOUND MERITORIOUS

In ***Lucia v. American Airlines, Inc.***, ARB Nos. 10-014, -015, -016, ALJ Nos. 2009-AIR 15, 16, 17 (ARB Sept. 16, 2011), the Complainants alleged that their paid sick leave had been changed to unpaid sick leave in retaliation for calling in sick rather than flying an aircraft in violation of the Federal Aviation Regulation, 14 C.F.R. § 61.53. While the matter was pending on appeal before the ARB, the Respondent repaid the sick leave and removed disciplinary letters from the Complainants' personnel files in accordance with an arbitration award. The Respondent argued that the AIR21 case was now moot. The ARB, however, found that compensatory damages and

attorney fees could be granted if the Complainants prevailed on the merits. Accordingly, the AIR21 case was not moot.

BACK PAY AWARD DEDUCTIONS FOR WORKERS COMPENSATION; DEDUCTIONS WILL BE MADE FOR COMPENSATION PAID FOR WAGES, BUT NOT FOR COMPENSATION PAID FOR IMPAIRMENT

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010), the ARB deducted workers' compensation payments covering lost wages from the back pay award to avoid a windfall, but did not deduct such payments where they were based on a permanent impairment. The ARB wrote:

> Generally, workers" compensation benefits that replace lost wages during a period in which back pay is owed may be deducted from a back-pay award; however, workers" compensation in reparation for permanent physical injury is not compensation for loss of wages and is thus not deductible.

(footnote omitted). The ARB also affirmed the ALJ's finding that the Respondent failed to prove that the Complainant had engaged in fraud (and therefore should have the back pay awarded discounted) when he sought unemployment benefits while receiving workers' compensation. The Complainant had paid back the overpayment once informed that he could not receive both benefits.

STAY OF ARB ORDER ON MONETARY DAMAGES DURING APPEAL; FOUR-PART TEST

In ***Evans v. Miami Valley Hospital***, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-22 (ARB Jan. 13, 2010), the ARB in an earlier decision had affirmed the ALJ's decision finding that the Respondent had violated the AIR21 whistleblower provision, and awarding reinstatement, back pay, compensatory damages, and attorney's fees. The Respondent filed a motion with the ARB for a stay of the money damages award pending its appeal in the Sixth Circuit. The ARB found that the Respondent's motion failed the four-part test used by the ARB to determine whether to stay its own actions. First, the ARB noted that the Respondent had not addressed the likelihood that it would prevail on appeal, and had simply objected to the ARB's interpretation of protected activity under AIR21. The Board found that its interpretation was consistent with common sense, and that substantial evidence supported the ALJ's finding that the Complainant had not deliberately violated FAA regulations. Second, the ARB rejected the Respondent's argument that it would be irreparably harmed because the Complainant might not repay the money if the Respondent prevailed on appeal. The ARB stated that the loss of the respondent's very business must be threatened for recoverable monetary loss to constitute irreparable harm. Third, the ARB found that the Complainant would be harmed if not returned to the position he would have been in if his employer had not retaliated against him. Finally, the ARB found that the Respondent had made no argument regarding a public interest that would be served by a stay.

DAMAGES; ALJ DID NOT ERR IN REOPENING THE RECORD FOR PRESENTATION OF EVIDENCE ON DAMAGES

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In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the Respondent argued that the Complainant was not entitled to back pay or any other damages because he did not present evidence of such at the hearing, and that the ALJ erred by reopening the record for presentation of such evidence. The ARB found that "[g]ranting leave to reopen the record is committed the sound discretion of the trial judge" and therefore "the ALJ did not abuse his discretion in reopening the record." USDOL/OALJ Reporter at 19 (footnote omitted).

MITIGATION OF DAMAGES; RESPONDENT'S BURDEN TO SHOW THAT COMPARABLE JOBS WERE AVAILABLE

In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the ARB noted that a respondent's burden to show that a complainant had not mitigated damages relating to wages was to establish (1) that comparable jobs were available, and (2) that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. In the instant case, the Respondent argued that because the Complainant had opted to stay home with his children instead of looking for work, it did not have to show that substantially equivalent positions were available. The ARB, noting that the ALJ found that the Complainant's seniority had earned him the benefit of being able to take care of his children during the day, found that the Respondent was not absolved of the first element of its burden to prove that comparable jobs were available.

DAMAGES; EVIDENCE FOR BONUSES, RAISES AND PER DIEM PAYMENTS MUST BE SUPPORTED BY ACTUAL PAY RECORDS

In ***Douglas v. Skywest Airlines, Inc.***, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the ALJ did not err in finding that the Complainant's evidence was "far too speculative" to award bonuses, pay raises, and per diems, because the Complainant did not submit any records substantiating a predictable pattern or rate at which he had received such amounts. Although the Complainant offered an expert opinion, it had been supported by only two actual pay records, and all other calculations were in the form of unsupported spreadsheets.

DAMAGES; 401K CONTRIBUTIONS; EVIDENCE MUST SHOW HOW THE CONTRIBUTIONS WERE CALCULATED

In ***Douglas v. Skywest Airlines, Inc.,*** ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009), the ARB affirmed the ALJ's denial of reimbursement for 401K contributions where the supporting evidence was inadequate to show how much the reimbursement should be. A single pay stub showed that a 401K contribution had been made, but did not evidence how that contribution had been calculated.

COMPENSATORY DAMAGES AWARD FOR NON-ECONOMIC DAMAGES; DETERMINATION IS A SUBJECTIVE ONE, BASED ON THE FACTS AND CIRCUMSTANCES OF EACH CLAIM; SUPPORTING MEDICAL EVIDENCE IS NOT ESSENTIAL WHERE TESTIMONY OF COMPLAINANT IS CREDIBLE AND UNREFUTED

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In ***Evans v. Miami Valley Hospital***, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), the ARB found that the ALJ properly found that the caselaw governing non-economic damages provides t hat a determination on such damages is a subjective one, based on the facts and circumstances of each claim. Thus, the ARB affirmed the ALJ's award of $100,000.00 in compensatory, non-economic damages where, even though the Complainant's testimony was not supported by medical evidence, it was unrefuted and corroborated by his wife, both of whom were found to credible witnesses by the ALJ. The ARB found that the record supported the ALJ's finding that the termination of the Complainant's employment caused emotional harm and damage to his reputation.

COMPENSATORY DAMGES FOR NONECONOMIC DAMAGE; PAIN AND SUFFERING; SETTING AMOUNT BY COMPARATIVE ANALYSIS

In ***Vieques Air Link, Inc. v. USDOL***, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), the First Circuit affirmed a compensatory damages award of $50,000 for mental anguish as supported by substantial evidence where the Complainant credibly testified that he struggled to support his wife and two infant children while he looked for a new full-time job following his termination by the Respondent. He had been forced to sell both of the family's modest cars and deplete their meager savings to make ends meet. He testified that this ordeal caused him pain and suffering. The court noted that the ALJ had taken into consideration like circumstances found to support similar awards in other cases which had come before the ARB, and that the ARB had agreed with the ALJ's assessment.

DAMAGES; CALCULATION OF A TAX EQUALIZATION ADJUSTMENT DOES NOT REQUIRE A TAX EXPERT

In ***Sievers v. Alaska Airlines Inc.***, 2004-AIR-28 (ALJ May 23, 2005), the ALJ accepted the report of Complainant's vocational economic consultant in regard to the calculation of present value of the Complainant's lost earning and tax equalization adjustment ("TEA"). The combined amount totaled over $534,000. The Respondent challenged the TEA on the ground that the consultant was not a tax expert. The ALJ, however, found that there was no expert of any kind at the hearing, that the consultant was eminently qualified as an economics damages expert, and that calculation of a TEA was within his expertise. The ALJ observed that the TEA was based on the fact that the Complainant would receive a large lump sum damages award that would otherwise would have been spread over 12 years (the Complainant's worklife expectancy) and that most of this sum would be taxed at a higher rate as a result. The ALJ found that knowledge of how to calculate a TEA is not so arcane or specialized as to require a tax expert.

COMPENSATORY DAMAGES; CREDIBLE TESTIMONY OF ECONOMIC HARDSHIP; CONSISTENCY WITH PRIOR AWARDS IN SIMILAR CIRCUMSTANCES

In ***Negron v. Vieques Air Link, Inc.***, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004), appeal docketed sub nom *Vieques Air Link, Inc. v. USDOL*, No. 05-1278 (1st Cir.), the Respondent had imposed a transfer on the Complainant in retaliation for his protected activity knowing that the Complainant would not be able to absorb with the expenses associated with the transfer. The ARB affirmed the ALJ's compensatory damage award of $50,000 under 49 U.S.C.A.

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§ 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). The Board found that substantial evidence supported the ALJ's award because the Complainant had testified that he had two young children (including an infant) and that, among other hardships, he was forced to sell his automobiles and deplete his family's savings. The Board deferred to the ALJ's finding that the Complainant testimony in this regard was credible, and observed that the amount of compensatory damages awarded by the ALJ was consistent with amounts awarded in similar cases.

AFTER-ACQUIRED EVIDENCE DOCTRINE; ANGRY E-MAIL SENT BY THE COMPLAINANT

In ***Clemmons v. Ameristar Airways, Inc.***, 2004-AIR-11 (ALJ Jan. 14, 2005), the Respondent argued that any back pay award should be cut off as of the date it learned of an inflammatory, angry and improper e-mail sent by the Complainant, a manager, to pilots, which would have resulted in the Complainant's termination from employment (had he not already been terminated). The ALJ, however, found that "extraordinary equitable circumstances existed in that the Respondents' own behaviors induced the e-mail and that absent the disparate treatment of the Complainant, he would not have had cause to send out the angry message." The ALJ therefore concluded that the after-acquired evidence doctrine should not be applied to limit the back pay award.

XVII. REINSTATEMENT AND EQUITABLE REMEDIES

DAMAGES; ALJ EXCEEDED HIS AUTHORITY IN ORDERING RESPONDENT TO EMAIL THE ALJ's DECISION TO ALL OF ITS EMPLOYEES, OFFICERS, AND DIRECTORS — AND TO SUBMIT TRAINING PLANS TO THE ALJ

DAMAGES; ORDER TO EXPUNGE RELEVANT PORTIONS OF PERSONNEL RECORD; ARB CLARIFIES THAT SUCH AN ORDER SHOULD BE CONSTRUED TO REQUIRE REASONABLE SEGREGATION OF THE RELEVANT INFORMATION FROM COMPLAINANT's EMPLOYMENT RECORDS BECAUSE EMPLOYERS MAY BE REQUIRED BY OTHER ADMINISTRATIVE AND LEGAL OBLIGATIONS TO RETAIN SUCH RECORDS FOR REASONS UNRELATED TO EMPLOYMENT STATUS

In ***Yates v. Superior Air Carrier LLC***, ARB No. 2017-0061, ALJ No. 2015-AIR-00028 (ARB Sept. 26, 2019) (per curiam), the ALJ ordered back pay; compensatory damages; expungement of relevant negative personnel records; emailing of the D&O to all employees, officers and directors; a nominal emotional damages payment; and pre- and post-judgment interest on the back pay award. On appeal, Respondent's only objection as to damages was the order to email the D&O to all employees, officers and directors — arguing that "because Complainant did not establish that Respondent engaged in a pattern or practice of discrimination such action is not warranted." Slip op. at 10. The ARB wrote:

> We reverse this aspect of the ALJ's damages award, specifically, the ALJ's order that Respondent must email copies of its D.&O. To employees, officers, and directors, provide and place a summary of the order in the email, and provide the summary as well as Respondent's plans to effectuate further training regarding AIR

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> 21 to the ALJ. The regulations provide that if we conclude that the employer has violated the law, we shall order the employer to abate the violation. 29 C.F.R. § 1979.110(d). We hold that the ALJ erred by requiring Respondent to email the D. & O. to all of its employees, officers, and directors and submit its training plans to the ALJ; such measures are not authorized by statute or regulation and go further than necessary or appropriate to ensure abatement of the injury suffered in this case. We do not disturb any other aspects of the ALJ's damages award as they have not been appealed. *See* 29 C.F.R. § 1979.110(a).

Id.

As to the order to expunge, the ARB noted:

> We recognize that other administrative and legal obligations may require that certain information and records about the incident and Complainant's involvement be retained and used for reasons unrelated to Complainant's employment status. We clarify that Respondent should take reasonable steps to keep those records segregated from Complainant's employment records to ensure that Complainant suffers no further adverse employment action as a result of his protected activities.

Id. at 9, n 11.

REINSTATEMENT; ARB AFFIRMS ALJ'S ORDER OF REINSTATEMENT WHERE RESPONDENT DID NOT INTRODUCE ANY EVIDENCE OR ARGUMENT BEFORE THE ALJ DEMONSTRATING THAT REINSTATEMENT WAS NOT APPROPRIATE

In ***Nagle v. Unified Turbines, Inc.***, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB May 31, 2013) (reissued with corrected caption on June 12, 2013), the Respondent argued on appeal that a lack of a suitable job opening or hostility between the parties warranted staying the ALJ's order of reinstatement. The ARB noted that it has recognized that circumstances may exist in which reinstatement is impossible or impractical and alternative remedies are necessary. In the instant case, however, the Respondent had not argued while the matter was before the ALJ that reinstatement was not appropriate in this case. Nor had the Respondent introduced any evidence to support such an argument. The ARB stated that it will not consider arguments a party did not, but could have made before the ALJ, and affirmed the ALJ's order of reinstatement.

FRONT PAY AND REINSTATEMENT; EVEN IF COMPLAINANT IS MEDICALLY UNFIT TO PERFORM HIS OLD JOB, ALJ MUST CONSIDER WHETHER THERE ARE ANY SUITABLE, ALTERNATIVE JOBS AVAILABLE WITH THE RESPONDENT

FRONT PAY MUST BE AWARDED FOR A SET AMOUNT OF TIME

FRONT PAY; WHERE COMPLAINANT SEEKS FRONT PAY RATHER THAN REINSTATEMENT THE ALJ MUST SET PARAMETERS PROVEN BY THE COMPLAINANT AS REASONABLE

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In ***Luder v. Continental Airlines, Inc.***, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012), the ALJ had awarded lost wages for the Complainant, a pilot, up until the time he had sufficiently recovered from disabling mental conditions to permit him to continue flying or to perform other suitable alternative employment. The ARB stated that, on the assumption that this award was an award of salary into the future in lieu of reinstatement, i.e., front pay, "it is not clear from the record that before making this award the ALJ first determined not only that [the Complainant] was unable to return to his former position as a pilot because of a causally related medical condition or conditions, but also that his condition prevented him from returning to a comparable position with Continental." USDOL/OALJ Reporter at 20. The Board wrote:

> As the ARB has previously held "front pay is used as a substitute when reinstatement is not possible for some reason." To bypass the presumptive remedy of reinstatement, the ALJ must provide reasons and bases justifying his decision. We understand that, at the time of the hearing, [the Complainant] was medically unfit to pilot Continental planes. But it is unclear whether there was any other suitable, alternative job available at Continental.
>
> Moreover, should front pay be a proper remedy, it must be awarded "for a set amount of time" and must be based on factors that the complainant proves are reasonable, e.g., "the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate." To the extent that [the Complainant] requests and proves entitlement to "front pay" rather than reinstatement on remand, the ALJ must set parameters that [the Complainant] proves as reasonable.

USDOL/OALJ Reporter at 20-21 (footnotes omitted).

REINSTATEMENT; ALJ'S FAILURE TO AUTOMATICALLY ORDER REINSTATEMENT NOT REVIEWED ON APPEAL WHERE NOT RAISED BY PARTIES

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010), the ARB stated that the ALJ erred in not automatically awarding reinstatement, even though the Complainant already had another job. However, because the issue was not raised on appeal, the ARB decided not to address it.

PRELIMINARY OSHA REINSTATEMENT ORDER; ALJ'S DISMISSAL NULLIFIES; DISTRICT COURT'S FAILURE TO ENFORCE REINSTATEMENT ORDER BECAME MOOT ISSUE AFTER DISMISSAL OF COMPLAINT AFFIRMED; DAMAGES FOR DELAY IN REINSTATEMENT NOT SUPPORTED BY STATUTE AND WOULD RESULT IN UNJUSTIFIED WINDFALL

In ***Rollins v. American Airlines, Inc.***, No. 06-5135 (10th Cir. May 28, 2008) (case below D.C. No. 04-CV-224-JHP-SAJ (N.D. Okla.); ARB No. 04-140; ALJ No. 2004-AIR-9), OSHA had ordered reinstatement of the Complainant under AIR21, but the ALJ found the complaint to be untimely. The ARB affirmed the ALJ's holding. The 10th Circuit affirmed the ARB. In the interim, the Complainant had filed an action in federal district court seeking enforcement of OSHA's

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reinstatement order. The district count found that the ALJ's decision had immediately nullified the reinstatement order. On appeal to the 10th Circuit, the Complainant argued that the district court had misinterpreted the regulations.

The 10th Circuit found that the issue of reinstatement was now moot given that the ARB's decision had been affirmed. The Complainant argued that if the district court erred in refusing to enforce the order when it was in effect, he would be entitled to a remedy. The 10th Circuit found that this contention was raised too late, and that AIR21 did not appear to authorize damages for delay in reinstatement. The court also wrote: "Moreover, given the dismissal of the underlying administrative action as untimely--demonstrating that the reinstatement order should not have been entered in the first place--damages for the delay in its effectuation would at this point reflect an unjustified windfall. These considerations counsel against any exercise of our discretion that would allow Mr. Rollins to belatedly interject a damages request so as to resuscitate his moot enforcement claim." (Slip op. at 5) (footnote omitted).

The court noted that some courts had raised practical concerns about enforcing preliminary enforcement orders in support of a finding of a lack of jurisdiction to do so, but declined to analyze this issue because of the disposition on mootness grounds.

REINSTATEMENT; WHERE ALJ DID NOT ORDER REINSTATEMENT BASED ON COMPLAINANT'S STATEMENT THAT HE DID NOT WANT HIS JOB BACK, AND NO PARTY APPEALED THIS POINT, THE ARB FOUND THAT REINSTATEMENT AS A REMEDY WAS WAIVED ON APPEAL

In ***Rooks v. Planet Airways, Inc.***, ARB No. 04-092, ALJ No. 2003-AIR-35 (ARB June 28, 2006), the Complainant testified that he did not want his job back and the ALJ did not order reinstatement upon finding that the complaint was meritorious. On review, the ARB recited caselaw holding that the preference of a prevailing complainant is not determinative on whether reinstatement or an alternative remedy such as front pay was available. The ARB stated that reinstatement would have been an appropriate remedy, but -- because neither party raised an issue on appeal concerning reinstatement -- it "deem[ed] the issue of reinstatement waived and accept[ed] the ALJ's recommended remedy of back pay."

BONA FIDE OFFER OF REINSTATEMENT; MOTIVE OF EMPLOYER TO CIRCUMVENT LIABILITY IS NOT RELEVANT

In ***Hirst v. Southeast Airlines, Inc.*****,** ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ALJ made a finding that the Respondent made an offer of reinstatement only after realizing that termination of the Complainant violated AIR21 and its implementing regulations. The ALJ, therefore, concluded that the offer was not bona fide because it was only asserted to circumvent liability. Thus, the ALJ found that the Complainant reasonably rejected the offer and was entitled to back pay from the date he was discharged until he regained full employment as a pilot.

The ARB found, however, that the Respondent's motive in offering reinstatement was not relevant. "Instead, an employer makes a bona fide offer of reinstatement when it unconditionally offers the

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same or a comparable position as the one held before an unlawful discharge." Slip op. at 8 (footnote omitted).

The ARB also found that the Complainant did not suffer adverse action. Thus, the ALJ's use of the wrong standard for determining whether a bona fide reinstatement offer had been made -- which goes to back pay and reinstatement remedies -- was harmless error.

REINSTATEMENT; OSHA'S PRELIMINARY ORDER OF REINSTATEMENT IS LIFTED UPON AN ALJ'S ORDER OF DISMISSAL OF THE COMPLAINT DURING THE PENDENCY OF AN APPEAL TO THE ARB

In ***Rollins v. American Airlines, Inc.***, No. 04-CV-224 (N.D.Ok. June 15, 2006) (case below 2004-AIR-9), OSHA had ordered reinstatement of the Complainant, which under the AIR21 regulations became effective immediately. The parties, however, were unable to agree on what constituted a comparable position, and the Complainant rejected the Respondent's reinstatement offer and instituted an enforcement proceeding in federal district court. In the meantime, the Respondent had requested a hearing before an ALJ, who eventually found in its favor and dismissed the complaint. The Complainant appealed to the ARB, where the case was still pending at the time that the district court ruled on the enforcement action. The court found that, under the AIR21 regulations, the ALJ's dismissal of the complaint had the effect of lifting the OSHA reinstatement order. The Complainant argued that OSHA's reinstatement order survived the appeal to the ARB, but the court found that the intent of the regulations was clear -- that the Complainant's status coming out of the ALJ's proceedings is maintained during the ARB proceedings. The court expressed sympathy with the Complainant's policy argument that the crux of the problem was that DOL had had the matter under consideration for 10 months, which was well beyond the 120 day period contemplated by the AIR21 statute, but held that such delay did not justify a tortured reading of the regulations.

FAILURE TO REINSTATE; REMEDY FOR

The Complainant requested an opportunity to supplement or reopen the record to show that because the Respondent failed to reinstate him as ordered by the ALJ, the ARB should convert the reinstatement order into an order for front pay. The ARB denied the request, stating that the remedy for a failure to reinstate lies with a district court and not the ARB. *See* 49 U.S.C.A. § 42121(b)(6). ***Lebo v. Piedmont-Hawthorne***, ARB No. 04-020, ALJ No. 2003-AIR-25 (ARB Aug. 30, 2005).

PRELIMINARY ORDER OF REINSTATEMENT BY OSHA UNDER THE FRSA; JUDICIAL ENFORCEMENT IS NOT AVAILABLE

In ***Solis v. Union Pacific Railroad Co.***, No. 4:12-cv-00394 (D. Idaho Jan. 11, 2013) (related to 2012-FRS-15), the Secretary of Labor sought enforcement of a preliminary reinstatement order issued by OSHA under the whistleblower provision of the Federal Railroad Safety Act, 49 U.S.C. § 20109. The district court found it had jurisdiction to enforce final orders of the Secretary of Labor, but not a preliminary order of reinstatement issued by OSHA. The court noted a split in the few courts that had addressed the about the issue, that the Ninth Circuit had not yet addressed the issue, and that the only circuit authority on the issue was a spilt decision. *Bechtel v. Competitive*

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Technologies, Inc., 448 F.3d 469 (2d Cir. 2006). The court found that "the fact that a preliminary order can prescribe the same relief as a final order does not mean Congress intended for federal courts to review preliminary orders." The court was not persuaded by the Secretary argument that because AIR21 (which is used for FRSA whistleblower procedure) provides that objecting to a preliminary order will not stay any reinstatement remedy in that order, and therefore there must be an enforcement mechanism. The court noted that a preliminary order issued by OSHA is based only on reasonable cause to believe a complaint has merit, which the court found was too tenative for present enforcement. The court was also not persuaded by the Secretary's alternative argument that the FRSA itself provides the necessary jurisdiction because the FRSA whistleblower provision specifically incorporates the procedures of AIR21 for preliminary orders, and because the appeals paragraph of the FRSA whistleblower provision also incorporates AIR21, which limits appeals to a final order of the Secretary.

XVIII. ATTORNEY'S FEES AND COSTS

ALJ HAS JURISDICTION TO ISSUE AN ATTORNEY FEE DECISION WHILE APPEAL ON THE MERITS IS PENDING BEFORE THE ARB

An ALJ has jurisdiction to issue an attorney fee award in an AIR21 whistleblower case even though the Respondent's appeal on the merits is pending before the ARB. ***Luder v. Continental Airlines, Inc.***, ARB No. 13-026, ALJ No. 2008-AIR-9 (ARB Jan. 7, 2015).

ARB REVIEW OF FEE AND COSTS PETITION FOR WORK BEFORE THE COURT OF APPEALS AND SUBSEQUENT REMAND

In ***Clemmons v. Ameristar Airways, Inc.,*** ARB No. 12-105, ALJ No. 2004-AIR-11 (ARB June 17, 2014), the Complainant submitted a fees and costs petition for litigating the Respondents' appeal before the 5th Circuit and a subsequent remand to the ARB. The ARB reviewed the fee petition and found that it adequately described the legal services rendered, that such services were appropriate, and that the number of hours was reasonable in view of the issues addressed in the case. The ARB also found that the attorney and non-attorney hourly rates were in line with prevailing legal fees. The ARB also found, in any event, that the Respondent had not contested the requested fees and costs. One member of the Board concurred, indicating that the fact that the Respondent did not contest the fee application was sufficient.

ATTORNEY FEE PETITION FOR WORK BEFORE ALJ MUST BE PRESENTED TO ALJ RATHER THAN THE ARB

In ***Nagle v. United Turbines, Inc.***, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB Aug. 8, 2013), the Complainant filed a petition for attorney's fees with the ARB. The ARB noted that the fee petition included requests for the payment of legal fees for services performed and costs incurred before the ALJ. The ARB declined "to address the payment requests for the services and costs incurred in litigation before the ALJ because the ARB does not have jurisdiction to entertain those requests." USDOL/OALJ Reporter at 3 (footnote omitted).

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RELEVANT LEGAL MARKET FOR DETERMINING REASONABLE HOURLY BILLING RATE

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 11-061, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the Complainant retained attorneys from Washington, DC to litigate a case in which the relevant legal market for purposes of determining a reasonable hourly billing rate was the Dallas-Fort Worth area. The ALJ determined that the Complainant had not proved that non-local rates should be awarded by showing a lack of local attorneys equally willing and able to handle the claim. The ALJ therefore decided to award hourly rates based on the prevailing rates in the local area. The Respondent argued that its own attorney's rate of $255.00 an hour was the best evidence of local rates. The ALJ, however, cited a recent federal district court case that awarded $355.00 an hour as the customary billing rate for attorneys in the Dallas division, and found that the Complainant's attorneys' "impressive presentation at trial, demonstrated litigation skills, the number and complexity of the issues, and the sheer length of the litigation" warranted the attorneys' hourly rates originally requested. The ARB found that the ALJ's determination was reasonable as to the rates awarded ($390.00 for one partner; $280.00 for a second partner; $225.00 for one associate; $185.00 for two other associates; and $110 for a paralegal).

ATTORNEY'S FEES; TEAM APPROACH, ESPECIALLY AT TRIAL, AS A COST-EFFECTIVE WAY OF PROVIDING LEGAL SERVICES

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 11-061, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the Respondent challenged the Complainant's attorney fee request, arguing that one attorney's work had benefitted another client. The ALJ found this argument speculative, found no proof of double billing, noted that the argument had been refuted in an affidavit, and found that the disputed time-and-task entries reasonably completed the lead attorney's work and were an "efficient delivery of legal services." The ALJ observed that "courts will permit partner/associate, first/second chair staffing, particularly at trial, and that the ARB has approved a team approach to litigation, using partners and associates, as a cost-effective way of providing legal services." The ARB affirmed.

ATTORNEY'S FEES; BLOCK BILLING DISFAVORED, BUT NO REDUCTION WHEN, IN CONTEXT, THERE WAS SUFFICIENT SPECIFICITY TO DETERMINE THAT THE SERVICES WERE COMPENSABLE

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 11-061, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the ARB reiterated past rulings that it "requires that an attorney's time-and-task entries be sufficiently detailed to demonstrate their reasonableness. Thus, we disfavor the use of block billing (the practice of grouping multiple tasks into a single time entry), and may make a percentage reduction of the requested fees in lieu of attempting to excise surgically those that are not properly billed." In *Clemmons*, the Respondent challenged entries showing that two attorneys shared certain tasks. The ARB agreed with the ALJ that the time charges requested were reasonably necessary to produce the documents in question, and that when read in the context of the billing statement as a whole and in combination with the timeline of the litigation, the entries had provided enough specificity to determine that the services rendered were compensable and in furtherance of the complaint. The ARB therefore declined to make an across-the-board reduction in the overall fee award.

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ATTORNEY'S FEES; ATTORNEY FEE RATES BASED ON *LAFFEY* MATRIX MAY BE FOUND REASONABLE WHERE THEY ARE SHOWN TO BE LOWER THAN THE PREVAILING RATES IN THE RELEVANT LOCAL COMMUNITY

DISFAVORED VAGUE BLOCK BILLING OF ATTORNEY FEES MAY BE ADDRESSED BY REDUCTION OF LODESTAR FEE BY A SET PERCENTAGE RATHER THAN AN ITEM-BY-ITEM REDUCTION

In ***Yates v. Superior Air Charter LLC***, ARB No. 2017-0061, ALJ No. 2015-AIR-00028 (ARB May 28, 2021) (per curiam), the ARB considered Complainant's fee and costs petition for appellate proceedings before the ARB.

Respondent first contested the reasonableness of Complainant's use of the *Laffey* Matrix, which provides a schedule of hourly rates prevailing in Washington, D.C., where the relevant community was, according to Respondent, the Central District of California. The ARB agreed that the relevant community was the Central District of California—but, citing *Barrett v. e-Smart, Techs., Inc.*, ARB Nos. 2011-0088, 2012-0013, ALJ No. 2010-SOX00031, slip op. at 10 (ARB Apr. 25, 2013)—found that Complainant "has met his burden to show that the *Laffey* Matrix is a reasonable rate, because Complainant has demonstrated that the requested rate is lower than the prevailing rates in the community in the Central District of California." Slip op. at 5.

The ARB, however, imposed a reduction of 10% for vague block billing by one law firm. In this regard, the ARB stated:

> The ARB requires that "time and task entries be sufficiently detailed to demonstrate their reasonableness." The ARB "disfavor[s] the use of block billing," which is "the practice of grouping multiple tasks into a single time entry." "Where the billing descriptions do not provide sufficient documentation to determine the reasonableness of the hours claimed, a reviewing body need not engage in an item-by-item reduction of the hours, but may instead reduce the lodestar fee by a set percentage."

Id. at 6 (footnotes omitted).

The ARB also reduced a fee request for one person to reflect that person's status as a law clerk, and removed fee requests for unidentified billers.

ATTORNEY'S FEE; FEE AWARD IS NOT REDUCED SOLELY BECAUSE THE AMOUNT REQUESTED IS LARGER THAN THE DAMAGES RECOVERED

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 11-061, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the Respondent argued that the Complainant's attorney fee request of $230,085.69 was "wildly disproportionate" to the amount of damages awarded of $37,995.09 plus interest. The Respondent requested that the fee and costs be cut to no more than $100,000.00. The ALJ rejected the argument, finding that the Complainant had only requested back pay (voluntarily mitigated by accepting other employment); did not seek compensatory damages; and was successful on every issue raised. The ALJ also noted that the Respondent's "aggressive litigation strategy" undoubtedly

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increased costs for both sides. The ARB affirmed the ALJ denial of the request to cut the fees , noting that it "has routinely declined to reduce attorney's fee awards solely because the amount requested is larger than the damages recovered."

COPYING COSTS, COMPUTER RESEARCH FEES, AND MAILING, FACSIMILE, AND DELIVERY CHARGES ARE REIMBURSABLE WHERE THE LAW FIRM DOCUMENTS THAT SUCH COSTS WERE BILLED DIRECTLY TO THE COMPLAINANT

In ***Clemmons v. Ameristar Airways, Inc.,*** ARB No. 11-061, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the Respondent objected to the Complainant's request for reimbursement for copying costs, computer research fees, and mailing, facsimile, and delivery charges because these are appropriately considered as part of a law firm's overhead. The ALJ awarded such costs because the law firm submitted documentation showing that under the terms of its retainer agreement with the Complainant, such costs were billed directly to the Complainant. The ARB affirmed.

COSTS; TRAVEL COSTS FOR OUT-OF-TOWN ATTORNEYS DEDUCTED WHERE COMPLAINANT DID NOT ESTABLISH A LACK OF QUALIFIED LOCAL ATTORNEYS

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 11-061, ALJ No. 2004-AIR-11 (ARB Apr. 27, 2012), the Respondent objected to the Complainant's request for reimbursement for his Washington, DC attorneys' travel costs because the Complainant could have obtained a local attorney in Dallas-Forth Worth. The ALJ deducted the travel costs because the Complainant did not establish a lack of qualified attorneys in the Dallas area. The ARB affirmed.

ATTORNEY'S FEES; FACT THAT UNION FUNDED LITIGATION DOES NOT ALTER COMPLAINANT'S ENTITLEMENT TO RECOVER FEES (WHICH WOULD BE USED TO REIMBURSE THE UNION); FACT THAT FEE AWARD WAS SUBSTANTIALLY LARGER THAN THE AMOUNT OF DAMAGES AWARDED IS NOT GROUNDS FOR REDUCTION

In ***Furland v. v. American Airlines, Inc.***, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11 (ARB July 27, 2011), the ALJ found that the Respondent had violated the whistleblower provision of AIR21 when it changed the Complainant's paid sick leave to unpaid sick leave and docked his pay. The ALJ awarded $915.64 plus interest, but denied the Complainant's request to have his personnel file expunged. In a subsequent decision the ALJ awarded $38,711.25 in fees and costs. On appeal, the Respondent argued that the fees should not have been awarded because the Complainant's union funded the action; that the fee award should be cut in half because the Complainant only won on half of his claims; and that the requested fee was disproportionate to the Complainant's success in the litigation. The ARB, however, agreed with the ALJ that the Respondent was liable for the fees reasonably incurred by the Complainant in prosecuting his AIR 21 complaint regardless of whether the Complainant or the union on his behalf funded the action. The ARB noted that this did not mean that the Complainant's counsel was entitled to double payment, and that the Complainant had represented that the award would be used to reimburse the union. The ARB agreed with the ALJ that the Complainant had substantially prevailed even though the ALJ had not ordered expungement of the personnel file. The ARB also noted its rulings in past cases

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that it has declined to reduce attorney's fee awards solely because the amount is larger than the damages recovered.

ATTORNEY FEES; COMPLAINANT MUST FILE REQUEST FOR ATTORNEY'S FEES FOR WORK BEFORE THE ALJ WITH THE ALJ RATHER THAN THE ARB; THE ARB DISFAVORS BIFURCATED APPEALS OF ATTORNEY'S FEE AWARDS

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB June 7, 2011), following a remand, the ALJ affirmed his earlier decision in favor of the Complainant and reaffirmed his earlier attorney fees and costs award. On appeal, the ARB affirmed the ALJ's decision on remand on the merits with certain modifications to a back pay award, permitted the Complainant's attorney to file a petition for fees and costs for legal services before the ARB, and denied a request to remand for the ALJ to consider fees and expenses before the ALJ for the reason that the attorney must file a petition for such fees and expenses with the ALJ. The attorney nonetheless requested in his petition to the ARB for attorney's fees an award of fees for 13 hours of work before the ALJ on the earlier remand. The ARB again instructed the attorney to apply to the ALJ for any legal fees for services performed before the ALJ. The attorney requested reconsideration of this ruling. The ARB denied the request for reconsideration stating that it "does not wish to consider bifurcated appeals of an ALJ's fee awards, and that the proper course for Clemmons's attorney is to wrap his request for 13 hours of legal fees on remand into his original request, thereby affording Ameristar the opportunity to challenge the entire amount of the fee request before the ALJ at one time and, depending on the results of the ALJ's consideration of the entirety of the award, affording both parties the opportunity to challenge that decision on appeal to the ARB."

COSTS NORMALLY PART OF OVERHEAD COMPENSABLE WHERE COMPLAINANT WAS DIRECTLY BILLED FOR SUCH EXPENSES

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB Jan. 5, 2011), the Respondent argued that the Complainant's request for $1,252.04 in costs should be rejected because photocopying, postage, research, and delivery expenses are part of the attorney's hourly fee and are not compensable. The ARB acknowledged that it has generally affirmed an ALJ's deduction of expenses associated with on-line legal research, photocopies, and postage because they are normally part of a firm's overhead and reflected in an attorney's hourly rate. In the instant case, however, the Complainant's attorney pointed out that his firm bills its clients directly for such expenses, and provided a declaration of the firm's administrative director showing that the Complainant had been so billed. The ARB thus, approved the request for $1,252.04 to compensate the Complainant for out of pocket expenses.

ATTORNEY FEE PETITION; BLOCK BILLING DISFAVORED UNLESS SUFFICIENT SPECIFICITY ESTABLISHED

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB Jan. 5, 2011), the ARB reiterated that it "requires that an attorney's time and task entries be sufficiently detailed to demonstrate their reasonableness. Thus, we disfavor the use of block billing (the practice of grouping multiple tasks into a single time entry), and may make a percentage reduction of the requested fees in lieu of attempting to excise surgically those that are not properly billed."

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USDOL/OALJ Reporter at 6 (footnote omitted). In the instant case, however, the ARB denied the Respondent's request for a reduction for block billing because, "when read in the context of the billing statement as a whole and in combination with the timeline of the litigation, [the billing entries at issue] do provide enough specificity to determine that the services rendered are compensable and in furtherance of [the Complainant's] defense against [the Respondent's] two appeals." *Id*. (footnote omitted).

ATTORNEY FEE PETITION; ATTORNEY FEES DISPROPORTIONATE TO DAMAGES AWARDED TO COMPLAINANT

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB Jan. 5, 2011), the Respondent challenged the Complainant's attorney fee request for appellate work before the ARB on the ground that the requested fees were disproportionate to the amount of damages awarded to the Complainant. The ARB stated that it has declined to reduce attorney's fee awards solely because the amount is larger than the damages recovered. *See Hoffman v. Boss Insulation & Roofing, Inc.*, ARB Nos. 96-091, 97-128; ALJ No. 1994-CAA-4, slip op. at 5 (ARB Jan. 22, 1997) (policy against chilling attorneys from taking moderately complicated cases where the complainant earned modest wages and hence the back pay sought would be small in relation to the attorney time expended; standard that degree of a plaintiff's success is crucial factor). In the instant case, the ARB found that the Complainant's attorneys achieved essentially complete relief under AIR21, and therefore denied the Respondent's request to reduce the attorney fee award based on its disproportionate size.

ATTORNEY FEES; ARB DECLINES TO REMAND FOR CONSIDERATION OF ATTORNEY FEES AND EXPENSES

In ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-11 (ARB May 26, 2010), the ARB affirmed the ALJ's decision finding in favor of the Complainant on the merits of his AIR21 whistleblower complaint, but declined to remand the case to the ALJ for consideration of attorney fees and expenses. The ARB explained that the Complainant "must file a petition for such fees and expenses with the ALJ."

ATTORNEY FEE PETITION; MERE FACT THAT FEES EXCEEDED DAMAGES AWARD IS NOT A GROUND FOR REDUCING FEE REQUEST

In ***Patino v. Birken Manufacturing Co.***, ARB No. 09-054, ALJ No. 2005-AIR-23 (ARB Nov. 24, 2009), the ARB ruled that although the attorney's fee petition was nearly double the damages award, that fact standing alone was not grounds for reducing a properly supported fee request.

ATTORNEY FEE PETITION; DOCUMENTATION REQUIREMENTS

In ***Evans v. Miami Valley Hospital***, ARB Nos 08-039, 08-043, ALJ No. 2006-AIR-22 (ARB Aug. 31, 2009), the ARB summarized the documentation requirements for petition for attorney's fees and costs in an AIR21 case:

> A successful AIR 21 complainant is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint. A

> prevailing party is entitled to reimbursement for attorney's fees and legal expenses and costs, including expert witness fees.
>
> The ARB has endorsed the lodestar method to calculate attorney's fees. This requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. As the Supreme Court explained in *Hensley v. Eckerhart*, *unreasonably* expended hours include those that are (1) excessive in relationship to the task performed, (2) redundant or duplicative because multiple attorneys performed the same task, or (3) unnecessary or inappropriate because the task is not properly billed to clients.
>
> An attorney seeking a fee award must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs. The burden of proof is also on the attorney to demonstrate the reasonableness of his hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. If the documentation of hours is inadequate, the award may be reduced accordingly. Further, hours that are not properly billed to a client are also not properly billed to an adversary.

USDOL/OALJ Reporter at 2-4 (footnotes omitted).

ATTORNEY FEE PETITION; ALJ'S DISCRETION IN SETTING HOURLY RATES

In ***Evans v. Miami Valley Hospital***, ARB Nos 08-039, 08-043, ALJ No. 2006-AIR-22 (ARB Aug. 31, 2009), the ARB found that the ALJ acted within his discretion in awarding an hourly rate to the Complainant's attorney at the higher end of the spectrum that the expert presented by one of the Respondents had suggested. Although the Respondents objected to the setting of the rates at the high end of the spectrum, the ARB noted that the ALJ had thoroughly discussed the hourly rates of the two principal attorneys and their associates, and the arguments of the Respondents; that he relied on the affidavits of two other attorneys who practiced in the relevant legal community; that the Respondent had suggested no alternative rates; that the aforementioned expert of the Respondent had provided evidentiary support for the hourly rates the ALJ set; and that the ALJ actually presided at the hearing and had the opportunity to evaluate the ability and expertise of the attorneys.

ATTORNEY FEE PETITION; RATE FOR ATTORNEY WHO HAD GRADUATED BUT HAD NOT YET BEEN LICENSED

In ***Evans v. Miami Valley Hospital***, ARB Nos 08-039, 08-043, ALJ No. 2006-AIR-22 (ARB Aug. 31, 2009), a Respondent argued for a reduction in the fee rate assigned to an attorney who had graduated, but who was not yet licensed. The Respondent argued that the rate should be the local rate for law school clerks. The ARB, however, found that the evidence supported the ALJ's findings with regard to local prevailing rates and his selection of an hourly rate was within his discretion.

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ATTORNEY FEE PETITION; BLOCK BILLING AND TIME-AND-TASK ENTRIES; SUFFICIENT DETAIL

In ***Evans v. Miami Valley Hospital***, ARB Nos 08-039, 08-043, ALJ No. 2006-AIR-22 (ARB Aug. 31, 2009), the ARB faulted the ALJ for not elaborating sufficiently on why he found the Complainants' attorneys' time-and-task entries to be sufficiently detailed and to represent time reasonably expended in furtherance of Complainant's case. Specifically, the ARB found that the ALJ's decision was deficient because he failed to make specific findings of fact regarding the reasonableness of the block-billed, time-and-task entries for services. The ARB therefore examined the records itself. In regard to block billing and charges for conferencing, the ARB wrote:

> Block billing is a time-keeping method by which a lawyer enters "the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." Such billing can make it difficult to determine the reasonableness of the hours expended, but the use of block billing does not justify an across-the-board reduction or rejection of *all* hours. Rather, a fixed reduction can be appropriate if a significant number of entries lack adequate detail or are not properly billable to clients.
>
> While block billing does not necessarily deprive a court of a basis upon which to determine the reasonableness of the hours an attorney expended on specific tasks, such bundled or batch billing does impede a court's ability to discern the time spent on tasks that are properly billable and discount the time spent on those that are vaguely described, duplicative, or not compensable at all. For example, entries that describe the service rendered as "office conference" may involve duplication of attorney work or training time and, without justifying detail, are not normally billable to private clients. Also, an unusually large amount of time billed as telephone conferences or internal meetings is not recoverable. In *Welch*, the Sixth Circuit affirmed the district court's reduction of 5.75 hours spent in intra-office conferences as unnecessary given counsel's experience and the petition's lack of justification for such conferences.
>
> Finally, while the mere fact of attorneys conferring with each other does not necessarily constitute duplication of services, the number of hours requested may be reduced when two or more attorneys work on a case because their involvement necessarily tends to generate a certain amount of overlap. For example, a local rule for the Maryland district court provides that only one lawyer is to be compensated for intra-office conferences except those that are reasonably necessary for proper management of the litigation. Thus, a party may only recover time that a single, participating attorney spent at intra-office conferences, client and third-party meetings, and in hearings.
>
> * * *
>
> [A]s we have said, the attorney seeking fees bears the burden of proof to show that the claimed hours of compensation are adequately demonstrated and reasonably expended. Where the billing descriptions do not provide sufficient

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> documentation to determine the reasonableness of the hours claimed, a reviewing body need not engage in an item-by-item reduction of the hours, but may instead reduce the lodestar fee by a set percentage . . . .

USDOL/OALJ Reporter at 8-10 (footnotes omitted). In the instant case, the ARB found that most time entries were, in context, sufficiently specific, but found enough lack of detail or apparent duplication between the two attorneys, to merit an across-the-board reduction of five percent for one of the attorneys, and fifteen percent for the other.

ATTORNEY FEE PETITION; EVIDENTIARY HEARING ON USUAL HOURLY RATE IS NOT MANDATED BECAUSE DOL USES LODESTAR METHOD

In ***Evans v. Miami Valley Hospital***, ARB Nos 08-039, 08-043, ALJ No. 2006-AIR-22 (ARB Aug. 31, 2009), the Respondents argued that the ALJ erred when he denied their requests for an evidentiary hearing to determine the customary billing rates of the Complainant's attorneys, arguing that a hearing is mandated when the facts regarding a fee petition and an hourly rate are disputed. The ARB rejected this argument, writing: "While an attorney's usual hourly rate can constitute evidence of the prevailing market rate, we have held that the prevailing market rate, as established by the attorney seeking a fee, is the key factor in determining a reasonable billing rate under the lodestar method, not the attorney's usual hourly rate or his fee arrangement with other clients." USDOL/OALJ Reporter at 15 (footnotes omitted).

ATTORNEY'S FEES; REASONABLENESS OF ALJ'S ADJUSTMENTS WHERE FEE PETITION FAILED TO ITEMIZE, BUT DID ESTABLISH THAT FEES WERE REASONABLY OR NECESSARILY INCURRED

In ***Florek v. Eastern Air Center, Inc.***, ARB No. 07-113, ALJ No. 2006-AIR-9 (ARB May 21, 2009), the Complainant's principal attorney submitted a an affidavit seeking attorney's fees, but did not itemize hours or services. The ARB agreed with the ALJ's finding that the affidavit contained sufficient specificity to show that his services were reasonably or necessarily incurred. The ALJ attempted to decide what constituted an objectively reasonably amount of time spent performing each task identified in the affidavit, resulting in a reduction of the award as compared to the requested amount. The attorney did not contest the ALJ's adjustments on appeal, and the ARB affirmed the calculation. The ARB also affirmed the ALJ's decision not to award any fees to two other attorneys used by the Complainant where their fee request did not detail tasks, the dates, or time spent, and did not provide a personal affidavit or any other evidence of the rates claimed. The ALJ did, however, award a limited amount for a legal assistant at this law firm.

ATTORNEY'S FEES; CHARGE FOR TRAVEL TIME SET AT ONE-HALF THE ATTORNEY'S REASONABLE HOURLY RATE

In ***Merritt v. Allegheny Airlines, Inc.***, 2004-AIR-13 (ALJ Mar. 28, 2005), the ALJ found that the Complainant's attorney's bill for driving between Rochester, New York and Harrisburg, Pennsylvania was reasonably incurred. The hearing location had originally been in Rochester, but moved to Harrisburg at the Respondent's request for the convenience of its witnesses. The ALJ, however, found that only one-half of the Complainant's attorney's reasonable hourly fee was reasonably charged for travel time.

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ATTORNEY'S FEES FOR WORK BEFORE THE ARB; ARGUMENT THAT RESPONDENT'S APPEAL HAD MERIT IS NOT GROUNDS FOR DENIAL OF FEE AWARD

In ***Negron v. Vieques Air Link, Inc.***, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Mar. 7, 2006), the Respondent challenged the Complainant's fee petition for work before the ARB on the ground that its appeal challenging the ALJ's decision had merit even though the ARB eventually sustained the ALJ's decision in favor of the Complainant. The ARB found that this is not a ground upon which an award of attorney's fees could be denied.

ATTORNEY'S FEES FOR WORK BEFORE THE ARB; COMPLAINANT'S ATTORNEY IS NOT REQUIRED TO DIVULGE FEE ARRANGEMENTS WITH OTHER CLIENTS TO JUSTIFY AN HOURLY RATE

In ***Negron v. Vieques Air Link, Inc.***, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Mar. 7, 2006), the Respondent challenged the Complainant's fee petition for work before the ARB on the ground that the fee petition failed to indicate the hourly rate that the Complainant's attorney charges for cases similar to the Complainant's, an argument that was raised before the ALJ in regard to that fee petition. The ARB agreed with the ALJ that AIR21 "contains no requirement that attorneys justify their billing rates by revealing fee arrangements made with other clients." Slip op. at 2.

ATTORNEY'S FEES FOR WORK BEFORE THE ARB; CHALLENGE TO FEE PETITION BASED ON ALLEGATION OF LACK OF ADEQUATE DETAIL REJECTED WHERE RESPONDENT DID NOT CHALLENGE ANY PARTICULAR ENTRY AND THE PETITION AND THE PETITION WAS OTHERWISE ADEQUATE

In ***Negron v. Vieques Air Link, Inc.***, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Mar. 7, 2006), the Respondent challenged the Complainant's fee petition for work before the ARB on the ground that the fee petition allegedly did not clearly state the attorney's hourly rate and did not contain a clear itemization of the complexity and type of services rendered. The ARB rejected this argument where the Respondent failed to challenge any particular time entry and the fee petition contained an itemized list of time billed on the matter that clearly described the services rendered and the rate charged. The ARB found the detail adequate and the stated overall number of hours for out-of-court service (29.25 hours) reasonable.

XIX. DISMISSALS

DISMISSAL FOR CAUSE; COMPLAINANT'S FAILURE TO COMPLY WITH ALJ'S ORDERS DIRECTING RESPONSES TO RESPONDENT'S INTERROGATORIES AND DISCOVERY REQUESTS

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the ARB affirmed the ALJ's dismissal of the complaint based on the Complainant's failure

to file adequate responses to the Respondent's interrogatories or any response to its discovery requests. The ARB found that the ALJ had given the Complainant more than adequate opportunities to comply and that the Complainant had been well aware of the consequences of refusal to comply. The ARB found that the Complainant failed on review to establish any basis for holding that the ALJ had incorrectly concluded that the response to the interrogatories was essentially a non-response. The Board found that 29 C.F.R. § 18.6(2)(v) provided authority for the ALJ to deny a complaint for failing to comply with an order directing a party to respond to interrogatories or to produce documents, and cited *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-14 (ARB Sept. 30, 2004), for the proposition that the ALJ must have the authority to dismiss cases involving flagrant non-compliance with discovery requests to deter others from disregarding such orders.

DISMISSAL FOR CAUSE; ARB AFFIRMS DISMISSAL WHERE COMPLAINANT FAILED TO COOPERATE IN DISCOVERY DESPITE ALJ'S REPEATED EFFORTS TO GET HIM TO PARTICIPATE IN GOOD FAITH, AND LESSER SANCTION WOULD NOT HAVE BEEN EFFECTIVE

In ***Ho v. Air Wisconsin Airlines***, ARB No. 2020-0027, ALJ No. 2019-AIR-00009 (ARB June 30, 2021) (per curiam), the ALJ granted Respondent's third motion to dismiss Complainant's AIR21 complaint as a sanction for failing to cooperate in discovery. The ALJ had previously denied two prior motions, instead taking actions to try to get Complainant to cooperate. Applying an abuse of discretion standard of review, the ARB affirmed the ALJ's sanction of dismissal.

The ARB began by stating the ALJ's authority in this regard:

> ALJs have an inherent authority to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Failure to comply with a judge's order may result in sanctions, which includes dismissal of the proceeding. When determining whether dismissal is warranted, there are several factors an ALJ may consider, including: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a sanction for failure to cooperate or noncompliance, and (5) whether the efficacy or lesser sanctions were considered.

Slip op. at 4 (footnotes omitted). In the instant case, the ALJ had taken in account Complainant's status as a self-represented litigant, provided three warnings of the potential consequences of failure to cooperate in discovery, provided multiple opportunities for compliance, and postponed the hearing twice to provide more time for discovery. Complainant's responses to interrogatories were incomplete or evasive, and he repeatedly disregarded the ALJ's orders to participate in discovery (as, for example, walking out of deposition despite Respondent having hired a Cantonese interpreter to assist Complainant). Complainant acknowledged that he willfully refused to participate in a deposition, and implied that he was trying to run out the clock on the discovery deadline. The ALJ also had considered Complainant's refusal to comply with her earlier orders, and determined that a lesser sanction would be ineffective. The ARB found that the ALJ had

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applied the correct legal standard and thoroughly considered all five factors. The ARB also found that the procedural background supported the ALJ's reasoning.

The ARB summarily rejected Complainant's argument that the ALJ had not considered Respondent's alleged offer of bribe – the ARB finding that this was a settlement offer. The ARB also rejected Complainant's argument that Respondent had not requested dismissal, finding instead that the ALJ had granted Respondent's third request for dismissal. The ARB rejected Complainant's argument that the ALJ denied him an equal opportunity to conduct discovery, finding that Complainant had not complied with the ALJ's instruction that all discovery requests had to be made thirty days prior the deadline for completion of discovery. The ARB noted lack of evidence to support Complainant's contention that there was a partnership between Respondent and the ALJ. Rather, the ARB found that the ALJ acted with extreme patience and professionalism to encourage Complainant to participate in the hearing in good faith. Thus, the ARB found that the ALJ did not abuse her discretion in dismissing the case with prejudice.

DISMISSAL FOR CAUSE; KNOWING AND VOLUNTARY WITHDRAWAL; FAILURE TO PROSECUTE

In ***Harnois v. American Eagle Airlines***, 2002-AIR-17 (ALJ Sept. 9, 2002), the Respondent filed a motion seeking an order compelling Complainant to comply with discovery requests. The ALJ issued an order setting out the Complainant's obligations relative to discovery and directing Complainant to address whether the case was in a posture to proceed to hearing. Complainant responded complaining that he had received a notice of deposition only one day before it was scheduled and that Respondent's discovery time-frames were unreasonable. Complainant also, apparently frustrated with the DOL handling of the case prior to referral to the OALJ, and in the apparent belief that he could not obtain a fair hearing, moved to withdraw his objection to the Secretary's findings, stating that he might appeal to Congress for an investigation by another agency. The ALJ continued the case, made a number of procedural rulings, encouraged Complainant to find an attorney, and declined to accept Complainant's motion to withdraw. Noting that acceptance of a withdrawal motion is discretionary, the ALJ concluded that a withdrawal must be made "knowingly and voluntarily and that withdrawal under the circumstances [must] not [be] inconsistent with the important policies underlying the Act." The ALJ, considering ALJ's pro se status, and the grounds stated by Complainant for withdrawal, declined to approve withdrawal.

Thereafter, Complainant sent a letter to the ALJ which, *inter alia*, requested that DOL cease any involvement with the complaint. The ALJ issued an order relating to the letter which, *inter alia*, made some discovery rulings, and denied withdrawal of the appeal. The order, however, permitted Complainant to renew his withdrawal of objections with the knowledge that such a dismissal would be final. Thereafter, Respondent moved to dismiss based on Complainant's failure to comply with the earlier discovery order. The ALJ issued an order to show cause, and Complainant did not respond. Based on the circumstances, the ALJ granted Respondent's motion to dismiss.

DISMISSAL FOR CAUSE; FAILURE TO COMPLY WITH ALJ'S ORDER FOR SUBMISSION OF PREHEARING STATEMENTS

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In ***Hafer v. United Air Lines***, 2002-AIR-5 (ALJ June 11, 2002), the ALJ dismissed the case after Complainant failed to timely submit a prehearing statement of position, despite warnings that failure to do so could result in sanctions. The ALJ acknowledged that the sanction of dismissal was extreme, but took into account that there had been several failures by Complainant and that Complainant was represented by counsel. The ALJ noted that it might appear that a lesser sanction of prohibiting Complainant from presenting witnesses or exhibits would be appropriate, but that if Complainant could not present witnesses or evidence, the hearing would be a meaningless exercise.

- *Dismissal for failure to state a claim upon which relief can be granted*

DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; FAILURE TO PLEAD ADEQUATE FACTS SHOWING EMPLOYER-EMPLOYEE RELATIONSHIP OR THAT THE AIRLINE TOOK, OR CAUSED TO BE TAKEN, ADVERSE ACTION

ONCE FACTS BEYOND THOSE ALLEGED IN THE COMPLAINT ARE REVIEWED, MOTION TO DISMISS IS TREATED AS A MOTION FOR SUMMARY DECISION

In ***Fullington v. AVSEC Services, LLC***, ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005), the ARB observed that since 29 C.F.R. Parts 18 and 24 do not contain a rule governing motions to dismiss for failure to state a claim upon which relief can be granted, it is appropriate to apply FRCP 12(b)(6). In the instant case, the ARB affirmed the dismissal of the complaint for failure to state of claim upon which relief could be granted against the Respondent airline where the Complainant, a supervisor for a company that had a cleaning services contract with the airline, failed to allege facts sufficient, if proved, to establish that the airline was her employer within the meaning of AIR21 and that it took or caused the cleaning services contractor to take adverse action against her.

The Board held that to state a cause of action under AIR21 "there must be an employer-employee relationship between an air carrier, contractor or subcontractor employer who violates the Act and the employee it subjects to discharge or discrimination, but that the violator need not be the employee's immediate employer under the common law. * * * The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant's employment. . . . Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. ... If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail." USDOL/OALJ Reporter at 6-7 (citations omitted). In the instant case, the Complainant alleged facts showing that the Respondent airline controlled the quality of a contract employee's work performance, but did not claim that the airline had the ability to hire or fire her, or take any unfavorable personnel actions against her.

The ARB also ruled that to the extent that the ALJ and the ARB reviewed more than just the allegations of the complaint, the airline's motion to dismiss would be handled as a motion for

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summary decision under 29 C.F.R. §§ 18.40, 18.41. The Complainant's mere conclusory allegation in her filings with the ALJ and the ARB that the airline had control over her work and had illegally terminated her were not sufficient under the summary decision standard to overcome the airline's denials that it played any part in the termination of the Complainant's employment. The ARB noted that the Complainant had opportunities to present facts demonstrating that the airline actually played a role in the adverse action taken by the cleaning service contractor, but failed to do so.

- *Stipulated dismissal*

STIPULATED DISMISSAL AGAINST SINGLE RESPONDENT

In ***Davidson v. Miami Air International, Inc.***, 2005-AIR-3 (ALJ May 16, 2005), the Complainant filed a motion to dismiss his complaint with prejudice against one of the Respondents. That Respondent filed a statement voicing no objection to the Complainant's motion. The ALJ interpreted the filing as a stipulated dismissal under Rule 41(a)(1)(ii), and noted that there was split in authority regarding the applicability of that Rule where the dismissal relates only to a single defendant. Since the matter arose in the 11th Circuit which permits such dismissals under Rule 41(a)(1) against a single defendant, the ALJ granted the Complainant's motion.

- *Dismissal for cause before the ARB*

DISMISSAL FOR CAUSE; FAILURE TO FILE OPENING BRIEF OR RESPOND TO ARB'S ORDER TO SHOW CAUSE

In ***Pohl v United Airlines***, ARB No. 06-122, ALJ No. 2003-AIR-16 (ARB Mar. 18, 2008), the ARB dismissed the Complainant's appeal where he failed to file an opening brief and did not respond to the ARB's order to show cause why the appeal should not be dismissed for failure to timely prosecute the appeal.

DISMISSAL FOR CAUSE; REFUSAL TO COMPLY WITH BOARD'S PAGE LIMITS FOR APPELLATE BRIEFS

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 04-102, 2004-AIR-6 (ARB Dec. 30, 2004) (reissued Jan. 5, 2005), *recon. denied* (ARB Feb. 17, 2005), appeal docketed sub nom *Powers v. USDOL*, No. 05-3266 (6th Cir.), the ARB dismissed the Complainant's complaint for failure to file a conforming brief. The Board imposes page limits on briefs, and based on prior experience with the Complainant expressly informed her that: "The initial brief should provide original legal argument in support of the Complainant's claims without relying on incorporation of analysis from the Complainant's previous filings." The Complainant thereafter filed a series of motions for enlargement and for other relief, and when she ultimately did file her brief, it was replete with incorporations by reference and references to other filings.

The Board observed that the Federal Rules of Appellate Procedure do not permit incorporation in briefs of documents and pleadings filed in district courts. The Board observed that dismissal of an appeal for failure to file a conforming brief is a very serious sanction, not to be imposed lightly. Nonetheless, the Complainant's failure to conform her brief to the ARB's express and unambiguous directions was blatant. The Board noted that in a previous case involving this Complainant, it had

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considered the lesser sanction of only requiring the Respondent to respond to the conforming part of the Complainant's brief, but that if the Complainant had relied on the possibility of that lesser sanction, she had seriously misjudged the Board's resolve, as clearly stated in its orders, that unless she filed a conforming brief, the Board would dismiss her appeal. *See Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004) (Board dismissed Powers' appeal for failure to file a conforming brief) (appeal to the United States Court of Appeals for the Sixth Circuit pending).

XX. MISCONDUCT AND SANCTIONS

AWARD OF ATTORNEY'S FEES TO DEFENDANT NOT WARRANTED WHERE, ALTHOUGH APPEAL WAS GROUNDLESS, ARB COULD NOT CONCLUDE THAT THE APPEAL WAS FRIVOLOUS OR BROUGHT IN BAD FAITH

In ***Lempa v. Hawthorne Global Aviation***, ARB No. 2018-0046, ALJ No. 2017-AIR-00008 (ARB July 23, 2019) (per curiam), the ARB adopted the ALJ's decision finding that Complainant did not timely file his AIR21 complaint. The ARB denied Respondent's request for attorney's fees in the amount of $1,000 to be paid by Complainant. The ARB stated: "while we hold that the appeal is groundless, the evidence does not support a conclusion that this appeal was frivolous or brought in bad faith." Slip op.at 3 (citing 29 C.F.R. § 1979.110(a); *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 7 (ARB July 21, 2011) (denying Respondent's motion for attorney's fees)).

JUDICIAL AND QUASI-JUDICIAL IMMUNITY OF JUDGES, ALJ'S AND JUDICIAL CLERKS

In ***Williams v. UAL, Inc.***, No. 13-15299 (9th Cir. Dec. 31, 2013) (unpublished) (case below ARB No. 08-063, ALJ No. 2008-AIR-3), the Ninth Circuit held that the district court properly dismissed the Plaintiff's claims against various federal circuit and district judges and the clerk of the court on the basis of judicial and quasi-judicial immunity. The district court properly dismissed the Plaintiff's claims against UAL, Inc. and the International Association of Machinists and Aerospace Workers defendants as time-barred. *See* 18 U.S.C. § 1514A(b)(2)(D). The court held that the district court lacked subject matter jurisdiction over the Plaintiff's claims against the Department of Labor ("DOL") defendants because he alleged that the DOL improperly denied his complaint under the AIR21 whistleblower provision, and jurisdiction to review the DOL's decision under AIR21 is vested in the Court of Appeals. *See* 49 U.S.C. § 42121(b)(4)(A); *see also Williams v. U.S. Dep't of Labor*, 447 F. App'x 853, 854 (9th Cir. 2011) (sustaining the DOL's denial of Williams's complaint as untimely). The Ninth Circuit further held that:

> the DOL administrative law judges are protected by quasi-judicial immunity. *See Hirsh v. Justices of the Supreme Court*, 67 F.3d 708, 715 (9th Cir. 1995) (per curiam) ("Administrative law judges . . . are entitled to quasi-judicial immunity so long as they perform functions similar to judges . . . in a setting like that of a court.").

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Slip op. at 2.

ATTORNEY'S FEE NOT AWARDED FOR COST OF ESTABLISHING THAT RESPONDENT HAD, IN FACT, TURNED OVER AN EMAIL IN DISCOVERY

In ***Hoffman v. NetJets Aviation, Inc.***, ARB No. 09-021, ALJ No. 2007-AIR-7 (ARB Mar. 24, 2011), the Complainant filed a motion to supplement the record in his AIR21 appeal with an email he argued first became available during an arbitration hearing. The ARB first noted that granting leave to reopen the record is committed to the sound discretion of the ALJ, and that the ARB's standard of review does not permit examination of new evidence. The ARB also found, however, that the email was part of a thread of emails already in the record. The ARB denied the Respondent's request for an attorney's fee to cover the cost of culling the voluminous record for this email because the ARB found that the Complainant's motion was neither frivolous nor brought in bad faith.

RULE 11 SANCTIONS; ARB DOES NOT HAVE THE AUTHORITY TO IMPOSE

In ***Florek v. Eastern Air Center, Inc.***, ARB No. 07-113, ALJ No. 2006-AIR-9 (ARB May 21, 2009), the ALJ declined to rule on the Respondent's motion for Rule 11 sanctions. On appeal, the ARB likewise declined to rule on the motion "as it is well established that the ARB may not impose Rule 11 sanctions." USDOL/OALJ Reporter at 14 (footnote/citation omitted).

SANCTION FOR FRIVOLOUS CLAIM; RESPONDENT'S BURDEN IS TO SHOW COMPLAINT LACKED ARGUABLE BASIS IN EITHER LAW OR FACT

In ***Powers v. Pinnacle Airlines, Inc.***, ARB No. 05-022, ALJ No. 2004-AIR-32 (ARB Jan. 31, 2006), the ARB affirmed the ALJ's dismissal of the complaint based on the Complainant's failure to file adequate responses to the Respondent's interrogatories or any response to its discovery requests, despite having several opportunities to comply. The Respondent requested in its appellate brief that the ARB find that the complaint was frivolous and brought in bad faith and order the Complainant to pay an attorney's fee of $1000 under 29 C.F.R. § 1979.110(e). The Board held that to prevail on such a request the Respondent was required to demonstrate that the complaint lacked an arguable basis in either law or fact. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ No. 2003-AIR-14, slip op. at 6 (ARB Sept. 30, 2004). Because the brief did not address this requirement, the ARB denied the request.

FRIVOLOUS COMPLAINT SANCTION; FACTS AS DETERMINED THROUGH LITIGATION DO NOT NEGATE COMPLAINANT'S ORIGINAL, SINCERE SUSPICION THAT PROTECTED ACTIVITY PLAYED A ROLE IN HER LAYOFF

In ***Parshley v. America West Airlines***, 2002-AIR-10 (ALJ Aug. 5, 2002), the ALJ declined to order Complainant to pay attorney fees up to $1,000 to Respondent based on the frivolous complaint sanction of 49 U.S.C. § 42121(b)(3)(C) and 29 C.F.R. § 1979.109(b), where Complainant had been able to establish a *prima facie* case and had established inconsistencies between Complainant's formal performance appraisals, advancement in the company, and subsequent selection for termination on the basis of performance. The ALJ found that Complainant

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had an understandable and sincere suspicion that her protected activity had been involved in her termination, even though the facts as developed through litigation failed to confirm her suspicion.

COMPLAINT WHICH WAS ALLEGEDLY FRIVOLOUS OR BROUGHT IN BAD FAITH; REQUEST FOR ATTORNEYS' FEES

In ***Peck v. Safe Air International, Inc.***, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the Respondent requested that it be awarded attorney's fees. The Board noted that if a complaint brought under AIR21 section 519 is found to be frivolous or brought in bad faith, it could "'award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.' 49 U.S.C.A. § 42121(b)(3)(C). *See* 29 C.F.R. § 1979.109(b) (ALJ award); 29 C.F.R. § 1979.110(e) (ARB award)." The ARB declined to award such fees, quoting the ALJ's findings that the Complainant had maintained "a firm and sincere belief that he had been the victim of a retaliatory termination" thereby precluding a finding of bad faith, that Peck's conclusion as to coverage "was understandable and not frivolous," and that the circumstances surrounding the discrimination complaint, including the temporal proximity between protected activity and unfavorable personnel action, prevented the complaint from being characterized as frivolous.

See also *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004) (ALJ declined to award fees where Complainant was "understandably suspicious about the motivations behind the adverse employment actions he suffered," and had established temporal proximity, but ultimately was not successful in confirming his suspicions; discussion of meaning of "frivolous" and "meritless").

ATTORNEY CONDUCT; BARRING ENTRY OF APPEARANCE AND ANY REPRESENTATION OF COMPLAINANT

In ***Powers v. Pinnacle Airlines, Inc.***, 2003-AIR-12 (ALJ Apr. 23, 2003), the ALJ issued an order to show cause why the complaint should not be dismissed based on Complainant's failure to cooperate in discovery and based on her conduct in filing legally frivolous, dilatory, redundant, misleading, and inaccurate pleadings with the Court. Eventually, Complainant informed the ALJ that she no longer wished to be represented by her attorney, and the ALJ dismissed the attorney from the case. ***Powers v. Pinnacle Airlines, Inc.***, 2003-AIR-12 (ALJ May 12, 2003). Subsequently, however, Complainant asserted that she might intend to re-employ the attorney, and the ALJ proceeded to rule on an earlier filed motion to disqualify the attorney, and held that the attorney would be barred from entering an appearance on behalf of the Claimant, or otherwise representing her in this matter. ***Powers v. Pinnacle Airlines, Inc.***, 2003-AIR-12 (ALJ May 21, 2003). The ALJ detailed the conduct of the attorney, which had essentially prompted the earlier order to show cause, and wrote:

> The Complainant and her counsel have every right to make vigorous arguments in support of her positions. Neither, however, is entitled to make misleading and factually incorrect statements, to flood the Court with boilerplate and string citations that have nothing to do with the issues presented by this case, and to repeatedly ignore the directives of this Court. Nor is either entitled to attack the dignity and integrity of this Court, in the hopes that I will recuse myself and the Complainant will have another chance with a different judge.

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XXI. DELIBERATE VIOLATION

DELIBERATE VIOLATION OF AIR CARRIER SAFETY REQUIREMENT AS PREVENTING COVERAGE

The ARB found that substantial evidence supported the ALJ's determination that 49 U.S.C. § 4121(d) did not apply to prevent coverage of the Complainant's complaint under AIR21. The Respondent alleged that the Complainant had stated that he had purposely mishandled a repair job to make a point. The Complainant consistently denied making the statement, and it was first presented in attorney-prepared affidavits over a year after the Complainant's discharge. ***Lebo v. Piedmont-Hawthorne***, ARB No. 04-020, ALJ No. 2003-AIR-25 (ARB Aug. 30, 2005).

XXII. SETTLEMENTS

ARBITRATION AGREEMENT FROM PRIOR SETTLEMENT DOES NOT DEPRIVE DOL OF JURISDICTION OVER AIR21 COMPLAINT; DISTRICT COURT, NOT ALJ, HAS JURISDICTION TO ENFORCE SETTLEMENT AGREEMENTS

In ***Mawhinney v. American Airlines***, ARB No. 14-060, ALJ No. 2012-AIR-17 (ARB Jan. 21, 2016), the Respondent in an AIR 21 action filed a motion to compel arbitration and dismiss the claim, alleging that the Complainant signed an arbitration agreement as part of a prior settlement agreement with the Respondent. The ALJ granted the motion, finding that the Complainant agreed to arbitrate all claims arising from his employment relationship with the Respondent. The Complainant appealed the dismissal to the Board.

The Board found that the existence of the settlement agreement did not prohibit the Complainant from pursuing his AIR21 claim. It also noted that the parties simultaneously participated in the arbitration process and the AIR21 claim without either party raising any objection. The Board further found that the issue of whether a settlement agreement has been breached is not a matter for the ALJ or the Board to determine, but rather, may be brought before the district court as a matter of contract dispute as provided by the AIR21 whistleblower provision. Thus, the Board found that the ALJ erred in dismissing the claim and remanded the claim to OALJ for proceedings consistent with the Board's decision. On remand, the Board instructed the ALJ to clarify the positions of the parties given that they willingly participated in both arbitration and the claim under AIR 21.

SETTLEMENTS; AIR21 SETTLEMENT REACHED DURING ARB REVIEW MUST BE SUBMITTED TO ARB FOR APPROVAL

Pursuant to 29 C.F.R. 1979.111(2), the parties are required to submit any settlement agreement reached while the case is pending before the ARB to the ARB for approval. ***Baena v. Atlas Air, Inc.***, ARB No. 03-008, ALJ No. 2002-AIR-4 (ARB Nov. 18, 2002). *See also Baena v. Atlas Air, Inc.*, ARB No. 03-008, ALJ No. 2002-AIR-4 (ARB Jan. 10, 2003).

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SETTLEMENT; AGREEMENT IS NOT VOIDABLE ON THE BASIS OF LACK OF COUNSEL OR FINANCIAL STRESS

In ***Trechak v. American Airlines, Inc.***, ARB No. 03-141, ALJ No. 2003-AIR-5 (ALJ Mar. 19, 2004), the Complainant argued that she should be permitted to be released from a settlement agreement because she signed the agreement against her better judgment when she and her family were ill and desperately in need of money, because she did not have counsel at the time of the settlement during a workers' compensation hearing, and because the Respondent had acted unreasonably in denying her request for 24 hours to think about the offer and get advice.

The ARB noted that it had held in *Beliveau v. Naval Undersea Warfare Ctr.*, ARB No. 99-070, ALJ No. 1997-SDW-6 (ARB June 30, 1999), that "an opposing party's improper conduct may render a settlement agreement voidable, "but had not addressed the specific question whether economic stress and/or lack of counsel can be grounds for voiding a settlement agreement. The Board ruled that "neither lack of counsel, nor financial stress, nor the combination of the two, can be grounds for voiding a settlement agreement. Were it otherwise, employers would have no reason to settle with employees in financial straits or employees acting pro se." The Board also found that the circumstances did not establish that the Respondent's refusal to allow 24 hours to consider the offer to be an unfair manipulation. Rather, the settlement was offered to avoid putting on witnesses on the day of the offer. In addition, the Complainant did not challenge the Respondent's claim that she accepted the offer with the assistance of the workers' compensation court's Administrative Officer, and did not indicate that she was misled by the Respondent as to the terms of the agreement.

XXIII. RES JUDICATA

RES JUDICATA EFFECT OF DOL DECISIONS IN BANKRUPTCY COURT

In ***In re Northwest Airlines Corp.***, No. 05-17930 (Bkrtcy. S.D.N.Y. Aug. 25, 2008) (2008 WL 4019847) (related to 2003-AIR-19 and 20, 2004-AIR-16 and 17), a former pilot for a Debtor before the bankruptcy court filed a claim seeking an unsecured priority claim for wages, compensatory damages and lost sick and vacation pay relating to several federal and administrative claims he had filed against the Debtor. A series of those claims were AIR21 whistleblower complaints adjudicated by DOL's Office of Administrative Law Judges (OALJ) and Administrative Review Board (ARB). The bankruptcy court found that all of the pilot's claims were barred. In regard to the AIR21 whistleblower claims, the bankruptcy court found that the administrative agency decisions of the ARB and OALJ had res judicata effect, as they were acting as judicial bodies and allowed the parties to fully litigate their claims. The bankruptcy court also found that the AIR21 claims were barred because the pilot had not pursued the AIR21 appeal procedures on his OALJ claims.

XXIV. RELATIONSHIP TO OTHER LAWS/FORUM

- *Federal Arbitration Act*

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ARBITRATION OF AIR21 RETALIATON COMPLAINT BASED ON JUDICIAL ENFORCEMENT OF TERM OF PRIOR SETTLEMENT AGREEMENT; ALJ FOUND TO HAVE CORRECTLY GRANTED SUMMARY DECISION DISMISSING DOL COMPLAINT BASED ON PRECLUSIVE EFFECT OF JUDICIALLY CONFIRMED ARBITRATION AWARDS

In ***Mawhinney v. American Airlines, Inc.***, ARB No. 2020-0067, ALJ No. 2012-AIR-00017 (ARB Feb. 4, 2021) (per curiam), the ARB adopted the ALJ's decision granting summary decision in favor of Respondent, finding that the ALJ's decision was accordance with the law and was well-reasoned, and that Complainant's appellate briefing failed to show that the ALJ erred.

The ALJ's grant of summary decision was based on the fact that a previous settlement agreement between the parties had included a provision that all future employment disputes were required to be addressed in arbitration. After a district court issued an order compelling Complainant to engage in arbitration regarding his AIR21 complaint, the ALJ placed the DOL hearing in abeyance. Two related arbitrations were then held, and both were confirmed by the District Court, and then affirmed by the Court of Appeals. The ALJ granted summary decision as to the DOL action based on the preclusive effect of the arbitration awards as confirmed by the Federal courts. The ALJ explained:

> Under the Federal Arbitration Act, a judgment confirming an arbitration award "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13(c). Thus, the judgments entered on the two arbitrations are final judgments of a district court, and it is established that (1) Mr. Mawhinney was not terminated in retaliation for engaging in protected activity, and (2) Mr. Mawhinney may not further pursue his AIR21 claim. The latter final judgment is sufficient to grant AA's motion. And because the judgments confirming the arbitration awards have the same force and effect as a judgment in a civil action, I need not determine whether the arbitrator's findings alone form a basis for granting summary decision based on res judicata; the arbitration proceedings resulted in the equivalent of a judicial judgment in favor of Respondent, which has been affirmed, and Complainant has no further recourse.
>
> Because I am granting summary decision based on the preclusive effect of the arbitration awards, as confirmed by the judgments of the district court that were themselves affirmed by the Court of Appeals, I need not and do not address Respondent's argument regarding collateral estoppel. And the grant of summary decision makes moot Respondent's motion for summary decision on the merits.

Mawhinney v. American Airlines, Inc., No. 2012-AIR-00017, slip op. at 4 (ALJ Sept. 3, 2020).

ARBITRATION; WHERE RESPONDENT (THE "WHISTLEBLOWER") CHOSE NOT TO ENGAGE IN AN ARBITRATION OF HIS AIR21 COMPLAINT AND INSTEAD TO RELY ON A CHALLENGE TO THE UNDERLYING MOTION TO COMPEL SUCH ARBITRATION, IT WAS TOO LATE TO RAISE OBJECTIONS TO THE

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ARBITRATION AWARD IN RESPONSE TO THE PETITIONER'S (THE EMPLOYER'S) PETITION TO CONFIRM THE ARBITRATION AWARD

In ***Am. Airlines, Inc. v. Mawhinney***, No. 18-cv-00731 (S.D. Cal. Apr. 29, 2019) (2019 U.S. Dist. LEXIS 72990) (case below ARB No. 14-060, ALJ No. 2012-AIR-17), American Airlines ("American") petitioned the court to confirm an arbitration award.

Background

The case has a long procedural history. In brief, Mawhinney was fired in 2001, and he initiated actions, including a DOL administrative action, alleging that the firing was in retaliation for whistleblowing. The parties reached a settlement, which included a provision that all future employment disputes be resolved exclusively through private arbitration. Mawhinney continued to work for American until 2011, when he his employment was terminated. Mawhinney initiated two separate proceedings, requesting private arbitration pursuant to the 2002 settlement agreement, and filing an AIR21 administrative complaint with USDOL.

American prevailed on the private arbitration; the district court confirmed the arbitration award and the Ninth Circuit affirmed. In the meantime, the district court had denied American's motion to enjoin the administrative action, or alternatively to compel the parties to arbitrate the claims in the administrative action. American filed a new civil action and moved to compel arbitration in the administrative action. The motion was granted by the district court. The Ninth Circuit denied Mawhinney's motions to stay the arbitration, which went forward while the appeal was pending. Mawhinney's only participation was to move to stay notwithstanding the Ninth Circuit's denial of a stay. The arbitrator granted American's motion for summary disposition on the ground that Mawhinney's claims of employment retaliation and wrongful termination were already decided in the first arbitration and therefore barred under the doctrines of res judicata and collateral estoppel. After Mawhinney did not timely move to vacate, amend or correct the arbitration award, American filed the instant petition with the district court to grant the second arbitration award.

While the petition was pending, the Ninth Circuit held that the claims between Mawhinney and American were properly subject to arbitration, affirming the district court. *See American Airlines, Inc. v. Mawhinney*, 904 F.3d 1114 (9th Cir. 2018), *pet. for reh'g den. American Airlines, Inc. v. Mawhinney*, No. 16-55006 (9th Cir. Nov. 5, 2018), and *cert. den. Mawhinney v. American Airlines, Inc.*, No. 18-1032 2019 WL 485453 (Mem) (U.S. Apr. 1, 2019).

Mawhinney's opposition

Mawhinney asked the court to deny American's petition and order that his administrative action be allowed to proceed — urging the court "to reject the Ninth Circuit's 'fallacious' and 'erroneous' conclusion, and allow the action to be litigated before an Administrative Law Judge." Slip op. at 5 (record citation omitted). The court explained how that argument "reflects a fundamental misunderstanding of the relationship between trial and appellate courts." *Id*. "As a lower trial court, this Court defers to the Ninth Circuit and the U.S. Supreme Court, and is bound by those courts' decisions. Here, Mawhinney has lost his appeal before the Ninth Circuit, and the Supreme Court denied certiorari. The underlying decision to compel arbitration is thus no longer disputable." *Id*.

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The court noted that Mawhinney had missed the three month window for challenging the arbitration award and ruled that he could not now do so through his opposition to American's petition. Although Mawhinney was proceeding pro se, he was aware of the procedure, having properly moved to vacate the first arbitration. The court found that it had been a tactical decision not to engage in the second arbitration and instead rely on a challenge to the underlying motion to compel the arbitration. "To the extent Mawhinney now challenges the arbitrator's ruling that res judicata and collateral estoppel apply to the administrative action, the arguments are untimely and unavailing." *Id*. at 6 (record citation omitted). The court thus granted American's petition to confirm arbitration award.

ARBITRATION; RESPONDENT DID NOT WAIVE ITS RIGHT TO ARBITRATE BY WAITING TO MOVE TO COMPEL UNTIL AFTER OSHA INVESTIGATION WAS COMPLETE

In ***Am. Airlines v. Mawhinney***, Nos. 16-56638, 16-56643 (9th Cir. Sept. 26, 2018) (2018 U.S. App. LEXIS 27450; 2018 WL 4609254), the Ninth Circuit "consider[ed] whether the district court properly compelled arbitration of Robert Steven Mawhinney's claims for whistleblowing retaliation, brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ('AIR21'), 49 U.S.C. § 42121." Slip op. at 4. Mawhinney argued on appeal that "the Airline waived its right to arbitrate his AIR21 action by participating in the initial investigation of Mawhinney's complaint at DOL." *Id*. at 12. The Ninth Circuit rejected the argument, finding that there had been "no 'litigation' at DOL from which to infer a waiver." The court held:

> As the Airline could not have compelled arbitration of DOL's independent investigation, the Airline cannot be faulted for failing to have sought to do so. The Airline's demand for arbitration, filed with the ALJ shortly after [a] bankruptcy stay was lifted, reflects a timely and diligent assertion of the right to arbitrate, and so precludes a finding of waiver.

Id. at 13.

ARBITRATION; AIR21 DOES NOT FORBID ENFORCEMENT OF ARBITRATION AGREEMENT; WHERE OSHA FOUND NO VIOLATION, DOL'S INVESTIGATORY ROLE ENDED; IN THAT SITUATION HEARING BEFORE OALJ ONLY PROVIDED FORUM FOR RESOLUTION OF PRIVATE DISPUTE AND DOL WAS NOT A PARTY; OALJ PROCEEDING, THEREFORE, WAS CONTROLLED BY PARTIES' ARBITRATION AGREEMENT

In ***Am. Airlines v. Mawhinney***, Nos. 16-56638, 16-56643 (9th Cir. Sept. 26, 2018) (2018 U.S. App. LEXIS 27450; 2018 WL 4609254), the Ninth Circuit "consider[ed] whether the district court properly compelled arbitration of Robert Steven Mawhinney's claims for whistleblowing retaliation, brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ('AIR21'), 49 U.S.C. § 42121." Slip op. at 4. Mawhinney argued on appeal that "his AIR21 action cannot be arbitrated because AIR21 itself forbids it." The court noted that there is no statutory language forbidding arbitration, and that Mawhinney was instead relying on "the importance of DOL's role in hearing and resolving retaliation complaints under AIR21." *Id*. at 13. The court rejected this argument, finding that once OSHA ceased its investigation with a finding

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of no violation, DO"s investigatory role was complete. In regard to Mawhinney's hearing request before an ALJ, the court found that

> the AIR21 action at that point concerned only Mawhinney's purely private dispute with the Airline, not the government's independent interest in advancing the public interest in airline safety. Once DOL found no violation, that is, the agency provided only the forum, but was not a party to the dispute. The proceeding before the ALJ was therefore squarely controlled by the arbitration provision in the Agreement.

Id. at 14.

ARBITRATION; WHERE AGREEMENT PROVIDING FOR ARBITRATION OF FUTURE DISPUTES WAS PART OF A SETTLEMENT OF AN EMPLOYMENT DISPUTE, FEDERAL ARBITRATION ACT DID NOT APPLY AS THE FAA GOVERNS "CONTRACTUAL" ARBITRATION AGREEMENTS

In ***Am. Airlines v. Mawhinney***, Nos. 16-56638, 16-56643 (9th Cir. Sept. 26, 2018) (2018 U.S. App. LEXIS 27450; 2018 WL 4609254), the Ninth Circuit "consider[ed] whether the district court properly compelled arbitration of Robert Steven Mawhinney's claims for whistleblowing retaliation, brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ('AIR21'), 49 U.S.C. § 42121." Slip op. at 4. Mawhinney argued on appeal that the arbitration agreement fell "within the statutory exemption [found in the Federal Arbitration Act (FAA)] for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1." *Id*. at 16. The court rejected the argument, first noting that it was doubtful that the cited FAA exclusion applied because the agreement was not the contract under which Mawhinney had been hired, or under which the terms and conditions of employment had been set. Rather, here, the agreement was found in a settlement agreement providing for the arbitration of later disputes.

The court also found that the Respondent was technically seeking to enforce an arbitration agreement that had been incorporated into a DOL order approving the agreement. It was not seeking, as required for the FAA to govern, a *contractual* arbitration agreement. The court ruled: "The [DOL] order incorporates the terms of the Agreement, including the arbitration provision for future disputes, and is *separately* enforceable under 42 U.S.C. § 42121(b)(6)(A)." *Id*. at 17 (emphasis as in original; footnote omitted).

ARBITRATION; WHERE EMPLOYER HAD ENTERED INTO SETTLEMENT OF PRIOR RETALIATION DISPUTE THAT INCLUDED AN AGREEMENT FOR ARBITRATION OF LATER DISPUTES, UNION COULD NOT ENFORCE THE ARBITRATION AGREEMENT AS AN "AGENT" OF EMPLOYER (DESPITE RULING BY THE ARB THAT THE UNION WAS A "CONTRACTOR" WITHIN THE COVERAGE OF AIR21 BECAUSE IT HAD BEEN PARTY TO A COLLECTIVE BARGAINING AGREEMENT)

WHETHER A UNION IS A "CONTRACTOR" WITHIN THE SCOPE OF AIR21 COVERAGE; ALTHOUGH NOT DECIDING THE ISSUE, THE NINTH CIRCUIT INDICATES DOUBT OF THE VALIDITY OF ARB FINDING THAT UNION WAS A

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"CONTRACTOR" WITHIN THE COVERAGE OF AIR21 BECAUSE IT HAD BEEN PARTY TO A COLLECTIVE BARGAINING AGREEMENT

In ***Am. Airlines v. Mawhinney***, Nos. 16-56638, 16-56643 (9th Cir. Sept. 26, 2018) (2018 U.S. App. LEXIS 27450; 2018 WL 4609254), the Defendant-Appellee (Mawhinney) had filed a claim that the Transport Workers Union, Local 591, had joined American Airlines in alleged retaliation in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ('AIR21'), 49 U.S.C. § 42121. The ALJ had found that the Union fell outside the scope of AIR21. The ARB reversed and remanded, finding that a union could be a "contractor" by virtue of being party to a collective bargaining agreement with an employer. The union then brought an action seeking to enforce an agreement for arbitration of later disputes that American Airlines had negotiated in settlement of an earlier retaliation complaint. The ALJ in that earlier case had approved the settlement agreement.

On appeal, the Union acknowledged that it was not named as a party to the settlement agreement or to its arbitration provision, but contended that it could enforce the arbitration provision because under the circumstances, it qualifies as an "agent" of the Airline, which was a category of third parties specifically authorized in the Agreement to enforce the arbitration provision against signatories. The district court had found that the Union's argument was at least colorable, and invoked the maxim that doubts about the scope of arbitrable issues should be resolved in favor of arbitration. The Ninth Circuit, however, reversed. The court held:

> Under the established meaning of the term "agent," and the statutory role of the Union under the Railway Labor Act, 45 U.S.C. §§ 151–165, 181–188, the Union simply was not the Airline's agent with regard to its role in Mawhinney's employment dispute, and so was not covered by the arbitration provision in the Agreement.

Slip op. at 20. The Ninth Circuit noted that the Union's argument was "counterfactual," driven by the ARB's conclusion that it has "contractor" status. The court stated that it does do not resolve cases based on how another forum is approaching parallel litigation, albeit noting that the ARB's decision was "neither final nor certain." *Id*. at 22. The court found that the district court's invocation of the federal policy regarding the scope of arbitrable issues was inapposite as the issue here was not about ambiguities about the scope of the arbitration clause, but whether a particular party is bound by the arbitration agreement.

Although the court did not reach the question of whether the Union was a "contractor" for purposes of AIR21, finding that this issue was not before it, the court included the following footnote in its opinion:

> It may well be that the Union is no more a "contractor" under AIR21 than it is an "agent" under the Agreement. The ARB's view, under which any party to a contract is a "contractor," is strangely literal, and seems to confuse contracting out or for something with simply being a party to any contract. *Cf. Contractor, Webster's Third New International Dictionary* (2002) ("[O]ne that formally undertakes to do something for another . . . ; one that performs work . . . or provides supplies on a large scale . . . according to a contractual agreement . . . ."). In any event, AIR21

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> itself defines "contractor" narrowly, as "a company that performs safety-sensitive functions by contract for an air carrier." 49 U.S.C. § 42121(e). There is little reason to believe the Union meets that definition — that is, that the Union, which is a representative for the workers in collective bargaining and in the grievance process, "performs safety-sensitive functions" *for* the Airline.

Id. at 21-22, n.10 (emphasis as in original).

ARBITRATION AGREEMENT FROM PRIOR SETTLEMENT DOES NOT DEPRIVE DOL OF JURISDICTION OVER AIR21 COMPLAINT; DISTRICT COURT, NOT ALJ, HAS JURISDICTION TO ENFORCE SETTLEMENT AGREEMENTS

In ***Mawhinney v. American Airlines***, ARB No. 14-060, ALJ No. 2012-AIR-17 (ARB Jan. 21, 2016), the Respondent in an AIR 21 action filed a motion to compel arbitration and dismiss the claim, alleging that the Complainant signed an arbitration agreement as part of a prior settlement agreement with the Respondent. The ALJ granted the motion, finding that the Complainant agreed to arbitrate all claims arising from his employment relationship with the Respondent. The Complainant appealed the dismissal to the Board.

The Board found that the existence of the settlement agreement did not prohibit the Complainant from pursuing his AIR21 claim. It also noted that the parties simultaneously participated in the arbitration process and the AIR21 claim without either party raising any objection. The Board further found that the issue of whether a settlement agreement has been breached is not a matter for the ALJ or the Board to determine, but rather, may be brought before the district court as a matter of contract dispute as provided by the AIR21 whistleblower provision. Thus, the Board found that the ALJ erred in dismissing the claim and remanded the claim to OALJ for proceedings consistent with the Board's decision. On remand, the Board instructed the ALJ to clarify the positions of the parties given that they willingly participated in both arbitration and the claim under AIR 21.

SECTION 1 EXEMPTION UNDER THE FEDERAL ARBITRATION ACT REGARDING ENFORCEMENT OF ARBITRATION AGREEMENTS APPLIES TO EMPLOYEES ENGAGED IN INTERSTATE AIR TRANSPORTATION OF PASSENGERS

In ***Willbanks v. Atlas Air Worldwide Holdings Inc.***, ARB No. 14-050, ALJ No. 2014-AIR-10 (ARB Mar. 18, 2015), the ALJ granted the Respondent's motion to stay the AIR21 hearing and to order the Complainant to arbitrate her AIR21 claim in accordance with a pre-employment arbitration agreement. The Complainant petitioned the ARB for interlocutory review. The ARB granted the petition, vacated the ALJ's order, and remanded for resumption of the AIR21 hearing.

The ARB stated that: "The Federal Arbitration Act (FAA) provides that arbitration agreements 'shall be valid, irrevocable, and enforceable' unless grounds 'exist at law or in equity for the revocation of any contract.' 9 U.S.C.A. § 2. The FAA nevertheless exempts from coverage all 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C.A. § 1." USDOL/OALJ Reporter at 4. The ARB recognized U.S. Supreme Court authority to the effect that the Section 1 exclusion regarding arbitration agreements is to be narrowly construed, but nonetheless found that airline employees

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engaged in interstate commerce are not precluded from coverage under the exemption. The ALJ had interpreted the law as holding that the FAA's arbitration exemption is limited to "transportation workers . . . actually engaged in the movement of goods in interstate commerce." *Id*. at 4-5, citing ALJ Order at 2 (quoting *Circuit City*, 532 U.S. at 112). The ARB, however, reviewed the caselaw and legislative background, and held: "Employees engaged in the interstate air transportation of passengers, such as [the Complainant], are to be afforded the same rights as are afforded railroad employees under the FAA, and thus entitled to the same exclusion from arbitration pursuant to 9 U.S.C.A. § 1." *Id.* at 8.

ARB GRANTS INTERLOCUTORY REVIEW OF ALJ ORDER STAYING HEARING AND REQUIRING AIR21 COMPLAINANT TO ARBITRATE PURSUANT TO EMPLOYMENT CONTRACT

In ***Willibanks v. Atlas Air Worldwide Holdings, Inc.***, ARB No. 14-050, ALJ No. 2014-AIR-10 (ARB July 17, 2014), the ARB granted the Complainant's petition for interlocutory review of the ALJ's order staying the hearing on the Complainant's AIR21 complaint and requiring the Complainant to arbitrate her AIR21 complaint pursuant to the arbitration provision of her employment agreement with the Respondent, and the Federal Arbitration Act. The ARB found that the interlocutory appeal met the "exceptional circumstances" standard for entertaining such appeals because, should the ARB delay consideration of the question, "there exists the distinct prospect that not only will Willbanks be precluded from further Department of Labor or court consideration of her AIR21 claim, but we well may be thwarting the underlying purposes and policies Congress sought to achieve by affording whistleblower protection under AIR 21." AIR21, the ARB noted, is more than just a means for vindication of employee rights — it has the underlying purpose of ensuring the safety of the traveling public.

The ARB also found that "the circumstances presented in this case meet the collateral order exception to the finality requirement set out in *Cohen v Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)." Slip op. at 3 (citation omitted). The ALJ's decision conclusively determined the disputed question; the ALJ's decision resolved an important issue completely separate from the merits of the action; and the ALJ's order may become effectively unreviewable if interlocutory review is not granted.

COLLATERAL ATTACK LIMITATION; COMPLAINANTS' DECISION TO PURSUE BINDING ARBITRATION UNDER A CBA DOES NOT CONFLICT WITH PURSUIT OF AIR21 WHISTLEBLOWER COMPLAINT

In ***Lucia v. American Airlines, Inc.*** , ARB Nos. 10-014, -015, -016, ALJ Nos. 2009-AIR 15, 16, 17 (ARB Sept. 16, 2011), the ALJ dismissed the Complainants' AIR21 whistleblower complaints because they had pursued remedies in binding arbitration under a collective bargaining agreement. The ARB found that the ALJ erred in citation of 49 U.S.C. § 4212(b)(4)(B), which limits a collateral attack on an order of the Secretary of Labor under AIR21. The ARB found that a remedy in arbitration does not work to collaterally attack an AIR21 remedy because the causes of action are different and wholly independent. Although the arbitration and the AIR21 proceedings could have varying outcomes, they would not conflict because the actions have independent causes and purposes. Further, any judicial relief order could be equitably structured so to avoid duplicative recovery.

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- *State laws*

STATE WHISTLEBLOWER CLAIM REGARDING AIRCRAFT SAFETY NOT PREEMPTED BY AIRLINE DEREGULATION ACT, AND AIR 21'S FEDERAL WHISTLEBLOWER PROTECTION REMEDY DOES NOT INDICATE OTHERWISE

In ***Ulysse v. AAR Aircraft Component Services***, 841 F. Supp. 2d 659 (E.D.N.Y. Jan. 23, 2012), the plaintiff, an aircraft mechanic, complained to his supervisors about his employer's instruction book which described when to repair, and when to not repair, airline parts, alleging that the instructions violated FAA rules and regulations. He also complained about the quality of the replacement parts that his employer provided to the mechanics. The plaintiff believed he was terminated as a result of these complaints, and filed a suit in the Supreme Court of the State of New York under New York State's whistleblower statute. The defendants removed the suit to the United States District Court for the Eastern District of New York, arguing that the District Court had federal question jurisdiction because the plaintiff's state law claim is completely preempted by the Airline Deregulation Act (ADA) of 1978.

In finding that the ADA did not completely preempt the plaintiff's retaliation claim, and remanding the case to the state court for lack of federal question jurisdiction, the Court considered whether the 2000 amendments to the ADA -- i.e. the enactment of the Whistleblower Protection Program (WPP), 49 U.S.C. § 42121 -- impacted the preemption analysis. The defendant argued that the existence of the WPP implies that Congress intended to completely foreclose state whistleblower claims relating to airline safety and FAA compliance. The district court disagreed, and found that "the WPP does not alter the scope of the ADA preemption provision so that the court's conclusion should be altered in any way." *Ulysse* at 681. The court noted that New York's whistleblower statute and the WPP provide for very different procedures, which in the court's view "lends credence to the notion that enactment of one would not necessarily have the intent to displace the other," and also notes that the text of the WPP "says nothing whatsoever about preemption." *Id.* at 680.

STATE WRONGFUL TERMINATION CLAIM BASED ON PUBLIC POLICY EMBODIED BY AIR21; FEDERAL COURT LACKED JURISDICTION TO HEAR THE CLAIM

In ***Conklin v. Moran Industries, Inc.***, CA No. 11-411, 2011 WL 2135647 (E.D. Pa. May 31, 2011), two pilots made complaints that the defendants were not complying with FAA regulations and flight safety laws, and were both subsequently terminated. The plaintiffs first filed a wrongful termination claim in state court, asserting that their termination violated the public policy of Pennsylvania as set forth in AIR21.

The defendants removed the case to federal district court, arguing that because the plaintiffs would have to prove that their termination violated AIR21 to be successful on their claim, the federal court had federal question jurisdiction over the claim. However, the court explained that the defendants have the burden establishing that federal district court has subject matter over the plaintiffs' wrongful termination claim, but the defendants had failed to argue that policy evidenced by AIR21 is, in fact, the public policy of Pennsylvania. Consequently, the defendants failed to meet their burden of proving subject matter jurisdiction.

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Moreover, assuming Pennsylvania's public policy incorporates the policies embodied in AIR21's whistleblower protection provision, the court found that it did not have federal question jurisdiction over the claim because the parties did not dispute the meaning of AIR21 itself, nor did the claim involve an "interpretation or application of AIR21 that would implicate significant federal interests." Consequently, plaintiffs' claim did not involve a substantial question of federal law, and the court remanded the case to state court.

STATE LAW PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT SUIT COULD NOT BE MAINTAINED WHERE PLAINTIFF HAD ADEQUATE REMEDY UNDER AIR21; ALTHOUGH PLAINTIFF RAISED BOTH SAFETY *AND QUALITY* CONCERNS, MAGISTRATE FOUND THAT IN AIRCRAFT CONTEXT, SAFETY AND QUALITY ARE ONE IN THE SAME; FACT THAT PLAINTIFF DID NOT PURSUE AN AIR21 COMPLAINT DOES NOT CREATE A CAUSE OF ACTION IN FEDERAL COURT

In ***Hobek v. Boeing Co.***, No. 16-cv-3840 (D. S.C. June 8, 2017) (2017 U.S. Dist. LEXIS 115343) (Magistrates' Report and Recommendation adopted by the court on July 6, 2017), the Plaintiff filed a complaint that alleged, in pertinent part, a cause of action for wrongful discharge in violation of public policy— retaliation for raising concerns about quality and safety. The Defendant moved for dismissal of the public policy cause of action on the ground that AIR21 is an existing statutory remedy. The Plaintiff argued that AIR21 is limited to reports regarding safety and does not include quality complaints or age discrimination. The Magistrate was not persuaded, finding that the Plaintiff had a reasonable means of redress under AIR21 based on his allegations. The district court adopted the Magistrate's recommendation. The district court noted:

Although Plaintiff has argued that his complaints related to both safety *and quality* so were not adequately covered by the AIR21 statutory remedy, the Magistrate found that, in the aircraft context, safety and quality are one and the same. In response to Plaintiffs argument that the AIR21 statutory remedy is only available to individuals who had made a report within the AIR21 framework, the Magistrate explained that Plaintiffs failure to exercise his rights under AIR21 does not create a cause of action in federal court.

Hobek v. Boeing Co., No. 16-cv-3840 (D. S.C. July 20, 2017) (2017 WL 3085856; 2017 U.S. Dist. LEXIS 112939), slip op. at 2 (emphasis as in original). Because the Plaintiff had only raised general objections to the Magistrate's report and recommendations, the District Court reviewed the Magistrate's determination under a clear error standard.

PREEMPTION OF STATE LAW CLAIM; COURT GRANTS LEAVE TO FILE ADMINISTRATIVE COMPLAINT WITH DOL

The Plaintiff's state law claim was found to be preempted by the Whistleblower Protection Program for the Airline Deregulation Act, which covers certain claims brought by employees against their air-carrier employers. *See* 49 U.S.C. § 41713; 28 U.S.C. § 1331. The court, however, granted the Plaintiff leave to file an administrative whistleblower complaint with the U.S. Department of Labor. ***Portalatin v. Pro Pilots, LLC***, No. 17-cv-3247 (D. N.J. July 6, 2017) (2017 U.S. Dist. LEXIS 103907; 2017 WL 2881346) (unpublished).

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PREEMPTION OF STATE WRONGFUL DISCHARGE CLAIM BY THE AIRLINE DEREGULATION ACT; 8TH CIRCUIT RETREATS FROM *BOTZ*

"We ... hold that the [Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1)] does not expressly pre-empt Watson's state-law wrongful-discharge claims involving *post hoc* reporting of alleged violations of air-safety regulations." ***Watson v. Air Methods Corp.***, 870 F.3d 812 (8th Cir. Aug 31, 2017) (en banc), slip op. at 2 (overrules *Botz v. Omni Air International*, 286 F.3d 488 (8th Cir. 2002), in relevant part).

PREEMPTION; STATE EMPLOYEE PROTECTION LAW

In ***Gary v. The Air Group, Inc.***, No. 02-3534 (3rd Cir. Dec. 16, 2004), the Third Circuit held that a pilot's complaint brought under New Jersey's Conscientious Employee Protection Act was not preempted by the Airline Deregulation Act as amended by the Whistleblower Protection program at 29 U.S.C. 42121 where the claim was not "related to" the "service of an air carrier" within the meaning of 49 U.S.C. 41713(b)(3). In so ruling, the court found the Eleventh Circuit's analysis in *Branche v. Airtran Airways, Inc.*, 343 F.3d 1248 (11th Cir. 2003) more persuasive than the Eight Circuit's analysis in *Botz v. Omni Air Int'l*, 286 F.3d 488 (8th Cir. 2002).

ISSUE PRECLUSION; COLLATERAL ESTOPPEL; EFFECT OF OSHA FINDING THAT WAS NOT TIMELY APPEALED FOR AN ALJ HEARING

In ***Murray v. Alaska Airlines, Inc.***, No. 06-15847 (9th Cir. Apr. 10, 2008), OSHA had investigated the Plaintiff's AIR21 whistleblower complaint but found a lack of causation. Despite notice of the opportunity to request a de novo hearing before an ALJ, the Plaintiff neither requested a hearing nor withdrew his complaint. Thus, the OSHA finding became the Secretary's final decision by operation of law. Subsequently, the Plaintiff filed a state whistleblower claim in California state court. The Defendant removed the case to federal court based on diversity jurisdiction and the district court dismissed based on collateral estoppel. On appeal to the Ninth Circuit, the court issued an Order Requesting That the Supreme Court of California Decide a Question of California Law. The court framed the issue as:

> Should issue-preclusive effect be given to a federal agency's investigative findings, when the subsequent administrative process provides the complainant the option of a formal adjudicatory hearing to determine the contested issues de novo, as well as subsequent judicial review of that determination, but the complainant elects not to invoke his right to that additional process?
> The court found that California state law would control, but found that:
>
> There do not appear to be squarely controlling California cases addressing whether an "opportunity to litigate" requires that an actual hearing with adequate procedural safeguards take place, or if instead it is enough that the agency's procedures afford the complainant the right to seek an adjudicatory hearing after the findings are made.

- *United States Constitution*

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ARB'S JURISDICTION TO CONSIDER CONSTITUTIONAL ISSUES

In ***Williams v. United Airlines***, ARB No. 06-106, ALJ No. 2003-AIR-11 (ARB Apr. 30, 2008), the ARB held that it did not have jurisdiction to consider the Complainant's argument that he has a constitutional right to a hearing on his AIR21 whistleblower complaint even though the Respondent had been discharged in bankruptcy.

XXV. BANKRUPTCY

BANKRUPTCY; ACTIONS OF RESPONDENT OCCURRING AFTER FILING OF BANKRUPTCY

In ***Sassman v. United Airlines***, ARB No. 05-077, ALJ Nos. 2005-AIR-4 (ARB Sept. 28, 2007), the Complainant had financed a loan for a van through an employee credit union. The Complainant filed an AIR21 whistleblower complaint after his discharge, which was dismissed because it had been discharged as part of the Respondent airline's bankruptcy reorganization. While that complaint was pending, the credit union repossessed the van, sold it at auction, and sought to collect the balance of the loan from the Complainant. The Complainant filed a new whistleblower complaint alleging that the Respondent airline caused the credit union to treat him more harshly upon default than other credit union members because of his protected activity. The ALJ dismissed the complaint. While on appeal to the ARB, the airline informed the ARB that the Bankruptcy Court had entered a confirmation order discharging the airline from any claims of any nature that arose before the confirmation date. The Complainant argued that the current case arose after the Respondent filed for bankruptcy and therefore was not discharged; he cited no authority for this argument. The ARB held that the AIR21 claim against the airline, "whether characterized as a pre-petition claim or as a post-petition claim, was discharged in bankruptcy because it arose before the Confirmation Order was entered."

BANKRUPTCY; FAILURE OF PARTIES TO COMMUNICATE WITH THE BOARD FOLLOWING RESOLUTION OF BANKRUPTCY PROCEEDING OR TO RESPOND TO ORDER TO SHOW CAUSE

In ***Taylor v. Express One International, Inc.***, ARB No. 02-054, ALJ No. 2001-AIR-2 (ARB Aug. 23, 2007), the ARB had stayed an appeal because the Respondent had entered bankruptcy. After the Board received a copy of an Agreed Order concluding the Respondent's bankruptcy case, and neither party communicated with the Board, the Board issued an Order to Show Cause why the case should not be dismissed on grounds of abandonment. Neither party responded, and the Board dismissed the appeal.

To the same effect: ***Carmichael v. Consolidated Freightways Corp. of Delaware, Inc.***, ARB No. 02-081, ALJ No. 2000-STA-53 (ARB Aug. 23, 2007).

BANKRUPTCY; RESPONDENTS WHO PASSED THROUGH BANKRUPTCY MAY BE ASSUMED TO HAVE CLAIMS AGAINST THEM EXTINGUISHED UNLESS THE COMPLAINANT CAN SHOW OTHERWISE

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In ***Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)***, ARB No. 04-111, ALJ No. 2004-AIR-19 (ARB Aug. 31, 2007), several airlines named in the Complainant's whistleblower complaint filed for bankruptcy between the time the ARB accepted the matter for review and the date it received the record from the ALJ, and the ARB consequently stayed the appeal. Once all entities emerged from bankruptcy, the ARB resumed consideration of the appeal. It found that the airlines that passed through bankruptcy would be considered to be discharged and dismissed from the action unless the Complainant provided evidence showing otherwise.

DISMISSAL; CHAPTER 11 REORGANIZATION OF RESPONDENT

In ***Davis v. United Airlines, Inc.***, ARB. 02-105, ALJ No. 2001-AIR-5 (ARB Apr. 26, 2006), the Bankruptcy Court entered into an order confirming United Airlines' Chapter 11 reorganization plan. Shortly thereafter, United filed a Notice of Discharge with the ARB relating to three appeals under stay before the Board. The ARB issued orders to show cause why the stays should not be lifted and the complaints dismissed. None of the Complainants proffered any legally supported rationale for not dismissing their complaints. Accordingly, the ARB dismissed all three appeals in a consolidated decision.

BANKRUPTCY; AUTOMATIC STAY APPLIES TO ARB REVIEW OF ALJ AIR21 DECISION

The Bankruptcy Code's automatic stay provision at 11 U.S.C.A. § 362(a)(1) (West Supp. 2003), applies to cases litigated by private parties arising under AIR21's whistleblower protection provision. *See Davis v. United Airlines*, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003). Accordingly, in ***Merritt v. Allegheny Airlines, Inc.***, ARB No. 05-084, 2004-AIR-13 (ARB Aug. 17, 2005), the ARB stayed its review of the ALJ's decision until the automatic stay is lifted or the bankruptcy proceeding are concluded.

BANKRUPTCY; AUTOMATIC STAY OF ARB APPEAL

In ***Merritt v. Allegheny Airlines, Inc.***, ARB No. 05-084, ALJ No. 2004-AIR-13 (ARB Aug. 17, 2005), the Respondent had entered into bankruptcy proceedings. The ARB noted that it has previously held that the Bankruptcy Code's automatic stay provision applies to cases litigated by private parties arising under AIR 21's whistleblower protection provision. Accordingly, the ARB stayed further proceedings until the automatic stay is lifted or the bankruptcy proceedings are concluded.

BANKRUPTCY; AUTOMATIC STAY; AIR21 WHISTLEBLOWER CASES EXEMPT

In ***Bodine v. International Total Services***, 2001-AIR-4 (ALJ Nov. 20, 2001), the ALJ recommended a finding that the automatic stay provision the Bankruptcy Act, 11 U.S.C. § 362(a)(1), was not applicable to an AIR21 whistleblower proceeding pursuant to the exemption at Subsection 362(b)(4). Subsection 362(b)(4) provides that a bankruptcy petition does not act as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The ALJ found:

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> In this case, Respondent, who is engaged in airport security operations, fired Complainant after he reported certain alleged "security breaches" by Respondent to various authorities. After an investigation into the complaint, the Secretary found that the "complainant [was] 'protected' under the law for providing information to regulatory agencies about violations or alleged violations of any order, regulation or standard related to air carrier safety." There is no greater example of regulations designed to ensure public safety than those of the AIR which regulate commercial air travel. Certainly, the Department's exercise of their power to investigate and enforce this power through sanctions and other assessments is not subject to the automatic stay provisions of the Bankruptcy Code. Such reasoning would go against the very purpose of the AIR and the automatic stay provision of the Bankruptcy Act.

BANKRUPTCY STAY; AIR21 CASES; POLICE AND REGULATORY AUTHORITY EXEMPTION DOES NOT APPLY WHERE COMPLAINANT IS SOLE PROSECUTING PARTY

In ***Davis v. United Airlines***, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003),* the ARB ruled in a consolidated Order Staying Proceedings that, where the employee complainant is the sole prosecuting party in an AIR21 whistleblower adjudication, the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362(a)(1) applies, and the proceeding is not exempt under § 362(b)(4). The § 362(b)(4) exemption to actions and proceedings by a governmental unit to enforce its police and regulatory authority. The ARB found that the great weight of the authority is that § 362(b)(4) refers to prosecutorial activity by a governmental unit. The Board rejected the argument that the Secretary's involvement in the entire administrative process created by § 42121 renders every step of that process a "governmental action or proceedings" within the meaning of the bankruptcy stay exemption. The ARB found that the few cases that "focus on adjudication by a governmental unit reject the notion that an agency adjudicator could be a § 364(b)(4) governmental unit." In other words, an agency acting in a quasi-judicial capacity seeking to adjudicate private rights is not engaged in the enforcement of policy or regulatory laws within the meaning of the bankruptcy stay exemption.

The decision takes no position on whether the stay applies if the Secretary or a delegate took a role in an AIR21 proceeding other than as an investigator of the employee's initial complaint.

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* The order also applies to the consolidated cases of *Hafer v. United Airlines*, ARB No. 02-088, ALJ No. 2002-AIR-5 (ARB May 30, 2003), *Lawson v. United Airlines*, ARB No. 03-037, ALJ No. 2002-AIR-6 (ARB May 30, 2003) and *Taylor v. Express One International, Inc.,* ARB No. 02-054, ALJ No. 2001-AIR-2 (ARB May 30, 2003). In *Lawson*, the ALJ issued a Recommended Decision and Order after the filing of the petition for bankruptcy. The ARB agreed with the Respondent that this recommended decision was void ab initio.

BANKRUPTCY; JURISDICTION; DOL'S AUTHORITY TO DETERMINE WHETHER BANKRUPTCY STAY APPLIES

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In ***Davis v. United Airlines***, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003), Respondents provided notice to the ARB of their filing for bankruptcy protection, and the ARB ordered briefs on whether the police and regulatory power exemption applied. One Respondent argued that only the Bankruptcy Court has authority to decide whether the automatic stay applies. The ARB, however, found that the overwhelming weight of authority is that the non-bankruptcy court properly responds to a filing by a party asserting an automatic stay under the bankruptcy law by determining whether the automatic stay applies to (*i.e.*, stays) the proceedings.

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