

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 01 October 2004**

CASE NO: 2004-AIR-31

In the Matter of:

RODNEY MORRIS,  
Complainant,

v.

CORPORATE FLIGHT INC.,  
Respondent.

Appearances:

Rodney Morris  
*Pro Se*

Fred A. Foley  
For Respondent

Before:

Stephen L. Purcell  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER  
GRANTING RESPONDENT'S MOTION  
FOR SUMMARY DECISION**

Complainant filed a whistleblower complaint with the Department of Labor ("DOL") on March 30, 2004, alleging that Respondent discriminated against him in violation of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR21"). The Secretary found no violation had occurred, and Complainant thereafter filed a request for a hearing on his complaint pursuant to 49 U.S.C. § 42121(b)(4)(a). During a July 22, 2004 telephone conference, counsel for Respondent informed the undersigned Administrative Law Judge that he intended to file a motion for summary decision in this matter, and the parties thereafter agreed that the formal hearing scheduled for August 19, 2004 should be cancelled pending the filing of, and ruling on, Respondent's motion. On August 18, 2004, Respondent filed a Motion for Summary Disposition ("Resp. Mot."). Complainant filed a Response to Respondent's Motion for Summary Disposition ("Cl. Opp.") on September 10, 2004, and Respondent thereafter filed a Reply Brief in Support of its Motion for Summary Disposition ("Reply") on September 28, 2004. Having reviewed the parties' pleadings, and the

attachments thereto, I find, for the reasons stated below, that Respondent's motion should be granted.

## **DISCUSSION**

Applicable regulations provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d). The opposing party "may not rest upon the mere allegations or denials of such pleading. . . . [but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c).

Section 18.40 is modeled on Rule 56 of the Federal Rules of Civil Procedure, pursuant to which "the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial" by viewing "all the evidence and factual inferences in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 99-107, ALJ No. 99-STA-21 at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)). The party moving for a summary decision has the initial burden of showing that there is no genuine issue of material fact. This burden may be discharged by simply stating that there is an absence of evidence to support the nonmoving party's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Moreover, there is no requirement that the moving party support its motion with affidavits or other similar material negating the opponent's claim. See *Celotex*, 477 U.S. at 324; Fed. R. Civ. Pro. 56(b). However, if a motion is properly supported, then the nonmoving party must go beyond the pleadings to overcome the summary judgment motion. He may not rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. See *Anderson*, 477 U.S. at 248.

### Undisputed Material Facts

Based on my review of the parties' pleadings and attachments, I find the following facts to be both material and undisputed:

1. Respondent is, and at all times relevant to this proceeding was, in the business of managing and chartering corporate aircraft for the benefit of executives who prefer to avoid ordinary commercial aircraft travel. Resp. Mot. at 3.
2. Complainant was hired as a salaried pilot by Respondent on October 1, 2002 at an annual salary of \$63,000. Resp. Mot., Exhibit ("RX.") E at 8-9.
3. According to Complainant, his duties while employed by Respondent "included being assigned as a Captain and Co-pilot on a HS-25 corporate jet which I was current and qualified to fly." RX B at 1.
4. Doug VanDyken, Respondent's Director of Operations, requested on November 29, 2001 that Complainant co-pilot a Citation III aircraft for which he was neither qualified nor licensed. RX B at 1.
5. Complainant complied with VanDyken's request and co-piloted the aircraft to Dupage, Illinois and Scottsdale, Arizona, during which flight he actively

- controlled the aircraft including landing the aircraft at Dupage Airport. RX B at 1.
6. Complainant alleges that Max Freeman, Respondent's owner, President, and General Manager, similarly requested on December 3, 2001 that Complainant co-pilot a Citation III aircraft with VanDyken. RX B at 2.
  7. Complainant complied with Freeman's request and co-piloted the Citation III aircraft with VanDyken on December 3, 2001. RX B at 2.
  8. Complainant alleges that he was told on December 26, 2001 by Cindi Jenkins, a co-worker, that he was again assigned to co-pilot Respondent's Citation III aircraft with VanDyken on or about December 28, 2001, and he thereafter had an angry telephone conversation with VanDyken during which he stated that he would not accept this assignment. RX B at 2.
  9. Respondent concedes that VanDyken asked Complainant to co-pilot the Citation III aircraft on December 26, 2001 and that "it would have been a technical violation of F.A.A. rules" for him to do so. Resp. Mot. at 4.
  10. In a letter dated January 7, 2002, Complainant was notified by Brenda Baxter, Respondent's Human Resources Manager, that "[p]er your request, you have been removed from Corporate Flight, Inc. as a full time salaried pilot to a part time per-diem pilot at the rate of \$400.00 per day." RX F.
  11. Complainant was further informed in the January 7, 2002 letter that "all health benefits have been terminated as of the 1<sup>st</sup> of the year and . . . you will not receive any further benefits enjoyed by full time employees." *Ibid.*
  12. Complainant received and read the January 7, 2002 letter on January 14, 2002. RX B at 2, RX E at 26-27.
  13. Complainant denies that he requested any change in his employment status prior to receiving the January 7, 2002 letter. RX E at 27.
  14. Respondent concedes, for purposes of summary disposition only, that "the change in [Complainant's] status was imposed upon him, rather than being requested by him." Resp. Mot. at 5.
  15. Complainant never contacted anyone at the FAA to tell them that the Citation III flights in which he was involved were illegal, nor did he tell any of Respondent's employees that he intended to report the flights to the FAA. RX. E at 38.
  16. On April 10, 2002, Complainant was offered a position as Chief Pilot for Chestnut Ridge Aviation. RX B at 2.
  17. On April 18, 2002, Complainant "told Matt [Freeman] that he could remove me from the available contract pilot list and that I had found employment with flying 6-5-Delta-Lima I think is the way I described it or Chestnut, I'm not exactly sure, but I had found a job." RX E at 39.
  18. According to Complainant, the owner of Chestnut Ridge Aviation withdrew his offer of employment on April 22, 2002 "with no explanation other than [sic] he had changed his mind." RX B at 2.
  19. Respondent concedes, for purposes of summary disposition only, that Complainant's "new job with Chestnut Aviation fell through . . . because of the actions of [Respondent]." Resp. Mot. at 6.
  20. Complainant filed for unemployment benefits on April 29, 2002 and filed a wrongful discharge lawsuit against Respondent on July 12, 2002. RX B at 2.

21. In a letter dated May 8, 2002, Complainant's attorney wrote to Respondent and requested "the full and complete employment file with respect to your former employee, Rodney C. Morris." Cl. Opp., Exhibit ("CX") 8.
22. According to a letter dated May 14, 2002, Respondent's Human Resources Manager, Brenda Peterson sent to Complainant "a copy of the entire contents of Mr. Rodney Morris' employment file. (23 pages)" CX 8
23. In a decision dated August 30, 2002, the Michigan Department of Consumer & Industry Services, Bureau of Workers' and Unemployment Compensation Office of Appeals issued a decision in which it found that Complainant had voluntarily left his employment with Respondent with good cause attributable to Employer and that he was not disqualified from receiving unemployment benefits for voluntarily leaving his employment. CX 14.
24. According to a memorandum dated September 4, 2002 from Tom Hector, General Manager, to Doug VanDyken, Director of Operations, Respondent was served with a wrongful discharge suit brought by Complainant in which he alleged he was discharged because he refused to fly a commercial jet that he was not qualified to operate. CX 11, CX 12 at 16, Reply Exhibit ("Rep. Ex.") A.
25. The September 4, 2002 memorandum further states: "I discussed the matter with Doug on or about Friday, August 16, 2002 at which time he acknowledged that compliance with FAR 61.55 was not done. Doug was advised that non-compliance with Federal Aviation Regulations (FAR's) was unacceptable performance and places Corporate Flight at risk. He agreed and will ensure that he and Corporate Flight are in full FAR compliance in the future." CX 11, Reply Ex. A.
26. On December 22, 2003, Complainant signed an "Air Carrier and Other Records Request" form directed to Respondent requesting records maintained by it under the Pilot Records Improvement Act of 1996, as amended. CX 1.
27. Under cover of letter dated January 27, 2004, Brenda Peterson forwarded to Complainant "all pertinent training records that we have." CX 2.
28. In an order dated January 9, 2004, the Circuit Court for Wayne County, Michigan entered a "Judgment on Mediation" in favor of Complainant in the amount of \$37,500.00. CX 17.
29. In a letter dated January 10, 2004, Complainant requested that Respondent produce copies of his "complete records as outlined in [PRIA]" including records relating to training, qualifications, proficiency, comments and evaluations made by a check airman, disciplinary action taken which were not subsequently overturned, and any release from employment or resignation, termination, or disqualification with respect to employment. CX 3.
30. In a letter dated February 26, 2004, Brenda Peterson responded to Complainant's January 10, 2004 request stating, in relevant part: "I don't know exactly what it is you are looking for. I forwarded to you all of your training records that we had in our possession. If you are looking for a copy of your personnel file, your lawyer was provided with a complete copy when we were subpoenaed." CX 4.
31. Complainant again wrote to Respondent on March 2, 2004 stating "[a]gain I request that Corporate Flight comply with Federal Law [49 U.S.C. §] 44703(h)91)(B)(i)(ii) PRIA." CX 5. After again referencing documents relating

to “training, qualifications, and proficiency,” Complainant wrote: “In consideration of past events, I feel there there [sic] can be no doubt, or argument made, and in fact the opposite, as to what should be included in provided records. I hope this serves to clarify any questions you or Corporate Flight may have.” CX 5.

32. In a letter dated March 3, 2004, Brenda Peterson wrote to Complainant that “I have sent you all of your training records that we have on file. There is no record of any disciplinary action taken as there was none given. There is no further information on file regarding your terminating your employment with Corporate Flight other than what was already given to your lawyer, which was a complete copy of the contents of your personnel file.” CX 6.
33. In a letter dated March 5, 2004, seeking to “clarify” his request, Complainant wrote that Respondent “continues to deny my rights outlined in [PRIA}. As a result of this non-compliance, I am hindered to a great extent in the continuation of my career as a pilot, and in fact just recently I have had to postpone a [sic] opportunity for consideration of employment as a pilot.” CX 5.
34. On March 9, 2004, Complainant wrote to Respondent requesting “a complete copy of my personnel file, with all records, memos, and information pertaining to me and my employment with Corporate Flight, Inc. . . .” CX 7.
35. On March 11, 2004, Brenda Peterson forwarded to Complainant a copy of his personnel file “as it was at the time of [Complainant’s] termination,” which, according to Peterson had been provided previously to Complainant and separately to his attorney. CX 8.
36. In a letter dated March 23, 2004, Complainant again wrote to Respondent stating, *inter alia*, “[s]pecifically I request, with reference to the following records . . . a memo *not* provided with records received in Jan 2004 or March 2004, from Tom Hector, General Manager, with regards to me and Doug VanDyken dated Sept. 4, 2002.” CX 9.
37. In the complaint filed March 26, 2004 with OSHA by Complainant, he states: “After more then [sic] sixty days, in which I have submitted four requests via certified mail for my records, as provided by (PRIA), Corporate Flight continues a practice of discrimination against me by not providing me complete and accurate records as provided for by 49 U.S.C. 44703(h)(1)(B)(i)(ii), (10) [and] this non-compliance is a violation and discriminatory, because of protected activities I engaged in and is prohibited under 49 U.S.C. 42121 (AIR21) 29 CFR Part 1979.102(b)(1) through (4).” RX B at 4.

#### Parties’ Contentions

Respondent alleges that Complainant’s whistleblower complaint must be dismissed because the undisputed material facts fail to establish that Respondent engaged in any discriminatory conduct within ninety days of the date upon which Complainant filed his AIR21 complaint. Resp. Mot. at 6-8. It further alleges that the claims raised by Complainant in this proceeding are barred by the doctrine of *res judicata* because they have been previously litigated in another forum. *Id.* at 8-12.

Complainant argues that his claim is not time-barred, states that he made repeated written requests for employment records from Respondent within ninety days of filing his AIR21 complaint, and asserts that Respondent failed to provide “complete and accurate records regarding my past employment . . . [impairing] my ability to reclaim and continue my career as a commercial pilot.” Cl. Opp. at 3. During the telephone conference held in this matter on July 22, 2004, Complainant made it clear that his whistleblower complaint is “based on . . . the fact that there’s some documents that have been denied me that I feel under [PRIA] should be provided.” Tr. 12. He further stated during the hearing:

Well, the premise of my case . . . is that by withholding the records and [not] allowing me to correct them, or at least, make corrections, that’s retaliatory action. . . . [I]t really prevents me from explaining my situation to my next employer, which my next employer, by law, by federal statute, he has to request this information . . . from Corporate Flight . . . [and] if the company’s providing information that they have on file, and that information, I believe is wrong, and I can show that it’s wrong and they don’t want to correct it, then I think there’s a case there . . . .

Tr. 12-13. The documentation in question, according to Complainant, relates to his interactions with VanDyken as co-pilot of a Citation III aircraft, and “states that, among other things that are incorrect, that I refused the training and that’s totally wrong.” Tr. 14. Complainant appears to be referring to the September 4, 2002 memorandum from Tom Hector to Doug VanDyken which notes, in relevant part:

The [Complainant] did fly as [co-pilot] on a deadhead (no passengers) leg on N86VP on Thursday, November 29, 2001 to Palwaukee, Illinois with Doug Van Dyken as [pilot]. He satisfactorily performed one takeoff from PTK as well as an instrument approach and landing at Palwaukee. When Doug Van Dyken asked for the additional two takeoffs and landings [required by the FARs, Complainant] reportedly said he was comfortable in the airplane, could land it again if necessary and, therefore, did not need to complete the other two takeoffs and landings before departing on the next leg of the trip with passengers.

CX 11; Reply Ex. A. With respect to the issue of *res judicata*, Complainant alleges, in essence, that the prior proceeding resulted in the issuance of a judgment in his favor following a mediation which did not involve any decision on the merits of the issues presented here. Cl. Opp. at 6-8.

### Analysis

As noted above, Complainant alleges that Respondent has violated AIR21 by virtue of its having withheld from him “documentation” which is inaccurate and which, at least at one time, was allegedly in his personnel file. The only “documentation” which Complainant has ever identified as being withheld is the September 4, 2002 memorandum from Tom Hector to Doug VanDyken. Complainant asserts, and Respondent disputes, that this memorandum was ever in

Complainant's personnel file.<sup>1</sup> Even if Complainant's assertion were true, he has, as explained below, failed to establish that Respondent engaged in conduct which violates the statute, and Respondent is thus entitled to judgment as a matter of law.

AIR21 provides, in relevant part, that no airline employee may be discharged or otherwise discriminated against by an air carrier if he or she has done one of the following:

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . .

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety .

(3) testified or is about to testify in such a proceeding; or  
(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121. The regulations implementing AIR21 state that “[i]t is a violation of the Act for any air carrier . . . to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against [an employee who engages in any activity protected by the statute].” 29 C.F.R. § 1979.102(b). The elements necessary to establish a *prima facie* violation of the statute are:

- (i) The employee engaged in a protected activity or conduct;
- (ii) The named person knew, actually or constructively, that the employee engaged in the protected activity;
- (iii) The employee suffered an unfavorable personnel action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b)(1)(i)-(iv). Any complaint alleging a violation of AIR21 must be filed “[w]ithin 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant) . . . .” 29 C.F.R. § 1979.103(d).

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<sup>1</sup> Complainant states, with respect to the Hector memo that “respondent has indicated that at least at one time this memo was part of my personnel file.” Cl. Opp. at 3. However, the transcript of Max Freeman’s September 16, 2003 deposition, upon which Complainant relies, directly contradicts this assertion. During Freeman’s testimony, Complainant’s attorney asked opposing counsel if there was “a particular reason why the memo wasn’t [previously] produced.” CX 12 at 16. Respondent’s counsel thereafter stated: “It was in Mr. Morris’ personnel file and – Excuse me – It was in Mr. VanDyken’s personnel file, *not* in Mr. Morris’ personnel file.” *Ibid.* (emphasis added).

The undisputed facts in the record establish that: On November 29 and December 3, 2001, Complainant, at the request of Respondent's Director of Operations and Owner, co-piloted a Citation III aircraft which he was not qualified under FAA regulations to fly; Complainant refused on December 26, 2001 to again co-pilot a Citation III aircraft; Respondent knew that Complainant was not qualified to fly the aircraft and that his activities were a violation of FAA regulations; Complainant's employment status was changed by Respondent effective January 1, 2002 from that of a salaried pilot to a part-time per diem pilot with no benefits; the change in Complainant's status was imposed on Complainant without his consent; Complainant left his employment with Respondent on April 18, 2002 to accept a position as Chief Pilot with Chestnut Ridge Aviation; and the offer of employment was withdrawn by Chestnut Ridge Aviation without explanation on April 22, 2002.

Complainant's reporting to Respondent that he lacked the qualifications to co-pilot the Citation III aircraft he flew in November and December 2001, as well as his refusal on December 26, 2001 to engage in similar activities, are clearly the types of conduct which the statute was intended to protect. In light of Respondent's knowledge of Complainant's activities, Complainant has satisfied the first two elements of a *prima facie* case. See 29 C.F.R. § 1979.104(b)(1)(i), (ii). Likewise, Complainant suffered an unfavorable personnel action when his status was changed from a full-time salaried employee with benefits to a part-time contract pilot effective January 1, 2002, and Complainant has thus satisfied the third element of a *prima facie* claim under AIR21. See 29 C.F.R. § 1979.104(b)(1)(iii). With respect to the fourth and final element of his claim, temporal proximity may be sufficient to raise an inference of causation in a whistleblower matter. *Tracanna v. Arctic Slope Inspection Serv.*, 1997-WPC-1 (ARB July 31, 2001). As the Board explained, when two events are closely related in time it is often logical to infer that the first event (*e.g.* protected activity) caused the last (*e.g.* adverse action). *Id.* at 8. Thus, the timing of Complainant's change in employment status, as well as the withdrawal of the offer of employment by Chestnut Ridge Aviation are, for purposes of the pending motion, sufficient to raise an inference that the protected activity was likely a contributing factor with respect thereto.<sup>2</sup> However, even if these incidents are assumed to be the result of retaliatory conduct by Respondent, Complainant cannot prevail in his claim for retaliatory discrimination.

Complainant filed his AIR21 whistleblower complaint with DOL on March 30, 2004. In order to be timely filed, any alleged violation must have occurred no more than ninety days prior thereto, *i.e.*, not earlier than January 1, 2004. 29 C.F.R. § 1979.103(d). Complainant's "demotion" on January 1, 2002 and Chestnut Ridge Aviation's withdrawal of its employment offer on April 22, 2002 occurred long before the period within which he was required to file a complainant. His complaint with respect to these incidents is thus not timely.

The only additional activity described by Complainant which occurred on or after January 1, 2002, is Respondent's alleged failure to produce the September 4, 2002 memorandum from Tom Hector to Doug VanDyken despite Complainant's requests for copies for copies of his

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<sup>2</sup> As noted above, Respondent concedes for purposes of its summary disposition motion that Chestnut Aviation withdrew its job offer "because of the actions of Corporate Flight." Resp. Mot. at 6.

employment records.<sup>3</sup> However, the evidence clearly shows that this document was produced by Respondent *at least* as early as September 16, 2003. Furthermore, even if this document had never been produced by Respondent, Complainant has to failed establish that the allegedly inaccurate information contained therein has, in any way, prejudiced him with respect to his ability to obtain or retain employment in the airline industry.<sup>4</sup>

### Respondent's Production of Hector Memo

On September 16, 2003, Complainant's attorney deposed Max Freeman, Respondent's owner, in connection with Complainant's wrongful termination suit filed in the Circuit Court for Wayne County, Michigan. CX 12. During the deposition, Freeman was asked whether he ever had a conversation with VanDyken about why he allowed Complainant to co-pilot Respondent's Citation III when he was not qualified to fly this type of aircraft. *Id.* at 66. Freeman testified that "[h]is supervisor talked to [VanDyken] directly, and did the memo that you saw." *Id.* at 67. He further testified that the memorandum was placed in VanDyken's personnel file. *Ibid.* The memorandum to which Complainant's attorney was referring was then marked as Deposition Exhibit 4 and identified by Freeman as the memorandum produced by Tom Hector after he had met with VanDyken per Freeman's instructions. *Id.* at 69-70. The deposition exhibit is the same September 4, 2002 memorandum which Complainant contends he did not receive until after his AIR21 complaint had been filed.<sup>5</sup> *See* Cl. Opp. at 3-4; Reply Ex. A.

Irrespective of whether Complainant was physically present for Freeman's deposition, and actually saw the memorandum, his attorney's knowledge and possession of the document is imputed to Complainant. *See, e.g., Link v. Wabash Railroad Co.*, 370 U.S. 626, 634 (1962) ("[In] our system of representative litigation, . . . each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'") *citing Smith v. Ayer*, 101 U.S. 320, 326 (1879). Since this memorandum has been available to Complainant since at least September 16, 2003, there is no merit to his allegation that he has somehow been denied an opportunity to correct information contained therein which he believes is inaccurate.

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<sup>3</sup> On December 22, 2003, Complainant signed an "Air Carrier and Other Records Request" form directed to Respondent requesting records maintained by it under the Pilot Records Improvement Act of 1996, as amended. CX 1. Respondent thereafter produced on January 27, 2004 "all pertinent training records that we have." CX 2. This is the most remote conduct by Respondent which, if found to be violative of the statute, would support a finding that Complainant's AIR21 complaint was timely.

<sup>4</sup> Although not expressly articulated by Complainant, it is clear that his complaint is premised on the assumption that his ability to work as a pilot in the airline industry has been, or will be, adversely effected by the events which led up to his departure from Corporate Flight, Inc.

<sup>5</sup> In his opposition to Respondent's motion, Complainant asserts: "I do not concede nor admit that all records that I seek have been delivered by Corporate Flight Inc. and in fact as of date Sept. 7, 2004, CFI remains in non-compliance of the (PRIA)." Cl. Opp. at 3. As noted previously, the Hector memorandum is the only document that Complainant has ever identified as having been withheld by Respondent and which contains information that he believes is either inaccurate or potentially harmful to him with respect to employment opportunities in the airline industry. In order to avoid summary judgment, it is Complainant's obligation to establish that there is a genuine issue of material fact in dispute. His non-specific allegation that "CFI remains in non-compliance of the (PRIA)" is insufficient to meet that burden. When one party moves for summary judgment, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth *specific facts* showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c) (emphasis added).

### Lack of Proof of Harm

Even if I were to assume that Respondent improperly refused to produce the Hector memorandum to Complainant *and* that this memorandum was in his personnel file at some point in time *and* that it contains inaccurate information regarding Complainant's activities with respect to his co-piloting Respondent's Citation III aircraft in November and December 2001, Complainant could not prevail in his whistleblower claim. Based on the undisputed facts presented here, there is simply no evidence that Complainant has suffered any harm as a result of the creation or dissemination of that document or its contents. For example, Complainant has not alleged, and there is nothing in the record to show, that Complainant has been denied employment because of this memorandum or that he has suffered any other harm as a result of any conduct of Respondent.<sup>6</sup> The only statement made by Complainant that even remotely suggests such harm is contained in a letter dated March 5, 2004 where he wrote that Respondent's failure to produce the documents he had requested "hindered [me] to a great extent in the continuation of my career as a pilot, and in fact just recently I have had to postpone a [sic] opportunity for consideration of employment as a pilot." CX 5. However, this statement asserts nothing more than that *Complainant* chose not to pursue a job opportunity because of what he perceived to be the potential for rejection of his application by a prospective employer when and if it became aware of either the September 4, 2002 memorandum or the circumstances surrounding the events described therein. Complainant does not state whether there was an actual or only perceived job opportunity, who the potential employer was, when the job opportunity was available, whether he actively pursued the job but then withdrew his name from consideration, or whether there was ever any direct contact with the prospective employer. As noted above, it is Complainant's obligation, as the party opposing summary decision, to set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). He simply has not done so with respect to the element of damages.

In order to prevail in a whistleblower complaint under AIR21, it is essential that the complaining party establish that he or she has suffered some adverse action or harm as a result of the employer's conduct. 29 C.F.R. § 1979.102(b). Complainant has not made the requisite showing in this instance. Where a party fails to establish "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is mandated. *Watson*, 235 F.3d at 857-858, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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<sup>6</sup> Although never expressly articulated, it appears that Complainant is alleging that Respondent has, through its creation and dissemination of the Hector memorandum or otherwise, violated the AIR21 provisions by engaging in "blacklisting" or other similar conduct which has impaired his ability to obtain employment as a pilot with another air carrier. "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." *Black's Law Dictionary*, 154 (5th Ed. 1979). It "is the quintessential discrimination, *i.e.*, distinguishing in the treatment of employees by marking them for avoidance." *Leveille v. New York Air National Guard*, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995). The only prospective employer identified by Complainant as an entity which has denied him employment is Chestnut Ridge Aviation which offered him a position as Chief Pilot on April 10, 2002 but then withdrew the offer on April 22, 2002 for unexplained reasons. Even if this offer of employment was withdrawn based on some conduct by Respondent, as it has conceded solely for purposes of summary disposition, that event, as noted previously, occurred too remotely to be litigated as part of Complainant's March 30, 2004 whistleblower complaint.

### Allegations of Continuing Violation

Undoubtedly in recognition of the untimeliness of his AIR21 complaint filed with DOL on March 30, 2004, Complainant asserts that Respondent has engaged in “ongoing unlawful employment practices” which began in 2001 and continued beyond the date upon which he filed his complaint. Cl. Opp. at 4. He relies on the Supreme Court’s decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) to support his contention.

*Morgan* involved a racial discrimination and retaliation suit brought by an African-American former employee against Amtrak, his former employer, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In that case, the Supreme Court considered the issue of “whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the 180-day or 300-day periods within which such suits must be filed with the Equal Employment Opportunity Commission].”<sup>7</sup> *Id.* at 105. According to the express language of the statute, any action brought by a claimant has to be filed “within one hundred and eighty days after the alleged unlawful employment practice occurred.” 42 U.S.C. § 2000e-5(e)(1). Recognizing that there are two different types of claims, *i.e.*, those involving discrete discriminatory acts and those implicating a hostile work environment, the Court determined that the critical questions were: (1) what constitutes an “unlawful employment practice” under the statute; and (2) when has that practice occurred. *Morgan, supra.* at 110. With respect to discrete retaliatory or discriminatory act claims, the Court found that such acts occurred on the day they “happened,” and any Title VII claim must therefore be filed within 180 days from the date of the act. *Ibid.* The Court expressly rejected the plaintiff’s claim that the term “practice” used in the statute meant an ongoing violation that can endure or recur over a period of time stating that there was “simply no indication [in the statute] that the term ‘practice’ converts related discrete acts into a single unlawful practice for the purposes of timely filing.” *Id.* at 111. The Court noted that it had “repeatedly interpreted the term ‘practice’ to apply to a discrete act or single ‘occurrence,’ even when it has a connection to other acts.” *Id.* at 111. It also noted that in one Title VII case brought against an air carrier, the Court “held that discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period.” *Id.* at 112 *citing United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). According to the Court:

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable “unlawful employment practice.” *Morgan* can only file a charge to cover discrete acts that “occurred” within the appropriate time period.

*Id.* at 114.

In his response to Respondent’s motion for summary decision, Complainant correctly notes that in *Morgan*, “[t]he Supreme Court held that a continuing violation could be supported

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<sup>7</sup> The period for filing claims under Title VII is either 180 or 300 days of the alleged unlawful employment practice depending on whether the State in which the claim is filed “has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice . . . .” *Id.* at 109.

under the ‘hostile work environment’ theory, but not under the ‘serial violations’ theory [upon which the Court of Appeals for the Ninth Circuit had improperly relied when it reversed the trial court’s grant of summary judgment].” Cl. Opp. at 4. He goes on to recite a portion of the Court’s comments with respect to a “hostile work environment” claim, without any assertion or argument that the facts giving rise to his AIR21 complaint can or should be characterized as such a claim. *Ibid.* Nothing in the record before me suggests that this matter is anything other than a claim alleging discrete retaliatory conduct by Respondent, and the Court’s decision in *Morgan* thus not only does not help Complainant but it supports Respondent’s motion for summary decision.

Based on the foregoing, I find that there is no genuine issue as to any material fact and Respondent is thus entitled to summary decision. In light of this finding, it is unnecessary to decide the issue raised by Respondent regarding whether the AIR21 complaint filed by Complainant is barred by the doctrine of *res judicata*.

### **Recommended Order**

The motion of Respondent Corporate Flight, Incorporate for summary decision against Complainant Rodney Morris is granted.

**A**

STEPHEN L. PURCELL  
Administrative Law Judge

Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board (“Board”), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate

Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.  
*See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, 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).