

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 December 2005

Case No. 2004-AIR-18

In the Matter of

JOHN G. TOPLIFF

Complainant

v.

FLIGHT OPTIONS, LLC

Respondent

APPEARANCES:

John R. Doll, Esq.
DOLL, JANSEN & FORD
Dayton, Ohio
For the Complainant

Timothy T. Brick, Esq.
Julie I. Juergens, Esq.
GALLAGHER, SHARP, FULTON & NORMAN
Cleveland, Ohio
For the Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This case arises under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21" or "Act"). This statutory provision, in part, prohibits an air carrier, contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against

any employee with respect to compensation, terms, conditions, or privileges of employment. The prohibition relates to an employee's having provided to the employer or the Federal Government information relating to any violation or alleged violation of any Order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety.

John G. Topliff ("Topliff" or "Complainant") was employed by Flight Options, LLC ("Flight Options," "Employer," or "Respondent") from April of 2002 until he was terminated on October 6, 2003. On December 31, 2003, Topliff filed a complaint with the Department of Labor alleging that he was discriminated against for informing his Employer of several violations of the FAA standards. His Complaint was denied on February 27, 2004 by the Office of Safety and Health Administration ("OSHA"). Topliff appealed that ruling and requested a formal hearing on March 25, 2004. Complainant's allegation of discrimination under Section 519 of AIR 21 was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held in Cleveland, Ohio, from October 26, 2004 until October 28, 2004. Post-hearing briefs were filed by both parties.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

References to "JX", "CX", and "RX" refer to Joint Exhibit, Complainant Exhibit, and Respondent Exhibit respectively. The transcript of the hearing is cited as "Tr." and by page number.

POSITIONS OF THE PARTIES

Topliff contends that his complaints to management and to the FAA about safety violations and his participation in two lawsuits, one of which also alleges safety violations, were protected activity under the Act. He also alleges that Respondent discriminated against him because of his protected

activity by giving him an Employee Warning Notice on September 8, 2003 and formally terminating his employment on October 6, 2003.

It is Respondent's position that Complainant's termination was not related to his claimed protected activity regarding the alleged safety violations at Flight Options. Employer contends that although Complainant raised safety issues at a February 2003 meeting where management was present, Topliff was promoted after the meeting. Additionally, the only alleged violation that occurred after the February 2003 meeting was a lightning strike incident in August 2003. However, Employer argues that Topliff blew the whistle on October 1, 2003, which was after he received the Employee Warning Notice and was placed on administrative leave. Finally, Employer asserts that Topliff was terminated because he was dishonest and lied to his superiors.

ISSUES

1. Whether Complainant engaged in protected activity;¹

¹ At the hearing, I admitted into evidence Joint Exhibit 11. The Exhibit contains a list of alleged safety violations that Complainant stated that he reported to his superiors and/or to the FAA. Topliff alleges that he engaged in protected activity when he complained about these violations. The Exhibit lists the date of the alleged violation, Federal Aviation Rule ("FAR") violated, type of violation, and name of the individual or agency (FAA) who was notified of the complaint. At the hearing, Complainant only discussed the violations he allegedly reported to the FAA on January 16, 2003; January 30, 2003; July 27, 2003; and October 1, 2003. (Tr. 95-102, 192-204). In his post-hearing brief, Complainant only makes specific findings of fact as to the violations that he allegedly reported on January 16, 2003; January 30, 2003; and October 1, 2003.

The original Notice of Hearing contains the following directive:

5. POST-HEARING BRIEFS.

The briefing directive relates to all named parties to the action as well as the U.S. Department of Labor.

. . .

(b) Each party will make specific, all inclusive FINDINGS OF FACT with respect to each issue being briefed. The absence of factual findings or arguments concerning record evidence will constitute an admission that they are of no importance in the disposition of the issue and that the party has abandoned any contention concerning the applicability of the ignored evidence to the pertinent issue. Thus all contentions

2. Whether Complainant suffered an adverse employment action when Flight Options terminated his employment on or about October 6, 2003;
3. Whether Complainant is entitled to reinstatement together with all benefits and seniority as a result of his termination;
4. Whether Complainant is entitled to compensatory damages, lost wages, attorney fees and costs together with other appropriate relief; and
5. Whether the Complainant's claim was frivolous and brought in bad faith, entitling Respondent to attorney fees.

STIPULATION OF FACTS²

1. The Office of Administrative Law Judges, U.S. Department of Labor, has jurisdiction over the parties and the subject matter of this proceeding.
2. Flight Options is an employer subject to the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR Act, "AIR21" or "Act"), 49 U.S.C. §§ 42121, *et seq.*, Public Law 106-181 Title V, § 519 and the regulations thereunder which are located at 29 C.F.R. Part 1979.
3. John Topliff was at all times material herein an "employee" of Flight Options, LLC for the purposes of applying the whistleblower protection provisions of 49 U.S.C. § 42121.

concerning fact and law as to individual issues which are not made on brief will be considered waived.

On brief, Complainant made no findings of fact concerning the violations he allegedly reported on April 5, April 22, May 6, and December 7, 2002; and January 28, February 3, July 27, and August 17, 2003. Complainant has thus abandoned these alleged violations as they relate to any contentions involving the issue of protected activity. Therefore, I will only discuss the violations listed on Joint Exhibit 11, which were reported on January 16, 2003; January 30, 2003; and October 1, 2003.

² See JX 18.

4. Flight Options, LLC is an "air carrier" within the meaning of 49 U.S.C. 40102(a)(2).
5. John Topliff was discharged by Flight Options, LLC on or around October 6, 2003, to be effective October 10, 2003.
6. John Topliff did not receive official notice of his discharge until October 10, 2003.
7. On December 31, 2003, John Topliff filed a Complaint with the Secretary of Labor - OSHA alleging that Respondent discriminated against him in violation of 49 U.S.C. § 42121.
8. The original complaint filed by John Topliff with the Secretary of Labor was timely.
9. The Area Director, Occupational Safety and Health Administration, U.S. Department of Labor issued his findings on February 27, 2004 following an investigation of the complaint.
10. John Topliff received those findings following the Secretary's mailing on or about March 4, 2004.
11. John Topliff mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on March 25, 2004.
12. The appeal request of John Topliff was received in the Office of Administrative Law Judges, U.S. Department of Labor, on March 30, 2004.
13. The appeal of John Topliff satisfies the thirty (30) day appeal constraints provided by the statute and 29 C.F.R. § 1979.106(a).
14. The allegations against Flight Options, LLC in the case captioned *Thomas Bowden, et al v. Flight Options, LLC*, United States District Court for the Northern District of Ohio, Case No. 02CV1768 related to whether Flight Options violated [the] Railway Labor Act, §2, Fourth, 45 U.S.C. § 152

and did not, in any way, relate to whistleblowing or safety [activities].

15. John Topliff provided deposition testimony in *Thomas Bowden, et al v. Flight Options, LLC* [.]
16. At his deposition in *Thomas Bowden, et al v. Flight Options, LLC*, Mr. Topliff was not asked any questions about safety related matters or whistleblowing and did not provide any testimony concerning safety related matters or whistleblowing.

CREDIBILITY FINDINGS

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant and probative record evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., *Frady v. Tennessee Valley Authority*, 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. See *Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n.5 (3d Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard to the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The transcript of the hearing contains the testimony of five witnesses.

Kenneth A. Combs ("Combs") has been employed at Flight Options since April of 2002. He was appointed to the position of 135 Chief Pilot in May or June of 2003 and currently holds that position. I find Combs' testimony to be very credible. He testified about his responsibilities concerning the conversion of operating under Federal Aviation Regulation ("FAR") Part 91 to FAR Part 135 and the training and qualification of the air crew under the new operating system. He also offered testimony

concerning the events that made him lose confidence in Topliff's abilities as program manager. His testimony was consistent, honestly given, and entitled to full credibility.

Joseph Salata ("Salata") has been employed at Flight Options since June of 2000 and currently serves as the Vice President of Flight Operations. At the time of Topliff's employment, Salata served as Senior Chief Pilot in the Operations Manual Department and held the title of Vice President of Program Management. As chief pilot, Salata was responsible for the conduct of all of the flying operations and supervision of program managers, the pilot training department, and the crew scheduling department. Salata was directly over Topliff administratively. He testified about the events that led up to the issuance of the Employee Warning Notice to Topliff and his involvement in Complainant's termination. I find Salata to have been a very credible witness.

Charles V. Starkey ("Starkey") began working for Flight Options as the Director of Pilot Training in May of 2000. In January of 2003, he was promoted to the position of Director of Safety and currently holds that position. He is also a part-time Captain on the Beechjet aircraft. Starkey's testimony primarily concerned an independent investigation and report he prepared for management based on the events surrounding Topliff and Dosie "Doss" Comer's ("Comer") August 2003 "check airman"³ training. I find both Starkey's report and his testimony to be entirely credible.

Robert R. Sullivan ("Sullivan") has worked for Flight Options for approximately three years as the Director of Human Resources. He offered testimony concerning the August 2003 training incident where Topliff allegedly attempted to falsify records relating to Comer's flight training certificate. After Complainant received the Warning Notice and appealed Salata's decision to demote him to the position of pilot, Sullivan conducted his own investigation and made the final decision to terminate Topliff in October of 2003.

I find Sullivan's testimony to be credible in part. I found Sullivan's testimony regarding the reasons why he decided

³ A "check airman" is a pilot approved by the FAA who has the appropriate training, experience, and demonstrated ability to evaluate and to certify the knowledge and skills of other airmen. Evaluation is made on the basis of various checks conducted as modules in a specified operator's FAA approved training program. See the Parties' Joint Stipulation of Glossary Terms [hereinafter "Glossary Terms"].

to terminate Topliff to be credible. However, I find Sullivan's testimony relating to the decision to place Topliff on administrative leave, to be in conflict with his deposition testimony. Specifically, at the hearing, Sullivan testified that before Topliff received his Warning Notice on September 8, 2003, Salata informed him that Complainant would be placed on administrative leave. (Tr. 493). However, at his deposition, Sullivan initially testified that he made the decision to put Topliff on administrative leave by himself after Complainant appealed Salata's Warning Notice. (CX 2; Tr. 495). Sullivan later testified that Salata informed him of his decision to put Topliff on administrative leave during a break that occurred at the September 8 meeting (CX 2; Tr. 494). At the hearing, Sullivan explained that this inconsistency is a result of his being "unclear about the exact time and date that I was aware of the information, and since then I've done a little bit more exploring and have been able to think a little bit further and discuss it with Joseph Salata, and it was correct that I was notified before the meeting that he would be on paid administrative leave." (Tr. 494). Due to the inconsistency, I find Sullivan's testimony to be in dispute on this point, but otherwise credible.

I find the testimony of John G. Topliff, Complainant, to be partially credible. He gave knowledgeable testimony about the operations at Flight Options. He testified about his experiences working as a Hawker 800 XP Pilot, serving as a Program Manager, and the details of his own safety complaints made to the FAA and Flight Options management. Generally, I found him to be a very knowledgeable, experienced pilot.

However, at times his answers to questions were not entirely forthcoming regarding the events surrounding Comer's check airman flight training. Specifically, I find his testimony at the hearing to be inconsistent with his statements written shortly after the incident. For example, Topliff testified that he was unaware that Greg Kremer ("Kremer") did not complete a flight training certificate for Comer because the second message he received from Kremer was "garbled." (Tr. 141). However, Topliff's written statement concerning Comer's training fails to mention that Kremer's second message was garbled. (JX 1, 3). In fact, these documents written by Topliff shortly after the incident, indicate that he was aware that Kremer did not complete a flight training certificate for Comer. (*Id.*). This inconsistency makes Topliff's hearing testimony on this matter not credible.

I also found Topliff's representations to be unbelievable when he testified that it was possible for Kremer to have completed a flight training certificate for Comer without personally observing the training. As discussed below, the facts established that Topliff is an experienced pilot who has conducted between 70 and 80 check rides as a certified check airman. (Tr. 175-8). Thus, as a longstanding certified check airman, who has completed this type of training many times previously, it is difficult to believe that Topliff was unaware that an acceptable flight training certificate could have been produced for Comer without Kremer being present for the ride.

Finally, I find Topliff's testimony regarding his conversation with Karla Parker⁴ ("Parker") to be untruthful. Topliff testified that he did not instruct Parker to input Comer's flight training date into the CAMP system. However, Starkey conducted an independent investigation that successfully refuted that representation, and other facts developed at trial also dispute his testimony.

Additionally, although he testified to numerous alleged complaints as to safety violations with the FAA, he could not recall specific details regarding many of the incidents he had allegedly reported to the FAA. I find his testimony in this regard to be suspicious at best. Overall, I find Topliff's testimony to be only partially credible.

FINDING OF FACT

In April of 2002, Complainant became an employee of Flight Options, LLC when his former employer, Raytheon Travel Air, merged with Flight Options, International. (Tr. 49, 546). Flight Options, LLC is a fractional aircraft carrier whereby customers purchase shares of a jet aircraft and Flight Options would operate, store, and maintain the aircraft for its customers. (Tr. 51). Flight Options employs approximately 1,000 pilots. (TR. 420).

Topliff is an experienced pilot who has flown various aircraft for decades. He has an airline transport pilot certificate with ratings for the following aircraft: Boeing 737; Air Bus 310, 600, and 8300; and the Hawker 800. (Tr. 29; JX 14). Complainant's previous employment includes working as a pilot and/or instructor for various commercial airlines. (Tr.

⁴ This individual was also mentioned in the transcript as being a Carla Parker. (Tr. 144).

49-50). Prior to the merger, Complainant worked for Raytheon Travel Air as a pilot, second in command, on the Hawker 800 XP aircraft but had been promoted to the position of captain.⁵ (Tr. 54-5). In addition, he became certified as a check airman and served as the fleet manager for a period of time. (Tr. 55).

During the time the merger was taking place, a labor organizing campaign had started at Raytheon Travel Air. (Tr. 67). Topliff stated he was approached by one of his superiors and asked if he would identify those XP pilots who were involved with the organizing campaign. (Tr. 69). Topliff testified that based on his prior experience with other unions, he knew that this was "a violation of the Railway Labor Act" and refused to help. (*Id.*).

After the merger, Complainant accepted a position at Flight Options as an Advanced Flight Officer and was promoted to the position of Hawker 800 XP Assistant Program Manager. (Tr. 56, 179; JX 5, pg. 1). Thereafter, Topliff received an e-mail from Kevin Miller, Program Manager for the Hawker 800 XP program, requesting his participation in identifying those pilots who assisted in organizing the Union.⁶ (Tr. 72). Topliff testified that he did "not participate in highlighting their names on this list as it is not only a violation of federal law, but it was also in bad faith with what had been presented to the pilots both by Raytheon and by Kenn Ricci⁷ in that, you know, that everybody gets a clean slate when you go over to this new company." (*Id.*).

Some time later, Topliff learned that a group of pilots sued Flight Options for violating the Railway Labor Act. (Tr. 74). The case is captioned: *Thomas Bowden, et al. v. Flight*

⁵ In the airline industry, the position of captain is also referred to as the "pilot in command" or "PIC." (Tr. 297).

⁶ The record contains two e-mail messages. (JX 17, pg. 1-2; Tr. 72). The first e-mail is dated January 29, 2002 and is addressed from Lynn Daugherty, who is the Assistant Chief Pilot at Raytheon Travel Air, to Topliff. (JX 17, pg. 2). Daugherty wrote the following: "We need you to help us on the list. Flight Options has requested it. [W]e have been assured that no one else will know. These guys started this union business and should pay. They don't want them over there." The second e-mail is dated March 25, 2002 and is addressed from Kenn Ricci, who was the CEO of Flight Options, to Sullivan. (JX 17, pg. 1; Tr. 72-3). The e-mail refers to a "list" but gives no specific details. (*Id.*).

⁷ This individual was also mentioned in the transcript as being a Ken Ricci. (Tr. 72).

Options, LLC, Case No. 02CV-1768 (hereinafter "*Bowden* lawsuit"). (JX 18, pg. 3). Although Topliff provided deposition testimony in the *Bowden* lawsuit, his testimony did not involve "safety related matters or whistleblowing." (*Id.*).

Topliff testified about another lawsuit resulting from the *Bowden* lawsuit. He explained that a pilot by the name of Eric Miller ("Miller") was initially a party to the *Bowden* lawsuit but withdrew his claim shortly after the suit was filed and decided to pursue his claim individually. (Tr. 75). Miller's suit is captioned: *Eric L. Miller v. Raytheon Aircraft Co., et al.*, Case No. 02-CV-0990 (hereinafter "*Miller* lawsuit"). (CX 1). Topliff alleges that Miller was terminated after he refused "to fly a broken airplane." (Tr. 75). Topliff testified that he provided deposition testimony in the *Miller* lawsuit; however, it was after he was terminated. (Tr. 284). Additionally, Topliff testified that at the pre-deposition meeting, he had told Julie I. Juergens ("Juergens"), legal counsel for the Respondent, about his knowledge of Miller being forced to fly broken airplanes, and problems with bad maintenance practices, write-ups, and other things. (Tr. 330).

In August of 2002, Complainant resigned his position at Flight Options and accepted a position as a Senior Test Pilot at Raytheon Aircraft in Little Rock, Arkansas. (Tr. 57, 180-82; JX 5, pg. 2). Topliff testified that he found the position at Raytheon Aircraft more appealing because of the numerous problems that had occurred as a result of the merger. (Tr. 57). In addition, he believed that Flight Options was operating in a manner contrary to the Federal Aviation Regulations. (Tr. 58, 179).

On September 9, 2002, Complainant began his job at Raytheon Aircraft. (JX 6, pg. 1). As part of his benefit package, Topliff received a \$3000.00 signing bonus. (JX 6, pg. 3). However, shortly after arriving in Little Rock, Topliff's father was diagnosed with a terminal illness. (Tr. 58; JX 6, pg.3). In addition, he testified that he was also presented with a layoff notice. (Tr. 58). To avoid being out of work, he requested a job transfer to Wichita, Kansas. (Tr. 58). The transfer was approved; however, prior to starting his new job, Topliff was notified that the layoff notice was in error, and he should report back to Little Rock. (Tr. 59). Upon his return to Little Rock, he spoke with Human Resources at Raytheon Aircraft about his father's illness and took a leave of absence pursuant to the Family Medical Leave Act ("FMLA"). (Tr. 59-60, 183-84).

While on administrative leave, Complainant called Chris Hertzberg, who was the Senior Vice President of Flight Options, about possibly returning on a part-time basis. (Tr. 60). Hertzberg offered him his old position back. (Tr. 61). However, Topliff declined the position of Assistant Program Manager and accepted a position as a check airman in the Hawker 800 XP program on October 1, 2002. (Tr. 61; JX 5, pg. 3). Complainant retained his seniority date of July 29, 1998. (*Id.*). He did not tell Salata about his employment with Raytheon Aircraft prior to his return. (Tr. 185).

Shortly after Complainant returned to Flight Options, Bob Reinhold was hired as the new Program Manager for the XP program. (Tr. 62). Thereafter, he and Reinhold had a number of disagreements concerning flight safety and aircraft maintenance. In particular, Topliff stated that during November of 2002, he was scheduled to fly to Los Angeles, California and from Los Angeles to Spokane, Washington. (Tr. 63). In preparation for his flight, he checked the weather in Spokane and the forecast was predicted to be "below minimums"⁸ all day. (Tr. 63-4).

Upon learning of the forecast, Complainant contacted the Operational Control Center ("OCC") in Cleveland, Ohio and informed the dispatcher of the possibility of not being able to land in Spokane to pick-up customers. (Tr. 64). Topliff stated that while he was speaking with the dispatcher, Reinhold interrupted the conversation to tell him that he needed to "get into Spokane today." (Tr. 64). Topliff informed Reinhold that he would fly to Spokane but if the weather was below minimums that he would not land. (Tr. 64). Topliff testified that Reinhold ended that conversation by stating, "Either you get into Spokane or you will be looking for work." (Tr. 65).

When the Complainant landed in Los Angeles, Reinhold was on the phone requesting to speak to him. (Tr. 65). Topliff stated that Reinhold continued to threaten his employment if he did not land in Spokane. (Tr. 65-6). Topliff informed Reinhold that he would attempt the approach into Spokane but if the visibility was poor, he may have to find an alternate route. (Tr. 66). However, once Complainant arrived at Spokane, the weather was not as bad as it was predicted, and he was able to land the aircraft without incident. (Tr. 66, 190). Topliff never reported this incident to the FAA. (Tr. 189).

⁸ The phrase "below minimums" refers to weather conditions which make it unsafe to land an aircraft because at less than 200 feet altitude there is less than a half mile of visibility. (Tr. 63-4).

Upon returning to the OCC, Reinhold and Sullivan questioned Topliff about his previous employment with Raytheon Aircraft. (Tr. 66). Sullivan advised Topliff that he was in violation of the company's non-compete policy by working for Flight Options and Raytheon at the same time. (Tr. 66-7; JX 6, pg. 2). As a result of violating Flight Options' policy, Topliff was sent home for three weeks and demoted. (Tr. 67; JX 5, pg. 4). Complainant was also required to pay back the \$3000.00 signing bonus he received from Raytheon Aircraft and resign from his position. (Tr. 187; JX 6, pg. 3).

Topliff offered testimony concerning flight safety and maintenance violations he allegedly reported to his superiors and the FAA. Specifically, Topliff testified that the 501 Forms numbered 0025 and 0026 refer to a complaint he made to management and the FAA concerning flying while the internal temperature of the engine was above its normal parameters. (Tr. 299-303; JX 19, pg. 6). He explained that the maintenance department faxed a section of the Honeywell Light Maintenance Manual at the direction of Reinhold to convince him that it was okay to fly the plane in its current condition. (Tr. 302; JX 19, pg. 2-4). However, Complainant stated that the engine was not safe for flight because "the hot section which is the turban section, it degraded to the point that it was not making target power any more, and it was indicated by the over temps on takeoff and it needed maintenance." (Tr. 305). The plane was eventually flown to California where the engine was changed. (Tr. 309-11). He testified that this incident is noted on Joint Exhibit 11 as a violation of Maintenance Operations that occurred approximately on January 30, 2003. (Tr. 302-4; JX 11, pg. 1).

Complainant testified that he also reported the discrepancies noted on the 501 Forms numbers 0067 through 0074 to management and to the FAA.⁹ (Tr. 311). Topliff explained that while flying from the northeast to Florida, he noticed a problem with the aircraft's thrust reverser and brakes. (Tr. 79-80, 313; JX 19, pg.8, 10). He called maintenance to give them a heads-up, and they assured him that they would fix the aircraft's brakes once he arrived in Florida. (Tr. 79-80). However, upon his arrival, Topliff was told that he needed to make a trip to Houston, Texas. (Tr. 80). Maintenance assured him that the aircraft would be fixed in Houston. (*Id.*).

⁹ Discrepancy Numbers 0072 and 0073 were written by Mike Kiegeli, a maintenance mechanic, and they relate to the same aircraft. (Tr. 318; JX 19, pg. 7-8).

After he arrived in Houston, he saw that he had flights scheduled for the next day starting at 6:00 a.m. and knew that there was no way there would be time to fix the aircraft. (*Id.*). When Reinhold found out that Topliff had grounded the aircraft, Topliff was told that he would be fired if he did not fly the plane. (Tr. 83). Topliff stated that he also spoke to Hertzberg regarding Reinhold ordering him to fly the broken plane. (Tr. 322). After corrective action was performed on the aircraft on January 16, 2003, Topliff continued to experience problems with the brakes. (JX 19, pg. 7). He wrote another discrepancy report and stayed in Houston until the brakes were finally fixed on January 19. (*Id.*). The discrepancies written in Houston relate to the violation Topliff noted on Joint Exhibit 11 as occurring on January 16, 2003. (Tr. 320; JX 11, pg. 1).

In February of 2003, Topliff attended a meeting with Hertzberg, Salata, Combs, and other XP pilots. (Tr. 86-7, 202). At this meeting, Topliff and the other XP pilots discussed maintenance issues and flight safety concerns with management. (Tr. 87, 202-03). Salata and Combs were not present for the whole meeting. (Tr. 545). However, Combs testified that Topliff did make complaints about safety concerns and maintenance write-ups. (Tr. 444). After the meeting, Topliff believed that Salata "was out to get him" for blowing the whistle concerning safety problems at Flight Options. (Tr. 205-6). He testified that Hertzberg threatened to terminate Salata because he had full knowledge of everything illegal that was going on and had put Reinhold into his position. (*Id.*).

Topliff stated that he attended other "all hands management meetings" during the month of February where he voiced his concerns about flight safety and maintenance. (Tr. 87). Topliff also testified that he told Juergens about the safety complaints listed on Joint Exhibit 11 prior to their meeting but was not aware if she had reported them to the Employer. (Tr. 274, 279). At the end of February 2003, Reinhold was demoted and Topliff was promoted to the position of Program Manager for the XP program. (Tr. 87-8, 204-06; JX 5, pg. 5). Topliff testified that his promotion was not in retaliation for making complaints at the February meeting. (Tr. 207).

In addition to discussing these safety issues with management, Topliff stated that he also called the FAA hotline and made complaints. (Tr. 88). Once the complaints were made, Topliff seldom spoke to an investigator or learned of the

outcome. (Tr. 88-9). Topliff testified that he told Combs, Hertzberg, and John Nahill, the new CEO of Flight Options, about his complaints to the FAA. (Tr. 89). Topliff also advised Jerry Nash, the former Director of Quality Assurance, that he reported certain incidents to the FAA. (Tr. 90).

In August of 2003, Topliff was the only program manager working at the OCC when he was asked to escort Bill Tacklett¹⁰, a FAA liaison, around the facility. (Tr. 102). Tacklett advised Topliff that he was there to investigate a Beechjet aircraft that had declared an emergency the day before in Cleveland. (Tr. 103). Upon investigating the aircraft, it was discovered that the aircraft was struck by lightning and had a hole in the elevator. (Tr. 103).

In the days following Complainant's first encounter with Tacklett, Topliff testified that he spoke to Tacklett on a couple of occasions and was asked additional questions. (Tr. 104). Specifically, Tacklett wanted to know whether the Beechjet was flown with any passengers aboard after the lightning strike. (Tr. 104). Topliff stated that he retrieved the aircraft's flight records, determined that it was flown with passengers, and provided the information to Tacklett. (Tr. 104-5, 329). However, he did not keep a copy of the documents for his own records. (Tr. 271-72). He notified the FAA of this incident in October of 2003. (Tr. 118-19, 268; JX 11, pg 2). His notification to the FAA occurred a full six weeks after the FAA had learned and investigated the incident. (Tr. 268). After the FAA investigation was complete, Flight Options was found to be in violation of a Federal Aviation Regulation and assessed a civil penalty of \$11,000.00. (Tr. 107-11; JX 8, pg. 4; JX 9, pg. 2).

In August of 2003, Flight Options was in the process of training pilots to be certified by the FAA as Part 135 check airmen. (Tr. 125, 384). Flight Options was operating under Part 91 of the FAA regulations and was certifying pilots under Part 135 because it was a higher standard. (Tr. 546-8). Combs was put in charge of making the conversion of operating under FAR Part 91 to FAR Part 135. (Tr. 126; 335). He testified that any evaluation or check evaluation had to be conducted by a certified check airman. (Tr. 342). Additionally, once a pilot is certified as a Part 135 check airman, they are able to perform check rides on behalf of the FAA to determine whether

¹⁰ This individual was also mentioned in the transcript as being Bill Takalla. (Tr. 266).

other pilots "meet [the] minimum performance standards under Part 135 of the Federal Aviation Regulations to perform duty as a captain or as a second in command, as the case may be." (Tr. 127).

Topliff chose Comer to complete the Part 135 check airman training with him. (Tr. 125, 134). The certification process requires a pilot to complete the following: check airman ground school, check airman flight training, preparation for a check ride with the FAA, and "an observation ride with the FAA where they observe you giving a check ride to another pilot in the airplane." (Tr. 125-26). Combs and Salata both testified that at the time Comer and Topliff were attempting to complete their Part 135 training, the FAA had already approved a Part 135 training program for Flight Options. (Tr. 343; 547-48). However, Salata stated that the approved master document was kept in the training department and a copy of the program was never presented to the program managers.¹¹ (Tr. 550). Additionally, although the training program may have been approved, Combs testified that he did not know how specifically it was being followed. (Tr. 424).

Complainant was a check airman at Raytheon Travel Air but his certification was only valid at the company where it was obtained. (Tr. 128, 132). He performed between 70 to 80 check rides while working as a check airman at Raytheon Travel. (Tr. 129-30, 173). Complainant never signed a certificate for a check air ride without personally observing the pilot. (Tr. 175-178). Additionally, Topliff testified that he had completed the Part 135 certification process in the past at Flight Options but Christiansen threw all the documentation away after he resigned. (Tr. 135).

On Monday, August 18, 2003, Topliff and Comer were scheduled to complete the FAA check air ride, which was the final portion of their Part 135 check airmen certification.

¹¹ At the hearing, a portion of the Part 135 Training Manual was entered into evidence. (Tr. 370-1; RX 1). Subsection F states, "All flight training will be accomplished and/or supervised by a current company Check Airman that has been previously approved by the POI and Chief Pilot." (RX 1, pg. 8). Combs testified that although the observer should remain within eyesight of the trainee, as long as he was somewhere in the airplane, he could sign the training certificate. (Tr. 378-79.). As Chief Pilot during August 2003, Combs indicated that he would not approve of anyone signing a training certificate that did not observe. (Tr. 400). Topliff believed that Respondent may have had some form of "an approved program but . . . there were many acceptable things, what the FAA will accept as training in lieu of what they've approved." (Tr. 254-55).

(Tr. 135). However, prior to the FAA check ride, both Topliff and Comer needed to complete the flight training portion of their training. (Tr. 136). Topliff testified that:

The plan was to go out on that Saturday, [August 16, 2003,] and I was going to give me a mock check ride. It would be observed by Mr. Greg Kremer who was an 800 check airman, and the very important part of that is that Mr. Kremer could not conduct the training. He could only observe it because he is not qualified in the 800 XP.

(Tr.136, 432). Christiansen approved the training because the other official check airmen in the XP program were either too busy or not available to train Topliff and Comer. (Tr. 136, 140; JX 1, pg. 27).

However, on the morning of August 16, dispatch called Topliff to inform him that Salata had cancelled training because Flight Options needed him to fly a rescue mission. (Tr. 137). After receiving the call, Topliff went to the OCC to see if there was a way that he and Comer could still complete their training. (Tr. 138). Topliff attempted to change the scheduling, however, Salata instructed Topliff to stop trying and go fly. (*Id.*).

While out flying the mission, Complainant continued to try to find a way to complete his and Comer's flight training. (*Id.*). He stated that he remembered that Scott Dennison ("Dennison"), who was vacationing in Florida and was a certified Part 135 check airman, had offered to assist Topliff in his training as a last resort. (Tr. 138). Since the last leg of their flight ended in Florida, Topliff testified that he spent all day attempting to contact Dennison but was unable to do so. (Tr. 138-9).

In response to an earlier message from Topliff, Kremer called and left a voice message on Topliff's cell phone. (Tr. 139). Kremer wondered if there was a way that he could produce a certificate for Comer without being present. (JX 1, pg. 22; Tr. 140). He also indicated that he would leave a certificate for Topliff on his desk based on the last time they trained together. (*Id.*). Topliff stated that he received a second message from Kremer that day concerning the training. (Tr. 140-41). However, "the second message was garbled, and I got to the part where he was getting on the airline and going home, and then apologized for not being able to get with us." (Tr. 141).

After completing the rescue mission, Topliff and Comer returned to the OCC where he saw a pile of paperwork on his desk. (Tr. 141). He glanced through the paperwork briefly, placed it all in his briefcase, and went home. (*Id.*). Topliff believed that he saw a certificate for Comer before he put the pile of documents in his brief case. (Tr. 142). He worked at the OCC on Sunday, August 17, 2003, but since he was the only program manager present, he did not have a chance to look at the documents Kremer had left for him the day earlier. (Tr. 142).

On the morning of Monday, August 18, 2004, Topliff was busy putting the paperwork together to present to the FAA instructor, so he and Comer could take their check rides scheduled later that day. (Tr. 143-4). Combs testified that he saw Topliff that morning and asked if he had all of the paperwork in order for the FAA check ride. (Tr. 386). Topliff stated that everything was in his briefcase because he believed that Comer's certificate was in the pile of paperwork he put in his briefcase on Sunday. (Tr. 147).

Once he thought he had all the required paperwork, he went to see Carla Parker. (Tr. 144). Parker is the records clerk at Flight Options, who was in charge of maintaining the pilots training records on the CAMP system.¹² (*Id.*). Topliff noticed that the dates for Comer's Part 135 and 299 check rides were not correct in the CAMP system, so he asked Parker to change them. (Tr. 145). Parker requested to see the documents, so Topliff went to retrieve the documents from Comer's training file. (*Id.*). Topliff testified that:

there is no place in the CAMP system to input the date for check airmen flight training, and there wasn't at that time . . . The only dates that were in there or were available were the dates for the 135 qualifications. In other words, the 135 and the 297 and 135 and 299, their last flight safety trip, ground training, and those sort[s] of things.

(Tr. 148-9).

However, during his conversation with Parker, Topliff noticed that he did not have a check airman flight training

¹² CAMP is the abbreviation for Flight Option's "Continuous Airworthiness Maintenance Program - a computer system utilized by Flight Options to organize and store various types of data regarding, among other things, the pilots and their training." (Glossary Terms; Tr. 148).

certificate for Comer. (Tr. 145). Topliff asked if Parker had seen Comer's certificate, and she told him no. (*Id.*).

After an unsuccessful search for Comer's certificate, Topliff advised Combs that although he did not complete the training "like we normally do," he thought he had the certificate based on Kremer's first telephone message. (Tr. 146-47). Combs told Topliff that he could complete the FAA check ride but Comer could not. (Tr. 387). Topliff testified that approximately an hour had passed before he had his second conversation with Combs. (Tr. 147).

Topliff stated that he has no reason to lie because there were no negative consequences as result of not completing the training. (Tr. 149-50). Additionally, Combs did not mention to Topliff that he had falsified documents or provided him with dishonest information. (Tr. 151-52).

The day after Topliff completed his FAA check ride, Combs, Christiansen, and Salata placed a conference call to Kremer regarding Comer's flight training. (Tr. 393-94). Combs testified that he learned from Kremer that the certificate for Comer was never completed because he was not there to observe the training. (Tr. 394). Later that day, Combs also spoke to Comer, who informed him that he and Topliff did train on August 16, but Kremer was not on the aircraft to observe. (*Id.*). Combs testified that he then discussed the incident with Christiansen and Salata. (Tr. 396). Combs stated that is when he:

came to the conclusion and told both [Christiansen and Salata] that I had lost confidence in John Topliff as a program manager because they had asked what should we do about it. And I said I believe he has lied to me about the completion of the paperwork and I said I cannot have him in a position of trust and responsibility if I cannot depend on his word as being the - - being honest.

(*Id.*).

About a week after the failed training incident, Hertzberg requested a written statement from Topliff concerning the training that occurred in 2002 and August of 2003. (Tr. 152, 156, 159). On August 24, 2004, Topliff provided the following statement:

I got a voice mail from Greg [Kremer] stating that he was sorry he had to go flying and that he missed us. He said he would leave a training certificate from what he had observed on 8-14-02 on my desk. He further said that it was unfortunate that he could not sign an observation for Doss Comer. He left a second voice mail before he boarded his flight going home restating the same information. I did not get to talk to Mr. [Kremer] that day.

(Tr. 152, 159; JX 16).

Salata testified that he learned about the training incident the day Topliff was scheduled to have his check ride with the FAA. (Tr. 528-29). He stated that there was no way Comer could have received an acceptable training certificate since Kremer was not present on the aircraft to observe the flight training. (Tr. 529). To get a better understanding of the facts, Salata requested Starkey to conduct an independent investigation of the events surrounding Topliff and Comer's training. (Tr. 531). Salata believed that Starkey was appropriate to conduct the investigation because he is an expert on the FAA regulations and had previously been the company's training officer. (*Id.*).

Starkey testified that Salata informed him of his assignment on August 21, 2003. (Tr. 458; JX 1, pg. 1). However, he confirmed his assignment with Hertzberg prior to starting his factual investigation. (458-59). In preparation for writing his report, Starkey spent approximately a week interviewing witnesses and obtaining written statements from people who were associated with the August 2003 training incident. (Tr. 458-59; JX 1, pg. 1). Starkey testified that he personally conducted Topliff's interview and that Complainant did not mention that Kremer's second message was garbled or that he made safety complaints to the FAA. (Tr. 461; JX 1, pg. 5-6).

Starkey's report contains a written statement from Kremer dated August 21, 2003. (JX 1, pg. 21-2). In his statement, Kremer stated that he learned that the flight training was cancelled prior to leaving his hotel on August 16, 2003 due to Topliff and Comer's rescue trips. (JX 1, pg. 21). Additionally, sometime during that day, Kremer called Topliff's cell number and left the following message on his voicemail:

I'm heading out of town shortly, but on your desk in an envelope is your re-done training record from last

year when we did the flight training in ICT . . . just curious John, did you happen to give Doss [Comer] his CA flight training while you guys were doing trips all day? If you in fact did, and if your aircraft flight log can confirm the extra flying & approaches, etc, then I wonder if John Christensen would allow me to sign-off that I observed you training Doss, basically as a professional courtesy upon your word, even though I obviously wasn't there? Hmm . . . I'll ask someone about that, and IF the company agrees, then I'll leave you that form also for you & Doss to sign.

(JX 1, pg. 22).

However, after thinking about the message he left for the Complainant, Kremer determined that it was not wise of him to suggest signing Comer's certificate without being present. (*Id.*). Therefore, Kremer called Topliff's cell number and left the following second voicemail message: "Forget the idea of me signing-off any observation of training you may have given Doss . . . bottom line is that I wasn't present so we cannot do that. Hope you guys had a good day." (*Id.*).

In a written statement dated August 26, 2003, Comer noted that he and Topliff reviewed the company's Check Airman's Manual on Sunday, August 17, in preparation of the FAA visit on Monday, August 18, 2003. (JX 1, pg. 11). Towards the end of the review, Topliff requested Comer to go retrieve both of their training records so Complainant could file copies of their training certificates. (*Id.*). Comer noted that he saw a training certificate signed by Kremer but he "did not file a copy of the Company Training Certificate for observed flight training in my record." (*Id.*). The next day, Comer was informed that his training certificate was missing, so he went to Comb's office, which is the last place he believed that he had seen the certificate. (JX 1, pg. 12). Unable to locate the certificate, he was advised by Topliff that he would have to complete his FAA observed check ride in the future. (*Id.*).

Starkey provided testimony concerning his August 27, 2003 interview with Parker. (JX 1, pg. 7). According to Starkey, Parker entered Comer's check airman flight training date in the CAMP system at Topliff's request. (Tr. 462-63; JX 1, pg. 7; JX 4, pg. 28). Starkey requested that Parker remove the date from Comer's record because there was no evidence that the training was completed. (Tr. 464; JX 4, pg. 28). He did not have Parker print out the screen from the CAMP system to show that the date

was entered and deleted. (Tr. 476-77). On August 29, 2003, Starkey presented his report to Hertzberg with copies to Salata and Sullivan. (JX 1).

Topliff testified that on September 7, 2003, he was at home in Kansas when he received a call from Salata telling him that he needed to report to the office as soon as possible. (Tr. 159-60). Topliff flew to Cleveland, Ohio that afternoon but could not see Salata until the next morning. (Tr. 160). On the morning of September 8, Salata called Topliff into his office. (Tr. 160). At the meeting, Salata presented Topliff with an Employee Warning Notice. (Tr. 160, 532, 535; JX 2). The document provides that:

Upon investigation, it was found that the flight training portion for Mr. Comer was never completed properly. In fact, you informed the Chief Pilot just prior to the check ride that the paper work was "missing" for Mr. Comer, when in fact it never could have existed in any manner that would have been acceptable. When Ms. Parker questioned the fact that the documentation for Mr. Comer's Flight Training was incomplete, you directed Ms. Parker to enter the dates of training . . .

Due to the breach of responsibility of proper documentation, both the Part 135 Chief Pilot and the Senior Chief Pilot no longer have confidence that you will approach critical matters within the company with the level of detail that is required; you are relieved of all duties as Program Manager and Check Airman for the company. While you will be returned to the line as a pilot within the XP program, it is imperative that you perform the functions of this role with the utmost professionalism and dedication. Any further indiscretions may result in further corrective action up to and including termination.

(JX 2).

After Topliff was presented with the notice, Salata asked Complainant if he had any comments. (Tr. 535). Topliff stated that: "Well, this is the fourth investigation since my deposition. This is all related to," and then he cut me off and said "bullshit" with his comment, and said sign the paper. (Tr. 162). Salata told Topliff that he was allowed to appeal his decision through human resources. (Tr. 537). Salata asked

Topliff to return the company's cell phone and Blackberry¹³. (Tr. 162). Topliff was sent home and placed on administrative leave until the Respondent had a chance to review his future employment. (Tr. 162-63, 535, 569).

Topliff was under the impression from reading the warning notice that he would only be relieved of his program manager duties and demoted to the position of line pilot. (Tr. 162). Salata testified that the reason he wrote the warning notice that way was because that was the minimum that would happen. (Tr. 536). He explained that:

John was being demoted from program manager and check airman, and the main reason was because he had lied, and that's, that is, that's really something that we do not tolerate in our company dishonesty. And, you know, the thinking at the time was that how could we even put him on line as a line pilot if we couldn't trust him. But we wanted to do a further review of that before we made any final decision. So I told John that he would be, you know, sent home and not used until we -- and we would get back to him on what his status with the company was.

(Tr. 536).

Complainant submitted a written appeal of the warning notice to Flight Options on September 9, 2003. (Tr. 163, JX 3). Salata testified that since Topliff mentioned his name in his appeal, he thought it was appropriate that Sullivan handle the appeal. (Tr. 539).

After receiving Topliff's appeal, Sullivan conducted a separate investigation and issued a report on October 1, 2003. (JX 4). Sullivan concluded that Topliff had violated the company's rules by being dishonest and attempting to falsify a company document. (Tr. 490-1; JX 4, pg. 7). As a result of Topliff's conduct, Sullivan determined that Topliff would be removed as an employee of Flight Options either by resignation or termination. (Tr. 491; JX 4, pg. 7). Sullivan testified that during his investigation, Topliff did not mention that he had made complaints to the FAA. (Tr. 491).

¹³ A Blackberry is a portable handheld machine that allows a person to receive and send e-mail messages. (Tr. 163).

In October of 2003, Sullivan informed Topliff that his employment with Flight Options had been terminated and that a letter explaining the reasons for the termination was forthcoming. (Tr. 166). Sullivan's termination letter is dated October 6, 2003 and provides that:

"We have concluded our investigation into this matter and determined your actions and behavior were in direct violation of the policy and procedure manual. These violations warrant your immediate dismissal."

(JX 10). Sullivan testified that he made the final decision to terminate Topliff because he had not acknowledged any wrongdoing on his part and he attempted to defend his actions with his appeal. (Tr. 519-20).

DISCUSSION AND APPLICABLE LAW

Since Complainant's employment was within the state of Ohio, this case is controlled by the law of the Sixth Federal Circuit. However, no Sixth Circuit case law exists which offers an interpretation of the proof of burdens applicable in this case.

AIR 21 provides 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.

Peck v, Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 5 (ARB Jan. 30, 2004); 49 U.S.C. § 42121(a).

A complaint alleging a violation under AIR 21 must be dismissed "unless the complainant has made a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." 29 C.F.R. § 1979.104(b). To show a *prima facie* violation of the statute by the Respondents, the following must be established:

- (i) The employee engaged in a protected activity or conduct;
- (ii) The named person knew or suspected, 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 a contributing factor in the unfavorable action.

29 C.F.R. § 1979.104(b) (1) (i-iv).

Temporal proximity between protected activity and adverse personnel action normally will satisfy the burden of making a *prima facie* showing of knowledge and causation. *Peck*, ARB No. 02-028, slip op. at 6 (citing 29 C.F.R. § 1979.104(b) (2)). However, even if the Complainant establishes a violation of the Act, relief may not be granted "if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event." *Peck*, ARB No. 02-028, slip op. at 6 (citing 49 U.S.C.A. § 42121(b) (2) (B) (iv); 29 C.F.R. § 1979.109(a)).

The Administrative Review Board ("ARB") commented further on the burdens of proof in AIR 21 cases in *Peck*, ARB No. 02-028, slip op. at 6. The Board stated:

The standard that ALJs apply at hearing (29 C.F.R. § 1979.109(a)) and that we apply on review of ALJ decisions 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 AIR 21 section 519(a). 49 U.S.C.A. § 42121(b)(2)(B)(iii). Cf. *Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) (conclusion that the term "demonstrate" means to prove by a preponderance of the evidence is reasonable). Preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY 1201 (7th ed. 1999). Assuming a complainant establishes a violation of the Act, he nonetheless may not be entitled to relief if the respondent "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY at 577.

Id.

Protected Activity

An employee's acts must implicate safety definitively and specifically to be considered protected. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). Although the employee's allegation need not be ultimately substantiated, the employee must have a reasonable belief that his or her safety complaint is valid. *Minard v. Nerco Delamar Co.*, 1992-SWD-1, slip op. at 8 (Sec'y Jan. 25, 1995); *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997); *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-2, slip op. at 8-9 (Sec'y Feb. 1, 1995). The Secretary has held consistently that internal complaints are protected activity under the whistleblower provisions of the environmental statutes. See, e.g., *Bassett v. Niagara Mohawk Power Corp.*, 1985-ERA-34 (Sec'y Sept. 28, 1993); *Helmstetter v. Pacific Gas & Electric Co.*,

1991-TSC-1 (Sec'y Jan. 13, 1993); *Williams v. TIW Fabrication & Machining, Inc.*, 1988-SWD-3 (Sec'y June 24, 1992).

Complainant contends that he engaged in the following protected activities: (1) providing deposition testimony in the *Bowden* lawsuit that involves a violation of the Railway Labor Act; (2) providing deposition testimony in the *Miller* lawsuit; and (3) reporting violations of FAA standards or regulations to upper management and to the FAA.

(1) *Bowden* Lawsuit

Complainant contends that he engaged in protected activity when he provided deposition testimony in the *Bowden* lawsuit. Respondent argues that Complainant's involvement in this case does not implicate air safety and, therefore, is not protected under the Act. Respondent's argument has merit.

Complainant testified that he provided deposition testimony in the *Bowden* lawsuit while he worked for the Respondent. However, according to the parties' stipulation, the lawsuit "related to whether Flight Options violated [the] Railway Labor Act . . . and did not, in any way, relate to whistleblowing or safety." (JX 18). Complainant argues that although the *Bowden* lawsuit does not involve air safety, Topliff's participation is protected activity since it involves testimony relating to "any other law of the United States." See § 42121(a).

The regulations implementing the Act provide that:

49 U.S.C. § 42121 ("AIR21"), which provides for employee protection from discrimination by air carriers or contractors or subcontractors of air carriers because the employee has engaged in protected activity pertaining to a 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*.

29 C.F.R. § 1979.100(a) (emphasis added).

Complainant's involvement in the *Bowden* lawsuit must involve air carrier safety to be protected under the Act. Complainant's involvement in the lawsuit related to Respondent's alleged violation of the Railway Labor Act and did not, in any way, relate to whistleblowing or safety. Thus, I find that Topliff's deposition testimony is not protected by the Act.

(2) Miller Lawsuit

Complainant asserts that he engaged in protected activity when he provided deposition testimony in the *Miller* lawsuit. Respondent asserts that Complainant's participation in this case was not protected under the Act because Topliff was deposed after being terminated.

Complainant testified that he was deposed after his employment was terminated. (Tr. 284). He was also unable to recall whether he was identified as a potential witness in the case prior to his termination. (Tr. 329). Additionally, Complainant failed to present any evidence that Respondent knew he was "about to testify" in the case prior to being terminated. See § 42121(a)(3). As stated above, Complainant's acts must implicate safety definitively and specifically to be considered protected. *American Nuclear Resources*, 134 F.3d at 1292. See *Peck*, ARB No. 02-028, slip op. at 9; *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004). Complainant failed to show specific facts demonstrating that Respondent was aware of his future testimony and discriminated against him based on deposition testimony given after his termination. See § 42121. Therefore, Complainant has not proven specific facts to support the allegation of his deposition testimony constituting protected activity.

(3) Alleged Safety Violations

Topliff also alleges that he engaged in protected activity when: (a) he informed Reinhold he would not land an aircraft if the weather was below minimums; (b) he questioned flying aircraft that needed maintenance because of engine overheating and faulty brakes; and (c) he assisted in the investigation of a lightning strike incident involving a Beechjet aircraft. Respondent argues that Complainant failed to produce any evidence establishing that the alleged safety violations had occurred. Additionally, Respondent asserts that there is no evidence that the FAA ever investigated these alleged incidents, except for the Beechjet lightning strike incident.

(a) Ordered to Fly

In November of 2001, Complainant testified that he had a disagreement with Reinhold about flying into Spokane, Washington where the weather was predicted to be below minimums. Topliff testified that Reinhold ordered him to fly into Spokane and land the aircraft despite the weather forecast in Spokane. Although it was Topliff's decision whether or not it was safe to land, I believe that Complainant engaged in protected activity when he told Reinhold that he would not land the aircraft if the weather was below minimums.

As discussed above, I find that I cannot credit Topliff's testimony concerning the events surrounding the August 2003 check airman flight training. However, I find Complainant's testimony concerning this incident with Reinhold to be very credible. A complainant's own subjective belief that his compliance would result in a violation is only protected if his belief is reasonable. *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997). Here, I find Complainant's belief to be reasonable in that being ordered to land an aircraft regardless of the weather conditions involves air carrier safety. See § 42121(a)(1). Therefore, I find that Topliff engaged in protected activity when he informed Reinhold that he would not land in Spokane if the weather was below minimums upon his arrival.

(b) Engine Overheating and Faulty Brakes

Complainant engaged in protected activity when he initiated maintenance work on two separate aircraft that he was told were safe to fly. First, Topliff testified that while flying in January of 2003, he noticed a problem with the aircraft's brakes. Complainant testified that Reinhold threatened to fire him after he returned the aircraft to maintenance because they had failed to resolve the issue during the first maintenance check. Topliff provided the Aircraft Maintenance Records that indicate he initiated maintenance work on the aircraft brakes on January 15, 2003 and requested additional maintenance on January 18, 2003. (JX 19). Additionally, the Maintenance Records show that Corrective Action was performed on the brakes on January 19, 2003.

Next, Topliff testified that maintenance personnel and Reinhold informed him that it was safe to fly after the aircraft's engine was operating above its normal parameters. He refused to fly the aircraft, as second in command, with

passengers on board until the issue was resolved. (Tr. 308). Topliff explained that maintenance personnel faxed the captain a part of the Honeywell Light Maintenance Manual to convince him and the captain that the aircraft was safe to fly. (JX 19). Topliff provided a copy of the Aircraft Maintenance Records that indicate maintenance work was requested on the aircraft due to overheating issues on January 31, 2003 and a copy of a facsimile dated January 31, 2003 that contains the portion of the Maintenance Manual relating to the proper engine temperature. (*Id.*). Complainant testified that after an additional test was performed on the aircraft engine, maintenance determined that the engine was not operating within its normal parameters and replaced it. (Tr. 310-11).

In both incidents, I find that Complainant held a reasonable belief that it is a violation of a federal regulation or standard involving air safety by being told to fly an unsafe aircraft. See *Kesterson, supra*. The Act dictates that an employee who provides information to his or her employer or to the Federal Government "relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration" or other Federal aviation law is engaged in protected activity. § 42121(a)(1). Here, Topliff told maintenance personnel and Reinhold that these aircraft needed additional maintenance work to ensure the aircraft's safety after they were supposedly safe to fly. Therefore, I find that Complainant was protected under the Act when he requested that additional maintenance was needed on these aircraft.

Additionally, I find that Complainant's refusal to operate these aircraft in an unsafe condition constitutes protected activity under the Act. AIR 21 does not specifically list a refusal as protected activity. § 42121(a). In contrast, Section 5851 of the Energy Reorganization Act lists a refusal to engage in an unlawful act under the ERA to be protected activity. 42 U.S.C. § 5851(a)(1)(B) (2002).

However, prior to the inclusion of the refusal provision in the ERA, refusals to work were found to be protected activity under certain circumstances. For example,

If management had requested Complainant to falsify a quality control document or violate quality control procedures his refusal would constitute protected activity. Such a refusal would be designed to protect the overall integrity of the applicable quality

control and inspection procedures. As such it could be construed as the initial step in instituting proceedings under 42 U.S.C. §5851 of the ERA.

Durham v. Georgia Power Co., 1986-ERA-9 (ALJ Oct. 24, 1986) (affirmed Sec'y Feb. 18, 1987). Therefore, if Topliff's refusal was based on a reasonable belief that he was being asked to violate FAA regulations by flying these aircraft without the proper maintenance, his actions could represent an initial step in instituting proceedings under AIR 21.

I find that Topliff's refusal does constitute protected activity. Such a refusal should be based on a belief that to comply with the request would violate FAA regulations or quality control procedures. *Id.* As stated above, Complainant believed that he was being asked to violate a FAA regulation or standard if he flew these aircraft without the proper maintenance being performed. See JX 11. This is supported by the aircraft maintenance records. Therefore, I find that Topliff held a reasonable belief that he engaged in protected activity by refusing to fly these aircraft until additional maintenance work was performed.

(d) Lightning Strike Incident

In August of 2003, Topliff assisted Tacklett, a FAA liaison, in the investigation of a Beechjet aircraft. Topliff testified that he provided documents to Tacklett indicating that the Beechjet was flown with passengers after it was damaged by lightning. Respondent admits to being assessed a civil penalty by the FAA concerning this incident. However, Respondent asserts that the preponderance of the evidence suggests that Topliff's participation in the investigation was not protected under the Act. I disagree.

The record establishes that the day after the Beechjet was struck by lightning, Topliff was asked to escort Tacklett around Flight Options. (Tr. 102-3, 266). Topliff stated that he provided Tacklett with documents showing that the aircraft was flown after being struck by lightning with passengers. (Tr. 104-5; 269-70). Although none of the FAA documents relating to the lightning strike incident specifically discuss Topliff's involvement, in a letter dated September 30, 2003, the FAA informed Flight Options that "[t]his office has received information that indicates that this aircraft was used for revenue flights after the discovery of a possible lightning strike." (JX 9, pg. 5).

Topliff admits that he became involved in the lightning strike incident after the FAA investigation had already begun. (Tr. 267). Although Complainant did not initially report the violation to the FAA, his conduct was protected activity because he was assisting Tacklett in the investigation of the incident. AIR 21 protects employees who provide or "cause to be provided" information relating to the relevant violations. § 42121(a)(1). See *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2003). As Complainant provided relevant information to Tacklett concerning a violation of a FAA regulation, I find that Topliff's participation in the Beechjet lightning strike incident is protected under the Act.

In sum, I find that Topliff's participation in the *Bowden* and *Miller* lawsuits were not protected under the Act. I have also concluded that it was protected activity to report safety violations of FAA standards or regulations to upper management. Respondent argues that except for the Beechjet lightning strike incident, there is no evidence that the FAA was notified or investigated any of the safety violations he allegedly reported. However, AIR 21 protects employees who provide information to the employer "or" the Federal Government relating to a violation of laws pertaining to air carrier safety. § 42121(a); *Peck*, ARB No. 02-028, slip op. at 5.

Although Topliff has failed to establish that he reported multiple safety violations to the FAA, I find that the record does support his complaints to management. Specifically, I found Topliff's testimony concerning his being ordered to fly in November 2002 and his refusal to fly aircraft that needed additional maintenance to be credible and supported by the maintenance records. As Employer has acknowledged that Topliff complained about safety and maintenance problems at the February 2003 meeting, Topliff's complaints to management alone are sufficient to establish protected activity under the Act.

Respondent's Awareness of Any Protected Activity

In order to prevail, Topliff must show that Flight Options was aware that he engaged in the protected activity prior to the adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(i); § 1979.104(b)(1)(ii). In *Peck*, the court held that:

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).

ARB No. 02-028, slip op. at 10.

Respondent argues that Complainant failed to satisfy its burden of establishing that Flight Options was aware that he had "blew the whistle" to the FAA prior to his termination. However, I find that Respondent was aware that Complainant had engaged in protected activity regarding the safety violations that occurred prior to the February 2003 meeting.

(1) Safety Violations

The record establishes that in February of 2003, a meeting was held where the Hawker 800 XP pilots voiced their concerns about aircraft maintenance and flight safety to management. Topliff testified that he complained to management about being ordered to fly in November of 2002, and the maintenance issues concerning poor brakes and the overheating of an engine in January of 2003. Although Combs was not present for the entire meeting, he testified that Topliff did make complaints about safety issues and maintenance write-ups. (Tr. 444). Salata also recalled attending the meeting where the XP pilots, including Topliff, discussed maintenance issues and "pilots having disagreements on whether or not they should fly" (Tr. 564).

As a result of the meeting, Topliff replaced Reinhold as the Program Manager for the XP program. Respondent terminated Complainant's employment in October of 2003, which was approximately eight months after his promotion. Therefore, I

find that Respondent was aware that Complainant had engaged in protected activity at the February 2003 meeting.

(2) Lightning Strike Incident

I find that Topliff failed to prove that the Respondent knew of his participation in the Beechjet lightning strike incident prior to his termination. The record establishes that the Beechjet aircraft was struck by lightning in August of 2003. (JX 9). In the days following the incident, the FAA sent Tacklett to investigate to determine whether the aircraft was flown in an unworthy condition with passengers aboard after it was struck by lightning. Topliff testified that he escorted Tacklett around the building since there were no program managers from the Beechjet division available. (Tr. 266). He stated that while he was escorting Tacklett, Will (Bill) Sintelee was present when he and Tacklett viewed the aircraft in the shop. (Tr. 266-67). Topliff testified that in the days following Tacklett's initial visit, he spoke to Tacklett on the telephone and eventually gave him the aircraft's flight records showing that the aircraft was flown with passengers aboard after it was struck by lightning. (Tr. 104-5, 329).

Topliff also testified that he "discussed it with Bill Sintelee [("Sintelee")] later that day." (Tr. 118). However, according to Topliff, Sintelee was only aware that Topliff was escorting Tacklett around the building. As stated above, I found Topliff to be protected under the Act when he provided Tacklett with the Beechjet's flight records several days after the FAA began its initial investigation. Since the record contains no information concerning whether Sintelee knew of Topliff's involvement in Tacklett's investigation after his initial visit, I find that Sintelee was not aware that Topliff had engaged in protected activity under these circumstances.

Topliff stated that he also spoke to Mr. Combs, Mr. Hertzberg, Tacklett, Gary Parks ("Parks"), Salata, and Reinhold about the Beechjet lightning strike incident. (Tr. 118-19; JX 11). However, other than Sintelee, the record contains no information as to whether Topliff spoke to Herzberg, Parks, Salata, Combs, and Reinhold prior to being placed on administrative leave. In addition, Salata, Sullivan, and Starkey all testified that they had no knowledge that Topliff had blown the whistle involving any of the reported safety violations he had allegedly previously reported to the FAA. (Tr. 543, 491, 461). The record also contains no information as to what was said to Combs, Hertzberg, Parks, Salata, or

Reinhold. Although Topliff testified about his interactions with Tacklett while employed by the Respondent, the record establishes that Tacklett was not an employee of Flight Options.

Additionally, Topliff received the Warning Notice on September 8, 2003, whereby he was placed on administrative leave. (JX 2). The next day, Topliff filed a written appeal; however, his appeal does not contain any information concerning his involvement in the Beechjet lightning strike investigation. (JX 3). On September 30, 2003, the FAA informed Flight Options that it had received information alleging that an aircraft was flown after the discovery of a possible lightning strike. (JX 9, pg. 5). However, this letter is also void of any information relating to Topliff's involvement in the investigation or in the initiation of the Complaint. (*Id.*).

Topliff was notified of his termination on October 6, 2003. (JX 10). Although Topliff's termination occurred five days after he stated he reported the incident to the FAA (Tr. 268; JX 11), he testified that the only person he spoke with while on administrative leave from Flight Options was Greg Gambino, who only "wanted to know what [his] status with the company was" (Tr. 166). Therefore, I find that Respondent had no knowledge of Topliff's participation in the Beechjet lightning strike incident prior to his termination.

In sum, I conclude that Topliff established that Respondent was aware that he engaged in protected activity regarding the violations of the FAA standards or regulations by reporting them to upper management. However, I determined that Complainant failed to establish by a preponderance of the evidence, that Flight Options was aware of Topliff's involvement in the Beechjet lightning strike incident prior to his termination. Complainant has failed to establish a key element of his *prima facie* case, as it relates to the lightning strike incident. Therefore, it is not necessary for me to address the lightning strike incident in the forthcoming sections of this decision.

Adverse Employment Action

Complainant must demonstrate by a preponderance of the evidence that he suffered an adverse employment action. The regulations define an adverse employment action to include an employer's acts to "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee." 29 C.F.R. §1979.102(b) (2002). The Sixth Circuit offers the following examples of adverse employment actions:

Termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Hollins v. Atlantic Co., Inc., 188 F.3d 652, 661 (6th Cir. 1999) (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993)).

The record establishes that Complainant received an Employee Warning Notice on September 8, 2003, whereby he was demoted from the position of program manager to line pilot. Thereafter, Flight Options terminated his employment on or about October 6, 2003. Therefore, I find that Topliff suffered an adverse employment action when he was demoted and subsequently terminated.

Protected Activity as a Contributing Factor in Adverse Employment Actions

A Complainant need not have direct evidence of discriminatory intent. Circumstantial evidence is permissible evidence of discriminatory intent. See *Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). Rarely will a whistleblower case record contain testimony by a member of management which would support a link between the protected activity and the adverse employment action. Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

However, 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 have failed to show that his protected activity was a contributing factor in the adverse

employment decision. *Peck*, ARB No. 02-028, slip op. at 11. If so, it is unnecessary to proceed to the next stage of proof, that being 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. *Id.*

Topliff argues that he was terminated because he made numerous reports and complaints concerning aircraft maintenance and safety to the Respondent and the FAA. Respondent asserts that Complainant has failed to establish that any alleged protected activity contributed to his termination. I agree with the Respondent for the following reasons.

I concluded that Complainant engaged in protected activity in November of 2002 and in January of 2003. Flight Options demoted Topliff on September 8, 2003 and terminated his employment on October 6, 2003. Therefore, approximately seven to ten months passed between the time I found Complainant to have engaged in protected activity and the time of his adverse employment actions. The Secretary of Labor has determined "that even a ten-month lapse between the protected activity and the adverse action may be sufficient to raise an inference of causation." *Williams v. Southern Coaches, Inc.*, 94-STA-44, slip op. at 4 (Sec'y Sept. 11, 1995). See *Dillard v. Tennessee Valley Auth.*, 90-ERA-31 (Sec'y July 21, 1994).

Here, the record establishes that after Topliff raised all of his safety and maintenance concerns at the February 2003 meeting, he replaced Reinhold as Program Manager of the XP program. Complainant testified that the promotion was obviously not in retaliation for making complaints to management and the FAA. (Tr. 207). A few months later in April of 2003, Topliff received another pay increase. (JX 5, pg. 6). Complainant's personnel records also show that no disciplinary actions occurred prior to his demotion. (JX 5). Therefore, I find that the lapse of time "between the last protected activities and the adverse action mitigates a finding that temporal proximity alone raised the inference of causation in this case." *Dillard*, 90-ERA-31, slip op. at 2.

Additionally, I find that Respondent has established that the adverse action was taken for legitimate, nondiscriminatory reasons alone. Combs testified that he lost confidence in Topliff after he discovered that there was no way Topliff could have had a certificate for Comer because Kremer was never on the aircraft to observe the training. Topliff argues that he

believed he had Comer's certificate based on a telephone message he received from Kremer. However, the evidence in the record establishes that Complainant knew that Kremer did not complete a certificate for Comer based on Kremer's messages. Even if he did complete the certificate, it would not have been acceptable because Kremer was not present to observe Comer's flight training. Combs smelled subterfuge.

Kremer testified that his first message to Topliff indicated that it was a possibility that he could sign-off on Comer's certificate without being present. (JX 1, pg. 21). However, after he thought about it, he called Topliff and left a second message stating he could not because he was not present. (*Id.*).

Topliff asserts that Kremer's second message was "garbled." However, as discussed in the Findings of Fact, I concluded that Topliff's testimony in that regard and as it related to whether he believed he had Comer's training certificate was simply not credible. His oral testimony at the hearing is inconsistent with his written statements made closer in time to the incident. Specifically, in a letter dated August 24, 2003 to Hertzberg, Topliff failed to mention that Kremer's second message was garbled. Topliff stated that:

I got a voice mail from Greg [Kremer] stating that he was sorry we had to go flying and that he missed us. He said he would leave a training certificate from what he had observed on 8-14-02 on my desk. He further said that it was unfortunate that he could not sign an observation for Doss Comer. He left a second voice mail before he boarded his flight going home restating the same information.

(JX 1, pg. 16). In addition, in his letter appealing Salata's Employee Warning Notice dated September 9, 2003, he repeated the same information. (JX 3, pg. 1, #3). Therefore, based on Topliff's written statements and Kremer's statement, I find that Complainant knew that Kremer did not complete a flight training certificate for Comer on Saturday, August 16 and his representations to the contrary are simply not believable.

Salata also determined that Topliff had been dishonest regarding his having a completed flight training certificate for Comer. Salata testified that Topliff knew that Comer's certificate was never missing because it never could have existed in any manner that was acceptable. Topliff contends

that it was possible for Kremer to have completed a certificate for Comer because of the loose operations at Flight Options. Topliff also asserted that he was not aware that Flight Options had a written Part 135 training program approved by the FAA during the time he and Comer were attempting to complete their training. Those representations were credibly refuted by the testimony of Salata and Combs. Both stated that at the time Comer and Topliff were attempting to complete their Part 135 training, Flight Options had a FAA approved Part 135 training program in place.

Regardless, I find that Topliff knew that any evaluation or check evaluation had to be conducted by a certified check airman. Topliff is an experienced pilot, who had conducted between 70 to 80 check rides. (Tr. 175-8). He never signed-off on any paperwork concerning a check air ride that he did not personally observe while working for Raytheon Travel Air. (Id.). He testified that prior to going to work for Raytheon Aircraft, he had already completed the Part 135 training program at Flight Options but his paperwork was destroyed after he resigned. (Tr. 135). He also stated that on August 16, 2003, he spent all day trying to get in touch with Dennison, a certified Part 135 check airman, to complete his and Comer's flight training. (Tr. 138-9). Thus, based on Complainant's previous experience as a check airman, having already completed the Part 135 training program at Flight Options, and his attempts to locate Dennison, I conclude that Topliff was aware of the proper training requirements to become certified as a Part 135 check airman.

Sullivan also concluded that Topliff had been dishonest and determined that Complainant was also guilty of falsifying company documents when he instructed Parker to enter Comer's flight training date into the CAMP system. At the hearing, Topliff testified that there was no place in the CAMP system to input the flight training date into the system. However, Starkey testified that he instructed Parker to remove the date from Comer's electronic record since he had no proof that the training was completed. Although Topliff denies that he instructed Parker to enter Comer's training dates into the CAMP system, I find those representations to be refuted by Starkey's testimony concerning his independent investigation report that I have found to be credible. Since I have also determined that Topliff knew that Comer's training was never fully completed based upon proper training requirements, I conclude that Topliff was guilty of attempting to falsify company documents when he

instructed Parker to enter Comer's flight training date into the CAMP system.

In sum, Topliff failed to demonstrate by a preponderance of the evidence that his complaints to management concerning safety violations occurring prior to February of 2003 were a contributing factor in Flight Option's decision to demote him and terminate his employment. Complainant has also failed to establish that the Respondent's legitimate, nondiscriminatory reasons alone, were pretextual. See *Peck*, ARB No. 02-028, slip op. at 11. The record supports a finding that Complainant was fired for being dishonest and attempting to falsify company documents. Since Topliff has failed to show that his protected activity was a contributing factor in the termination of his employment, it is unnecessary to address the question as to whether Flight Options demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Topliff's protected activity. See *id.*, slip op. at 13 (citing 49 § 42121(b)(2)(b)(iv)).

However, even assuming that Topliff had established a *prima facie* case under AIR 21, I find that Employer has carried its burden by demonstrating with clear and convincing evidence that they would have taken the same adverse action in any event. See *id.* Employer has established that Topliff was fired as a result of his being dishonest about having a completed flight training certificate for Comer and attempting to falsify company documents when he instructed Parker to input Comer's flight training date into the CAMP system. As a result of Topliff's conduct, Flight Options lost confidence in Topliff's abilities as a Program Manager and decided to terminate his employment. I find the Respondent's reasons for termination to be legitimate, nondiscriminatory, and supported by the credible testimony of Combs, Salata, Sullivan, and Starkey. Therefore, I find that Respondent would have terminated Topliff's employment regardless of any protected activity Topliff may have engaged in under the Act.

Frivolous Complaint

AIR 21 includes a provision that permits an award of attorney's fees, up to \$1,000, to the employer if the complainant has brought a claim in bad faith or the claim is frivolous. 29 C.F.R. §1979.109(b) (2002). In *Berry v. Brady*, the court said that:

A complaint is frivolous "if it lacks an arguable basis in law or fact." *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998). "A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir. 1999). "A Complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Talib*, 138 F.3d at 213.

192 F.3d 504, 507 (5th Cir. 1999). See *Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000); see also *Hill v. Potter*, 48 Fed. Appx. 198 (6th Cir. 2002) (unpublished).

The Sixth Circuit has held that imposing sanctions against Complainants may have the effect of chilling appeals or claims that involve "serious, controversial, doubtful or even novel questions." *Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670 (6th Cir. 1999). However, the Court also determined that sanctions are appropriate where the claim was brought for purposes of harassment, delay or "other improper purposes." *Wilton*, 188 F.3d at 676 (citing *Dallo v. INS*, 765 F.2d 581, 589 (6th Cir. 1995)).

Respondent argues that it is entitled to recover reasonable attorney fees because Topliff's claim is frivolous and was filed in bad faith. Complainant contends that he engaged in protected activity and suffered adverse employment actions. Based on the evidence in the record, I conclude that Topliff's claim does not lack a rational basis in law or fact.

Complainant established that he had engaged in protected activity and that he suffered an adverse employment action. He held a firm belief that Flight Options terminated his employment based on the numerous safety violations that he reported to management and the FAA. He also believed that his participation in the *Bowden* and *Miller* lawsuits resulted in his termination. Although Claimant was ultimately unable to prove by a preponderance of the evidence that his protected activities were a contributing factor in the adverse employment actions, his claim was not necessarily meritless. The United States Supreme Court has held, "the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case"

Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1998).

For the reasons mentioned above, I find that Topliff held a firm and sincere belief that his Complaint was not based upon a meritless legal theory nor was it based upon baseless facts. Although Topliff was not successful in questioning the motivation behind the discipline relating to his demotion and termination, I am convinced that he was sincere in pursuing this claim. His claim was not brought in bad faith nor was it frivolous. Therefore, Respondent's request for a partial recoupment of attorney fees is DENIED.

CONCLUSION

It is my conclusion that John G. Topliff was not disciplined or discriminated against for any activities protected by the Act.

ORDER

Based upon the above findings, IT IS ORDERED that the Complaint of John G. Topliff for money damages and attorney fees is hereby DENIED.

A

Rudolf L. Jansen
Administrative Law Judge

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, NW, 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).