



**Issue Date: 11 December 2007**

**Case No.: 2005-AIR-32**

**In the Matter of**

**Darryl Thompson,**

**Complainant,**

**v.**

**BAA Indianapolis LLC,**

**Respondent.**

**RECOMMENDED DECISION AND ORDER<sup>1</sup>**

This case arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 49 U.S.C. § 42121 (“AIR 21”). The pertinent provisions of AIR 21 prohibit the discharge of an employee or discrimination against an employee with respect to compensation, terms, conditions, or privileges of employment in retaliation for the employee engaging in certain protected activity.

*Procedural Background*

On July 12, 2005, Complainant filed a complaint with the Department of Labor’s Office of Occupational Safety and Health Administration (“OSHA”), alleging that he had been discriminated against by the Respondent in retaliation for engaging in whistleblowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on September 19, 2005, concluding that the complaint was not covered under AIR 21 because Respondent was not an “Air Carrier” as defined by AIR 21.

The proceedings before the Office of Administrative Law Judges (“OALJ”) were initiated on September 30, 2005, when Complainant filed his Objection to Investigator Findings and Request for Hearing, and the matter was assigned to me. On November 16, 2005, Respondent filed its Motion for Summary Decision; Complainant filed his response on November 30, 2005. On December 6, 2005, I conducted a hearing in Indianapolis, Indiana on the issue of whether Complainant’s claim falls under AIR 21, and thus whether this Court has

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<sup>1</sup> Citations to the record of this proceeding will be abbreviated as follows: “Tr.” refers to the Hearing Transcript; “CX” refers to Complainant’s Exhibits; “ALJX” refers to Administrative Law Judge’s Exhibits; “RX” refers to Respondent’s Exhibits; and “JX” refers to Joint Exhibits.

jurisdiction to consider the merits of the claim. By Order dated December 13, 2005, I denied Respondent's Motion for Summary Decision and scheduled a hearing on the merits of the case.

On January 17, 2006, Respondent filed its Motion to Certify Interlocutory Order for Appeal and to Stay Proceedings During Pendency of Appeal. Complainant filed his response January 24, 2006, and Respondent filed a reply on January 31, 2006. By Order dated February 2, 2006, I granted Respondent's motion and certified my December 13, 2005 Order for appeal to the Administrative Review Board ("ARB"). On July 10, 2006, the ARB issued an Order denying Respondent's interlocutory appeal and remanding the matter back to me for further proceedings.

A hearing on the merits of the case was conducted in three parts in Indianapolis, Indiana on February 21 through February 23, 2007; April 24 through April 26, 2007; and May 22 through May 23, 2007. During the hearing, I admitted Complainant's Exhibits 1 through 4, 6 through 7, 9 through 33, 35 through 47, 49 through 52, 57, 59 and 60, 63 through 66, 68 and 69, 72, 74 and 75, 77 through 79, 81 through 83, 85 through 89, and 91 and 92; Respondent's Exhibits 4 through 6, 8, 16, 21 through 29, 31, 34 through 44, 48, 50 through 59, 61 through 63, 67 through 73(a), 85 through 94, 97 through 98, 101 through 104, 111 through 122, and 124; Joint Exhibit 1; and Administrative Law Judge's Exhibit 1. Complainant was represented at the hearing by Mr. Scott M. Dillon, Esq.; the Respondent was represented by Mr. Kim Ebert, Esq., and Ms. Kristin Keltner, Esq. Post-hearing, Respondent submitted and I admitted to the record RX 125 and RX 126. Complainant submitted his brief on November 6, 2006; Respondent filed its brief on October 29, 2007. I have based my decision on all the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

### *Factual Background*

#### *Management Structure*

Since 1995, British Airport Authority ("BAA"), the Employer-Respondent, has been under contract with the Indiana Airport Authority ("IAA") to manage the day-to-day operations of the air terminals at the Indianapolis International Airport ("IIA") and the Mount Comfort Airport.<sup>2</sup> (ALJX 1, Tr. 55). At the time of his termination, Complainant had been employed at IIA for 28 years, beginning in 1976, first as a general maintenance worker, then as an Airfield Operations Manager ("AOM") and or Airport Duty Manager ("ADM").<sup>3</sup> (Tr. 41, 46; CX 74). Complainant was an AOM for Employer at the time that he was terminated. (Tr. 46). In addition to his employment as an AOM for Employer, Complainant worked as a private contractor on IIA property. (Tr. 119-20).

As an AOM, Complainant's job duties included conducting inspections of the airfield, terminal, parking facilities, runways and perimeter on a daily basis; recording all findings during the inspections and timely reporting all operating conditions of the airport to the FAA, airlines, and pilots; requesting the appropriate action by the operating departments in order to correct any problems; enforcing applicable airport ordinances and FAA regulations; maintaining daily

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<sup>2</sup> The Mount Comfort Airport is a satellite airport that does not fall under the requirements of the FAA.

<sup>3</sup> Complainant was an AOM when the facts in issue began; at some point in early 2005, the AOM team was split into airport duty managers and airport operations managers. (Tr. 986).

records and inspection reports; and participating in FAA certification inspections and inquiries. (RX 43). The AOMs were obligated to ensure that Employer stayed in compliance with the FAA regulations in Part 139 of the Federal Code of Regulations. (Tr. 806). Additionally, AOMs were required to be familiar with the certification manual and to adhere to the requirements of the certification manual in the performance of their duties. (Tr. 809). The employee handbook encouraged employees to raise safety concerns and suggestions with their supervisor or other supervisors or managers and stated that all reports could be made without fear of reprisal. (CX 9; Tr. 206-07). All AOMs reported directly to the general manager of operations, although one AOM (Mr. Berlen) served as the supervising AOM. (RX 43, JX 1).

As part of their duties, all AOMs were required to note any safety violations or concerns on both their daily logs and their checklists. The checklists are preprinted forms that list various conditions reflecting the minimal safety standards as required by the FAA; they do not provide space for much detail. (Tr. 77, 1325). Maintenance personnel rely on the checklists to determine whether there are any conditions on the airfield which require their attention. (Tr. 1015, 1325). The daily logs detail everything that an AOM did at the airport on a given day, and are reviewed by other AOMs in order to apprise themselves of the conditions of the airfield. (Tr. 76-77, 1323-24).

Complainant reported to several different general managers at different times throughout the course of his career as an AOM with Employer. Generally, Complainant did not have any personal issues with the several general managers with whom he worked over time, and in fact established a personal friendship with one of the managers, Jim McCue. (Tr. 52, 1223). He did, however, have issues with one former general manager, Jane Griswold, as evidenced by his response to her 1999 performance evaluation of him, as well as his admission at the hearing that he questioned Ms. Griswold's management style and credentials. (RX 48, Tr. 904). He also testified that he "did not click too well" with Ms. Griswold's successor, David Fleet. (Tr. 68). Catherine Scionti, Employer's vice president for human resources, testified that before June 2004 she had never received any complaints regarding Complainant's job performance, but that she knew that he was perceived by some of his superiors to be difficult to work with. (Tr. 1115).

#### Reorganization of Management Structure

In June of 2004, BAA reorganized its management structure, combining the management of the maintenance and operations departments. Mike Medvescek, who was the airport maintenance manager at the time, was named as the manager of the combined maintenance and the operations departments. (Tr. 69, 1137). Mr. Medvescek replaced David Fleet, who until then had managed the operations department.<sup>4</sup> (Tr. 1414). This change was part of a larger reorganization which involved merging five departments into one; the operations department was the last group to be joined with the others. (Tr. 1413). Under this structure, Complainant, as well as the other AOMs, Todd Ebbert, Bill Abell, Steven Leach, and for a limited time, Mike Riedlinger, reported directly to Keith Berlen, the supervising AOM; their interaction with Mr. Medvescek was rare. (Tr. 60, 71, 1326).

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<sup>4</sup> Mr. Fleet was transferred to the planning and engineering department. (Tr. 1027).

Complainant testified that he felt there was a possibility of conflict once the two groups—maintenance and operations—were joined under one supervisor, Mr. Medvescek. (Tr. 418-19). He felt that after the change, it became discretionary rather than mandatory for maintenance to fix problems that were identified by the operations group, because one person was in charge of the budgeting for both groups. (Tr. 420).

### Complainant's Discovery of Airfield Conditions

The Complainant testified that on May 10, 2004, he noticed a series of ruts due to erosion, which were six to eight inches deep on the airfield, parallel with the hold lines.<sup>5</sup> (Tr. 130-31). He also saw a manhole, which appeared to be above the three-inch limit set by the FAA regulations, in the same area. (Tr. 128-30). All were located in the grassy area between Runway 5-L (RWY 5-L) and Taxiway B, and in what he believed to be the “safety area.”<sup>6</sup> (Tr. 128-32). Taxiway B was closed and under construction at the time, but RWY 5-L was open to air traffic. (CX 2 June 24, 25 and 26, 2004 checklists; Tr. 164, 172, 175). Complainant was not on duty at the time that he noticed the manhole and ruts, so he did not note the conditions in his daily log or in the inspection checklist at this time; instead, he contacted his supervisor, Mr. Berlen, by telephone and advised him of the conditions. (Tr. 132-134, 843). According to Complainant, Mr. Berlen told him that he would inspect the area. (Tr. 135).

Mr. Berlen testified that upon being notified by Complainant about the manhole cover and ruts, he contacted the maintenance department and instructed them to place some dirt around the area. (Tr. 1332). He did not check to see whether this had been done; based on his history with the maintenance department, he knew that they were very responsive, and he trusted that they would take care of the problem right away. (Tr. 1332). Mr. Berlen also testified that Complainant told him that the manhole and ruts were in line with the runway hold-short lines for Runway 23-Right, which indicated to him that they were outside of the runway safety area. (1333).

On June 14, 2004, approximately one month after Complainant reported the ruts and manhole that he believed to be FAA violations to Mr. Berlen, Jesse Carriger, an FAA inspector,<sup>7</sup> performed a periodic inspection at IIA. (Tr. 143). Periodic inspections are announced inspections that are conducted by the FAA on a routine basis, anywhere between 9 to 15 months apart. Surveillance inspections are unannounced inspections that are conducted if, for example, Part 139 violations are observed during a periodic inspection, or the FAA wants to inspect construction projects in progress.

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<sup>5</sup> Hold lines or hold-short lines are demarcated with optional signs called “runway safety area/obstacle free zone boundary signs” and designate the area that should be cleared in order to use the runway. (Lott Dep. 77-78). An advisory circular standard determines where the signs and line should be placed. *Id.* At BAA, the hold line or hold short line is 288 feet from the center line of the runways. (Tr. 1333).

<sup>6</sup> The “safety area” is the grassy area immediately adjacent to the runway. These areas must remain clear of debris to avoid damage to aircraft. (Tr. 130-133).

<sup>7</sup> In 2004, Mr. Carriger had been an inspector for two or three years. He completed several weeks of training at the FAA academy, and as part of his training, he shadowed experienced inspectors and completed his own inspections under the close supervision of experienced inspectors. (RX 101, p. 13).

During the June 14, 2004 periodic inspection, Mr. Carriger inspected all areas of the airfield, including the grassy area between the runway and taxiway where the conditions about which Complainant was concerned were located. After completing his inspection, Mr. Carriger issued a Letter of Correction<sup>8</sup> ("LOC") which indicated that he did not find any safety violations.

Approximately one and a half weeks after the inspection, on June 24, 2004, Complainant drove into the area of Taxiway B looking for safety issues. (Tr. 162-63). He was able to drive in this area because the runway was at least periodically closed during the day for construction. (Tr. 162-63). Complainant noticed that the rut and manhole cover he had seen on May 10 had not been repaired. (Tr. 162). He also discovered that there were twenty manhole structures in the safety area, which he determined by using a line of sight test with the hold lines. (Tr. 243-44, 841-42). Complainant testified that he noted on his checklist for that date that the manholes and ruts constituted violations; a hard copy of the June 24 checklist reflects that he noted them as violations. (Tr. 164; CX 2). Complainant testified that he also talked with Mr. Berlen about whether he had gotten the drainage structure fixed; Mr. Berlen told him that he had forgotten about them, and again told Complainant that he would take care of the problem. (Tr. 166). However, Mr. Berlen testified that after the initial call from Complainant on May 10, 2004 about the manhole and ruts, he did not receive any more contact from Complainant about them. (Tr. 1335).

The Complainant testified that the next day, June 25, 2004, he observed that the manhole and ruts still had not been repaired. (Tr. 170). On June 26, he returned to the grassy area between the runway and the taxiway and, following advice that he had found in an FAA circular, took photographs of the conditions. (Tr. 177). He did not tell his supervisor, Mr. Berlen, that he had found the additional manholes. (Tr. 839, 842).

Complainant's checklists indicate that the ruts and manhole structures were located in the area of Taxiway B, which is parallel to Runway 5-L. (CX 2 June 24, 25 and 26, 2004 checklists; Tr. 164). Complainant testified that he marked the area as Taxiway B rather than Runway 5-L because that was the project he was working on in an off-duty capacity when he first saw the ruts and manhole structure. (Tr. 164). He also noticed that the grassy area contained some ruts that were six to eight inches deep, approximately a foot wide, and fifteen to twenty feet long. He believed that the manholes and ruts were situated inside the safety area, and therefore constituted FAA violations.<sup>9</sup> (Tr. 129). He could not measure whether the manhole and ruts were actually within the safety area because in order to do so, the runway would have to be closed. (Tr. 366). Instead he employed a line of sight test using the hold lines, a method he had been taught during runway incursion classes to mark the safety area. He believed that the manhole covers and ruts constituted a violation because they ran parallel with the hold lines. (Tr. 131, 132, 365). The Complainant testified that at this time, he had not measured the hold lines, and did not know that they in fact did not mark the safety area. (Tr. 372).

Mr. Berlen testified that the description of the manhole and ruts as being in line with the hold lines indicated to him that they were outside of the safety area. (Tr. 1333). He also testified

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<sup>8</sup> A LOC is a form used by the FAA to identify Part 139 discrepancies. (RX 101, p. 10).

<sup>9</sup> Complainant acknowledged that it is not an FAA violation for these conditions to be outside the safety area. (Tr. 896).

that to his knowledge, manholes are always outside of the safety area because the airfield is designed so that manholes can be accessed without closing the runway if a problem should arise with them. (Tr. 1334). According to Mr. Berlen, the runway hold lines are 288 feet from the center line, nearly 40 feet outside of the safety area; he was aware of this on the day that Complainant reported the manhole and ruts to him. (Tr. 1332-33). He stated that he would have expected Complainant to know that the hold lines are 288 feet and outside of the safety area. (Tr. 1334).<sup>10</sup>

According to the FAA certification manual, the safety area for the runways is 250 feet from the center line of the runway. (Tr. 942). The certification manual does not discuss the relationship between the hold lines and the safety area. (Tr. 942 )

Mr. Ebbert testified that when he trains employees regarding the runway safety area, he instructs them not to drive past the hold lines, and shows them a PowerPoint presentation which states that “[t]he hold-short line defines the boundaries of the runway safety area.” (Tr. 1386-87). He testified that the hold short lines serve as a guide on where employees should not drive without informing the tower. (Tr. 1388).

Mr. Lott testified in his deposition that the hold lines are optional signs that are actually called safety area/obstacle free zone boundary signs. (Lott Dep. 77). He stated that there is a standard used as to where to place them, being 1 foot for each 100 feet of elevation above sea level past either a 250 or 280 line, depending on the level of aircraft at issue. (Lott Dep. 78). He also testified that it is part of the job of an ADM to know where the safety areas are, and that he would expect that someone who had been an ADM for 15 years would know where their safety areas were. (Lott Dep. 95-96).

### Decision to Implement Rotating Shifts

When Mr. Medvescek took over the operations department in June of 2004, each AOM had a consistent schedule of morning, afternoon, or evening shifts. (Tr. 1142). Soon after taking over the operations department, Mr. Medvescek began considering the possibility of rotating shifts among the AOMs.<sup>11</sup> (Tr. 1140; CX 10). Mr. Medvescek knew that although the FAA recommended rotating shifts for training purposes, they were not required under Part 139.<sup>12</sup> (Tr. 1141). He felt that it was important for each AOM to see the airport at different times, so that they would know and understand all of the functions of the airport in a 24 hour period, as it is the AOMs’ responsibility to respond to emergencies or unusual events. (Tr. 1518). He obtained information on how other airports scheduled shifts and consulted with Mr. Fleet and Ms. Scianti. (Tr. 1417).

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<sup>10</sup> During Mr. Berlen’s testimony, a presentation given to the 22<sup>nd</sup> Annual Airport Conference in November of 2006 was discussed in which the runway hold-short sign is described as the most critical marking on the airport because it defines the boundaries of the runway safety area. (Tr. CX 92, Tr. 1357).

<sup>11</sup> During her tenure as the general manager of the operations department, Ms. Griswold had also considered implementing rotating shifts; however, she ultimately abandoned the idea. (Tr. 905).

<sup>12</sup> In March of 2004, the FAA issued a new ruling stating that there should be more documentation and training for airfield operations people; rotating shifts was one way to accomplish this.

On June 4, 2004, Mr. Medvescek sent an e-mail to Mr. Fleet and Ms. Scionti indicating his intent to switch to rotating shifts, and inviting comments and concerns. (CX 10). Both Mr. Fleet and Ms. Scionti supported the plan. (CX 10). A June 7, 2004 e-mail from Mr. Fleet to Mr. Medvescek and Ms. Scionti reflects that the shift rotations were to begin in July, and that one month's notice would be given to the ADMs. (CX 10). The e-mails do not reflect the nature of the rotating shifts, but indicate that the ADMs would decide how long the shifts would be. (CX 10).

On June 30, 2004, at 7:00 a.m., Mr. Medvescek held a departmental meeting, where he announced that there would be a change to rotating shifts, and that an operations manager was going to have to be cut for budgetary reasons. (Tr. 277, 817-19, 821; CX 35). Mr. Medvescek informed the AOMs that the shift change would be effective in July 2004, and that the AOMs were free to work out the schedule amongst themselves, and to change it around to fit their needs. (Tr. 1143, 1145). However, they would have to work a new shift pattern every three months for the first year. (Tr. 1143, 1145).

According to Complainant, at the end of the meeting it was unclear what the rotating shifts would consist of in terms of the actual shifts themselves. (Tr. 265-66). Complainant testified that all of the operations managers, except for Mr. Berlen, were upset about going to rotating shifts. Mr. Berlen was not upset because his shift was not going to change—he was to continue on a permanent daytime shift. (Tr. 278). Mr. Medvescek testified that the feedback from the AOMs as a group was not favorable, and by December, relations between Mr. Medvescek and some of the AOMs had become contentious because of the schedule change.<sup>13</sup> (Tr. 1144; CX 35).

The rotating shift policy went into effect at the beginning of August 2004. (CX 23; Tr. 250). Complainant viewed the scheduling change as a retaliatory action in response to his contact with the FAA. (Tr. 823). Complainant, who had worked one shift for most of his career before the implementation of the rotating shifts, felt that the midnight shift would adversely affect his health. (Tr. 817, 827). He stated that Mr. Berlen and Mr. Medvescek knew that he did not like the midnight shift, because he had mentioned this to them during training. (Tr. 267-70).

According to the Complainant, the change in shifts caused chaos, because it was hard to tell who was working at what times each day. (Tr. 421). Mr. Leach stated that they “switched to a rotating shift where you really didn’t know when you’re going to work” and that they would “work some afternoons, some nights, and some during the day” within the same week. (Tr. 1305). The Complainant was aware of the FAA advisory circulars that encouraged working different or rotating shifts, but he testified that he and the other ADMs were always able to fulfill it by filling in for other people when they took their vacations. (Tr. 452).

The new rotating shift policy required the AOMs to work differently-timed shifts during one work week. (Tr. 1305). Complainant’s first shift under the new schedule was: Saturday 8:00 p.m. – 4:30 a.m. Sunday, 8:00 p.m. Sunday – 4:30 a.m. Monday, Tuesday 4:00 a.m. – 12:30

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<sup>13</sup> In a chain of e-mails between Mr. Medvescek and the AOMs dated December 4, 2004 through December 10, 2004, both Complainant and Mr. Leach expressed their dissatisfaction with the schedule change and manifested the hostility brewing within the department. (CX 35).

p.m. Wednesday, Wednesday 4:00 a.m. – 12:30 p.m. Thursday, Thursday 4:00 a.m. – 12:30 p.m. Friday. (Tr. 327). Complainant testified that he believed that the Pink shift was unsafe, because it required a person to work until 8:30 p.m. on Friday and then come back in at 4:00 a.m. on Saturday, leaving only seven and a half hours between the shifts. (Tr. 328). The Pink shift was the second three-month shift that he worked upon implementation of the rotating shift policy. (Tr. 329). Complainant testified that the worst shift for him would have been the Yellow shift, which he reached about a week and a half before he was terminated. (Tr. 329). He testified that it contained a midnight shift, which was typically the last choice for operations managers, and was usually given to new hires once they completed their training for that reason. (Tr. 268).

Mr. McCue, who was the managing director of operations for IAA from 1981 to 1991, testified that in his experience, the only time airports changed operations department managers' shifts so that they would work different hours on a regular basis within the same week would be in dire situations where additional personnel were needed, such as after an aircraft accident. (Tr. 1218, 1254). He had never heard of it being done in any airport other than in that type of situation. (Tr. 1254).

#### Alleged Protected Activity – Report of Violations to FAA

Complainant testified that directly after the June 30 meeting with Mr. Medvescek and the AOMs, he telephoned John Lott, an FAA inspector whom he had known for several years, because he was concerned that the manhole and ruts he had seen constituted FAA safety violations that remained unaddressed. (Tr. 178-79; CX 12; RX 125). Complainant placed the call to Mr. Lott from his home, within an hour after the announcement of the new rotating shift policy. (Tr. 829). He told Mr. Lott that there were safety violations on the airfield, and that Mr. Carriger had overlooked them during his inspection on June 14. (Tr. 180, Lott Dep. 17). He testified that at the time of the call, he thought that Mr. Lott would investigate the issues himself. (Tr. 185, 238).

At his deposition, Mr. Lott indicated that his understanding was that Complainant believed that the manhole and ruts were within the safety area, and that he wanted the FAA to be aware of FAA violations. (Lott Dep. 65-66). Mr. Lott testified that he could not tell whether the Complainant's allegations were actual violations, either based on what was described to him by Complainant over the telephone, or from the photographs that Complainant sent him. (Lott Dep. 66). Mr. Lott said that Complainant also told him about changing shifts in airport operations to rotating shifts. (Lott Dep. 18).

Mr. Lott testified that Complainant told him that during their telephone conversations that he had not marked the items about which he was concerned on his self-inspection checklists. (RX 101, pp. 15-16). Complainant testified at the hearing that he was noting issues on his checklist every time he saw them and that Mr. Lott may have been confused by his wording. (Tr. 221). He said that when he told Mr. Lott that he was not noting the violations on his checklists regularly, this was because he did not inspect the area regularly—but he claimed that he noted the issues on every day that he saw them. (Tr. 221). He believed that Mr. Lott misunderstood him because he did not go the area regularly. (Tr. 221).

Mr. Medvescek testified that Mr. Berlen did not bring to his attention any concerns on the Complainant's part about ruts, humps, or depressions at Taxiway B. He stated that he tries to look at the checklists every day to make sure that the proper information is being put in, and to monitor the technical and airfield personnel. After the initiation of this litigation, he was surprised to see that the checklists for June 24-26, 2004 showed an unsatisfactory condition at Taxiway B; if he had seen these checklists, he would have questioned them. He believes that they were altered, because he would have noticed them if they were not. (RX 105, 107, 109, Tr. 1423).

Tim Konopinsky, Employer's Information Technologies Director, testified that the computer records show that the June 24, 2004 checklist was last modified by Complainant at 5:34 p.m. on June 30, 2004, and the June 25, 2004 and June 26, 2004 checklists were last modified by Complainant on June 30, 2004 at 12:01 and 12:02 p.m., respectively. (Tr. 1493, 1496-97). Complainant acknowledged that he was on duty on June 30, 2004 during the times that the checklists were edited, but he denied having edited the entries. (Tr. 845, 854, 857). Mr. Konopinsky agreed that even minor changes, such as deleting a "." or saving the record would show up as a "modification." (Tr. 1502-1503).

At the hearing, Complainant testified that he believed he had made one or two phone calls to Mr. Lott before June 30, 2004. (Tr. 218, 831). He believed that his first call to Mr. Lott was made right after June 24, 2004, the first day that he noticed that the ruts and manhole had not been repaired after Mr. Carriger's June 14, 2004 inspection. (Tr. 218). However, Complainant's phone records (both home and cellphone) do not show any calls made to Mr. Lott's telephone number before June 30. (CX 12; RX 125, 126).

In addition to the telephone calls, Complainant sent Mr. Lott two e-mails on June 30, 2004 and one on July 1, 2004, in which he included three sets of photographs he had taken of the manholes and ruts as attachments. (CX 13; RX 101; Tr. 836-839). Mr. Lott thanked him for the e-mails and photographs by e-mail on July 1, 2004. (CX 13). Complainant never showed these photographs to his supervisor, Mr. Berlen. (Tr. 839, 842, 1335).

On July 1, 2004, Mr. Lott sent an e-mail to Mr. Carriger regarding Complainant's calls, informing him that Complainant had indicated there was "a local issue brewing involving changes in operations agent shift assignments and reductions in staff resources." (CX 15). He also told Mr. Carriger that Complainant had stated that there were FAA violations at the airport which Mr. Carriger had failed to identify, and of which management was aware. (CX 15). He sent Mr. Carriger the photographs that Complainant had e-mailed to him. (CX 15).

Sometime between June 30, 2004, the date of Complainant's first call to Mr. Lott, and August or September 2004, Mr. Lott informed Mr. Fleet, the former general manager of the operations department, that Complainant had called him alleging FAA violations in the airfield, and that he had advised Complainant to ensure that he was reporting his concerns on his checklists. (RX 101, p. 48). Mr. Lott identified Complainant by name. (RX 101, p. 48). He testified that he decided to contact Mr. Fleet because he was concerned that Complainant was reporting alleged violations to him instead of noting them on his checklists. (RX 101, pp. 49, 54). Mr. Lott also felt that, because the surveillance inspection revealed no violations,

Complainant's allegations were without merit; he wanted the phone calls to stop. (RX 101, pp. 49, 51). Mr. Lott testified that he believed that Complainant's complaints were meritless because of Mr. Carriger's report that there were no discrepancies. (Lott Dep. 54). Mr. Fleet asked Mr. Lott for copies of the e-mails or a statement, but Mr. Lott refused. (RX 101, p. 51).

Complainant testified that on July 8, 2004, he received a call at home, before he went to work, from Roger Fulkerson, a construction contractor who had contracts with Respondent, and who was a personal friend of Complainant's. (Tr. 198-99). According to Complainant, Mr. Fulkerson told him that he heard from Bill Abell that Mr. Medvescek had met with David Fleet and Catherine Scionti and perhaps Bob Duncan, the airport attorney; that Mr. Medvescek had learned that Complainant had reported safety violations to the FAA; and that Mr. Medvescek was going to terminate Complainant. (Tr. 285). Complainant further testified that Mr. Fulkerson told him that Bill Abell had asked him to get in contact with Complainant to alert him before he came into work that day. (Tr. 285-86).

Mr. Fulkerson corroborated Complainant's testimony in part, testifying that in mid-summer of 2004, through conversations with people in operations, he became aware that Complainant had made reports to the FAA, and that "someone was trying to do everything they could to get him fired or quit his position." (Tr. 1278-79). Mr. Fulkerson could not remember who had given him this information, but he said that it was someone in the operations group because they were the people whom he dealt with when he was at the airport, and that it was not Complainant. (Tr. 1279-80). He testified that he called Complainant and told him to be careful. (Tr. 1280).

Mr. Abell testified that he "became aware that there [was] friction and there was... head-butting going on between [Complainant] and the bosses" and that he assumed because of that, the situation would "come to a head at some point" and that somebody would do something about it. (Tr. 1272-73). Mr. Abell did not know that Complainant was going to be terminated before he was actually "let go." (Tr. 1272). He did not provide any testimony to corroborate the alleged conversation between himself and Mr. Fulkerson about the Complainant.

Complainant testified that when he arrived at work on July 8, 2004, Mike Riedlinger asked him what he was doing at work, and told him that he had heard he was fired. (Tr. 298). Mr. Riedlinger did not testify at the hearing.

Later on that same day, Complainant placed a phone call to Mr. Lott. (Tr. 198; CX 12; RX 125). Telephone records verify that this call was made on July 8, 2004; it was the last call that Complainant made to Mr. Lott. (CX 12; RX 125). Complainant testified that the purpose of his July 8, 2004 call was to tell Mr. Lott that he had heard that he was going to be terminated for talking to the FAA. (Tr. 198). Complainant testified that Mr. Lott responded by telling him that he did not want to get involved in airport politics. (Tr. 286). For his part, Mr. Lott testified that he could not remember if he spoke to Complainant on July 8, 2004 or received a voicemail from him, and he could not remember the subject of any communication that occurred on that day. (Lott Dep. 37-38).

Complainant testified that a few days after these events, Danny Cooper told him that he had heard that he had been fired. (Tr. 299). Complainant responded that he had heard that too, but that no one had notified him that he actually was terminated. (Tr. 299). Danny Cooper testified that he had heard rumors that Complainant was going to be disciplined in 2004 or 2005, but he did not remember the source or exact nature of the rumors. (Tr. 1259-60). He also testified that he was shocked when Complainant was terminated. (Tr. 1260). Finally, Mr. Cooper testified that he never told Complainant in 2004 that he heard that he was fired. (Tr. 1264-66).

#### Stewart MacVicar Arrives as Vice President of Customer Service at IIA

In July of 2004, Stewart MacVicar arrived in the United States to become the Vice President of Customer Service for Employer at IIA.<sup>14</sup> (Tr. 967). Mr. Medvescek reported to Mr. MacVicar.<sup>15</sup> (Tr. 967). Mr. MacVicar began working for Employer in the 1980s as a planning and construction project manager; he became Vice President of Customer Services in the mid-1980s. (Tr. 1508-09). His expertise was in safety practices and compliance with international aviation standards. (Tr. 1510).

Mr. MacVicar testified that he wanted to bring the Indianapolis airport into line with the rest of BAA. In Indianapolis, the ADMs had other responsibilities in addition to the airfield, including terminal responsibilities, and the staff had been on the same shifts for many years. In “best practice” airports, however, it is common practice for airport operations managers to be dedicated solely to the airfield, and to rotate shifts. (Tr. 1055). When Mr. MacVicar first arrived in Indianapolis, the discussions about rotating shifts had already taken place, and the process was just about to begin. (Tr. 1055). He recalled that Mr. Fleet, along with Mr. Medvescek, was responsible for implementing the rotating shift policy before he arrived; shortly after he arrived, the policy was implemented with respect to the operations managers. (Tr. 1054-1055, 1517). Mr. MacVicar also testified that it was best practice and the most effective way to deal with safety issues for the maintenance and operations groups to be in one department. (Tr. 1547-48).

#### Unannounced FAA Inspection

On July 14, 2004, in response to Complainant’s calls to Mr. Lott, Mr. Carriger conducted an unannounced surveillance inspection at IIA. (RX 101). Mr. Ebbert escorted Mr. Carriger through the airfield during this inspection. (Tr. 1392). During the inspection, which lasted two and a half hours, they drove in the grassy areas between the runways and taxiways, looking for any ruts, humps, or depressions in the safety area. The inspection encompassed the area in which the manhole covers and the ruts that Complainant reported were located; that area was double-checked. (Tr. 1398).<sup>16</sup> Mr. Ebbert testified that the manhole covers they saw were located outside of the safety area, about 285-286 feet from the runway center line. (Tr. 1400). He also stated that they noticed a manhole with erosion around it in the area about which Complainant was concerned, but they found no FAA violations. (Tr. 1394 - 1400). At the

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<sup>14</sup> Mr. MacVicar had been working part-time from the United Kingdom for several months before this date with regard to IAA. (Tr. 1032).

<sup>15</sup> Mr. MacVicar’s title changed to Deputy Airport Director in early 2005.

<sup>16</sup> As noted above, Mr. Lott had forwarded the photographs the Complainant had e-mailed him to Mr. Carriger.

conclusion of the inspection, Mr. Carriger issued a LOC which indicated that he found no discrepancies. (RX 101, Ex. 10). Mr. Ebbert testified that Mr. Carriger's inspection was thorough. (Tr. 1400).

Complainant testified that he heard that the inspection on July 14<sup>th</sup> by Mr. Carriger was completed in "record time," and that he was concerned that it was done by noon on Tuesday; he claimed that an inspection usually takes a full two to three days, and sometimes four. (Tr. 180-81). Complainant measured the hold lines after Mr. Carriger's second inspection, and found them to be approximately 290 feet from the center runway line, and 40 feet outside of the safety area. (Tr. 372).

Complainant testified that he believed he went back out to the area with the ruts and manholes on July 20, 2007 and that the problems had been repaired. (Tr. 295). He did not know when the repairs were made, but he believed that they began "as soon as Jesse was there" or "within that timeframe of the 14<sup>th</sup> through the 20<sup>th</sup>." (Tr. 295). He testified that Mr. Ebbert's log indicated that there was work occurring on the airfield and that runway 23 Right was closed for construction work; there was also dirt work being performed. (Tr. 296).

#### Vacation/Snow Policy

On July 27, 2004, Mr. Medvescek sent an e-mail to the operations and maintenance departments, with a subject line "Snow season policy," reminding employees that although vacation and personal leave was allowed during November through March, employees were expected to be available on call during this period to cover their shifts. According to Mr. Medvescek, the purpose of the e-mail was to allow employees to get ready and plan for the snow season ahead of time. In the e-mail, Mr. Medvescek explained that the policy was in place because during the winter months, winter operations took priority in order to maintain airport safety. (CX 21). This snow policy was effective for both the maintenance and operations departments, although it had applied only to the maintenance department for the previous 17 years. (Tr. 1154 - 55).

Mr. Berlen testified that the snow season policy was implemented with respect to the operations department because Mr. Medvescek wanted all of his employees to be held to the same policy. (Tr. 1345). Mr. MacVicar testified that he had asked for the implementation of what was considered the best practice, and that is why it was put into effect with respect to the operations group. (Tr. 1592). The snow season policy remained effective as of the date of the hearing. (Tr. 1346, 1428).

Because the policy had not previously applied to the operations department, Complainant had been able to take a cruise during the winter months each of the four years preceding the application of the policy to the operations department.<sup>17</sup> Complainant testified that he took his vacation during the winter because he and his family enjoyed it, and it freed up the summer months for the people with children who needed to take their vacation during the summer time. (Tr. 300-301). Complainant felt that the change was made in retaliation against him because he

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<sup>17</sup> As of the date of the e-mail, Complainant had not scheduled a cruise or requested vacation time for the winter months of 2004. (Tr. 872).

had contacted the FAA. (Tr. 869 – 72). He testified that he heard from Danny Cooper that Mr. Medvescek interrogated him about Complainant’s vacation habits, and “accused” Mr. Cooper of taking a cruise with Complainant and his wife. (Tr. 305). According to Complainant, Mr. Medvescek found out when Complainant took his vacations, and within a week, the vacation policy changed. (Tr. 302-303). On the other hand, Mr. Cooper testified that while he was asked about his own vacation, he was not asked about Complainant or Complainant’s vacation habits.

Complainant also testified that after the snow season policy e-mail was sent out, Bill Abell told him that “they’re out to get you, you’re the only one who takes winter vacation.” (Tr. 311). At the hearing, Bill Abell did not testify about the snow season policy, either in general or as to the statement Complainant ascribed to him.

Mr. Berlen testified that during snow season, the priority is to keep the airport open and safe during inclement weather. (Tr. 1344). Because it takes a lot of people to do that, a snow team is used. (Tr. 1344-45). The snow season policy, as it applied to the maintenance department, had been in place since at least 1992. (Tr. 1345). Starting in July 2004, the snow team consisted of both the maintenance and operations departments. (Tr. 1345). The snow season policy is still in place today in the same form as it was implemented during the time Complainant claims it was put in place to target him. (Tr. 1346).

Mr. Medvescek testified that the snow season policy never changed, only those subject to it did. The operations department, of which Complainant was a part, was moved into this policy in July of 2004, and so notified in an e-mail. (Tr. 1154-55). The e-mail was sent in July in order to plan for snow season ahead of time, and to give people time to get ready and acclimated. (Tr. 1155). Mr. Medvescek also testified that he was not aware of Complainant’s vacation practices or the vacation practices of any of the operations department managers. (Tr. 1156, 1428).

Mr. MacVicar testified that the constraints that were placed on Complainant and the other members of the operations group in the form of the snow policy applied to all employees in “all of the airports where snow is a factor.” (Tr. 1592). Because snow is unpredictable, the airport, for safety reasons, requires that the airport have its experts and its skilled resources—employees—available. Such a policy cancels or restricts leave in airports that will likely get snowy weather from November until May. Mr. MacVicar testified that this was common practice and that within BAA, it was the “best practice.” (Tr. 1592).

#### *Awareness of Complainant’s Calls to FAA*

Mr. Medvescek testified that in August or September of 2004, he had a conversation with Mr. Fleet, in which Mr. Fleet told him that the Complainant had contacted the FAA, and reported deficiencies or violations on the airfield to Mr. Lott, which resulted in extra inspections (Tr. 1157). Mr. Medvescek was concerned that he had not been advised about these complaints, and that the Complainant had gone over his head to Mr. Lott (Tr. 1158). However, Mr. Medvescek did not ask the Complainant about it. (Tr. 1159).

Ms. Scionti testified that she had heard from either Mr. Fleet or Mr. MacVicar that Complainant had called Mr. Lott about some issues, but she did not remember when she heard this. (Tr. 1119-20).

Complainant's personal friend and former supervisor, Mr. McCue, testified at the hearing that at an Airport Safety and Operations Specialist School held in Denver, Colorado in August of 2004, Todd Ebbert told him that BAA thought Complainant had given some information to the FAA about safety deficiencies and that "they had changed his schedule, work time, work hours, days off and so on." (Tr. 1222-23). Mr. McCue testified that he was surprised that Mr. Ebbert offered this information to him since he and Complainant were friends, and he concluded that Mr. Ebbert must not have been aware of their friendship. (Tr. 1223).

In an earlier notarized affidavit dated August 5, 2005, Mr. McCue stated that at the 2004 School in Denver, Mr. Ebbert told him that BAA was attempting to have Complainant give up his position as Operations Manager at IIA "by intimidation and changing his work hours and days off." (Ex. 19). He further stated that Mr. Ebbert told him that the reason for the tactics was that "BAA was concerned that [Complainant] had reported safety violations to the FAA." (Ex 19). In his affidavit, Mr. McCue stated that the next time he saw Complainant, he related the conversation to him. (Tr. 1224).

Mr. Ebbert testified that at some point Mr. Medvescek told him about the FAA safety complaints by Complainant, which he had figured out himself. (Tr. 1206, 1343). He testified that Mr. Medvescek did not give him any details, other than that Complainant made an FAA complaint. (Tr. 1209). He could tell that Mr. Medvescek was upset because he raised his voice when he talked about the situation. (Tr. 1211-12). Finally, Mr. Ebbert testified that it was likely that he told Kevin Unger, another AOM, that Complainant had made complaints to the FAA. (Tr. 1210). In his testimony at the hearing, Mr. Ebbert acknowledged that he approached Mr. McCue at the conference, but denied having told him anything about the FAA, or management attempting to have Complainant resign. (Tr. 1214-15).

Mr. MacVicar testified that he was not sure whether he ever knew about Complainant's contact with the FAA before the initiation of these proceedings. (Tr. 1026). He later acknowledged however, that sometime around January 7, 2005, Mr. Medvescek "mentioned that there was a rumor" or "suspected" that the Complainant had contacted the FAA about safety concerns. (Tr. 1035; 1040-41). He testified that Mr. Medvescek did not tell him the source of the rumor. Mr. Medvescek testified that sometime after Complainant gave his PowerPoint presentation to Mr. MacVicar, he talked with Mr. MacVicar about the Complainant's communications to the FAA. (Tr. 1160).

Mr. MacVicar also testified that the rumor did not particularly concern him; in his positions with airports in the United Kingdom, people were encouraged to raise safety matters with whomever they felt was appropriate. While the preference is to go through the line of command, the chief executive has a hotline so people can phone anonymously. The CAA, the equivalent of the FAA, also encourages people to contact them about safety issues, and the CAA then contacts the airport. According to Mr. MacVicar, in a "safety culture," that is quite normal behavior, and it was also encouraged in the culture in Indianapolis. (Tr. 1037).

Mr. Medvescek recalled that sometime around November 2004, he informed Messrs. Berlen and Ebbert about Complainant's FAA complaints and asked them if they knew anything about it.<sup>18</sup> (Tr. 1159, 1208).

Mr. Medvescek testified that he spoke with Mr. Unger and Mr. Lawson, airfield supervisors, about the Complainant's reports to the FAA. (Tr. 1161). He told them to make sure to monitor the inspection sheets; some of the information that the Complainant was giving to the FAA was that they were not maintaining the safety areas of the airport. (Tr. 1161 - 1164).<sup>19</sup>

### Conditions at Mount Comfort Airport

Once a month, Mr. Medvescek assigned an AOM to inspect the Mount Comfort Airport. The AOMs were expected to prepare a report about their inspections for Mr. Medvescek's review. (Tr. 1431). Complainant's turn to perform the inspection occurred late September of 2004, but he did not create a report of his inspection as Mr. Medvescek testified he would have expected. (Tr. 1431; CX 25). That same week, Complainant went to the Mount Comfort airport after his shift at IIA to show one of Employer's inspectors a concrete panel that he believed was moving on the runway. (CX 25). Mr. Medvescek neither requested Complainant to perform the inspection, nor did he approve the inspection. (Tr. 1429; CX 25). Nonetheless, Complainant requested overtime compensation for the time spent at Mount Comfort. (Tr. 866; CX 25). Mr. Medvescek refused to approve the overtime. (Tr. 1429; CX 25).

On October 11, 2004, Mr. Medvescek sent an e-mail to Mr. MacVicar and Ms. Scionti explaining his reasons for refusing to approve the overtime, and advising them that it was his understanding that Complainant planned to appeal the decision. Mr. Medvescek explained that he denied the overtime because the Complainant did not ask for nor did he receive permission to take an airport vehicle on his own time to the Mount Comfort Airport. (CX 25). He testified that his refusal to approve Complainant's overtime was not based on a belief that the Complainant reported safety violations to the FAA. (Tr. 1431).

Complainant did not appeal the denial of overtime until November 9, 2004, when he made his PowerPoint presentation to Mr. MacVicar, which included a description of this situation. (CX 30). In response to the complaint, Mr. MacVicar reviewed Complainant's overtime records and determined that he was entitled to overtime compensation. (Tr. 1057; CX 50). Mr. MacVicar approved the payment adjustment on January 21, 2005, and the overtime compensation was added to Complainant's February 8, 2005 pay check. (RX 31).

### PowerPoint Presentation

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<sup>18</sup> Mr. Ebbert testified that Mr. Medvescek told him and Mr. Berlen about Complainant's FAA complaints, but Mr. Berlen testified that he did not. (Tr. 1343).

<sup>19</sup> Mr. Medvescek testified that in early 2005, he met with Mr. MacVicar, Mr. Duncan, Mr. Fleet, and Ms. Scionti and discussed the Complainant's reports to the FAA. (Tr. 1160, 1165). However, he later testified that he was mistaken, and that this meeting was to discuss the Complainant's SIDA violation. (Tr. 1426). Nor was Mr. Fleet, who had left the airport by this time, at the meeting. Mr. Medvescek stated that he never had such a meeting to discuss the Complainant's contacts with the FAA.

On November 9, 2004, after requesting an appointment, the Complainant met with Mr. MacVicar, whom he had never met before, and made a PowerPoint presentation he had created, entitled "Mismanagement, Safety, and Conduct Issues," dated October 29, 2004. (Tr. 1077; CX 30). The presentation addressed Complainant's concerns regarding, among other things, the above-grade manhole and rut that he had reported to Mr. Lott, the type of sand that Employer used in previous years to assist with snow removal, paint flaking, alleged construction safety issues, a broken safety railing on the loading dock, and debris in the Mount Comfort airport main runway. (Tr. 1531-43; CX 30).

The presentation consisted of pictures and statements about safety issues, complaints about Mr. Medvescek, Mr. Ebbert, and Mr. Berlen, a declaration that he had wrongly been denied overtime, allegations about defamation of his character by other employees, and copies of objectionable e-mails that had been sent within the office. (RX 11). Complainant testified that he wanted to present safety issues to Mr. MacVicar because he felt that they needed to be addressed and that the problems needed to be identified. (Tr. 356). He stated that his intent was not to disparage his co-workers, but to point out safety issues that needed to be addressed. (Tr. 357).

Complainant also voiced his concern about discrepancies in the airport's Jeppesen charts, which act as roadmaps for pilots. (CX 30; Tr. 1531-32). However, at the hearing, Complainant testified that while he believed at the time he delivered the PowerPoint presentation that the discrepancies constituted FAA violations, he understood at the time of the hearing that they did not. (Tr. 761-62). He also admitted he knew at the time of his presentation that the cracked and discolored concrete shown in the PowerPoint presentation was not an FAA violation. (Tr. 763). And he was also aware that any safety issues at Mount Comfort Airport were not violations, because Mount Comfort Airport is not subject to the FAA. (Tr. 763).

The PowerPoint presentation included a number of statements addressing what Complainant believed to be "management" issues, such as his belief that he was not being paid overtime as "a direct result of Mike feeling threatened by the exposure of his complacency and neglect of overseeing his maintenance department," that there had been "[a]nother attempt by Keith to cover for Todd," that "Keith and Mike pays [*sic*] Todd for ghost hours simply to appease him for covering hours that Keith is consistently late." He also included offensive e-mails that had nothing to do with safety, which were sent by Mr. Berlen, who at the time was a close personal friend.

The PowerPoint concludes:

- The operations department should function as an independent entity without intimidation, jeopardizing the integrity and safety of the airport
- Operations Managers by definition manage the overall operation of the airport. Hence the assurance of overall safety, day to day function and coordinating with all departments, tenants and the public
- Mike Medvescek: Attempts to manage beyond his capabilities by neglecting repairs, intimidating other operations managers,

revealing confidential information, causing chaos within the operations department...

- Keith Berlen: Did not follow up on several safety issues. Did not follow up on the Jeppesen Chart when reminded of the serious consequences. Continues to cover up for Todd's failure to perform his job. Pays Todd overtime for hours not worked...

- Todd Ebbert: Escorted a bus into a [sic] aircraft, opened a RWY with safety violations while on probation, released confidential information in Denver, and falsified his overtime sheet.

(RX 11).

Upon the conclusion of the PowerPoint presentation, Mr. MacVicar told the Complainant that there was an extensive amount of information, and it would take him some time to review it. He told the Complainant that he would advise him in writing how he intended to address the issues, and schedule a follow-up meeting once he finished his investigation. (Tr. 1090; RX 16). On November 11, Mr. MacVicar sent a letter to Complainant indicating that it would take him about two weeks to investigate the PowerPoint issues. (CX 31). Mr. MacVicar testified that it actually took him longer than two weeks because he had a lot of other commitments, and he had a vacation scheduled.

#### Mr. MacVicar's Response to the PowerPoint Presentation

Mr. MacVicar asked his secretary to get him information, including checklists, logs, and overtime records in order to investigate the issues that the Complainant raised. (Tr. 986). He testified that he kept his investigation of the Complainant's PowerPoint presentation to himself and did not discuss the issues he was investigating with anyone else. (Tr. 996). He testified that he never showed the PowerPoint presentation to anyone other than Ms. Scionti, and never discussed it with anyone else until the time of the filing of this claim.<sup>20</sup> (Tr. 1077-78). He did not interview anyone regarding the PowerPoint issues.

Mr. MacVicar had only been at the airport for a few months, and he wanted to establish for himself the safety aspects of the allegations in the PowerPoint presentation. He felt that he needed to assure himself on the standards of all of the people involved in safety at the airport; thus, he felt that it was appropriate to carry out the investigation himself. (Tr. 997). He had many years of experience in running operations departments in many airports around the world, and he knew what he was looking for. He believed that he had the capability and skills to determine the standard of safety that was being delivered. (Tr. 996-997). Mr. MacVicar had also worked in a capacity similar to that of an AOM or ADM with Employer, for less than a year, early in his career in Scotland. (Tr. 987-88). The laws he was subject to at that time were very similar to those in the United States. (Tr. 987). Although Mr. MacVicar did not use logs in that position, checklists were used and they were similar. (Tr. 988).

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<sup>20</sup> Mr. MacVicar did show some of the photographs in the PowerPoint presentation to Mr. Medvescek during the course of his investigation.

Mr. Medvescek recalled that Mr. MacVicar told him about the PowerPoint presentation in November. (Tr. 1435). He also said that Mr. MacVicar called him to his office in late 2004, a few weeks after Complainant made his presentation,<sup>21</sup> and showed him a few of the PowerPoint slides, which showed photographs of drains, pavement, paint, and ruts. (Tr. 1170). Mr. Medvescek could not tell where some of the photographs were taken, or if they showed the airfield or the parking lot. (Tr. 1171). He testified that Mr. MacVicar explained the Complainant's allegations, and told him that he had started doing research, and that he had wanted to investigate the allegations before he said anything to Mr. Medvescek about them. (Tr. 1171). Mr. Medvescek testified that he was upset that the Complainant went to Mr. MacVicar with these issues instead of him. (Tr. 1171). Mr. MacVicar asked Mr. Medvescek to assist him by providing reports, inspection sheets, and daily logs. (Tr. 1172).

According to Mr. Medvescek, the Complainant did not tell him about the problems he identified in his PowerPoint presentation. Mr. Medvescek was not involved in Mr. MacVicar's investigation, nor did he confront the Complainant about it. (Tr. 1432). He did speak to Mr. Berlen about the PowerPoint presentation, because it included allegations of inappropriate e-mail activity by Mr. Berlen, which required Mr. Medvescek to write him up. (Tr. 1176). Mr. Berlen was issued a written warning by Mr. Medvescek, at Mr. MacVicar's instruction. (RX 25, Tr. 1549-50). According to Mr. Medvescek, Mr. Berlen, who was Complainant's supervisor, as well as personal friend, was upset that the Complainant gave this information to Mr. MacVicar. (Tr. 1176).

Mr. Medvescek testified that about a month after his first meeting with Mr. MacVicar regarding the PowerPoint presentation, there was a second meeting after Mr. MacVicar had done some investigation. (Tr. 1174). Mr. Medvescek testified that he advised Mr. MacVicar to look at certain dates in Complainant's checklists and logs; he reviewed all of the AOMs' logs and checklists, including Complainant's, and personally visited some of the specific sites specified by Complainant in the PowerPoint presentation as not being repaired after Mr. MacVicar met with him to explain the areas at issue. (Tr. 1172-74). He testified that Mr. MacVicar told him what the specific allegations of Complainant were but did not show him slides as had been done at the first meeting. (Tr. 1174). The purpose of this second meeting was to discuss whether there was merit to Complainant's allegations. (Tr. 1175).

For his part, Mr. MacVicar refreshed his memory on Part 139, looked into overtime records, and reviewed e-mail records in connection with the inappropriate e-mails included in the PowerPoint presentation. He also reviewed the departmental procedures for authorization of overtime, and for completing checklists and logs. He compared the complaints raised in Complainant's PowerPoint presentation to Complainant's daily logs and checklists. (Tr. 992). He also looked at some of the other ADMs' checklists and began reviewing the daily logs generally. (Tr. 997). Each log includes entries by more than one manager, because it usually covers a number of shifts. (Tr. 997). In addition, Mr. MacVicar testified that he regularly visited the airfield and covered all areas such as Taxiway B, and did general inspections. (Tr. 1005). He stated, however, that he did not specifically observe any of the items that Complainant noted in his PowerPoint presentation. (Tr. 1006).

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<sup>21</sup> This would have been the third or fourth week of November, as the PowerPoint presentation was given on November 9, 2004.

Mr. MacVicar testified that he did not track the photographs in the PowerPoint presentation to a specific location, with the exception of the manholes; it was hard to establish the point from which particular photos were taken. He stated that there was a row of manholes that ran all the way down the drain parallel to Taxiway B and Five L. (Tr. 1006). He consulted with the Engineering Department, and looked at the drawings that showed where the manhole covers should be in relation to the rest of the airfield topography. According to Mr. MacVicar, the drawings showed that the manhole covers were not in the safety area. He agreed that the photographs of ruts and rocks on Taxiway B showed valid concerns, and were an issue that they were trying to clear up with the contractor, whose responsibility it was to pick up the rocks and fix the ruts. (Tr. 1527-1528).

Mr. MacVicar testified that he also checked the FAA inspection reports, including the LOC from the June 14 FAA inspection, and noted that the manhole cover issue was not raised (Tr. 1526). While some of the manhole covers were in need of repair, they were outside the safety area, and therefore did not constitute FAA violations. (Tr. 1526-30). Mr. MacVicar stated that he did not measure the distance of the manholes from the runway center line; rather, he accepted the FAA's conclusions that they were not in the safety area. The scheduled inspection report, and the subsequent special inspection report confirmed that they were not in the runway safety area, and he was comfortable with the FAA's conclusions. (Tr. 1007).

Mr. MacVicar stated that the type of sand that was used to assist in snow removal was known to refreeze into a chunk, but it was acceptable to use, and needed to be picked up, loosened, or spread thinner if it was frozen. (Tr. 1542-43).

Mr. MacVicar testified that the photograph depicting the Complainant's concerns about construction safety issues showed that the construction sites were at Federal Express entry points; one photograph showed that the area was properly covered to avoid FOD,<sup>22</sup> and the other showed a piece of machinery next to the site, indicating that the construction work was in progress when the Complainant took the photograph. He pointed out that FedEx had several entry points, and if construction were in progress, a NOTAM<sup>23</sup> would be issued in order to advise pilots not to use the specific entry point. (Tr. 1553).

According to Mr. MacVicar, the safety railing about which the Complainant was concerned belonged to an airport tenant, and was therefore not a BAA or IIA concern. He also stated that a runway sweeper had been sent to the Mount Comfort airport, so that clearing the runways of FOD would be more effective. (Tr. 1537, 1539).

Mr. MacVicar stated that the photographs of concrete panels in the PowerPoint presentation merely confirmed that the maintenance department needed to keep up with concrete repair, but he did not think it posed a safety problem. He indicated that deterioration is natural; furthermore, he could not tell from the photographs exactly where the panels were. (Tr. 1534-1535). With respect to the staining on the concrete, Mr. MacVicar stated that while it was not aesthetically pleasing, it was not a safety issue. (Tr. 1537).

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<sup>22</sup> "FOD" is an acronym for "foreign object debris."

<sup>23</sup> "NOTAM" is an acronym for "notice to airmen."

Based on his investigation, Mr. MacVicar concluded that Complainant's safety concerns were minor in nature, but nevertheless should have been reported in his checklists. (RX 26). In reviewing Complainant's checklists, he found no reference to the issues addressed in the PowerPoint presentation. He found this to be an important safety issue in itself. (RX 26).

#### Tension Between Complainant and Mr. Medvescek

Between December 4 and December 10, 2004 there was an exchange of e-mails between Mr. Medvescek and Complainant regarding salaries, rotating shifts, and other issues. (CX 35, Tr. 1433). Mr. Medvescek stated that following this exchange, there were bad feelings between himself and the Complainant. (CX 35, Tr. 1433). In one of the e-mails, Complainant told Mr. Medvescek that the rotating shift policy was "mandated," "conveyed a lot of hostility," and "did not present as a training tool or team building but rather chaos for the operations department." (Tr. 1554). He copied Mr. MacVicar on this e-mail. (Tr. 1554). Mr. MacVicar felt that this e-mail, which he testified was disrespectful and accusatory in tone, confirmed his suspicions that the Complainant had a personal agenda. (Tr. 1554).

On December 11, 2004, Mr. Medvescek initiated a discussion with Complainant of the issues involved in their e-mail exchange, including the rotating shift issue, and they came to what both men felt was a resolution of the issues. (Tr. 460; CX 38). Mr. Medvescek sent out an e-mail on December 11, 2004 explaining that he felt that he and Complainant had resolved their differences. (CX 38).

#### Mr. MacVicar's Conclusion of Investigation

Mr. MacVicar testified that he met with the Complainant in his office on December 16, 2004 and told him that he had investigated the issues brought up in the PowerPoint presentation, and he was satisfied that there were no safety violations.<sup>24</sup> (RX 11, Tr. 1550-51). Mr. MacVicar told the Complainant that he thought a lot of the issues involved routine maintenance and repair, and that some of the issues were sensationalized. (RX 11). He told the Complainant that he had gone through logs and checklists, and he made it clear that he expected everything to be on the checklist, with the logs to be used as aids. (Tr. 1550-1551). Mr. MacVicar told Complainant that he agreed that there had been inappropriate e-mails sent and that action would be taken. (Tr. 1551). He also told him that he thought that he would pay for the disputed overtime that Complainant had worked but that he was not happy with the way in which overtime was allocated. (Tr. 1551).

During this meeting with the Complainant, Mr. MacVicar discussed issues about the ADM team and team performance. He testified that he suggested that he did not think operations was working as a team, and that there would be a team meeting in early January to discuss issues regarding the duty managers' team. (Tr. 1091, 1552). Mr. MacVicar thought that the Complainant's reaction was positive, and that he was going to make an extra effort to be part of the team. He felt that he had closed the issues involving the e-mails and the overtime, and that

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<sup>24</sup> Mr. MacVicar testified that he thought the January 12 letter was his first response to the Complainant's concerns expressed in the PowerPoint. (Tr. 981).

he had satisfied the Complainant that the manhole covers were not a safety issue. (Tr. 1553). He told Complainant that he would “lead a piece of work” in January about team issues and that he would write Complainant in the future with a formal report of his findings.<sup>25</sup> (RX 11; Tr. 1551-52).

After the winter holidays, Mr. MacVicar shared the results of his investigation with Mr. Medvescek, telling him that there was no merit to the Complainant’s complaints, and that there were no safety issues alleged in the PowerPoint presentation. (Tr. 1437).<sup>26</sup>

In January 2005, Mr. MacVicar instructed Mr. Medvescek to issue new instructions regarding inspections. (Tr. 1095). The Complainant’s PowerPoint presentation had shown Mr. MacVicar that there was some confusion about the checklists, and he wanted to clarify to everyone that safety items should go on the checklist. (Tr. 1094). Following Mr. MacVicar’s instructions, Mr. Medvescek sent an e-mail to the operations department on January 1, 2005, which explained that general airport issues were to be noted on the logs while airfield concerns and correction issues were to be noted on the checklists for repairs or monitoring.<sup>27</sup> (Tr. 1000; CX 44).

Mr. MacVicar was especially concerned with Complainant’s failure to change the “0” in the status column of the checklist to “X” at some points in his checklists. (Tr. 1016, 1103, 1580, 1586). After Mr. Medvescek issued this e-mail, Mr. MacVicar checked ADM logs and checklists to make sure that they were complying with the new instructions. According to Mr. MacVicar, the new instructions that Mr. Medvescek sent out were not a new policy, but were intended to emphasize that the existing policy needed to be carried out diligently. (Tr. 1100).

During his investigation into the merits of Complainant’s claim, Mr. MacVicar found that the overtime approval system in the operations department was varied; sometimes overtime was pre-approved, other times it was not. (Tr. 1057). Mr. MacVicar instructed Mr. Medvescek to implement a strict pre-approval system for overtime. (Tr. 1057). In his e-mail of January 1, 2005, Mr. Medvescek announced that all overtime was to be pre-approved. (CX 44).

### SIDA Violation

On January 7, 2005, in his capacity as a private contractor, Complainant entered IIA property through an unmanned gate. (Tr. 1484; CX 47). The area of IIA which Complainant

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<sup>25</sup> On December 29, Complainant received an e-mail from Mr. MacVicar’s assistant, Dawn Sanders stating that Mr. MacVicar was on vacation and would sign and issue his responses after he returned to the office. (RX 11).

<sup>26</sup> Mr. Medvescek testified that Mr. MacVicar later told him that he had lost trust in the Complainant; they had agreed that the issue was over, but the Complainant then gave his PowerPoint to Mr. Duncan. (Tr. 1437).

<sup>27</sup> Mr. Medvescek’s e-mail states, in pertinent part:

I understand that not everyone address [sic] the daily airfield inspections and ops logs the same. Daily airfield inspection information does not go on the Ops logs. All airfield concerns or correction issues should be addressed on the airfield checklist for repairs and or monitoring. This is addressed under our FAA part 139 self-inspection. Ops logs are for general airport issue’s [sic] with the terminal, airlines, meeting, training, and other similar reporting. Keith [Berlen] and I will be monitoring this closely for compliance.

(CX 44).

entered was known as a Security Identification Display Area (“SIDA”). (Tr. 1482; CX 47). A SIDA is an area designated by the FAA that is not accessible without a criminal background check and proper identification. (Tr. 1483). If an off-duty employee or a contractor needs to access the airport, the FAA regulations provide that he or she must enter through a manned gate at which the driver’s identification is checked and the vehicle is searched.<sup>28</sup> (Tr. 1484).

William Reardon, the Chief of Police for the IIA Police Department, was informed that Complainant had been seen entering the SIDA area through an unmanned gate while he was off-duty. (Tr. 1485). Chief Reardon’s protocol, when informed of a SIDA violation, was to contact the violator’s manager or supervisor, explain the incident, and allow the manager or supervisor to address the issue internally. He did not instruct the manager or supervisor as to the level of discipline that should be imposed. (Tr. 1487). Chief Reardon did not issue a citation to Complainant for the SIDA violation. (Tr. 1491). Although he had the authority to issue tickets for SIDA violations, he generally only got involved in cases of repeat violations. (Tr. 1487, 1491). Chief Reardon testified at the hearing that he considers the SIDA requirements a serious matter and that repeat violations may lead to administrative fines, confiscation of the repeat violator’s identification, and a denial of access to the airport, which in effect would cost the violator his or her job. (Tr. 1487-88).

Following protocol, Chief Reardon informed Mr. Medvescek of Complainant’s SIDA violation. (Tr. 1485). Mr. Medvescek issued a written warning to Complainant dated January 7, 2005, instructing him to enter the airport property as an off-duty employee only through certain gates and warning him that any subsequent violations would be subject to additional disciplinary action. (CX 47). After receiving the warning, Complainant went to Chief Reardon to ask him whether he considered his actions to be a violation. (Tr. 528). He testified that Chief Reardon told him that he was unaware of any other contractors using the prohibited gate, and that to his knowledge all of the contractors use Gate 10, a manned identification checkpoint gate. (Tr. 528).

Complainant responded to the written warning with a two-page memorandum addressed to Mr. Medvescek in which he pointed out that he had routinely entered IIA property through the SIDA in his capacity as a private contractor without objection, and insisted that he had never been made aware of any rules which prohibited him from entering through a SIDA. (CX 51). Complainant accused Mr. Medvescek of singling him out and treating him unfairly, of committing SIDA and other policy violations himself, and of retaliating against Complainant for the PowerPoint presentation to Mr. MacVicar.<sup>29</sup> (CX 51).

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<sup>28</sup> It appears that Complainant entered the SIDA by using a security key. (CX 47).

<sup>29</sup> Complainant’s written objection states, in pertinent part:

tak[ing] offense to about everything I do. . . . It might be because I disagreed with my raise percentage last week and asked to appeal it. Or perhaps it is the constant anger you express with regards to me and other operations manager’s objective self inspections and or log reporting. . . . It is obvious that you have singled me out! Mike, it is common knowledge that you bypass the north SIDA gate on taxiway M for no other reason than to go to the terminal building daily (Tape recorded). As a matter of fact, I feel compelled to report that I was advised that three Saturday’s [sic] ago you were viewed with a small child exiting a BAA/IAA truck outside the AOA SIDA area and entering into the terminal building. . . . Family members accompanying you in a BAA/IAA vehicle to Greenfield or for that matter any other place, presents liability issues with regards to insurance and personal use of a company vehicle. . . . In conclusion, I am appealing the

Mr. Medvescek testified that he felt this letter was partly a personal attack by the Complainant. He responded by sending the Complainant an e-mail which advised him that he was free to appeal the written warning to Mr. MacVicar. (RX 29, Tr. 1438). Mr. Medvescek copied Mr. MacVicar and Ms. Scionti on this e-mail and specifically addressed them, stating that he felt that Complainant was harassing him and undermining his character and management skills to other employees in the department. Mr. Medvescek also requested that Complainant be transferred to another department.<sup>30</sup> (RX 29). Mr. Medvescek testified that he wanted the Complainant transferred because he felt that he was disrupting the transition process of joining all of the departments together. (Tr. 1440).

Complainant testified at the hearing that the SIDA warning letter was the first and only warning he ever received as an employee. (Tr. 501). He also testified that it had been the custom for him and other employees to enter through the unmanned gate he used that day and that Mr. Medvescek was also known to use the SIDA gate. (Tr. 505, 531).

Mr. MacVicar testified that after this incident there was an exchange of e-mails between the Complainant and Mr. Medvescek, with both parties making accusations. When Mr. Medvescek came to talk to Mr. MacVicar about it he was upset, frustrated, and concerned about the security of his position. He felt that this was a personal attack by the Complainant. Mr. MacVicar stated that he explained to Mr. Medvescek that they should deal with the issues in front of them and not be concerned about personalities. (Tr. 1039). He recalled that Mr. Medvescek mentioned that perhaps the Complainant was talking to the FAA about safety concerns. (Tr. 1040). But Mr. MacVicar was more concerned about whether there was any validity to the Complainant's allegations, and how they should deal with them. (Tr. 1040). He testified that he was disappointed because he felt that he had received a commitment from Complainant in their December 16, 2004 meeting to be more of a team player. He viewed Complainant's appeal of the SIDA warning, by calling into question Mr. Medvescek's behavior, habits, and procedures—issues not relevant to the appeal—as a vitriolic attack on Mr. Medvescek, which was antipathetic to team building behavior. (Tr. 1559-60).

According to Mr. MacVicar, after September 11, the rules for access to air site security areas were constantly changing; entry into the SIDA area through an unmanned gate was no longer permitted.<sup>31</sup> The Complainant used a gate improperly, and was given a warning. (Tr. 1046).

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unnecessary and unsubstantiated formal written warning as an issue you are trying to exploit. This is due to your knowledge of my meeting with Mr. MacVicar over issues involving you.

(CX 51) (emphasis in original).

<sup>30</sup> Mr. Medvescek's e-mail states, in pertinent part:

I'm officially filing a personal harassment charge against [Complainant]. I have evidence from other employee's [sic] concerning his attack on my character and ability to manage my team. I'll have my personal attorney review my charges and complaint. I'm requesting until the issues are resolved [Complainant] be transferred to another team.

(RX 29).

<sup>31</sup> On January 31, 2005, Complainant sent a letter to Ms. Scionti advising her that employees and contractors remained unclear about the rules pertaining to access through SIDA points and requesting another meeting "to further discuss this and other issues that need to be addressed immediately." (CX 60). Complainant concluded his

On January 12, 2005, Mr. MacVicar responded to the Complainant's concerns as presented in the PowerPoint presentation in a letter. (Tr. 981). In this letter, Mr. MacVicar stated

It is clear from the general tone of your report along with subsequent discussions you and I have had, you do not feel the ADM's [sic] operate as a team, and members of the ADM group do not carry out their roles in a way that keeps all the members of the team included and informed. . . . I know from our discussions you realize you also have a role to play in adhering to the agreed upon processes and procedures and will work with your colleagues to communicate more effectively. . . . I would like . . . to review our progress in approximately three months to ensure we are correcting these issues and improving the situation for everyone.

(CX 50). By the language in this letter, Mr. MacVicar meant to convey to Complainant that he was under a 90-day review to determine whether he was able to function as a team member. He felt that Complainant should be given the opportunity to undergo a 90-day review because it is Employer's standard practice to do so when there are concerns about someone's performance, and because of Complainant's seniority level in the organization. (Tr. 1558). He testified that he was looking for substantial improvement, including participation by the Complainant in teamwork, over the next three months. (Tr. 983). In his January 12, 2005 letter, Mr. MacVicar shared his conclusions with Complainant and indicated that he would ensure that instructions would be issued to all AOMs regarding the correct method of reporting concerns. (RX 26).

Also on January 12, Mr. MacVicar began reviewing Complainant's daily logs and checklists on a regular basis. (Tr. 992, 1087). Mr. MacVicar started his own log which tracked Complainant's behavior from January 1 through February 20, including Complainant's e-mails to Mr. Medvescek and his entries on his daily logs and checklists.<sup>32</sup> (RX 35). Mr. MacVicar chose the dates at random, or because he heard that things on the airfield were not as he wished regarding safety. (Tr. 994). He testified that he received information as to the issues and dates in the chronological log of events for January and February from Mr. Berlen, Mr. Medvescek, Mr. Unger, and Scott Lawson, the supervisor of maintenance department on the airfield. (Tr. 995).

According to Mr. MacVicar, the purpose of the log was to keep track of what was going on through e-mails that he was copied on, and to keep an eye on the Complainant's checklists and team behavior. He was double checking the Complainant because of his growing distrust of his performance, and because the Complainant was under review. (Tr. 1574). Mr. MacVicar testified that it is essential that he be able to trust his ADMs, because if the airport becomes non-

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e-mail by encouraging Ms. Scionti "to speak with all other operations managers due to the fact that departmental issues with regard to [Mr. Medvescek] do not solely rest with me." (CX 60).

<sup>32</sup> Mr. MacVicar testified that he started this log after Mr. Duncan brought his copy of the PowerPoint presentation to his office. (Tr. 1573).

compliant with FAA regulations or unsafe because of poor work quality on the ADMs' part, he is responsible. (Tr. 1572-73).<sup>33</sup>

Mr. MacVicar testified that this chronological log was not an audit of the Complainant's behavior; he described it as a chronological record that was relevant to his investigation. He noted that the first point in the log acknowledged Mr. Medvescek's e-mail about instructions clarifying departmental procedures, one of the actions he thought it was appropriate to take after the PowerPoint presentation. (Tr. 998).

Mr. MacVicar held a meeting on January 18, 2005 with Mr. Medvescek and the ADMs to explain the company's strategy, including its policy of regarding safety and security as top business priorities. (RX 11; Tr. 985). He outlined a proposal to split the team of ADMs into airport duty managers and airport operations managers, which is how Employer organizes its airports around the world and is considered in some aviation circles to be the best practice. (Tr. 986).

Mr. MacVicar then met with Mr. Medvescek and Mr. Berlen on January 19, 2005 to discuss the business plan and to speak in more detail about the instructions for completing checklists and working overtime. They also talked about splitting the department into two different functions. (Tr. 1564).

Mr. MacVicar testified that he stopped keeping the chronological log on Complainant on February 20, 2005. After that time, he kept track of the Complainant by stepping up his contact with Mr. Medvescek and Mr. Berlen, and having them check around the airfield for issues after the Complainant's shifts. He also visited the airfield more often. Mr. MacVicar indicated that a lot of time went into checking and double-checking the Complainant's work. (Tr. 1574, 1580). He testified that they checked Complainant's work, reviewed his shifts, and corrected things that they found. (Tr. 1015). During this time Mr. MacVicar did not indicate to Complainant that anything needed to be corrected or coach him as to what he was doing incorrectly. (Tr. 1014-15). Eventually, Mr. MacVicar concluded that the Complainant could no longer be an airfield operations manager because he could not trust him. The checklists were not being completed properly, and the Complainant was still pursuing an agenda against individuals in the department. He felt that they were spending too much time dealing with issues that should not have been issues. (Tr. 1574, 1580).

Mr. MacVicar testified that he found that Complainant was noting violations on his daily logs, and although he was noting them on the checklists, he was not marking them with the required X in the "status" column. (Tr. 1087). For example, on February 7, 2005, Complainant reported in his log that there was a 107 foot hole by one of the taxiways. (Tr. 1576-77; RX 54). On his February 7 checklist, Complainant wrote "Hole N side TWY R 107' off C/L S/E of Rd." and "Violation of 3" repaired" in the remarks section, but he left a "0" in the status column, indicating that the conditions were satisfactory. (Tr. 1577; RX 55). Also, on February 13, 2005, Complainant wrote "Check drainage structure at FedEx2" and "repaired violation" in his checklist. (Tr. 1578; RX 57). In his log for that date, he noted that he was "[a]dvised by 602 that they will repair point 2 at FedEx on Monday." (Tr. 1378; RX 56). Mr. MacVicar was

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<sup>33</sup> Mr. MacVicar did not keep a log on any ADM other than the Complainant. (Tr. 997-99, 1091, 1094-1098).

informed by Kevin Unger, the maintenance employee who performed the repair, that the hole constituted a clear violation. (Tr. 1578-79). He felt that the checklist should have been marked with an "X" to reflect that it was a repair which required immediate attention. (Tr. 1579). Mr. MacVicar eventually came to the position that he was not able to trust the Complainant's reports. (Tr. 1016).

On the other hand, the Complainant testified at length about errors on other AOMs' checklists. (Tr. 596-700). But Mr. Medvescek testified that these checklists were in fact correctly completed either because the items Complainant identified were issues that were resolved, did not need maintenance, or were not violations. (Tr. 1442-57).

#### Complainant Gives Copy of PowerPoint Presentation to Mr. Duncan

In late January 2005, Mr. Duncan, Employer's general counsel, came to Mr. MacVicar's office with a hard copy of the PowerPoint presentation, which Complainant gave to him sometime around January 26, 2005. (Tr. 1078, 1570; CX 59). Complainant testified that he knew that Mr. Duncan was the airport attorney, but he gave him the PowerPoint presentation in his capacity as a pilot and instructor, to get his view from an aviation standpoint. (Tr. 541). He also said he wanted to ask about the harassment charges Mike Medvescek had mentioned bringing against him after the exchange of letters regarding the SIDA violation. (Tr. 541).

Mr. MacVicar advised Mr. Duncan that he was investigating Complainant's allegations. (Tr. 1079). He was surprised and annoyed that Complainant had gone to Mr. Duncan despite Mr. MacVicar's investigation of the allegations and his work to remedy the issues. (Tr. 1570, 1571). He stated that it was his responsibility to deal with the issues and not the legal department's. (Tr. 1571).

At the time that Mr. Duncan came to him with the PowerPoint, Mr. MacVicar thought that he had dealt with the issues, and that Complainant would work to keep problems within the department and resolve them within the team. (Tr. 1570, 1571). Mr. MacVicar felt that Complainant was undermining and personally attacking him, as other members of the operations team perceived Complainant had attacked them. (Tr. 1571). He also testified that he was disappointed because he had trusted that things would improve and that Complainant would undertake to become a team player. He felt that Complainant's action of giving the PowerPoint presentation slides, the exact same document which he had spent months examining, to the airport's legal counsel for comment and observation, went against this undertaking. (Tr. 1571-72). The Complainant had not expressed any dissatisfaction with his investigation in the time between the PowerPoint presentation and the time that he gave the presentation to Mr. Duncan. (Tr. 1572). As a result, Mr. MacVicar was reaching a point at which his trust in Complainant was completely undermined.<sup>34</sup> (Tr. 1572).

#### Decision to Terminate Complainant

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<sup>34</sup> Mr. Medvescek testified at the hearing that at some point after the first of January, Mr. MacVicar told him that he had lost his trust in the Complainant, because Complainant and Mr. MacVicar had agreed that the issue was over, but the Complainant then gave the PowerPoint presentation to Mr. Duncan. (Tr. 1437).

Mr. MacVicar testified that Mr. Medvescek never indicated that he wanted to get rid of the Complainant, although he asked that the Complainant be transferred to another team at the airport. Mr. MacVicar thought that this was related to the personal exchange of e-mails, and that Mr. Medvescek was concerned about his ability to handle the situation. He decided not to transfer the Complainant; he did not feel that it was an appropriate action at the time, and there were no vacancies at the Complainant's level of experience and salary. (Tr. 1073-1076).

Mr. MacVicar testified that he made the decision to terminate Complainant late in January of 2005. (Tr. 1600). He stated that by late January he "had reached a point where [he] was coming to that conclusion due to the issues that had...taken place during January." He made the final decision to terminate Complainant about a week or so before April 18, 2005, because at that time he "would have had sufficient information to decide the appropriate action." (Tr. 976).

Mr. MacVicar testified that his April decision was based on months of review of Complainant's logs and checklists up until April 18<sup>th</sup>. (Tr. 1014). He was concerned about Complainant's ability to function as a member of the operations team. (Tr. 983-84, 1103, 1561, 1571, 1580). This concern was based primarily on the hostile tone of Complainant's e-mails to Mr. Medvescek, the amount of time and energy that Complainant had spent on e-mailing rebuttals, and what Mr. MacVicar believed was Complainant's counterproductive personal agenda. (Tr. 1102-03).

According to Mr. MacVicar, his decision to terminate the Complainant was due to a combination of events that started when he was first made aware of the Complainant's safety concerns, and throughout his investigation, up to the week before April 18. (Tr. 1014). He testified that in addition to the problems with the checklists, he had found it hard to trust the Complainant's judgments and motivation, and his ability to put safety first rather than a personal agenda.<sup>35</sup> (Tr. 1580). He felt that the issues Complainant raised had been resolved, so they should have been able to move forward, but instead Complainant was making issues when there should not have been issues. (Tr. 1580-81). It came to the point where Mr. MacVicar was unable to trust the Complainant's judgment in doing his job properly. (Tr. 1580). He thought that the Complainant was not appropriately reporting safety issues. (Tr. 1580). He cited the Complainant's general demeanor, his lack of communication on issues within the team, and the amount of time and energy spent on e-mailing, rebuttals, and threatening legal action against various people on the team. (Tr. 1103).

Mr. MacVicar testified that he felt that the Complainant's aim was to show that the operations and maintenance departments should be under separate management, as they were before. But he disagreed with the Complainant, because in his experience, the best practice is to have maintenance and operations under the same management. He was surprised by the Complainant's personal attacks on his colleagues. (Tr. 1546-1548). Based on the chain of e-mails, he felt that the Complainant was having a significant adverse effect on the management of the team. (Tr. 1561).

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<sup>35</sup> Mr. MacVicar testified that he suspected the Complainant's agenda because of the reference in the PowerPoint presentation to the inappropriate e-mails by Mr. Berlen. (Tr. 1546).

Mr. MacVicar's 90-day review ended in April 2005. On April 14, he sent Complainant a letter requesting that he attend a meeting with him and Ms. Scionti on April 18. (CX 65). During this meeting, Mr. MacVicar presented Complainant with a letter in which he informed Complainant that he was being terminated. (CX 66; Tr. 1581-83). The letter gave three reasons for Complainant's termination: 1) Complainant's counterproductive personal agenda compromised safety and made him untrustworthy as to safety, 2) there were regular failures to correctly document violations that persisted despite repeated instructions, and 3) too much time and energy was being consumed on the prior two issues that could be better spent on legitimate safety issues. The letter indicated that Mr. MacVicar was concerned that Complainant's personal issues with Mr. Medvescek would cause him to mishandle a safety issue for the purpose of making Mr. Medvescek look bad. Because of this concern, Mr. MacVicar felt that he could not trust Complainant to make appropriate decisions regarding airport safety.

The termination letter stated that Mr. MacVicar had determined, at the time he wrote to Complainant on January 12, 2005, that Complainant was trying to undermine Mr. Medvescek, and that he gave Complainant the benefit of the doubt that he would improve his attitude toward Mr. Medvescek in a three month review period that he set up for Complainant. (CX 66).<sup>36</sup>

Mr. MacVicar requested that Complainant sign the letter, but Complainant refused. (Tr. 1582). Mr. MacVicar had Chief Reardon escort Complainant off IIA property and follow him home to collect radios and pagers that belonged to IIA. (Tr. 1488). At that time, Complainant told Chief Reardon that he felt that his termination was due to the SIDA violation, and that Mr. Medvescek "would not let it go." (CX 69). Neither Mr. Medvescek nor the other AOMs were informed in advance that Complainant was going to be terminated. (Tr. 1177, 1213, 1305, 1354, 1583).

Mr. Medvescek testified that he was not consulted about the decision to fire the Complainant. (Tr. 1441). He stated at one point that Mr. MacVicar called him about half an hour after Complainant was terminated to advise him of it, and at another point that Mr. MacVicar informed him a few hours before the Complainant was fired because he had to get ready to schedule someone to cover Complainant's shift. (Tr. 1177, 1441). After Complainant was terminated, on the day of his termination, Mr. Medvescek e-mailed John Lott to notify him that Complainant had been terminated.<sup>37</sup> (CX 68).

Mr. MacVicar e-mailed Chief Reardon, who escorted Complainant from the airport on the day of his termination, informing him that Complainant was terminated because he did not trust "his ability to make decisions that were correct and safe in his role as ADM." (RX 38; Tr. 1585). Ms. Scionti testified that she believed that Complainant was terminated for poor

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<sup>36</sup>Mr. MacVicar acknowledged that he never told Complainant that he believed Complainant was trying to undermine Mr. Medvescek, that he never attempted to resolve the issues involving Mr. Medvescek with Complainant, and that he never told Complainant that he was under review. (Tr. 979)

<sup>37</sup> When first asked whether he contacted Mr. Lott after Complainant was terminated, Mr. Medvescek testified that he did not, but stated that he remembered that he had after viewing the e-mail. (Tr. 1177).

performance because Mr. MacVicar could no longer trust him to fulfill the duties of his job and work effectively as a team member. (Tr. 1118).

On April 18, 2005, the day that Complainant was terminated, the department discontinued use of rotating shifts and implemented a consistent schedule. (Tr. 1148). At this time, only eight and a half months of the one year was completed for which the rotating schedule was implemented. Complainant testified that both Mr. Fulkerson and Mr. Leach told him that on the day he was terminated, Mr. Medvescek said, in Mr. Fulkerson's presence, that since Complainant was gone, the other managers could go back to their regular permanent shifts. (Tr. 275, 276). Mr. Leach testified that he was told of Complainant's termination by Messrs. Medvescek, Berlen, and Abell on the day that Complainant was terminated, and that effective immediately, the shifts would be able to go back to normal "since [Complainant] [wa]s no longer [t]here." (Tr. 1305-06).

Mr. Berlen testified that he and Mr. Medvescek went out on the airfield where Mr. Leach was working as an off-duty construction escort and informed him of Complainant's termination. (Tr. 1373). But he testified that he did not make a comment about going back to a normal shift, as Mr. Leach testified. (Tr. 1373-74). Mr. Fulkerson testified that he heard about Complainant's termination on the day that it happened, but the only statements he recalled being made about Complainant's termination were that some of the AOMs said that they were sorry to hear him go. (Tr. 1280-811).

According to Mr. Medvescek, the return to the consistent scheduling was required because without Complainant in the department, there were not enough managers to cover all the shifts. (Tr. 1148). They needed four people in addition to him; he could not cover the Complainant's position himself because he had other duties. Mr. MacVicar also testified that the rotating shifts stopped for a period of time because they were a person short, but when another person was recruited for the post, the rotating shifts resumed. (Tr. 1055). He stated that when one person is lost from the team, the others have to put in additional hours, effectively imposing overtime. To rotate shifts as well was not reasonable. Thus, the rotating shifts were suspended for a short period of time until manpower was recovered. He viewed this as mainly a staff morale issue. (Tr. 1063). When Complainant's replacement was hired, her training required her to be assigned to different shifts, so the department continued to use consistent scheduling. (Tr. 1150).

Mr. Medvescek testified that the department returned to a form of rotating shifts once Complainant's replacement had completed her training. (Tr. 1152). Mr. Leach testified that while the shift schedule implemented after Complainant's replacement completed training was of a rotating nature, it was not of the same type. (Tr. 1306). Instead of a schedule that changed every three months and required that employees work some days at night and some days during the day within the same week, the new rotating schedule required each employee to work 80 hours a year in each of the shifts other than their own regular shift. (Tr. 1306, 1368). Employees may count time they work overtime during shifts that are not their own on individual days and hours until they reach 80 hours. (Tr. 1306).

### Alleged Blacklisting

After his termination with Employer, Complainant was offered employment with Frontline Construction Inspection, Inc., which is owned by Complainant's personal friend, Mr. Fulkerson. (Tr. 705). As part of Complainant's duties as an employee with Frontline he was to inspect the Mount Comfort airport. (Tr. 1585). Mr. Medvescek learned that Complainant would be working at the Mount Comfort airport and expressed concern to Mr. MacVicar that it would be uncomfortable for Employer's maintenance personnel to work with Complainant there. (Tr. 1179-81). According to Mr. Medvescek, it was a conflict of interest to have someone inspecting airport projects who had been fired from the airport. (Tr. 1180).

In response, Mr. MacVicar sent a letter to Frontline asking that Complainant be assigned to projects that were not under Employer's contract. (Tr. 1586, RX 40). He testified that one of the contractor's duties was the inspection of completed work at the airport. He had no faith in the Complainant's ability to make those decisions, and was not comfortable with him working through the contractor, when he could not trust him to make proper decisions. (Tr. 1106).

Frontline responded by sending a letter to Mr. MacVicar dated July 11, 2005, assuring him that Complainant would no longer provide inspection services through Frontline Construction at the Mount Comfort airport or any other airport managed by Employer. (RX 42). Frontline then informed Complainant that he could no longer work for them because Employer was the only client that Frontline had at the time. (Tr. 1284; CX 77).

#### Statement of the Law

AIR 21 provides that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee:

- 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law;
- 2) filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law;
- 3) testified or is about to testify in such a proceeding; or
- 4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102.

Section 519(b)(2) charges the Secretary of Labor with conducting an investigation of any complaint to determine whether there is reasonable cause to believe that it has merit. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 8 (ARB January 30, 2004). The Secretary shall notify the complainant and the Respondent of the Secretary's findings. *Id.* If reasonable cause exists to believe that a violation occurred, the Secretary shall

accompany the findings with a preliminary order providing relief. *Id.* (citing 49 U.S.C.A. § 42121(b)(2)(A)).

As outlined in *Peck*, AIR 21 § 519(b)(2)(B) contains evidentiary standards, including a “gatekeeper test” and legal criteria:

(i) **Required showing by complainant.** – The Secretary of Labor shall dismiss a complaint, filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) **Showing by employer.** – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) **Criteria for determination by Secretary.** – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) **Prohibition.** – Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

*Peck*, slip op. at 9 (quoting 49 U.S.C.A. § 42121(b)(2)(B)).

A “gatekeeper” standard is used during the preliminary investigatory stage of the proceeding. There, OSHA declines to conduct an investigation of a complaint unless the complainant makes a prima facie showing that protected activity was a contributing factor in a respondent’s adverse action. *Id.* (citing 49 U.S.C.A. § 42121(b)(2)(B)(i)). A prima facie case is defined as “[t]he establishment of a legally required rebuttable presumption” or “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” *Id.* (quoting BLACK’S LAW DICTIONARY 1209 (7th ed. 1999)).

To meet this standard for purposes of AIR 21, a complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and “either direct or circumstantial evidence” showing that the employee engaged in protected activity, that the employer “knew or suspected, actually or constructively, that the employee engaged in protected activity,” that “[t]he employee suffered unfavorable personnel action,” and that “[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.” *Id.*, slip op. at 9-10 (quoting 29 C.F.R. § 1979.104(b)(1) and (2)). Temporal proximity between protected activity and adverse personnel action will normally

satisfy the burden of making a prima facie showing of knowledge and causation. *Id.*, slip op. at 10 (citing 29 C.F.R. § 1979.104(b)(2)).

A respondent may avoid investigation, however, notwithstanding a prima facie showing, if it “demonstrates, by clear and convincing evidence” that it would have taken adverse action in the absence of protected activity. *Id.*, slip op. at 10 (citing 49 U.S.C.A. § 42121(b)(2)(B)(ii)). Although OSHA’s determination controls whether there is an investigation and preliminary relief, either party may object to OSHA’s action and proceed to obtain a hearing to adjudicate the complaint. 29 C.F.R. § 1979.106. *Id.*, slip op. at 10.

Once a complainant meets the initial burden of establishing a prima facie case, the burden shifts to the employer to produce evidence or articulate that it took adverse action for a legitimate, non-discriminatory reason. *Morriss v. LGE Power Services, LLC*, ARB No. 05-047, ALJ No. 2004-CAA-14, slip op. at 32 (February 28, 2007), *appeal docketed*, No. 07-1412 (4th Cir.). When the respondent produces such evidence the rebuttable presumption created by the complainant’s prima facie showing “drops from the case.” *Id.* (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981)). At that point, the inference of discrimination disappears, compelling the complainant to prove intentional discrimination by a preponderance of the evidence. *Id.* (citing *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 01-CER-1, slip op. at 6 n.1 (ARB Apr. 30, 2004); *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD- 2, slip op. at 18 (ARB Feb. 28, 2003)).

Thus, at the hearing stage, the question is not whether a prima facie showing has been established, but whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity. *Id.* (citing *Schlagel*, slip op. at 6 n.1; *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 9 n.9 (ARB Oct. 31, 2003), *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 6 n.12 (ARB Sept. 30, 2003), *Simpkins v. Rondy Co., Inc.*, ARB No. 02-097, ALJ No. 2001-STA-0059, slip op. at 3 (ARB Sept. 24, 2003), *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 7-8 n.11 (ARB Mar. 29, 2000)).

This case has been fully tried on the merits and the Respondent has put forth evidence of legitimate non-discriminatory reasons for terminating Complainant, namely that Complainant did not work well as part of a team, did not follow procedure, and was untrustworthy regarding safety. Therefore, as the Secretary of Labor explained in *Carroll v. Bechtel Power Corp.*, I have before me all the evidence I need to determine whether the Respondent intentionally discriminated against the Complainant. *Calhoun v. United Parcel Service*, ARB No. 04-108, ALJ No. 2002-STA-31, slip op. at 8-9 (ARB Sept 14, 2007) (quoting *Carroll v. Bechtel Power Corp.*, No. 91-ERA-046, slip op. at 11 (Sec’y Feb. 15, 1995) (quoting *USPS Bd. of Governors v. Aikens*, 460 U.S. at 715 (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253 (emphasis supplied)))).

To establish a discrimination complaint and entitlement to relief, Complainant must prove that a protected activity was a contributing factor in an unfavorable personnel action.

Complainant must show by a preponderance of the evidence that:

- 1) He engaged in a protected activity or conduct;
- 2) Respondent knew, actually or constructively, that Complainant engaged in the protected activity;
- 3) Complainant suffered an unfavorable personnel action; and
- 4) The protected activity was a contributing factor in the unfavorable action.

*Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 5 (ARB June 29, 2006).

If the Complainant proves these elements by a preponderance of the evidence then he has established a violation of AIR 21 section 519(a). *Peck*, slip op. at 9 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iii)). A 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.” *Id.* (citing 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. *Peck*, slip op. at 9 (citing 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.” *Id.* (citing BLACK’S LAW DICTIONARY at 577).

Complainant asserts that he was discharged or otherwise discriminated against by virtue of his termination and blacklisting because of protected activities. Respondent denies that Complainant engaged in protected activities, but even if he did, argues that his protected activities were not a contributing factor in any adverse action it may have taken against him.

#### Timeliness

An employee who believes that he or she has suffered unlawful discrimination in violation of AIR 21 may file a complaint not later than 90 days of the date on which the violation occurred. 49 U.S.C.A. § 42121(b)(1). Complainant alleges that there were six violations of AIR 21 by Respondent: a shift change, a change in the snow season policy, a warning letter, non-payment of two hours of overtime, his termination, and alleged blacklisting. Discrete adverse employment actions, however, are actionable only if they occur within the prescribed limitations period. *Lewis v. U.S. Environmental Protection Agency*, ARB No. 04-117, ALJ Nos. 2003-CAA-6, 2003-CAA-5, slip op. at 8 (March 30, 2007) (referencing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-115 (2002); *Erickson v. U.S. Env’tl. Prot. Agency*, ARB Nos. 03-002 – 004, 03-064; ALJ Nos. 99-CAA-2, 01-CAA-8, 13, 02-CAA-3, 18, slip op. at 21, n.60 (ARB May 31, 2006)). Of the six adverse actions described by Complainant, only two are not time-barred.

Complainant filed his July 12, 2005 complaint within 90 days of both his April 18, 2005 termination and the July 7, 2005 letter from Respondent to Frontline, Complainant’s subsequent

employer, which Complainant describes as blacklisting. Because these actions took place within 90 days of the filing of Complainant's complaint, Complainant timely filed his complaint as to these actions.

The other four allegedly adverse employment actions - implementation of a shift change, the imposition of a snow season policy on the operations group, a warning letter, and the refusal to pay for two hours worked in overtime - all occurred more than 90 days before the complaint was filed. Therefore, Complainant did not timely file his complaint as to these employment actions, making them time-barred. But whether they are actionable or not, they may be used as background evidence to support actionable claims. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 6, n.9 (ARB Jan. 31, 2006) (noting *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)).

#### Credibility Determinations

I have carefully considered and reviewed 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, probative and available evidence, analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19, slip op. 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 Altomose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975). Based on the unique advantage of having heard the testimony firsthand, I observed the behavior and demeanor of the witnesses. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit, it must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it. *Indiana Metal Prod.*, 442 F.2d at 51.

#### Whether the Parties are Subject to the Act

The substance of my December 13, 2005 Order Denying Summary Judgment and Scheduling Hearing is hereby incorporated into this Recommended Decision and Order, which shall be transmitted to the Administrative Review Board for final decision.

In my Order, I noted that Respondent is a contractor of the Indianapolis Airport Authority, who manages the Indianapolis area airports. I found that Respondent, as an entity charged with maintaining the safety and security of the landing areas, indirectly provides air

transportation, and thus falls squarely within the definition of “air carrier” in AIR 21.<sup>38</sup> I found that the available legislative history clearly evinces the intent of Congress to insure that persons who are in the position to observe safety violations or concerns are free to report those concerns to the appropriate authorities without fear of jeopardizing their livelihood.

Considering both the language of the Act and its underlying purpose, I found that the whistleblower protections are not limited to employees of airlines but also to employees of those who contract to manage the airport, as Respondent does. The services that Respondent provides by contract with the airport have a direct impact on the safety and well-being of the airlines and the passengers they carry. The maintenance of safe and secure runways on which airplanes take off and land is just as crucial to airline safety as the services provided by airline employees.

I found that Congress’ desire to broaden the protection of whistleblower laws as evidenced in portions of the House Report<sup>39</sup> and the language of the act<sup>40</sup> suggest that Congress intended AIR 21 protections to extend to an employee of a citizen of the United States undertaking to provide air transportation by any means, directly or indirectly. Therefore, I found that Respondent, an entity charged with managing the Indianapolis area airports, falls squarely within the definition of “air carrier” under AIR 21.

Because Respondent is an air carrier under AIR 21, Complainant, as an individual who worked for Respondent, meets the definition of employee under the Act and his complaint falls within the jurisdiction of the whistleblower provisions of AIR 21.<sup>41</sup>

### *Merits of Complainant’s Case*

#### *Whether Complainant Engaged in Protected Activity*

Complainant argues that he engaged in two protected activities that led to adverse action by Respondent: telephone calls regarding alleged safety violations to John Lott, an FAA employee, and his PowerPoint presentation on the subject of safety issues to Stewart MacVicar, an upper-level supervisor. Respondent argues that Complainant did not engage in protected activity, both because Complainant’s activities did not relate to violations or alleged violations of federal law, and because Complainant did not reasonably believe that the issues he reported were violations.

Section 42121(a)(1) of AIR 21 makes it protected activity for an employee to provide 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.”

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<sup>38</sup> “Air carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. 29 C.F.R. 1979.101.

<sup>39</sup> H.R.Rep. No. 106-167 (1999).

<sup>40</sup> The definition of “air carrier” does not limit the term to include only “airlines.”

<sup>41</sup> An employee under the Act is “an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier....” (29 C.F.R. § 1979.101).

In order for the provision of “information” to constitute protected activity, the information must be “specific in relation to a given practice, condition, directive or event,” and the complainant must reasonably believe “in the existence of a violation.” *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 9 (citing *Peck*, slip op. at 13). The standard for determining whether the complainant’s belief is reasonable involves an objective assessment. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

A complainant’s acts must implicate safety definitively and specifically to be considered protected activity. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 5 (ARB June 29, 2006) (citing *American Nuclear Resources v. United States Dep’t of Labor*, 134 F.3d 1292 (6th Cir. 1998)). While the complainant must have a reasonable belief that his or her safety-related complaint is valid, the complainant’s allegation need not be ultimately substantiated. *Id.* (citing *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)).

1. Telephone calls to FAA

Viewing the evidence as a whole and factoring in my determinations on the credibility of the various witnesses at the hearing, I find that the Complainant’s telephone calls to Mr. Lott were protected activity under AIR 21. These telephone calls were made to Mr. Lott, an employee of the FAA, and included information relating to a violation or alleged violation of an order, regulation, or standard of the FAA as required by § 42121(a). Complainant’s communication to FAA inspector John Lott fits squarely within the definition of protected activity under AIR 21.

On May 10, 2004, Complainant viewed what he believed to be safety violations in the form of one manhole and several ruts in an area adjacent to an airport runway. The manhole height appeared to Complainant to exceed the three-inch limit set by the FAA regulations in Part 139 of the Federal Code of Regulations in the grassy area between a runway and a taxiway. There were also several six to eight inch deep, one foot wide, and fifteen to twenty feet long ruts in the grassy area between a runway and a taxiway. Complainant believed the manhole and ruts to be located inside the safety area, and therefore FAA violations. He reported the ruts and manhole to his supervisor, Keith Berlen, with the expectation that they would be repaired. When he saw the same manhole and ruts over a month later on June 24, 2004, Complainant again notified his supervisor.

Complainant took pictures of the manhole and ruts on June 26, 2004, and on June 30, 2004, still believing that FAA violations were going unremedied after he had notified his immediate supervisor, he called John Lott, an FAA inspector, and told him that safety violations existed on the airfield, which had been overlooked in a June 14, 2004 FAA inspection. There is no dispute that if these conditions were located within the safety area next to the runway, they would have been safety violations. I find Complainant’s testimony that he believed these conditions constituted FAA safety violations to be credible. That his belief was later shown to

be unfounded is irrelevant; the Act does not require that there actually be a violation, only that the belief in the existence of a violation was objectively reasonable.

I find that the evidence as a whole supports the conclusion that at the time he made the telephone calls to John Lott it was reasonable for the Complainant to believe that the manhole and ruts were FAA violations, because he believed that they were in the safety area. There is no dispute that the FAA Certification Manual defines the measurements of the safety area as 250 feet from the center of the runway on each side. However, it is also clear from the testimony that operations and maintenance personnel who are on the airfield on a daily basis use, out of necessity, a more practical approach to demarcate the safety area. As several witnesses testified, it is not always practical to actually measure the distance from the center of a runway, because this requires shutting down the air traffic on the runway. Thus, the “line of sight” method used by the Complainant comes into play. For example, Mr. Ebbert testified about a PowerPoint training presentation which stated that the hold lines define the boundaries of the runway safety area, and that they serve as a guide as to where employees should not drive without informing the tower. Mr. Lott testified in his deposition that the hold lines are optional signs that are actually called “*safety area slash obstacle free zone boundary signs.*”

The testimony establishes that there are no markings showing the actual boundaries of the safety areas. It makes abundant sense for airport personnel who are on the airfield to have a quick and convenient way to determine where it is safe for them to work and drive while the airport is in operation. That the boundaries as defined by the hold lines may exceed the precise 250 feet from the center of the runway, which defines the safety area under the FAA regulations, allows a practical way for airfield personnel to avoid the safety zone, with a little extra cushion.

Respondent argues that Complainant’s beliefs were not reasonable because there was abundant testimony that the safety area is 250 feet off of the runway centerline and that the hold signs are placed 288 feet off the runway centerline. Respondent notes that Complainant testified at the hearing and noted in his PowerPoint presentation that the hold lines upon which he relied were 288 feet off the runway centerline—indicating that he should have known that the manhole and ruts that he saw were not within safety area since they were situated “in line” with the 288 feet hold lines. But at the time that Complainant made his calls to John Lott, he had not measured the hold lines, and did not know that they did not in fact mark the safety area. He did not measure the lines until after Jesse Carriger’s second inspection, when he found them to be approximately 290 feet from the center runway line and 40 feet outside of the safety area.

I find that, given what appears to be a day to day practice of using the hold signs to measure the safety area, it was objectively reasonable for the Complainant, at the time he called Mr. Lott, to believe that the manhole and rut conditions were safety violations.

Respondent has attempted to establish that the Complainant’s report to Mr. Lott was motivated, not by his concern over safety violations, but by his unhappiness with Mr. Medvescek’s announcement of the upcoming change to rotating shifts. There is some merit to this argument. Respondent points out that Complainant stated he made approximately four telephone calls to John Lott about the alleged FAA violations, with the first call being made at some time before June 30, 2004. However, the Complainant’s telephone records, both from his

home and his cell phone, show only two calls, made on June 30, 2004 and July 7, 2004. The Complainant has offered nothing to explain this discrepancy. The June 30, 2004 call was made directly after Complainant arrived home, after the meeting in which Mr. Medvescek announced that there would be a new rotating shift schedule.

Complainant testified that he told Mr. Lott that he noted the violations on his inspection sheets, and that Mr. Lott told him to keep noting them on his self-inspection sheets to determine if Maintenance was reviewing it. However, Mr. Lott testified that Complainant told him that he had **not** marked the manhole and ruts on his self-inspection report as required by the FAA. In fact, Mr. Lott's concern on this point prompted him to call Mr. Fleet, a manager in a supervisory capacity to Complainant.<sup>42</sup> Mr. Lott testified that he called Mr. Fleet to make him aware that Complainant was calling him and alleging FAA violations, that he told Complainant to identify them on his self-inspection form, and that to his knowledge, Complainant was not doing so.

Tim Konopinsky, a BAA employee, testified that Complainant's computer checklists for the days in question, June 24-26, 2004, were "modified" by Complainant on June 30, 2004. Mr. Konopinsky acknowledged that simply opening these files and then saving them, without making any changes, would indicate that they had been "modified." In other words, the computer data merely reflects that Complainant accessed the files; it does not establish that he changed them in any way. While Complainant claims that he did not edit his checklists on June 30, Respondent argues that because the records show that the Complainant accessed the files on that day, he changed his checklists to reflect that he made notations of the violations on the days in question when he actually did not.<sup>43</sup>

I find that the reasonable inference to be drawn from this evidence is that when Complainant called Mr. Lott on the morning of June 30, 2004, his principal motivation was his unhappiness with the scheduling change announced by Mr. Medvescek earlier that morning. But while he told Mr. Lott about the scheduling change, he also told him about the manhole and ruts he had seen and reported to Mr. Berlen. Protected activity does not lose its character as protected activity merely because a person has dual motives for his or her protected activity.

I also find it to be a reasonable inference that after his conversation with Mr. Lott, the Complainant accessed the files and amended his checklists to reflect the violations that he described to Mr. Lott. Mr. Lott's testimony that the Complainant told him that he did not report his observations on his checklist is consistent with Mr. Lott's subsequent call to Mr. Fleet, which was motivated in part by his concern that such observations were not being reported on the checklists. Finally, although there is no documentary evidence to show that in fact the Complainant amended his checklists after he talked to Mr. Lott, it is no mere coincidence that he accessed his files for these two dates shortly after talking with Mr. Lott. In other words, I do not accept the Complainant's explanation that Mr. Lott "misunderstood" him on this issue.

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<sup>42</sup> Mr. Lott testified that he also called Mr. Fleet, Complainant's supervisor, because he thought that Complainant's complaints were meritless as they had already been checked and two letters of correction listing no discrepancies had been issued.

<sup>43</sup> Indeed, Respondent says in its brief that the computer data it presented confirms that Complainant had not documented those items on the checklist until June 30, because they were "altered" on June 30—this is not the case. The evidence shows that the computer data indicates that the checklist was accessed, it does not show whether any information was changed.

However, that the Complainant did not originally note these violations on his checklist, or that he went back into his files to change them, does not lead to the conclusion that he did not observe these conditions in the first instance, or that he did not believe them to be violations when he talked to Mr. Lott.

I find that Complainant's suspicions that the manhole and ruts he reported to Mr. Lott were FAA violations were objectively reasonable. The Complainant saw that they were parallel with the hold lines; at that time, he did not know the distance between the hold lines and the center runway line. As confirmed by Mr. Ebbert, Complainant had been taught during runway incursion classes that the hold lines mark the safety areas of the runway.<sup>44</sup> Again, this is a practical way for airfield personnel to keep out of the safety area, which is not otherwise marked.

I find that Complainant's belief that the manhole and ruts he reported to Mr. Lott on June 30, 2004 were in the safety area, and thus FAA violations, was objectively reasonable. Thus, his reporting of these conditions to Mr. Lott constituted protected activity under the Act.

## 2. PowerPoint Presentation to Management

I find that the PowerPoint presentation Complaint made to the Vice President of Customer Service for BAA, Stewart MacVicar, was not protected activity under the Act.

The Complainant's PowerPoint presentation, which he titled "Mismanagement, Safety, and Conduct Issues," purported to document a number of safety issues. However, in reviewing each of these alleged issues, as well as the evidence as a whole, it is clear that Complainant was motivated not by a reasonable concern over safety issues, but by his dissatisfaction with recent operational changes.

Thus, Complainant included the same manholes and ruts along runway 5L, in line with the hold lines, which he knew by that time were approximately 290 feet from the runway center line, and which had been repaired earlier, in July. These areas had been inspected by the FAA during a routine inspection, and again after Mr. Carriger received the Complainant's photographs, and found to be satisfactory.

The Complainant also included allegations of erroneous log reporting on the taxiway B safety area next to runway 5L, ruts along the taxiway, a Jeppesen chart discrepancy on taxiway B, problems in the FedEx construction area, cracked panels and unsealed/unmaintained joints on taxiway N, a drain issue in the taxiway safety area, a manhole structure above the FAA three inch limit, a damaged safety railing on the loading dock, flaking paint, concrete F.O.D. on runway 7-25 at Mount Comfort Airport, and rocks on runway 7-25 and A-1 T/O at Mount Comfort Airport. He also focused on what he viewed as the faults and "mismanagement" of others, including Mr. Medvescek.

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<sup>44</sup> Mr. Lott's testimony, that the actual name for the hold lines is *safety area*/obstacle free zone boundary signs, also suggests that these hold lines are used as the day-to-day boundary measure for the safety area by airfield personnel.

The Complainant's inclusion of Mr. Berlen's inappropriate e-mails speaks volumes about his intent. It is simply not possible to characterize this as a safety concern. The Complainant did not speak to Mr. Berlen, who had been his friend for a number of years, about these e-mails, or otherwise indicate to anyone that he felt they were inappropriate. His inclusion of these e-mails in the PowerPoint presentation strongly suggests that his motivation in going to Mr. MacVicar was not to report legitimate safety concerns, but to instigate an investigation that he hoped would reverse the management changes that began with the merger of the maintenance and operations departments.

Mr. MacVicar testified that ruts and rocks on Taxiway B, as shown on the PowerPoint presentation, were a valid problem, but that it was the contractor's responsibility to take care of the ruts and rocks at that location until the airport accepted the Taxiway. As to the other safety issues on the PowerPoint presentation, Mr. MacVicar testified that they were all minor in nature and did not constitute violations.

I find that the Complainant's PowerPoint presentation to Mr. MacVicar did not constitute protected activity. While the problems with the ruts and manhole covers was a legitimate concern at the time that Complainant reported them to Mr. Berlen and Mr. Lott, they had been addressed and repaired long before the Complainant's presentation to Mr. MacVicar. Moreover, by that time, Complainant was aware that these conditions were not in fact in the safety area, and thus were not FAA violations. The remainder of the alleged airfield problems depicted in the presentation, to the extent that their location could be identified from the photographs, were not in fact safety issues, and were minor problems, according to Mr. MacVicar. Indeed, the only valid concern in the presentation, the ruts and rocks on Taxiway B, were in an area under construction.

#### *Whether Respondent Knew that Complainant Engaged in the Protected Activities*

##### *1. Telephone calls to FAA*

I find that at the time of the Complainant's termination and the alleged blacklisting, the Respondent was aware of the Complainant's complaints to Mr. Lott. Mr. Lott testified that after he received the Complainant's call, and sometime before August or September 2004, he contacted Mr. Fleet, who at the time was the general manager of the operations department, to tell him about the Complainant's call, and to express his concern that the checklists were not being properly completed. Sometime in August or September 2004, Mr. Fleet passed this information along to the new manager of the combined maintenance and operations departments, Mr. Medvescek. As might be expected, it appears that after Mr. Carriger's unannounced inspection in July 2004, rumors were circulating about who might have instigated this inspection, with more than one person speculating that it was the Complainant.

For his part, Mr. MacVicar, who made the decision to terminate the Complainant, was not clear about when he became aware that the Complainant had gone to the FAA with safety complaints. For example, he testified that he was aware of such a rumor as early as November 2004, from Mr. Medvescek; there is also testimony that Mr. MacVicar became aware of this rumor in January 2005.

Mr. MacVicar also testified that he did not become aware of the Complainant's allegations until the initiation of this litigation. While this statement may be technically correct, I nevertheless find that Mr. MacVicar was aware, well before the start of this litigation, that the Complainant had made some type of complaint to the FAA. Thus, while he might not have been aware of the precise nature of the complaints that the Complainant made to Mr. Lott until after this litigation started, the testimony, including his, establishes that by at least November 2004, he was aware that the Complainant had made some type of allegations to the FAA, which had resulted in the surprise inspection by Mr. Carriger.

I find that the Complainant has established by a preponderance of the evidence that management of Respondent, including Mr. MacVicar, knew by the end of 2004, well before any decision was made to terminate the Complainant, that he had gone to the FAA with safety complaints.

## 2. PowerPoint Presentation

As the PowerPoint presentation was given to Stewart MacVicar, the Vice President of Customer Service for Employer, who made the decision to terminate Complainant, I find that Employer-Respondent necessarily knew about the PowerPoint Presentation at the time of Complainant's termination and alleged blacklisting, the only two actions by Complainant that are not time-barred.

### *Whether Complainant Suffered an Unfavorable Personnel Action*

As noted above, I have found that the first four actions alleged to be retaliatory by the Complainant are time-barred. But even if they were timely, I find that these actions do not constitute retaliation as that term is defined under the Act.

Not every action taken by an employer that makes an employee unhappy constitutes an adverse employment action. *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47, slip op. at 9 (ARB Jan. 31, 2007) (citing *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) (approving *Smart's* proposition that "personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment")).

A complainant must "prove by a preponderance of the evidence that the employer's action was a 'tangible employment action' that resulted in a significant change in employment status." *Id.* Firing, failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits are examples of tangible employment actions. *Id.* (citing *Jenkins v. United States Envtl Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 20 (ARB Feb. 28, 2003); *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002) (holding that a supervisor's criticism does not constitute an adverse action); *Ilgenfritz v. United States Coast Guard*, ARB No. 99-066, ALJ No. 1999-WPC-3, slip op. at 8 (ARB Aug. 28, 2001) (holding that a negative

performance evaluation, absent tangible job consequences, is not an adverse action); *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001) (holding that in the absence of a tangible job consequence, a verbal reprimand and accompanying disciplinary memorandum are not adverse actions)).

A complainant “bringing a retaliation claim must show that a reasonable employee or job applicant would find the employer’s action ‘materially adverse.’” *Id.* at 11. The respondent’s “actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.* (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S.-- , 126 S. Ct. 2405, 2409 (June 22, 2006)).

### 1. Rotating Shift Schedules

Complainant argues that the rotating shift schedule was an adverse action put into practice in order to target him for contacting the FAA. For its part, Respondent asserts that the rotating shift policy was instituted in the ordinary course of business. The record reflects that on June 4, 2004, twenty-six days before Complainant’s first call to Mr. Lott, Mr. Medvescek sent an e-mail to Mr. Fleet and Catherine Scionti, Employer’s Vice President for Human Resources, announcing his intention to implement rotating shifts. The policy applied not only to Complainant, but to everyone in the operations department. Although they were not required, rotating shifts were recommended by the FAA for the safety purpose of training every member regarding all aspects of the airport at different times. Mr. Medvescek intended to implement rotating shifts which would change every three months for a period of one year.

It is understandable that a change in shift scheduling could, and it apparently did, make the BAA employees unhappy. But it was not a tangible employment action with consequences that affected the employees’ employment status. Rather, it was a change in working conditions, along with other changes Mr. Medvescek was implementing as the new supervisor of the newly-combined group of maintenance and operations managers.

Nor do I find that this policy was intended to target the Complainant in retaliation for his call to Mr. Lott. As noted above, Mr. Medvescek announced its implementation well before the Complainant called Mr. Lott. In addition, although Complainant testified that Mr. Medvescek knew that the midnight shift was his least desired shift, he did not receive that shift as his first assignment. Indeed, because of his seniority, the Complainant had the first pick of the available shifts.

I find that implementation of the rotating shift policy was not an adverse action under AIR 21.

### 2. Snow Season Policy

Complainant argues that the decision to apply the snow season policy that applied to the maintenance department to the operations department was an adverse action implemented in retaliation for his protected communication to the FAA. His reasoning is that he was the only member of the operations department who took a winter vacation, instead of a summer vacation,

and application of the snow season policy would make these vacations impossible. Respondent argues that this had been a part of the airport management policy for 17 years, and that it had applied to the maintenance department for all of that time. Respondent also contends that application of the policy to the operations department, which included Complainant, was part of the overall reorganization of the two groups under one supervisor, Mr. Medvescek.

I find that the Respondent's implementation of the snow policy as to Complainant and the rest of the operations group was not an adverse action under the Act. Mr. Berlen, Mr. Medvescek, and Mr. MacVicar each testified about the importance of the snow season policy to safety at the airport. Mr. MacVicar testified that this policy is a safety measure which is taken in many airports that have snow in the winter. When he was assigned to the United States in July, Mr. MacVicar asked Mr. Medvescek to implement what he considered to be "best practice." This included combining the maintenance and operations groups under one manager, and extending the snow policy, which had formerly applied only to the maintenance department, to the entire group. Complainant has offered no evidence to establish that the snow policy was implemented in response to his complaints to Mr. Lott.

Moreover, the implementation of a policy that affected whether Complainant took his vacation between November and May, or during the rest of the year, is not a tangible employment action. That the Complainant might have to take his cruise at another time of year is not a material change that would have the tendency to repress any safety concerns he may have had. Complainant was still able to take vacation, and he could still take it during the winter, as long as he could be on standby for his shift in case of an emergency at the airport. Indeed, at the time that the extension of the snow season policy to the operations department was announced, the Complainant had not scheduled a cruise or requested vacation for the following winter.

I find that the imposition of the snow season policy does not constitute an adverse action. Rather, it reflects a legitimate management prerogative, is not on its face a restriction on protected activity, and had no tangible effect on Complainant's employment. It would not dissuade a reasonable worker from making or supporting a charge of retaliation or reporting a safety violation.

### 3. Payment for Overtime

Complainant claims that Mr. Medvescek's refusal to approve payment of overtime was an adverse action for purposes of AIR 21. Respondent counters that although overtime payment was initially denied, it was approved and eventually paid to Complainant, thus negating the possibility of there being any adverse employment action.

Mr. Medvescek initially denied Complainant's request for overtime payment because Complainant was not asked to perform the overtime work. Nor did the Complainant submit a report on his inspection of the Mount Comfort Airport, as required. After Mr. Medvescek denied his request for overtime, the Complainant waited about a month, and included this issue in his

PowerPoint presentation to Mr. MacVicar, who subsequently approved the overtime, which was paid to Complainant.<sup>45</sup>

Thus, Mr. Medvescek's denial of the overtime request was subsequently approved by Mr. MacVicar, and Complainant was paid for the overtime he worked. I find that this series of events did not result in a tangible job consequence, nor would it dissuade a reasonable employee from reporting safety violations. They were not adverse actions under the Act

4. *SIDA Violation*

Complainant contends that the warning letter he receiving from Mr. Medvescek regarding his SIDA violation was an adverse action against him. This warning letter was issued by Mr. Medvescek after Chief Reardon, in the ordinary course of business and pursuant to established policy, reported to Mr. Medvescek that the Complainant had been seen entering the airport through an unmanned security gate. This was a clear violation of FAA regulations. The Complainant offered no evidence that he in fact did not commit the SIDA violation, or that he was singled out for punishment by Mr. Medvescek.

Moreover, this was a warning letter, which cautioned the Complainant to follow proper procedures regarding the SIDA security gates; it did not result in any tangible job consequences. It was not likely to dissuade a reasonable worker from making or supporting a charge of retaliation or reporting a safety violation. On its face, it was intended to address the violation of FAA regulations by Complainant.

I find that the issuance of the warning letter was not an adverse action.

5. *Termination*

Complainant alleges that the Respondent discriminated against him because of his protected activity by terminating him on April 18, 2005. (Complainant's Closing Brief, p. 33). Complainant's termination was an adverse employment action as a matter of law. 29 C.F.R. §1979.102(a).

6. *Alleged Blacklisting*

Complainant alleges that Respondent blacklisted him by asking his Mr. Fulkerson, his subsequent employer, to assign him only to projects that were not under Mr. Fulkerson's contract with Respondent. This request prompted Mr. Fulkerson to let him go, because he had no other contracts besides the ones with Respondent.

Blacklisting is included among the acts that an Employer may engage in that would constitute adverse action under AIR 21.<sup>46</sup> The complainant must produce evidence that a

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<sup>45</sup> Mr. MacVicar testified that the Complainant's complaint brought to his attention that the overtime payment procedures were not consistent, and prompted him to implement a consistent procedure of pre-approval for overtime hours for the operations department.

specific act of blacklisting occurred; his subjective feelings about a respondent's action are insufficient to establish blacklisting. *Lewis v. U.S. Environmental Protection Agency*, ARB No. 04-117, ALJ No. 2003-CAA-5, 2003-CAA-6, slip op. at 14 (ARB Mar. 20, 2007).

Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Id.* at 13-14 (citing *Pickett v. Tenn. Valley Auth.*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 8-9 (ARB Apr. 23, 2003)). A blacklist is "a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." *Johnsen v. Houston Nana, Inc.*, ARB No. 00-064, ALJ No. 1999-TSC-4, slip op. at 6 (ARB Jan. 27, 2003) (quoting *Howard v. Tennessee Valley Authority*, 90-ERA-24, slip op. at 2, n.4 (Sec'y July 3, 1991), citing BLACK'S LAW DICTIONARY 154 (5th ed. 1979)).

In this case, Respondent requested that Mr. Fulkerson, a contractor who performed work at both IIA and the Mt. Comfort airports, not use the Complainant on contracts he had with BAA. Mr. MacVicar had just terminated the Complainant, because he could not trust him from a safety standpoint. As might be expected, if BAA did not want the Complainant working as an employee at its airports, it would not want him working indirectly at its airports as an employee of a contractor. Mr. MacVicar's letter made only the limited request that Mr. Fulkerson not hire Complainant for work at BAA airports. Complainant has not alleged that Respondent took any action, other than the letter, to injure his employment prospects.<sup>47</sup> I therefore find that Complainant has not proven by a preponderance of the evidence that the letter from Respondent to Frontline was an adverse employment action under AIR 21.

*Complainant Has Not Proven by a Preponderance of the Evidence that Protected Activities were Likely a Contributing Factor in Unfavorable Action*

As discussed above, I have found that the first four alleged adverse actions are time-barred, and do not qualify as adverse action under the Act. Nevertheless, I have considered whether Complainant's protected activities were likely a contributing factor in each of the six adverse actions alleged by Complainant.

1. *Rotating shifts*

Complainant contends that his report to John Lott was a contributing factor in Respondent's implementation of a rotating shift schedule. He relies on his claim that Mr. McCue told him that he heard from Mr. Ebbert at training school that Respondent was trying to force Complainant to leave by changing his hours.

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<sup>46</sup> Adverse action is defined under the regulations as any intimidation, threats, restraints, coercion, blacklisting, discharge or in any other manner discriminate against any employee because the employee engaged in protected activity. 29 C.F.R. § 1979.102(b).

<sup>47</sup> Indeed, Mr. Fulkerson testified that he did not interpret the letter to prevent the Complainant from working on non-BAA projects. (Tr. 1285).

Complainant also testified that Mr. Berlen and Mr. Medvescek knew that he would have a lot of difficulties with the midnight shift, and that it would affect him physically. Complainant theorizes that although rotating shifts were being planned before his calls to Mr. Lott, the nature of the shifts themselves was not decided upon until after these calls. He believes that the way in which they were implemented, to include some daytime and some nighttime shifts within the same week, was in retaliation for his calls to Mr. Lott, because Respondent knew they would be a hardship to him. He points to the testimony of Mr. McCue, that he had never heard of shifts of this nature being implemented and that if they were, it would probably only be in dire circumstances.

Complainant believes that it is significant and indicative of retaliation that the rotating shift policy was “abandoned” the day of his termination. Indeed, Mr. Leach testified that on the date that Complainant was terminated, he was informed that effective immediately, the shifts would be able to go back to normal “since [Complainant] [wa]s no longer [t]here.” He also testified that while the shift schedule implemented after Complainant’s replacement completed training was rotating, it was not of the same type. The rotating shift Employer has used since Complainant was terminated only requires the employees to work 80 hours a year in each of the shifts that is not their own, rather than switching shifts every three months.

Respondent counters that at the time of Complainant’s communication to Mr. Lott, implementation of the rotating shift policy was already in the planning stages. Respondent maintains that while rotating shifts had not previously been used at IIA, they were used for Respondent’s airports worldwide. In addition, the shift change affected all of the operations managers equally. Respondent notes that while the rotating shift policy was suspended on the day of Complainant’s termination because they were short-staffed, a modified form of rotating shifts continues today. Finally, Mr. Ebbert testified that while he spoke to Mr. McCue, he did not tell him that Employer was attempting to force Complainant to leave by changing his hours.

I find that, taken as a whole, the evidence establishes that the Respondent had legitimate reasons for imposing the rotating shift schedule, and that this decision was not influenced by the Complainant’s calls to Mr. Lott. The testimony from Mr. Medvescek, Mr. MacVicar, and Ms. Scionti, as well as contemporaneous e-mails, establishes that the planning for this change started well before the Complainant made his first call to Mr. Lott. This was not a new idea; it had been considered and abandoned earlier by Ms. Griswold, Mr. Medvescek’s predecessor. Ms. Scionti, who supported the rotating shift schedule, testified that she had not heard about the Complainant’s calls to Mr. Lott at that time.

Complainant was not the only employee affected by the change, nor was he the only employee who disliked this change—feedback from the AOMs was not favorable generally. While Complainant testified that Mr. Medvescek knew of his feelings about the midnight shift, there is no other evidence to establish that this was the case; Mr. Medvescek testified that he did not impose the rotating shift policy to target Complainant. Moreover, the midnight shift was not given to Complainant, and he was allowed to pick which shift he initially wanted. The evidence simply does not suggest that rotating shifts were adopted or implemented with the intent to target the Complainant because of his calls to Mr. Lott.

While Complainant has read much into the return to a consistent shift schedule on the day he was fired, I find that Respondent's reasons for changing the schedule on that day are credible and reasonable. Mr. Medvescek testified that with Complainant gone, the staff had to work overtime to cover for his absence; the imposition of a rotating shift schedule on top of these very unusual shifts was an unjustified burden. Once the Complainant's replacement was hired and trained, the shifts again rotated, although in a different manner. Indeed, Respondent continues to use a rotating shift schedule, for training purposes and pursuant to FAA recommendation.

It appears that the rotating schedule currently in use by the Employer may be less rigorous than the one first implemented during Complainant's employment with Employer. Regardless, the decision to implement these rotating shifts, and to apply them to all five departments, including operations and maintenance, came from Respondent's management, and was a business decision designed to bring the IIA into line with its other airports worldwide, and to follow FAA recommendations. It was not the Complainant's position to make this determination for the Respondent, nor was it Mr. McCue's.

I find Complainant's claim that the rotating shifts were adopted and implemented as a way to retaliate against him for reporting safety violations to Mr. Lott to be based on nothing but speculation. Other than Mr. McCue's testimony, which I do not find to be particularly credible, and which is contradicted by Mr. Ebbert, there is not a shred of evidence in the record to support the Complainant's claim.<sup>48</sup>

## 2. Snow Season Policy

Complainant asserts that the snow season policy was changed in retaliation for his calls to Mr. Lott. He argues that the fact that Mr. Medvescek sent out the snow policy e-mail in July, shortly after his calls to Mr. Lott, shows that these calls were a contributing factor in the implementation of the snow policy as to the operations group. He relies on his claim that Mr. Medvescek found out when he took his vacation from Danny Cooper and a week later, sent out the e-mail changing the policy, in order to prevent him from taking his customary winter vacation. He also claims that Mr. Abell told him that Employer was out to get him, because Complainant was apparently the only person affected by the change.

I find that the snow season policy e-mail sent by Mr. Medvescek on July 27, 2004 was not aimed at Complainant, but was instead part of Mr. Medvescek's overall plan of achieving consistency between the maintenance and operations departments, which had been consolidated under his supervision in June of 2004. Mr. Medvescek testified that the e-mail was sent in July in order to give the managers time to prepare and plan their vacations. I find that the temporal relationship of the e-mail to Complainant's reports to Mr. Lott was coincidental, and that the e-

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<sup>48</sup> In his affidavit, Mr. McCue stated that Mr. Ebbert told him that BAA was attempting to have Complainant give up his position as Operations Manager at IAA "by intimidation and changing his work hours and days off." But at the hearing, Mr. McCue testified that Mr. Ebbert told him that BAA thought Complainant had given some information to the FAA about safety deficiencies and that "they had changed his schedule, work time, work hours, days off and so on." He did not testify, as he stated in his affidavit, that Mr. Ebbert told him Respondent was trying to force Complainant to leave. For his part, Mr. Ebbert testified that while he spoke to Mr. McCue at the conference, he did not talk about Complainant.

mail was sent at that time because of the reorganization of the departments that had recently occurred, and in order to give new AOMs time to adjust to the policy.

Complainant testified that Mr. Medvescek asked Danny Cooper about Complainant's vacation habits less than a week before the e-mail, but this was not corroborated by Mr. Cooper, who testified that he was not asked about Complainant's vacation habits. Nor did Mr. Abell corroborate the statement attributed to him by Complainant, that management was "out to get" Complainant. The snow season policy had been applied to the maintenance department for the previous 17 years, and the evidence as a whole establishes that it was applied to the five members of the operations department to bring them into line with the maintenance department, and provide coverage for inclement weather. Again, there is not a shred of evidence to support the Complainant's claim that it was implemented to target him for making his calls to Mr. Lott.

### 3. SIDA violation

Complainant believes that the SIDA warning letter was sent by Mr. Medvescek in retaliation both for his calls to John Lott of the FAA and his PowerPoint presentation to Mr. MacVicar. He argues that he was a good employee with a long history of awards and letters of commendation, who never had a warning in his 28 years at the airport until the SIDA incident. He also testified that it had been customary for him and others to enter through the gate that he used, and that Mr. Medvescek was also known to use the SIDA gate.

Respondent argues that the SIDA warning letter was unrelated to the Complainant's calls to Mr. Lott and his PowerPoint presentation, and was sent to Complainant solely as discipline for a serious violation concerning the SIDA security area, which has been an especially sensitive area since September 11, 2001. Respondent argues that Complainant committed the violation, was reported on by the airport police, and provided no evidence that any other members of the team committed similar infractions.

I find that the warning letter Complainant received on January 7, 2005 was not issued to him in retaliation for protected activity. Chief Reardon testified that he followed Airport protocol, which was that when he learned of a SIDA violation, he contacted the violator's manager or supervisor, who then handled the matter. Once Chief Reardon informed Mr. Medvescek of the Complainant's violation, Mr. Medvescek issued a written warning, informing Complainant of the violation, instructing him to enter the airport in an off-duty capacity only through certain gates, and cautioning him that if he did not do so then he would be subject to further discipline.<sup>49</sup>

Complainant has submitted no evidence to show that the SIDA warning was related either to his calls to John Lott or his PowerPoint presentation to Stewart MacVicar. Indeed, the only basis for the Complainant's claim appears to be the timing of the letter, which was sent,

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<sup>49</sup> As if to suggest that this violation was trumped up, Complainant states in his brief that "Notably, despite Medvescek's warning, Chief Reardon admitted never issuing Thompson a citation for this alleged violation." Complainant's Brief at 26. However, as discussed above, Chief Reardon testified that it was his standard policy NOT to issue a citation, but to notify the offending party's supervisor so that it could be addressed internally; citations were only issued in the case of repeat offenders. (Tr. 1487).

according to the Complainant, after Mr. Medvescek learned about his PowerPoint presentation to Mr. MacVicar. But sometimes a coincidence is really just a coincidence. The Complainant has not presented any evidence, other than possibly the timing of the letter, to support his claim that his calls to Mr. Lott, and his PowerPoint presentation to Mr. MacVicar, rather than the fact that he did in fact commit a security violation, prompted Mr. Medvescek to issue him the warning letter.

Indeed, shortly before he issued the warning letter, Mr. Medvescek met with Complainant to resolve the rotating shift issues on December 11, 2004; Complainant testified that at this time, he felt that he and Mr. Medvescek were on good terms. CX 38, 460-61. Nor was the level of punishment so disproportionate to the misconduct as to suggest retaliatory motives. Indeed, Chief Reardon's testimony reflects that the SIDA requirements are a serious matter, and that repeat violation can lead to police involvement, administrative fines, confiscation of the violator's identification card, and denial of access to the airport.

I find that the issuance of the SIDA warning letter was solely motivated by the Respondent's legitimate interest in ensuring the safety and security of the airport in the sensitive SIDA areas, and that it was not even in part motivated by retaliatory animus.

#### 4. Overtime

Complainant argues that Mr. Medvescek's refusal to approve overtime pay for his work at the Mount Comfort airport was in retaliation for his calls to Mr. Lott. A review of the record reflects that the Complainant's request for overtime pay was denied because the Complainant was not given permission, nor did he ask for authority to take an airport vehicle to Mount Comfort on his own time. Nor did the Complainant submit a report of his inspection so that safety issues could be investigated and addressed.

I credit Mr. Medvescek's testimony, that he did not approve the Complainant's request for overtime, because he failed to follow procedure regarding approval for the overtime and submission of an inspection report. As Mr. Medvescek advised the Complainant, he was free to appeal this decision, and he did. His overtime was ultimately paid by Mr. MacVicar. Thus, not only is there no evidence that Mr. Medvescek's denial of the overtime request was motivated by the Complainant's calls to Mr. Lott, rather than his failure to follow procedure, the Complainant was paid for the overtime, and thus suffered no adverse consequences.

#### 5. Termination

I find that Respondents' rationale for its termination of the Complainant is credible, and that Complainant has failed to show by a preponderance of the evidence that his termination was a pretext for discrimination.

Mr. MacVicar's April 18, 2005 letter listed as grounds for the Complainant's termination his conclusion that he could not trust Complainant to make appropriate decisions regarding airport safety, that Complaint continually failed to correctly document safety issues in his

checklist, and that Complainant's personal issues with Mr. Medvescek caused him to mishandle safety issues for the purpose of trying to make Mr. Medvescek "look bad."

Complainant believes that his termination was in retaliation for his calls to Mr. Lott. This belief is founded, in part, on what his friend, Roger Fulkerson, allegedly told him—that Employer was planning to terminate him as a result of his contact with the FAA. However, I find that this was not corroborated by Mr. Fulkerson, whose testimony was less than convincing on this point. Thus, he was not able to identify who allegedly told him that Employer was planning to terminate Complainant. Rather, he testified that it *must have* been someone in the operations group, because they were the people he dealt with when he was at the airport, and it was not Complainant.

Mr. MacVicar was the sole decision-maker regarding the Complainant's termination. I find that while he was aware of rumors that Complainant made calls to the FAA, and Mr. Medvescek had told him that he suspected Complainant had made such calls, the evidence does not establish that the fact that the Complainant contacted the FAA regarding safety issues played any role in his decision to terminate the Complainant. Mr. MacVicar testified that even if he had known that Complainant had communicated to the FAA regarding safety issues, this was an accepted and encouraged practice by Respondent. He testified that in a "safety culture" it is normal and encouraged behavior to contact the FAA about safety issues, and that was encouraged at the airport in Indianapolis.

I found Mr. MacVicar to be a very credible witness, and I credit his testimony that BAA encourages its employees to contact their superiors or the FAA about safety issues. That this is so is borne out by the fact that, again, despite the fact that Mr. Carriger's unscheduled inspection in July 2004 implied that someone at the airport had contacted the FAA, and indeed rumors circulated that it was the Complainant who did so, there is no evidence that there was any effort by management either to learn the identity of this person, or to punish the Complainant, who was rumored to have triggered the inspection.

Nor has the Complainant established by a preponderance of the evidence that his PowerPoint presentation to Stewart MacVicar on November 9, 2004 was a contributing factor in his termination. Mr. MacVicar testified that he took Complainant's allegations seriously, spent a great deal of time investigating the issues presented in the PowerPoint, and communicated his findings in person and by letter to Complainant.<sup>50</sup> Indeed, the Complainant testified that he thought that Mr. MacVicar took his PowerPoint presentation issues seriously. Mr. MacVicar's reaction to the Complainant's PowerPoint presentation does not suggest retaliatory motivation on his part.

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<sup>50</sup> Complainant argues that Mr. MacVicar did not investigate the safety issues reported by the Complainant, but "instead launched a full-fledged investigation of the messenger, Thompson, while ignoring the message." Complainant's brief at 24. To the contrary, I find that the credible testimony and evidence establishes that Mr. MacVicar invested a great deal of effort in investigating each allegation by the Complainant. While he needed some assistance from Mr. Medvescek and Ms. Sanders in collecting information, as a relatively new BAA employee at IIA, he felt that it was important for him to become familiar with these issues and satisfy himself about the Complainant's claims. Indeed, as a result of the information from Complainant, he tightened up both the checklist reporting, and the overtime procedures.

I find that the reasonable inference to be drawn from the evidence as a whole is that Mr. MacVicar, having been presented with a laundry list of alleged management and safety problems by the Complainant, undertook a serious and good faith investigation of these allegations. As much as possible, he attempted to conduct this investigation by himself, without bringing anyone else into it, except to the extent that he needed to obtain information to evaluate the Complainant's allegations. He met with the Complainant in December, and went through the issues raised in the PowerPoint presentation. Mr. MacVicar testified that it was his impression that the Complainant was satisfied with his conclusions, and that he agreed to undertake to be part of the team.

Subsequently, after receiving the Complainant's vitriolic two page "appeal" of his warning letter regarding the SIDA violation, Mr. Medvescek met with Mr. MacVicar to express his anger and frustration with the Complainant, and to ask that the Complainant be transferred. Mr. MacVicar testified that he was disappointed by this exchange, as well as the e-mail exchanges that followed between the Complainant and Mr. Medvescek, as he felt that the Complainant had committed to being a team player during their December 16 meeting. However, he did not agree to Mr. Medvescek's request to transfer the Complainant, as there was no position that was commensurate with his experience and tenure with the airport.

Mr. MacVicar's written response was dated January 12, 2005, which is also the date on which Mr. MacVicar began keeping a record on the Complainant's work activities. At about the same time, Mr. MacVicar learned from Mr. Duncan that the Complainant had given Mr. Duncan a copy of the PowerPoint presentation.<sup>51</sup> At the time, Mr. MacVicar thought that he had dealt with the issues, and that Complainant had given his commitment to keep problems within the department and resolve them within the team. According to Mr. MacVicar, he felt that Complainant was undermining and personally attacking him, just as other members of the operations team perceived Complainant had attacked them. He was disappointed because he had trusted that things would improve and that Complainant would undertake to become a team player; giving the PowerPoint presentation slides, the exact same document which he had spent months examining, to the airport's legal counsel for comment and observations, went against this undertaking. According to Mr. MacVicar, the Complainant had not expressed any dissatisfaction with his investigation in the time between the PowerPoint presentation and the time that he gave the presentation to Mr. Duncan. He became convinced that safety was not the Complainant's goal, and that his aim was to cause conflict and discord.

Mr. MacVicar acknowledged that he made his decision to terminate the Complainant in late January, although he did not formally terminate him until April. I find that the reasonable inference to be drawn from the evidence as a whole is that, after his meeting with the Complainant in December, where Mr. MacVicar explained the results of his investigation, Mr. MacVicar was satisfied that the Complainant would work as part of the team, and would leave his conflicts with Mr. Medvescek behind him. On the heels of this meeting, however, he became aware of the exchanges between Mr. Medvescek and Complainant over the SIDA violation, and he also learned that the Complainant had gone to Mr. Duncan with a copy of the PowerPoint.

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<sup>51</sup> Mr. MacVicar testified that he began keeping the written log on the Complainant after he found out that Mr. Duncan had received a copy of the PowerPoint.

This told Mr. MacVicar that, contrary to the Complainant's assurances, he could not be trusted to put safety first, over his own personal agenda.

However, at this point Mr. MacVicar had already given the Complainant a letter addressing the issues raised in the PowerPoint, and suggesting that the issues would be revisited in three months. Mr. MacVicar also testified that it was BAA policy to provide a 90 day review period in such circumstances; he also considered the Complainant's long tenure and standing at the airport, as well as the hope that the Complainant would improve. Thus he decided to wait for the three months to pass.

Mr. MacVicar began keeping a chronological checklist on the Complainant on the same date as his letter to the Complainant with the response to the PowerPoint presentation. He acknowledged that he kept this log only on the Complainant, and not on any other maintenance or operations employee. I find that it is reasonable to infer from the sequence of events that as of January 12, 2005, when he sent his letter to the Complainant, Mr. MacVicar, at the least, recognized the possibility that it might be necessary to terminate the Complainant.

I also find that it is reasonable to infer that, by keeping a written account of the Complainant's activities, and particularly his shortcomings, Mr. MacVicar was attempting to create documentation to justify a decision to terminate the Complainant. There was extensive testimony at the hearing about specific entries on various checklists, and whether certain problems should or should not be included on the checklists. Clearly, the proper completion of the checklists, which are required by the FAA, and trigger repairs by maintenance, are a legitimate safety concern of airport management. And it is clearly the prerogative of management to oversee the completion of these checklists, and to mandate procedures for their proper use.

But it is also clear that the ADMs did not approach the checklists in a uniform manner, and there was room for disagreement about what should and should not be included on a checklist. Indeed, prompted by the Complainant's PowerPoint presentation, Mr. MacVicar had Mr. Medvescek issue instructions clarifying departmental procedure on checklists, which was followed by a meeting with the ADMs to discuss safety and security as top business priorities of the Respondent, as well as Mr. MacVicar's plan to split the duty and operations managers' responsibilities. In other words, the Complainant was not the only ADM who needed guidance on checklist procedures. But he was the only one who merited a log of his activities.

The very first entry on the log is a notation that Mr. Medvescek e-mailed the instructions to the ADMs clarifying the checklist procedure. The fact that Mr. MacVicar's handwritten log was kept only on the Complainant indicates that its purpose was to justify a decision to terminate the Complainant. I find that this decision began to gel in late January, after Mr. MacVicar learned that, despite his assurances that he would work with the team, the Complainant had provided the PowerPoint presentation to Mr. Duncan, the airport attorney. Clearly, by that point, the only purpose to be served by Mr. MacVicar's handwritten record was the wish to "paper" a decision that had already been made; the evidence as a whole does not support any other conclusion.

That being said, however, it does not affect my conclusion that Mr. MacVicar's decision to terminate the Complainant, considered in January and implemented in April, was based, not on the Complainant's submission of his PowerPoint presentation, but on his conclusion that he could not rely on the Complainant to put safety over his own personal agenda.

In order to sustain a claim of unlawful retaliation under the Act, the Complainant must describe circumstances sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. The Complainant may demonstrate the Respondent's motivation through either direct or circumstantial evidence of discriminatory intent. *See Id.*; *Fradley v. Tennessee Valley Authority*, 92-ERA-19, slip op. at 34 (Mar. 26, 1996); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). I find that there is neither direct evidence establishing that Complainant's alleged "protected activity" contributed in any way to his termination, nor circumstantial evidence from which one could infer that either the Complainant's calls to Mr. Lott, or his PowerPoint presentation to Mr. MacVicar, were a contributing factor in his termination.

Thus, even assuming Complainant has established each element sufficient to raise an inference of unlawful discrimination, I find, after viewing the record as a whole, that Respondent has presented a legitimate nondiscriminatory rationale to justify terminating the Complainant, who has not shown this rationale to be a pretext.

Mr. MacVicar was clearly aware of Complainant's protected activities regarding the PowerPoint since at least November of 2004, and he was also aware of the rumors identifying Complainant as the instigator of the July 2004 inspection by Mr. Carriger. There is nothing in the record to reflect that in the six months or so between the surprise inspection and Mr. MacVicar's consideration of termination, there was any effort by management to either identify or punish the instigator of this surprise inspection. Indeed, Mr. MacVicar, whose testimony I found to be credible, stated that BAA employees are encouraged to report safety problems to anyone in management, as well as to the FAA.

Mr. MacVicar took the Complainant's PowerPoint presentation seriously. He looked into each allegation, obtaining information from his management and maintenance team, reviewing FAA requirements, and looking at the airport drawings to determine if any of the Complainant's concerns were justified. Indeed, as a result of this presentation, Mr. MacVicar concluded that there was work to be done to make sure that the ADMs were correct and consistent in their reporting of problems on the checklists. He also clarified and firmed up the policy regarding overtime.

There is also abundant evidence to support Mr. MacVicar's claim that he had determined that the Complainant could not be trusted to put safety, as opposed to his own personal agenda, first. The record clearly establishes that Complainant was unhappy with the changes that came with the new management by BAA. He was unhappy with the fact that the operations and maintenance departments were merged under Mr. Medvescek. He, as well as other ADMs, was unhappy with the imposition of a new shift system that followed, and the application of the snow season policy to operations department ADMs. He chafed under the stepped up security requirements after September 11, which required him to show identification and enter by a

secured gate when doing off duty work. He did not hesitate to make his dissatisfaction known, sending numerous vitriolic communications to Mr. Medvescek, on which he copied Mr. MacVicar, as well as other members of management. The Complainant wanted things to return to the way they were before, and that was his motivation in going to Mr. MacVicar with his PowerPoint presentation.

Even so, as discussed above, Mr. MacVicar took this presentation seriously, and invested a significant amount of time and effort satisfying himself that the presentation raised, at most, minor safety concerns. He thought that he had satisfied the Complainant as well, and that this matter was behind them. Only when it became clear that the Complainant could not be trusted to abandon his personal agenda, and put safety first, did Mr. MacVicar decide to terminate him.

#### 6. Blacklisting

To be discriminatory, the allegedly “blacklisting” communication must be motivated at least in part by the protected activity. *Pickett v. Tenn. Valley Auth.*, ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 9 (ARB Apr. 23, 2003). Complainant’s second actionable contention is that the letter that Respondent sent to Frontline asking that Complainant not work on BAA contracts was blacklisting under AIR 21. Respondent counters that it was not blacklisting but simply preventing Complainant from doing indirectly what he could not do directly. Respondent asserts that Complainant was free to continue working for Frontline, just not on Employer’s contracts, and that Employer did not interfere with his ability to obtain any other employment.

I find that even if the letter requesting Frontline not to use Complainant to work on any of Respondent’s contracts was an adverse employment action, Complainant has not proved by a preponderance of the evidence that protected activity was a contributing factor.

Mr. MacVicar testified that BAA did not want Complainant working on BAA contracts for the same reason that they did not want him working for them directly—Mr. MacVicar did not trust him to properly deal with safety issues. I find that Mr. MacVicar’s request was not motivated by any protected activity, but arose from the same concerns that led to the Complainant’s termination.

#### *Respondent has Demonstrated by Clear and Convincing Evidence that it Would Have Taken the Same Action in the Absence of the Alleged Protected Activity*

I find that the Respondent has shown by clear and convincing evidence that it would have terminated the Complainant, and prevented him as working as a contractor on BAA projects, even in the absence of the Complainant’s alleged protected activity. The Complainant was fired because he was not properly marking his checklists, after having been told to do so on several occasions. As discussed above, the proper completion of the checklists was not a problem confined to the Complainant. But the Complainant was also terminated because Mr. MacVicar, who was ultimately responsible for the safety of the airport, concluded that he could not trust the Complainant to put safety over his clearly demonstrated animosity toward other members of his team, as reflected in his PowerPoint presentation, which criticized almost every member of his

team, and his e-mails to Mr. Medvescek, which he copied to Mr. MacVicar. Complainant made it crystal clear that he did not like the changes that came with the new management.

As the Secretary of Labor has previously noted, although whistleblowers are protected from retaliation for blowing the whistle, the fact that any employee may have done so does not afford him protection from being disciplined for reasons other than his whistleblowing activities, nor does it give such an employee carte blanche to ignore the usual obligations involved in an employer-employee relationship. *Dunham v. Brock*, 794 F.2d 1037 (5th Cir. 1986). Thus, "[a]n otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct." 794 F.2d at 1041 (citations omitted).

#### Attorney's Fees

Respondent argues that Complainant brought his claim in bad faith because he knew that he did not engage in protected activity. Respondent claims that it is entitled to its attorney's fees under 49 U.S.C. § 42121(b)(3)(c) due to the frivolousness of the action.

Title 29, Part 1979.109(b) of the Code of Federal Regulations, 29 C.F.R. §1980.109(b), provides:

(b) If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding \$1,000.

It has been held that a complaint is frivolous when there is no "arguable basis in law or fact" to maintain an action under the Act, *Hopkins v. ATK Tactical Systems*, 2004 SOX-19 (ALJ May 27, 2004) *citing* *Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000), or when "the claim was brought for purposes of harassment, delay or 'other improper purposes,'" *id.*, *quoting* *Wilton Corporation v. Ashland Castings Corp.*, 188 F.3d 670, 676 (6th Cir. 1999).

Although the strength of the Complainant's claim is in serious question, I find that his complaint does not rise to the level of being frivolous. In other words, a complaint is not considered frivolous merely because the complainant was not able to sustain a successful claim based on the merits. *See Hopkins*, 2004 SOX-19. That Complainant did not have a strong argument or strong factual basis to establish that he engaged in "protected activity" as defined by the Act, or that he suffered retaliation for his alleged protected activity, does not mean he did not have a sincere belief that a legitimate claim could be brought. The Complainant alleged facts that conceivably could have established unlawful discrimination, and the Act allows

Complainant to explore the possibility that those facts may amount to a violation of law—even if that possibility is slight.

Accordingly, I find that after consulting counsel, the Complainant held a sincere belief he could maintain a viable claim under the Act against Respondent. There is nothing in the record indicating that the Complainant filed his claim to harass, intimidate, cause delay, or for any other improper purpose. Thus, I find that Respondent’s request for sanctions in the form of attorney fees must be denied.

### Conclusion

Based on the foregoing, I find that the Complainant was engaged in protected activity when he reported what he believed were safety violations to Mr. Lott in June 2004, and that the Respondent had knowledge of this protected activity at the time of the Complainant’s termination. But the Complainant has not established by a preponderance of the evidence that this protected activity was a contributing factor in his termination.

I find that the Complainant’s claims of retaliation by the change in shift rotation, the imposition of a new snow season policy, the issuance of the SIDA violation warning letter, and the initial refusal to pay overtime, are time-barred, and in any event, do not constitute “adverse action” under the Act. I also find that the Respondent’s request that Frontline not use Complainant, whom it had fired as untrustworthy, to work on Respondent’s projects, was not “blacklisting.”

I find that the Complainant’s PowerPoint presentation to Mr. MacVicar did not constitute protected activity, but even if it did, the Complainant has not established by a preponderance of the evidence that it was a contributing factor in his termination.

I find that the Respondent has established by clear and convincing evidence that it would have terminated the Complainant despite his reports to Mr. Lott, and his PowerPoint presentation to Mr. MacVicar.

Finally, I find that Complainant’s complaint was not frivolous, and Respondent’s request for attorney fees is therefore denied.

### **RECOMMENDED ORDER**

Accordingly, IT IS RECOMMENDED that the complaint of Darryl Thompson for relief under the Act be DENIED.

**A**

LINDA S. CHAPMAN  
Administrative Law Judge

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.