

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 October 2007

CASE NO.: 2006-AIR-00014

In the Matter of:

DON DOUGLAS,
Complainant,

v.

SKYWEST AIRLINES,
Respondent.

Appearances: Erik Strindberg, Esq.
Kathryn K. Harstad, Esq.
For Complainant

Todd Emerson, Esq.
Scott Petersen, Esq.
Gregory Saylin, Esq.
For Employer

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"), as implemented by 29 C.F.R. Part 1979 (2002). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a); 29 C.F.R. §1979.102.

Don Douglas ("Complainant") was employed as a pilot for Respondent Skywest Airlines ("Respondent") until his employment was terminated on August 31, 2005. On November 20, 2005, Complainant filed a written electronic complaint with the Federal Aviation Administration ("FAA") alleging that Respondent had terminated his employment due to activity that is protected under AIR 21. Complainant alleged the protected activity occurred on March 23, 2005

when he declared himself and his crew unfit to fly. In response to the complaint, an FAA official contacted Complainant on December 9, 2005 informing him that he had the right to file an AIR 21 complaint with the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"). Complainant then filed the same complaint with OSHA on December 12, 2005. Because Respondent learned of the right to file the complaint on December 9, 2005, OSHA extended the filing period and therefore considered the complaint timely filed. On April 17, 2006, OSHA found that the preponderance of evidence supported Respondent's position that Complainant's protected activity was not a contributing factor in his termination and consequently OSHA dismissed the complaint.

On April 28, 2006, Complainant requested a hearing by an administrative law judge pursuant to 29 C.F.R. § 1978.105(a). The case was assigned to the undersigned, who held a formal hearing in Salt Lake City, Utah on the following dates: November 15, 2006; November 16, 2006; January 16, 2007; January 17, 2007; and January 18, 2007. The parties were afforded a full and fair opportunity to present evidence and arguments. Both Complainant and Respondent were represented by counsel. Administrative Law Judge Exhibits ("AX") 1-5, Joint Exhibits 1-43 and 50-52, Respondent's Exhibits 44-46, and Complainant's Exhibits ("CX") 47-49 were admitted into the record.¹ The following witnesses testified at the hearing: Don Douglas, David Moore, Michael Macias, Amy Tallman, James Black, Brandee Black, Troy Brewer, Anthony Fizer, David Bechtold, Lou Bodkin, Christine Merrill, Kelly Jasmin, Jeff Nostrom, Linda Cropp, Christopher Abell, David Faddis, and Klen Brooks. The parties were provided the opportunity to present post trial briefs. On May 21, 2007, Employer filed a post trial brief. Complainant filed a post trial brief on May 25, 2007. Respondent then filed objections to Complainant's post trial brief on June 8, 2007 and Complainant filed a motion to strike Respondent's objections on June 11, 2007. Respondent's objections were raised without leave from the Court and were filed beyond the stipulated deadline for filing post trial briefs, and therefore Respondent's objections are disregarded.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable provisions, regulations and pertinent precedent. Any evidence in this sizeable record that has not been discussed specifically has been determined to be either relevant, but comprised in other evidence, or insufficiently probative to affect the outcome directly.

ISSUES

1. Whether AIR 21 applies.
2. Whether Complainant engaged in protected activity and, if so, whether Respondent knew of the protected activity.

¹ See Hearing Transcript ("TR") at 30, 85, 419, 430, 589, 708, 727, 1021, 1209. JX 29, JX 30, and JX 52, were admitted over Complainant's objection. *Id.* at 30, 1209. It is noted that JX 26 is a color photocopy in Complainant's exhibits whereas in Respondent's exhibits JX 26 is a black and white photocopy. However, the parties have otherwise submitted duplicate exhibits and therefore the term "JX" will be utilized to refer to all exhibits. Joint exhibit 41 includes a recording of a meeting that took place on July 19, 2005, held by Complainant's supervisor, Tony Fizer, who did not know that the meeting was being recorded. JX 41:1. The exhibit was admitted without objection. TR at 82.

3. Whether Respondent engaged in an adverse employment action.
4. Whether the protected activity was a contributing factor in Respondent's decision to take the adverse action.
5. Whether Respondent provides clear and convincing evidence of a non-discriminatory motive for the adverse action.
6. If Complainant prevails, what relief is appropriate.

FINDINGS OF FACT

This AIR 21 claim was brought by Complainant concerning the termination of his employment by SkyWest Airlines ("Respondent"), where Complainant was a pilot for 16 years. *See* Hearing Transcript (hereinafter, "TR") at 61-62. Complainant had a good record of employment without any discipline prior to the 5-month period that preceded his termination. *Id.* at 233, 242, 745; JX 34 at 29. Complainant alleges that Respondent violated the Act when it terminated his employment on August 31, 2005 because he declared himself and his crew unfit on March 23, 2005, which he claims constituted protected activity under AIR 21. Respondent replies that the termination was unrelated to the March 23, 2005 incident, claiming that Complainant was terminated because he wrote profane graffiti on two occasions and then denied doing so.

Prior to the alleged protected activity, Complainant had surgery, a vasectomy, on March 18, 2005. TR at 92-93, 331, 740-741; JX 2. He recovered for a few days, experiencing no complications, and returned to work on March 21, 2005. TR 71, 74; JX 2. He also completed a shift on March 22, 2005. These shifts were "stand-up" shifts, meaning Complainant could be on continuous, overnight duty, with fewer than eight hours rest at a hotel. TR at 71-73, 874-875. Often, flight crews on stand-up shifts spend some time in a hotel, but crews are aware it is possible that they could be called upon to work at any point during the shift. *Id.* at 875.

According to Complainant, his surgeon made recommendations for his recovery from surgery, which he followed. *Id.* at 341, 346-347. Complainant testified that he told his surgeon that he was a pilot and his surgeon stated he could return to work on March 21, 2005 after three days barring complications. *Id.* at 331, 341, 332, 452, 455. He also testified that his surgeon also told him that he should avoid lifting objects heavier than ten to twenty pounds. *Id.* at 346. As a result, Complainant asked his First Officer to carry his flight bag on March 21, 22, and 23, 2005. *Id.* at 346-347, 564. Complainant testified that his surgeon prescribed pain medication which Complainant took on the day of the surgery, March 18, 2005, and the following day, March 19, 2005. *Id.* at 341. He did not take it thereafter, and returned to work two days later on March 21, 2005. *Id.* He does not recall the name of the pain medication, did not ask his doctor if the medication would affect his piloting abilities, and did not consult a flight surgeon certified by the FAA. *Id.* at 331-333, 335, 339. Complainant was never disciplined for not consulting an FAA flight surgeon or for flying the two stand-up shifts on March 21, 2005 and March 22, 2005.

See Id. at 71; *see also* JX 8; JX 10; JX 16. Respondent became aware of Complainant's surgery after he declared himself unfit on March 23, 2005. TR at 93. Respondent did not ask him to see an FAA flight surgeon at that point, but rather continued to schedule him for flights, which he completed successfully. *Id.*

Complainant testified that after the surgery he felt "a little discomfort" and that this discomfort "interrupt[ed] my sleep a little bit" (TR at 333-334) but he completed two stand-up shifts and felt fit to fly his third shift after the surgery, on March 23, 2005. *Id.* at 71. That shift was also a stand-up shift. *Id.* at 71-73, 874-875. Complainant and his crew members, First Officer Troy Brewer and Flight Attendant Brandee Black, were scheduled to fly from Salt Lake City, Utah to Jackson Hole, Wyoming. *Id.* at 71-73. They were to depart at 8:45 p.m. that night and return to Salt Lake City the following morning. *Id.* He felt fit notwithstanding the fact that he and his crew were "weather warned" that the shift would be impacted by inclement weather, including rain and snow storms. *Id.* at 71-72, 367-368; JX 2; JX 37 at 1; JX 47 at 7. He stated later to an internal disciplinary appeal board, "I really thought I could do all night." JX 47 at 7.

At the beginning of the shift, First Officer Troy Brewer and Flight Attendant Brandee Black each told Complainant about physical concerns they had. *Id.* at 75-76; 368-69, 541-544. Brewer told Complainant that he was tired; he had not had a lot of sleep. *Id.* at 75-76; 368-69. Brandee Black stated to Complainant that she was having difficulties with her arthritis and hoped she could get out of bed the next morning. *Id.* 74-75, 541-544. Black's arthritis was more problematic than usual for her because she had strep throat and could not take her usual injections for arthritis while on antibiotics for the strep throat. *Id.* at 543, 552.

The flight's departure was delayed for approximately one hour due to late passengers and baggage. *Id.* As predicted, the weather in Salt Lake City was "rainy and snowing," and the weather on the route to Jackson Hole had "snow storms in the whole area." *Id.* Complainant testified that flying in those conditions can be very stressful and it requires a pilot to be "on top of [his] game." *Id.*

The flight itself was difficult, according to the testimony of Complainant, Black and Brewer. *Id.* at 72-73, 367-368, 544-545. Complainant and his First Officer were under more stress than usual because they had to fly on instruments and the conditions were icy. *Id.* The plan had been for the flight to land and the pilot and crew to spend the night in Jackson Hole. Complainant testified that when he and his crew had been "weather warned" they had been told that their flight to Jackson Hole might be turned away. *Id.* at 367-368. Nearing the Jackson Hole area, high winds and poor runway conditions made it unsafe to land, and the flight entered a holding pattern that lasted for approximately an hour. *Id.* at 72-73, 544-545. At that point, still unable to land, the plane was turned back to Salt Lake City. *Id.* at 73. The poor conditions due to inclement weather continued for the return flight. *Id.* As a result of the conditions, the flight to Jackson Hole took three hours instead of one (due to the one-hour holding pattern and the one hour return flight after being turned back to Salt Lake). *Id.* at 72-73, 544-545.

After landing in Salt Lake City at around midnight, Complainant learned that that he and the crew were scheduled to attempt another flight to Jackson Hole in a few hours, boarding at 4:00 a.m. and departing at 4:40 a.m. TR at 78; JX 2; JX 37; JX 41:2 at 00:05, 00:30.

Complainant found himself unexpectedly feeling too unwell to complete another flight because he was "just physically and mentally drained" from the experience. TR at 74; JX 37 at 1. He attributed this to the length of the flight, the stress of flying in poor conditions, and discomfort from the surgery that had unexpectedly become intense, rather than mild, as it had been previously. TR at 74, 333-334; JX 37 at 1. Complainant testified that he based his determination of his own unfitness, as well as that of his crew, on the inclement weather and the stress of the previous flight, the length of time he and First Officer Brewer had been in the cockpit, and observations and discussions he had with Brewer and Flight Attendant Brandee Black. *Id.* at 72-76, 368-69, 541-544, 552; JX 37 at 1.

Once Complainant concluded that neither he nor his crew members would be capable of attempting another flight to Jackson Hole at 4:00 a.m. in inclement weather, he notified Respondent of this. TR at 75, 78, 369; JX 41:2. In the recording to Crew Scheduling, Complainant stated that he had determined that based on his own fatigue and that of his crew, they would not be safe to fly to Jackson Hole again at 4:00 a.m. JX 41:2 at 00:16 to 00:29; *see also* TR at 74, 85. Complainant also spoke with acting shift supervisor System Chief Pilot Jim Breeze, informing Breeze that he and his crew would not be able to safely complete the 4:00 a.m. flight. *Id.* at 78, 83-84, 358, 441, 546-47, 553-54, 568; JX 2; JX 41:2. Complainant testified that he informed Breeze and Crew Scheduling that he did not think that it would be safe for him or his crew to rest for two or three hours in between flights and fly again. TR at 78, 83-85, 358, 441; JX 41:2, 00:18, 00:27. He testified that once he determined this, he contacted Crew Scheduling as soon as he could to give as much notice as possible. TR at 85; JX 41:2, 00:18, 00:27.

As a pilot, Complainant was trained to declare himself unfit should he become unfit during the course of a shift. TR at 328-329. He believed that it would be a violation of federal air safety regulations if he were to fly unfit, or were to allow a crew member to fly that he had determined was unfit. *Id.* at 85-86, 387. He also believed that he as the captain (pilot) had the final authority to make fitness determinations concerning himself and his crew. *Id.* at 86.

First Officer Troy Brewer testified that, in retrospect, although he was tired that night, and was more tired after the flight, he believes he was fit to complete the second flight. TR at 569-570. Brewer also testified that he did not object when Complainant made a decision to declare Brewer unfit. *Id.* at 568-569. On cross-examination, Brewer admitted that sometimes reserve pilots are available and it is possible one was available that night. *Id.* at 617.

Similarly, Flight Attendant Brandee Black testified that in retrospect she believes she could have flown that night. *Id.* 74-75, 541-544, 546-47, 553-54. Black, who was standing next to Complainant when he made the call to crew scheduling, testified that she did not disagree with Complainant because she felt it was the right decision at the time. TR at 543, 546-47, 553-554; JX 37 at 1. She stated that she felt "justified that we -- you know, that took quite a bit and we were going home." TR at 546. Complainant testified that, in retrospect, he could have asked for each crew member's opinion about their own unfitness but that based on his interactions with the crew and his assessment of their fatigue and his fatigue, he believed at the time that he made the best determination because it was "the safest thing." *Id.* at 371, 546.

The following day, March 24, 2005, Tony Fizer, the Regional Chief Pilot for the Salt Lake City Airport, contacted Complainant, Brandee Black, and Troy Brewer after Jim Breeze had notified Fizer of the cancelled flight. *Id.* at 92, 723, 733. When Fizer asked the crew members why they did not work the 4:00 a.m. flight, they stated to Fizer that the decision was made for safety reasons but when specifically asked by Fizer, Brewer stated his opinion that he had been fit; Black stated her opinion that she had been fit. *Id.* at 87-89, 547-48, 569-572. Fizer asked Complainant about the reasons for his determination that he and his crew were unfit to complete the 4:00 a.m. scheduled flight to Jackson Hole. *Id.* at 733. Complainant testified that he responded to Fizer that he believed he had made the safest decision in declaring himself and the crew unfit. *Id.* at 88-89. He testified that Complainant was abrupt in his response. *Id.* at 733. Fizer testified that Complainant stated "We weren't fit for duty and we weren't going to do it, and I don't know why you can't just leave it at that. Why do you have to look into this?" *Id.* at 733. Complainant testified that Fizer's voice was loud and high and he seemed upset and angry. *Id.* at 88. Complainant also testified that Fizer wanted to know why Complainant had called the crew unfit and was upset that Complainant had cost the company money and displaced passengers. *Id.* at 88. Fizer testified that he did not like Complainant's attitude toward Crew Scheduling, Jim Breeze, and him. *Id.* at 725-733. Complainant stated Fizer was angry about an "attitude" that Fizer felt he heard in Complainant's voice in the recording of his calls to SkyWest in which he declared himself and his crew unfit. JX 37 at 1. After listening to Complainant's call to Crew Scheduling at the hearing, Fizer testified that he heard insubordination in the statement Complainant made about the 4:00 a.m. flight: "We're not going to do it." TR at 725; JX 41:2. He also testified he heard frustration in Complainant's voice about not being afforded enough of a break as he had expected, and that he should not expect such on a stand-up shift. TR at 725-726. Complainant stated that the tone in his voice was due to fatigue and discomfort. JX 37 at 1.

When Fizer initially contacted Complainant the day after he declared himself and his crew unfit, Fizer asked Complainant to complete an Irregular Operations Report ("IOR") and meet with him the following day, March 25, 2005. TR at 89-92, 740; JX 2. Complainant did so, and when he turned in the IOR he informed Fizer of the vasectomy surgery he received on March 18, 2005. TR at 92-93, 740-41. Complainant also disclosed these details in the IOR, including the fact he received vasectomy surgery and that he had followed the post-surgery recovery recommendations of his surgeon. JX 2. Complainant apologized in the IOR for not informing crew scheduling about the vasectomy, stating he had been reluctant to reveal something so personal but that in the future he would be forthcoming even with such personal details. *Id.* Complainant did not include details in the IOR concerning Brewer's lack of sleep or Black's arthritis problems. *Id.* Complainant testified that he particularly felt uncomfortable revealing that Black had shared a personal medical condition with him. TR at 91. Fizer testified that company policy requires an IOR must be completed fully and that not including this level of detail in the IOR therefore constitutes failing to comply with company policy. *Id.* at 737-38. It does not appear that Complainant was disciplined for this. *See id.* at 862; *see also* JX 3; JX 10; JX 16.

Fizer testified that he believed that Complainant started the shift expecting to be able to sleep even though there should have been no such expectation with a stand-up shift. TR at 725-726. Fizer testified that he therefore believed Complainant was unfit from the very beginning of

the shift because the shift did not guarantee a significant break period. *Id.* Complainant's testimony indicates he understood that a stand-up shift meant that he could be on continuous duty rather than being afforded a break. *Id.* at 63-64.

Complainant was disciplined for declaring himself and his crew unfit to fly on March 23, 2005. Fizer testified that he made the decision to discipline Complainant "[f]or showing up to work, reporting to duty, not fit for duty" and "[f]or calling his crew members off, that they would not be fit for duty to do the mission." *Id.* at 862. Fizer testified that the type of discipline he originally considered implementing, before he had time to think about all of the details, was a Letter of Instruction and one day without pay. *Id.* at 740-741. But because of the "attitude" that Fizer perceived in Complainant's call to crew scheduling² and because of "pulling the crew off like this" which he felt to be in bad faith, he decided the appropriate discipline was one week of suspension without pay and a Counseling Statement.³ *Id.* at 741.

At first, Complainant was unaware of the discipline because he was not informed of it, and because Respondent continued to schedule Complainant for shifts. *Id.* at 93. He then noticed that he had been put on administrative leave and contacted Fizer, who scheduled a meeting with Complainant on April 1, 2005. *Id.* at 93-94. The meeting was attended by Fizer, Complainant, Harold Allen (the Chief Flight Attendant), and Jim Black, a SkyWest Airlines Pilots Association ("SAPA") representative. *Id.* at 95. Complainant testified that Fizer did most of the speaking, telling Complainant that he had made an inappropriate decision on March 23, 2005 and as a result had lost the airline revenue. *Id.* at 96; *see also id.* at 845. He was informed he would receive a Counseling Statement and a week's suspension without pay. *Id.*; JX 4.⁴

Complainant sought to appeal the discipline. Complainant testified that he was especially concerned because it was his understanding that under the Pilot Record Improvement Act of 1996 ("PRIA") the Counseling Statement would go into his permanent file and would be disclosed to any other airline he might want to work for in the future. TR at 107-108; JX 33 at 13. Complainant contacted a friend at SkyWest, Klen Brooks, Director of Flight Operations, Assistant Chief Pilot, and asked Brooks what he could do. TR at 273-74; 1174-75. Brooks testified that he consulted with some of his contacts and advised Complainant to contact Brad Holt, the Vice President of Flight Operations, because Brooks had known Holt for years and felt Holt would assess and deal with the situation fairly. *Id.* at 1180-81. Brooks stated that both he and his wife, also friends with Complainant, suggested Complainant pursue informal channels of communication rather than a formal appeal. *Id.* at 1182- 84. Complainant had already contacted

² I find Complainant's tone in the recording of the call to Crew Scheduling to be fatigued and frustrated about being scheduled for the 4:00 a.m. flight, but he did not sound insubordinate, and he conveyed a sincere tone as he discussed his safety concerns based on his determinations concerning his own unfitness and that of the crew. JX 41:2.

³ A Counseling Statement is a serious corrective action tool, concerning changes SkyWest expects the employee to make, and a copy of the Counseling Statement is placed into the employee's personnel record. TR at 742. A Letter of Instruction, the lighter discipline Fizer originally considered, is less serious than a Counseling Statement. *Id.* 741-42.

⁴ After Complainant appealed this discipline, the Counseling Statement, JX 4, was later reduced to an Important Conversation, JX10, and he was reimbursed for the loss of the week's pay. Complainant does not allege any of these disciplinary actions to be the adverse action under which he filed his claim, but rather his termination by Respondent on August 31, 2005. *See* ALJX 4 at 6; *see also* Complainant's Post-trial Brief at 1, 41.

Holt by email and Holt responded that Complainant could formally appeal the discipline through the Review Board process. JX 38. On April 7, 2005, Complainant emailed the Manager of Employee Relations, Kelly Jasmin, inquiring into SkyWest's review board hearing process. JX 5. On April 18, 2005, Jasmin provided Complainant the appropriate form to fill out, a SkyWest Airlines Request for Review Board Hearing. *Id.*; JX 6.

The review board hearing took place on May 13, 2005 ("May Review Board"). TR at 276. SkyWest policy indicates that a review board will be comprised of two employees and two managers who will "review all of the available facts surrounding the termination appeal" JX 7 at 8. Jasmin was the moderator. TR at 227-28. Complainant and Mr. Fizer made statements that were followed by a question and answer period, and then Complainant and Fizer were dismissed while the Board deliberated. TR at 237. The May Review Board reversed the week's suspension without pay and reduced the Counseling Statement to an Important Conversation. TR at 100-103, 229; JX 8.¹ Immediately after the May Review Board made its decision, Jasmin told Complainant that the Board ruled that the Counseling Statement had been reduced to an Important Conversation and that the loss of a week's pay had been reversed. TR at 1001-1005; JX 47 at 62. She later told the review board to which Complainant appealed his termination ("the September Review Board") that she spoke with Complainant immediately after the May Review Board hearing had concluded, telling Complainant, "congratulations. They did decide to give you what you were asking for." JX 47 at 67. Complainant was pleased with this result. TR at 550, 573.

Jasmin told Fizer of the outcome as well, and told him that he would need to replace the Counseling Statement with an Important Conversation. *Id.* at 753, 1033. Fizer testified that he was told that in the future, he should discipline Complainant in the same manner that he had, and that he should do nothing different. *Id.* at 642. A Review Board member ("juror"), SkyWest pilot and SAPA representative Michael Macias, testified that the Board recommended that Fizer tell Complainant that, in the future, if he has medical concerns he should consult with a flight surgeon, and each individual crewmember should make their own phone calls to SkyWest concerning that crew member's unfitness. *Id.* at 232, 243. Macias testified that the Review Board did not present a recommendation directly to Fizer but gave it to the moderator of the Review Board who gave it to Fizer. *Id.* at 229-230. At the hearing, Jasmin testified that she passed the request on to Fizer. *Id.* at 1004-1005. Fizer testified that after the Review Board took place, the Review Board told him Complainant's 16-year positive work record was the only reason they eliminated Complainant's one-week suspension without pay and reduced the Counseling Statement to an Important Conversation. *Id.* at 754. Fizer testified that he and Complainant "left the [May] Review Board on pretty good terms." *Id.* at 642.

A former SkyWest supervisor, Lou Bodkin, testified at the hearing that he believes that the pilot possesses the responsibility of determining whether the crew members on a particular flight are fit to fly.⁵ *Id.* at 881-882, 890-891. Even if a crew member were to think he or she is fit, if Bodkin as a pilot were to find that crew member unfit, he would notify the manager on duty. *Id.* He testified that this is the responsibility of every pilot. *Id.*

⁵ At the time the events in this case took place, Lou Bodkin was Assistant Chief Pilot in Salt Lake City underneath Tony Fizer, who was Chief Pilot in Salt Lake City. TR at 881-882.

Complainant also testified that it was his understanding that SkyWest disciplined him for declaring his crew unfit because each individual crew member should have to call crew scheduling directly to notify SkyWest of this. *Id.* at 436. Macias, a juror on the May Review Board, confirmed this. *See id.* at 243-244. He testified that this was one of the items that the May Review Board wanted Fizer to discuss with Complainant: "I think it was something to the effect of it should be -- in the discussion he (Complainant) should be told that each individual crew member should make their own phone calls when calling unfit, and that the captain may when making the initial call say, 'Well, the other crew members will call but it looks like we're all unfit,' something along those lines. But to never actually make -- he should not be making that call for everybody". *Id.* at 243-244. Macias testified that only exception would be if a crew member were incapacitated and therefore could not make the call. *Id.* at 244.

Complainant does not recall hearing anything about the discipline for a couple of months. On May 16, 2005, Fizer downgraded the Counseling Statement to an Important Conversation. *Id.* at 640; JX 10. Fizer wrote, "Each crewmember is required to make that separate determination based on their physiological condition." JX 10. Fizer also wrote, "These actions are in direct violation of Company Policies:

"SP 324

3.A. 2) Category II - Non-Safety of Flight Conduct/Revenue Loss/Service Failures: This conduct can be described as a failure to perform duties which might lead to a delayed or canceled flight, potential or actual loss of revenue, or any adverse interaction between the crewmember, customers, or other employees.

"SP306

2. Crewmember Rules of Conduct - B. 14)a) All Crewmembers will report fit for duty.
3. Crewmember Reliability Program - A. 1)a) Each crewmember is expected to maintain good health and ensure availability to perform his/her duties.
5. Scheduled Assignment Deviation (SAD) A. 1) d) A crewmember checks in, but later misses the scheduled or rescheduled trip and/or trip series."

JX 10.

In the Important Conversation Document, Fizer also wrote, "You will perform your duties in a manner that will not delay, cancel or cause loss in revenue. You will report for duty, fit for your duty assignment." *Id.* Then, Fizer wrote that each crew member told Fizer they would have been fit to fly, and Fizer added, "Don made this decision without questioning them. They did not have any input in the decision." *Id.* In the last portion of the document, Fizer indicated that when he initially contacted Complainant, he was told by Complainant the matter could have been easily resolved without cancelling a flight had there been a reserve pilot available. *Id.* Fizer noted that Complainant asked why the incident could not be overlooked given his clean record of 16 years. *Id.* He also wrote that Complainant's account of the cancelled flight was that he had received vasectomy surgery, and had pain from it but thought he could do one leg to Jackson Hole, expecting to get sleep. *Id.* Fizer also noted Complainant brought up his 16 years of good service and that Fizer responded that it was not a matter of

Complainant being a 16-year good pilot because Fizer had to discipline Complainant regardless.
Id.

Fizer also stated in the Important Conversation document that Complainant "Changed to a Vasectomy unfit to fly issue long after the fact. The health issues were not brought up the night in question with scheduling, the MOD, the rest of the crew. The Vasectomy was brought up days after, trying to justify an unfit for duty situation." JX 10. However, as reflected in Complainant's testimony and Fizer's testimony, it was the day after Complainant declared himself unfit that Complainant told Fizer about the vasectomy. TR at 92-93, 740-41. Complainant also provided Fizer with the IOR on that day as well, and it included the details of the vasectomy. JX 2.

The account of events in the Important Conversation document is not included in the original disciplinary document, the Counseling Statement, but each lists the same violations of company policies. JX 4; JX 8; JX 10. The Counseling Statement was stamped "OVERTURNED" with the following violations of company policies crossed out using a pen or pencil:

"SP 306

2. Crewmember Rules of Conduct - B. 14)a) All Crewmembers will report fit for duty.
5. Scheduled Assignment Deviation (SAD) A. 1) d) A crewmember checks in, but later misses the scheduled or rescheduled trip and/or trip series."

JX 8.

The following items that were not crossed out on the Counseling Statement stamped "OVERTURNED" include:

"SP 324

- 3.A. 2) Category II - Non-Safety of Flight Conduct/Revenue Loss/Service Failures: This conduct can be described as a failure to perform duties which might lead to a delayed or canceled flight, potential or actual loss of revenue, or any adverse interaction between the crewmember, customers, or other employees.

"SP 306

3. Crewmember Reliability Program - A. 1)a) Each crewmember is expected to maintain good health and ensure availability to perform his/her duties."

JX 8.

On June 14, 2005, Kelly Mitchell emailed Complainant a request by Kelly Jasmin that Mitchell follow up with Complainant to "make sure the counseling statement is replaced by a verbal discussion, that your user/vacation hours used during your suspension are credited, and that any missing pay for scheduled flights missed is reflected in your next pay check." Mitchell indicated to Complainant that once all of these items were accomplished she would email him and that in the meantime she was available should he have any questions. JX 9. Complainant testified he does not recall reading the email but also volunteered he had no reason to believe it was not sent. TR at 382-383. Kelly Mitchell emailed Kelly Jasmin on June 17, 2005, stating she had spoken that day with Tony Fizer who confirmed that he "has entered a ROD to replace the

CS regarding the 3/24/05 incident. I have now received a copy for Don's personnel file. We need to review the document before we share it with Don." JX 12. Mitchell also documented the details of reinstatement of pay which she also wanted Jasmin to review, after which Mitchell would share the information with Complainant. JX 12.

Sometime before July 19, 2005, Respondent was contacted by Delta Airlines concerning a report that two Delta supervisors observed a SkyWest First Officer making an obscene gesture, "flipping off" Delta ramp agents while his plane was taxiing by a Delta ramp ("the Delta ramp incident"). *Id.* at 757, 907-910. Bodkin received the report by email and recalled the report contained information that allowed him to track down who the crew was; although he did not recall what this information was, he stated it was probably the tail number of the Brazilia aircraft in question. *Id.* at 908-909. He stated that he does not recall how he then used this information but that he likely asked SkyWest customer service to utilize the tail number to find out the names of the First Officer and the Captain (the pilot), in the computer tracking system. *Id.* at 909. Bodkin, whose job duties included disciplining crew members, confronted that First Officer, Troy Brewer, who denied making the obscene gesture. *Id.* at 880, 910. Bodkin did not contact the person who reported the incident to get more information, did not interview those who claimed to have observed the incident, and apparently did not in any way further investigate the incident. *See id.* at 910-911. Bodkin testified that at some point he told Tony Fizer that he had spoken with Troy Brewer about the Delta ramp incident. *Id.* at 911-912. Bodkin does not recall exactly when this conversation with Fizer occurred, but he believes it was sometime after July 19, 2005, which is the date that Fizer confronted Brewer about the same incident. *Id.* Bodkin assumed that Fizer must have also received the email concerning the Delta report of the obscene gesture. *Id.* at 911. Bodkin testified that he "was under the impression that Tony (Fizer) was going to call Troy (Brewer) in, because we found out, you know, that he was the First Officer on that particular flight." *Id.* at 920.

Prior to the July 19, 2005 meeting that he held with Complainant and Brewer, Fizer asked his administrative assistant, Amy Tallman, to pull the manifest, or record, of the flight involved in the Delta ramp incident. *Id.* at 757-758. Tallman testified that her typical job duties include pulling manifests; she often did this for Fizer to determine what crew was involved in a particular flight, by first finding the crew members in Crew Track and then pulling the manifest for that flight. *Id.* at 500.

Sometime in July prior to the July 19, 2005 meeting, graffiti appeared on a cork board in the crew lounge with the epithet, "FUCK FIZER" in block letters. TR at 646, 899-900; JX 18; JX 25; JX 28; JX 34 at 36; JX 47 at 3. Fizer later stated that the graffiti emerged prior to the meeting he held with Complainant and Troy Brewer on July 19, 2005. JX 34 at 36. He said of the graffiti on the cork board, "So I -- and the message doesn't bother. I mean, there's 2,200 guys here, and I'm thinking, Well, somebody's mad at me. You know I don't know who. I haven't had any review boards lately. You know. Somebody's bound to not like you with 2,200 guys running around. So I -- and what was written didn't really bother me. My skin is thicker than that. It wasn't that big of a deal." JX 34 at 37. After the cork board was removed, graffiti appeared on the wall stating, "YOU CAN STILL FUCK FIZER." TR at 899-900; JX 19; JX 24.

At the hearing, Fizer testified that the graffiti created a sexually hostile work environment and required extensive investigation due to a high level of managerial concern. TR at 715-718. He testified that in comparison to the Delta ramp incident, the graffiti was a more grave concern because the graffiti "created a hostile work environment, it created a sexual harassment issue with hundreds of people, male and female, walking by this." *Id.* at 715-716. As to its meaning to him on a personal level, Fizer stated to the September Review Board that the graffiti on the cork board mattered to him so little that, when he first heard about it, he "didn't even go and look at it." JX 47 at 2-3. Lou Bodkin, who was Assistant Chief Pilot underneath Fizer at the time the events in this case transpired, and whose management duties included providing discipline, testified that the cork board had been defaced by the graffiti sometime in July and that it was left on the wall for some time. TR at 898-899. He testified that he did not instruct anyone to take the cork board down nor did he have any concern that the graffiti could be considered sexual harassment. *Id.* He stated that it was only after many employees complained about it that the cork board was removed. *Id.*

Similarly, Complainant recalled that the graffiti was on the wall for some time. *Id.* at 309. Complainant recalled that the graffiti had been on the cork board for "a while" prior to the meeting Fizer had with him and Brewer on July 19, 2005. *Id.* at 309. Brandee Black testified that she recalled that the cork board remained on the wall with the graffiti on it not for a matter of days but for at least a week or two. *Id.* at 550-551. Amy Tallman testified that she heard about the graffiti on the cork board from other SkyWest employees, and heard that Fizer had already seen it when she went to go see it. *Id.* at 469. She testified she could not recall how long it was from the time she heard about the graffiti until the cork board was removed from the wall, nor does she recall any other time frames in relation to any graffiti. *Id.* at 473-477, 478-480. At some point, Fizer asked Tallman to take pictures of the graffiti on the wall as well as the graffiti written on the removed cork board. *Id.* at 479-480.

It was shortly after the cork board was removed that the graffiti was written on the exposed wall where the cork board had been with the words "YOU CAN STILL FUCK FIZER." *Id.* at 899-900; JX 19; JX 24. The graffiti apparently stayed exposed on the wall for months. At the time of the September Review Board, Fizer told the Board, "you're welcome to walk down to the locker room and see the message on the wall, because it's still there." JX 34 at 37. He explained to the Review Board that the graffiti had been up "for a really long time" and that the administrative assistants "ordered a new cork board, and it's here now, but they're waiting for somebody to put it up on the wall." JX 47 at 4. Bodkin testified that the graffiti on the wall was left up for a period of time, and that as far as he knew it was never removed, but eventually, a new cork board was obtained and put on the wall over the graffiti. TR at 899-901.

Fizer testified that he first learned of the Delta ramp incident when he received a phone call from a Delta supervisor who gave Fizer the same report of the incident. *Id.* at 754-755. Unlike Bodkin, Fizer did not testify that he had learned that it was the First Officer who had made the gesture. *Id.* at 757. He did not receive the email that Lou Bodkin had received containing the report that the First Officer made an obscene gesture to the Delta ramp agents. *Id.* at 650, 907-910. Fizer testified that this was the reason he called not only Brewer but also Complainant into his office for a meeting on July 19, 2005, because they both reportedly had been on the aircraft and he did not know whether Complainant or Brewer had made the obscene

gesture. *Id.* However, in the transcript of the meeting, Fizer confronted Brewer about the Delta ramp incident. JX 33 at 1-7. When Brewer denied making the gesture and asked that Fizer produce proof, Fizer stated that he did not need to produce proof because two Delta supervisors had already provided it. *Id.* at 4. Fizer told Brewer that he was putting their statements in Brewer's file, and that if such an incident happened again, Brewer would be disciplined. *Id.* at 4-5. When Complainant asked Fizer why he was required to be present while Fizer confronted Brewer, Fizer told Complainant that the pilot is responsible for his crew. No evidence indicates that Fizer ever stated to Complainant that Complainant would be disciplined for Brewer making the obscene gesture. *Id.* 1-16; JX 34; JX 41:3, 4, 5, 6; JX 47.

Fizer held a meeting with Complainant and Troy Brewer on July 19, 2005. JX 33 at 1-16 (transcript of the meeting). The reason Fizer called the meeting was to discuss the Delta ramp incident with Brewer and Complainant, and to speak with Complainant concerning the recommendations of the May Review Board, in order to satisfy the requirement of an Important Conversation, the downgraded discipline Complainant received instead of a Counseling Statement. TR at 229-232, 243, 638, 640, 641-642, 651-652, 1004-1005; JX 8; JX 10; JX 33 at 1. As noted above, Fizer confronted Brewer concerning the Delta ramp incident. JX 33 at 1-7. Fizer at that point excused Brewer from the meeting. *Id.* at 7.

Fizer then began discussing the outcome of the May Review Board with Complainant. *Id.* Fizer asked Complainant whether he agreed with Fizer that Complainant erred in his decisions on March 23, 2005 concerning his declaring himself and his crew unfit, and demanded that Complainant admit that he was wrong and admit that he had not prevailed at the May Review Board. *Id.* at 7-11; JX 41:2. Complainant responded that he disagreed, based on what he had been told after the May Review Board. JX 33 at 7-8, 12; JX 41:2. Fizer responded by raising his voice, stating emphatically to Complainant, "You were wrong under that situation. And if you don't think you were, then we need to take a time-out here and reevaluate the whole damn thing, until you understand that you were wrong, because I don't want you to do that again." JX 33 at 10 (transcript of meeting); JX 41:2 (audio recording). Fizer accused Complainant of "bad-mouthing" him, claiming that SAPA representatives Dave Bechtold and Jim Black had told Fizer that Complainant was "out there bad-mouthing me." JX 33 at 12. Complainant denied doing so. *Id.* Fizer stated that if Complainant were bad-mouthing him to others at SkyWest, that would be wrong, because Fizer himself had been the one who obtained Complainant's reduced discipline ruling from the May Review Board by stating Complainant had been a good employee at SkyWest for 16 years, and was a "16-year good guy". JX 33 at 7-9; JX 41:2.

Lou Bodkin testified that, at some point after the May Review Board, Fizer told Bodkin that he had heard from someone that Complainant had been bad-mouthing Fizer to other employees in the crew lounge. TR at 933. Bodkin testified that Fizer did not mention who he heard this from and only mentioned this casually without leaving an impression that he was upset or frustrated with Complainant. *Id.* at 933-934.

Complainant later told the September Review Board that his SAPA representatives acted as employee representatives and were individuals to whom he could vent his frustrations but this did not including "bad-mouthing" Fizer. JX 47 at 27, 34. At the hearing, Complainant testified

that he never "bad mouthed" Fizer. Dave Bechtold and Jim Black also testified that they did not recall Complainant ever bad-mouthing Tony Fizer. TR at 292-293, 508, 870; JX 31.

At the hearing, Fizer recalled the July 19, 2005 meeting as a meeting in which he did his job of passing on the recommendation of the May Review Board. TR at 813-816, 827-828. He denied feeling bothered, annoyed or angry. *Id.* He claimed that he was focused on having the conversation with Complainant that was the corrective action recommended by the May Review Board. *Id.* He added that he was merely doing his job, "Little things like this come up, big things come up. It's my responsibility to deal with them." *Id.* at 813.

In the July 19, 2005 hearing, Fizer told Complainant that his being a "16-year good guy" was the only reason why Complainant received his pay back concerning the March 23, 2005 incident in which Complainant declared himself and his crew unfit. JX 33 at 8; JX 41:2. However, no evidence outside of Fizer's statements actually supports Fizer's claim that he advocated for reduced discipline or that his statement (that Complainant was a good guy) resulted in the decision by the May Review board to reduce discipline. An individual who sat on the May Review Board, Michael Macias, testified that Fizer did not ask the Board to overturn or reduce the discipline. TR at 242-243. Macias testified Fizer told the May Review Board that the decision to discipline Complainant was *not* about Complainant being a 16-year good guy. *Id.*

Fizer testified that in the meeting on July 19, 2005, he brought up to Complainant the recommendations that Jasmin passed along to him from the May Review Board. *Id.* at 637, 641. However, Fizer did not bring up at any point in the meeting the recommendations, according to a juror from the May Review Board. JX 33 at 1-16. It is unclear whether Fizer ever received the recommendations from the May Review Board.⁶

Like Bodkin, Fizer did not contact the person who reported the incident to get more information, did not interview those who claim to have observed the incident, and apparently did not in any way further investigate the Delta ramp incident after confronting Brewer. TR at 652. Fizer claimed that the difference in his treatment of the Delta ramp incident and the graffiti is that the graffiti itself made it "fairly easy to start investigating something like that" whereas the Delta ramp incident involved "an isolated incident that would be very hard to go and interview, try and figure out exactly what happened." *Id.* at 715-716.

After the July 19 meeting, Fizer was out of the office for business and for vacation in late July and early August, for nearly a month. *Id.* at 767-769. When he returned, he noticed the

⁶ One May Review Board juror, Michael Macias, testified that after the Board concluded, he on behalf of the May Review Board had asked its moderator, Kelly Jasmin, to ask Fizer to tell Complainant in the future that a crew member should make his or her own phone call to SkyWest if he or she is unfit, and that should Complainant have medical problems in the future he should always consult an FAA flight surgeon. TR at 229-230, 231-232, 1004-1005. Moderator Kelly Jasmin, who passed the requests of the May Review Board on to Fizer, testified that she did not recall specifically what the requests were, but had no reason to doubt Macias' testimony. *Id.* at 1004-1005. Fizer testified he received instructions from the May Review Board via Kelly Jasmin but his testimony does not indicate his understanding of what those instructions were. *Id.* at 638. When Fizer implemented the downgrading of the discipline in May 2005, he provided somewhat similar instructions, that is, he noted in the "Important Conversation" disciplinary document that when Complainant reports for duty he must be fit and that crew members must each make their own determination as to fitness. JX 10 at 1-2.

similarity between the handwriting of graffiti and the handwriting on the manifest that he had Tallman pull concerning the Delta ramp incident. *Id.* at 770. He later stated to a review board to which Complainant appealed his termination ("the September Review Board") that the idea that there was some sort of "witch hunt" against Complainant was wrong because, upon returning to the office in August, it was "strictly coincidental" that he noticed that the letter "Z" on the cork board, which having been taken down was sitting in his office, looked similar to a "Z" written on a manifest on his desk. JX 34 at 37; *see also* TR at 769-771. He testified that this was the manifest he had on his desk for the July 19, 2005 meeting with Complainant and Brewer. *Id.* at 769-770. He testified that he noticed both "Zs" had a slash through them, and then noticed other resemblances among other letters, resemblances that other managers agreed were present. *Id.* at 769-771, 958. Fizer asked Chris Merrill, Director of In-Flight Operations, Harold Allen, the Chief Flight Attendant, and Lou Bodkin, the Assistant Chief Pilot, to examine the handwriting and verify whether they saw similarities. *Id.* at 770-771. Fizer testified that the other managers felt that they saw similarities and as a result Fizer asked his administrative assistant, Amy Tallman, to pull manifests written by Troy Brewer. *Id.* at 770-773. Fizer explained that he assumed manifests from Brewer's flights would be written by Brewer because in his experience the First Officer often fills out the manifests. *Id.* at 770. Fizer then discussed with Bodkin whether Troy Brewer should be confronted about the graffiti on the bulletin board. *Id.* at 310, 777, 919.

Fizer next arranged for the hiring of a handwriting analyst, Marilyn Gillete, to assess the similarities between Complainant's handwriting and the graffiti. *Id.* at 676-678, 920; JX 27 at 1. Gillette looked at the graffiti and also at the manifest authored by Complainant that Fizer felt was "a match" and rendered her decision in approximately 15 minutes. *Id.* at 950-955. She based her decision on the fact that the "European" Z was utilized, with a cross hatch through it and the K's appeared to have similar strokes. JX 15 at 61. In her report, she noted concerning the dearth of samples provided, "Although there was not much to compare, all of the printing appears to the same" between the manifest and the graffiti, and so she wrote that it was her professional opinion that the person who wrote the manifest wrote the graffiti. *Id.*

Fizer met with Brewer and then Complainant on August 16, 2005. TR at 310. Fizer determined from Brewer that Complainant writes his own manifests rather than asking his First Officer to write them. *Id.* at 602. Fizer met with Complainant who confirmed this. *Id.* at 314, 779; JX 17 at 85. Fizer testified that this gave him "a sinking feeling." TR at 779. He then confronted Complainant about writing the graffiti, which Complainant denied. *Id.* at 314, 1011; JX 17 at 85. Fizer, as well as Kelly Jasmin, whom Fizer asked to be present, stated that the situation could be remedied if Complainant were to admit he wrote the graffiti at that point. TR at 314, 1011; JX at 17 at 85. Fizer told Complainant that if he did not admit he wrote the graffiti and it was later determined Complainant had written it, then Complainant's employment would be terminated. TR at 315; JX 17 at 85. Fizer testified that Complainant was quiet in the meeting and did not state much other than to say, "I didn't do it." TR at 784. Jasmin testified that she was concerned that Complainant was not participating much in the meeting and did not look at the writings that Fizer was showing him. *Id.* at 1012. Fizer noted this as well, and in his notes from that meeting he wrote that Complainant responded that the author of the graffiti was "absolutely not me, have a handwriting expert go over it." JX 17 at 85; *see also* TR at 782, 784.

Complainant was told that pending further investigation into the graffiti he was suspended from employment. *Id.* at 314; JX 17 at 85.

Fizer arranged for a second handwriting analyst, Linda Cropp, to be hired. TR at 784-785. Bodkin testified he never told Fizer the first expert's analysis was, in his opinion, "hokey". *Id.* at 950-955. Fizer told the September Review Board that the reason he chose the second analyst was that he wanted to "do due diligence here" and that he wanted to go to this additional expense "to spend a large amount of money to do a large amount of work and research in preparation for a court case if so be." JX 24 at 47; JX 41. Cropp requested 25 handwriting exemplars (samples) of any individual who might have written the graffiti, and Fizer arranged for Cropp to receive 25 exemplars of Complainant's handwriting but never provided exemplars of any other employee. TR at 487-488, 492, 495, 784, 787-788, 1099; JX 47 at 49, 62. Cropp concluded that it was highly probable that the handwriting on the exemplars was the same as the cork board and the graffiti on the wall. TR at 789; JX 15 at 63; JX 22 at 95.⁷

In connection with the hearing in this matter, Complainant retained the handwriting analysis services of David Moore. TR at 206; JX 39. Moore reviewed the same documents provided to Linda Cropp. JX 14 at 19.⁸ Some of the documents were copies, but the majority of them were originals. TR at 206. Moore concluded that the author of the graffiti is probably not Complainant. *Id.* at 171-172, 217-218; JX 39 at 3.

Fizer terminated Complainant's employment on August 31, 2005, and Complainant appealed his decision, filing a request for a hearing with a review board. Prior to Complainant's termination, Fizer met with the other chief pilots as well as Fizer's Assistant Chief Pilot, Lou Bodkin, on a couple of conference calls to discuss the handwriting analysis and his decision to terminate Complainant's employment. TR at 789, 950, 953. Although Fizer testified that he and the other pilots made the decision to terminate Complainant's employment together as a group (*id.* at 938-939), Kelly Jasmin testified that she recalled that the point of the conference calls was to "pull together the chain of command" (*id.* 1050) and Lou Bodkin recalled that the meeting was not about whether Complainant had written the graffiti but whether the pilots agreed with Fizer's proposal to terminate Complainant. *Id.* at 953. Bodkin testified that the chief pilots accepted, without much question, Fizer's statement that he had enough evidence to form a belief that Complainant should be terminated. *Id.* at 952-953. He recalled the meetings focused on a timeline of events, what Fizer felt the decision should be, and although Bodkin felt that there was an opportunity to disagree with Fizer, no one did. *Id.* at 953-954. Bodkin testified to his belief that he thought that the first handwriting analyst was "hokey" but he did not raise the matter at that meeting. *Id.* at 950, 955. He explained that he felt comfortable with the conclusions of the second expert because she based her findings on additional exemplars. *Id.* at 946. No one raised the issue that no other individuals besides Complainant were selected for the handwriting

⁷ Cropp was accidentally provided handwriting by other individuals which SkyWest in error represented to her was that of Complainant. TR at 1129-1130, 1133. This did not affect Cropp's analysis, however, because she did not utilize them for her analysis because they appeared so different from Complainant's writing. *Id.* at 1133.

⁸ Respondent argues Moore improperly utilized a handwriting sample for analysis that was not Complainant's and that Moore's report did not note that the words "Tom" and "Speer" were not written by Complainant but by Complainant's wife. Yet the evidence indicates that Moore did not base his analysis on Complainant's wife's handwriting, because Moore was informed that those words were not written by Complainant. TR at 203; JX 39 at 4.

investigation. *Id.* at 951. Nor was it discussed that the graffiti was written in block letters or the idea that there is less variation in writings using only block letters than those with regular handwriting. *Id.* Bodkin admitted no one on the conference calls raised the idea that a lot of the determination was based on the cross-hatched Z even though many individuals who have served as pilots in the military write that way, particularly in print.⁹ *Id.* at 952. He testified that he felt comfortable with Fizer's conclusion that Complainant had authored the graffiti and admitted that he attributed the chief pilots' acceptance of the evidence without question was due to the fact that Fizer was the individual charged with making the termination decision. *Id.* at 946, 953.

On August 31, 2005, Respondent terminated Complainant's employment. JX 16 at 83, 83. A form that was signed by Fizer and provided to Complainant, titled "Termination Information", listed the basis for termination as "209 Dishonesty; Involuntary; Ineligible for Rehire." JX 16 at 83; JX 30; TR at 328. Complainant also received a letter titled "Letter of Termination" signed by Fizer stating the reason for termination, first summarizing the conclusions of the handwriting analysts and then concluding: "Your actions violate company policy. As you know, pilots are unsupervised and are entrusted with the lives of our passengers, crew and the safe operation of multi-million dollar airplanes. Dishonest and/or inaccurate reports to the company are intolerable. Your decision to provide false information to the company and take no responsibility for your actions shows no respect, responsibility, trust or dignity for the company and leaves me with no other option but to terminate your employment with SkyWest, effective Aug 31st, 2005." JX 16 at 82.

On September 27, 2006, a SkyWest internal review board convened to address Complainant's appeal of his termination by Respondent ("September Review Board"). Fizer stated that he based his decision to investigate whether Complainant wrote the graffiti on his belief that Complainant was motivated to write the graffiti because of the outcome of the May Review Board. JX 47 at 49, 62. Fizer claimed Complainant was unhappy with the outcome of the May Review Board, which according to Fizer indicated that Complainant had a timeline and a motive to write the graffiti. *Id.* at 62. Fizer testified that also he felt that the graffiti was Complainant's because he felt that the "Zs" matched, and that "[t]he Z is very unique, with a line through it." TR at 769-70; JX 34 at 55. When the September Review Board asked Fizer why he escalated the graffiti incident into an investigation, Fizer denied that it was an escalation. JX 47 at 50-55; JX 41:4 at 1:03:57. He stated he had initially thought that FO Brewer had written the manifest and stated he was sick to his stomach when he learned Complainant had written the manifest. JX 47 at 50-55; JX 41:4 at 1:04:11.¹⁰ Fizer told the Board that it was coincidental that he even noticed Complainant's manifest, but that once he noticed it, "I ran with it." JX 47 at 50-55; JX 41:4 at 1:09:00. The September Review Board asked Fizer about singling out

⁹ Bodkin admitted that many SkyWest pilots have served in the military. TR at 952.

¹⁰ Respondent claims this statement shows that Fizer did not single out Complainant or feel ill will toward Complainant because he testified that he was surprised and felt a "sinking feeling" that Complainant wrote the manifest. TR at 779-780. But the record reflects Fizer was shocked because in his experience First Officers *always* write the required information on the manifest of each flight so Fizer assumed Complainant, a pilot, did not author the manifest. *Id.* Moreover, it was only *after* Fizer learned that Complainant authored the manifest that he escalated the matter into an investigation. As for the claim that Fizer did not dislike Complainant, evidence of Fizer's personal feelings toward Complainant would come from Fizer himself. I find Fizer to be less than credible when it comes to his account of events concerning Complainant. Moreover, the presence or absence of ill will is not determinative of any intent to retaliate for protected activity. Such intent can be motivated by many factors unrelated to dislike.

Complainant's handwriting to be analyzed instead of pulling random samples of various SkyWest employees. Fizer replied that once he saw the similarities between the manifest written by Complainant and the graffiti, he found such a step to be unnecessary. JX 47 at 50-51; JX 41:4 at 1:10.

Complainant stated to the September Review Board that he did not have a motive to write the graffiti after the May Review Board and that he would not have caused any problems at that point because he feared retaliation for his appeal to the May Review Board: "I was just glad to get - I tell you, I just wanted to not be noticed. That's my whole goal here. Is to do a good job and not be noticed. Who wants to be -- you know, I don't do -- didn't try for management stuff. Because I don't want those headaches. All I want to do is tell me how to do my job, do my job, go home, take care of my family." *Id.* at 36, 66.

Concerning March 23, 2005, Complainant told the September Review Board that he initially felt fit for that flight ("I really thought I could do all night) and declared himself unfit after he became too exhausted to fly after returning to Salt Lake from Jackson Hole. *Id.* at 7-8, 12. He told the September Review Board he did not realize becoming unfit would be a possibility, as it never had happened in 16 years of working as a pilot for Respondent. *Id.* at 7-8. He assessed that the break would be insufficient and then notified Crew Scheduling as soon as he realized this, in order to give as much notice as possible. *Id.* Complainant also told the September Review Board that his decision to declare the crew unfit was based on First Officer Troy Brewer's level of fatigue, and Flight Attendant Brandee Black's diminished ability to function due to her arthritis. JX 47 at 12-14; JX 41:4 at 10:45, 11:51.

Fizer told the September Review Board that Complainant was wrong for declaring himself and his crew unfit, and that the May Review Board found this to be the case and downgraded Complainant's discipline "from a counseling statement to an important conversation because he's a 16-year good guy." JX 47 at 8-9; JX 41. Fizer also told the September Review Board that he told the May Review Board "Don is a 16-year good guy. I don't have a problem with Don. I just have a problem with Don's decision that night, and that's why we had the review board." JX 34 at 29; JX 41.

At the September Review Board hearing, Fizer claimed that the July 19, 2005 meeting with Complainant was a time in which they were able to work out their differences and that Fizer achieved the goal of addressing remaining items that he was asked to discuss by the May Review Board. JX 34 at 36; *see also* 41:4 at 21:48, 21:55, 22:51. He stated at the hearing of the September Review Board, "I even called Jim Breeze, and I told him at that point, I said, Hey, I had a nice conversation with Don. We kind of put all of the water under the bridge. It's all behind us. Everything's cool, and -- (inaudible). I don't have any issues with Don, and he didn't have any issues with me." JX 34 at 36. Fizer originally opposed the September Review Board hearing the tape recording of the July 19, 2005 meeting. *Id.* at 19-20. When a Board member asked him if there was something in the tape Fizer would be ashamed of, he denied it; Fizer asserted that the meeting went well with a good hearing of differences between Fizer and Complainant and a positive resolution at the end of the meeting. JX 47 at 19-20, 24. Later, as the Board began discussing their desire to hear the tape (41:4 at 55:00), Fizer volunteered: "If I was chewing his ass, I was chewing his ass. If I was defensive about him bad mouthing me in the

crew lounge, or bad-mouthing SAPA, then I was defensive about that. I'll give him all of that." JX 47 at 61; JX 41:4 at 1:08:45. Fizer told the September Review Board that he was right to confront Complainant about bad-mouthing because "management can't represent ourselves when it comes to people out bad-mouthing." JX 47 at 25-26; 41:4 at 20:28, 20:33, 20:32, 20:53, 55:56, 1:06:36, 1:07:06. At the hearing, Fizer admitted that it would not have been against company policy if Complainant had expressed unhappiness about the discipline to others with whom he worked, and volunteered that this would be the case even while working a shift. TR at 851-852.

Complainant told the September Review Board that he never "bad mouthed" Fizer, and that when he spoke with his SAPA representatives, Jim Black and Dave Bechtold, they stated they never told Fizer that Complainant had been "bad mouthing" Fizer. JX 47 at 27.

Brazilia Turboprop Aircraft

At the time of his termination, Complainant was a pilot on a 30-passenger turboprop called the EMB 120 Brazilia Turboprop Aircraft ("the Brazilia"). TR at 62, 621, 879. The Brazilia is considered a "rudder-intensive" aircraft. TR at 873. For take-off, the pilot of the Brazilia must push on the rudder significantly. *Id.* One SkyWest pilot, Dave Bechtold, stated that the pushing required is probably greater than ten pounds of pressure. *Id.* at 873-874. David Faddis, Director of Training and Standards in Flight Operations, testified that the rudders can require up to 16.3 to 16.5 pounds of pressure from the legs and feet for normal operation. *Id.* at 1172. Neither Faddis or Bechtold knew how much pressure would be needed if an engine were lost, but they agreed it might require double the amount of pressure. *Id.* at 873-874, 1172.

Other Complaints Against SkyWest Management

In 2005, a SkyWest pilot, Jeff Nostrom, filed a complaint unrelated to the events in this case. *Id.* at 1060-1064. It was a complaint against Tony Fizer. *Id.* Nostrom was told by Kelly Jasmin that his complaint was not the only complaint, and that she was tired of processing complaints against management because she had a backlog of 50-60 complainants against SkyWest management in Salt Lake. *Id.* at 1064-65.

Findings Regarding Complainant's Credibility

Respondent argues that Complainant's testimony should be disregarded, claiming that Complainant lacks credibility because Complainant did not disclose Brandee Black's arthritis condition in his Irregular Operation Report ("IOR") to Respondent about declaring himself and his crew unfit. *See* Respondent's Post-trial Brief at 34. However, Complainant testified that the reason he did not disclose this condition in the IOR was because he did not feel comfortable disclosing personal medical information. TR at 91. Given this concern about such a disclosure, which is similar to his concern about disclosing his own personal medical information about the vasectomy (JX 2), I find that these facts do not call Complainant's credibility into question.

Respondent also claims that Complainant lacks credibility as evidenced by the fact that Complainant did not declare Brandee Black unfit at the beginning of the shift. *See* Respondent's Post-trial Brief at 34. Respondent somehow reasons that if Complainant was so concerned about

Black's arthritis, he should have declared her unfit when she told him at the beginning of the shift that she was off her arthritis medication and she wondered how she would be able to get out of bed the next morning. *See id.* However, the evidence reflects that it was not Black's arthritis alone that led Complainant to declare her unfit and Complainant did not find Black unfit at the beginning of the shift. TR at 73-75. Rather, it was her physical condition in combination with the stress of the lengthy flight hat led him to this conclusion. *Id.* Thus I do not find that these facts call Complainant's credibility into question.

In addition, Respondent claims that Complainant lacks credibility because he did not disclose to Respondent that he used prescription medication after his surgery. But Complainant only used the medication on the day of the surgery, March 18, 2005, and the day after, and did not use the medication on any shift. He testified that his last dose of the medication was on March 19, 2005 and he returned to work on March 21, 2005. *Id.* at 341. Therefore, I do not find Complainant's credibility implicated by the facts concerning his use of medication, particularly because such use ended days before he returned to work.¹¹

Respondent claims that Complainant lacks credibility because he claimed in his written request for a review board to appeal his termination that he determined that his crew members were unfit after he "received indications from the crew that they too felt unfit." JX 6. Respondent claims that Complainant admitted in his testimony that he lied when he stated this. *See* Respondent's Post-trial Brief at 34, citing TR 377. Nothing in Complainant's testimony reflects this. Rather, Complainant's testimony shows that he received indications from the crew as to their fitness in the following ways: he spoke with both Brewer and Black as to each of their physical conditions, and then also observed them during the attempted flight in inclement weather to Jackson Hole and back. *Id.* at 73-75, 377.

Respondent also claims that Complainant admitted in his testimony that he lied to Tony Fizer during the July 19, 2005 meeting, lying when he was "accepting responsibility for his decision to fly unfit and to call off his entire crew." Respondent's Post-trial Brief at 34, citing TR 390. But the evidence does not reflect this. Instead, it shows that Complainant was attempting to appease Fizer who was demanding that Complainant admit that he was wrong and demanding that Complainant admit that he did not prevail at the May Review Board hearing. JX 33 at 7-16. From listening to Fizer's demeanor as well as Complainant's on the audio tape, I find that toward the end of the meeting Complainant merely attempted to smooth over the conflict by telling Fizer he accepted Fizer's version of events and that he wanted to move forward. JX 41:1; JX 33 at 14-16. I find credible Complainant's testimony when he admitted to being insincere at that point in order to appease Fizer. TR at 390.

Respondent also claims that the following evidence indicates that Complainant lied when he denied that he wrote the graffiti: Complainant testified that he could see himself writing the graffiti (TR at 411), and Complainant wrote in an email, "I wish I had written the graffiti" (JX 29 at 2). However, merely because Complainant admitted that he could have written the graffiti

¹¹ Respondent also claims the medication was a "painkiller" that could impact Complainant's performance, but did not submit any evidence as to what the medication actually was. Not all pain relief medications impact performance, and I find Respondent fails to provide evidence that the medication itself was ever of a variety that could have impacted Complainant's performance, even if he had used it during his shift.

does not mean that he did; these comments, in the context of all of the other evidence, does not provide evidence regarding whether Complainant wrote the graffiti. Moreover, I find Complainant's comment in the email to be taken out of context. The full comment reflects Complainant's point of view about his termination. He stated that the only way he felt he could have avoided being fired would have been to admit he did something he did not do (author the graffiti), and he felt because of his refusal to do so, he lost his job. JX 29. I do not find that these comments reflect that Complainant wrote the graffiti or otherwise call Complainant's credibility into question.

Respondent also alleges that Complainant claims that Fizer called him a "bastard" and that this is a lie. *See* Respondent's Post-trial Brief at 34, citing TR at 414-415, 1043. Complainant explained in his testimony that the comment was not a literal accusation but rather an accusation that everything that Fizer said about him amounted to Fizer saying to Complainant that "I was an untrustworthy of flying a multimillion dollar aircraft bastard, and then some." Again, I find that Respondent fails to show Complainant was dishonest or that his testimony is lacking in credibility.

Thus, I find no merit to Respondent's credibility arguments. Moreover, I do not find that Complainant's testimony is contradicted by any other SkyWest employees except for that of his supervisor, Tony Fizer. I find that Fizer's statements, particularly his accusations of Complainant "bad-mouthing" him, are contradicted by not only Complainant's testimony but also testimony of other SkyWest employees, Jim Black and Dave Bechtold. I find that Respondent's contentions are without merit and conclude that Complainant's testimony does not lack credibility.¹²

CONCLUSIONS OF LAW

Air carriers are prohibited under AIR 21 from discharging or otherwise discriminating against any employee because the employee, inter alia, provided the employer or Federal Government with information "relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety" 49 U.S.C.A. § 42121(a). To secure an OSHA investigation, a complainant needs only to raise an inference of unlawful discrimination (i.e., establish a prima facie case), while at the adjudicatory stage a complainant must prove unlawful discrimination by a preponderance of evidence. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 13 (ARB Jan. 31, 2006). Thus, the prima facie structure serves a gate-keeping function by setting the minimal standard required to secure a foothold in the courtroom in cases where the complainant relies on circumstantial evidence of discrimination. 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.104(b); *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 8 (ARB January 30, 2004). In contrast, once the hearing takes place, the complainant must prove by a preponderance of evidence all of the standard elements required in any whistleblower

¹² In addition, Complainant's testimony is strongly supported by the audio and written recordings of the July 19, 2005 meeting, and of the two Review Boards (JX 33; JX 34; JX 41; JX 47) all of which I find provides a great deal of detail concerning the events, Complainant's actions, and the parties' demeanor. I accord Complainant's testimony and these other items in evidence significant weight. In comparison, for reasons discussed below, I find Fizer's credibility lacking at certain points in his testimony concerning the decisions he made regarding Complainant.

case: 1) status; 2) engaging in protected activity; 3) adverse action; 4) a causal connection. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11, slip op. at 9 (ARB June 29, 2007). In *Brune, supra*, at 13-14, the ARB restated the procedures and burdens of proof applicable to an AIR 21 whistleblower complaint, which it had previously articulated in *Peck, supra*, slip op. at 6-18. The ARB stated that to prevail at the hearing stage the complainant must do more than make a prima facie showing, that is, the complainant must demonstrate discrimination by a preponderance of evidence. See *Brune, supra*, at 13. However, the ARB went on to state:

This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases. The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.

Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event.

Brune, supra, slip op. at 13-14 (footnotes omitted).

Thus an affirmative defense is available to the employer if it can produce clear and convincing evidence that it would have taken the same adverse employment action regardless of any protected activity. See 49 U.S.C.A. § 42121(b)(2)(B)(iv); see also 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." See *Brune, supra*, at 14, n.37, citing *Black's Law Dictionary* 577 (7th ed. 1999). However, the ultimate burden of persuasion that the respondent intentionally discriminated because of a complainant's protected activity remains at all times with the complainant. See *Taylor v. Wells Fargo Bank*, ARB No. 05-062, ALJ No. 2004-SOX-43, slip op. at 5, n.12 (ARB June 28, 2007).

Whether AIR 21 Applies

A complainant is an "employee" for the purposes of AIR 21 if the complainant is "an individual presently or formerly working for an air carrier..." 29 C.F.R. § 1979.101. The status of the parties is not contested. Respondent is a commercial air carrier that employed Complainant for 16 years, and terminated his employment after alleged protected activity occurred. Respondent employed Complainant as a pilot and his rank was that of Captain. Therefore, Complainant is an employee under AIR 21. The parties nonetheless dispute whether AIR 21 applies; specifically, they dispute whether the complaint itself is time barred.

Timeliness of Complaint

The Regulations require that an AIR 21 complaint must be filed by the complainant within 90 days after the alleged violation of the Act occurs. 49 U.S.C.A. § 42121(b)(1); 29 C.F.R. § 1979.103(d); *Turgeon v. The Nordam Group*, ARB No. 04-005 at 3-4, ALJ No. 03-AIR-41, slip op. at 3 (ARB November 22, 2004); *Sasse v. Office of the U.S. Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 8 (ARB Jan. 30, 2004) (holding that the date of the alleged violation occurs when the allegedly discriminatory decision has been made and communicated to the complainant). Absent the application of equitable principles such as waiver, estoppel, or tolling, a complaint shall be dismissed if filed after the expiration of this deadline. See *Turgeon*, *supra*, slip op. at 3.

On August 31, 2005, Respondent terminated Complainant's employment. Complainant filed a complaint alleging wrongful termination with the FAA on November 26, 2005, within the 90-day deadline for filing an AIR 21 complaint with OSHA. On December 9, 2005, the FAA contacted Complainant and he learned of his rights at that point under AIR 21. Three days later, on December 12, 2005, Complainant filed the identical complaint with OSHA, the proper venue for an AIR 21 complaint. The latter filing exceeded the 90-day filing deadline under AIR 21. In an order denying Respondent's motion to dismiss based on lack of timeliness, the undersigned found that equitable tolling applies. Order Denying Motion to Dismiss (July 24, 2006). Complainant initially filed in the wrong forum (the FAA) within the statutory time frame and subsequently filed the exact same statutory claim with OSHA after the statutory period. *Id.* Complete identity existed between the two filings. *Id.* Complainant only became aware of his rights under AIR 21 when the FAA responded to the complaint he filed at that forum. The FAA directed Complainant to OSHA as the proper forum, and Complainant filed exactly the same complaint with OSHA three days later. The circumstances thus presented a situation where equitable tolling applies because the complaint was filed in the wrong forum within the time limit and then a completely identical cause of action was filed in the proper forum after the statutory period. See *Turgeon v. Admin. Review Bd., US DOL*, 446 F.3d 1052, 1061 (10th Cir. 2006).¹³ Therefore, the undersigned found the equitable tolling exception applies to the present claim.

In its Post-trial Brief, Respondent fashions yet another timeliness argument. Respondent asserts (disingenuously)¹⁴ that the adverse action was not the termination of employment on

¹³ This exception is also consistent with OSHA policies. The OSHA investigation manual states that complaints filed after the deadline will normally be closed but "certain extenuating circumstances...could justify tolling these statutory filing periods for equitable principles." See OSHA Inst. DIS 0-08; see also 29 C.F.R. § 1979.103(c). The investigation manual is particularly persuasive where it states such extenuating circumstances include a situation where "[t]he employee mistakenly filed a timely discrimination complaint with another agency that does not have the authority to grant relief to the whistleblower (e.g., an AIR 21 complaint is filed with the FAA)." See OSHA Inst. DIS 0-08.

¹⁴ I find this statement on Respondent's part to be disingenuous given that elsewhere in Respondent's Post-trial brief it repeatedly refers to the adverse action of Complainant's termination on August 31, 2005, and then unequivocally concedes that the underlying adverse action was Complainant's termination on August 31, 2005 and that it was timely filed: "The statute of limitations for any protected activity, real or imagined, relating to the March 23, July 19, and August 16 incidents has long since passed. The only complaint about an adverse action that was timely filed relates to Mr. Douglas's termination on August 31, 2005." Respondent's Post trial Brief at 21. Respondent is correct that these other events are not additional adverse actions. Complainant has not alleged that they are, but rather that

August 31, 2005. Respondent's Post-trial Brief at 45-46. Respondent claims that the discipline Complainant received for the alleged protected activity occurred on April 1, 2005, and that therefore the statutory period expired 90 days after *that* date, months prior to Complainant's filing dates with the FAA and OSHA. *Id.* Thus Respondent apparently argues that the adverse employment action was not the termination of Complainant's employment on August 31, 2005 but rather his one-week suspension without pay and the issuance of a written counseling statement on April 1, 2005, which he received after declaring himself and his crew unfit to fly on March 23, 2005.

Respondent's argument requires a statement of the obvious: it is not for Respondent, the employer, to state the claim. Complainant filed a complaint containing one claim of adverse action, that of Respondent's termination of Complainant's employment on August 31, 2005. No final decision was made by Respondent to terminate Complainant prior to August 31, 2005. JX 16 at 16-17. At most, the warnings that Respondent made prior to that date, such as when Complainant was suspended on August 16, 2005, created the possibility that a decision to terminate Complainant *could* be made in the future. TR at 314-315; JX 17 at 85. Complainant received final and unequivocal notice of the challenged termination on August 31, 2005, and therefore I conclude that this date triggers the 90-day filing period. *See* 49 U.S.C. § 42121(b)(1); *see also See Turgeau, supra*, slip op. at 3; *Sasse, supra*, slip op. at 8; *Rollins v. American Airlines, Inc.*, ARB No. 04-140 at 2, ALJ No. 04-AIR-9, slip op. at 2 (ALJ April 3, 2007). I find Respondent's timeliness arguments provide no reason to depart from the rationale of my previous ruling.

Protected Activity

Next, Complainant must show a preponderance of the evidence that the protected activity contributed to the termination of his employment. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2005-AIR-11, slip op. at 9 (ARB June 29, 2007). Under AIR 21, an employee has engaged in protected activity when the employee has “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.” 49 U.S.C. § 42121(a)(1). Such protected activity requires (1) a genuine belief that there was or would be a violation or alleged violation of an FAA order, regulation or standard, or a federal law relating to air carrier safety; (2) this concern was objectively reasonable in the circumstances; and (3) that the complainant expressed the concern in a manner that was “specific” with respect to the “practice, condition, directive or event” that gave rise to the concern. *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14 (ARB July 31, 2006); *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 03-AIR-35, slip op. at 18 (June 29, 2006); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (Jan. 30, 2004). The complainant's allegation must only be objectively reasonable in the belief that his or her safety complaint is valid, and need not be ultimately substantiated. *Rooks, supra*, slip op. at 18.

Complainant alleges that he engaged in protected activity when he declared himself

the evidence of these events reflects that the challenged termination action was motivated by retaliatory intent for the protected activity.

unfit to fly, mid-shift on March 23, 2005, and also when he declared his crew unfit to fly on that shift. Complainant also claims he engaged in protected activity when he discussed with his supervisors his decision to declare himself and his crew unfit. Respondent does not address the latter argument but contends that declaring himself and his crew unfit did not constitute protected activity. Respondent alternatively argues that even if Complainant engaged in protected activity, Complainant deliberately violated air safety regulations and therefore cannot claim protection under the Act.

I find that the evidence indicates that Complainant engaged in protected activity when he declared himself unfit to fly. Complainant reported to his shift expecting to successfully complete it, just as he had for two shifts in the preceding two days. TR at 71; JX 2; JX 37 at 1. But he experienced for the first time unexpected complications of exhaustion and pain. TR at 71-74; JX 2; JX 37 at 1; JX 47 at 7-8. Around midnight, after concluding a prolonged flight in inclement weather, he learned that he was scheduled for another attempt to fly to Jackson Hole at 4:00 a.m. TR at 71-74; JX 2; JX 37 at 1; JX 47 at 7-8. Complainant determined that based on his fatigue and pain he would need a longer break than the few hours available to rest. TR at 74, 85 349; JX 2; JX 37 at 1; JX 41:2 at 00:16 to 00:29; JX 47 at 7-8. Contacting Respondent, he reported himself as unfit both to SkyWest Crew Scheduling and to SkyWest shift supervisor Jim Breeze. TR at 74, 83-85, 358, 441; JX 2; JX 37; JX 41:2 at 00:16 to 00:29. At the hearing, Complainant testified that because he felt this break would be insufficient, he did not wait until later in the morning to declare himself and the crew unfit because the sooner he notified SkyWest the sooner a relief crew might be put in place so as to not displace the passengers. TR at 85; JX 41:2, 00:16, 00:27. He also testified that he had been trained to declare himself unfit if he found he had become unfit during the course of a shift such that he could not safely complete that shift. TR at 328-329. Complainant testified that he believed that if he were to fly unfit this would be a violation of federal regulations. TR at 85-86, 387. Complainant also testified that he notified acting shift supervisor Jim Breeze that he would not be able to fly, and specifically informed Breeze that he had determined that he was unfit to fly. TR at 84.

Based on the evidence, I conclude that Complainant (1) genuinely believed that if he flew he would be violating an FAA order, regulation or standard relating to air carrier safety; (2) that Complainant's belief was objectively reasonable in the circumstances of the impact his fatigue would have on flight safety; and (3) that when he reported this concern to supervisor Jim Breeze, Complainant expressed it in a manner that was "specific" with respect to the "practice, condition, directive or event" that gave rise to the air safety concern. *Rougas, supra*, slip op. at 14. I therefore find that Complainant engaged in protected activity when he declared himself unfit on March 23, 2005.

Complainant also alleges that he engaged in protected activity when he declared his crew unfit to fly on that same shift. His First Officer, Troy Brewer, stated to Complainant at the beginning of the shift that he was tired because he had not gotten a lot of sleep, and after they returned from Jackson Hole, Brewer and Complainant discussed that they had become fatigued by the prolonged flight in inclement weather. TR at 75-76; 368-69. At the beginning of the evening, Flight Attendant Brandee Black told Complainant she was having difficulties with her health, stating she hoped she would be able to get out of bed the next day. TR at 74-75, 542-543. Black told Complainant that her arthritis was worse because it was not being managed by the

medication she usually took to control the symptoms, which included stiffness in her hands. TR at 542-543. Black told Complainant that she also had strep throat, and was taking antibiotics that made her unable to also take her arthritis medication. TR at 74-75, 542-543.

As a result of these discussions and his observations, Complainant concluded that neither Troy Brewer nor Brandee Black would be safe to fly to Jackson Hole at 4:00 a.m. because each would need a longer rest period. TR at 73-75, 85; JX 41:2 at 00:16 to 00:29. Complainant told Crew Scheduling and acting shift supervisor, Chief Pilot Jim Breeze, that he did not think either Black or Brewer were fit to complete the scheduled 4:00 a.m. flight. TR at 83-84, 358, 441; JX 2; JX 37; JX 41:2 at 00:16 to 00:29.

Respondent argues that the fitness determinations that Complainant made concerning Black and Brewer were unreasonable because he should have waited until the crew had rested for a few hours and because Complainant should not have made any determination without input from each crew member. Respondent emphasizes that on the day *after* the flight in question, SkyWest Chief Pilot and supervisor Tony Fizer asked Black if she felt that she could have flown and she said she could have; Brewer told Fizer this as well. TR at 87-89, 547-48, 569-572. Respondent contends that if Complainant had not declared the crew unfit, then a reserve captain (who Respondent claims was available) could have flown with the crew. Respondent claims that by declaring the crew unfit, Complainant's "actions displaced Passengers and caused the loss of revenue to the company because the flight had to be cancelled." *See* Respondent's Post-trial brief at 13, citing Fizer's Testimony, TR at 845. Respondent also apparently assumes that if Complainant had solicited the crew members' opinions, any such opinion would have had to override Complainant's opinion as pilot that his crew member is unfit.

Respondent's claim of unreasonableness may be based in part on assumptions Respondent makes concerning the pilot's responsibilities. Complainant testified that SkyWest disciplined him for declaring his crew unfit because each individual crew member should have to call crew scheduling directly to notify SkyWest of this. TR at 436. Macias, one of the members of the May Review Board, confirmed this. *See* TR at 243-244. He testified that this was one of the items that the Review Board wanted Fizer to discuss with Complainant: "I think it was something to the effect of it should be -- in the discussion he (Complainant) should be told that each individual crew member should make their own phone calls when calling unfit, and that the captain may when making the initial call say, 'Well, the other crew members will call but it looks like we're all unfit,' something along those lines. But to never actually make -- he should not be making that call for everybody and not have them call in on their own." TR at 243-244. The only exception Macias felt would justify the pilot making the call himself would be if a crew member were incapacitated. TR at 244.¹⁵

¹⁵ Although Respondent seems to be implementing a policy emphasizing self-assessment by each crew member, former SkyWest supervisor Lou Bodkin (Assistant Chief Pilot in Salt Lake at the time Complainant declared his crew unfit), testified that the pilot possesses the responsibility of determining whether the crew members on a particular flight are fit to fly. TR at 891. Even if a crew member were to think he or she is fit, if Bodkin as a pilot were to find that crew member unfit he should notify the manager on duty. *Id.* He testified that this is the responsibility of every pilot. *Id.*

Thus it appears Respondent contends that each crew member's belief about his or her unfitness is as significant as that of the pilot's assessment of the crew's fitness; but it is not a democracy. Federal law confers a great deal of responsibility upon the pilot in command, and commensurate authority. *See* 14 C.F.R. § 1.1, Federal Aviation Regulation ("FAR") 1.1 (the pilot bears "final authority and responsibility" for the safety of the flight); *see also* 14 C.F.R. § 91.3, FAR 91.3 ("The pilot in command of an aircraft is directly responsible for, and is the final authority, as to the operation of that aircraft."). The regulations require that the pilot in command of a flight be accountable for the safety of the flight, and Complainant acted on that authority when he determined that the crew was too fatigued to fly. The FAR specifically state:

(d) Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and airplane.

(e) Each pilot in command has full control and authority in the operation of the aircraft, without limitation, over other crewmembers and their duties during flight time, whether or not he holds valid certificates authorizing him to perform the duties of those crewmembers.

FAR 121.533(d), (e); 14 C.F.R. § 121.533(d), (e).

Thus, I do not find valid Respondent's hindsight second-guessing of Complainant's fitness determinations regarding his crew members. Complainant told Crew Scheduling and Jim Breeze that he had determined shortly after arriving back in Salt Lake around midnight that it would be unsafe for him and for his crew to rest for the few hours available before boarding the next flight at 4:00 a.m. JX 42:2 at 00:16 to 00:29; *see also* TR at 74, 85. Respondent apparently argues that a pilot in Complainant's circumstance could not make a reasonable determination that a crew member was unfit shortly after observing that crew member during a three-hour flight in inclement weather and after discussing with the crew member his or her level of fatigue and/or physical symptoms. TR at 73-75. Certainly, it would have been ideal for Complainant to ask each crew member this question, and neither he nor the shift supervisor, Jim Breeze, did so. TR at 87-89. However, I do not find Complainant's assessment of Black, or Brewer, objectively unreasonable because Complainant gathered detailed information about the fitness of his crew, through discussion with and observation of each crew member. TR at 73-75. Moreover, I find that it would have been an objectively *unreasonable* determination of fitness if instead Complainant's determination were based on a yes or no answer from each crew member. Such a declaration would be fairly meaningless absent details about the crew member's physical and mental condition (i.e., physical symptoms, fatigue) or details about the circumstances (i.e., the inclement weather, the resulting prolonged flight).

I find that Complainant based his determination on discussions he had with each crew member that evening and on observations of each crew member during that evening's flight in difficult weather. Therefore, I find Complainant's decision that neither Brandee Black nor Troy Brewer would be safe to fly objectively reasonable. In addition, because the crew landed around midnight, and only a few hours remained prior to boarding the scheduled flight to Jackson Hole at 4:00 a.m., I do not find the decision or the call to crew scheduling after returning to Jackson Hole around midnight to be either speculative or premature. By the time Complainant and the

crew disembarked from the attempted flight to Jackson Hole, only two or three hours remained before the time that the pilot and crew would need to prepare to board the next flight, even if they only utilized the crew lounge to rest instead of returning home. Thus I conclude that on March 23, 2005, Complainant held a genuine belief that was objectively reasonable in the circumstances that Brandee Black and Troy Brewer were unfit to complete the 4:00 a.m. flight to Jackson Hole. In addition, based on Complainant's testimony, I find that Complainant held a genuine belief that if he were to allow a crew member to fly whom he had determined to be unfit, this would be a violation of federal regulations. TR at 85-86, 387.¹⁶ He also believed that he as the captain (pilot) had the final authority to make fitness determinations concerning himself and his crew. *Id.* at 86. I also find that on March 23, 2005, Complainant notified acting shift supervisor Jim Breeze that his crew would not be able to fly and specifically informed Breeze of his determination that the crew was unfit. TR at 84.

Based on the evidence, I conclude that Complainant (1) had a genuine belief that Brandee Black and Troy Brewer were each unfit and that if either were to fly the 4:00 a.m. shift there would be a violation of an FAA order, regulation or standard; (2) that belief was objectively reasonable in the circumstances; and (3) that Complainant expressed the concern in a manner that was "specific" with respect to the "practice, condition, directive or event" that gave rise to Complainant's air safety concern when he told supervisor Jim Breeze that the crew was unfit to fly on March 23, 2005. *See Rougas, supra*, slip op. at 14. Therefore, I conclude that the record indicates Complainant engaged in protected activity when he declared his crew unfit to fly on March 23, 2005.

Discussions with Supervisors as Additional Protected Activity

When a complainant engages in protected activity, and later communicates about that protected activity to the employer in a manner that meets the required elements of protected activity, such a communication in itself can constitute additional protected activity. *See Negron v. Vieques Air Link*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 6-7 (December 30, 2004). Complainant contends that he engaged in protected activity on the several occasions that he communicated to SkyWest management his air safety concerns relating to the decision on March 23, 2005 to declare himself and his crew unfit to fly, both on March 23, 2005 and thereafter.

Complainant claims that declaring himself and his crew unfit on March 23, 2005 to shift supervisor Jim Breeze (TR at 84) somehow constitutes additional protected activity. *See* Complainant's Post-trial Brief at 36-37. However, Complainant cannot claim this as *additional* protected activity because his notification of Breeze was part of what makes his declarations of unfitness protected activity. A complainant must express his or her concern in a manner that was "specific" with respect to the "practice, condition, directive or event" that gave rise to the

¹⁶ Although Complainant's determinations about his own unfitness and that of his crew appear to directly relate to established air safety regulations, a complainant need not show this much under the Act. A complainant under AIR 21 must establish a "genuine *belief* that there was or would be a violation or alleged violation of an FAA order, regulation or standard, or a Federal law relating to air carrier safety." *Rougas, supra*, at 14 (emphasis added); *see also Walker v. American Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-17, slip op. at 15 (ARB Mar. 30, 2007).

concern. *See Rougas, supra*, slip op. at 14; *see also Negron, supra*, slip op. at 6-7. Therefore, I find that the conversation with Jim Breeze on March 23, 2005 does not in itself constitute separate, additional protected activity.

But I do find that the following conversations with management after March 23, 2005 constitute additional protected activity because they had sufficient specificity about the safety concerns that led to Complainant's decisions on March 23, 2005, and because his concerns were based on an objectively reasonable belief that those decisions related to air safety regulations: Complainant's discussion with his supervisor, Salt Lake Chief Pilot Tony Fizer, on March 24, 2005, TR at 92; the April 1 meeting with Complainant, Fizer and other chief pilots, TR at 94-96; Complainant's discussions with Klen Brooks, the Director of Flight Operations, about the discipline and the incident, who in turn told him to contact Brad Holt, the Director of Flight Operations, TR at 273-74, 1174-75; Complainant's email to Holt on April 3, 2005, JX 37; statements Complainant made in his appeal to the May Review Board concerning the decisions he made on March 23, 2005, TR at 100-103, 229, 1004-1005; statements Complainant made in his appeal to the September Review Board concerning those decisions as well, JX 34, JX 41:3-41:6, JX 47. I conclude that these communications made by Complainant to Respondent constitute additional protected activity because Complainant (1) genuinely believed that declaring himself and his crew unfit on March 23, 2005, as discussed above, related to an air safety regulation; (2) that belief was objectively reasonable in the circumstances; and (3) Complainant expressed the concern to Respondent in a manner that was "specific" with respect to the "practice, condition, directive or event" that gave rise to the concern. *Rougas, supra*, slip op. at 14.¹⁷

Complainant also claims that when he appealed the discipline he received for declaring himself and his crew unfit, the written request he submitted to appeal the discipline to a review board also constitutes protected activity. JX 6 at 2. However, the request did not detail the circumstances, observations, discussions, and physical complaints that gave rise to Complainant's concerns for flight safety and led him to declare himself and his crew unfit on March 23, 2005. *Id.* I thus do not find that the request itself raised the matter with the specificity required with respect to the "practice, condition, directive or event" giving rise to the concern. *See Rougas, supra*, slip op. at 9. Therefore, the written request for an appeal of discipline does not in itself constitute protected activity.

Respondent's affirmative defense

Under AIR 21, a whistleblower cannot claim protection while also violating air carrier safety requirements under federal law. AIR 21 protection "shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States." 49 U.S.C. § 4121(d).

¹⁷ For purposes of discussion throughout the remainder of the decision, the references by the parties and the undersigned to "protected activity" refer to the incident in which Complainant declared himself and his crew unfit to fly and notified shift supervisor Jim Breeze, on March 23, 2005.

The regulations require that the pilot execute a non-delegable duty to sign a release for each flight only once the pilot believes "that the flight can be made with safety." 14 C.F.R. § 121.597(c); FAR 121.597. The pilot in command must not embark on a flight if the pilot knows or has reason to know of any medical condition that would make the pilot unable to meet the requirements of his or her medical certificate, or is taking medication or receiving other treatment for a medical condition that results in the person being unable to meet the requirements of the medical certification to fly. 14 C.F.R. § 61.53(a); FAR 61.53(a).

Respondent claims as an affirmative defense that Complainant violated air safety regulations by flying unfit when he returned to work after surgery. Respondent argues that Complainant should not have returned to work without consulting with an FAA flight surgeon about the surgery and also about the medication prescribed by his surgeon for pain after the surgery because Complainant had reason to know he would not be able to meet the requirements of his job, by taking such medicine in violation of 14 C.F.R. § 61.53(a), *supra*.

Complainant took prescribed pain medication on the day of the surgery, March 18, 2005, and the following day, March 19, 2005. TR at 341. He does not recall the name of the medication. *Id.* at 333. On March 20, 2005, Complainant did not take the medication, and never took it thereafter. *Id.* at 341. He returned to work on March 21, 2005, and successfully completed a stand-up shift on that day and also on March 22, 2005. *Id.* at 71.

Respondent embellishes the facts to support its argument that Complainant violated the regulations, arguing that the surgery caused significant pain and "sleep deprivation" that gave Complainant reason to know he must consult with an FAA flight surgeon. But the evidence Respondent cites to support this claim is Complainant's testimony that in the days after the surgery he had "a little discomfort" that "interrupt[ed] my sleep a little bit." *Id.* at 333-334. The evidence also indicates that Complainant returned to work as a pilot on March 21, 2005 without having taken medication since March 19, 2005. *Id.* at 341. He never took the medication again after March 19, 2005. *Id.* On March 23, 2005, five days after his surgery, he felt fit to fly notwithstanding the fact that he knew the shift would be impacted by rain and snow storms. *Id.* at 71-73, 92-93; JX 2; JX 37 at 1; JX 47 at 7. After concluding the prolonged round trip to Jackson Hole and after being turned back in inclement weather, he experienced for the first time unexpected complications of exhaustion and pain. TR at 71-74; JX 2; JX 37 at 1; JX 47 at 7-8. Upon learning he was scheduled for another attempt to fly to Jackson Hole at 4:00 a.m., Complainant determined he would need a longer break than the few hours available to rest. TR at 349.

Notwithstanding Respondent's exaggeration of Complainant's symptoms, I find that Complainant had little reason to believe or know that he had a medical condition that would make him unable to meet the requirements of his medical certification to fly. Complainant consulted with his surgeon and followed his surgeon's directions concerning return to work. On the day of the surgery, March 18, 2005, Complainant asked his surgeon about returning to work as a pilot, and the surgeon told Complainant he could resume work by March 21, 2005, barring complications, and prescribed pain medication that Complainant took in the interim. *Id.* at 71, 331, 341, 346-347. Complainant followed his physician's instructions. He took the medication as prescribed on March 18, 2005 and March 19, 2005, and returned to work on March 21, 2005.

Id. at 71, 341. I find Complainant had no reason to think he could not complete his job because without the pain medication Complainant had only minor discomfort with his stitches that did not significantly impair his sleep. *Id.* at 333-334. Complainant successfully completed two stand-up shifts without any problems on March 21, 2005 and March 22, 2005. TR at 71-73, 92-93; JX 2. When he started the stand-up shift on March 23, 2005 there had been no change or exacerbation of the minor symptoms he had been experiencing, and although he looked forward to taking a break he felt ready to complete the shift. Therefore, I find Complainant had no reason to think he would experience the complications of exhaustion and pain that occurred unexpectedly mid-shift five days after the surgery, on March 23, 2005.

In support of its affirmative defense that Complainant should not have returned to work after surgery without consulting with an FAA flight surgeon, Respondent cites the air safety regulation that states that a pilot must not act as pilot in command of a flight if he or she has reason to know of a medical condition that would make the pilot unable to meet the requirements of his or her medical certificate. *See* 14 C.F.R. § 61.53(a). Respondent does not claim Complainant violated any other federal law, rule, or regulation. Respondent does not cite any pertinent ruling by the National Transportation Safety Board, nor do I find any ruling in which a pilot violated air safety requirements for the kinds of decisions Complainant made in relation to returning to work after surgery. Respondent cites the SkyWest Flight Operations Manual, a violation of which would not in itself constitute an affirmative defense under AIR 21 because such a defense must be based on a deliberate violation of an air safety requirement under AIR 21 or any other law of the United States. *See* 49 U.S.C. § 4121(d). However, the flight manual text is considered here because the flight operations manual presumably provides pilots with guidance about flight safety. Therefore, a flight operations manual could give a pilot reason to know his medical condition would make him unable to safely fly, that is, whether after surgery he could still meet the requirements of his FAA medical certificate.

Respondent's flight operations manual states that a pilot could be unsafe to fly *while taking* medication because some medications can impact the nervous system and/or cause mild hypoxia. TR 338-339. Respondent does not claim that Complainant was taking the medication while on shift and does not provide medical evidence as to which prescription drug Complainant took, or its side effects, or the length of the side effects after the medication has been discontinued. Complainant's testimony indicates he did not take the medication while working. He returned to work on March 21, 2005 after taking his last dose of medication on March 19, 2005. *Id.* at 341. He had consulted with his physician about the medication and had ceased taking it well before returning to work. Respondent provides no evidence that would indicate Complainant had any reason to know his medical certification to fly would be compromised by taking the medication on March 18, 2005 and March 19, 2005 and then returning to work days later, on March 21, 2005. No medical evidence indicates whether this medication was of the variety that could impact the nervous system and/or cause mild hypoxia and, if so, could continue to cause such problems two days after ceasing the medication. Thus I find no merit to Respondent's bald assertion that Complainant's conduct concerning medication violated air safety regulations.

I also find that Respondent fails to support its claim that Complainant violated air safety regulations because he did not see an FAA flight surgeon prior to returning to work about

whether it was safe to fly after the surgery. Respondent fails to cite convincing evidence that the surgery was the kind of medical intervention that "results in the person being unable to meet the requirements of the medical certification to fly." See 14 C.F.R. § 61.53(a). Respondent cites the testimony of Klen Brooks, Director of SkyWest Operations, in support of its claim that after surgery Complainant was automatically required to see an FAA flight surgeon. But Brooks merely stated he *thought* that not seeing a certified physician would be a violation of company policy but he did not refer to any particular policy (TR at 1187) nor does Respondent cite any policy. As for Respondent's claim that Brooks' testimony shows Complainant violated a federal law or regulation, Brooks merely agreed that flying unfit is a violation of the air safety regulations. *Id.* Based on the evidence, I do not find that Complainant had reason to know the surgery itself was the type of medical intervention that barred him from meeting the requirements of his medical certificate. As discussed above, Complainant spoke with his physician about what an adequate amount of time would be to take off prior to returning to work. *Id.* at 331, 341, 346-347. Moreover, he inquired about any medical restrictions, and his surgeon told him to not lift more than 10-20 pounds. *Id.* at 346-347. Complainant followed his physician's instructions. He took the medication as prescribed, rested for the period his doctor suggested, and complied with his doctor's restriction on lifting. *Id.* at 331, 341, 346-347, 564. Based on the evidence, I find that Respondent fails to support its claim that Complainant had reason to know the surgical intervention could result in Complainant being unable to meet the requirements of the medical certification to fly. See 14 C.F.R. § 61.53(a), *supra*.

Respondent also claims that Complainant should not have returned to work because he was unfit to fly based on his physician's restriction on Complainant lifting more than 10-20 pounds. See TR at 346. No evidence indicates that Complainant needed to lift objects heavier than 10-20 pounds as part of his job duties as pilot in command on the Brazilia, the aircraft Complainant piloted. Nor does Respondent argue this. Rather, Respondent contends that the restriction on lifting somehow means that Complainant would have been physically incapable of operating the foot pedals on the Brazilia had the Brazilia lost an engine. The Brazilia has rudders that can require up to 16.3 to 16.5 pounds of pressure from the legs for normal operation, possibly double that figure if an engine were lost. *Id.* at 873-874, 1172. Yet Respondent provides no evidence that the pressure requirement for the foot pedals was something Complainant could not complete upon his return to work after the surgery. I find Respondent's claim far too speculative that the recommendation to not lift objects weighing more than 10-20 pounds is relevant to Complainant's capacity to apply pressure with foot pedals. I also find no evidence that Complainant had any difficulty using the foot pedals in the shifts he completed on March 21, 2005 and March 22, 2005. Nor does the evidence suggest that Complainant had any problem or anticipated any problem with applying pressure to the foot pedals on March 23, 2005. I therefore find Respondent fails to support the claim that Complainant was unfit to work the foot pedals during normal operation or emergency operation if an engine were lost.

Respondent also argues that on March 23, 2005, Complainant flew unfit, from the beginning of the shift. Respondent contends that when he started the shift he felt so unwell that he relied on having a longer break than what circumstances allowed. See Respondent's Post-trial Brief at 15. Respondent emphasizes that Complainant knew that he could not necessarily count on a significant break during a stand-up shift. See *id.* Respondent notes that Complainant's

supervisor, Tony Fizer, disciplined Complainant for flying unfit and for declaring his crew members unfit without a good faith basis. *See id.*¹⁸

I find Respondent's claim that Complainant showed up unfit to his shift on March 23, 2005 lacking in merit. Complainant reported to the shift confident that he could complete the flight successfully as he had completed two shifts the day prior, March 22, 2005, and the day before that, March 21, 2005. TR at 71; JX 2. Although Complainant felt some mild discomfort at the beginning of the shift in question on March 23, 2005, he had successfully completed his shifts in the two preceding days while experiencing the mild discomfort. TR at 71; JX 2. It was only as the March 23 2005 shift progressed, with a late departure and inclement weather, that Complainant's pain became significant. TR at 74; JX 2; JX 37. He was very surprised to feel a great deal of pain and he "found that night draining and taxing, more than I could have ever known. On my previous two shifts on Monday and Tuesday I had experienced only minimal discomfort during the normal one hour flights and I had no reason to suspect that a longer time in the plane would be any different. I was simply too tired and unfit to fly for safety reasons." JX 37 at 1 (Complainant's email to Brad Holt on April 3, 2005); *see also* TR at 74, 334. He testified that flying in inclement weather, a pilot must be "on top of [his] game" and that he had been trained to declare himself unfit should he find during the course of a shift that he could not safely complete that shift. TR at 328-329. He determined at that point that regardless of whether he rested or not, he would not be fit to fly another flight, four hours later, again in inclement weather. *Id.* at 349.

Respondent argues that Complainant only worked the shift on March 23, 2005 in reliance on taking a break, Respondent cites the testimony of SAPA representative Jim Black who testified that he felt that had Complainant shown up for the shift hoping he could get to feeling better during the shift's break period. *Id.* at 510. The shift was a stand-up shift which involves overnight, continuous duty without a significant break period (*Id.* at 874-75) and Respondent claims that Complainant improperly relied on a significant break period and when he did not get one he declared himself unfit. However, I find that merely because Complainant hoped to feel better and looked forward to a break, no evidence indicates Complainant embarked on his shift on March 23, 2005 *in reliance* on getting a break. Moreover, SAPA representative Jim Black's testimony merely reflects his opinion; Complainant did not speak with him that night. *Id.* at 510. Upon returning to Salt Lake from the prolonged flight in inclement weather during which Complainant had begun to feel intense pain and exhaustion, Complainant learned that he and his crew were scheduled for another flight to Jackson Hole four hours later. At that point, he determined that the break he was being provided would not be sufficient to fly safely. *See* TR at

¹⁸ Without explanation, then Respondent contradicts its argument that Complainant flew unfit from the beginning of the shift, by claiming that Complainant flew fit and that when he declared himself unfit he was not. *See id.* at 9. Respondent contends that Complainant was merely speculating that he would not be unfit four hours later after taking a break. *See id.* Respondent argues Complainant should not have declared himself unfit without at least trying to recuperate over the break, and was wrong also to declare the crew unfit, because by "taking the entire crew offline, Douglas's actions displaced passengers and caused the loss of revenue to the company because the flight had to be cancelled." *See id.*, citing Fizer's testimony at 845. *See id.* at 13. For the reasons discussed above, I do not find that Complainant's decision to declare himself and his crew unfit premature. Only two or three hours remained before the time that the pilot and crew would need to prepare to board the next flight, even if they were to utilize the crew lounge to rest instead of returning home.

328-329, 349; *see also* JX 41:2 at 00:16 to 00:29; JX 47 at 7-8. I thus find that Respondent fails to support its claim that Complainant began his shift unfit to fly on March 23, 2005.

Based on the evidence, I find that Respondent fails to provide evidence that Complainant flew unfit or violated any other requirement relating to air carrier safety under this subtitle or any other law of the United States. Therefore, I conclude that Respondent cannot claim wrongdoing by Complainant as an affirmative defense.

Knowledge of Protected Activity

In a whistleblower case the employer's knowledge of the protected activity is also required, which may be shown by circumstantial evidence. *Rooks, supra*, slip op. at 5; *Kester v. Carolina Power and Light Co.*, slip. op at 9, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 20, 2003). A whistleblower must show that an employee with authority to take the adverse action, or an employee "with substantial input" in that decision, knew of the protected activity. *See id.*, slip op. at 5-6. It is undisputed that Complainant's Respondent knew that Complainant declared himself and his crew unfit to fly on March 23, 2005, and knew of the related conversations between Complainant and his supervisors. The evidence indicates that SkyWest management, including Tony Fizer, Jim Breeze, Lou Bodkin, and other chief and assistant chief pilots, knew that Complainant declared himself and his crew unfit on March 23, 2005. TR at 78, 83-84, 92, 358, 441, 546-547, 553-554, 568, 723, 733; JX 2; JX 8; JX 10; JX 41:2. Thus, Respondent had knowledge of the protected activity.

Adverse Employment Action

Not everything that makes an employee unhappy is an actionable adverse action; a complainant must show that something the employer did adversely affected his employment. *Trimmer v. US DOL*, 174 F.3d 1098, 1103 (10th Cir. 1999). The Secretary's regulations forbid air carriers to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee who has engaged in protected activity. *See* 29 C.F.R. § 1979.102(b) (AIR 21); *see also* 29 C.F.R. § 24.2(b) (2003) (adopting similar definitions under similar whistleblower protection statutes). Although AIR 21 protections are not reserved for especially detrimental employment actions, such as termination, suspension, demotion, or loss of status or pay, these are certainly the most obvious examples of an adverse employment action. *See Trimmer*, 174 F.3d at 1103.

The evidence leaves no doubt that Respondent engaged in an employment action that adversely affected Complainant's employment when it terminated that employment on August 31, 2005. RX 16 at 1. Moreover, Respondent conceded this at the hearing. *See* TR at 6. I conclude that Respondent's contentions concerning adverse action are without basis because Respondent and Complainant stipulated to the adverse action. TR at 6.

Termination of employment clearly constitutes an adverse employment action. *Trimmer*, 174 F.3d at 1103. I conclude that when Respondent terminated Complainant's employment on August 31, 2005, it engaged in an adverse action against Complainant.

Whether the Protected Activity Contributed to the Adverse Employment Action

This element of an AIR 21 case requires Complainant to show by a preponderance of the evidence that the protected activity was a contributing factor in Respondent's termination of Complainant's employment. *See* 49 U.S.C.A. § 42121(b)(2)(B)(i), (iii) (2003); 29 C.F.R. § 1979.104(b). A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Heinrich v. Echolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 10 (ARB June 29, 2006). The causal nexus between protected activity and adverse employment action may be established using circumstantial evidence. *See Frady v. Tennessee Valley Authority*, ALJ Nos. 1992-ERA-19 and 34, slip op. at 3 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), *quoting Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

Temporal Proximity Between Protected Activity and Adverse Action

An unfavorable personnel action taken shortly after a protected disclosure may lead the fact finder to infer that the disclosure contributed to the employer's adverse employment action. 29 C.F.R. § 1980.104(b)(2); *Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (per curiam). Temporal evidence is but one factor to be considered in determining whether the evidence as a whole suffices to raise the inference that the adverse action was taken in retaliation for the protected activity. *See Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173, 177 (3d Cir.1997). Although temporal proximity between the protected activity and the adverse employment action circumstantially creates an inference of causation, it may not be sufficient to establish a violation of AIR 21. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 3, 2004).

Where the protected activity and the adverse action are separated by an intervening event that could have *independently* caused the adverse action, the inference of causation is compromised. *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1, slip op. at 8 (ARB July 31, 2001). However, the Board has indicated that even where an intervening event breaks the *temporal* link, other evidence may establish the causal link. *Id.*, citing *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000) (emphasis added). Thus, where the temporal evidence is compromised, other evidence must be produced in order to show a causal nexus. *See Farrell*, 206 F.3d at 279-280.

Complainant argues that the causal nexus between the protected activity and his termination is established by the temporal proximity of the events during the last five months of Complainant's employment with Respondent. Prior to that time, Complainant had a good employment record. He had no problems or discipline in 16 years he had worked for Respondent. JX 47 at 62. A few months after he was disciplined for the protected activity, Complainant was singled out by Respondent for the graffiti investigation. When Complainant did not admit he wrote the graffiti, he was suspended and subsequently fired. Complainant raised the timeline of events to the September Review Board and one juror on the Board responded, "I agree. This is all very strange." *Id.*

Respondent argues that any causal link that may exist between the protected activity and the adverse action is broken by an intervening event that independently could have caused the adverse action. Respondent crafts an intervening event, however, accusing Complainant of "participation" in the Delta ramp incident and arguing that Complainant could have been fired for such participation.

The intervening event must, at minimum, have a factual basis. *See Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6-7 (April 28, 2006). Respondent fails to cite any evidence of "participation" by Complainant in the Delta ramp incident. To the contrary, the evidence supports that Complainant was not a participant, but rather was a witness, to the event. Two Delta supervisors witnessed and reported the First Officer on a SkyWest aircraft made an obscene gesture at Delta ramp agents while taxiing by their ramp. TR at 907-910. Fizer confronted First Officer Troy Brewer, who demanded Fizer produce proof of the incident. JX 33 at 5. Fizer stated that he did not need to prove it because the report from the Delta supervisors was sufficient proof. *Id.* He told Brewer he was putting the report of the incident into Brewer's personnel file and that if such an event happened again, Brewer would be disciplined. *Id.* Complainant asked why he was in attendance and Fizer stated it was because Complainant was the pilot on the flight in which Brewer made the obscene gesture, but Fizer did not accuse Complainant of participation or having any responsibility for the incident. Fizer confronted Complainant in that same meeting with various events that he felt Complainant was wrong to have done. Fizer told Complainant he was wrong for his decisions on March 23, 2005, demanded Complainant admit both that he was wrong and did not prevail at the May Review Board, and accused Complainant of "bad-mouthing" him. *Id.* at 7-16. It seems likely that if participation by Complainant concerning the Delta ramp incident been at issue, Fizer would have brought it up in that meeting or at some point, but Fizer did not do so then, or at any point thereafter. *See generally* JX 41:1; JX 33; JX 34; 41:3, 4, 5, 6; JX 47. In fact, no evidence indicates Fizer ever accused Complainant of participation in the Delta ramp incident.

Thus, Respondent fails to provide a factual basis for its argument that would break the causal nexus. *See Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-A1R-22, slip op. at 9 (ARB November 30, 2005), citing *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Therefore, I find no basis for Respondent's argument that Complainant could have been fired for "participation" in the Delta ramp incident.

Respondent also claims that Complainant wrote the graffiti and that Respondent could have terminated Complainant for writing the graffiti.¹⁹ I find that this event constitutes an intervening factor because the protected activity and the termination are separated by an intervening event that could have independently caused the termination. *See Tracanna, supra*, slip op. at 8.

The Board has determined that where the temporal link is comprised, a complainant is then required to produce other evidence in order to show a causal nexus. *See id.*; *see also*

¹⁹ Respondent states it did not fire Complainant for writing the graffiti but rather fired Complainant for lying when he denied writing the graffiti.

Farrell, 206 F.3d at 279-280; *Kachmar*, 109 F.3d at 177. Thus, in order to prevail, Complainant is required to produce other evidence in order to establish the causal link.

The Meeting on July 19, 2005

Complainant argues that the audio and written recordings of the July 19, 2005 meeting between Complainant and his supervisor, Tony Fizer, reflect retaliatory animus concerning the protected activity. Respondent argues that the meeting does not reflect such intent, and that the meeting was held to address Complainant "bad-mouthing" Fizer and to pass along the recommendations of the May Review Board.

For the following reasons, I find that Fizer's meeting with Complainant on July 19, 2005 reflects retaliatory animus on Fizer's part because he directly confronted Complainant about the protected activity and insisted that Complainant admit that he was wrong for engaging in the protected activity. Fizer asked Complainant whether he agreed with Fizer that Complainant erred in his decisions on March 23, 2005 concerning declaring himself and his crew unfit, and then demanded that Complainant admit he was wrong and admit that he had not prevailed at the May Review Board. JX 33 at 7-11; JX 41:2. Complainant responded that he disagreed, based on what he had been told after the May Review Board had made its decision to downgrade the discipline. JX 33 at 7-8, 12; JX 41:2.²⁰ Fizer responded by raising his voice, stating emphatically to Complainant, "You were wrong under that situation. And if you don't think you were, then we need to take a time-out here and reevaluate the whole damn thing, until you understand that you were wrong, because I don't want you to do that again." JX 33 at 10; JX 41:2 (audio recording).

At the hearing, Fizer recalled that in the July 19, 2005 meeting, he did his job of passing on the recommendations of the May Review Board. TR at 637, 641, 813-816, 827-828. He denied feeling bothered, annoyed or angry, and claimed that he was focused on discussing the corrective action recommended by the May Review Board. *Id.* He added that he was merely doing his job, "Little things like this come up, big things come up. It's my responsibility to deal with them." *Id.* at 813. Based on the tone, demeanor and content of the July 19, 2005 meeting, I find disingenuous Fizer's claim that he did not feel bothered and was merely passing on the recommendations of the May Review Board.²¹

²⁰ Immediately after the May Review Board made its decision, the board moderator, Kelly Jasmin, told Complainant that the Board ruled that the Counseling Statement had been reduced to an Important Conversation, that the loss of a week's pay had been reversed. TR at 1001-1005; JX 47 at 62. She told the September Review Board she spoke with Complainant immediately after the May Review Board hearing and told Complainant, "congratulations. They did decide to give you what you were asking for." JX 47 at 67. Complainant was pleased with this result. TR at 550, 573.

²¹ I also do not find Fizer ever actually conveyed the recommendation of the May Review Board. It is unclear whether this was a miscommunication between Fizer and the May Review Board, but it may have been. Fizer testified that in the meeting on July 19, 2005, he brought up to Complainant the recommendations that Jasmin passed along to him from the May Review Board. TR at 637, 641. But Fizer did not bring up the recommendations that Macias testified that the May Review Board asked that he bring up. May Review Board juror Michael Macias testified that after the Board concluded, he on behalf of the May Review Board, asked Board moderator Kelly Jasmin to ask Fizer to tell Complainant in the future that a crew member should make his or her own phone call to SkyWest if he or she is unfit, and that should Complainant have medical problems in the future he should always consult an FAA flight surgeon. TR at 229-230, 231-232, 1004-1005. Moderator Kelly Jasmin testified she passed

I also find evidence of retaliatory animus in the audio and written recordings of the July 19, 2005 meeting where Fizer repeatedly accused Complainant of "bad-mouthing" him to other employees in the crew lounge. JX 33 at 7-16; JX 41:2. Fizer claimed that SAPA representatives Dave Bechtold and Jim Black had told Fizer that Complainant was "out there bad-mouthing me." JX 33 at 12. Complainant denied doing so. JX 33 at 12. At the September Review Board, which ruled in favor of Complainant's termination, Fizer characterized Complainant as having a time line and motive for writing the graffiti, and in support of that claim defended his accusation of Complainant "bad-mouthing" him because "management can't represent ourselves when it comes to people out bad-mouthing." JX 47 at 25-26. Complainant told the September Review Board that his SAPA representatives acted as employee representatives and were individuals to whom he could vent his frustrations but this did not including "bad-mouthing" Fizer. JX 47 at 27, 34. The September Review Board ruled in favor of Fizer's decision to terminate Complainant.²² At the hearing, Jim Black and Dave Bechtold testified that that they never told Fizer that Complainant had been "bad mouthing" Fizer and they did not recall Complainant ever bad-mouthing Tony Fizer. TR at 292-293, 508, 870; JX 31; JX 47 at 27.

At the July 19, 2005 meeting, Fizer stated that if Complainant were bad-mouthing him to others at SkyWest, that would be wrong, because Fizer himself had been the one who obtained Complainant's reduced discipline ruling from the May Review Board by stating Complainant had been a good employee at SkyWest for 16 years, and was a "16-year good guy". JX 33 at 7-9; JX 41:2. Fizer told Complainant that this was the only reason why Complainant received his pay back concerning the March 23, 2005 incident in which Complainant declared himself and his crew unfit. JX 33 at 8; JX 41:2.

No evidence outside of Fizer's statements actually supports Fizer's claim that he advocated for reduced discipline or that his statement (that Complainant was a good guy) resulted in the decision by the May Review board to reduce discipline. An individual who sat on the May Review Board, Michael Macias, testified that Fizer did not ask the Board to overturn or reduce the discipline. TR at 242-243. Macias testified Fizer stating at the hearing of the May

the request on to Fizer and that she did not recall specifically what the requests were, but had no reason to doubt Macias' testimony. TR at 1004-1005. Fizer testified he received instructions from the May Review Board via Kelly Jasmin but his testimony does not indicate what his understanding of those instructions were. TR at 638.

²² The September Review Board, like all SkyWest review boards, did not have the authority to take away Fizer's decision, and Fizer voluntarily agreed to abide by the decision of the board. JX 7 at 8, item H; JX 34 at 3. Even if Respondent had raised the argument that the September Review Board removed any impermissible retaliatory animus from the termination decision, I would still find that the protected activity contributed to Respondent's decision to terminate Complainant. The Board relied on Fizer's information in its decision to uphold Complainant's termination as reflected in the testimony of one of its jurors, Christopher Abell. TR at 1155-1157. Fizer characterized Complainant to the September Review Board as having a timeline and a motive for writing the graffiti, and as part of that characterization Fizer misinformed the Review Board that Complainant engaged in repeated "bad-mouthing" of Fizer to other employees. JX 33 at 7-16; JX 41:2; JX 47 at 61. As discussed above, the testimony of those employees refuted Fizer's claim. TR at 292-293, 508, 870; JX 31. Thus, even if the Board were an authoritative body, the September Review Board was given misinformation from Fizer on which it relied for its decision to favor Complainant's termination. As a result, such a decision would merely act as a rubber stamp of Fizer's termination of Complainant, and therefore Respondent could not in any event evade liability with this extra step of review. See *Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657, 664, 672, 663 n.11 (4th Cir. 2003); see also *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir.2000); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057 (8th Cir.1993); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir.1993).

Review Board that the decision to discipline Complainant was *not* about Complainant being a 16-year good guy. *Id.*

Fizer told the September Review Board that the May Review Board's "exact words" to Fizer were that the only reason that the discipline was downgraded was "because he was a 16-year good guy." JX 34 at 28; JX 41. Fizer also told the September Review Board that he told the May Review Board "Don is a 16-year good guy. I don't have a problem with Don. I just have a problem with Don's decision that night, and that's why we had the review board." JX 34 at 29; JX 41. Macias testified that the May Review Board did not speak with Fizer or Complainant after it issued its decision, but rather made a recommendation to Fizer, delivered by Board moderator Kelly Jasmin, as to what Complainant should do in similar circumstances in the future. TR at 229-230, 231-232.

At the September Review Board, Fizer claimed that the July 19, 2005 meeting with Complainant was a time in which they were able to work out their differences. JX 34 at 36. He told the Board, "I even called Jim Breeze, and I told him at that point, I said, Hey, I had a nice conversation with Don. We kind of put all of the water under the bridge. It's all behind us. Everything's cool, and -- (inaudible). I don't have any issues with Don, and he didn't have any issues with me." JX 34 at 36. Fizer originally opposed the September Review Board hearing the tape recording of the July 19, 2005 meeting. *Id.* at 19-20. When a Board member asked him if there was something in the tape Fizer would be ashamed of he denied it and asserted the meeting went well with a good hearing of differences between Fizer and Complainant, with a positive resolution at the end of the meeting. JX 47 at 19-20, 24. Later, as the Board began discussing their desire to hear the tape (41:4 at 55:00), Fizer volunteered: "If I was chewing his ass, I was chewing his ass. If I was defensive about him bad mouthing me in the crew lounge, or bad-mouthing SAPA, then I was defensive about that. I'll give him all of that." JX 47 at 61. At the hearing, Fizer admitted that it would not have been against company policy if Complainant had expressed unhappiness about the discipline to others with whom he worked, and volunteered that this would be the case even while working a shift. TR at 851-852.

I find that Fizer lacks credibility because of his claims that he obtained Complainant's reduced discipline, and because of his baseless accusations of "bad-mouthing." I also find Fizer's antagonistic statements concerning the protected activity provide circumstantial evidence of a retaliatory motive for terminating Complainant's employment. *See Timmons v. Mattingly Testing Services*, ARB No. 95-ERA-40, ALJ No. 1995-ERA-40, slip op. at 6 (ARB June 21, 1996). Fizer's demeanor in the tape recording of the July 19, 2005 meeting, his demands that Complainant admit he was wrong about the protected activity and wrong to think he prevailed at the May Review Board, and his baseless accusations in that meeting and before the September Review Board, taken together, establish that the protected activity contributed to Fizer's decision to terminate Complainant. I therefore find that the July 19, 2005 meeting and Fizer's characterization of the meeting before the September Review Board establish a causal nexus between the protected activity and Complainant's termination.

Fizer's Decisions Prior to Complainant's Termination

I also find that decisions made by Fizer concerning Complainant, after the meeting on July 19, 2005 up until Complainant's termination, further support the causal nexus. At the July 19, 2005 meeting, Fizer demanded Complainant admit he was wrong for engaging in the protected activity and then accused Complainant of "bad-mouthing" him. A few weeks later, Fizer accused Complainant of writing the graffiti and suspended him. Two weeks later, Complainant was terminated for writing the graffiti. Alone, a series of accusations related to "bad-mouthing" and writing graffiti would not necessarily raise an inference that Complainant was being targeted for the protected activity. However, such instances, in the context of Fizer's demand that Complainant admit he did not prevail at the May Review Board and that he was wrong to have engaged in the protected activity, as well as Fizer's manner of singling out Complainant for the graffiti investigation, taken together raise a strong inference that Fizer's decision to fire Complainant was at least in part in retaliation for Complainant's protected activity of declaring himself and his crew unfit. TR at 487-488, 492, 495, 784, 787-788, 1099; JX 47 at 49, 62; JX 24 at 47; JX 41.²³

After the July 19, 2005 meeting, Fizer was out of the office for a few weeks. TR at 769. Upon returning to the office, Fizer singled out Complainant for the handwriting investigation. *Id.* Fizer claims this was because he noticed that the manifest discussed in the July 19, 2005 meeting resembled the graffiti on the cork board. *Id.* Fizer arranged for a handwriting analyst to compare these writings. The analyst, Marilyn Gillette, viewed the manifest and the cork board for 15 minutes and concluded the manifest and graffiti were authored by the same person.²⁴ Fizer then accused Complainant of writing the graffiti, demanded Complainant admit he wrote the graffiti and suspended Complainant when he would not admit he wrote the graffiti, stating that if further analysis of Complainant's handwriting confirmed he wrote the graffiti, he would be terminated.

When the September Review Board asked Fizer why he escalated the graffiti incident into an investigation, Fizer denied that it was an escalation. 41:4 at 1:03:57. He stated he had initially thought that First Officer Troy Brewer had written the manifest that he thought matched the graffiti and stated he was sick to his stomach when he learned Complainant had written the manifest. 41:4 at 1:04:11.²⁵ Fizer told the Board that it was coincidental that he even noticed

²³ An alternative explanation for Fizer's demand that Complainant admit he did not prevail at the May Review Board could be that Fizer was retaliating against Complainant appealing the discipline to the May Review Board. But even if this were the case, this too would be retaliation for protected activity, because as discussed above the statements Complainant made in his appeal to the May Review Board concerning the decisions he made on March 23, 2005 are also protected activity. TR at 100-103, 229, 1004-1005.

²⁴ Another supervisor, Lou Bodkin, felt this first analysis was "hokey" because the analysis was too brief and the analyst was provided with only one handwriting sample to compare with the graffiti. TR at 950-955.

²⁵ Respondent claims this statement shows that Fizer did not single out Complainant or feel ill will toward Complainant because he testified that he was surprised and felt a "sinking feeling" that Complainant wrote the manifest. TR at 779-780. But the record reflects Fizer was shocked because in his experience First Officers *always* write the required information on the manifest of each flight so Fizer assumed Complainant, a pilot, did not author the manifest. *Id.* Moreover, it was only *after* Fizer learned that Complainant authored the manifest that he escalated the matter into an investigation. As for the claim that Fizer did not dislike Complainant, evidence of Fizer's personal feelings toward Complainant would come from Fizer himself. I find Fizer to be less than credible when it comes to

Complainant's manifest, but that once he noticed it, "I ran with it." 41:4 at 1:09:00. In making his determination that Complainant had lied to him in denying authoring the graffiti, Fizer never considered other employees and never looked at the handwriting of other employees. TR at 838; JX 47 at 49, 62-63. The September Review Board asked Fizer about the fact he provided the handwriting experts only samples of Complainant's handwriting and no samples of other employees' handwriting. JX 47 at 49-50. Fizer defended his choices by claiming that Complainant was motivated to write the graffiti because of the outcome of the May Review Board. JX 47 at 49, 62. Fizer claimed Complainant was unhappy with the outcome of the May Review Board, which showed, according to Fizer, a timeline and an intent to write the graffiti and then lie about it. JX 47 at 50-51, 62. When the Board asked Fizer why he had not pulled random samples of other employees' handwriting, Fizer replied that once he saw the similarities between the manifest written by Complainant and the graffiti, he found it unnecessary. JX 47 at 50-51.

I find that the evidence indicates that Complainant was singled out for the graffiti investigation because of an unsupported belief that Complainant had a timeline and a motive and was unhappy and "bad-mouthing" Fizer to other employees. When Fizer brought in a second expert, Linda Cropp, she requested Respondent to provide exemplars (handwriting samples) of any employee suspected of writing the graffiti, Fizer arranged for the analyst to receive exemplars only of Complainant. This seems especially odd given that Fizer apparently had believed Brewer made the obscene gesture in the Delta ramp incident that occurred in July 2005; when he accused Brewer and Brewer demanded proof, Fizer responded that the Delta supervisors' report of the incident had proven that Brewer made the gesture and that Fizer was putting their report of the incident in Brewer's file. JX 33 at 5. I find it odd that Fizer, who believed Brewer made the gesture around the same time that the cork board graffiti appeared in July 2005, did not include Brewer in the handwriting investigation. Moreover, he did not include in the investigation any employee who was disciplined around that time period, or any employee who had lodged a complaint against management.²⁶

Thus, I conclude that Fizer's choice to single out Complainant for the handwriting investigation was unreasonable and evidence that Complainant was targeted in a discriminatory manner. I find no reason to believe that Fizer had a basis to believe that Complainant had a timeline and a motive to write the graffiti. At the point in time that the graffiti emerged, in early July (JX 47 at 3), Complainant had heard nothing about his discipline for some time and thought the entire matter had been resolved in his favor. Kelly Jasmin, the moderator at the May Review Board, testified that she told Complainant that the Review Board would be giving him what he wanted. TR at 1001. She told the September Review Board that she told Complainant of the decision of the May Review Board, "congratulations. They did decide to give you what you were asking for." JX 47 at 67. Complainant was pleased with this result. TR at 550, 573. Fizer

his account of events concerning Complainant. Moreover, the presence or absence of ill will is not determinative of any intent to retaliate for protected activity. Such intent can be motivated by many factors unrelated to dislike.

²⁶ There are a couple of indications that suggest that there were complaints against Fizer in 2005. Fizer supervised 2,000 pilots. Among this many employees, it seems likely that there would be some who would be disgruntled about or file a complaint against management. In addition, one witness, a SkyWest pilot who filed a complaint against Fizer in late 2005, was told by Kelly Jasmin that his was not the only complaint, that she was tired of processing complaints against management, and that she had a backlog of 50-60 complainants against SkyWest management in Salt Lake. TR at 1064-65

himself thought he and Complainant left the May Review Board “on pretty good terms.” TR at 642. Complainant had no incidents or even contact with Fizer in between the May Review Board and the meeting on July 19, 2005. TR at 292-293, 508, 550, 573, 642, 870, 1001; JX 31. Moreover, in between the May Review Board and the July 19 meeting, only one event occurred in relation to the May Review Board, and it was a rather benign event. Complainant received an email from Kelly Mitchell on June 14, 2005, concerning Kelly Jasmin's request that Mitchell follow up with Complainant to ensure that the counseling statement was “replaced by a verbal discussion, that your user/vacation hours used during your suspension are credited, and that any missing pay for scheduled flights missed is reflected in your next pay check.” Mitchell indicated to Complainant that once all of these items were accomplished she would email him and that in the meantime she was available should he have any questions. JX 9. It is unclear whether Complainant even read this email (TR at 382-383), but it certainly seems extremely unlikely that the email, the May Review Board, or any event prior to the July 19, 2005 meeting would lead a reasonable person to single out Complainant for the handwriting investigation. In addition, any response Complainant may have had to the July 19, 2005 meeting would not be a rationale to suspect Complainant of writing the graffiti, given that the graffiti emerged prior to the meeting. JX 47 at 3. Fizer knew of this and testified to this fact. TR at 644-45; JX 47 at 3:3-10.

For the reasons stated above, I find that Fizer's testimony concerning Complainant in July 2005 and August 2005 are lacking in credibility, and that Fizer's choices concerning Complainant during that time period provide strong evidence that the decision to terminate Complainant was at least in part motivated by animus concerning Complainant's decision to declare himself and his crew unfit to fly. Thus, Complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in Respondent's termination of Complainant's employment.

Respondent's Showing of a Non-Discriminatory Motive

If a complainant proves by the preponderance of the evidence that the Respondent violated AIR 21, the Complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Hirst v. Southeast Airlines, Inc.*, ARB Case No. 04-116, 04-160, ALJ Case No. 2003-AIR-47, slip op. at 7 (ARB January 31, 2007). “Clear and convincing” evidence is more than a preponderance of the evidence but less than proof “beyond a reasonable doubt.” *Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12, slip op. at 4 (Sec'y May 24, 1995). An employer fails to meet this burden of proof if it is determined that the employer's stated basis for the adverse employment action is pretextual, that is, a false cover for the adverse action where the real basis is impermissible retaliation for protected activity. *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-17, slip op. at 18 (ARB March 30, 2007). Where an employer offers shifting explanations for the adverse personnel action, this in itself may be sufficient to provide evidence of pretext. *Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 110 (1st Cir. 2006). Pretext also may be found where an employer engages in disparate treatment, meting out more lenient treatment to similarly situated employees who did not engage in protected activity. *Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (per curiam) (affirming the finding of disparate treatment in AIR 21 case where the complainant was punished twice while

another employee was punished once for actions that were at least as objectionable as the complainant's actions); *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990). Pretext does not automatically compel a finding of discrimination. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2005-AIR-11, slip op. at 9 (ARB June 29, 2007). Where pretext is present, the administrative law judge must consider the evidence and determine whether a violation of AIR 21 occurred. *Id.*

Respondent claims that clear and convincing evidence shows it would have terminated Complainant regardless of any protected activity. *See* Respondent's Post-trial brief at 53-54. Respondent does not cite the record in reference to any of its claims of clear and convincing evidence, but refers to testimony of Kelly Jasmin and Complainant to emphasize that it would be reasonable to terminate an employee who wrote obscenities on company property if the employee refused to take responsibility for doing so. *See id.* at 53. Respondent emphasizes that between the dates of March 23, 2005 (the date of the protected activity) and August 3, 2005 (the date Complainant's employment was terminated), Complainant was involved in two additional disciplinary incidents, the Delta ramp incident and the graffiti. *See id.* at 54. Respondent argues, "The evidence establishes that these incidents led to a loss of trust in Douglas by SkyWest, at several levels in the chain of command, and constituted a legitimate basis for SkyWest's decision to terminate Douglas regardless of any prior alleged protected activity." *See id.* at 54 (emphasis in original).

While arguing against the causal nexus, Respondent claimed that Complainant *could have been* fired for "participation" in the Delta ramp incident. Here, Respondent claims that Complainant *was* fired for "participation" in the Delta ramp incident. As discussed above, the evidence does not indicate that Complainant participated in the Delta ramp incident, or that his supervisor, Tony Fizer, ever suspected or accused him of doing so, or held him responsible for the actions of the person who was suspected. JX 33 at 7-16; JX 41:2. When Fizer discussed the reason for termination of Complainant with the September Review Board, he did not present the Delta ramp incident. JX 34 at 25-59. Thus I find that Respondent argues that Complainant *was* fired for "participation" in the Delta ramp incident, without citing evidence to show participation or to show that such participation was a reason Respondent fired Complainant. In fact, Respondent does not cite the record for any of its claims that clear and convincing evidence shows Respondent would have terminated Complainant regardless of any protected activity. Therefore, I conclude that this statement appears to be a new basis of termination created by Respondent after the termination. Respondent claims that Complainant was fired because "these incidents led to a loss of trust" (*see id.* at 54, emphasis in original) departs from the stated reason for termination in Respondent's Termination Letter to Complainant on August 31, 2005. *See* JX 16 at 82-83. The Termination Letter states Complainant was terminated due to dishonesty, based on Respondent's belief that Complainant lied when he denied writing the graffiti. *See id.* I find that there are two differences between the explanations. First, there is a difference between terminating an individual's employment based on a general "loss of trust" and termination due to a specific incident concerning alleged dishonesty. Second, Respondent claims in its Post-trial Brief that the basis for the loss of trust leading to Complainant's firing was because of *multiple* incidents, the Delta ramp incident and the graffiti. *See* Respondent's Post-trial brief at 53-54. Respondent cites no evidence to support the claim that Respondent lost trust concerning the Delta ramp incident prior to the termination; it appears to be an explanation emerging presently,

well after the termination. Thus, I conclude Respondent provides shifting explanations for termination of employment because it appears that a new explanation for termination emerged only after Complainant filed his AIR 21 complaint.

Where the employer offers shifting explanations for an adverse employment action, this in itself can serve as evidence of pretext. *See Vieques Air Link*, 437 F.3d at 110 (affirming the Administrative Review Board's finding of pretext where the employer did not offer lack of seniority as the reason for a disadvantageous transfer until the time of the hearing); *see also E.C. Waste, Inc. v. N.L.R.B.*, 359 F.3d 36, 44 (1st Cir. 2004) (affirming a finding of pretext where the employer changed its explanation at the time of the hearing for why it terminated plaintiff). I find that Respondent provides an after-the-fact explanation for Complainant's termination, a shifting explanation for terminating Complainant's employment significantly different from the reason Complainant was provided at the time of his termination. *See Vieques Air Link*, 437 F.3d at 110. I conclude that these inconsistencies provide evidence of pretext.

Disparate discipline as to similarly situated employees

An employee can prove pretext by showing the employer meted out more lenient treatment to similarly situated employees who were not in the protected class, or as here, who did not engage in protected activity. *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir.1994); *Smith*, 302 F.3d at 834-35; *Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (per curiam) (affirming the finding of disparate treatment in AIR 21 case where the complainant was punished twice while another employee was punished once for actions that were at least as objectionable as the complainant's actions); *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990).

Complainant argues as evidence of pretext that Respondent meted out a more lenient response to a similarly situated employee concerning the Delta ramp incident, while choosing to terminate Complainant for writing the graffiti. Fizer claimed that the reason he launched an extensive investigation concerning the graffiti but did not concerning the Delta ramp incident is because the graffiti created "a sexual harassment issue" and created a "hostile work environment". TR at 715-716, 718. Respondent argues that this required the launching of the investigation. *See Respondent's Post-trial Brief* at 24.

I find two significant problems with Respondent's claims. First, the Delta ramp incident involved an obscene gesture ("flipping off" the Delta ramp agents) that has the same meaning and connotation as the obscenity contained in the graffiti on the cork board ("FUCK FIZER") as well as the graffiti on the wall ("YOU CAN STILL FUCK FIZER"). JX 18; JX 19; JX 25. The graffiti contained a phrase that is commonly regarded as an offensive gesture equivalent to the obscene gesture made to the Delta ramp agents. That phrase is generally considered as lacking in genuine sexual content and is used as a general expletive, whereas a sexually hostile work environment offends or references sexual activity or sexual conduct. Based on common usage and the evidence, I find no such sexualizing connotation in the term as it was used in the graffiti and as it was displayed in the obscene gesture to the Delta ramp agents. Second, Respondent fails to cite any evidence in support of any reasonable belief on Fizer's part that he or any manager or employee at SkyWest felt sexually targeted by the graffiti or that he or SkyWest had

a concern at the time that the graffiti created a hostile workplace. Thus, I find Fizer's explanation for treating the graffiti differently than the Delta ramp incident not credible, particularly given the fact that Respondent allowed the graffiti to remain a part of the SkyWest work environment in Salt Lake for at least two months by Fizer's own admission. JX 34 at 37; JX 47 at 4. This was the same time period that Fizer launched the handwriting investigation, concluded the investigation, recommended to other managers that Complainant be terminated, terminated Complainant's employment, and advocated that termination before the September Review Board.

In addition, the reason Complainant was fired had nothing to do with creating a sexually hostile work environment; this matter was never raised to Complainant, or other managers, or the September Review Board. The stated reason for termination of Complainant's employment, at the time of termination, was "dishonesty" for not admitting that he was the author of the graffiti. JX 16 at 1-2. I find that Fizer's concept of a "hostile work environment" was an idea Fizer formed after the fact to justify his actions. Fizer's shifting explanations for the reason he investigated the graffiti, as well as for his disparate treatment of the First Officer who he confronted concerning the Delta ramp incident, lead me to conclude that Respondent's stated basis for the termination of Complainant's employment is pretextual.

Respondent attempts to argue that the difference between Fizer's approaches to the Delta ramp incident and to the graffiti is justified. Fizer testified that the difference in his treatment of the two incidents is that the presence of graffiti made it "fairly easy to start investigating something like that" whereas the Delta ramp incident involved "an isolated incident that would be very hard to go and interview, try and figure out exactly what happened." TR at 715-716. Yet to "figure out what had happened" would seem to be exactly what Fizer did. As discussed above, Fizer confronted Brewer for making an obscene gesture at Delta ramp agents, and when Brewer demanded proof, Fizer stated that the report of the incident from the two Delta supervisors was proof. JX 33 at 4. He also told Brewer that he was putting the report of the incident into Brewer's file. *Id.* He took no other action except to warn Brewer that if the incident happened again in the future he would be disciplined.

The apparent determination that Brewer was dishonest in denying that he was responsible for the Delta ramp incident seems to be quite similar to the determination that Fizer made in concluding Complainant was dishonest in denying that he was responsible for writing the graffiti. I therefore conclude that Fizer engaged in disparate disciplinary measures.

Furthermore, I find that these different measures were taken toward two similarly situated individuals not only because the incidents in question (graffiti and the obscene gesture) were similar but because SkyWest company policy reflects that Brewer and Complainant were suspected of engaging in similar actions that impacted Respondent similarly. I find that the disparate treatment of the two incidents is particularly striking given that it is difficult to see how the ramp incident would not implicate the same company policy cited in both the Counseling Statement and in the Important Conversation statement, both of which were issued to Complainant based on the March 23, 2005 flight cancellation:

"SP 324

3.A. 2) Category II - Non-Safety of Flight Conduct/Revenue Loss/Service Failures: This conduct can be described as a failure to perform duties which might lead to a delayed or canceled flight, potential or actual loss of revenue, or any adverse interaction between the crewmember, customers, or other employees."

JX 8; JX 10. The obscene gesture, at minimum, caused "adverse interaction" between Delta employees and SkyWest employees, as well as between SkyWest employees (Brewer and Complainant) and SkyWest management in the meeting on July 19, 2005. Moreover, the ramp incident could impact SkyWest's professional relations with Delta. Thus, I find that Respondent took different measures with two similarly situated individuals. I find that Respondent engaged in disparate treatment of similarly situated individuals and that this provides further evidence that the stated basis for termination is pretextual.

In sum, I conclude that Respondent failed to show a non-discriminatory motive for its termination of Complainant's employment. Based on the evidence, I find that Respondent discriminated against Complainant for the protected activity of declaring himself and his crew unfit on March 23, 2005. Therefore, I find that the record shows that when Respondent terminated Complainant it impermissibly retaliated against Complainant for protected activity in violation of AIR 21.

Relief

Complainant seeks various forms of relief to remedy Respondent's violations of the Act. These are the Secretary's regulations on fashioning a remedy:

If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.
29 C.F.R. § 1979.109(b).

Abatement of the violation

Complainant's record at SkyWest should be purged of the negative references and references to the protected activity found in the relevant letters, memos and disciplinary documents written to and about him. This applies to all documents, however denominated by Respondent and in all the places they are kept. This does not apply to documents which must be retained under the Pilot Records Improvement Act, 49 U.S.C.A. § 44703(h)(1)(B)(ii)(II).

Compensatory damages

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation under 29 C.F.R. § 1979.109(b). The testimony of medical or psychiatric experts is not strictly necessary. *Thomas v. Arizona Public Service Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993). However, damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. *Id.* Complainant has failed to provide such evidence. Therefore, Complainant's request for compensatory damages is denied.

Back Pay and Restoration of Employment

Health, pension and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, such as insurance premiums. *Creekmore v. ABB Power Sys. Energy Serv., Inc.*, 1993-ERA-24 (Dep. Sec'y Feb. 14, 1996).

Complainant is awarded back pay and restoration of the terms, conditions, and privileges associated with his employment, including all privileges associated with seniority. *See id.*; *see also* 29 C.F.R. § 1979.109(b). Restoration of employment is effective immediately. *See* 29 C.F.R. § 1979.109(c). Respondent shall reimburse Complainant for all medical expenses incurred because of termination of medical benefits, including but not limited to health care premiums.

Costs and Expenses Reasonably Incurred

Complainant has prevailed under the Act and such success carries with it an award of attorney's fees and costs to Complainant's counsel. 29 C.F.R. § 1979.109(b). Thirty (30) days is hereby allowed to Complainant's counsel for the submission of an application for attorney's fees and costs. A service sheet showing that service has been made upon all the parties, including Complainant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

Respondent is also liable for reimbursement of any other expense reasonably incurred by Complainant because of termination of Complainant's employment. 29 C.F.R. § 1979.109(b). Complainant does not request or provide details as to any such expenses but if Complainant has reasonably incurred any such expense, a record of the expense may be submitted, served and responded to in the same manner as provided for attorney's fees and costs.

ORDER

1. SkyWest shall purge all of its files all negative references to Don Douglas found in the relevant letters, memos and disciplinary documents written to and about him, however denominated by SkyWest and in all the places they are kept. This does not apply to

documents which must be retained under the Pilot Records Improvement Act, 49 U.S.C.A. § 44703(h)(1)(B)(ii)(II) (2003).

2. SkyWest shall compensate Don Douglas for all back pay and shall restore the terms, conditions, and privileges associated with his employment, including seniority, effective immediately.
3. SkyWest shall reimburse Don Douglas for all medical expenses incurred because of termination of medical benefits, including but not limited to health care premiums. SkyWest shall also reimburse Don Douglas for all expenses reasonably incurred by Complainant because of termination of employment.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1979.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. 29 C.F.R. § 1979.110(b).