

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 March 2008

Case No. 2007-AIR-00008

In The Matter Of:

LEONARD OLE MALMANGER,

Complainant,

v.

AIR EVAC EMS, INC., d/b/a
AIR EVAC LIFETEAM,

Respondent.

APPEARANCES:

James A. Devine, Esq.
Springfield, Illinois
For the Complainant

Stephanie S. Kelly, Esq.
Veronica Li, Esq.
Littler & Mendelson, PC
Chicago, Illinois
For the Respondent

BEFORE: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("the Act" or "AIR21"), 49 U.S.C. § 42121 et seq. and the regulations promulgated thereunder, which can be found at 29 C.F.R. 1979. This statutory provision 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 related to air carrier safety. 49 U.S.C. § 42121(a).

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Complainant filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") on or about December 22, 2006. He alleged that he was terminated for reporting safety concerns to his supervisors in violation of AIR21. After the investigation, the Administrator found that the Respondent would have taken the same adverse action regardless of the alleged protected activity and dismissed the complaint. By letter, dated June 18, 2007, Complainant objected to the findings of the Administrator and requested a hearing before an Administrative Law Judge.

A hearing was conducted on November 7, 2007, in Springfield, Illinois. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument, and file post-hearing briefs. The hearing transcript is referred to herein as ("Tr."). The following documentary evidence was admitted: Administrative Law Judge's Exhibits ("ALJ") 1-4; Complainant's Exhibits ("CX") 1-7, 10, and 11; and Respondent's Exhibits ("RX") 1-4. Post-hearing briefs were timely received from Complainant and Respondent.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. Air Evac EMS, Inc., d/b/a Air Evac Lifeteam ("Air Evac") hired Leonard Malmanger as a regional mechanic on or about June 28, 2002.

2. On or about October 20, 2002, Dr. Joel Schneider flew an aircraft at the Springfield, Illinois, base.

3. When Dr. Schneider returned the aircraft, the engine was overtemped. Dr. Schneider did not advise anyone that the engine on the aircraft was overtemped.

4. During a pre-flight inspection of the aircraft by pilot Sam Caine, he discovered the engine had been overtemped.

5. Leonard Malmanger took the aircraft out of service and performed a "hot-end inspection" of the engine and found no defects.

6. On August 27, 2006, Leonard Malmanger wrote and sent an e-mail titled "Reminder to Air Evac CEO Colin Collins and the Air Evac board of directors."

7. On August 30, 2006, Air Evac placed Leonard Malmanger on administrative leave.

8. On September 6, 2006, Leonard Malmanger met with Steve Thomas, Carla Neff, Debra Williams, and Lendon Kok to discuss his August 27, 2006, e-mail to CEO Colin Collins and the Air Evac board of directors.

9. On or about October 3, 2006, Steve Thomas and James Loftin terminated Leonard Malmanger in a meeting at Air Evac headquarters in West Plains, Missouri.

(Tr. 8-9).

ISSUES

1. Whether Complainant is a covered employee under the Act;
2. Whether Complainant engaged in protected activity as defined by the Act;
3. Whether Complainant thereafter was subjected to adverse action regarding his employment;
4. Whether Respondent knew of the protected activity when it took the adverse action;
5. Whether Complainant's protected activity was a contributing factor for the adverse action;

6. Whether Respondent would have taken the same action in the absence of protected activity; and,
7. The appropriate remedy, if any.

SUMMARY OF THE EVIDENCE

Leonard Ole Malmanger, Complainant

Mr. Malmanger testified at the formal hearing. (Tr. 12). Mr. Malmanger received his Airframe and Power Plant certificate from the FAA, and has roughly twenty-five years of experience in the aviation industry. (Tr. 14). He worked for Respondent Air Evac, a rotary helicopter air ambulance service, from June 2002, until he was terminated on October 3, 2006. (Tr. 15, 162; RX 1).

Mr. Malmanger testified that helicopters have scheduled routine inspections and maintenance. (Tr. 15). However, aircraft are also subject to unscheduled maintenance, if a maintenance issue is discovered before or during a flight. (Tr. 15). When helicopters are being maintained, they are taken out of service, and the aircraft should not be called for a flight. (Tr. 16).

At the hearing Complainant testified that in October of 2002, Dr. Joel Schneider took a helicopter for a "joy ride," and failed to report to anyone that the engine's temperature was elevated too much upon its start. (Tr. 21-2). Complainant talked with Dr. Schneider and Len Kok, the regional maintenance manager, about the issue, but was told that it "wasn't a big deal" because the helicopter had been inspected and that there were no defects. (Tr. 22, 58-62). He told Dr. Schnieder that his actions were a safety violation, but was told by Dr. Schneider that because he was flying in a non-revenue flight status, the reporting rule did not apply to him. (Tr. 23).

On August 27, 2007, Complainant sent an e-mail titled "Reminder" to Colin Collins, CEO of Air Evac and copies forwarded to members of the Board of Directors and investors. (CX 3). In the e-mail, he wrote:

Colin, remember me, Ole? I'm a company mechanic in Springfield, Ill. I understand you are the new membership boss. And as you recall, when the company was bought out, the new owners wanted a new 'corporate image' and proceeded to put a new paint scheme and new flight suits in service? Remember?

And now as new membership boss, you will probably want to 'change' the membership brochure, right? well, as a reminder, in the new brochure, under 'Terms and Conditions' you would want to be honest, right? #9 services may not be available, in addition to, remember? because a friend of the 'president' has taken the helicopter for a JOYRIDE. Remember, [C]olin? Remember? You used company resources to deliver a message to me to 'keep my mouth shut' Remember? Shame on you, [C]olin! You should have delivered that message in person. Remember what the Bell check airman said, about your friend's pilot skills? Remember? Do I need to remind you? Did you threaten a company check airman's job to 'sign off' your friend? Remember? Just a side note to the audience, your friend returned the helicopter in an unairworthy condition, and didn't know it, and didn't tell anyone what happened. Remember? Remember, Colin? then as a post flight inspection I performed, we missed a patient flight. Remember? Colin? Tell me, Colin, where is the SAFETY in this incident? I just recently found out why you want me to keep my mouth shut. I am scheduled to be in West Plains Nov 10-15 for maintenance training. I expect we can talk about this then? The reason I'm telling the investors is because of respect. If the president of my company talked to my employees like that, I would like to know. Sleep well, Colin. Ole.

Id.

On August 30, 2006, Mr. Malmanger received a memo from Air Evac and was told to go home on administrative leave. (Tr. 24). He stated that the memo was a delayed response to the August 27, 2006, e-mail he had written to the CEO of Air Evac, Colin Collins, and several Air Evac investors, regarding Dr. Schneider's flight issue. (Tr. 17, 23, 57, 84; CX-3). This e-mail concerning the flight issue was sent four years after the flight had occurred. (Tr. 58). Mr. Malmanger stated that he never meant to sound insubordinate by sending the e-mail, but just wanted to talk with the CEO about the issue. (Tr. 25). However, in his complaint statement with OSHA, Mr. Malmanger testified that he composed the e-mail to Mr. Collins because he thought that Mr. Collins and Mr. Kok were going to use an upcoming employee performance report to fire Mr. Malmanger. (Tr. 87; RX-2, 3). A few days after he was sent home, he called Steve Thomas, the director of maintenance with Air Evac, and

scheduled a meeting regarding the following safety issues: Dr. Schneider's flight, an issue with a leaking oil tank, and an issue regarding a tail rotor assembly being out of limits. (Tr. 26, 31).

Mr. Malmanger further testified regarding the oil tank issue, and stated that during a graduation party for Mr. Kok's daughter which occurred around May 26, 2006, he overheard Mr. Kok talking on the phone and asking Leland Sutter, a base mechanic how much the oil tank in question was leaking; he proceeded to tell Mr. Sutter that the leak was within limits. (Tr. 27-28). Mr. Malmanger testified that immediately after the phone call, Mr. Kok told him about the extent of his conversation with Mr. Sutter, and that Mr. Malmanger was surprised because he later discovered that there were no leak limits for oil tanks. (Tr. 28-9; CX-5). Mr. Kok made another phone call that night, in which he ordered a replacement tank that needed to be delivered to the facility. (Tr. 30). Mr. Malmanger later found out that although the aircraft was supposed to have been out of service while the replacement oil tank was being delivered, the aircraft had been flown at that time. (Tr. 51).

Mr. Malmanger also testified about the tail rotor limit issue, and stated that in April, 2006, Alex Wacks, a base mechanic, talked to him regarding a tail rotor that was out of limits according to a maintenance manual. (Tr. 31-32; CX-6). Upon Mr. Malmanger's inspection of the aircraft, Mr. Kok, on the phone with lead pilot Larry Pluhar, insisted that a different manual correctly declared that the tail rotor was within its limits. (Tr. 34; CX-7). The blade was replaced over Mr. Kok's objection. (Tr. 37).

Mr. Malmanger stated that he was counseled for failure to meet job performance standards. (Tr. 71-72). The Disciplinary Action report, dated February 23, 2006, upon which the counseling of Complainant by Mr. Kok was based, stated the following:

Description of act or omission causing action to be taken: Light on fuel press/load meter out for at least one year. Clock backlight out for 8 to 10 months. [transmission] over serviced throwing Oil on [transmission] deck and [transmission] mounts which will destroy mounts. Hanger not clean had to clean it myself[.] Paperwork all in one pile not filed or put up in any way.

(RX 4; Tr. 126-130).

Mr. Malmanger disagreed with the report. (Tr. 71-3; RX-4).

Mr. Malmanger met with Mr. Thomas, Mr. Kok, Debra Williams, a human resources manager, and Carla Neff, a corporate compliance officer, on September 6, 2006. (Tr. 39). During the meeting, Mr. Malmanger was asked questions about the allegations in his e-mail, and was never told his employment would be terminated. (Tr. 41). As a result of the meeting, Mr. Thomas told Mr. Malmanger to go back to work the next day. (Tr. 43). However, a few hours after Mr. Malmanger returned to work, he was notified that he was not to be put back to work because he had not been officially released from the investigation; he was subsequently sent home on paid administrative leave. (Tr. 43-4, 93).

Mr. Malmanger testified that he was on administrative leave from September 7, 2006, until he attended another meeting with Mr. Thomas on October 3, 2006. (Tr. 45). He attended this meeting with James Loftin and Mr. Thomas, and was fired that day. (Tr. 45). Mr. Malmanger had earned approximately \$900.00 each week plus health benefits and 401(k) while employed at Air Evac. (Tr. 94). After termination at Air Evac, he worked part-time for First Class Air, and subsequently worked for Big Sky Airlines for approximately six months. (Tr. 95). Mr. Malmanger has been unemployed since June, 2007, and has drawn unemployment from July, 2007. (Tr. 95-6).

Lendon ("Len") Kok

Mr. Kok testified at the formal hearing. (Tr. 109). Mr. Kok has worked as a regional maintenance supervisor for Air Evac for over five years. (Tr. 109-10). He also served as Mr. Malmanger's supervisor for a majority of the time during which Mr. Malmanger worked at Air Evac. (Tr. 113).

Mr. Kok testified that if an employee wanted to make a safety complaint, the employee could fill out a Safety Enhancement Report form ("SERF") found on the Air Evac website, or they could address safety concerns at monthly safety meetings. (Tr. 111-2).

Mr. Kok stated that he had heard about Dr. Schneider's flying incident from Mr. Malmanger shortly after the incident occurred. (Tr. 116). Because Mr. Malmanger performed an

inspection on the aircraft and found that it was free of defects, and because Mr. Kok understood Dr. Schneider to have been qualified to fly the aircraft, Mr. Kok thought that the incident was not a safety issue. (Tr. 117, 142).

Mr. Kok further testified that he met with Mr. Malmanger on February 23, 2006, regarding a disciplinary report. (Tr. 121; RX-4). Mr. Kok issued the report because Mr. Malmanger was "slipping at his job" and he had hoped Mr. Malmanger would acknowledge that fact and return to his normally outstanding work performance. (Tr. 121-2, 132). At the meeting, Mr. Malmanger did not have a response regarding the disciplinary report, but instead discussed Dr. Schneider's aircraft flight. (Tr. 129-130).

Mr. Kok also testified about the oil tank leaking issue. (Tr. 143). Mr. Kok received a call from Mr. Sutter during his daughter's May 2006, graduation party regarding a leaking oil tank. (Tr. 143). After the conversation, he called West Plains for a replacement tank. (Tr. 144). Neither he nor Mr. Sutter ever determined that the tank was actually cracked. (Tr. 145). Because Mr. Kok was not present to examine the tank, he left the decision to take the aircraft out of service to Mr. Sutter. (Tr. 146).

Mr. Kok additionally testified to the tail rotor issue. (Tr. 147). He stated that Mr. Malmanger felt the tail rotor was out of limits in accordance with a manual, so Mr. Kok consulted a different manual and subsequently disagreed with Mr. Malmanger about the appropriate limits. (Tr. 149-150; CX-6).

Mr. Kok further testified that he had heard about Mr. Malmanger's e-mail to Mr. Collins on August 28, 2006, one day after it was sent. (Tr. 134). He called Mr. Malmanger to discuss the e-mail, but Mr. Malmanger refused to talk; Mr. Kok then told him to go home while the issues were being sorted out. (Tr. 134-135).

Mr. Kok testified that he was present at the September 6, 2006, meeting with Mr. Malmanger. (Tr. 135). Mr. Malmanger was asked to explain what he meant by each statement in the e-mail, and Mr. Malmanger also addressed his concerns with Dr. Schneider's flight. (Tr. 135-136). Mr. Malmanger mentioned the oil tank issue and the rotor blade incident, and also stated that he had sent the e-mail to Mr. Collins because he felt he was going to receive a poor performance evaluation. (Tr. 137).

After the September meeting, Mr. Kok had no more involvement with Mr. Malmanger's situation. (Tr. 140).

James Loftin

Mr. Loftin testified at the formal hearing. (Tr. 151). Mr. Loftin has been employed by Air Evac for approximately two years, and currently serves as the vice president of aviation. (Tr. 152).

Mr. Loftin testified that if an Air Evac employee wishes to make a safety complaint, he or she can complete a SERF on the Air Evac website, call the "hot line" to the compliance officer, send an e-mail to the corporate safety manager, or bring the safety concern up at a monthly meeting. (Tr. 154). If a SERF is submitted, it goes to a safety manager and the issue is discussed at a safety meeting and appropriate action is taken. (Tr. 154-155).

Mr. Loftin, who learned of the contents of the e-mail from Mr. Collins, requested that Mr. Steve Thomas and Drew Buckingham, the director of operations, look into the allegations. (Tr. 156-157). Mr. Thomas and Mr. Buckingham reported that they had not seen anything unusual in the maintenance records regarding the allegations. (Tr. 157). Mr. Loftin testified that he and Mr. Thomas, after a conversation with [human resources] ("HR"), decided to place Mr. Malmanger on administrative leave for the following reasons:

Well, we looked at the e-mail and we just didn't understand it. We really didn't understand it. But clearly he was upset and concerned. And just wanted to disconnect everybody from the emotions of the moment, I guess. And so we said let's, let's put him on administrative leave until we can figure out what's going on and what's[] behind the e-mail, if anything.

[question] Why was it important to disconnect everyone from the emotions of what was going on?

[answer] It's a safety concern for us. It's, we,[] have a lot of regulations that the FAA puts on us. We put some rules on ourselves that are really geared round making sure that people [] have their head in the game, for lack of another word, that

they're focused on the task at end because at a remote base it's, we're really dependent upon those individuals down to the point that anybody can take themselves off the line. It probably happens more frequently on the pilot side but if, if you had some disturbance in your life, a death in the family or got divorced or whatever, we ask them to say, you know, hey, step back. Pull yourself out of service and, and by all means, don't operate the aircraft or work on the aircraft while you're in that state of mind. So the same thought process when we read that e-mail. We just thought that he was very upset.

(Tr. 157-58).

Mr. Loftin was not present at the September 6, 2006, meeting with Mr. Malmanger, but was informed about what occurred at the meeting from Mr. Thomas and Ms. Williams immediately after the meeting occurred. (Tr. 158-59). Mr. Loftin was informed of the following:

That [Mr. Thomas and Ms. Williams] still couldn't get any real specifics from [Mr. Malmanger] about exactly which aircraft or what he was concerned about. But he was clearly concerned about something. But then during the course of that discussion, he told them, because they were trying to understand why he sent the e-mail and what the specifics were. So during that conversation he told them that he sent that e-mail in an effort to affect his review or to prevent a bad review being written against him.

[question] And what was your response or reaction to that?

[answer] Well, I guess the first response was, you know, are you sure that, it doesn't make sense, but are you sure that's really what he said? And they confirmed it. They all confirmed it. Then we had a fairly short discussion about why he felt like that was really necessary or why he would do something like that. And then we got into a discussion about whether we could trust him to, to report the, the

condition of the aircraft and sign off the maintenance on that aircraft given the fact that he had, by his own admission, turned in that, that e-mail on a safety concern when that really wasn't his, his intent.

(Tr. 159-160).

Mr. Loftin asked Mr. Thomas to check the records again to make sure that there was nothing unusual. (Tr. 161) Later, when Mr. Thomas confirmed that the records were normal, Mr. Loftin terminated Mr. Malmanger on October 3, 2006. (Tr. 162). At the termination meeting, Mr. Loftin told Complainant he was terminated because:

[Mr. Malmanger] sent the e-mail under false pretenses, that we just didn't feel like we could have him operating at the base signing off aircraft, doing safety sensitive work since, as far as we can tell, you know, he sent in a safety complaint knowing that it wasn't really a safety complaint.

(Tr. 163).

Steve Thomas

Mr. Thomas testified at the formal hearing. (Tr. 171). Mr. Thomas has been employed by Air Evac since 1999, and currently holds the position of director of maintenance. (Tr. 171, 176). Prior to his employment with Air Evac, Mr. Thomas served as a helicopter aviation mechanic with the Army for twenty-one years. (Tr. 172).

Mr. Thomas testified that Air Evac employees may make a safety complaint through SERF, which can be accessed through the Air Evac safety intranet; alternatively, employees may call a hotline to report a safety concern; mechanics may call Mr. Thomas directly or any of the directors or members of the safety committee. (Tr. 178). As a member of the safety committee, Mr. Thomas has been involved in approximately 150 maintenance-related safety complaints this year. (Tr. 179).

Mr. Thomas further testified that Mr. Kok approached him regarding Mr. Malmanger's Disciplinary Action Report. (Tr. 181). Mr. Thomas and Mr. Kok discussed the report, and Mr. Thomas agreed that Mr. Malmanger needed a written report because he was not performing at the expected level. (Tr. 182).

Mr. Thomas also testified that Mr. Collins had sent him an e-mail inquiring about the issues alleged in Mr. Malmanger's e-mail. (Tr. 183). After receiving the e-mail, Mr. Thomas called Mr. Kok in order to understand the subject of Mr. Malmanger's concern; Mr. Kok told him that the e-mail from Mr. Malmanger to Mr. Collins concerned the flight of an aircraft by Dr. Schneider. (Tr. 184). Mr. Thomas then sat down with Mr. Loftin and Ms. Williams to discuss what should be done. Mr. Thomas drafted the letter placing Mr. Malmanger on administrative leave. (Tr. 184). When specifically asked at the hearing why Complainant was placed on administrative leave, he stated:

Safety sensitive position. That all AMP'S are in safety sensitive positions. That would be something I would do to any mechanic that those issues came up.

[question] And what issues are you referring to?

[answer] Anything about what like Dr. [Schneider], what he had in there, while we investigate that[,] we would pull him off the line, just as a safety concern so, your head has to be 100% in the game. We can kill more people as an aircraft mechanic than the pilots ever thought of. If your head is not in the game that is safety sensitive. If he's thinking about something else, we don't want him playing with the aircraft.

(Tr. 185).

Shortly after the letter was given to Mr. Malmanger, Mr. Thomas and Mr. Malmanger spoke on the phone to set up a meeting regarding the e-mail to Mr. Collins. (Tr. 186). Mr. Thomas attended the September 6, 2006, meeting, where they discussed the e-mail with Mr. Malmanger line by line. Additionally, Mr. Malmanger was asked why he wrote the e-mail in question. (Tr. 186). Mr. Malmanger stated that he wrote the e-mail to influence an upcoming employee evaluation, which Mr. Malmanger had thought was going to be negative. (Tr. 187).

Mr. Thomas stated that Mr. Malmanger had called him when the flight incident first occurred. (Tr. 188). Mr. Malmanger was upset that Dr. Schneider had flown an aircraft because Dr. Schneider had given the aircraft a "hot start." Mr. Thomas instructed Mr. Malmanger to inspect the aircraft and put it back

in service; Mr. Thomas knew that Mr. Malmanger had followed his instructions because it was marked in the engineer log. (Tr. 189). Mr. Malmanger also raised safety issues regarding a tail rotor being out of limits and an oil tank leak. (Tr. 189). After the meeting, Mr. Thomas personally investigated all of the complaints raised by Mr. Malmanger, but he found no problems. (Tr. 193).

Mr. Thomas also testified that he, Mr. Loftin, and Ms. Williams decided to terminate Mr. Malmanger after all investigations were concluded, so he contacted Mr. Malmanger for an October 3, 2006, meeting. (Tr. 195). During the meeting, Mr. Thomas told Mr. Malmanger that he was being fired for trying to influence the appraisal system. (Tr. 196). Mr. Thomas believed he could no longer trust Mr. Malmanger (Tr. 197).

ANALYSIS AND DISCUSSION

Credibility Determinations

I have considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and have attempted to analyze and assess its cumulative impact on the record contentions. See *Fraday v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). The Court stated:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable, and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe... Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of

the testimony. *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 16 at N. 5 (3rd Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic and probability and plausibility and the demeanor of each witness.

Applicable Law

AIR21 extends whistleblower protection to employees of air carriers, contractors and subcontractors of air carriers. 49 U.S.C. § 42121(a); 29 C.F.R. §§ 1979.100, 102(a). The Act extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. *Hirst v. Southeast Airlines, Inc.*, USDOL/OALJ Reporter (PDF), ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 at 6 (ARB Jan. 31, 2007).

To establish a violation under AIR21, a complainant must prove by a preponderance of the evidence:¹ (1) that he engaged in protected activity; (2) that the employer subject to AIR21 was aware of the protected activity; (3) that he was subjected to an unfavorable personnel action ("adverse action"); and (4) that the protected activity was a "contributing factor" in the adverse action. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); see also *Hirst*, ARB Nos. 04-116, 04-160 at 7; *Rooks v. Planet Airways, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-092, ALJ No. 2003-AIR-35 at 5 (ARB June 29, 2006); *Brune*, ARB No. 04-037 at 13; *Peck v. Safe Air Int'l, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 02-028, ALJ No. 2001-AIR-3 at 6-7, 9 (ARB Jan. 30, 2004). "Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Id.* at 13, citing *Black's Law Dict.* at 1201 (7th ed. 1999)

¹ Because this case was tried on the merits, I need not determine whether Complainant presented a *prima facie* case. See, *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). (stating that the *prima facie* analysis is only conducted at the investigation level); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006).

(internal quotation marks omitted). If Complainant proves that Respondent violated AIR21, Respondent may still avoid liability if it can show by clear and convincing evidence that despite Complainant's protected activity, Respondent would have still taken the same unfavorable action. *Clemmons v. Ameristar Airways, Inc. and Ameristar Jet Charter, Inc.*, USDOL/OALJ Reporter (PDF), ARB Nos. 05-048 and 05-096, ALJ No. 2004-AIR-11 at 6 (ARB June 29, 2007).

Protected Activity

Under AIR21, an employee of an air carrier has engaged in protected activity when he has:

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

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

(3) testified or is about to testify in such a proceeding; or

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

49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b)(1)-(4).

An employee's complaints must "implicate safety definitely and specifically" to be protected activity. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). "[AIR21] . . . protects not only those who report air safety violations to the government, but also those who make such reports to their employers." *Vieques Air*

Link, Inc. v. United States DOL, 437 F.3d 102, 107 (1st Cir. 2006), citing 49 U.S.C. § 42121(a). "[A] complainant need not prove an actual violation, but need only establish a reasonable belief that his . . . safety concern was valid." *Rooks*, ARB No. 04-092 at 6, citing *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4-5 (ARB Apr. 8, 1997). As such, a complainant must show that he "subjectively believed that his employer was engaged in unlawful practices and [his belief must be] objectively reasonable in light of the facts and record presented." See *Walker v. American Airlines*, USDOL/OALJ Reporter (HTML), ARB Case No. 05-028, at 15 (ARB Mar. 30, 2007).

In the case, Complainant alleged he engaged in protected activity when he expressed his safety concerns about a "hot start" of an aircraft, as well as an alleged leaky oil tank, and an out of limits tail rotor. These concerns were expressed in Complainant's e-mail to the CEO of Air Evac, statements from a meeting with Complainant, and phone conversations between Complainant and members of management. Evidence in the record, however, shows that Complainant did not raise the alleged safety issues in good faith. Complainant admitted to Air Evac that the purpose of raising the safety issues was to preempt an anticipated adverse performance evaluation. (Tr. 137; RX 3 at 3). This admission, coupled with the fact that Complainant made his e-mail complaint four years after the "hot start" incident and several months after the alleged leaky oil tank and out of limits tail rotor blade indicates that Complainant's motive was not to report safety violations but to ensure that he would not lose his job. Therefore, I find that the evidence establishes that Complainant did not subjectively raise the safety concerns in good faith.

Furthermore, the record reveals that there was no reasonable basis to objectively believe the company violated an order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. The Complainant's testimony indicates that his complaints were insincere at the time he actually made them. The alleged issues regarding the "hot start," the oil tank, and the tail rotor limits were raised by the Complainant months or years after they occurred; by the time the Complainant raised those issues, they had been resolved by the company. Additionally, he made the complaints to forestall what he believed would be an adverse performance evaluation. Accordingly, I find that at the time he complained, his complaints were not objectively reasonable.

In sum, the evidence establishes that the Complainant did not have a subjective nor an objective reasonable belief that Respondent was engaged in unlawful activity at the time he complained. After careful consideration of the evidence, I find and conclude that Complainant did not engage in protected activity actionable under AIR21.

Assuming, *arguendo*, that the evidence supports Complainant's belief of conduct sufficient to constitute protected activity, I will proceed to analyze the remaining factors.

Knowledge of Protected Activity

After establishing that he engaged in protected activity, the Complainant must show that the Employer had knowledge of that protected activity. The ARB has stated that "[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity." *Peck*, ARB No. 02-028 at 14, *citing Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996) and 49 U.S.C. § 42121(a).

It was clearly established in the testimonial evidence that Complainant expressed the safety concerns regarding a "hot start" issue to the CEO of Air Evac, as well as to a regional maintenance supervisor and a director of maintenance at Air Evac. He also raised the issues regarding tail rotor limits and an alleged leaky oil tank to the regional maintenance supervisor. Assuming that Complainant engaged in protected activity (i.e., that he raised a good faith safety concern that Respondent was engaged in unlawful activity), this actual knowledge of the safety issues suffices to constitute the employer's knowledge of the activity. Therefore, I find that disclosures to the CEO and managers of Air Evac constitute actual knowledge within the purview of the Act.

Adverse Action

The Complainant's employment with Air Evac was terminated as of October 3, 2006. Termination of employment is adverse action under AIR21. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b).

Protected Activity as a Contributing Factor to Adverse Action

The complainant must prove by a preponderance of the evidence that his protected activity was a "contributing factor" which motivated the employer to take the adverse employment action against him. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); see also *Hirst*, ARB Nos. 04-116, 04-160 at 7; *Clark*, ARB No. 04-150 at 11, 12; *Rooks*, ARB No. 04-092 at 5; *Brune*, ARB No. 04-037 at 13.

Assuming that the Complainant was able to establish that he engaged in protected activity and that he experienced an adverse employment action, he cannot establish that the Respondent's legitimate reasons for his termination, i.e., his bad-faith preemptive tactics to raise safety concerns and distrust of his judgment, are a pretext for retaliation. In other words, Complainant did not establish that Respondent terminated him because of his complaints as opposed to his attempt to influence Respondent's appraisal system, which caused Respondent to distrust Complainant's judgment. As such, I find that Respondent would have taken the same adverse action regardless of the alleged protected activity.

Respondent's Clear and Convincing Evidence

If a complainant fails to show by a preponderance of the evidence that a protected activity was a contributing factor to an adverse action, it is unnecessary to consider the question of whether a defendant employer has shown by clear and convincing evidence that the same adverse action would have been taken even if there had been no protected activity. Hence, it is not necessary to resolve this issue in this proceeding.

Remedy

If a complainant fails to show by a preponderance of the evidence that a protected activity was a contributing factor to an adverse action, it is unnecessary to consider the question of whether the complainant is entitled to a remedy. Hence, it is not necessary to resolve this issue in this proceeding.

ORDER

For the reasons discussed, I find that Complainant has failed to establish the essential elements of coverage under the Act. Accordingly, this matter is **DISMISSED**.

A

Larry S. Merck
Administrative Law Judge

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, Suite S-5220, 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).