

U.S. Department of Labor

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Issue Date: 22 September 2008

CASE NO.: 2008-AIR-00005

In the Matter of

MARCIA PINKSTON,
Complainant,

v.

MESA AIR GROUP, INC.,
d/b/a MESA EXPRESS AIRLINES, MESA
AIRLINES, INC.,
Respondent

For Complainant: Julie B. Anderson, Esquire
Daniel C. Fabbri, Esquire

For Respondent: Douglas W. Hall, Esquire
Christopher Pappaioanou, Esquire

Before: Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

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 (“the Act”), as implemented by 29 C.F.R. 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).

BACKGROUND

A. Procedural History

On or about May 2, 2007, Marcia Pinkston (“Complainant”) filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (“OSHA”), alleging that Mesa Air Group (“Respondent” or “Mesa”) had engaged in adverse action against her in violation of Section 42121 of the Act. After conducting an investigation of the complaint, the Regional Administrator for OSHA issued a determination dated November 30, 2007 that concluded that the investigation disclosed no violation of the Act's employee protection provisions. On December 28, 2007, Complainant objected to the findings and requested a hearing before an Administrative Law Judge pursuant to 49 U.S.C. § 42121(b)(2)(A).

By Notice dated January 10, 2008 I scheduled a hearing for February 26, 2008 in Chicago, Illinois. On January 28, 2008, Complainant filed an unopposed motion for a continuance of the scheduled hearing in this matter. By Order dated January 31, 2008, I granted Complainant’s motion for a continuance and rescheduled the hearing for April 8, 2008. On March 19, 2008, Respondent filed a motion for summary judgment together with a motion for continuance of the hearing. By Order dated March 24, 2008, I denied Respondent’s motion.

My decision in this case is based on the sworn testimony presented at the hearing and the following evidence admitted into evidence: CX 1 through CX 20; CX 23 through 28; RX 1 through RX 17. CX 17 contained sensitive security information. I directed Complainant to submit the redacted exhibit within 30 days of the hearing. Complainant submitted the redacted CX 17 on May 5, 2008.

On May 23, 2008, Complainant filed a motion to supplement the record with documents relative to the remedies aspect of Complainant’s case. On May 30, 2008, Respondent objected to the admission of the evidence, in part because Respondent would not have the opportunity to cross examine Complainant regarding the information on the tax returns. By Order dated June 5, 2008, I overruled Respondent’s objections and admitted Complainant’s evidence. I also allowed Respondent, if necessary, to hold a telephone deposition with Complainant so that Respondent could question Complainant regarding her 2007 income. By letter dated June 12, 2008, Respondent advised me that it did not intend to depose Complainant regarding her 2007 income.

Post-hearing briefs were scheduled to be filed July 3, 2008. Complainant filed her brief on July 7, 2008, and Respondent filed its brief on July 11, 2008. As no objection has been filed regarding the timeliness of the filing of the briefs, I hereby admit them to the record.

B. Complainant's Statement of the Case

Complainant alleges that her probationary period of employment with Respondent was extended, and her employment was terminated, because she raised safety concerns to her supervisors. Complainant contends that she reported to her direct supervisor that she could not exit the doors leading to the tarmac because her security code was not activated. Complainant asserts that she was directed by her supervisor to exit the doors with another employee. On another occasion, she used another employee’s security code to exit the airport. She also exited the secured door without a code, thereby setting off an alarm. Complainant further states that she raised concerns about the illegal nature of this direction to other employees of Respondent.

C. Respondent's Statement of the Case

Respondent maintains that Complainant's probationary period and subsequent discharge were due to her inappropriate and unprofessional behavior towards her co-workers and supervisors. Respondent denies that it directed or otherwise caused Complainant to breach security procedures, or that Complainant raised complaints about safety issues to Respondent's management or other employees.

ISSUES

1. Whether Complainant engaged in activity protected under the Act, and if so,
2. Whether Respondent was aware of this activity, and if so,
3. Whether the activity contributed to Respondent's decision to terminate Complainant's employment; and if so,
4. Whether Respondent can demonstrate by clear and convincing evidence that it would have terminated Complainant even in the absence of the protected activity?

SUMMARY OF THE EVIDENCE

A. Exhibits

- CX-1 Photo of Complainant during training.
- CX-2 Photo of Complainant with training supervisor.
- CX-3 Photo of Complainant with training supervisor and other Mesa employees.
- CX-4 New hire "Welcome to Chicago" packet.
- CX-5 Directions to Employee Parking.
- CX-6 April 26, 2007 letter to Complainant from Mesa colleague Liz Flores.
- CX-7 February 3, 2007 letter from Complainant to various Mesa employees.
- CX-8 February 20, 2007 letter from Complainant to Jamie Lynn McClay.
- CX-9 February 21, 2007 letter from Complainant to Transportation Security Association ("TSA").
- CX-10 Complainant's payroll records.
- CX-11 Complainant's credit card statements.
- CX-12 Complainant's receipt for groceries.
- CX-13 Complainant's receipt for payment of Mesa uniforms.
- CX-14 Complainant's 2005 tax return.
- CX-15 Complainant's 2006 tax return.
- CX-16 January 26, 2007 e-mail from Bradley Rizzoli to Mesa supervisors.
- CX-17 Respondent's spreadsheet of security codes.
- CX-18 Complainant's termination form.
- CX-19 E-mail exchange between Jennifer Overhaug and Kenley Chambers from February 1, 2007 and February 7, 2007.

- CX-20 E-mail from Kenley Chambers to Jennifer Overhaug, Isaac Urrutia, and John Gardner.
John Gardner's e-mail response to Kenley Chambers.
- CX-23 January 28, 2007 voice mail from Chantil Huskey to Marcia Pinkston.
- CX-24 Flight Attendants' Union Newsletter to New Hire Employees.
- CX-25 Initial Operating Experience Packet.
- CX-26 Mesa Airlines New Hire Pre-Training packet, p. 11: Suggested Material for Classroom Training and Leisure.
- CX-27 Mesa Air Group Anti-Fraud Whistleblower Hotline web page.
- CX-28 Undated note from Mandy Nolin and June Furr to Complainant.
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- RX-1 January 22, 2007 e-mail and attached spreadsheet from Jennifer Overhaug to ORD Badging and Access Control Office.
- RX-2 ORD Badging Office Frequently Asked Questions document.
- RX-3 Complainant's Handbook Receipt Acknowledgement dated December 13, 2006.
- RX-4 January 26, 2007 e-mail from Bradley Rizzoli.
- RX-5 February 2, 2007 e-mail from John Gardner.
- RX-6 E-mails exchanged between Jennifer Overhaug and Kenley Chambers.
- RX-7 Complainant's work schedule from January 14, 2007 through February 10, 2007.
- RX-8 Complainant's Termination Form.
- RX-9 ORD New Hire Welcome Package.
- RX-10 Complainant's Parking Expense Report, Receipt, and Reimbursement.
- RX-11 AFA/Mesa Collective Bargaining Agreement.
- RX-12 Mesa Employee Handbook.
- RX-13 ORD Yellow Parking Card.
- RX-14 ORD SIDA Badge.
- RX-15 Mesa Flight Attendant Crew Badge.
- RX-16 AirlineCareer.com E-zine newsletter dated September 25, 2007.
- RX-17 Transcript of February 1, 2007 voice mail from Jennifer Overhaug to Complainant.

B. Testimony

Complainant Marcia Pinkston

Complainant lives in Elburn, Illinois with her husband and two children. Tr. at 41. She has worked as a hairstylist for over 30 years and has owned her own salon in St. Charles, Illinois since 1983. Tr. at 42. Ms. Pinkston testified that she has wanted to be a flight attendant since grade school. Tr. at 42-43. Complainant began training as a flight attendant for Respondent Mesa Airlines in December 2006. Tr. at 43. She chose to work for Mesa because they are a regional airline and she would be on reserve less than if she worked at a main airline such as United. Id. Ms. Pinkston began a three to six week training course in Phoenix, Arizona on December 12, 2006. Tr. at 43-44. During training, Complainant learned CPR, first aid, airplane safety, and how to exit an aircraft during an emergency. Tr. at 45. The training was unpaid, but upon its completion, Mesa gave her a \$100 gift card. Tr. at 44. While she was away at training, Complainant allowed another hair stylist to use her salon without any remuneration. Tr. at 45.

As part of her training, Complainant was required to complete an Initial Operating Experience (“IOE”) at O’Hare International Airport (“O’Hare”), which involved flying with a supervisor who assessed her performance. Tr. at 47. During IOE, Complainant drove to the airport and parked in passenger parking, as her supervisor, Jennifer Overhaug, had told her that she could park there and be reimbursed for the fees. Tr. at 47. Ms. Pinkston believed that she could only park in the passenger lot with reimbursement during IOE training. Tr. at 48. Complainant’s IOE took place on January 9, 2006 and she testified that it was a great experience. Tr. at 48. Complainant got along well with her supervisor, who told her that she performed “really well.” Id.

At the conclusion of the IOE, Complainant received a parking badge that would allow her to park in the employee parking lot. Tr. at 49. During her initial training, Complainant received a document with instructions about employee parking, including how to get a badge and directions to the lot. Tr. at 52. Complainant believed that the document authorized her to park in the employee parking lot. Id.

Complainant expected to get a schedule and be assigned a flight in a few days following the IOE, as her IOE paperwork stated that she should expect 48 hours to lapse before she was processed and placed on the schedule. Id. However, Complainant was called by crew tracking on the day following her IOE, January 12, 2007, and told to report to the airport in one hour. Tr. at 50. Complainant was confused about her schedule because she did not expect to be put in service so soon after IOE. Tr. at 53. She had to cancel her hair salon customers. Id. Complainant called her supervisor for directions to O’Hare and the parking lot. Tr. at 51. In response, another flight attendant e-mailed directions to the employee parking lot. Id.; CX 5. Complainant testified that when she arrived at the airport, she parked in the employee parking lot because that was where she was told to park. Tr. at 51. Complainant described how a bus picked up employees at the lot and transported them to the tarmac, after which the employees entered the airport from a gate off the tarmac. Tr. at 53.

When she arrived at O’Hare on January 12, 2006, Complainant met with her supervisor Jennifer Overhaug to discuss the schedule. Tr. at 53-54. Complainant worked the flight on January 12, 2007 and returned to the airport two days later on January 14, 2007. Id. She attempted to leave the airport through gate E3, where she expected to be picked up by the bus that would shuttle her to employee parking lot. Tr. at 55. She waited inside the gate for the bus to arrive, and when she started out the door, an alarm went off. Id. Complainant did not continue through the door, but was let out by a United employee who was exiting the airport. Complainant testified that she did not know that she needed a code to leave through that door. Id. Complainant did not fully pay attention to the directions she was given, and did not ask what the notation “code to exit door” meant. Tr. at 112-113. There was no code on the document. Tr. at 112; CX 5.

Complainant next reported to work on January 17, 2007 and parked in the employee parking lot because she had not been told to park anywhere else. Tr. at 58. Ms. Pinkston met with Ms. Overhaug on January 17 to discuss the problem Complainant experienced with exiting the airport. Tr. at 59. Complainant stated that Ms. Overhaug told her that she needed a security code that would be activated by the City of Chicago. Id. Complainant testified that Ms.

Overhaug told her to “just keep on waiting for someone to come and go through that door.” Id. Complainant was aware that she needed a code to access the elevator to the “crew room” but did not realize until her conversation with Ms. Overhaug that the same code was needed to pass through the doors leading to the tarmac. Tr. at 56, 150, 154. Complainant learned that her code did not work when she tried to enter the crew room. Id. She testified that the new flight attendants were told to “just wait until somebody came up or down that elevator and that we could then go down with them.” Id. Also, Ms. Overhaug told Complainant that either she or Issac could escort Complainant to those areas. Tr. at 154. She had not been told that individuals who wore green badges were authorized to escort unbadged persons to secured areas. Tr. at 155.

After meeting with Ms. Overhaug on January 17, 2007, Complainant left the secure area and went to get something to eat. Tr. at 57. When she returned, Complainant waited to go down the elevator. Id. One of Mesa’s pilots got on the elevator but would not let her accompany him. Id. She told him that she was a new employee and that Ms. Overhaug had “told [her] that everyone had been there, they knew – you know, they knew that the City of Chicago was slow sometimes in getting these codes activated and they would understand and they would let us down.” Id. Nevertheless, the pilot did not let her down on the elevator with him. Id.

Complainant flew out on January 17 and returned on January 20. Tr. at 60. Ms. Pinkston testified that when she tried to leave the airport on January 20, she went to the gate at E3 and tried her security code but it did not work. Id. Complainant waited at the door, and when two SkyWest pilots came, she explained to them that her code was not working. Tr. at 61. The code did not work for the pilots, who reluctantly let her pass through the door with them. Id. Complainant testified that the only access to her car was through that door. Id.

Complainant reported to the airport for reserve duty on January 23, 2007, and again parked in the employee lot. Tr. at 61-62. Complainant acknowledged that Ms. Overhaug had told her that she needed to wait for her code to be activated, but she maintained that no one had given her any other option for parking. Id. Complainant tried her code, but it still did not work. Id. When she was ready to leave the airport, she waited at the door for approximately 15 minutes, and exited through the door when she saw the shuttle bus arrive. Tr. at 62. Although an alarm went off, Complainant assumed that if she was stopped the person would see her badges and credentials and she would tell the person that her code had not been activated yet. Id. Complainant did not attempt to resolve the code problem because she believed that her supervisor had told her to continue doing what she had been doing. Tr. at 115.

Ms. Pinkston parked once more in the employee lot when she next flew out on January 24. Tr. at 60, 63. Complainant returned to O’Hare on United Airlines because she was not scheduled to work the return Mesa flight. Tr. at 63. She arrived at the United terminal at approximately 10 o’clock or 11 o’clock p.m., and asked two United flight attendants where the gate was for the pickup. Tr. at 64. When she told them that her code was not working, they told her that she could not use the gate. The flight attendants’ supervisor also would not let her out. Id. Complainant told a TSA agent that she was new and that her code was not working, but he would not allow her to exit. Tr. at 64. The TSA agent located a Chicago police officer for her, and he also would not let her exit. Tr. at 65.

Complainant became concerned that the TSA agent and the police officer would not let her down. Tr. at 65. Complainant thought that if a police officer would not let her down when she was in full uniform, then “something was wrong.” Id.; Tr. at 110. Complainant attempted to contact Ms. Overhaug and another supervisor, Isaac, but was unable to reach either supervisor. Tr. at 66. She then called crew tracking and explained that she was locked in O’Hare and could not get out because her code was not working. Tr. at 66. Complainant testified that she acknowledged that crew tracking “had nothing to do with this” and “probably could not even help [her]”. Id. Crew tracking contacted Ms. Overhaug, and advised Complainant that Ms. Overhaug provided her with a code that she could use that evening. Tr. at 66. Complainant rejected the offered code, because she wanted a final solution to “getting locked inside”. Tr. at 67. Complainant exited the airport that night when another employee came in while the door was unlocked. Id.

In response to the question “when you were on the phone with crew tracking, did you talk to them about whether what Mesa was doing was illegal?”, Complainant stated “Yes”. Tr. at 67. She did not know with whom she spoke, but maintained that she asked whether Mesa was acting legally with respect to her code. Tr. at 109. Complainant testified that she told crew tracking that unless Mesa paid for alternative parking or activated her code, she could not come back to work, because she did not feel like an employee. Tr. at 68. Crew tracking responded, “so you’re not coming to work, I’m clearing your schedule.” Id. Complainant denied that she raised her voice when speaking with crew tracking but admitted that she was frustrated about being locked in the airport because her code was not activated. Tr. at 108. Her question about alternate parking or reimbursement was not addressed in that conversation. Tr. at 148.

Complainant admitted that by January 17, 2007, she was aware that she needed a code to exit the airport at a place with access to the employee shuttle bus. Id. She nevertheless parked in the employee lot on January 17, 2007. Tr. at 108. She also parked on the lot during her trip from January 24 through January 26, and again on January 31, 2007. Tr. at 109. Complainant testified that she used the lot with the hope that her code had been activated. Id. Complainant acknowledged that she was never told or instructed to exit a secure door and set off the alarm. Tr. at 113. Jennifer Overhaug contacted Complainant on January 27, 2006 and told her, “that I needed to report to work and that it was not her problem if the code was not working, that her hands were tied... and that I needed to show up to work or I’d be fired.” Tr. at 68. Complainant testified that she questioned Ms. Overhaug “about whether or not what Mesa was doing was legal.” Tr. at 69; 116. Complainant acknowledged that she had not testified at her deposition that she raised her concern about the legality of the code with Ms. Overhaug during that conversation. Tr. at 118-119.

Complainant testified that she was concerned “about what they were having me do” so she looked at the union’s website and printed “anti-fraud whistleblower hotline documentation.” Id. If the problem was not fixed, Complainant planned to call the hotline. Id. Complainant testified that she did not tell anyone at Mesa that she intended to call the hotline, and she did not in fact call the hotline prior to her discharge. Tr. at 120.

Complainant tried to use her code on January 31, but it did not work, and so she used a code that belonged to another individual. Tr. at 70. Complainant went to the “badging

department” to talk to someone about her code, because “it was very dangerous. It was late at night and it was very scary.” Id. Complainant told Bertie Yancey of the city’s badging office that she needed her code activated and asked who could activate it. Tr. at 72. Ms. Yancey told her that John Gardner could activate the code, and she gave Complainant his phone number. Id. Complainant testified that she told Ms. Yancey what Mesa had been telling her to do to get through the doors, and Ms. Yancey told her that it was illegal and she could be arrested if she continued doing it. Id. Complainant believed that the illegal conduct that Ms. Yancey referred to was Complainant’s lack of a code, and not her exiting a secured door. Tr. at 113.

Immediately after leaving the badging office Complainant went to see John Gardner, and asked him to activate her code. Tr. at 72- 73. She had not met Captain Garner before going to his office and did not know his position with Mesa. Tr. at 99. She started to tell him about the situation with her code but was interrupted when Captain Gardner “started screaming at [her].” Tr. at 73. She did not get a chance to discuss the legality of the code situation with him. Tr. at 146. Complainant testified that Captain Gardner told her “to shut up and sit down.” Tr. at 73. Captain Gardner activated her code in a short amount of time, and when he was done, Complainant started to walk out the door. Tr. at 74. She testified that Captain Gardner said, “you’re welcome” in a manner that Complainant characterized as “very condescending and snide..” Id. Complainant responded, “excuse me, I’m supposed to thank you for doing your job?” Id. Complainant testified that Captain Gardner then started screaming at her and “got in [her] face.” Id. Complainant thought he was going to hit her. Id. She stated that Captain Gardner “threw [her] out of his office and slammed the door.” Id. Complainant admitted that Captain Gardner did not physically remove her from his office. Tr. at 120. She denied being angry when she met with Captain Gardner, and said that she was “excited” that the problem involving her code would be resolved. Tr. at 100.

Complainant went to her supervisor Isaac’s office after leaving Captain Gardner. She spoke with Isaac about why it took so long to activate her code. Id. She did not speak with anyone else at Mesa thereafter about her problem with the code. Tr. at 118-199; 135.

On January 31, 2007, Complainant flew out on her scheduled flight. Tr. at 75. On February 1, 2007, she received a voice mail message from Ms. Overhaug, asking her to be in Ms. Overhaug’s office at 9:00 o’clock a.m. the next day for a conference call with Kenley Chambers. Id. Complainant recalled the message saying: “it would be greatly appreciated if I could be in attendance and to call her if I was going to be there.” Id. Complainant was confused because she was scheduled for a 9:00 a.m. flight, and thought the meeting would conflict with her scheduled assignment. Id. The telephone message was received two days after Complainant’s meeting with Captain Gardner, but she did not know that the meeting would be about her dealings with him. Tr. at 98. Tr. at 98.

Complainant did not perceive a sense of urgency from the message, and did not believe the meeting was mandatory. Tr. at 159. Complainant testified, “it was such a nice voice mail, I could have been getting a job promotion”. Tr. at 98. Complainant testified that she did not intend to call Ms. Overhaug to say she could not attend the meeting. Tr. at 156. However, Complainant called her union representative, Chantil Huskey, and left a message for her, because Ms. Huskey had told her to never go into a meeting without a union representative. Tr. at 76.

Based on her reading of the union handbook, Complainant thought that she had a right to union representation at the meeting. Tr. at 77. Complainant admitted that had she thought that she was getting a promotion, she would not have felt the need for the presence of her union representative during the teleconference. Tr. at 99.

Complainant landed at O'Hare at 8:30 a.m. on February 2, 2007. Tr. at 78. She spent 15 to 20 minutes cleaning the plane after the passengers disembarked. Id. Complainant also went to the crew room to check her messages. Id. Complainant thought that she had been given a choice to call Ms. Overhaug or go on the next flight. Id. She confirmed that she was booked for the next flight, and then reported to the gate for that flight and boarded the plane. Tr. at 78-79. She passed by Ms. Overhaug's office, but Ms. Overhaug did not call out to her to come to her office. Tr. at 152. If Complainant had not shown up for her scheduled flight, passengers would have been prevented from boarding the plane. Id. Complainant testified that she planned to call Ms. Overhaug after the flight, which Complainant described as "like a 10 minute flight." Id. She hoped that she would have heard from her union representative by the end of the flight. Tr. at 152.

She was stowing her luggage on the plane when she was told that Ms. Overhaug was walking to the plane. Tr. at 79. Ms. Overhaug directed her to leave the plane, and they walked together across the tarmac to Ms. Overhaug's office. Tr. at 80. During the walk Complainant asked if her union representative would be at the meeting, and Ms. Overhaug told her that she expected the union representative to be present by conference call. Id. A call was made to Kenley Chambers, but the union representative was not present. Id. Complainant stated that Ms. Chambers began the meeting by telling Complainant that she missed a "mandatory meeting." Id. When Complainant responded that the message she received said to call "if [she] was going to be in attendance", Ms. Chambers "started yelling" at her. Tr. at 80. Complainant acknowledged that Ms. Chambers was Ms. Overhaug's supervisor and the head of the in-flight department. Tr. at 97.

During the telephone conference with Ms. Overhaug and Ms. Chambers, Complainant described her problems with her code. Tr. at 81. Complainant had no communication of any nature with Ms. Chambers before that telephone conference. Tr. at 125. Complainant started to tell Ms. Chambers that the City of Chicago had given her John Gardner's number, but was interrupted by Ms. Chambers who said, "listen to your tone, listen to your tone." Id. Complainant testified that Ms. Chambers knew of the problems with her code because Ms. Chambers told her "she was the one that had started in O'Hare and set it all up, and that this was not her first rodeo." Id. Ms. Chambers told Complainant that she would either be terminated or placed on an extended probation. Id. Complainant told Ms. Chambers that she would not say anything until she had some type of representation. Tr. at 81-82. Ms. Chambers told her that she did not have that option and fired her. Tr. at 82. Ms. Chambers instructed Ms. Overhaug to take Complainant's badges and escort her out of the airport. Id. Complainant could not recall whether she raised the question of the legality of Mesa's actions during the telephone conference. Tr. at 125.

Complainant acknowledged that she had been advised during training that her code would not be activated immediately. Tr. at 101. She recalled that Ms. Overhaug reminded her

of the time lag during their meeting on January 17. Id. Despite this, Complainant continued to park on the employee lot because she did not want to pay for parking. Tr. at 102. Although Complainant was aware that less expensive remote parking places were available, and that an elevated train went to the airport, she was not familiar with those facilities. Tr. at 102. Complainant would not have felt safe taking the train at night. Tr. at 138. She admitted that she had not parked in the employee lot during her IOE, which cost her \$70 for three days. Tr. at 103-104. She submitted a request for reimbursement of the costs on January 17, 2007 and received a check in early February. Tr. at 104. No one from Mesa told Complainant that she would be reimbursed for parking at any other time than during IOE. Tr. at 105. Ms. Overhaug had told her that she would only be reimbursed for parking during IOE. Tr. at 138. She believed that she was supposed to park in the employee lot, though she agreed that she was not told that it was mandatory to do so. Tr. at 105.

After she was fired, Complainant wrote a letter dated February 20, 2007 to TSA. Tr. at 82. Complainant wrote the letter because she had done “a lot of research” and felt that she had been wrongfully discharged. Id. Complainant “felt it was [her] duty to let TSA know what they were doing.” Id. Complainant was concerned “with what Mesa was doing” because of security procedures. Tr. at 83. She said, “[t]hey were asking people to violate Homeland Security procedures.” Id.

Complainant testified that she was depressed and upset after she was fired. Tr. at 83. She was humiliated and embarrassed when she told her family and friends. Id. Complainant loved being a flight attendant, and her enthusiasm during training had been noted by other trainees. Tr. at 92. Complainant also missed the income she earned from her job with Respondent. Complainant testified that she earned \$1600 during her employment with Mesa. Tr. at 84. She had been guaranteed 65 hours of work during every 28 day flight period, and Complainant expected the hours to be similar throughout her employment with Respondent. Tr. at 141. Her income did not reach that level until mid to late September of 2007, when she supplemented her hair salon income by working at another job. Tr. at 141-142.

Ms. Pinkston stated that one of the benefits of working for an airline is free travel, and she and her family had taken advantage of those benefits during her employment. Id.; Tr. at 85. Complainant understood that she could fly for free on Mesa, United or US Airways. Tr. at 144-145. Complainant had hoped to use passes for her family to travel to watch her daughter compete in competitions. Id. The family reduced the number of planned trips for that purpose and drove to some locations because of the expense. Tr. at 85-86. Complainant also testified that she had intended to use her income from her job with Mesa to build an addition on her house, which she has not been able to complete because of finances. Tr. at 87.

Complainant applied for a flight attendant position with another airline. Tr. at 87. She did not remember which airline but believed that it was out of Indianapolis. Id. Complainant acknowledged on the application that she had been fired, and she heard nothing more from the company. Tr. at 88. Complainant stated that she would like to work as a flight attendant again but has hesitated because of the expense of training. Tr. at 89.

Jennifer Overhaug

Jennifer Overhaug works for Respondent as an in-flight manager, whose primary duty is to supervise in-flight supervisors. Tr. at 338. Ms. Overhaug began working for Respondent in 2004. Tr. at 339. In January and February 2007, she was one of the in-flight supervisors to whom Complainant reported. Tr. at 161. Her primary duties were to coach and assist flight attendants. Tr. at 339.

Ms. Overhaug explained that Mesa pays for employees to park in the employee parking lot but she did not believe Respondent reimbursed employees who take the train to work. Tr. at 174. Mesa does not require new employees to park in the employee parking lot. Tr. at 184. Respondent is aware that having a non-working code is a problem for new employees stationed at O'Hare, and is a particular problem for new employees who drive to work as they need the code to exit the door to the shuttle bus to the employee lot. Id. Ms. Overhaug stated that new flight attendants are given information about the City of Chicago, including information on parking at O'Hare and directions to the employee parking lot. Tr. at 175. The information does not state that new employees should park in the passenger parking lot until their codes are activated. Tr. at 175-176.

During ground school, Ms. Overhaug makes new employees aware of issues with access codes that affect parking and other items and tells them to park in long-term parking. Id. Mesa also reimburses parking and train fare during the period when the access code is not activated. Tr. at 185. Ms. Overhaug addressed this issue with Complainant's class. Id. Ms. Overhaug did not believe that it was an unusually long period of time between when Complainant starting work and the date her code was submitted for activation. Id. It can take the City between one week and one month to activate the codes and Ms. Overhaug explained that Mesa had no control over how long the process took. Tr. at 186.

It was Ms. Overhaug's practice to submit a spreadsheet of codes to the City of Chicago for activation every two to four weeks. Tr. at 168. The list contains the names of new employees, transfers, and those recently terminated. Id. Ms. Overhaug testified that Complainant's first flight was January 12 but Ms. Overhaug did not submit her code until January 22, 2007. Tr. at 169. Ms. Overhaug stated that they were going through a process of ensuring that everyone who worked for Respondent was in the system. Id. Ms. Overhaug acknowledged that the list she sent on January 22nd contained over 800 employee names, including those who were not new employees or transfers. Tr. at 169-170.

Ms. Overhaug is responsible to ensure that security rules are followed, but she considered that duty to be part of every employee's job. Tr. at 170. Ms. Overhaug explained that a security code is private and can be revoked when disclosed to individuals other than the employee assigned to it. Id. Ms. Overhaug described the types of security badges issued by the City of Chicago, and testified that Respondent also issues a crew badge to those employees authorized to work on flights. Tr. at 348. A green card authorizes individuals to enter secured areas and escort unbadged individuals. Id. These badges are not widely issued. Tr. at 356. Ms. Overhaug testified that an employee with no identification but her crew badge could still enter the airport and get through security. Id. Flight attendants can perform their duties with only that badge. Tr.

at 348-349. Ms. Overhaug agreed that Respondent's training manual does not differentiate between escorting and piggybacking. Tr. at 356. She also agreed that flight attendants are instructed that their daily duties include checking their mailbox and e-mail, and she further agreed that Complainant would do this at the crew room. Tr. at 357. Ms. Overhaug agreed that the security codes were issued to keep areas secure so that passengers and crew would be safe. Tr. at 358.

Ms. Overhaug recalled three times that Complainant raised concerns to her that her security code could not be used. Tr. at 177. She recalled Complainant generally asking that the problem with her code be fixed. Tr. at 178. The first time Complainant spoke to Overhaug regarding the code issue was after her first completed flight on January 17th. Tr. at 182-183. Ms. Overhaug told Complainant that it took time for the code to be activated. Tr. at 177-178. Id. Ms. Overhaug acknowledged that she could have e-mailed the City of Chicago to request activation of Complainant's code, but she did not know that she could do that at the time. Id. Ms. Overhaug also spoke with Complainant about the code issue on January 27. Tr. at 183. Ms. Overhaug called Complainant on that date after Complainant's conversation with crew tracking. Id. Ms. Overhaug also tried to contact Complainant on February 1, 2007 and then spoke with her during the meeting of February 2, 2007. Ms. Overhaug had no other discussions with Complainant regarding the access code issue. Tr. at 184.

Ms. Overhaug testified about three instances where she found Complainant to be unprofessional. On January 12, 2007, Complainant came to Ms. Overhaug about her schedule, and appeared "very agitated and very upset" about having to work that day. Tr. at 359. She found it unusual for a new flight attendant to be unhappy about working, since they had not earned money during training. Id. As far as Ms. Overhaug knew, flight attendants were not guaranteed a period of 48 hours following IOE before being assigned a flight. Tr. at 352. She did not recall Complainant discussing problems with her security code during the meeting on January 12. Id. Ms. Overhaug also learned of her conversation with crew tracking about exiting the airport; and her meeting with Captain Gardner. Id. Ms. Overhaug concluded that the incidents demonstrated that Complainant was argumentative and unprofessional. Tr. at 161-162. Ms. Overhaug testified that she considered Complainant's demeanor to be argumentative. Tr. at 162.

Ms. Overhaug acknowledged that she was not a party to the call with crew tracking and did not have first hand knowledge of Complainant's demeanor during that conversation. Tr. at 165. However, Mr. Rizzoli informed her about the incident. Tr. at 352-353. Ms. Overhaug also testified that she was not present during Complainant's meeting with John Gardner but had communicated with him. Tr. at 166; Tr. at 354. Ms. Overhaug testified that Complainant did not inform her that Respondent was violating safety standards or regulations, or complain that she was being required or asked to do anything illegal. Tr. at 352. She did not have the impression that Complainant's concerns regarding the code were safety related, but rather, her impression was that Complainant was upset about not being able to get out of the airport. Tr. at 354. Both Mr. Rizzoli and Captain Gardner informed her that Complainant had complained about the code. Tr. at 359.

Ms. Overhaug acknowledged that she has the option of disciplining non-probationary employees by issuing an oral reprimand, a written reprimand, or a standing letter. Tr. at 163; 187. Ms. Overhaug testified that a standing letter is not the standard protocol taken for disciplinary action against probationary flight attendants such as Complainant, and explained that the only disciplinary action taken with probationary flight attendants is extension of probation. Tr. at 187. Ms. Overhaug did not confer with her supervisor about imposing discipline. Tr. at 164. Ms. Overhaug testified that she wanted to extend Complainant's probation period in response to her concerns over Complainant's conduct. Tr. at 179. Ms. Chambers did not consult with Ms. Overhaug about her decision to discharge Complainant. Tr. at 354. Ms. Overhaug testified that she would not have overridden Ms. Chambers' decision. Tr. at 360.

Ms. Overhaug did not consider her first observed incident of Complainant's unprofessionalism on January 12 as warranting disciplinary action. Tr. at 187. Ms. Overhaug stated that the incident with crew tracking was significant because crew tracking told her that Complainant was yelling at trackers. Id. Ms. Overhaug found the incident important because of the way Complainant communicated with crew tracking, and not because she complained about the code. Id. Ms. Overhaug also found the incident with Captain Gardner to be significant because of how Complainant communicated with him. Id. She testified that she did not receive complaints from Captain Gardner about flight attendants on a regular basis. Tr. at 188.

Ms. Overhaug acknowledged that her message to Complainant about the meeting did not specifically state that the meeting was mandatory or that Complainant's presence was required. Tr. at 189. Ms. Overhaug did not tell Complainant that she did not have to go to her scheduled morning flight, or take Complainant off that flight. Id. Ms. Overhaug nevertheless intended Complainant to attend the meeting. Tr. at 190. Ms. Overhaug stated that flight attendants do not get called into meetings with Ms. Chambers on a regular basis, and that the purpose of the meeting was to inform Complainant that her probation was being extended. Id. Ms. Overhaug anticipated that the meeting would last no more than five minutes, and therefore, she did not pull Complainant from her flight. Id. Ms. Overhaug expected Complainant to perform the rest of her duties after the meeting. Id. Ms. Overhaug acknowledged that she did not tell Complainant that the meeting would not be long. Tr. at 191. Ms. Overhaug stated that it is very common for a flight attendant's probation to be extended, and the most common reason for an extension is attendance problems. Tr. at 196.

On the morning of the meeting, between 8:30 and 8:45 a.m., Ms. Overhaug saw Complainant walk past her office and assumed that she would return after stowing her baggage. Tr. at 391. At about 9:00 o'clock, Complainant walked past Ms. Overhaug's office for the second time. Id. Ms. Overhaug called out to her and asked her to come back, but she did not respond. Id. She estimated that Complainant was 15 to 20 feet away, but Ms. Overhaug did not walk out to stop her. Tr. at 393. Ms. Overhaug stated, "I was a little flabbergasted at the time that she would walk past my office twice and not stop. Tr. at 392.

Ms. Overhaug testified that in 2007, Mesa lost flight attendants to other carriers. Tr. at 341. She found job vacancies by searching internet sites, but did not know if there were websites that specialize in airline hiring. Id. Ms. Overhaug explained that buddy passes can be used by flight attendants on any Mesa operated flight. Id. After six months of employment with

Respondent, flight attendants are given approximately one buddy pass every two months. Tr. at 342. In addition, flight attendants in Chicago get to use United and US Airways benefits for themselves and dependents. Id. Whether an employee gets to fly depends on their seniority, seat availability and sometimes weather. Tr. at 342-344. It is more difficult to exercise flight pass benefits when traveling in a group. Tr. at 345.

Captain John Gardner

John Gardner is a line pilot and a captain for Freedom Airlines, a subsidiary of Mesa Air Group. Tr. at 199. Captain Gardner is currently an IOE check airman for Freedom Airlines. Tr. at 210. He also serves the FAA by observing other captains before they are qualified. Id. A pilot must spend a certain amount of time as a line check airman and complete FAA training to qualify for that position, which is certified by the FAA. Id. Captain Gardner believes that there are only two certified individuals who perform that job at Freedom.” Id. Before he became a pilot, Captain Gardner was a fire marshal and emergency management coordinator for Denton County, Texas for five years. Tr. at 211.

In January and February 2007, Captain Gardner was the regional chief pilot for Mesa Air Group. Tr. at 200. At that time, Captain Gardner had been with Mesa for approximately five years. Id. His primary responsibilities were the Chicago, Nashville, and Denver bases. Id. Captain Gardner had an office at O’Hare. Id. As regional chief pilot, Captain Gardner was the direct supervisor for all the pilots in Chicago, Denver, and Nashville. Id. In Chicago, Captain Gardner also performed ancillary duties, such as covering “station duties” and badging individuals. Id. Generally, Captain Gardner’s supervisory duties applied to pilots but occasionally extended to flight attendants while in flight. Tr. at 201. Unless they are part of his crew on a flight, Captain Gardner did not have the power to discipline flight attendants, although he assisted attendants whose supervisors are not available. Id. In February, 2007, the Captain was a signatory, which vested him with the ability to provide employees with access to secured areas. Tr. at 202. Captain Gardner testified that he believed Ms. Overhaug was also a signatory at that time. Tr. at 203.

Captain Gardner testified that there were no unusual circumstances facing Complainant as a newly hired flight attendant. Tr. at 214. He estimated that the average time for new codes to be activated was “upwards of two weeks.” Id. Captain Gardner testified that Mesa reimbursed parking expenses for new employees who did not have activated codes. Tr. at 214. When approached about problems with security codes, Captain Gardner generally advises employees that it takes some time for activation and recommends that they wait for it to occur. Id. If repeated requests for activation are made, he asks for activation and confirmation from the City. Id. The speed of confirmation of the code activation depends on how “hard [the Captain] would press the issue.” Tr. at 209. Captain Gardner had followed up activation requests by sending e-mails, visiting the City office, or calling the Director of the department responsible for activating codes. Id.

During January and February 2007 there were three badges issued at O’Hare. Tr. at 210-211. A yellow badge was issued for parking. Id. A green Security Identification Display Area (“SIDA”) badge allowed individuals to gain access to restricted areas and to act as escorts for

other persons into restricted areas. Tr. at 212. Escorts must maintain close proximity of the person being escorted. Id. A blue badge was issued for law enforcement or others who needed access to the runway. Id.; Tr. at 223.

Captain Gardner had not met Complainant prior to January 31, 2007. Tr. at 214. He testified that he was on the phone when Complainant entered his office, and he considered her to be agitated or upset rather than excited. Tr. at 215. When he finished his phone call, Complainant asked who he was and then complained about her treatment by Mesa. Id. Captain Gardner testified that Complainant was “somewhat accusatory” in tone, and criticized Mesa, himself, the police department and TSA. Id.; Tr. at 216. Captain Gardner observed that Complainant was speaking loudly in a rude tone of voice. Tr. at 206. He knew from her uniform and badge that she was a Mesa flight attendant but said to her, “I don’t know anything about you. I don’t know what you’re talking about, let’s back up, you know, tone it down and let’s start over.” Tr. at 215. Captain Gardner asked Complainant to “tone it down” because he could see the meeting starting to escalate. Tr. at 216. Gardner denied telling Complainant to “shut up and sit down”, but acknowledged that Complainant did sit down eventually during their exchange. Id.

At the time of his meeting with Complainant, Captain Gardner was not responsible for activating the codes for flight attendants. Tr. at 205. He testified that Complainant’s code was the first flight attendant code that he had been asked to activate, although he had activated approximately 10 other codes. Id.; Tr. at 207. Captain Gardner e-mailed the City of Chicago and requested activation, and although he did not request confirmation, he later learned that Complainant’s code was activated. Id. The e-mail took a few minutes to complete because it needed to comply with a specific format. Tr. at 206. After he sent the e-mail to the City, Captain Gardner handed Complainant her badge, and she “snatched it” from him. Tr. at 218. He was frustrated with her and said, “you’re welcome.” Id. In response, Complainant “started her tirade again”, which Captain Gardner described as “a rant about what Mesa had done to her, how she had been mistreated by everyone, and how we weren’t helping her.” Tr. at 218.

Captain Gardner felt that he had been insulted multiple times, despite having helped Complainant. Id. Captain Gardner stated that Complainant was loud and his voice became loud in response, and he told her that she needed to show “common courtesy and professionalism to everyone at Mesa, regardless of how she thinks she’s been treated.” Tr. at 219. At some point, Captain Gardner stood and asked Complainant to leave his office. Id. When Complainant did not leave, Captain Gardner told her to “get out of my office before I have you removed.” Id. Captain Gardner stated that “several times” Complainant said, “you guys should just fire me.” Complainant also made statements that she was not going to work if she did not have an active code. Id.

Ms. Overhaug had never mentioned the problem with Complainant’s code to Captain Gardner. Tr. at 217. He would not have expected Ms. Overhaug or Isaac to discuss Complainant’s security code problems with him, as he was not primarily responsible to activate codes. Tr. at 213. Captain Gardner testified that if he had known in advance about Complainant’s code problem, he would not have sent the e-mail requesting activation, because any signatory from Mesa at O’Hare could have sent the e-mail. Tr. at 208.

Complainant's interaction with Captain Gardner caused him concern about how she would treat other employees and passengers. Tr. at 220. Although Captain Gardner was the ranking person in flight operations at the time, it was unclear to him whether he had disciplinary authority over Complainant at the time. Tr. at 221. He testified that if he had known that he had disciplinary authority, he would have "pulled [Complainant] offline right there on the spot" because of her "inappropriate" behavior. Tr. at 221. Captain Gardner denied that Complainant made any statements or allegations that Mesa was violating safety standards or that Respondent forced her to act illegally. Tr. at 222. Immediately after the meeting with Complainant, Captain Gardner went to Isaac's office and spoke with him about the meeting. Tr. at 238. Captain Gardner also later spoke with Ms. Overhaug about the meeting. Id. Approximately two days after meeting with Complainant, Captain Gardner sent an e-mail to Kenley Chambers that described his encounter with Complainant. Tr. at 204. Captain Gardner stated that Ms. Chambers is the "top of the flight attendant chain of command." Id.

Captain Gardner agreed that controlling access to the tarmac area is important. Tr. at 223. Captain Gardner did not have any communication with Complainant after his meeting with her. Tr. at 224. Captain Gardner testified that Complainant did not need the security code to perform her job duties. Tr. at 236. Captain Gardner testified that "lots" of people had escort privileges. Tr. at 237.

Kenley Chambers

Kenley Chambers is the Vice President of in-flight services for Mesa. Tr. at 245. She oversees approximately 1,050 flight attendants employed by Respondent. Tr. at 362. Her duties involve managing the budget, working on contractual issues, and dealing with unusual personnel issues. Tr. at 363. Ms. Chambers testified that in 2007, Respondent hired 700 flight attendants. Id. She recalled that the market for flight attendants was very good, and that all airlines were hiring. Tr. at 364. New flight attendants for Mesa are guaranteed 65 hours of flight time and are paid more if they fly more hours, but are not paid less if they fly fewer hours through no fault of their own. Tr. at 364-365. In addition, flight attendants earn a per diem for expenses and earn flight passes. Tr. at 365-366. Ms. Chambers described the buddy pass benefit, which was limited to Mesa operated flights and subject to seniority and availability. Tr. at 366-368. Flight attendants also get to use other flight benefits within 15 days of graduation, and family and friends may use passes in 45 or 60 days after graduation. Tr. at 368-369.

Ms. Chambers testified that she intended to extend Complainant's probation, based on her communications with Captain Gardner and crew tracking. Tr. at 371. Ms. Chambers did not consider the content of Complainant's communications, but "the way that she handled the matter" as the reason to extend her probation. Tr. at 371. Ms. Chambers testified that it was her decision to discharge Complainant. Tr. at 246. She made that decision during a conference call on February 2, 2007 with Ms. Overhaug and Complainant. Tr. at 247. Ms. Chambers had not met Complainant nor spoken with her prior to February 2, 2007. Id. Ms. Chambers decided to terminate Complainant's employment because of her unprofessional and confrontational attitude during the call. Id. Prior to the conference call, Ms. Chambers intended only to extend Ms. Pinkston's probation. Tr. at 248. Ms. Chambers testified that any member of in-flight

management can decide to extend an employee's probation. Id. Ms. Overhaug could have made that decision as well. Id.

Ms. Chambers was aware of two incidents involving Complainant. Tr. at 250. Ms. Overhaug made Ms. Chambers aware of the meeting between Ms. Overhaug and Complainant where Complainant questioned her schedule. Id. She also learned about Complainant's telephone conversation with crew tracking. Id. As a result, a meeting with Ms. Pinkston was scheduled. Id. Ms. Chambers could not remember if she or Ms. Overhaug initiated the meeting. Tr. at 253. Ms. Chambers also spoke with Captain Gardner and was aware of his concerns about Complainant's attitude. Tr. at 254. She did not know if anyone had talked to Complainant about her demeanor before the telephone conference on February 2. Id.

Ms. Chambers testified that attendance is mandatory at any meeting that she sets in her department. Tr. at 253. Ms. Chambers was certain that Complainant knew who Ms. Chambers was because she had attended a luncheon held for the trainees and spoke with the trainees after the luncheon. Id. Ms. Chambers asserted that Complainant was not fired for failing to call when told about the meeting. Tr. at 272. She explained:

...Part of the reason I—the reasons behind her termination—or, reason behind the termination was because of the games or the semantics she liked to play about coming to the meeting and walking past the supervisor's office twice. It had nothing to do with her not showing up at the meeting. I mean, had she been in a car wreck, I wouldn't have fired her because she didn't show up. It was the fact that I knew she received the message, I knew she had contacted her union representation—or, her union rep. I know that she was there at the airport that day. I know for a fact—or, I know from what Ms Overhaug has given me that she walked by the office twice. I know that she was on duty, because we had to pull her off her flight. And to come in and say, I didn't know that I had a meeting, I'm not going to play games.

Tr. at 272. Ms. Chambers clarified her statement by acknowledging that Complainant said that she didn't know that the meeting was mandatory. However, she believed that Complainant "deliberately did not show up for a meeting". Tr. at 381. Ms. Chambers testified:

...I can tell you one hundred percent without a doubt, had she handled herself in an apologetic manner...it would have been handled completely different. Her probation would have still been extended, absolutely, no doubt, because of the way the situations were handled. Maybe she did not realize she was being as abrasive as she was, but this was not a meeting that she asked for. It was a meeting that I asked for—or her management asked for. And it's not her duty to sit there and interrupt everything that I'm saying to her. If I'm—if a vice president is having to get involved in an extension of probation, there is an issue...

Tr. at 381-382.

Ms. Chambers had exchanged e-mails with Ms. Overhaug about Complainant's conversations with tracking and Captain Gardner. Tr. at 287. She did not consider Complainant's discussions about her code with Ms. Overhaug more than an expression of frustration that alone would not have warranted discipline. Id. She was aware that the conversations with both tracking and Gardner were about the security code. Tr. at 288. Ms. Chambers directed Ms. Overhaug to take Complainant off her flight when she learned by e-mail that Complainant had walked past Ms. Overhaug's office twice. Tr. at 381.

Ms. Chambers testified that she knew of no passenger complaints about Complainant, or any complaints relating to her performance, although she was aware that Complainant had refused to come to work on January 27, 2007. Tr. at 383. Ms. Chambers made the decision to terminate Complainant's employment, but did not prepare her termination paperwork. Tr. at 386. Ms. Chambers explained that a probationary flight attendant such as Complainant is permitted to have a union representative present at a meeting with management. Tr. at 275. However, union representatives are not permitted to interject on behalf of probationary employees who are being disciplined. Id. Ms. Chambers acknowledged that Complainant's schedule had not been revised because of the meeting. Tr. at 276. She asserted that Complainant would have learned that the meeting would be a short one if she had returned Ms. Overhaug's call. Id. Ms. Chambers had listened to Ms. Overhaug's voice mail message to Complainant regarding the meeting. Tr. at 277. She believed that the message invoked a mandatory meeting. Tr. at 279. She considered the language, "please call me back to let me know you will be there" to be polite. Tr. at 280. Ms. Chambers testified:

I think if, in fact, Jennifer had just called her and said, I'd like to meet with you to discuss a couple of things, come by at your earliest convenience, it would have been one thing. But the fact that my name was put in there, I have no doubt that Ms. Pinkston knew who I was. And I have no doubt she knew what this was about because she had, in fact, contacted her union rep.

Tr. at 285.

Ms. Chambers recalled firing one other flight attendant for bad attitude. Tr. at 375-376. She has mainly fired people for attendance problems and customer complaints. Tr. at 376. Ms. Chambers said there is no set policy or specific number of complaints about an employee that mandates discipline, and she considers the entire situation. Tr. at 377. Ms. Chambers concluded that Complainant's abrasiveness with her on the phone and disrespect to co-workers was not consistent with good customer service. Tr. at 377.

Ms. Chambers first found out that another employee had shared her security code with Complainant during the OSHA investigation. In January and February 2007, Ms. Chambers was a signatory and would have had the ability to request activation of Complainant's security code. Tr. at 255. Only the City of Chicago had the authority to activate codes. Tr. at 256. Ms. Chambers did not believe that she could request activation for one individual, and was aware that a spreadsheet with changes and additions had already been sent to the City, pursuant to past practice. Id. Ms. Chambers was one of the first people at Mesa that the City instructed on the use of spreadsheets when requesting code activation. Tr. at 256-257. Ms. Chambers recalled

starting the process in July, 2005. Tr. at 261. She estimated that she sent at least twelve spreadsheets to the City. Tr. at 262. In some months, she only sent to the City the names of individuals who needed to be changed, deleted or added. Tr. at 264. Ms. Chambers acknowledged that the spreadsheet that included Complainant's name as an additional individual to be activated included the names of all individuals at Mesa who were assigned security codes. Tr. at 265. She noted that there had been a change in management in the months prior to January, 2007, but she did not know why a complete list of employees was sent to the City at that time. Tr. at 267-268.

Ms. Chambers agreed that access to the tarmac was a security issue, and could be a safety related issue as well. Tr. at 268. She did not believe that flight attendants needed access to the crew room to do their job, but admitted that Respondent liked attendants to use the room. Tr. at 269-270. Ms. Chambers testified that individuals needed a code to access the crew room and supervisor's office. Tr. at 270. Ms. Chambers observed that it was not uncommon for a code not to work and noted that Complainant could have called another crew member to escort her to the secured areas. Id. Ms. Chambers did not know if new employees are told about the availability of escorts. Tr. at 278. Ms. Chambers testified that anyone with a blue badge may escort others to secured areas of the airport, and included police officers, TSA officers, supervisors and chief pilots among those with that authority. Tr. at 283. Ms. Chambers could think of no situation where an individual would have been denied an escort. Tr. at 284.

Ms. Chambers acknowledged that an individual could exit the coded door that led to where employees caught the shuttle bus. Tr. at 290. She did not believe that posed much of a threat because it is a long walk from there to any plane on the tarmac. Id. She acknowledged that if Complainant needed an escort to allow her to exit to the bus stop, the escort would have had to stay with her until she got on the bus.

Ms. Chambers testified that it was Respondent's policy to reimburse new employees for the cost of parking or train fare until they received their parking badge. Tr. at 271. After parking badges are issued, employees are not eligible for reimbursement of such costs. Id. Ms. Chambers admitted that having a parking badge but no access code was of no use to an employee, and blamed the problem on the City's activation procedures. Tr. at 282.

Brad Rizzoli

Mr. Rizzoli works for Respondent in employee travel services, and his job involves helping crew members get to and from destinations and making sure they have hotel transportation. Tr. at 294. He occupied that position in January, 2007 when he was supervising crew tracking operations. Id. Crew trackers are responsible for assuring that the airline is compliant with FAA rules and regulations involving crew flight hours. Tr. at 295. The job requires creativity because flights cannot take off unless the number of members complies with FAA rules. Tr. at 295-296. Flights are delayed and can be cancelled if crew members become unavailable, and he sometimes has to tell people that they must work when they don't want to. Tr. at 296.

Mr. Rizzoli recalled speaking with Complainant on January 26, 2007. Tr. at 296. One of the crew trackers on his shift initially took her call, and he took over when it became clear that the conversation was escalating in tone. Tr. at 297. When he came on the line, Complainant immediately “screamed” and “yelled” at him. Id. Mr. Rizzoli could not determine the substance of her complaint, and he explained, “. . .it was hard to even reach clarity as far as what I was being yelled at. It was about the company, it was about Mesa, it was about crew tracking screwing her over, it was about parking. . .”. Tr. at 298. Complainant brought up parking, but he still wasn’t sure what the issue was, and the call ended abruptly without any resolution that Mr. Rizzoli could discern. Tr. at 299. Complainant did not complain that she was being asked to break laws or security rules. Tr. at 301. Mr. Rizzoli did not understand that Complainant’s main concern was that her code had not been activated. Tr. at 301-302. Mr. Rizzoli stated that he “definitively looked at it as she was personally concerned about her car and where it was going to be and not as far as an overall safety issue with either the airline or her well-being.” Tr. at 305.

Mr. Rizzoli testified that when Complainant told him that she would not take her flight the next morning, he advised her that he would have to contact her in-flight supervisor and ask her to be removed so that he could make a back up plan. Tr. at 298-299. Mr. Rizzoli had personally removed a flight attendant from her scheduled shift only twice. Tr. at 300. Mr. Rizzoli sent Ms. Overhaug an e-mail about the circumstances and also spoke with her. Id. Mr. Rizzoli testified that Complainant did not request to be removed from the schedule, but rather threatened not to show up. Tr. at 303. The purpose of Mr. Rizzoli’s e-mail to Complainant’s supervisor was to report her inappropriate conversation. Tr. at 304.

Chantil Huskey

Ms. Huskey works for Respondent as a flight attendant, and also serves as the president of the local Association of Flight Attendants. Tr. at 309. She is the primary union representative for flight attendants in Nashville, Chicago, Denver and Grand Junction. Id. Ms. Huskey knew Complainant, and recalled initially meeting her when she was in IOE training. Tr. at 309-310. Ms. Huskey and Complainant talked about the union and its contract with management and the role of union representatives. Tr. at 310. Ms. Huskey denied instructing Complainant to never attend a meeting with Mesa management without a union representative. Id. Ms. Huskey stated, “I would never say not to attend a meeting. I said to try to get a hold of a union member before attending the meeting.” Tr. at 310.

Ms. Huskey is familiar with airport security rules and policies, and with the security codes used at O’Hare. Tr. at 310. In her experience, those codes allow individuals to enter secured areas such as a crew room or jet bridges. Tr. at 311. Ms. Huskey denied that flight attendants need a security code to do their job, but agreed that they should have one. Tr. at 323. Ms. Huskey testified that she has performed the duties of a flight attendant at O’Hare for one and one-half years without a security code for that airport. Tr. at 311. She works approximately three four-day trips per month at O’Hare. Tr. at 311-312. When Ms. Huskey needs to go to the crew room, she contacts a supervisor or others who have escort badges to take her to the room. Tr. at 312. Gate agents escort her to the aircraft. Tr. at 312. Her crew badge is sufficient to

allow her to gain access to those areas. Id. Ms. Huskey does not park in the employee lot, and her security code was revoked by the City when she allowed Complainant to use it. Tr. at 327.

Ms. Huskey was aware of the City's delay in activating codes at the time that Ms. Pinkston worked for Respondent. Tr. at 313. She believed that there continued to be an average of two to four weeks delay in the activation of codes. Tr. at 335. She did not believe that the current time for activation differed from when Complainant was issued a code. Tr. at 325-326.

Ms. Huskey recalled receiving a telephone message one night from Complainant, who was upset about not being able to get to her car. Tr. at 313. When she returned the message, Ms. Huskey provided Complainant with her own security code. Tr. at 324. At the time of the message, Ms. Huskey perceived Complainant to be very upset, and since her car was in the employee lot, her "first instinct was to give her my code so that she could get to her car. There was no point to tell her to park in [the] economy parking lot when her car was in the employee parking lot." Tr. at 324-325. Ms. Huskey made that suggestion to Complainant in a later conversation and also suggested the subway, but Complainant considered those options inconvenient. Tr. at 314. Complainant asserted that the company should provide her with parking, and although Ms. Huskey agreed, she assured Complainant that her parking costs would be reimbursed. Tr. at 315. Ms. Huskey was routinely reimbursed for parking expenses during her ten years of employment with Respondent. Id.

Ms. Overhaug contacted Ms. Huskey to advise her that management wanted to meet with Complainant about two incidents. Tr. at 316; 318-319. In her experience, management's intention to extend Complainant's probation was "pretty much protocol". Tr. at 317. Ms. Huskey has attended other meetings that involved the extension of a flight attendant's probation, and she testified that the meetings lasted for 15 minutes at most. Id. Ms. Huskey is informed by the company of all probation extensions so that she can inform the union about them. Tr. at 318. However, not all flight attendants request Ms. Huskey to attend meetings with them, because the union cannot do anything for probationary flight attendants. Tr. at 331. Ms. Huskey recalled that she was in Honolulu when she received a message from Complainant about the meeting. Tr. at 319-320. She did not immediately respond because of the difference in time zones. Id. Ms. Huskey did not join the meeting because it occurred at 3:30 a.m. her time. Tr. at 321. Ms. Huskey did not recall Complainant telling her that she was asked to violate security procedures before she was terminated, but she "remember[ed] messages after the termination stating that she felt that she was required to do that". Tr. at 322-323.

As a result of providing her security code to Complainant, Ms. Huskey lost the right to use the code. Tr. at 328. She was required to retake security training and a letter of reprimand is in her file. Id. She believed Respondent learned of the incident during the investigation into Complainant's complaint. Tr. at 327-329. Ms. Huskey testified that she could not say how often employees allow other employees to use their security codes. Tr. at 331-332. Ms. Huskey stated that "piggybacking" occurs, and she described that as circumstances where a captain uses his security code for persons in his command, rather than getting a special escort. Tr. at 332. Ms. Huskey was not aware of flight attendants "piggybacking" on other flight attendants. Id. Ms. Huskey agreed that piggybacking is not "completely rare". Tr. at 334.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of the Law

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121. Subsection (a) prohibits discrimination against airline employees as follows:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(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); *see also* 29 C.F.R. § 1979.102(b)(1)-(4). An employee's complaint may be oral or in writing, but must be specific in relation to a given practice, condition, directive, or event. Peck v. Safe Air International Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB January 30, 2004). The complainant must have a reasonable belief that her complaint is valid. Id.

The AIR21 Act requires a complainant to establish a *prima facie* showing that the protected activity described at 49 U.S.C. § 42121(a) was a contributing factor in the unfavorable personnel action taken against her. Taylor v. Express One International, Inc., 2001-AIR-2 (ALJ February 15, 2002). Once the Complainant presents a *prima facie* case, then respondent has the opportunity to present by clear and convincing evidence that there was a nondiscriminatory justification for the adverse employment action. 29 C.F.R. § 1979.104(c); *See*, Yule v. Burns

Int'l Security Service, Case No. 1993-ERA-12 (Sec'y May 24, 1995)¹. The respondent need only articulate a legitimate reason for its action. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). A complainant can show pretext by proving that discrimination is the more likely reason for the adverse action, and that the employer's explanation is not credible. Hicks, supra. at 2752-56.

In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." Id. See also, Blow v. City of San Antonio, Texas, 236 F. 3d 293, 297 (5th Cir. 2001). The proper focus of the inquiry is whether the complainant has shown that the reason for the adverse action was her protected safety complaints. Pike v. Public Storage Companies Inc., ARB No. 99-071, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). Although the standard of "clear and convincing" evidence has not been defined with precision, courts have held that it requires a burden higher than "preponderance of the evidence" but lower than "beyond a reasonable doubt." Id. If respondent is able to meet this burden, the inference of discrimination is rebutted. As the Supreme Court noted in Hicks, supra., the rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination. See also Blow v. City of San Antonio, 236 F.3d 293, 297 (5th Cir. 2001). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." Mitchell v. Link Trucking, Inc., ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

At the level of a formal hearing before an administrative law judge, the presumption ceases to be relevant and falls out of the case. Burdine, 450 U.S. at 253, 256. Instead, the complainant must prove the same elements as required for the prima facie case, with the exception that complainant must prove them by a preponderance of the evidence and not by mere inference. Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). Until the complainant meets her burden of proof, Respondent need only articulate a legitimate business reason for its action. Clemmons v. Ameristar Airways, Inc., ARB Case Nos. 05-048, 05-096 at 9, ALJ Case No. 2004-AIR-11 (ARB June 29, 2007). The onus falls on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action.

B. Analysis

1. Adverse Action

In Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 (ARB Jan. 31, 2007), the ARB relied upon a decision by the United States Supreme Court in holding that the Complainant had not established that he suffered adverse employment action.

¹ The whistleblower provision set forth in the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, contains the same burden of proof standards as those included in the AIR 21 Act.

See Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (June 22, 2006). The ARB found that the Complainant must establish that a reasonable employee or job applicant would find the employer's action "materially adverse", which was described as "actions [that are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." USDOL/OALJ Reporter at 10-11, quoting 126 S. Ct. at 2409.

It is uncontroverted that Complainant was terminated from her employment with Respondent by Kenley Chambers, on the day that she would have been placed on probation. I find that her discharge constitutes a materially adverse action.

In her written closing argument in the instant matter, Complainant alleges that Respondent's extension of her probationary period constitutes a separate adverse action. It is not perfectly clear that she identified this incident as a separate cause of action in her complaint to OSHA. In its findings upon investigation, OSHA does specifically note that Respondent told Complainant that her probationary period was extended. Respondent has not asserted otherwise. Whether the extension of probation constitutes a separate adverse action is of little significance in this case. Complainant's employment was terminated during the meeting when she was told that her probation was to be extended. Complainant did not suffer any adverse consequence from an extension of her probation because she lost her job. Accordingly, I decline to find that the anticipated extension of probation constitutes an adverse action in the instant matter. Similarly, it is not necessary to determine whether Complainant specifically identified the probation extension as a separate adverse action in her complaint with OSHA.

2. Protected Activity

A protected activity occurs when an employee:

“(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 [the Act] 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 [the Act] or any other law of the United States...”

49 U.S.C. § 42121; see also, 29 C.F.R. §§ 1979.102.

“While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event.” Leach v. Basin 3Western, Inc., ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003), citing Clean Harbors Env'tl. Serv. v. Herman, 146 F.3d 12, 19-21 (1st Cir. 1998). Although it does not matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.” Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must implicate safety definitively and specifically and must at least “touch on” the subject matter of the related statute. Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, Dodd v. Polysar Latex, 88-SWD-4 (Sec'y Sept. 22, 1994). Additionally, the subjective belief of the complainant is not sufficient, and the standard involves an objective assessment of whether the allegation constitutes protected activity. Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997).

In ERA cases, internal complaints made to company supervisors concerning safety and quality control have been held to be protected activities. See Bassett v. Niagara Mohawk Power Corp., Case No. 1985-ERA-34 (Sec'y Sept. 28, 1993). Because of the statutory connection between cases under ERA and AIR 21 Act, I find that holding pertinent to the instant matter, and conclude that specific complaints of safety made to Complainant's supervisor could constitute protected activity.

Respondent's Violation of Security Rules

The FAA has promulgated rules that require airports to develop a system to detect and prevent unauthorized entry into secured areas and air operation areas. 49 C.F.R. §§ 1542.201(b) and 1542.203(b). In addition, the Department of Transportation articulated its goal to eliminate “piggy-backing”, which is described as a situation “where another person follows an authorized person through the access point”. 49 U.S.C. § 44903(j). I find that the employee protection provisions of AIR 21 would protect an individual who filed a complaint regarding violations of these security provisions. See, 49 U.S.C. § 42121(a)(1).

All of Complainant's allegations in support of protected activity involve the failure of Respondent to provide her with an activated security code that would have enabled her to gain access to the employee parking lot from the airport. Complainant alleged that Mesa forced and instructed her to violate security procedures by instructing her to park in employee parking but not activating her security code. Because her code was not activated, Complainant maintains that she was forced to exit by going through secured doors without the code; by using another employee's code, and by “piggybacking” on other employees' codes by exiting with them. Complainant alleges that Respondent had provided no alternative to her other than to park in the employee lot, and she could not gain access to the lot without an active code. She contends that her supervisor Jennifer Overhaug instructed her to park in the lot, was aware of her problems with the code, and endorsed her solutions to the problem.

I find little evidence to support Complainant's contention that Respondent instructed her to use only the employee parking lot. The evidence does not support her assertion that the employee parking lot was “the only place that [she] thought [employees] were supposed to park.” See, Tr. at 105. It is undisputed that Complainant was provided a parking badge without

the means to properly use it. The new employee information package discusses the employee lot and provides instructions to it, and does not provide information about Respondent's alternate parking policies. CX 4. However, the record establishes that Complainant should have been aware that her ability to park in employee parking would not coincide with her deployment to active flight duty.

The evidence reflects that the City of Chicago was responsible for activating codes and instituted procedures by which Respondent could request activation. Complainant acknowledged that she had been advised during training, and then later by her supervisor Jennifer Overhaug, that her code would not be activated immediately. Tr. at 101. Although Complainant has asserted that she thought she was supposed to use the employee lot, the record reflects that Complainant was not restricted to parking in the employee lot. Complainant admitted that no one at Mesa told her that she could not park anywhere else. Tr. at 105. Complainant also admitted that she could have parked in passenger parking but did not want to pay for parking. Tr. at 102. Complainant denied knowing about the reimbursement policy, and during her conversation with crew tracking, Complainant indicated that she would have considered parking elsewhere if Respondent agreed to reimburse her. Tr. at 68. However, Ms. Overhaug testified that during training, she advised employees that they would be reimbursed for parking in long term parking until their security codes were activated. Tr. at 184-185. In addition, the agreement between Respondent and the flight attendants' union reflects that when free parking is not available, Respondent "will secure and pay for suitable parking". EX 11 at 10 (page 18 of the agreement). Complainant was familiar with the contract. CX 7; Tr. at 77.

Chantil Huskey testified that she advised Complainant about reimbursement and the train, but Complainant rejected those options as inconvenient. Tr. at 312-314. Although Complainant denied being given that information from Ms. Huskey, Complainant tacitly confirmed Ms. Huskey's testimony. Complainant admitted that she did not want to use a remote parking site or an elevated train to get to the airport, as she was unfamiliar with those facilities and would have felt unsafe. Tr. at 102; 138. In addition, Complainant's testimony regarding the cost of parking and delay in reimbursement indicates her reluctance to rely upon reimbursement. Tr. at 103-104.

I find that Complainant was determined to use employee parking regardless of the consequences. By no later than January 17, 2007, Complainant was aware that she needed a code to exit the airport at a place with access to the employee shuttle bus. Tr. at 148. She had encountered problems leaving the airport without an active code. Nevertheless, Complainant continued to assume the risk of parking in the employee lot without knowing whether her code had been activated.

Complainant has argued that Respondent had instructed her to engage in unlawful "piggybacking" in order to gain access to employee parking. Complainant's testimony about her conversation with Ms. Overhaug on January 17, 2007 provides some support for her contention that she was instructed to pass through secured doors with other people with an active code. Complainant testified that when she told Ms. Overhaug about her problems exiting the airport without a code, Ms. Overhaug told her to "just keep on waiting for someone to come and go through that door". Tr. at 59. The record on this issue is not well developed. Ms. Overhaug was not specifically asked whether she made the incriminating statement that Complainant recalled.

As the statement is uncontradicted, I accord it probative weight and find that Ms. Overhaug instructed Complainant to engage in “piggybacking”. However, I find that the evidence does not demonstrate that Ms. Overhaug instructed Complainant to breach security policy.

The record demonstrates that some piggybacking was authorized. Ms. Overhaug testified that Respondent’s training manual does not differentiate between “escorting” and “piggybacking”. Tr. at 356. However, the record establishes that certain individuals were authorized to escort unauthorized individuals into secured areas. Captain Gardner testified that when Complainant worked for Mesa, captains had authority to escort their entire crew to the aircraft. Tr. at 234. Flight attendant Chantil Huskey testified that “piggybacking” commonly occurs when a captain uses his code for his crew, but she denied knowledge of such practice viz a viz one flight attendant to another. Tr. at 332-334. Complainant did not state whether Ms. Overhaug meant to advise her to use authorized escorts to exit the airport.

The circumstantial evidence demonstrates that Complainant was not instructed to engage in unlawful piggybacking. The most compelling evidence against Complainant’s case is the fact that her attempts to piggyback were not very successful. Complainant testified that on the first occasion that she attempted to exit the door to the employee shuttle bus pick up area, she went out with a United employee. Tr. at 55. She did not say whether it was an individual with escort authority. *Id.* Complainant next encountered problems with gaining access to the crew room on January 17, 2007. Tr. at 57. She asked a pilot to escort her and he refused. *Id.* On January 20, 2007, when her code once again did not work at the exit door, pilots for Sky West Airlines “reluctantly” let her pass with them. Tr. at 61. On January 24, 2007, United employees refused to give her access to a secured door. Tr. at 64. A Chicago city police officer and a TSA (Transportation Safety Agency) officer refused to allow her through a secured area. Tr. at 64 - 65². Complainant described how she left the airport on that night in an e-mail that she sent to various Mesa employees on February 3, 2007. CX 7. At enumerated paragraph 4, Complainant wrote in pertinent part: “...[a]t about that time a Continental employee walked in the door and I slid my foot in the door and let myself out...” CX 7, page 2, paragraph 4. The evidence makes it clear that Complainant did not easily “piggyback” to get to the employee shuttle bus stop. In addition, the record shows that the only times that Complainant successfully “piggybacked” was with non-Mesa employees.

Furthermore I find that Complainant objectively could not have reasonably believed that Respondent authorized “piggybacking” or any other procedure designed to thwart an unactivated code. Complainant demonstrated that she did not believe that she had authority to rely upon piggybacking to exit the airport when she sought out Captain Gardner to activate her security code. I find that the preponderance of the evidence establishes that Respondent did not instruct her to violate security procedures to gain access to employee parking.

Complainant also alleged that Respondent violated security procedures by authorizing her to use another individual’s security code. Complainant alleged that when she spoke to crew tracking on January 26, 2007, the crew tracking employee that she spoke with contacted her supervisor Jennifer Overhaug, who offered her the use of another employee’s code for that one

² Complainant testified that she grew concerned that security officials refused to escort an employee “in full uniform”, but she did not state whether she showed her employee identification to those individuals.

instance. Tr. at 66. Complainant rejected the offered code, because she wanted a final solution to “getting locked inside”. Tr. at 67. Complainant testified that while waiting to be told the code, an employee went through the door, and she exited with the employee. Tr. at 66. Complainant also made this allegation in her e-mail of February 3, 2007, although it is clear in that e-mail that she surreptitiously exited behind the other employee. CX 7. Although both the crew tracking employee, Brad Rizzoli, and Ms. Overhaug testified, neither were asked about whether Ms. Overhaug offered the use of a code.

Better development of this issue would have been appreciated, but based on the record before me, I find that Complainant’s testimony on this issue is not entirely credible. I rely upon Mr. Rizzoli’s testimony about his exchange with Complainant:

Q So when Ms. Pinkston -- or, did Ms. Pinkston tell you that she was not going to accept any future flights?

A She told me directly that she was not going to take her flight in the morning.

Q And what did you do then?

A At that point I said that I was going to be contacting her in-flight supervisor and immediately started trying to get hold of Jennifer Overhaug.

Q And were you successful in reaching Ms. Overhaug?

A I believe eventually in the evening, but not while I still had her [Complainant] on the phone.

Q So, while you still had her on the phone, how did the phone call conclude?

A I would say probably abruptly. There was no real resolution to the issue, and by the end of it I wasn't still exactly sure what the issue was.

Q The issue that she was complaining about?

A And definitely parking was addressed, but there was so much other things that were brought up during it I wasn't even sure that parking was an issue.

Q Did you keep Ms. Pinkston on her scheduled --

A When she told me that she had no intention of showing up for her flight the next morning, I considered that as a no-show. I asked her to be removed offline so we could have an effective backup plan just to make sure that we covered our side on operations.

Tr. at 298-299.

In this version of the discussion, Mr. Rizzoli did not contact Ms. Overhaug until after the conversation with Complainant had ended. This is consistent with Complainant’s own admitted unsuccessful attempts to reach Ms. Overhaug on “her work number, cell work number and her private cell number” before she called crew tracking. CX 7 at page 2. I also credit Mr. Rizzoli’s version over Complainant’s because I find it difficult to believe that Complainant would have refused to use a security code that was offered to her, even if the offer was limited to one night. Firstly, Complainant described feeling “trapped like an animal” and being “near hysteria” at not being able to reach her car on the night of her second conversation with crew tracking. CX 7 at page 2. In addition, Complainant had no scruples about using her friend Chantil Huskey’s security code when Ms. Huskey offered it on another occasion when Complainant was distressed and upset about being denied access to the employee parking lot.

I also find no reason to believe that Ms. Overhaug would have attempted to help Complainant. The record demonstrates that Ms. Overhaug did nothing at all to help Complainant activate her code. The following testimony shows that Ms. Overhaug did not even directly address Complainant's repeated concerns about the activation of her code:

Q Do you recall how many times Ms. Pinkston came to you with concerns about her code?

A No.

Q Can you give us an estimate?

A Possibly another time, so it would be a total of three.

Q So in the times that Ms. Pinkston was raising the concerns about her code to you, she generally was asking that the problem be fixed, correct?

A Correct.

Q And you told her that it just took time, am I right?

A In a roundabout way, yes.

Tr. at 177-178. Ms. Overhaug also testified that she did not do anything to expedite the code activation, or do anything to learn whether she could. Id.

I additionally find it unlikely that a supervisor would have breached security by sharing her code. When Respondent learned that Complainant had used Ms. Huskey's code months after the incident, Ms. Huskey was disciplined. She was reprimanded, sent to security training, and lost the use of her security code. Tr. at 328-329. Ms. Huskey's experience demonstrates that Respondent considered the use of another's code to be a serious matter. There is no evidence that inquiries were made into Complainant's allegations regarding Ms. Overhaug. I give little weight to the suggestion that Respondent's release of the employee code manifest during litigation demonstrates its lack of concern about security codes. I also give no weight to Complainant's hearsay testimony that Ms. Overhaug gave her personal code to another employee. See, Tr. at 114.

Complainant's arguments suggest that Respondent's failure to activate her security code was a violation of safety and security rules in and of itself. I disagree. Although it is clear that Respondent had the means to accelerate the code activation process, it was under no obligation to do so. Captain Gardner credibly testified that he had requested code activation for approximately ten individuals only. The record demonstrates that Ms. Overhaug delayed the code activation process by mistakenly providing the City of Chicago a manifest of every employee rather than only those with a change in status. However, every new employee was affected by this error. Although I agree with Complainant that the process appeared to have been unduly delayed, this issue is immaterial to my adjudication. I accord substantial weight to the evidence that demonstrates that Complainant did not need the code to perform her job duties. Ms. Huskey has been working without a code for one and ½ years. Tr. at 311. An activated code would have made it easier for Complainant to enter crew areas, and was essential for access to the shuttle bus. However, Complainant could have contacted authorized personnel to gain access to the crew room, as Ms. Huskey, Ms. Overhaug and Captain Gardner testified. I give little weight to the evidence suggesting that escorts were scarce. Even accepting that to be true, Complainant's complaints primarily involve her lack of access to the employee parking lot, and

not her inability to perform her job because of security problems. Complainant was not limited to parking in the employee lot, and therefore did not strictly need access to the shuttle bus.

Complainant also described incidents where she passed through a secured, alarmed door in violation of security policy. The record does not establish that Mesa supervisors instructed her to go through an alarmed door without the security code, and in fact, Complainant testified that she had not been told or instructed to exit a secure door without an active code. Tr. at 113.

I find that the evidence demonstrates that Complainant violated security procedures for her own convenience. The record does not establish that Complainant was instructed to park exclusively on the employee parking lot. The preponderance of the evidence does not show that Respondent directed Complainant to impermissibly piggyback onto other employees' codes, to impermissibly use other employees' codes, or to exit alarmed doors without a code. Complainant spoke to her supervisors about her problems with the code, and was advised that the process took time. Complainant was unwilling to wait, as she proved by her demands to crew tracking, and her confrontation with Captain Gardner. Contrary to Complainant's contentions, I find that her actions were taken for purposes of personal convenience, and not because she was given no alternative solution. The evidence fails to establish that Respondent instructed her to violate any safety or security procedures.

Complaints Regarding Alleged Security Violations

Even if I were to find that Respondent had instructed Complainant to violate security procedures, there is no evidence that she made specific complaints regarding the violations. Although I find that a violation of security procedures would inherently affect safety, Complainant's testimony about her complaints is broad and vague, and does not reflect that she raised specific safety or security standards with any one at Mesa. Complainant asserted that in her conversation with crew tracking on January 24, 2007, she told them that what Mesa was doing was "illegal". Tr. at 67. In her conversation with Ms. Overhaug on January 27, 2007, Complainant asked "whether or not what Mesa was doing was legal". Tr. at 69; 116. Complainant did not have a chance to raise the issue of the legality of Respondent's actions when she spoke with Captain Garner. Tr. at 146. She could not recall whether she discussed the legality of Mesa's actions during her telephone conference with Ms. Overhaug and Ms. Chambers. Tr. at 125.

Even according full credibility to Complainant's testimony, I find that none of her statements demonstrate that she engaged in protected activity. Complainant did not identify the nature of the illegal conduct that Respondent was allegedly performing. Her concerns were not expressed "in a manner that was 'specific' with respect to the 'practice, condition, directive or event' giving rise to the concern." Rougas v. Southwest Airlines, Inc., ARB No. 04-139, 14, ALJ No. 2004-AIR-3 (ARB July 31, 2006); Simpson v. United Parcel Service, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14 2008). Moreover, I find that by continuing to park in an area with restricted access, Complainant demonstrated that her concerns about "legality" were not objectively reasonable, as she repeatedly was denied access to the secured area and repeatedly violated security rules to enter the area.

On February 3, 2007, Complainant sent a six page e-mail to many individuals, including her supervisors, “mesaafasafey”, and her union representative. CX 7. In her message, Complainant described all of her problems with exiting the airport before her security code was activated. Complainant refers to “piggybacking” and stated that she “began to question the ramifications” of being caught using that process. *Id.* Complainant also wrote that she was “breaking the laws” doing what she was told by her supervisor. As discussed herein, *supra.*, she states that she was asked to break the law when Respondent asked her to use another employee’s code.

I find that Complainant’s e-mail does not constitute protected activity. Complainant generally referred to piggybacking and breaking laws, but her references are vague and non-specific. Complainant protests that her discharge was unfair, and suggests that her problems with Mesa were all because “one of [Respondent’s] employees ‘dropped’ the ball in getting our codes properly to the City of Chicago in a timely fashion”. CX 7 at page 4. Complainant further argued that her performance as a flight attendant was good and that her “attitude” did not merit discharge. Complainant wrote: “I will stand on my performance and attitude aside from John Gardner being mad that I came to him and wanted his assistance to rectify the situation.” CX 7. Complainant also discussed the union contract and suggested that her case warranted less drastic discipline. I find that this communication constitutes an objection to her discharge, rather than a complaint of protected activity.

Respondent’s Awareness of Safety-Related Complaints

The Secretary has held that knowledge of a complainant’s protected activity on the part of the alleged discriminatory official is an essential element of a complainant’s case. Martin v. Akzo Nobel Chemicals, Inc., 2001-CAA-00016 (ALJ December 20, 2001), *aff’d*, ARB 02-031 (July 31, 2003), citing Bartlick v. TVA, Case No. 88-ERA-15, Sec. Ord., Dec. 6, 1991, slip op at 7 n. 7 and Sec. Ord. Apr. 7, 1993, slip op. at 4 n.1, *aff’d*, 73 F.3d 100 (6th Cir. 1996). Complainant must show that Respondent had actual or constructive knowledge of her alleged protected activity at the time of her termination. Moseley v. Carolina Power & Light, 94-ERA-23 (ARB Aug. 23, 1996); Ford v. Northwest Airlines, Inc., 2002-AIR-21 (ALJ May 15, 2003). The evidence must show that an employee of the respondent with the authority to take the complained action had knowledge of the protected activity. *Id.* Complainant must prove by a preponderance of the evidence that those responsible for the adverse action were aware of the alleged protected activity. Mace v. Ona Delivery Systems, Inc., 91 STA-10 (Sec’y Jan. 27, 1992).

Even if Complainant had established that she engaged in violations of security procedures at Respondent’s behest, the preponderance of the evidence does not establish that she communicated her concerns about violating security procedures with anyone employed by Respondent. Complainant’s testimony and pleadings on this issue are vague. Complainant responded “Yes” to the question “And when you were on the phone with Jennifer did you question to her about whether or not what Mesa was doing was legal?” Tr. 69. Complainant replied in the affirmative to a similar question about her conversation with crew tracking. Tr. at 67. Complainant did not describe the nature or extent of the purported illegal conduct.

Furthermore, Complainant's assertions regarding her complaints to Ms. Overhaug are undermined by inconsistencies in her testimony. Complainant did not testify at her deposition that she raised her concerns about the legality of the code situation with Ms. Overhaug. Tr. at 188-119. I accord substantial weight to Ms. Overhaug's testimony that Complainant did not raise concerns about Respondent violating safety standards or doing anything illegal. Tr. at 352. Ms. Overhaug believed that Complainant's concerns regarding the code were not related to safety or security, but rather, were directed at Complainant's inability to get out of the airport. Tr. at 352; 354. The preponderance of the evidence supports that conclusion. There is no evidence that Complainant reported safety violations to Kenley Chambers, the official who decided to discharge her, although Ms. Chambers was aware that Complainant's conversations with crew tracking and Captain Gardner involved the security code. Tr. at 288.

Captain Gardner corroborated Complainant's testimony that she did not raise the legality of Mesa's code policy with him. Tr. at 222. Crew tracking manager Brad Rizzoli denied that Complainant complained about being told to violate laws or security rules by Mesa. Tr. at 301. Mr. Rizzoli perceived her complaint to involve access to her car, and not an issue involving airline safety. Tr. at 305. Complainant acknowledged that once she was issued a code she did not speak with anyone at Mesa about her concerns regarding the code. Tr. at 118-199; 135. Complainant testified that she had reviewed whistleblower information online and considering filing a complaint, but she did not share those intentions with anyone at Mesa. Tr. at 119-120.

The evidence reflects that Complainant talked to O'Hare employee Bertie Yancey about her problems with the code. In pertinent part, Claimant testified:

Q So, Marcia, when you were talking with the City of Chicago's badging office, can you tell us what happened in this conversation?

A I explained to her that I had been getting locked in O'Hare and what I had been told and that Mesa had told me that I needed to get my code activated and I wanted to know who I could get my code activated from. And she wrote down a gentleman's name and his phone number and told me that he would activate it.

Q And did you tell the City of Chicago what your employer had been telling you to do to get through these doors?

A Yes.

Q And what did the City of Chicago tell you about that?

A I actually asked her directly if what I was doing was illegal, and she said yes, that I could get arrested if I continued doing it.

Tr. at 72. This discussion was somewhat clarified later in Complainant's testimony.

Q Were you ever told or instructed by anyone at Mesa Airlines it was appropriate for you to simply bust through a secure door and set off an alarm?

A No.

Q You did that, didn't you?

A Yes.

Q Did you tell that to Ms. Yancey that you had done that?

A I believe so.

Q Could that have been what she was referring to when she said that was illegal conduct? It could get you arrested?

A No, I think we were talking in reference to the code, that I needed my code.

Tr. at 113. In her written e-mail of February 3, 2007, Complainant described this exchange thusly: “[Ms. Yancey] informed me that yes indeed I would get arrested if I were to use another employee code to get out or if I were to set off the alarm to get out to the bus”. CX 7 at page 3.

This testimony is uncontradicted and I find that Complainant advised a City of Chicago employee about the circumstances involving the security code. However, Complainant’s rendition of her conversation reflects that Ms. Yancey confirmed that Complainant’s actions were illegal. Complainant did not contend that she told Ms. Yancey that Respondent directed her to use another employee’s code or exit an alarmed door. In addition, the record does not establish that the City of Chicago shared these concerns with anyone employed by Respondent.

Considering all of the evidence, I find that it fails to establish that Complainant communicated to Respondent any concern about specific security or safety violations regarding the security code or any other security policy. As the ARB has held, “[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint”. Bartlik v. TVA, supra at 4 n.1. The ARB confirmed this holding in Peck v. Safe Air International, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). This element applies even in circumstances where the employee “is about to” provide or cause to be provided information about air carrier safety. 49 U.S.C.A § 42121(a)(1)and (2). Accordingly, I find that Complainant did not engage in protected activity.

3. Legitimate Business Reason for Adverse Action

Assuming arguendo that Complainant had established that she engaged in protected activity and suffered an adverse employment action, the burden shifts to Respondent to articulate a legitimate non-discriminatory reason for the adverse action. In the instant matter, Ms. Overhaug testified that she was concerned that Complainant’s conduct was inappropriate and harsh during interactions with her and other Mesa employees. Accordingly, Ms. Overhaug scheduled a meeting to extend Complainant’s probation. Ms. Overhaug’s supervisor, Ms. Chambers, was scheduled to attend the meeting as well. Ms. Chambers concluded that Complainant deliberately avoided the meeting because Complainant had not responded to her supervisor’s telephone message regarding the meeting, and had walked past her supervisor’s office twice without inquiring about the meeting. Tr. at 272. Ms. Chambers found this conduct to be unprofessional and confrontational. When combined with the negative reports of Complainant’s interaction with Mesa employees, Ms. Chambers concluded that Complainant’s conduct was inconsistent with good customer service. She decided to discharge Complainant’s employment rather than extend her probationary period.

Ms. Chambers rejected Complainant’s explanation that she believed that Ms. Overhaug’s telephone message constituted an invitation to attend a meeting. Ms. Chambers pointed out that the message stated that she would also attend the meeting, and Complainant knew of her position as Vice President of In-flight Operations from flight school. Ms. Chambers did not accept

Complainant's reasoning that attendance at the meeting was elective because her flight schedule had not been changed. Complainant made no attempt to call her supervisor to clarify any ambiguity in the message, but did leave messages for her union representative. Ms. Chambers believed that Complainant's conduct showed a "bad attitude" and lack of respect. Although Ms. Chambers was not aware of any customer complaints about Complainant, she was aware that Complainant had refused to come to work. In addition, she was aware of what she characterized as Complainant's disrespect and abrasiveness to Mesa employees during her encounters with crew tracking and Captain Gardner.

I accord substantial weight to Ms. Chambers' probative and credible testimony and find that it is supported by the record. Complainant had worked for Respondent for three weeks, and during that time had two emotional conversations with Mesa employees and on one occasion had refused to come to work. I find that Ms. Chambers was solely responsible for the decision to terminate Complainant's employment. I accord substantial weight to Ms. Chambers' perception of Complainant's conduct regarding the meeting that management had scheduled. I reject as objectively unreasonable that Complainant did not believe that the meeting was mandatory. I agree that the part of Ms. Overhaug's message that addresses Complainant's confirmation of her attendance could be construed as invitational. ("...so call me back to let me know you will be there, and I'll talk to you soon..." Tr. at 121.) However, in the context of the rest of the message, it is unreasonable to conclude that the message implied anything other than that Complainant's attendance was expected.

Ms. Overhaug stated that the meeting would be held in the morning following the message. She demonstrated familiarity with Complainant's schedule by noting that she expected Complainant's flight to land at about 8:30 a.m.. Ms. Overhaug set a definite time for the meeting, with some flexibility to accommodate Complainant's schedule ("8:45 or 9:00"). Tr. at 121. Ms. Overhaug was specific in directing Complainant to attend ("...and we need to have you on our conference call with Kenley Chambers and myself at about 9:00 a.m." *Id.*). The fact that the message was couched in courteous terms does not materially alter the overall content of the message, which I find clearly intended to compel Complainant to attend a meeting with her supervisor and another Mesa official. I find it unreasonable that Complainant would construe Ms. Overhaug's message to convey an option to attend her supervisor's scheduled meeting.

Complainant's position is also not supported by her conduct. Although she stated that she was confused because she did not know whether the meeting would conflict with her flight schedule, her confusion would have been resolved had Complainant complied with her supervisor's request to call and confirm her attendance. Complainant found the time to call her union representative to ask her to attend. Although I find it reasonable that Complainant would have wanted a union representative in attendance at a meeting with management, I find that Complainant provided no objectively reasonable rationale for failing to contact her supervisor to discuss her attendance at the meeting. Complainant compounded the unreasonableness of that failure when she passed her supervisor's office twice on the morning of the scheduled meeting without discussing the meeting with Ms. Overhaug.

I also fully accept Respondent's explanation that as a probationary employee, Complainant was not entitled to the full protection of the union-management labor contract regarding discipline. See, EX 11. The agreement between those parties reflects that a new flight attendant must complete a six month probationary period, which may be extended at Respondent's discretion. Id. The agreement further reflects that probationary flight attendants are subject to discipline at Mesa's discretion.

I find that Respondent has met its burden of production and has stated a legitimate business reason for its adverse employment action against Complainant. The record establishes that Respondent would have discharged Complainant for its perception of her attitude and unprofessionalism, regardless of whether Complainant had participated in protected activity.

4. Pretext for Discrimination

As I have found that the evidence does not support a finding that Complainant engaged in protected activity, the issue of whether Respondent's stated legitimate business reasons were pretextual is moot. I accord full weight to Ms. Chambers' testimony that although she was aware that Complainant's conversations with crew tracking and Captain Gardner involved complaints about the security code, she did not consider the content of those conversations when she reached her decision to discharge Complainant. I accord substantial weight to Ms. Chambers' explanation that she was in agreement with Ms. Overhaug's plan to extend Complainant's probationary period until Complainant's conduct regarding the meeting.

C. Damages

Since Complainant has not carried her burden of proof, the issue of damages is not relevant.

CONCLUSION

The Complainant failed to establish that she engaged in protected activity that contributed to her probation and discharge. Complainant has failed to prove that any employee of Mesa that was involved in the decision to terminate her employment had any knowledge that she had engaged in protected activity. Therefore, Complainant has failed to prove the essential elements of her case. Complainant did not establish that the adverse personnel action was a pretext for any of Complainant's discussions regarding Respondent's security policies or procedures. Accordingly, I find that Respondent did not violate the employee protection provisions of the Act.

ORDER

The relief sought by MARCIA PINKSTON is DENIED, and the complaint filed herein is dismissed.

So ORDERED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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).