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Issue Date: 31 July 2009

Case No.: 2008-AIR-7

In the Matter of:

SHANE SITTS,
Complainant

v.

COMAIR, INC.,
Respondent

APPEARANCES:

W. Kash Stiltz, Jr., Esq.
For Complainant

J. Stephen Smith, Esq.
For Respondent

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER GRANTING RELIEF

This proceeding arises from a claim under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. The statute and the implementing regulations at 29 C.F.R. Part 1979 prohibit discrimination against airline employees for engaging in protected activity. In this case, Shane Sitts ("Sitts" or "Complainant") filed a complaint against Comair, Inc. ("Comair" or "Respondent"). Complainant alleges that Respondent terminated him after he refused to fly an assigned flight on November 12, 2007 for safety reasons.

Summary of the Evidence

I have carefully considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. Based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses and gathered impressions as to their demeanor. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

I. Background

Complainant Sitts was hired by Comair in June 2000 as a First Officer, and later promoted to Captain in June 2003. (Tr. 25-26, 31). He flew for Comair until December 2007, when he was terminated for refusing to fly an aircraft with a “deferred” passenger door power assist system (“PDPAS”) on November 12, 2007, and for refusing to fly for the same reason in February 2004. (CX 3; Tr. 117). An item is “deferred” when it need not be operational in order for the aircraft to be flown. Deferrals are regulated by the Minimum Equipment List (“MEL”). The MEL allows the aircraft to be flown, even though some parts of the aircraft are not functional. (Tr. 249; 14 C.F.R. § 91.213). The PDPAS is a mechanism that closes the main cabin door automatically and has the “ancillary benefit” of “assist[ing] the door in opening less harshly.” (Tr. 272-73, 297). The MEL at issue in this case provides that the PDPAS may be deferred if certain criteria are met.¹ (CX 7 at 8).

¹ Specifically, the MEL at issue, Sequence Number 11-01, provides that the PDPAS “[M]ay be inoperative provided door is verified manually operative (opens and closes) without any interference.” The MEL provides the following additional instructions:

For an inoperative Passenger Door Power Assist System, do as follows:

1. Do a deactivation of the Passenger Door Power Assist Motor
2. Open and close the passenger door to make sure the inoperative Power Assist System does not affect the normal door operation.
3. Have a qualified person available to assist in closing the door prior to departure.

Placard the flight Attendant Panel

NOTE 1: Stand clear of door when opening (door opens faster).

NOTE 2: A qualified person should be capable of closing the door from the outside without the Power Assist System operating. A flight crewmember inside the airplane can assist by pulling the inner hand grip to move the door to the CLOSED position.

II. Complainant's Evidence

Sitts believes that the MEL represents only the minimum equipment needed to make the aircraft airworthy and is not a guarantee of safety. (Tr. 35). Based on his training, he believes that a pilot has the ultimate responsibility for deciding whether an aircraft is safe to fly, and that this determination should be based on several factors, including the MEL, but also weather conditions and the performance of the airplane. (Tr. 33). In support of his belief that the MEL is not a guarantee of safety, Sitts cited an example from flight school, where he learned that although an anti-skid system is MEL-deferrable, other considerations, such as the length of the runway and weather conditions, could make it unsafe to fly with a deferred anti-skid system. (Tr. 34-35). Furthermore, Sitts believes that the pilot is responsible not only for the airworthiness of the aircraft and the safety of the passengers, but also the safety of those who work around the plane, including the ground crew. (Tr. 71-72, 163-64).

Based on several experiences, Sitts came to believe that it is not safe to operate an aircraft with a deferred PDPAS. (Tr. 42). He testified that an unassisted door opens with great speed and force and that it is difficult to get out of the way if the person opening the door from outside is not prepared. (Tr. 66). Sitts has observed that the MEL states that ground personnel must stand clear of the door when it is being opened, yet Sitts believes that it is necessary for someone to stand under the door to assist opening it and to ensure that the door does not impact the ground. (Tr. 66). Sitts believes that allowing the door to fall unassisted and impact the ground can cause damage to the door and the frame of the aircraft. (Tr. 66-67).

The first experience that led to Sitts' belief occurred in January 2004. Sitts testified that he was waiting at the gate to board an airplane that he was assigned to fly from Pittsburgh to Cincinnati when he heard a "large bang." Deplaning crewmembers told Sitts that the aircraft had a deferred PDPAS, and that the main cabin door had been "dropped." A crewmember told Sitts that maintenance had instructed them to have ramp personnel assist by opening the door, either by "walking" the door with their hands or catching the door as it was opened. Maintenance was called to inspect the door and found it to be airworthy to operate the flight to Cincinnati. Sitts contacted operations in Cincinnati and advised them to have ramp agents available to assist with the door when the aircraft arrived. Sitts testified that operations told him that the plane had been flown in and out of Cincinnati all day, and that they were aware of the problem. Sitts then flew the aircraft to Cincinnati. (Tr. 42-43).

Upon landing in Cincinnati, the plane sat at the gate for about twenty minutes, waiting for ramp personnel to open the door. Eventually, and after several requests for assistance, there was a knock on the door and the flight attendant pushed the door open from inside. Sitts testified that the door missed hitting a ramp agent's face by less than one inch. The ramp agent became upset

NOTE 3: Ground personnel should be instructed to only assist during the closing of the door. The door should be locked and handle stowed by a flight crewmember using "Normal" procedures.

(CX 7 at 8).

and told Sitts that she had been told to assist with the door but was not warned about the inoperable PDPAS or that she should stand clear of the door or try to catch it. Sitts then called maintenance to request another inspection. Sitts testified that Terry Dunaway, a maintenance supervisor, inspected the door and told Sitts that “the airplane is not going anywhere, it’s a safety issue.” Dunaway explained to Sitts that when the door falls open and lands on the wheel, it can damage the door or the wheel, or the frame of the plane when the weight of the door pulls against the rivets of the frame. According to Sitts, Dunaway further explained that the unassisted door is “a safety issue with ramp personnel,” because the outside of the door contains no warning that the door would fall unassisted and that ramp personnel should not stand underneath the door. Dunaway refused to sign off on the aircraft, and Sitts was reassigned to a different aircraft to make the assigned flight. (Tr. 42-45; 163).

The second experience that caused Sitts to believe flying with a deferred PDPAS is unsafe occurred in October 2005. Sitts was called by maintenance to “ferry”² an airplane from Boston to Cincinnati. Sitts was informed that the plane’s PDPAS cable broke when it was at JFK and the door was deferred. The plane was then flown to Boston with passengers. When the door was opened in Boston, a cable malfunctioned, causing the door to impact the ground, damaging the “skin” of the door and a wheel attached to the bottom of the door. Upon arriving at the airplane, Sitts noticed “severe damage” to the outdoor skin of the main cabin door, and the door was “speed-taped”³ shut. Sitts was told that the door was taped shut because the cables were hanging out and it would be “too much to get the cables back in and everything else.” He was told not to use the main cabin door, and to fly the plane unpressurized, below 10,000 ft, and at 250 knots. Sitts testified that originally he thought the speed tape was just to keep the door shut on the ground so that no one would attempt to open the door. However, he later came to believe that the door physically would not close and that the tape was being used to keep the door shut during flight. He thought the directive to fly the plane unpressurized was consistent with this belief, because pressurization pushes out on the fuselage and could push open a door that was not securely closed. He could discern no other reason why the door would be taped shut, or why he would be directed to fly the plane unpressurized. Related to this concern, Sitts testified that he once encountered a main cabin door that had been damaged and would not close properly, although not due to an inoperative PDPAS. He also recalled that in flight school he had learned of two incidents in which a main cabin door has opened during flight. (Tr. 46-54, 67-69).

Sitts’ safety concerns regarding an inoperable PDPAS first brought him into conflict with Comair in February 2004. Sitts was waiting to board an aircraft that had just landed. According to Sitts, when the flight attendant opened the door, the door hit the ground and bounced six feet back into the air and then bounced “multiple” times after that. Sitts requested that maintenance inspect and fix the door. According to Sitts, maintenance informed him that they would inspect,

² Sitts testified that “ferrying” is flying an aircraft in need of maintenance to a location where the maintenance can be performed; passengers are not carried on a ferried flight. (Tr. 54).

³ Speed tape, according to Sitts, is a heavy-duty duct tape that is clear and made of plastic. Sitts was not sure of the exact applications of speed tape but testified that it is called speed tape because it remains in place up to a certain speed. (Tr. 47).

but not fix, the door. Sitts testified that he informed maintenance of his concerns with the door, but was told that it was not their “call.” Sitts spoke to dispatch and was told to contact Chief Pilot Max Roberts. Roberts told Sitts that he did not understand Sitts’ reasoning, but would come over to the gate to look at the door. Roberts never came, and Sitts eventually spoke to Roberts on the phone, at which time Roberts stated that Sitts would need a union official because he was going to be fired. Sitts had a meeting with Roberts and a union representative. Sitts testified that Roberts told him that he did not have the authority to make a decision on the safety of the airplane. According to Sitts, Roberts told him that he would investigate the situation and determine what discipline, if any, Sitts would receive. A letter dated February 23, 2004, stated that Sitts engaged in rudeness, intimidation, and disrespect, by arguing with Roberts, insubordination by “refusing to fly a legally assigned trip with an A/C with a legal deferral and not reporting to the chief pilots’ office as directed,” and “walking off the job.” The letter stated that Comair considered terminating Sitts, but after reviewing his personnel file, decided to impose a thirty-day suspension. The letter stated that future instances of “sub-standard performance and/or violation of these rules or any other rules will result in immediate termination.” (Tr. 58-65; CX 4).

Over three years later,⁴ on November 12, 2007, Sitts again refused fly a plane with an inoperable PDPAS. Sitts was scheduled to operate Flight 4996 from Cincinnati to New York (JFK). He reviewed the plane’s logbook and noted that the PDPAS was deferred. Sitts spoke to maintenance to ask whether the door would be fixed. From his experience, it took only “a couple of minutes” to replace the service unit that needs to be replaced. Maintenance was already coming to the plane to replace a seat cushion. Sitts was told that the door would not be fixed at that time because there was no time to do so or because there were no mechanics available. Maintenance told Sitts that the parts were onboard the plane and that the repair would be performed that night at JFK. Sitts explained his concerns about the door and reiterated what Terry Dunaway had told him in 2004. Maintenance told Sitts to contact Chief Pilot Eric Barrell. Sitts informed Barrell of “the situation” and his “concerns” and “issues” with the door. He thought Barrell understood his concerns. Barrell told Sitts that he would contact maintenance at JFK to manually open the door when it arrived. Sitts objected because the MEL states that personnel must stay clear of the door when opening. Sitts refused to fly the plane unless the PDPAS was fixed. Barrell then told Sitts that he would assign another crew to the flight. Sitts was subsequently terminated. A letter dated December 4, 2007, stated that Sitts was being terminated for refusing to fly Flight 4996 on November 12, 2007 and previously refusing to fly in 2004. (Tr. 111-14; CX 3).

Sitts also presented testimony from David Sarker, a First Officer for Comair, who testified to his beliefs regarding the MEL and safety issues associated with an inoperative PDPAS. Sarker opined that the MEL does not guarantee a plane’s safety and cited a specific example of a time he flew with an MEL-deferrable item, but, in retrospect, thought it was not safe to do so. Like Sitts, Sarker believes that an unassisted PDPAS poses a threat to the person opening the door, because he or she will not necessarily realize that the door is unassisted and

⁴ Several events relating to Sitts’ requests that seat cushions be replaced and various incidents of alleged misconduct occurred in the intervening period. However, these events are not relevant to the instant claim. *See* Footnote 18, *infra*.

can be struck by the door when it opens more quickly than anticipated. Sarker suggested to Comair's Director of Safety that a flag or sticker be placed on unassisted doors to notify ground crew and allow them to open the door in such a manner that they will not be injured. Sarker further opined that many pilots do not consider the safety of those around the aircraft, but believes that Sitts made a "good call," in refusing to fly, because he was considering the safety of ground personnel. (Tr. 173-179).

III. Respondent's Evidence

Respondent presented opposing testimony from Daniel Pugh, Manager of Human Resources for Flight Operations; Eric Barrell, Chief Pilot; and Steven Briner, Director of Flight Operations. Mr. Pugh testified regarding Sitts' disciplinary history and his testimony is not directly relevant to the issues in the case. *See* Footnote 18, *infra*.

Chief Pilot Barrell testified to his beliefs concerning the MEL, the safety of operating an airplane with an inoperative PDPAS, and the November 12, 2007 incident when Sitts refused to fly. Regarding the MEL, Barrell testified that it provides "very, very good guidelines . . . as to what is safe and not safe to operate . . . an aircraft with." (Tr. 234). He also testified that the regulations "give[] some latitude to the pilot in command, because we operate in situations with many, many, many variables." (Tr. 233). Barrell suggested that a pilot may override the MEL, provided that there is some "logic" or "judgment" behind the decision. (Tr. 234).

Barrell opined that an inoperative PDPAS does not affect the airworthiness of an airplane and does not pose a danger to the crew, passengers, or maintenance personnel who open the door. (Tr. 221-22). Barrell testified that he has flown an aircraft with an MEL-deferred PDPAS, that it gives him no "pause," and that he would not hesitate to do so again in the future. (Tr. 219-20). Barrell testified that ground personnel know not to stand underneath the door, and that crew onboard the plane will ensure that no one is under the door prior to opening it, either by radio or by opening the door slightly and looking outside before opening it fully. (Tr. 227-28).

Barrell spoke to Sitts via telephone after Sitts refused to fly Flight 4996 on November 12, 2007. (Tr. 220). According to Barrell, the conversation lasted about 15 to 20 minutes. (Tr. 230). Barrell testified that he asked Sitts what his concern was, but that Sitts was not able to articulate what Barrell considered to be a valid safety issue, other than simply stating that it was an issue of safety. (Tr. 220, 231). Barrell testified that he told Sitts that he would arrange to have JFK maintenance "meet" the airplane when it arrived in New York. (Tr. 221). Barrell did not personally call anyone at JFK, but maintenance at Cincinnati assured him that they would do so. (Tr. 232). Barrell did not know what procedure maintenance would use to open the door, but only that it was "their decision to do what they would do." (Tr. 229-30). Barrell testified that Sitts did "not really" give any reason for his concern. (Tr. 235). He testified that he and Sitts "really never got into a lot of discussion" about Sitts' specific concerns. (Tr. 235). Barrell felt that Sitts was unwilling to change his position, and Barrell "had other issues going on" and wanted to "move on with it," and not "go back and forth." (Tr. 230). Therefore, he assigned another crew to the flight. (Tr. 231).

Director of Flight Operations Steven Briner testified to his beliefs concerning the MEL and the safety of operating an airplane with an inoperative PDPAS. Briner testified that the MEL is a “double-edged sword” that prevents “rogue” pilots from choosing to fly when the MEL forbids deferring an item and refusing to fly when the MEL permits deferring an item. (Tr. 249-52). Briner testified that Comair makes it “very clear” in its training program that the MEL “usurps” the pilot’s authority and that Comair does not “give the pilot the authority to say no on an MEL item.” (Tr. 252-53). In support of this statement, Briner stated that a pilot would not have the authority to refuse to fly because he believed that an inoperative lavatory or broken reading light in the passenger compartment was a safety issue. (Tr. 253-54). Asked whether a pilot could exercise discretion in a situation involving “something more serious,” Briner responded that the pilot has “some discretion,” but then appeared to limit this to situations in which “MEL items won’t work together” or two or more MEL items “wouldn’t fit together and wouldn’t work.” (Tr. 253-54). However, Briner acknowledged that a pilot “has decision-making authority in a broad spectrum of areas, and it’s hard to define what that is.” (Tr. 254). He also testified that he does not know how the FAA reconciles the pilot’s authority with the MEL, and believes that “some of Part 91⁵ still applies and some of it does not.” (Tr. 255).

Briner opined that an inoperative PDPAS is not a safety hazard and does not jeopardize the airworthiness of an aircraft. (Tr. 255, 287). He testified that he has flown airplanes with such deferrals on multiple occasions and would do so again in the future. (Tr. 255-56). According to Briner, Sitts is the only pilot he has ever known to refuse to fly a plane “with an MEL item” since he became a chief pilot in 1997. (Tr. 256). Briner testified that Sitts’ refusal to fly “left us all scratching our heads in light of the fact that his peers flew the airplane before him, . . . [and] his peers flew the airplane after him.” (Tr. 262). He opined that Sitts’ decision lacked common sense and that he “can’t explain [Sitts’] decision making process.” (Tr. 262). Briner explained that there is no risk of anyone being struck by the door, because Comair’s procedure is for the pilot to notify the station to tell the ground crew to stand clear of the door and the flight attendant to open the door, stick her head outside, and make sure no one is near the door before opening it. (Tr. 281). Briner further testified that Sitts would not be responsible for such an injury if it did occur, because a pilot is responsible only for the safe movement of the aircraft and the safety and comfort of the passengers. (Tr. 242-43). According to Briner, a pilot has no responsibility for the safety of the ground crew, except for ensuring not to injure personnel or damage property with the airplane’s jetblast when powering up the engines. (Tr. 242, 263).

Procedural History

Sitts filed a complaint with the Department of Labor, Occupational Safety and Health Administration, which dismissed his complaint on March 24, 2008. The Administrator found that “the malfunctioning power door assist system is an MEL-deferrable item approved by the FAA,” and therefore, concluded that “Complainant’s safety concern was not related to aviation safety or the airworthiness of the craft.” Sitts requested a hearing, which was held on January 21 and 22, 2009. ALJ Exhibits (“ALJX”) 1-14, Complainant’s Exhibits (“CX”) 1, 3-7, and 10-11,

⁵ Part 91 provides, among others things, that “[t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.” 14 C.F.R. § 91.3(a).

and Respondent's Exhibits ("RX") 2-4 were admitted into evidence. Comair's August 1, 2008 responses to Complainant's interrogatories were served on Complainant and referred to at the hearing without objection. (Tr. 212-13). These responses shall be admitted as Complainant's Exhibit 2.

Law and Analysis

To prevail on an AIR 21 claim, Sitts must establish that he engaged in protected activity, that Respondent had knowledge of his protected activity, that he suffered an adverse personnel action, and that his protected activity was a contributing factor in Respondent's decision to take the unfavorable personnel action. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 5 (ARB June 29, 2006). If Sitts makes this showing, Respondent may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-9, slip op. at 5 (ARB May 21, 2009).

I. Protected Activity

In determining whether Sitts engaged in protected activity, I begin with the statutory language. The Act protects an employee who has:

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.

49 U.S.C. § 42121(a)(1).

The Administrative Review Board ("Board") has construed protected activity under AIR 21 "broadly." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12, slip op. at 9 (ARB Dec. 31, 2007). The Board applies a three-part test to determine whether a complainant has engaged in protected activity: (1) the complainant must genuinely believe there was or would be a violation of an FAA order, regulation, standard, or federal law relating to air carrier safety; (2) the concern must be objectively reasonable under the circumstances; and (3) the concern must be expressed in a manner that is specific to the practice, condition, directive or event giving rise to the concern. *See Rougas v. Southeastern Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14 (ARB July 31, 2006); *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22, slip op. at 13 (ARB June 30, 2009).

A. Whether Sitts genuinely believed that there was or would be a violation of an FAA order, regulation, standard, or federal law relating to air carrier safety

The first issue is whether Sitts' safety concerns were based on perceived violations of regulations relating to air carrier safety and whether his concerns were genuine. An employee need not "cite to a specific violation"; his concerns need only "relate" to violations of FAA orders, regulations, or standards. *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-081, slip op. at 5 (ARB Mar. 14, 2008); *see also Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008) ("An employee need not cite a code section he believes was violated"). "Relate" means "[t]o stand in some relation; to have bearing or concern; to pertain" *Black's Law Dictionary* 1288 (6th ed., West 1990).

Several air safety regulations relate to a pilot's safety obligations. Fourteen C.F.R. § 121.533(d) provides that "[e]ach pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and airplane." The Board has held that this regulation "requires a pilot in command to restrict and suspend operations when he becomes aware of conditions that are a hazard to safe operations." *Rooks*, slip op. at 5-6. Similarly, 14 C.F.R. § 121.663 provides that "[t]he pilot in command and an authorized dispatcher shall sign the [flight] release only if they both believe that the flight can be made with safety." Finally, 14 C.F.R. § 91.7(b) provides that the pilot in command of a civil aircraft is "responsible for determining whether that aircraft is in condition for safe flight."

Therefore, a pilot engages in protected activity when he refuses to fly an airplane based on a reasonable belief that flying would jeopardize the safety of "passengers, crewmembers, cargo, [or] airplane," 14 C.F.R. § 121.533(d); that there are "conditions that are a hazard to safe operations," *Rooks, supra*; that a flight cannot be made "with safety," 14 C.F.R. § 121.663; or, that an aircraft is not in a "condition for safe flight." 14 C.F.R. § 91.7(b). In *Evans v. Miami Valley Hospital*, this administrative law judge found that the complainant engaged in protected activity when he grounded a helicopter because he believed a hydraulic leak and windscreen vibration were "air safety concerns." *Evans*, slip op. at 11. The Employer argued that the pilot's actions were not protected because the statute does not list grounding an aircraft for safety reasons as a protected activity. *Id.* at 13. The Board expressly rejected this argument, holding that although the complainant did not "identify a specific air safety regulation," it was sufficient that he harbored a reasonable belief that "the issues implicated safety" and that "the problems he raised were safety concerns." *Id.* at 14.

In this case, Sitts testified that he believed that an inoperative PDPAS posed a safety hazard to personnel on the ground and to the integrity of the door itself. (Tr. 45, 66-67). He further testified that he believed that his responsibility as a pilot was to ensure that the airplane was operated safely, and that this responsibility extended to the safety of those working around the aircraft. (Tr. 71-72). I find this testimony credible and conclude that Sitts had genuine safety

concerns and that these concerns related to perceived violations of regulations related to air safety and the responsibilities of a pilot.⁶

B. Whether Sitts' concerns were objectively reasonable under the circumstances

I must next determine whether Sitts' safety concerns were objectively reasonable. The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person "in the same circumstances with the same training and experience" as the complainant. *Pierce v. United States Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-1, slip op. at 11 (ARB Aug. 29, 2008); *Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 27 (ARB July 14, 2000); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 468 (5th Cir. 2008). Objective reasonableness is a mixed question of law and fact. *Welch*, 536 F.3d at 278. In some cases, the reasonableness of an employee's belief must be analyzed at multiple points in time; a refusal to work grounded in a belief that is initially reasonable "loses its protected status after the perceived hazard has been investigated and, if found safe, is adequately explained to the employee." *Rocha v. AHR Util. Corp.*, ARB No. 07-112, ALJ Nos. 2006-PSI-1 through 4, slip op. at 11 (ARB June 25, 2009). Therefore, I must first determine whether Complainant's safety concerns and refusal to fly were reasonable, and if so, whether Complainant's refusal to fly lost its protected status as a result of remedial actions taken by Comair.

1. *Whether Sitts' refusal to fly was initially reasonable*

As an initial matter, Respondent has argued throughout this proceeding that the fact that the inoperative PDPAS was legally deferred under the MEL renders Sitts' concerns unreasonable and unprotected as a matter of law. For the following reasons, I find that the existence of the MEL does not necessarily establish that Sitts' concerns were unreasonable.

Testimony from Respondent's witnesses does not establish that the MEL ensures safety or that a pilot has no authority to override the MEL. Chief Pilot Barrell testified only that the MEL provides "very, very good guidelines . . . as to what is safe and not safe to operate . . . an aircraft with." (Tr. 234). He also testified that the regulations "give[] some latitude to the pilot in command, because we operate in situations with many, many, many variables." (Tr. 233). Although he did not directly address the issue, Barrell suggested that a pilot *may* override the MEL, provided that there is some "logic" or "judgment" behind the decision. (Tr. 234).

Testimony from Director of Flight Operations Briner also fails to establish that the MEL is a guarantee of safety or that a pilot has no authority to override the MEL. Briner testified that

⁶ Respondent relies on *United Air Lines, Inc. v. Air Line Pilots Assn., Intl.*, No. 08 CV 4317, 2008 WL 4936847 (N.D. Ill. Nov. 17, 2008), for the unremarkable proposition that a pilot's "discretion can be used as a pretext for creating flight delays and cancellations by rejecting aircraft where the pilot has no sincere concern over safety." However, this concern is not present here, as I find that Sitts' refusal to fly was not pretextual, but was based on genuine safety concerns.

Comair makes it “very clear” in its training program that the MEL “usurps” the pilot’s authority and that “we [Comair] don’t give the pilot the authority to say no on an MEL item.” (Tr. 252-53). In support of this statement, Briner offered hypothetical examples, such as a pilot who refuses to fly because of a broken reading light or an inoperative lavatory. (Tr. 253-54). Asked whether a pilot could exercise discretion in a situation involving “something more serious,” Briner responded that the pilot has “some discretion,” but then appeared to limit this to situations in which “MEL items won’t work together,” or two or more MEL items “wouldn’t fit together and wouldn’t work.” *Id.* However, Briner acknowledged that a pilot “has decision-making authority in a broad spectrum of areas, and it’s hard to define what that is.” (Tr. 254). He also testified that he does not know how the FAA reconciles the pilot’s authority with the MEL, and believes that “some of Part 91 still applies and some of it does not.” (Tr. 255). Briner also explained that a pilot may not disregard the MEL by choosing to fly when the MEL does not permit; however, that it is not the issue in this case. (Tr. 249-50). I find Briner’s testimony on this subject to be contradictory and unclear. Despite several opportunities to do so, Briner never directly addressed the situation where a pilot legitimately and reasonably believes that the MEL does not adequately ensure safety.

Complainant’s witnesses also refute the notion that the MEL is a guarantee of safety or that a pilot has no authority to override the MEL. First Officer Sarker opined that the MEL does not guarantee a plane’s safety and cited a specific example of a time he flew with a MEL-deferrable item, but, in retrospect, thought it was not safe to do so. (Tr. 175-76). Sitts also gave the example of an airplane with legally deferred anti-skid system, which he stated could not be safely landed at an airport with a short runway. (Tr. 35). As noted, Briner did not address these examples, but instead posited absurd examples as red herrings. Thus, I do not find that the testimony presented at hearing establishes that Sitts was unreasonable in believing either that a MEL is not a guarantee of safety or that a pilot has an independent obligation to ensure safety, notwithstanding the MEL.⁷

Relevant case law also does not establish that the MEL ensures safety or that a pilot has no authority to override the MEL. The one Board case that addresses refusing to fly with an MEL-deferrable item, while not dispositive, does not support Respondent’s contention that such a refusal is never protected activity under AIR 21. In that case, a pilot refused to fly with broken landing lights despite assurances by his employer that the item was deferrable under the MEL and that the plane was “safe to fly.” *Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-26, slip op. at 5-6 (ARB July 22, 2008). The Board, summarizing its previous decision, stated that “[i]n view of the mechanics’ assurances that the aircraft was safe to MEL, [the pilot’s] refusal [to fly] may not have been reasonable.” *Id.* at 6 (emphasis added). Nonetheless, the Board “credited [the pilot] with making a protected safety complaint.” *Id.* If the law is as Respondent suggests, the Board would have simply dismissed the pilot’s safety concern as inconsistent with the MEL, and therefore unreasonable and unprotected.

⁷ Much of Respondent’s evidence also consisted of opinion testimony concerning the consequences of granting a pilot discretion to disregard the MEL and ground an airplane for any reason the pilot deems appropriate. (Tr. 234, 250, 254, 260-62, 298, 301). However, the issue in this case is whether Sitts’ specific concerns were reasonable, not whether all pilots are permitted to refuse to fly in all circumstances.

Respondent relies heavily on *Air Line Pilots Assoc. Intl. v. FAA*, 454 F.2d 1052 (D.C. Cir. 1971). In that case, pilots sought review of a dismissal of a complaint alleging that an airline violated FAA rules by disciplining pilots for refusing to fly airplanes with equipment legally deferred under the MEL. *Id.* at 1053. The pilots' association alleged that the FAA's dismissal of its complaints was contrary to regulations giving the pilot the authority to refuse to fly under unsafe conditions. *Id.* The court noted the difficulty in reconciling 14 C.F.R. § 91.3 ("the pilot . . . is directly responsible for, and is the final authority as to, the operation of that aircraft.") with 14 C.F.R. § 121.301, *et seq.* and 14 C.F.R. § 121.627(c) (granting the FAA authority to publish MELs). *Id.*

The FAA contended that its authority to publish MELs "modifies the scope of the pilots' authority under § 91, and that[,] therefore[,] the pilot has no FAA protected right to refuse flights for lack of operable equipment not required by the MEL." *Id.* at 1054. The court held that this interpretation was "not irrational." *Id.* at 1055. However, the court was clearly not enamored by this approach. It characterized the relationship between these two provisions as ambiguous, and lamented that the issue "represents a difficult problem of reconciling two agency regulations which do not fit comfortably together." *Id.* at 1053-55. The court went on to opine that "a different view of the interrelationship of the MEL regulations and the pilot in-command regulation might represent better policy." *Id.* at 1054. The court reasoned as follows:

It is entirely possible to view the two regulations as complementing each other doubly to ensure air safety. Thus viewed, the pilot could not authorize a flight lacking any MEL required equipment, while at the same time no flight could be undertaken when the pilot believes in good faith that in light of all the circumstances the flight would be unsafe even with all the required equipment.

Id. at 1054, n.5. The court also noted in a 1969 hearing on a proposal to add an item of equipment to a particular MEL, the airline industry opposed the requirement on the following basis:

Dispatch rules now afford adequate protection in that the Captain can refuse an airplane because of inoperative components, whenever there are extenuating circumstances. . . . Airline pilots have the prerogative of refusing a flight with inoperative equipment when conditions dictate regardless of MEL requirements. Applying the captain's good judgment to conditions that prevail seems a more prudent approach than an arbitrary rule requiring a piece of equipment that may not be used on a particular flight.

Id.

An AIR 21 complainant need only establish that he had reasonable "air safety concerns" or reasonably believed that his concerns "implicated safety." *See Evans*, slip op. at 14. Accordingly, the relevant question is whether a pilot who refuses to fly an aircraft with an MEL-deferred item is not only mistaken in his understanding of his obligations under the law, but *unreasonably* so. *Air Line Pilots* does not establish that a pilot is necessarily unreasonable in

believing that he has an obligation to exercise judgment in ensuring air safety, rather than simply relying on the MEL. While the court deferred to the FAA's view on this issue, it intimated that the contrary view is more reasonable and represents better policy. If three federal court of appeals judges believe that the issue "represents a difficult problem of reconciling two agency regulations which do not fit comfortably together," Sitts' belief that he had an independent obligation to ensure safety, despite the MEL, was certainly not unreasonable.

Having found that the MEL does not render Sitts' concerns unreasonable and unprotected as a matter of law, I turn to the specific facts of the case to determine whether Sitts' concerns were in fact reasonable. Although the inquiry is an objective one, the knowledge, experience, and training of Sitts may be considered in determining whether his refusal to fly was based on reasonable safety concerns. *See Pierce*, slip op. at 11. Sitts' uncontradicted testimony regarding his experiences and training supports the reasonableness of his safety concerns.

Sitts testified that in January of 2004, he witnessed a door with an inoperative PDPAS impact the ground, causing a loud bang. Sitts was concerned that the door could have twisted and pulled itself from the frame or that the wheel on the door could have shattered or broken off the door. Maintenance was called to inspect the door and found it to be undamaged. Later, the door nearly struck a ramp agent in the face, who became very upset. The ramp agent advised Sitts that she had been told to assist with the opening of the door, but had not been warned that the door would fall to the ground unassisted. Sitts called maintenance personnel to inspect the door and, according to Sitts, a maintenance supervisor, Terry Dunaway, refused to sign off on the airplane. Sitts testified that Dunaway told him that the unassisted door involved several risks, including the door being bent, the frame of the door being damaged when the door impacts the ground, and ramp personnel being injured by the falling door. (Tr. 42-46; CX 4 at 4, 7-8).⁸

The second incident Sitts testified to occurred in October 2005, when he ferried an airplane from Cincinnati to Boston. Sitts was directed not to use the main cabin door and fly the plane unpressurized at a low speed and altitude. Sitts also observed that the skin of the cabin door had incurred severe damage and had been taped shut. Sitts was informed that the door had impacted the ground when a cable controlling the wheel extension had broken. Although this was apparently not the result of an inoperative PDPAS, the experience reasonably caused Sitts to believe that a main cabin door could be damaged by impacting the ground, and that a plane with a damaged door could only be safely flown under special conditions: without passengers, unpressurized, at low speed and altitude, and with the door taped shut. (Tr. 46-55).

⁸ Although this testimony is hearsay, hearings in AIR 21 cases are not subject to formal rules of evidence; administrative law judges are to follow "principles designed to assure production of the most probative evidence." 29 C.F.R. § 1979.107(d); *Weil v. Planet Airways, Inc.*, ARB No. 04-074, 2003-AIR-18, slip op. at 4 (ARB Oct. 31, 2005). I find Sitts' testimony to be credible, reliable, and probative evidence of an experience that influenced his subsequent belief that it was unsafe to fly in the circumstances present in this case. I further note that Respondent indicated an intention to call Terry Dunaway as a witness but subsequently decided to rest its case without doing so. (Tr. 236, 310).

In light of his knowledge and experiences, it was reasonable for Sitts to believe that an inoperable PDPAS posed a direct threat to ground personnel on whom the door could fall. Sitts' testimony is supported by the testimony of First Officer Sarker, who opined that an unassisted door poses a threat to the person opening the door, because he or she would not necessarily realize that the door was unassisted and could be struck by the door when it fell faster than anticipated. Sarker suggested to Comair's Director of Safety, that a flag or sticker be placed on unassisted doors to notify ground crew and allow them to open the door in such a manner that it would not fall on them. Sarker opined that many pilots do not consider the safety of those around the aircraft. Sarker believed Sitts made a "good call," because he thought it was "good to consider the people who work around you and not just the aircraft." (Tr. 173-79).

Respondent contends that Sitts' concern about ground personnel being struck by the door is unreasonable because a pilot has no responsibility to ensure that ground personnel are not struck by the main cabin door and because an inoperative PDPAS does not pose a threat to ground personnel.

Respondent suggests that Sitts' concerns were unreasonable because a pilot is not responsible for the safety of ground personnel. Director of Flight Operations Briner testified that a pilot is responsible only for the safe movement of the aircraft and the safety and comfort of the passengers. (Tr. 242-43). According to Briner, a pilot has no responsibility for the safety of the ground crew, except for ensuring not to injure personnel or damage property with the airplane's jetblast when powering up the engines. (Tr. 242, 263). Briner did not provide the basis for this statement. The regulations, which broadly describe a pilot's obligation to ensure "safety" and "safe flight," does not provide clear support for this view. 14 C.F.R. §§ 121.663 and 91.7. Additionally, 14 C.F.R. § 121.533(d), refers to the safety of the "crew." "Crew" is not defined, and it is not clear that ensuring the safety of the "crew," does not extend to ensuring the safety of ground personnel. Common sense would dictate that a pilot is responsible for ensuring that ground personnel are not struck or injured while the plane is taxiing on the runway,⁹ so it is not clear why he would not also be responsible for ensuring that ground personnel are not struck when the cabin door is opened.

It must be emphasized that in resolving this issue I am not called upon to determine the exact nature and extent of a pilot's safety obligations, and whether and in what situations these obligations include ensuring the safety of ground personnel. Even if Respondent is correct in its assertion that a pilot is not responsible for ensuring that ground personnel are not struck and injured by an opening door, I find that it was reasonable for Sitts to believe that this concern was consistent with his legal obligations to ensure safety.

Respondent also offered testimony, albeit very little, directly addressing Sitts' specific concern about the door striking ground personnel. Chief Pilot Barrell testified that ground personnel know not to stand underneath the door, and that crew onboard the plane will ensure

⁹ Briner was asked, presumably hyperbolically, whether a pilot is responsible for ensuring that he does not run over ground personnel while operating the airplane. In a dismissive fashion that characterized much of his testimony, Briner responded only that there is "literally . . . no way" that that could ever happen. (Tr. 274).

that no one is under the door prior to opening it, either by radio or by opening the door slightly and looking outside before opening it fully. (Tr. 227-28). Similarly, Director Briner testified that the pilot is expected to advise the ground crew in advance by radio to stand clear of the door, and that the flight attendant knows to look outside and ensure that no one is under the door prior to opening it. (Tr. 281). Although testimony as to these precautions is relevant, it does not establish that Sitts' contrary view was unreasonable. *See Evans*, slip op. at 11 ("although the mechanics found that the conditions were not as severe as Evans thought, he had a reasonable belief that the issues implicated safety."). Despite the testimony of Barrell and Briner, it is not clear that ground personnel never stand underneath the door or that this problem can be avoided simply by ensuring that no one stands under the door prior to opening it. Sitts witnessed a ground crewmember nearly being struck by the door, despite specific assurances that ground personnel were aware that the PDPAS was inoperable on that particular flight. (Tr. 43-44). Sitts was also advised that having ground personnel stand underneath the door is *necessary* so that they can assist opening the door and prevent it from falling unassisted to the ground. (Tr. 42). In light of Sitts' concerns that allowing the door to fall unassisted could damage the door, it was also reasonable for him to believe that simply ensuring that no one was under the door prior to opening it was not an acceptable procedure. (Tr. 42-44, 46).

I also find Sitts' concern that the inoperable PDPAS created a risk of damaging the door and the aircraft to be reasonable. Mr. Dunaway refused to sign off on a plane after the door had fallen unassisted, and explained that an unassisted door could result in the door and/or the airplane's frame being damaged. (Tr. 44-45). Sitts also observed that other personnel had requested that maintenance inspect a door that had been allowed to impact the ground. (Tr. 42). Sitts' experience ferrying the plane with the damaged door could also support a reasonable belief that a door could be damaged after falling, and that a plane that incurred this damage could not be safely operated under normal flight conditions. (Tr. 46-54; 150-51).

While Respondent presented contrary testimony from pilots who generally stated that they do not believe it is unsafe to fly an airplane with an inoperable PDPAS, (Tr. 221-22, 255-56), no testimony was presented to actually address the substance of Sitts' concern that allowing the door to fall unassisted and impact the ground could damage the door and the aircraft. Respondent has offered no evidence that this specific concern is unreasonable or unfounded. There has been no testimony that: 1) the door will not in fact fall quickly when unassisted;¹⁰ 2)

¹⁰ In its statement to OSHA, Respondent asserted that Sitts' concern was unfounded because the PDPAS in a Phase III door does not affect how quickly the door opens. (CX 1 at 10, n.26). Similarly, at the hearing, Respondent's counsel argued that Sitts thought the airplane he was refusing to fly contained a Phase IV door, but in fact contained a Phase III door. (Tr. 189). However, Respondent produced no evidence that Sitts in fact made this mistake or that such a mistake would have any relevance to the reasonableness of Sitts' safety concerns. Sitts testified that the only difference between the two doors is that the Phase III door is heavier, and that both involve the same safety concerns. (Tr. 39, 146). According to Sitts, both doors have a braking system that slows down the door, although they function differently. (Tr. 38-39). Sitts testified that he was aware that the airplane he refused to fly had a Phase III door and specifically denied that he had mistakenly believed that the airplane had a Phase IV door. (Tr. 142-43). Director Briner testified that the braking mechanism in the doors is different in that one uses a hydraulic

the door will not in fact impact the ground when allowed to drop unassisted; 3) dropping the door unassisted onto the ground will not in fact damage the door (*i.e.*, the door is designed to withstand such impact); or, 4) that there is some alternate procedure by which the door can be opened other than having personnel stand under the door (in violation of the MEL) that does not result in the door impacting the ground. Instead, Respondent's evidence consists of general statements that an inoperable PDPAS is not a safety hazard or a threat to ground personnel or the airworthiness of airplane (Tr. 221-22, 227, 255-56, 281, 287, 296). Because Sitts' concern that the door could be damaged when allowed to drop unassisted to the ground is reasonable on its face, and Respondent has presented no persuasive evidence addressing the substance of his concern, I also find that Sitts' concern that an inoperative PDPAS could cause damage to the door and the airplane was reasonable. This concern and Sitts' concern about the door striking ground personnel were both reasonable, and either would suffice to establish that Sitts engaged in protected activity by refusing to fly.

In determining whether Sitts engaged in protected activity, three additional issues are relevant, two of which favor Sitts and one of which favors Respondent. Following his second refusal to fly, Sitts filed a report with Comair's Flight Safety Department, requesting that the MEL concerning the PDPAS be modified. Sitts described the circumstances of his refusal to fly and his concerns that the unassisted door could injure ground personnel or cause the door to be damaged. He further explained that the only way to open the door is to stand under it, yet the MEL states the personnel must stand clear of the door. Sitts received a response from Comair's "Event Review Committee" ("ERC"),¹¹ which stated, "The ERC agrees with you that this is a significant safety factor. Although we are closing your report, we are still pursuing getting the MEL changed with the Program Managers Office." This letter was received after Sitts' termination. Although it cannot support the reasonableness of Sitts' belief at the time of his refusal, it is compelling evidence that Sitts' concern was not unreasonable or irrational. (Tr. 115-17; CX 7).

Also supportive of Sitts' claim is Comair's response to Claimant's pre-hearing request for admissions. Respondent answered "Admit" in response to a request that it "admit or deny that a main cabin door with a malfunctioning door assist system can constitute a *safety hazard*." (CX 2 at 1) (emphasis added). While the term "*safety hazard*" is subject to different interpretations, Respondent was entitled to qualify its answer and admit or deny the request, in whole or in part, as it deemed appropriate.¹² 29 C.F.R. § 18.20(b)(1). Matters admitted under this Rule are

shock absorber while the other uses the motor itself to slow down the door. (Tr. 272-73). However, he was not sure which door was which and did not explain how this is relevant to the reasonableness of Sitts' safety concerns, other than "speculating" that Sitts believed that "he had one type of door versus the other type of door." (Tr. 73).

¹¹ According to Director Briner, the ERC is comprised of "a company member," "an FAA member," and "a union member." (Tr. 257).

¹² There is no evidence that this is a clerical oversight or typographical error. Request Three, which asked whether an inoperative PDPAS can constitute a safety hazard, was the only request that Respondent admitted. Respondent answered "Deny" in response to the other four

deemed “conclusively established.” 29 C.F.R. § 18.20(e). While an admission that an inoperative PDPAS “can constitute a safety hazard” is not necessarily dispositive on the issue of protected activity, it seriously undermines testimony from Respondent’s witnesses, specifically Chief Pilot Barrell’s testimony that an inoperative PDPAS does not “pose a danger” to the crew, passengers, or ground personnel, (Tr. 222), and Director Briner’s directly contradictory testimony that an inoperative PDPAS does not constitute a “safety hazard,” (Tr. 287), and that any benefits associated with the PDPAS are unrelated to safety. (Tr. 305).

One factor that weighs against Sitts, however, is evidence regarding the frequency that airplanes were operated with the same deferral at issue here. Respondent’s documentation shows that a PDPAS was deferred 76 times in 2007 and 2008. (RX 4). Respondent’s counsel represented that each plane had been flown about fifty times, suggesting that nearly 4,000 flights had been made with a deferred PDPAS in that two-year period. (Tr. 149). While this evidence provides support for Respondent’s argument that Sitts’ concerns were unreasonable, it does not establish that Sitts’ concerns were in fact unreasonable in light of the contrary evidence. Furthermore, it does not address Sitts’ specific concerns or identify what procedure was used on those flights to ensure that the door did not strike personnel or impact the ground.

While I do not find that Sitts’ concerns were necessarily valid, I find that they were at least reasonable. Respondent failed to present sufficient evidence to establish that Sitts’ concerns were unreasonable, but relied on general testimony in an attempt to dismiss Sitts’ concerns as idiosyncratic and trivial. Had Respondent taken Sitts’ safety concerns more seriously and presented evidence specifically contradicting the concerns raised by Sitts, Respondent may have succeeded in establishing that Sitts acted unreasonably. As Respondent has failed to do so, I find that Sitts’ refusal to fly was reasonable, and therefore, protected under AIR 21.

2. *Whether Sitts’ refusal to fly lost its status as protected activity*

In a long line of cases, the Board and Secretary have held that a refusal to work, even if initially reasonable, “loses its protected status after the perceived hazard has been investigated and, if found safe, is adequately explained to the employee.” *Rocha*, slip op. at 11; *Eltzroth v. Amersham Medi-Physics, Inc.*, ARB No. 98-002, ALJ No. 97-ERA-031, slip op. at 4 (ARB April 15, 1999); *Tritt v. Fluor Constructors, Inc.*, 88-ERA-29, slip op. at 6-7 (Sec’y Aug. 25, 1993) (employee’s refusal to work would have lost its protection “if some responsible party had investigated and explained adequately” the perceived hazard); *Van Beck v. Daniel Constr.*, 86-ERA-26, slip op. at 4 (Sec’y Aug. 3, 1993) (the relevant issue is “whether complainant had a reasonable, good faith belief that conditions were unsafe, and whether respondent provided sufficient information to dispel these concerns and adequately explained the safety issues raised”); see also *Day v. Staples*, 555 F.3d 42, 58 (1st Cir. 2009) (“A company’s explanations given to the employee for the challenged practices are also relevant to the objective reasonableness of an employee’s belief”).

requests. Respondent has not moved to withdraw or amend this admission, as 29 C.F.R. § 18.20(e) allows.

However, an employer is not required to do more than what is reasonable under the circumstances. Thus, in one case, the Board held that an employee's refusal to work lost its protection after the employer "conscientiously attempted to allay his concerns, and reassigned him to a different job category so that he would not be called upon to perform work which he rejected," but the employer's "diligent efforts to convince [the employee] that working conditions were safe were rebuffed by his obduracy." *Dobreuenaski v. Associated Universities*, ARB Case No. 97-125, ALJ Case No. 96-ERA-44, slip op. at 12 (ARB June 18, 1998); *see also Rocha*, slip op. at 11-15. *Rocha* is particularly instructive to the case at hand. In that case, which arose under the Pipeline Safety Improvement Act, the complainants refused to weld pipes that they believed were excessively corroded. The employer proposed that the complainants cut back the pipes and grind out the corrosion from inside, a procedure consistent with federal law. However, the complainants still refused to weld the pipes and were terminated. The Board held that the complainants' initial refusal to work was protected, but that the refusal lost its protected status when the complainants did not question or challenge their employer's proposed solution or provide any evidence or explanation as to why the proposed solution was unacceptable or insufficient to allay their concerns.

Thus, under *Rocha* and earlier cases, a safety complaint or refusal to work imposes shifting obligations on the employee and the employer. The employee must initially articulate a basis for his concern, which the employer must address and either explain why the concern is unfounded or offer an alternative. The obligation then shifts back to the employee to provide further support for his claim or, if an alternative has been proposed, explain why the alternative is unacceptable. The dialogue continues until one party fails to adequately or reasonably respond to the other. *See Rocha*, slip op. at 11-15; *see also Melendez*, slip op. at 28-29 (discussing the importance of dialogue between employees and employers regarding compliance with applicable laws).

Here, the critical conversation following Sitts' refusal to fly occurred in a 15-20 minute phone call between Sitts and Barrell. Sitts testified that he informed Barrell of "the situation," and his "concerns with the door." Sitts testified that he also informed maintenance about his concerns, including his prior encounters with the door and his conversation with Terry Dunaway, before speaking to Barrell. Sitts believed that Barrell understood what his concerns were, and that Barrell stated that he would (or perhaps already had) contacted maintenance to have them meet the airplane at JFK. Sitts testified that he objected to this, because having ground personnel assist with the opening of the door would itself violate the MEL, which requires ground personnel to stand clear of the door. According to Sitts, Barrell then "queried [his] plan and intention" and Sitts stated that he would not fly the aircraft unless the PDPAS was fixed. Barrell then told Sitts that he would be replaced. (Tr. 113).

Barrell's account of the conversation was less clear, but Barrell suggested that Sitts gave no reason, or at least not a valid reason, for his safety concern:

Q: When he first tells you, "I'm not flying this plane," what do you do at that point?

A: Well, I asked him, "What's your concern?" And I think in addition to saying that I asked, I told him, "I never had any problem flying it, and I've flown it like that, and tell me what your concern is."

Q: Okay. And at any point after that did you actually call JFK?

A: Well I would have, but I never got to that stage. I mean we never got that far because when I explained that we would have maintenance waiting I, the answer to that was, "Well I'm not flying the airplane, I think it's an issue of safety." And at that point my concern is, "Well okay, I can't force you to fly the airplane. I'll just have to reassign it to another crew," and that was pretty much the end of the conversation, you know. I had other issues going on and let's just move on with it. It wasn't something I wanted to go back and forth. If he felt that way, so be it, you know?

(Tr. 231). Barrell also testified that he was interested in Sitts' concern, but that Sitts was unable to articulate a "valid safety issue," other than simply stating that he felt it was a "safety issue."

(Tr. 220). Asked whether Sitts gave any reason as to why he thought it was unsafe or explained his concern about the door hitting ground personnel, Barrell testified,

You know, not, not really. He just insisted that I have the authority, and I'm the pilot in command, and I think it's unsafe. At which point I tried to offer up some kind of - - with the idea maintenance would meet the aircraft, you know trying to relieve some concern that he might have. But again he insisted, "I'm going to stand on my decision I think its unsafe."

* * * * *

[w]e really never got into a lot of discussion about [the door falling open freely and hitting maintenance personnel]. That really didn't - - if he had asked me "When you operate the airplane what did you do to ensure safety?" We never really got into that kind of a discussion where I could offer ideas as to ways to ease his mind even more, so I never, it never really got to that. It was just, "I think it's unsafe and I'm standing on my decision."

(Tr. 234-35). Regarding his proposed solution to Sitts' concern, Barrell testified that maintenance would "meet" the plane when it arrived at JFK and that he communicated to Sitts that he would "ensure that they would be there" and that he would "remind them again to make sure they were there." (Tr. 221). However, he did not know what procedure maintenance would use to open the door, but only that it was "their decision to do what they would do." (Tr. 230).

While Barrell did not know exactly what maintenance would do when the plane arrived at JFK, Sitts reasonably understood Barrell's proposal to mean that maintenance personnel would open the door from the outside.¹³ Sitts testified that he responded, again reasonably, that this would itself violate the MEL.¹⁴ Since Barrell testified that he did not know what maintenance would do to open the door safely, he clearly could not have given an explanation to Sitts. I find that to the extent Sitts' concern was "investigated" and "found safe," this was not "adequately explained" to Sitts.¹⁵ *Rocha*, slip op. at 11. Unlike the employees in *Rocha*, Sitts challenged the proposed solution and presented reasonable grounds for doing so.¹⁶ *Cf. Rocha*, slip op. at 11. At that point in the conversation, Barrell did not further engage Sitts, because he "had other issues going on," did not want "to go back and forth," just wanted to "move on with it." (Tr. 231). This is not a case where an employer made "diligent" efforts to convince the employee that working conditions were safe and was rebuffed. *Dobreuenaski*, slip op. at 12. In the absence of an adequate explanation or solution addressing Sitts' concerns, I find that Sitts was reasonable in standing by his initial position, and that his refusal to fly did not lose its protected status at any point in time.¹⁷

¹³ Comair appears to also believe that this was what Barrell proposed, despite Barrell's testimony that he did not know what maintenance would do. In its Statement to OSHA, Comair asserted that Barrell arranged to have maintenance personnel "personally open the door upon landing." (RX 1 at 10).

¹⁴ To the extent Barrell disputes that Sitts stated this, I credit Sitts' testimony. Sitts' testimony regarding the conversation was more detailed and credible.

¹⁵ In its statement to OSHA, Respondent alleged that "the Maintenance Supervisor along with other maintenance employees responded to the aircraft and assured Captain Sitts both verbally and via demonstration that that the aircraft was safe and operable . . ." (CX 1 at 10). However, there is no evidence in the record to support this assertion.

¹⁶ Sitts also testified that he believed that the parts to fix the door were on the airplane, and that the door would be replaced that night at the airplane's final destination. (Tr. 112). Sitts testified that "from previous experience, it took only a couple of minutes to replace the service unit that needed replaced." (Tr. 112). These undisputed facts further support the reasonableness of Sitts insistence that the door be fixed.

¹⁷ I focus on the second refusal to fly, because this was the action for which Sitts was terminated. There is no evidence that Respondent took any action following the initial refusal to fly that would render future refusals by Sitts unreasonable. The evidence establishes that following the 2004 refusal to fly, Sitts was suspended for thirty days, without any dialogue occurring regarding the safety of an inoperable PDPAS. According to Director Briner, Sitts was "instructed on the use of the MEL" and told that he must fly "under the provisos of the MEL," and that his "limited command authority [is] usurped by the MEL." (Tr. 284). There is no evidence that Respondent provided any assurances or solutions for Sitts' specific concerns.

C. Whether Sitts' safety concern was expressed with sufficient specificity

The final requirement for protected activity is that the employee's complaint to the employer must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety. *Rougas*, slip op. at 9. This analysis is largely subsumed by the analysis of whether Sitts' refusal lost its protected status. I incorporate my analysis from *Section I.B.2.*, *supra*, in which I found that Sitts adequately described his concerns and reasonably objected to Barrell's proposed solution. Therefore, I find that Sitts expressed his concerns with sufficient specificity. Based on the findings above, I further find that Sitts' refusal to fly meets all of the criteria for protected activity under AIR 21.

II. *Adverse Action and Causal Connection to Protected Activity*

Sitts' termination is, without question, adverse action. In its prehearing statement, Respondent asserts that "Sitts' extensive disciplinary history dating back to February 2004 was the reason for his termination" This history relates to various incidents involving alleged misconduct by Sitts.¹⁸ Sitts need only establish that his protected activity was a contributing factor to his termination. A "contributing factor" is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the adverse personnel decision." *Evans*, slip op. at 16 (*citing Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Sitts' termination letter discusses his refusals to fly on November 12, 2007, and February 6, 2004. The letter states, "Based upon the above infractions, the decision has been made to terminate your employment with Comair" (CX 3). No "infractions" other than refusing to fly are mentioned in the letter. Complainant's refusal to fly on November 12, 2007, was clearly a contributing factor to his termination. Respondent has offered no evidence that this letter is erroneous, pretextual, or that it does not represent the actual reason that Sitts was fired. Therefore, I find that Sitts has established that he was fired because of his protected activity, which establishes Respondent's liability under AIR 21.

III. *Affirmative Defense*

An employer found to have violated AIR 21 can defeat a complainant's right to relief by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). The failure of the termination letter to mention any misconduct other than

¹⁸ The incidents include: Sitts giving the middle finger to a ramp agent on September 17, 2004 (Tr. 72-74); Sitts berating a gate agent on October 12, 2004 (Tr. 74-79); Sitts disparaging Comair to a prospective employee on August 20, 2007 (Tr. 82-85); Sitts threatening to call in sick unless given a new seat cushion on November 2, 2007 (Tr. 107-08); and Sitts using profane language near a gate agent on November 4, 2007 (Tr. 108-09). Sitts disputes that several of these incidents occurred as described. Because it is clear that Sitts' refusal to fly was a contributing factor to his termination, I need not address these incidents or determine whether or to what extent they contributed to Respondent's decision to terminate Complainant. Although interesting background material, these facts have no direct relevance to the case.

Sitts' refusal to fly would seem to present an insurmountable obstacle to Respondent establishing this affirmative defense. In any case, Respondent has submitted no evidence to establish that it would have fired Sitts in the absence of his protected activity. Therefore, Sitts is entitled to relief under AIR 21.

IV. Remedies

AIR 21 provides that if a violation of AIR 21 is found, the administrative law judge shall order the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. *Evans*, slip op. at 19 (citing 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b)). Sitts requests reinstatement, back pay, \$100,000 in compensatory damages, interest, attorney's fees and costs, and remedial measures, including abatement, purging of Sitts' personnel file, and an order that this decision be posted at appropriate locations in Respondent's facilities.

A. Reinstatement

Reinstatement is a statutory remedy that is appropriate unless impossible or impractical. *Rooks*, slip op. at 9. Sitts testified that he wishes to return to his job. (Tr. 132). Respondent has not identified any compelling reason why reinstatement is not appropriate. Therefore, Sitts is entitled to reinstatement to his previous position with the terms, conditions, and privileges to which he would now be entitled had he not been discharged.

B. Back Pay

The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (ARB Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with "unrealistic exactitude." *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (ARB June 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628. Backpay awards are not reduced by the amount of income and social security taxes that would have been deducted from the wages the complainant would have received. *Id.* at 627. Interim earnings at a replacement job are deducted from back pay awards. *Id.* at 623. Although a terminated employee has a duty to mitigate damages by diligently seeking substantially equivalent employment, the respondent bears the burden of proving that the complainant failed to properly mitigate damages. *Id.*; *Hobby*

v. Ga. Power Co., ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 19 (ARB Feb. 9, 2001).

In *Artrip v. Ebasco Services, Inc.*, 89-ERA-23, slip op. at 4-5 (ARB Sept. 27, 1996), the Board noted that the Secretary has long followed the rule adopted by a majority of the federal circuits that unemployment compensation is not deducted from backpay awards under federal discrimination statutes. *But see Florek*, slip op. at 11-12 (holding, without discussion, that a complainant's backpay award was properly offset by the amount received in unemployment benefits). The Sixth Circuit, within which jurisdiction this case arises, has expressly held that unemployment benefits are not deducted from awards of backpay. *Rasimas*, 714 F.2d at 627-28. Therefore, Complainant's backpay award will not be offset by his unemployment earnings.¹⁹

Sitts testified that his wages at Comair were based on a union-negotiated contract. His hourly rate of pay was \$68.86 at the time of his termination, and would have increased to \$75.40 in June of 2009. He worked approximately 90.55 hours per week. (Tr. 122-26; CX 11). Attached to Claimant's post-hearing brief is a table calculating his lost wages from December 2007 through July 2009. The data and calculations are consistent with Claimant's uncontradicted testimony. Therefore, Complainant is entitled to \$122,713 through June of 2009 and an additional \$6,827 for the month of July.²⁰

Claimant testified that he earned approximately \$7,100 in interim earnings at other jobs. This amount is deducted from his back pay award for a total of \$122,440.²¹ Sitts' testimony establishes that he took reasonable measures to mitigate his damages by seeking employment as a pilot for other airlines, and Respondent has presented no evidence to the contrary. (Tr. 127-31). Therefore, no additional deductions are appropriate.

C. Compensatory Damages

Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Evans*, slip op. at 20. To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.* Sitts testified that his termination took a vast toll on his family and professional life. (Tr. 131). I find his testimony to be credible and unrefuted. I find an award of \$25,000 to be appropriate under the facts of this case.

¹⁹ Sitts testified that he received approximately \$15,700 in unemployment compensation. (Tr. 131).

²⁰ Numbers are rounded to the nearest dollar.

²¹ Sitts testified that he received various fringe benefits, but has not provided sufficient evidence to arrive at a reasonable approximation of the value of these benefits, nor has he requested an augmented award to account for these benefits. (Tr. 126).

D. Remedial Action

Complainant also requests the removal of all documentation of his termination from his personnel file, that a copy of this Decision be posted, and that an order be issued instructing Respondent to refrain from further violations under the Act. Expungement of derogatory information relating to a complainant's protected activity is commonly ordered as an affirmative remedy to ensure that the employee does not experience future harm as a result of the Employer's discrimination. *See Doyle*, slip op. at 10 (ARB Sept. 6, 1996). Therefore, Respondent is ordered to purge Complainant's employment records of all references suggesting that Complainant was discharged for cause and expunge any adverse or derogatory statements pertaining to Sitts' November 12, 2007 refusal to fly. Respondent shall not make derogatory statements about Complainant to other employees or prospective employers. Posting of the administrative law judge's decision is a standard remedy in discrimination cases that notifies a respondent's employees of the outcome of the case. *Michaud v. BSP Transport Inc.*, 95-STA-29 (ARB Oct. 9, 1997) (*rev'd* on other grounds). Respondent is ordered to post a copy of this Decision and Order in its Cincinnati/Northern Kentucky International Airport (CVG) in Erlanger, Kentucky for sixty days at a location accessible to all pilots, taking reasonable steps to ensure that it is not defaced or altered. Respondent is also ordered to comply with the Act's whistleblower protections provisions.

E. Interest

A prevailing complainant is entitled to interest on an award of backpay. *See EEOC v. Ky. St. Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996); *Doyle*, slip op. at 17-19. Compounding is calculated quarterly, and the proper rate is the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points. *Doyle*, slip op. at 17-19 (*citing* 26 U.S.C. §6621(a)(2)). Complainant shall also receive post-judgment interest on his backpay award, which is calculated by the identical formula set forth in *Doyle*.

F. Attorney Fees

Complainant is entitled to "all costs and expenses (including attorneys' and expert witness fees) reasonably incurred." 49 U.S.C. § 42121(b)(3)(B). Complainant may submit a Fee Petition within thirty (30) days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have twenty (20) days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have ten days within which to file any reply to Respondent's response.

ORDER

1. Respondent shall immediately reinstate Complainant to his former employment under the terms, conditions, and privileges of employment to which he would now be entitled had he not been discharged;

2. Respondent shall pay Complainant the sum of \$122,440 in back pay plus pre and post-judgment interest. Backpay shall accrue until the date of reinstatement;
3. Respondent shall pay Complainant non-economic compensatory damages in the amount of \$25,000;
4. Respondent shall take the remedial action described in this Decision; and
5. Respondent shall pay attorney fees and costs in the amount to be determined after briefing.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

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

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