



In the Matter of:

MICHAEL R. CLARK,

ARB CASE NO. 04-150

COMPLAINANT,

ALJ CASE NO. 2003-AIR-28

v.

DATE: November 30, 2006

PACE AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael R. Clark, *pro se*, Carmel, Indiana

For the Respondent:

Denis E. Jacobson, Esq., J. Reed Johnston, Jr., Esq., *Tuggle, Duggins & Meschan, P.A.*, Greensboro, North Carolina

FINAL DECISION AND ORDER

Michael R. Clark filed a complaint alleging that his former employer, Pace Airlines, Inc., retaliated against him in violation of the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) denied Clark's complaint. We affirm the ALJ's decision.

¹ 49 U.S.C.A. § 42121 (West Supp. 2005). The regulations implementing AIR 21 are found at 29 C.F.R. Part 1979 (2006).

BACKGROUND

The ALJ provided a comprehensive recitation of the evidence, including 136 findings of fact.² Substantial evidence of record supports these findings, and they are incorporated herein by reference. We summarize the relevant background information.

Pace Airlines, Inc. (Pace), headquartered in Winston-Salem, North Carolina, provides charter passenger service in addition to managing private aircraft operations for professional sports franchises.³ On April 13, 2000, Pace hired Clark (Clark) as its Manager of Standards/Fleet Manager for its Boeing 737 aircraft.⁴ Clark's primary responsibilities included developing a flight standards manual and establishing standard operating procedures.⁵ He also supervised Pace's Check Airmen – pilots the Federal Aviation Administration (FAA) authorizes to conduct training and administer pilot proficiency examinations.⁶ Additionally, Clark flew the line as a crew member.⁷ While employed at Pace, Clark also trained a number of his fellow pilots.⁸ On or about May 7, 2001, Clark relinquished his managerial duties and began working as a floater pilot.⁹

Clark was a safety-conscious individual and a stickler for adhering to regulations and standard operating procedures.¹⁰ His efforts to standardize Pace's flight operations

² Decision and Order (D. & O.) at 4-33.

³ D. & O. at 5, para. 3, 4; *id.* at 9, para. 24; *id.* at 11, para. 33.

⁴ Respondent's Exhibit (RX)-3; D. & O. at 5-6, para. 8, 9. Prior to joining Pace, Clark worked seven years as a professional pilot for various airlines. D. & O. at 4, para. 2. And from 1973 to 1993, Clark worked for the FAA where he assisted airlines in solving safety and compliance issues, participated in airline certifications and enforcement actions and conducted crash site investigations. *Id.*, para. 1.

⁵ D. & O. at 6, para. 9.

⁶ *Id.*, para. 9, 10; RX-1 at 2.

⁷ D. & O. at 6, para. 9.

⁸ *Id.* at 14-15, para. 41, 42, 47.

⁹ *Id.* at 13, para. 39.

¹⁰ *Id.* at 7-8, para. 19.

were not always well-received.¹¹ Additionally, Clark was the subject of derisive and unflattering remarks from coworkers, some of whom saw him as a “dictator,” “arrogant,” “intimidating,” a “micromanager,” and “hard to talk to.”¹² The ALJ found that Clark lacked appropriate communication skills.¹³

Pace Flight 111 and its Aftermath

On June 21, 2002, Pace dispatched Clark to pilot a charter flight (Pace Flight 111) from Cincinnati, Ohio to Sanford, Florida.¹⁴ Prior to takeoff Clark and the assigned first officer, Captain Aileen Watkins, had a misunderstanding regarding the status of the plane’s public address (PA) system.¹⁵ The two also disagreed about the appropriate method by which the cockpit would communicate with the cabin crew in light of the inoperative PA system.¹⁶ Because of this dispute, Clark arranged with Pace’s crew scheduling department to have Watkins removed from the flight.¹⁷ Pace assigned First Officer Robert Holt as Watkins’s replacement on Flight 111.¹⁸

Upon departing Cincinnati, Pace Flight 111 flew through airspace that Air Traffic Control (ATC) centers in Indianapolis, Atlanta, and Jacksonville monitored.¹⁹ As a flight passes from one ATC sector to another, it is assigned a specific radio frequency within each sector.²⁰ Thus, the same frequency Pace Flight 111 used to communicate with Indianapolis ATC would not work in Atlanta or Jacksonville ATC airspace. When an aircraft nears an ATC sector boundary, the departing sector initiates what is commonly

¹¹ Darren A. Zehner, Pace’s former Director of Operations, characterized Clark’s efforts to standardize the airline’s flight operations as “a very difficult and thankless job.” CX-7.

¹² D. & O. at 7-8, para. 19.

¹³ *Id.*

¹⁴ *Id.* at 19, para. 68.

¹⁵ *Id.* at 20, para. 70.

¹⁶ *Id.* at 20-21, para. 74.

¹⁷ *Id.* at 21, para. 75.

¹⁸ *Id.*

¹⁹ RX-21.

²⁰ D. & O. at 22-23, para. 85.

referred to as a “handoff,” alerting the cockpit of the radio frequency necessary to communicate with the approaching sector.²¹ As Pace Flight 111 traveled through the Atlanta ATC airspace, an approximate 26-minute lapse in communication between the cockpit and ATC occurred.²² Flying without radio contact is generally referred to as NORDO (no radio).²³

Pace Flight 111 was equipped with two radios – COM1 and COM2.²⁴ ATC communications are monitored on COM1, and COM2 is generally used for communication between the airline and the cockpit.²⁵ Clark piloted Flight 111 and Holt, as first officer, monitored radio communications.²⁶ For its domestic flights, Pace subscribed to a commercial transportation communications service, Atlanta/Delta Radio, to facilitate communications with its aircraft.²⁷ Pace Flight 111 was also equipped with a SELCAL system that uses the COM2 radio frequency.²⁸ SELCAL assigns a specific four-digit code to each plane and when activated, a series of chimes and a warning light can be detected in the cockpit, alerting the crew to a desired communication.²⁹ When Atlanta ATC was unable to establish direct communication with Pace Flight 111, it contacted Pace’s in-house flight following department for assistance.³⁰ Pace was able to contact Flight 111 through use of the SELCAL system.³¹ Pace Flight 111 eventually

²¹ *Id.*

²² *Id.* at 23, para. 88.

²³ *Id.*, para. 89.

²⁴ *Id.* at 21, para. 78.

²⁵ *Id.*

²⁶ *Id.*, para. 79.

²⁷ *Id.* at 21-22, para. 80.

²⁸ *Id.* at 22, para. 81, 82.

²⁹ *Id.*, para. 81.

³⁰ *Id.* at 24-25, para. 92, 95. Atlanta ATC also contacted ARINC, another transportation communications service with which Pace contracted to enable air-ground communications with its flights outside the continental United States. *Id.* at 21-22, para. 80; *id.* at 24, para. 95. ARINC contacted Pace by telephone regarding the lapse in communication between ATC and Flight 111. *Id.* at 25, para. 96; RX-13.

³¹ D. & O. at 25, para. 97. Had the communications lapse continued much longer, Pace was prepared to declare a dispatcher emergency that would have resulted in F-16 fighter jets meeting and diverting Flight 111. *Id.* at 26, para. 101.

contacted Atlanta ATC when the plane was at or near the Atlanta-Jacksonville ATC boundary.³²

Harlan Cobert, Pace's Director of Safety and Regulatory Compliance, immediately investigated the Flight 111 NORDO incident. He interviewed Clark by telephone while Clark was still in Sanford, Florida.³³ Cobert reported that Clark claimed he was not "out of contact" or "off frequency" for "more than a few minutes."³⁴ Clark also indicated that he had been out of the flight deck, and soon after he returned the SELCAL signal illuminated. Clark then promptly contacted Pace. During the interview Clark was initially reluctant to discuss what he characterized as "safety" reasons for not wanting to fly with Watkins.³⁵ But when Cobert pressed him to elaborate, Clark mentioned the PA malfunction and Watkins's failure to advise him of the problem. He also commented about Watkins's understanding of command authority and responsibility. In his report, Cobert characterized the Clark-Watkins incident as a "personality conflict."³⁶

Clark later provided a "Captain's Irregularity Report" describing his interaction with Watkins on the day of the incident.³⁷ He noted that from the first moment it seemed that Watkins had a "serious problem" working with him and that she was going to be uncooperative even to the extent of not sharing safety-related information about the flight.³⁸ He also reported that Watkins would not allow him to complete a briefing with the flight attendants without "continuous public argument."³⁹

In addition to interviewing Clark, Cobert also spoke with Holt, Watkins and representatives from both Indianapolis and Atlanta ATC. Regarding the pre-flight

³² *Id.* at 25, para. 97; RX-14.

³³ Mark Spence, Pace's Manager of Systems Operations Control, also participated in the June 21, 2002 conference call. RX-24. Spence instructed Clark to immediately submit to a drug test, the results of which were normal. *Id.*; D. & O. at 27, para. 105.

³⁴ RX-24.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Complainant's Exhibit (CX)-31.

³⁸ *Id.*

³⁹ *Id.*

dispute between Watkins and Clark, Watkins explained that Clark arrived at the aircraft agitated and that he immediately grabbed the microphone to address the passengers.⁴⁰ When Watkins attempted to advise Clark that the PA was not working properly, Clark told her he needed to make an announcement and would talk to her later. Clark attempted his announcement and realized the PA system was not working, and then he verbally admonished Watkins for not telling him the system was inoperable. Watkins also indicated that Clark then began briefing the flight attendant on the procedures to use in light of the inoperative PA system. However, Clark's "book procedures" were different from those of all other captains who had flown with this same crew.⁴¹ And when Watkins attempted to advise Clark about how communications had previously been handled with the inoperative PA system, Clark reportedly told her "I'm the Captain of this flight" and she should "speak when spoken to."⁴²

According to Holt, when Clark initially advised him that he would be joining Pace Flight 111 as first officer, he did not elaborate about the "conflict" with Watkins.⁴³ But once airborne, Clark elaborated extensively about his displeasure with Watkins. This continued until Clark left the flight deck to use the lavatory. When Clark returned approximately 3 to 5 minutes later, the SELCAL signal illuminated and the cockpit was advised to contact Atlanta ATC immediately. Holt further indicated that Clark normally turned the COM2 volume to its lowest level or off, and the crew had not been monitoring COM2, which was still set to CVG (Cincinnati/Northern Kentucky International Airport) operations. And on COM1, Holt was listening to Indianapolis ATC and did not think anything was out of sorts. Additionally, Holt indicated that when the SELCAL signal illuminated, Clark thought it was in regard to the morning's events with Watkins and not the actual flight.⁴⁴

Indianapolis ATC advised Cobert that it made three attempts to directly contact Pace Flight 111.⁴⁵ They also attempted contact via another aircraft, but that too failed. Indianapolis then advised Atlanta ATC that Pace Flight 111 was unresponsive to the frequency change. Atlanta ATC also made several unsuccessful attempts to establish communications with Pace Flight 111 before contacting AIRINC and Pace for assistance. Atlanta ATC also contacted NORAD (North American Aerospace Defense Command)

⁴⁰ RX-16.

⁴¹ *Id.*

⁴² *Id.*

⁴³ RX-17.

⁴⁴ *Id.*

⁴⁵ RX-14.

concerning the aircraft. Pace Flight 111 had not deviated from its flight plan, and when it eventually contacted Atlanta ATC, the aircraft was south of Macon, Georgia just prior to being handed off to Jacksonville ATC. Coburn noted that the lapse in radio communication with ATC lasted approximately 40 minutes, and during that time Pace Flight 111 traveled over 400 nautical miles.⁴⁶

On June 26, 2002, Cobert reported his findings to F. Darrell Richardson, Pace's President and Chief Executive Officer.⁴⁷ Also present during the June 26, 2002 meeting were Director of Operations Mark Shue and Chief Pilot David W. Turner, Clark's immediate supervisor.⁴⁸ Both Turner and Shue recommended that Clark be dismissed for the Pace Flight 111 NORDO incident. Richardson concurred.⁴⁹ Later that day Turner telephoned Clark and informed him of his immediate termination.⁵⁰ Turner also dispatched a June 26, 2002 letter in which he advised Clark that his employment was being terminated. The letter noted that as pilot-in-command on Pace Flight 111, Clark was "out of radio contact with ATC for 35 minutes" and "[d]uring this time period ATC and the company tried to contact [him] with no success."⁵¹ Turner characterized Clark's actions on June 21, 2002, as "unacceptable," thereby warranting immediate termination.⁵²

Clark's Safety-Related Activities at Pace

During his 26-month tenure with Pace, Clark reported a number of safety-related issues to both the FAA and Pace management. The earliest incident dated back to November 2, 2000, when Clark reported his concerns about a particular pilot's decision to taxi an aircraft. Clark also documented a number of other problems he observed while flying with this particular pilot, who was apparently unfamiliar with Pace's standard operating procedures.⁵³ On January 2, 2001, Clark authored a similar memorandum

⁴⁶ *Id.*

⁴⁷ D. & O. at 30, para. 121; Hearing Transcript (TR) at 1065.

⁴⁸ TR at 1065.

⁴⁹ D. & O. at 31, para. 125. Richardson perceived Clark's role in the Flight 111 NORDO incident as a "tremendous breach of safety." TR at 1067.

⁵⁰ D. & O. at 31, para. 127.

⁵¹ RX-18.

⁵² *Id.*

⁵³ CX-21.

regarding another pilot's performance problems.⁵⁴ Additionally, Clark authored two memoranda on January 4, 2001. One pertained to aircraft weight and balance procedures that Pace was not following, and the other memorandum dealt with compliance problems within the Check Airmen program.⁵⁵ In a January 11, 2001 memorandum, Clark reiterated his earlier concerns about adherence to weight and balance procedures, and he addressed other standardization issues, including cabin calls and signals, seat swapping, crew briefings, and proper use of runway approach and taxi charts.⁵⁶ Compliance with weight and balance procedures continued to be an issue for Clark, and on February 23, 2001, he dispatched another memorandum regarding completion of necessary forms.⁵⁷ He also raised concerns about cockpit access, operation of cockpit controls, aircraft communications, and logbook entries.⁵⁸

Clark prepared two memoranda in March 2001 regarding problems he observed with Pace's New York operations. Pace operated an aircraft that Madison Square Garden (MSG) owned and that was used to transport the National Basketball Association's New York Knicks and the National Hockey League's New York Rangers.⁵⁹ For a period of time in 2001, Clark piloted MSG's aircraft.⁶⁰ In a March 3, 2001 memorandum Clark explained to Pace's then-Director of Operations, Darren Zehner, why Clark aborted an initial landing attempt on March 1, 2001.⁶¹ According to Clark, the "go-around" was necessary because the cabin crew did not respond to his request for confirmation that all passengers were properly seated.⁶² In a subsequent memorandum to Zehner dated March 6, 2001, Clark listed his problems with the lead flight attendant and with communications between the cockpit and the cabin crew.⁶³ He reported difficulties obtaining an accurate passenger manifest and also noted that the cabin crew often failed to provide required

⁵⁴ CX-22.

⁵⁵ CX-10, 25.

⁵⁶ CX-11.

⁵⁷ CX-12.

⁵⁸ *Id.*

⁵⁹ D. & O. at 9, para. 24.

⁶⁰ *Id.*, para. 26.

⁶¹ CX-13.

⁶² *Id.*

⁶³ CX-14.

passenger briefings. Clark also complained about distractions in the cockpit and other sterile cockpit intrusions.⁶⁴ On another occasion in March 2001, Clark reported safety concerns about one of the pilots in the New York operation.⁶⁵

In October 2001 Clark placed a call to an FAA hotline alleging that Pace falsified pilot training records. He also complained about recurring equipment malfunctions and maintenance issues.⁶⁶

On February 20, 2002, Clark reported a February 5, 2002 duty time violation through the NASA Aviation Safety Reporting System.⁶⁷ He explained that a security threat occurred in Cancun, Mexico on a flight he piloted. When the flight reached Sanford, Florida, he encountered an unexpected four-hour delay while the FBI investigated the matter. Although Clark initially expressed reservations about continuing with the February 5, 2002 flight because of a potential duty time violation, Pace provided him with written assurance that he could lawfully continue with the flight because the circumstances giving rise to the delay were beyond the airline's control. Clark then proceeded with the final leg of the flight, which caused him to exceed the 16-hour duty time limitation that FAA regulations impose. On February 20, 2002, Clark learned that Pace was mistaken in its earlier interpretation of the regulation, and he immediately alerted the FAA of the February 5, 2002 infraction.⁶⁸

Also in February 2002, Clark was attempting to resolve an in-flight incident involving a cockpit warning light when he discovered that a portion of the flight standards manual had been removed without proper authorization. He reported the incident to Cobert and Turner.⁶⁹

Clark's AIR 21 Complaint

Clark did not believe that his June 26, 2002 dismissal was due to the Pace Flight 111 NORDO incident. Instead, he felt that Pace had targeted him because he had raised numerous safety-related issues. On September 1, 2002, Clark filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Pace had violated

⁶⁴ *Id.*

⁶⁵ D. & O. at 9-10, para. 27.

⁶⁶ *Id.* at 17, para. 53, 54.

⁶⁷ CX-27.

⁶⁸ *Id.*

⁶⁹ D. & O. 17-18, para. 60, 61.

the employee protection provision of AIR 21. OSHA denied Clark's complaint on April 1, 2003. He subsequently requested a hearing before the Office of Administrative Law Judges. The hearing took place over a six-day period in January 2004.

On July 2, 2004, the ALJ issued a decision denying Clark's complaint. The ALJ concluded that Clark had engaged in protected activity on numerous occasions of which Pace management was aware.⁷⁰ Additionally, the ALJ concluded that Clark's June 26, 2002 dismissal constituted an adverse employment action.⁷¹ But according to the ALJ, Clark failed to establish by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment action.⁷²

Clark filed a timely appeal with the Administrative Review Board (ARB or the Board). After an exhaustive review of the record and consideration of the parties' briefs on appeal, we agree with the ALJ that Clark failed to establish that his protected activity contributed to Pace's decision to dismiss him. Accordingly, we affirm the ALJ's July 2, 2004 decision and deny Clark's AIR 21 whistleblower complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.⁷³ In cases arising under AIR 21, we review the ALJ's factual determinations under the substantial evidence standard.⁷⁴ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁷⁵ But the Board exercises de novo review with respect to the ALJ's legal conclusions.⁷⁶

⁷⁰ *Id.* at 38-49, 50-52.

⁷¹ *Id.* at 52.

⁷² *Id.* at 74.

⁷³ See Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

⁷⁴ 29 C.F.R. § 1979.110(b).

⁷⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁷⁶ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 4 (ARB June 29, 2006); *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 4 (ARB April 28, 2006).

DISCUSSION

The whistleblower protection provision of AIR 21 prohibits air carriers and their contractors and subcontractors from retaliating against employees for engaging in protected activity. Under AIR 21, an employee is protected if he:

(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 [subtitle VII of title 49 of the United States Code] or any other law of the United States.... [77]

To prevail in an AIR 21 case, a complainant like Clark must demonstrate that: (1) he engaged in protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable (“adverse”) personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.⁷⁸ If a complainant proves that the employer violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.⁷⁹

On appeal, Clark took exception to numerous findings of fact and conclusions of law, some of which the ALJ resolved in Clark’s favor.⁸⁰ As previously noted, the ALJ

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

⁷⁸ 49 U.S.C.A. § 42121(a), (b)(2)(B); 29 C.F.R. § 1979.109(a).

⁷⁹ 49 U.S.C.A. § 42121(b)(2)(B)(ii), (iv); 29 C.F.R. § 1979.109(a); *see, e.g., Rooks*, slip op. at 5.

⁸⁰ Clark’s December 9, 2004 petition for review consists of a cover letter and a copy of the ALJ’s 75-page Decision and Order, wherein Clark highlighted portions of the decision with which he disagreed. Specifically, Clark highlighted 66 pages of the decision, including 90 of the ALJ’s 136 findings of fact. Although Clark was represented by counsel when his claim was pending before the ALJ, he currently is without counsel. Because Clark is a pro se appellant, we liberally construe his petition for review and briefs. But we are also mindful of our duty to remain impartial. Thus, we must refrain from becoming Clark’s advocate. *See Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-47, slip op. at 2 (ARB Apr. 26, 2005); *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-9 (ARB Feb. 28, 2003).

concluded that Clark engaged in protected activity of which Pace was aware and that the June 26, 2002 termination was an adverse personnel action. Although Clark challenged some aspects of these otherwise favorable rulings, substantial evidence supports those conclusions. Therefore, the dispositive issue on appeal is whether the ALJ properly found that Clark did not prove by a preponderance of evidence that his protected activity contributed to his dismissal. We will respond only to Clark's arguments on appeal that address this particular issue.

Clark bears the burden of establishing by a preponderance of the evidence that protected activity was a contributing factor in Pace's decision to take adverse action.⁸¹ He need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent.⁸² In Clark's case, no so-called smoking gun or direct evidence of discriminatory intent exists. Clark instead bases his claim on circumstantial evidence.

In his submissions to both the ALJ and the Board, Clark argues that the timing between his protected activity and his dismissal raises an inference of discrimination and that the Pace Flight 111 NORDO incident does not independently justify his firing. In challenging the legitimacy of his termination, Clark contends that the Pace officials who decided to dismiss him were biased and that they did not follow company personnel procedures. He also contends that Pace treated Watkins, Holt and other Pace employees differently than it treated him. Clark also argues that a pattern of adverse acts evidences discrimination because of his protected activity.

A. Temporal Proximity

Retaliatory motive may be inferred when an adverse action closely follows protected activity.⁸³ An inference of discrimination, i.e., the protected activity contributed to the adverse action, is less likely to arise as the time between the adverse action and the protected activity increases.⁸⁴ But if an intervening event that independently could have

⁸¹ *Rooks*, slip op. at 5; *Barber*, slip op. at 4-5.

⁸² *See Gavalik v. Continental Can Co.*, 812 F.2d 834, 852-53 (3d Cir. 1987); *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

⁸³ *Keener v. Duke Energy Corp.*, ARB No. 04-091, ALJ No. 2003-ERA-12, slip op. at 11 (ARB July 31, 2006); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 10 (ARB Sept. 30, 2003).

⁸⁴ *See Evans v. Washington Pub. Power Supply Sys.*, ARB No. 96-065, ALJ No. 1995-ERA-52, slip op. at 4 (ARB July 30, 1996) (lapse of approximately one year was too much to justify an inference that protected activity caused the adverse action).

caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.⁸⁵

Although the ALJ credited Clark with numerous protected activities, only three of those acts occurred within a year of his June 26, 2002 dismissal. The ALJ found Clark's October 2001 FAA Hotline complaint and two February 2002 complaints regarding a duty-time violation and alteration of the Flight Standards Manual to be sufficiently close in time to the June 26, 2002 dismissal to raise an inference of discrimination.⁸⁶ Pace, however, argues that the Flight 111 NORDO incident was the sole reason for Clark's removal and that it represented an intervening, independent basis for the June 26, 2002 termination. The ALJ found that Pace offered "a legitimate, nondiscriminatory basis for Clark's termination," thus severing the temporal link between Clark's protected activity and the adverse action.⁸⁷

Clark challenges the legitimacy of Pace's reason for dismissing him. In effect, he argues that the NORDO incident was a pretext for dismissing him and that the real reason was his protected activity.⁸⁸ He points to several circumstances that he claims evidence pretext.

Disparate Treatment

Clark argues that Pace treated him differently because it did not similarly dismiss either Watkins or Holt over the NORDO incident. This argument, however, is not compelling. Watkins and Clark were not similarly situated individuals.⁸⁹ Watkins was

⁸⁵ *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 1997-WPC-1, slip op. at 8 (ARB July 31, 2001).

⁸⁶ D. & O. at 55. Clark argued below that he engaged in protected activity on June 21, 2002, when he reluctantly reported his pre-flight dispute with Watkins, which he characterized as a "safety" issue. RX-24; CX-31. The ALJ rejected this argument because he found that the incident evidenced only a "communications problem that had the potential to become a safety concern which was resolved by the captain before take-off." D. & O. at 41-42. Substantial evidence supports this finding.

⁸⁷ D. & O. at 56.

⁸⁸ If Clark proved that Pace's reason for dismissing him is not believable, he might have prevailed. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 14 (ARB Jan. 31, 2006).

⁸⁹ A whistleblower who argues disparate treatment must prove that similarly situated persons were treated more favorably. *Sasse v. Office of the United States Attorney.*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 21 (ARB Jan. 30, 2004).

not onboard Pace Flight 111 at the time of the NORDO incident and, thus, she bore no direct responsibility for the lapse in communication between the aircraft and ATC. Holt, on the other hand, was tasked with monitoring radio communications on Pace Flight 111, and thus, he arguably bears some responsibility for the June 21, 2002 NORDO incident.

Richardson, Pace's President and CEO, commented about the disciplinary action taken against Holt. He testified that Holt was "counseled," but to the best of his knowledge, Holt was not given any days off or suspended.⁹⁰ Perhaps Clark believes that he too should have only been counseled, but the decision as to the appropriate sanction properly rests with Pace management.⁹¹ Richardson believed a loss of "focus" occurred in the cockpit and that once Clark left the flight deck to go to the lavatory, "everything settled down."⁹² Holt was then able to refocus his attention and adjust COM2 to the appropriate radio frequency, which enabled receipt of the SELCAL signal soon after Clark returned. Richardson further explained that Clark was fired, and not First Officer Holt, because Clark was the captain and he "lost his ability to be the pilot in command on that flight."⁹³ Our task is not to decide whether retaining Holt while dismissing Clark was a wise and prudent personnel decision. We do, however, find that Clark's disparate treatment argument has no merit given Richardson's explanation as to why Clark's sanction, as captain of Flight 111, was more severe than First Officer Holt's.

Clark also contends that while Pace ostensibly terminated him for the Flight 111 NORDO incident, the company tolerated other pilots' egregious safety infractions. He points to one incident involving a hazardous high-speed takeoff and another incident in which a Pace pilot blew over some parked cars because of the thrust from the aircraft's jet engines. Clark also claims that Pace pilots struck buildings and light poles with their assigned planes. According to Clark, these instances of serious safety violations did not result in any of the responsible Pace pilots being terminated or disciplined. But the

⁹⁰ TR at 1078-79.

⁹¹ Clark claimed that immediate termination was inconsistent with Pace's policy of progressive discipline, which would normally call for an initial oral reprimand followed by a written reprimand, then probation or suspension, and finally discharge. CX-42B at 247-48. But Pace's Policies and Procedures Manual, § 7.2 *Disciplinary Procedures*, also provides that "employees who commit ... serious safety violations will be suspended at the time of the incident, pending a management investigation and review of the matter." *Id.* at 248. If the employee is found guilty of the charges, he or she "will be discharged without delay." *Id.*

⁹² TR at 1066-67.

⁹³ *Id.* at 1067, 1069.

record demonstrates, and the ALJ properly found, that Clark did not prove that these alleged egregious safety violations occurred.⁹⁴

Improper Investigation Procedures

Clark argues that Pace's investigation of the Flight 111 NORDO incident was flawed because the lead investigator should have been someone in his direct chain of command. Chief Pilot Turner was Clark's immediate supervisor and Director of Operations Shue was Clark's second-line supervisor. Nevertheless, Richardson instructed Cobert to investigate the Pace Flight 111 NORDO incident. According to Richardson, under normal circumstances the department supervisors would be involved in the investigation, and in Clark's case that would have been Turner and Shue.⁹⁵ He further explained, however, that "the Director of Safety and Security investigates all matters that deal with the safety and security of an airplane."⁹⁶ And because the Flight 111 NORDO incident involved the safety and security of the aircraft, Richardson asked Cobert to investigate the incident.⁹⁷

Clark claims that he was unable to communicate directly with pilots in his chain of command, including Turner. He claims that he called and left several messages that were never returned, but Turner testified that he spoke with Clark about the Flight 111 NORDO incident a few days after it occurred.⁹⁸ Pace's Policies and Procedures Manual provides that "[b]efore being subjected to any discipline, an employee will be given an opportunity to relate his/her version of the incident or problem and provide an explanation or justification."⁹⁹ While Clark preferred to have discussed the June 21, 2002 incident with pilots in his chain of command, Pace's personnel policy confers no such right. What it does provide, however, is an opportunity to be heard. In this instance, Cobert and Spence interviewed Clark on June 21, 2002, and Clark later prepared a detailed memorandum for Cobert regarding the pre-flight incident with Watkins.¹⁰⁰ Clark has not argued, nor does the record support, that he was denied access to Cobert or otherwise precluded from submitting any information in his defense.

⁹⁴ D. & O. at 73.

⁹⁵ TR at 1064.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1065.

⁹⁸ D. & O. at 27, para. 106; *id.* at 29, para. 118; TR at 876-77.

⁹⁹ CX-42B at 248.

¹⁰⁰ RX-24; CX-31. Clark also provided Turner a similar, but less detailed written account of his June 21, 2002 dispute with Watkins. CX-30.

The Decision-Makers' Retaliatory Animus

Richardson, Turner, Shue and Cobert each played a role in the process that culminated in Clark's June 26, 2002 termination. Clark argues that Turner, Shue and Cobert were biased. He does not assert bias or retaliatory animus on Richardson's part. Although Cobert investigated the Pace Flight 111 NORDO incident, he did not offer an opinion regarding appropriate disciplinary action.¹⁰¹ Richardson testified that both Turner and Shue recommended termination, with which he concurred.¹⁰²

Cobert's bias was evident in February 2002 when, according to Clark, he exhibited a "lack of understanding and a lack of interest" in response to Clark's report about an emergency procedure having been improperly removed from the cockpit Flight Standards Manual.¹⁰³ But Clark's subjective assessment of Cobert's lack of understanding or interest does not evidence bias, particularly in light of the fact that the missing document Clark reported was replaced before his next flight on that same aircraft.¹⁰⁴ In another incident involving Cobert, Clark claimed the Director of Safety "scoffed" at his concerns regarding the February 5, 2002 duty time violation and encouraged him to keep the incident quiet.¹⁰⁵ But Cobert denied Clark's claims, and in fact he eventually filed a self-disclosure report with the FAA regarding the February 5, 2002 duty time violation.¹⁰⁶ Thus, the record does not support a finding that Cobert was biased.

Although Clark testified that Turner was hostile toward him, Clark did not prove that Turner's hostility was because of his protected activity or other safety-related matters.¹⁰⁷ Turner may not have been one of Clark's biggest supporters,¹⁰⁸ but as the

¹⁰¹ TR at 1003, 1070.

¹⁰² *Id.* at 1070.

¹⁰³ *Id.* at 30.

¹⁰⁴ *Id.*

¹⁰⁵ TR at 88-89, 90; D. & O. at 19, para. 65.

¹⁰⁶ TR at 966; D. & O. at 19, para. 65, 67.

¹⁰⁷ D. & O. at 30, para. 120.

¹⁰⁸ In May 2001, Turner expressed opposition to Clark becoming a full-time, salaried floater pilot. Turner was aware of other pilots' complaints about Clark being hard to talk to,

ALJ found, the record contains no credible evidence that Turner retaliated against Clark.¹⁰⁹ Therefore, we accept the ALJ's finding that Turner did not retaliate against Clark.

Director of Operations Shue previously held the position of Manager of Training. Clark at one point trained Shue on Boeing 737-300 series aircraft. During a trip to Seattle, Washington, the two disagreed about whether Shue should complete ground school training before undergoing flight simulator training.¹¹⁰ Clark wanted Shue to first complete ground school, and he ultimately prevailed.¹¹¹ According to Clark, the training incident with Shue is just one example of Shue's bias against him. While Shue acknowledged the problem he had with Clark during the Seattle training program, he explained that his disagreement was simply with the timing of Clark's request, and not with whether he should have been required to complete the ground school portion of the training.¹¹² This incident does not demonstrate bias or retaliation because of protected activity.

Other pilots testified that Shue had once referred to Clark as a "pain in the ass" and had said he was going to get rid of him.¹¹³ Clark testified that Shue taunted him about the FAA hotline complaint concerning falsified training records. Another Pace employee indicated that Shue told him he took exception to pilots who wrote-up problems in logbooks. Shue, however, denied all of this.¹¹⁴ Clark also claimed that Shue resisted use of FAA-approved standard operating procedures, which Shue also denied.¹¹⁵ The ALJ found that other witnesses corroborated some of what Clark claims that Shue said. But he found that Clark did not prove that Shue's statements were connected to

and he did not believe that Clark was good for the company. TR at 869; D. & O. 13-14, para. 39.

¹⁰⁹ D. & O. at 65.

¹¹⁰ The ground school training had been conducted in Winston-Salem, North Carolina. Shue, however, had missed a few hours of the training. Some of Pace's pilots then flew to Seattle, Washington to undergo flight simulator training. D. & O. at 14, para. 41.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ D. & O. at 29-30, para. 119.

¹¹⁴ *Id.*

¹¹⁵ D. & O. at 8, para. 20.

protected activity.¹¹⁶ Again, we accept the ALJ's finding because substantial evidence supports it. Furthermore, the record does not contain any evidence that Clark's protected activity was a factor in Shue's recommendation to terminate Clark's employment because of the Pace Flight 111 NORDO incident.

To sum up, substantial evidence supports the ALJ's finding that Clark failed to prove that his protected activity contributed to the decision to dismiss him. Moreover, Clark's arguments concerning disparate treatment and the alleged improprieties in the conduct of the Flight 111 NORDO investigation have no merit because the record does not support them. Therefore, like the ALJ, we find that the NORDO incident represents "a legitimate, nondiscriminatory basis for Clark's termination."¹¹⁷ And because of this independent intervening event, Clark's argument that he proved discrimination because of temporal proximity fails.

B. Alleged Pattern of Discrimination

Clark argues that during his tenure at Pace an ongoing pattern of safety-related activity followed by adverse consequences existed. He claims that he was removed from the New York operation because of his numerous reports about safety issues. But Pace explained that the aircraft owner, MSG, and the Knicks requested that Clark be reassigned. Also, Clark's management style in implementing FAA compliance was a factor. While Clark was trying to implement the correct procedures, he simply antagonized the entire New York operation.¹¹⁸

Additionally, Clark claims that in March 2001, Pace reneged on a promise to allow him to participate in training for assignment to the new Boeing 757 aircraft Pace would soon operate for the NBA's Dallas Mavericks. Pace issued a March 7, 2001 memorandum advising its crewmembers that the Mavericks would be reviewing résumés, and anyone interested in joining the new 757 team should update their résumé and submit it to either the Director of Operations or the Chief Pilot.¹¹⁹ Clark did not present any evidence indicating that he had submitted a résumé for the Maverick's consideration. Nor is there any evidence that the Mavericks expressed an interest in Clark's services.¹²⁰

Clark also contends that Pace discriminated against him by curtailing his training duties. On March 19, 2001, Clark was the subject of an anonymous FAA hotline

¹¹⁶ D. & O. at 66-67.

¹¹⁷ *Id.* at 56.

¹¹⁸ D. & O. at 10, para. 29, 30.

¹¹⁹ CX-6.

¹²⁰ D. & O. at 11, para. 34.

complaint regarding a March 10, 2001 fueling incident.¹²¹ As a result of this complaint, the FAA withdrew Clark's Check Airman status pending investigation.¹²² Former Manager of Training Shue explained that Clark ceased doing training at Pace when management determined that only personnel who were FAA qualified as Check Airmen should conduct all training.¹²³ Therefore, Pace did not discriminate because the FAA had withdrawn approval of Clark's Check Airman status, and he was no longer eligible to conduct training at Pace.

Clark also points to several payroll and personnel-related issues that he claims were retaliatory. Occasionally Clark's pay was less than what he believed he was entitled to receive. Clark, however, presented no evidence that this was anything more than an accounting mishap, and the record reflects that Pace was responsive to Clark's efforts to rectify the situation.¹²⁴ Clark also claimed that Pace should have converted him to a full-time salaried employee prior to May 7, 2001. Clark's initial employment agreement with Pace provided him the option to convert from daily-pay consultant status to full-time salaried employee on or before July 1, 2000.¹²⁵ But the record contains no evidence that Clark exercised this option within the allotted timeframe.

Another example of retaliation, according to Clark, occurred after he converted to a full-time salaried floater pilot in May 2001 and Pace changed his base of operation from Indianapolis to Cincinnati.¹²⁶ Clark resided in the Indianapolis area and when his base of operation changed to Cincinnati, he incurred the additional costs of commuting to Cincinnati.¹²⁷ But Pace offered the legitimate explanation that its policy was to base their pilots where an aircraft was located, and good business practice did not allow Clark, or other pilots, to be based other than where the plane was.¹²⁸

¹²¹ D. & O. at 12-13, para. 35-38.

¹²² RX-11.

¹²³ D. & O. at 15-16, para. 48.

¹²⁴ CX-28.

¹²⁵ CX-2; D. & O. at 13-14, para. 39.

¹²⁶ CX-19; D. & O. at 13-14, para. 39.

¹²⁷ D. & O. at 13-14, para. 39.

¹²⁸ *Id.*

And as a final example of a personnel-related issue, Clark claims that Pace retaliated against him when it did not issue a performance evaluation for the period dating back to May 7, 2001. Clark was entitled to an appraisal for the approximate one-year period ending May 1, 2002.¹²⁹ Pace, however, terminated his employment approximately six weeks later because of the Flight 111 NORDO incident and did not issue Clark a performance appraisal. Although Pace did not explain why it did not issue his annual appraisal, Clark did not present any evidence that Pace's failure to rate him related to his protected activity. And the same holds true for the several other personnel and payroll matters Clark claimed were retaliatory in nature. Therefore, Clark failed to prove a pattern of discrimination.

CONCLUSION

Clark cannot prevail on his AIR 21 complaint because he did not, as he must, prove by a preponderance of the evidence that his protected activities contributed to his dismissal. True, we could presume that Pace retaliated against Clark because it dismissed him a relatively short time after some of his protected activities. But the intervening NORDO incident that occurred five days before Pace dismissed him rebuts this presumption, and Clark did not demonstrate that the NORDO incident was a pretext for firing him. Furthermore, Clark's argument that Pace engaged in a pattern of discrimination when it removed him from its New York operation, curtailed his training duties, and subjected him to payroll and personnel-based adversities fails because, again, Clark did not sufficiently demonstrate that his protected activity contributed to these circumstances. Therefore, like the ALJ, we **DENY** this complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹²⁹ RX-4 at 10.