



**In the Matter of:**

**BRIAN WILLIAMS,**  
  
**COMPLAINANT,**  
  
**v.**  
  
**AMERICAN AIRLINES, INC.,**  
  
**RESPONDENT.**

**ARB CASE NO. 09-018**  
  
**ALJ CASE NO. 2007-AIR-004**  
  
**DATE: December 29, 2010**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Michael G. O'Neill, Esq., New York, New York**

*For the Respondent:*

**Donn C. Meindertsma, Conner & Winters, LLP, Washington, District of Columbia**  
**Vincent S. Carver, Esq., American Airlines, Inc., Fort Worth, Texas**

**BEFORE: Luis A. Corchado, Administrative Appeals Judge, E. Cooper Brown, Deputy Chief Administrative Appeals Judge, and Joanne Royce, Administrative Appeals Judge**

### **DECISION AND ORDER OF REMAND**

Respondent American Airlines, Inc. (AA), an air carrier, employed Complainant Brian Williams (Williams) at all times relevant to this litigation as a licensed aviation maintenance technician (AMT) at John F. Kennedy Airport (JFK). Williams filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that AA violated the whistleblower protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21) when it took adverse

personnel actions against him from August through October of 2004 because he engaged in protected activity.<sup>1</sup>

In December 2006, OSHA completed its investigation and ordered relief for Williams finding that AA harassed him because he engaged in activities protected by AIR 21. Objecting to OSHA's findings, AA requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Following a hearing on the merits, the ALJ issued a Decision and Order on October 23, 2008, concluding that AA violated AIR 21 based on a finding of protected activity that had not been alleged by Williams nor argued by either of the parties before the ALJ.<sup>2</sup> AA subsequently filed a timely petition for review with the Administrative Review Board (Board). Williams did not file an appeal. AA (1) appeals the ALJ's finding of protected activity and adverse action and (2) asserts that the ALJ violated its due process right to notice and hearing when, on her own initiative, the ALJ adopted, post-hearing, a new theory of Williams's claim for relief, rather than addressing only the claim Williams presented. For the following reasons, we affirm the ALJ's decision in part, vacate in part, and remand for further proceedings consistent with this Decision and Order of Remand.

#### BACKGROUND

AA is an air carrier covered by AIR 21<sup>3</sup> with whom Williams has been employed since 1991 as a licensed AMT. Since July 2004, Williams has been stationed at AA's JFK facility. At all times relevant to this case, Williams worked under various supervisors employed by AA, including A.J. Murray, Phillip Joshua, Lou Gonzales, Joseph Ambrosio,<sup>4</sup> and Devon Erriah, the shift/production manager to whom the line supervisors reported.<sup>5</sup> The theory of Williams's retaliation claim before the ALJ focused on alleged protected activity that occurred on July 30, 2004, with the "torque wrench incident," and a series of personnel actions AA subsequently took against Williams that he alleges are related to and in retaliation for that protected activity. However, the ALJ based her finding of illegal retaliation on a finding of protected activity that occurred in January 2005 involving an Extended Twin-Engine Operations (the "ETOPS") inspection. We describe each incident separately below.

---

<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2007).

<sup>2</sup> *Brian Williams v. American Airlines*, 2007-AIR-00004 (Oct. 23, 2008).

<sup>3</sup> Decision and Order (D. & O.) at 34; 49 U.S.C.A. § 42121(a).

<sup>4</sup> D. & O. at 34-35; Transcript (Tr.) at 447, 481.

<sup>5</sup> Tr. at 471-472.

### Torque Wrench Incident

The protected activity forming the basis of Williams's OSHA complaint arose from an incident that occurred on July 30, 2004, involving a verbal altercation between Williams and his supervisor, A. J. Murray. The disagreement concerned the correct wrench to use to repair an aircraft with a thrust reverser problem (the "Torque Wrench Incident").<sup>6</sup> Williams refused to use the wrench Murray provided, because Williams believed that the aircraft maintenance manual required him to use a specific type of wrench. Murray became agitated, yelled at Williams, and used abusive language in front of other workers. On July 31, 2004, Williams complained to AA's Human Resources (HR) Department about Murray (the "HR Complaint").<sup>7</sup> Erriah investigated the HR complaint. Williams also filed a complaint with the Federal Aviation Administration (FAA) (the "FAA Complaint") shortly after the incident.<sup>8</sup> Erriah, a high level manager, knew that Williams had reported the Torque Wrench Incident to the FAA, but did not believe the report was "warranted."<sup>9</sup> On August 9, 2004, Erriah sent a letter to Williams concerning the resolution of his complaint to HR.<sup>10</sup> Shortly after the Torque Wrench Incident, AA subjected Williams to a string of employment actions that caused him to file a whistleblower complaint with OSHA. In short, those actions were numerous counseling sessions, docked pay, and a Counseling Record referred to as a "CR-1" (described more fully below).

### ETOPS/Brake Change Incident

On January 8, 2005, Williams and mechanic Joe Urso were assigned to do an ETOPS inspection on an aircraft that was scheduled for a trans-Atlantic flight. During the inspection, they determined that a brake change was required (the "ETOPS/Brake Change Incident"). The brake change took longer than normally required for experienced mechanics, mostly due to the difficulty locating a needed tire dolly to lift the heavy wheels of the aircraft.<sup>11</sup> Following the delay, Williams and Urso believed that a new ETOPS inspection was required because too much time had elapsed.<sup>12</sup> They argued with their supervisor, Joshua, about whether a new ETOPS was

---

<sup>6</sup> However, the ALJ did not find any illegal retaliation based on Williams's theory of the case, and Williams did not appeal. Consequently, AA's limited challenge to the ALJ's findings on Williams's theory of the case is moot. Nevertheless, a limited understanding of the facts related to Williams's theory of the case is necessary to understand AA's due process claim.

<sup>7</sup> D. & O. at 4, 10, 25, 34, citing Respondent's Exhibit (RX) 7; D. & O. at 38-39, citing Tr. at 44-45, 534.

<sup>8</sup> D. & O. at 4, 10, 34, citing RX 1; D. & O. at 37-38, citing Tr. at 45-46; CX 3, RX 37.

<sup>9</sup> D. & O. at 25, citing Tr. at 525-539.

<sup>10</sup> RX 8.

<sup>11</sup> Tr. at 89-100.

<sup>12</sup> D. & O. at 49.

required. Joshua contacted technical services (Tech Services) and Tech Services agreed that a new ETOPS was needed. Joshua reported the incident to Erriah, his direct supervisor, who evaluated the situation and determined there was a job performance issue.<sup>13</sup>

On January 14, 2005, the fallout from the ETOPS/Brake Change Incident escalated. On that day, Joshua discussed the incident with Williams.<sup>14</sup> Consequently, that same day, Williams self-reported the ETOPS Incident to the FAA pursuant to the Aviation Safety Action Program (ASAP).<sup>15</sup> Under the ASAP policies, a committee determines whether an ASAP is accepted, which then commences an investigation into the matter. Once an ASAP is accepted, the employee is protected from AA's disciplinary action, but the FAA may take disciplinary action. It would take a couple of weeks before Williams would learn whether his ASAP was accepted.

### The ETOPS CR-1 Entry

On February 5, 2005, pending the decision on the ASAP, Joshua held a counseling session with Williams and entered a CR-1 in Williams's file about the discussion (the "ETOPS CR-1").<sup>16</sup> The ETOPS CR-1 referenced AA's Rules of Conduct Nos. 12, 15, and 24, noted that Williams's job performance was unsatisfactory, and warned about future corrective action up to and including termination.<sup>17</sup> A CR-1 is a permanent counseling record that is required under AA's policy for recording discussions between supervisors and employees.<sup>18</sup> AA's policy provides as follows, in relevant part:

#### MANAGER RESPONSIBILITIES FOR PEAK PERFORMANCE THROUGH COMMITMENT (PPC)

As a manager, your role is to:

\*\*\*\*

---

<sup>13</sup> *Id.* at 23-24.

<sup>14</sup> Joshua discussed the incident with Urso on January 13, 2005, counseled him on January 27, 2005, and entered a CR-1 in his personnel file.

<sup>15</sup> D. & O. at 43; RX 27; Complainant's Exhibit (CX) 8.

<sup>16</sup> D. & O. at 11-14, citing CX 8, CX 10, CX 12, RX 28, RX 29; Tr. at 100-103, 519-520; D. & O. at 35, citing Tr. at 245, 258; D. & O. at 43, citing Tr. at 689-691; RX 28.

<sup>17</sup> On September 6, 2007, AA filed a Motion in Limine to limit the evidence of adverse actions Williams identified in his complaint and exclude evidence concerning the February 5, 2005 CR-1. On September 24, 2007, the ALJ denied the motion, ruling that she would consider evidence concerning the CR-1 at trial.

<sup>18</sup> D. & O. at 35, 48; RX 47.

Maintain a Performance Counseling Record (CR-1) for each employee. This record should include commendations, violations of AA company policy, disregard of instructions or procedures, and unacceptable job performance or conduct.

\* \* \* \*

Fully investigate the more serious infractions immediately to determine all the facts and document findings on the Performance Counseling Record.

Before deciding on any action, review the employee's personnel file and his or her Performance Counseling Record to get a complete picture of previous job performance and behavior history<sup>19]</sup>

A CR-1 is often used as the first step in the disciplinary process. Unlike a first advisory, which is automatically removed after two years and can be grieved, the CR-1 is permanent and cannot be grieved.<sup>20</sup> If an employee fails to respond to "coaching and counseling," the next step up in severity of unfavorable employment actions is a "first advisory" in AA's disciplinary policy under its "Peak Performance Through Commitment" program (PPC). However, AA's policy provides that any step may be skipped depending on the circumstances.

On February 17, 2005, the ASAP was accepted for investigation and review. Consequently, AA rewrote the ETOPS CR-1 to delete references to the ETOPS inspection and the possibility of termination (the "Revised CR-1") (collectively the "CR-1s"). However, references to the delay due to the brake change, violations of the Rules of Conduct, unsatisfactory job performance, and the possibility of future corrective action were retained.<sup>21</sup>

#### Proceedings before OSHA and the Office of Administrative Law Judges

On October 20, 2004, Williams filed an AIR 21 whistleblower complaint with OSHA, alleging that AA retaliated against him for engaging in protected activity.<sup>22</sup> Pursuant to a letter dated November 1, 2004, OSHA acknowledged receipt of Williams's complaint and informed him that OSHA would notify management and conduct an investigation.<sup>23</sup> Subsequently, the

---

<sup>19</sup> RX 47.

<sup>20</sup> Tr. at 176-177, 229, 260, 264-265, 297-298, 324-325, 333, 341, 345, 364-365, 366-367, 375-378, 418-419, 433-434, 446.

<sup>21</sup> D. & O. at 12-14, citing Tr. at 100-103; RX 27; D. & O. at 36, citing RX 29; RX 28; D. & O. at 43, citing Tr. at 510. The revised CR-1 was dated February 15, 2005.

<sup>22</sup> D. & O. at 1; RX 1.

<sup>23</sup> *Id.*

ETOPS Incident, the CR-1s, and ASAP were incorporated into OSHA's pending investigation.<sup>24</sup> On December 14, 2006, OSHA issued the Secretary's Findings and Order, ordering relief for Williams.<sup>25</sup> OSHA found in Williams's favor and ordered AA to expunge the Revised CR-1 from Williams's file and pay him \$10,000 for noneconomic damages.

On January 4, 2007, AA filed objections to the Secretary's findings and requested a hearing before an ALJ.<sup>26</sup> A three-day hearing was held on January 22 and 23, and February 23, 2008, in New York, New York.<sup>27</sup> On October 23, 2008, the ALJ issued a Decision and Order in Williams's favor.<sup>28</sup> The ALJ did not find illegal retaliation connected to the Torque Wrench Incident. Instead, the ALJ found, *sua sponte*, that Williams's conduct in January of 2005 (Williams's ASAP in response to the ETOPS/Brake Change Incident) constituted protected activity and that the resulting CR-1s constituted illegal retaliation. The ALJ ordered AA to expunge the Revised CR-1 from Williams's personnel file and pay Williams \$3,000. AA appeals the ALJ's finding of illegal retaliation and also argues that the ALJ violated its due process rights by inserting a new theory of liability.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions in AIR 21 cases to the Administrative Review Board.<sup>29</sup> This Board reviews the ALJ's findings of fact under the substantial evidence standard.<sup>30</sup> Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>31</sup> The Board reviews questions of law *de novo*.<sup>32</sup>

---

<sup>24</sup> We recognize that OSHA's letter of findings was not listed among the hearing exhibits. However, for purposes of considering AA's lack of notice, we consider it as part of our review of the record as a whole. We do not consider the letter substantive evidence.

<sup>25</sup> *Id.*

<sup>26</sup> D. & O. at 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Brian Williams v. American Airlines*, 2007-AIR-00004 (Oct. 23, 2008).

<sup>29</sup> 49 U.S.C.A. § 42121(b)(3); Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See* 29 C.F.R. § 1979.110(a).

<sup>30</sup> 29 C.F.R. § 1979.110(b).

<sup>31</sup> *Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, -160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal citation omitted)).

## ISSUES

The issues raised on appeal and addressed below are: (1) whether substantial evidence of record supports the ALJ's findings with respect to protected activity, AA's knowledge of the protected activity, and that Williams's protected activity contributed to the taking of adverse action; (2) whether the ALJ's finding of adverse action is supported by substantial evidence of record and in accordance with applicable law; and (3) whether the ALJ violated AA's due process rights by relying on a theory of liability neither raised by Williams nor addressed by the parties at the evidentiary hearing.<sup>33</sup>

## DISCUSSION

### 1. Legal Standard

AIR 21 provides that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment” because the employee has engaged in certain protected activities, including providing information to the employer or the Federal government about a violation, or alleged violation of any Federal law relating to air carrier safety.<sup>34</sup> An employer violates AIR 21 if it “intimidates, threatens, restrains, coerces, or blacklists” an employee because of protected activity.<sup>35</sup> To prove illegal retaliation under AIR 21, a complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) the employer knew that he engaged in protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.<sup>36</sup> If the Secretary determines that protected activity contributed to

---

<sup>32</sup> See, e.g., *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

<sup>33</sup> We recognize that AA enumerated thirteen issues in its petition for review. However, AA did not address all the issues in its briefs in support of its appeal. In any event, several issues AA identified are moot because of our decision (e.g., whether Williams engaged in protected activity by reporting complaints to the Human Resource department), and the remaining issues are fairly encompassed in the three issues we have expressly identified.

<sup>34</sup> 49 U.S.C.A. § 42121(a).

<sup>35</sup> 29 C.F.R. § 1979.102(b).

<sup>36</sup> 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

an adverse action, the employer can escape liability only if it shows by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.<sup>37</sup>

## 2. Williams's Asserted Claim

The only protected activity Williams claimed as the basis for illegal retaliation was the activity related to the July 2004 Torque Wrench Incident. More specifically, he alleged that the HR Complaint and the FAA Complaint sparked all the unfavorable employment actions allegedly occurring throughout the remainder of 2004 and early in 2005, which included various instances of counseling, warnings, advisories and/or docked pay related to attendance issues, and the CR-1s. The ALJ found that the HR Complaint and the FAA Complaint constituted protected activity related to the Torque Wrench Incident, findings which AA appealed. The ALJ did not find unlawful retaliation connected to the Torque Wrench Incident.<sup>38</sup> However, because Williams has not appealed the ALJ's rejection of his claim of retaliation because of the July 2004 incident, we do not address the correctness of the ALJ's holding with respect to the Torque Wrench Incident.<sup>39</sup> Therefore, we accept as final the ALJ's rejection of Williams's claim of retaliation for having engaged in protected activity involving the July 2004 Torque Wrench Incident. We now turn to the illegal retaliation that the ALJ found based on the January 2005 ASAP and CR-1s related to the ETOPS/Brake Change Incident.

## 3. ETOPS/Brake Change Incident

After rejecting Williams's theory of retaliation, the ALJ found illegal retaliation connected to the ETOPS/Brake Change Incident. She found that the January 2005 ASAP report that Williams filed with the FAA was protected activity, and that the Revised CR-1 was an adverse action that AA took in retaliation for the ASAP. AA appeals these findings. AA argues that by sua sponte finding a retaliation claim based on the January 2005 ETOPS/Brake Change Incident, without providing notice and an opportunity to respond, the ALJ violated AA's due

---

<sup>37</sup> 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). See, e.g., *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 6 (ARB Dec. 30, 2004); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

<sup>38</sup> In rejecting Williams's claim of retaliation because of the Torque Wrench episode, the ALJ rejected the assertion that the cited unfavorable employment actions were causally related to Williams's activities in July of 2004, and rejected Williams's argument that the cumulative impact of those subsequent employment actions constituted actionable adverse action based on the conclusion that Williams was asserting a hostile work environment.

<sup>39</sup> See *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 12, n.59 (ARB May 26, 2010), citing *Walker v. American Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 9 (ARB Mar. 30, 2007) (argument not raised on appeal is waived); 29 C.F.R. § 1979.110(a).

process rights. Additionally AA argues, the ALJ's determination that the ETOPS CR-1, as revised, constitutes actionable adverse action is reversible error, both as a matter of law and because substantial evidence of record does not support the ALJ's finding that the employment action was "material." For the following reasons, because the ALJ failed to afford AA prior notice and an opportunity to be heard, we agree with AA that the ALJ's finding of protected activity involving the ETOPS/Brake Change Incident violated its due process rights and remand this aspect of the case to the ALJ for further proceedings. However, because the parties litigated the issue of whether the ETOPS CR-1 constituted adverse employment action before the ALJ, we will first address the merits of the ALJ's ruling on this issue. We find that substantial evidence supports the ALJ's factual finding as to the ETOPS CR-1 and conclude that the CR-1s were "adverse actions" for purposes of AIR 21 whistleblower claims.

#### A. Whether the February 2005 CR-1s Constitute Adverse Action

In concluding that the ETOPS CR-1 regarding the January 2005 ETOPS/Brake Change incident that AA placed in Williams's personnel file constituted adverse personnel action, the ALJ relied upon ARB decisions that have embraced the "materiality" standard articulated in *Burlington Northern & Santa Fe Ry. Co. v. White*,<sup>40</sup> a case decided under Title VII of the Civil Rights Act of 1964.<sup>41</sup> Consistent with *Burlington Northern*, the ALJ evaluated the ETOPS CR-1 within the totality of the circumstances surrounding its entry into Williams's personnel record, and concluded that the supervisor's action in issuing the ETOPS CR-1 "under these circumstances was adverse" inasmuch as "a reasonable employee would be dissuaded from engaging in protected activity."<sup>42</sup>

On appeal, AA argues that the ALJ erred in finding that the ETOPS CR-1 was adverse action under AIR 21 on several grounds. AA objected to the ALJ's application of the "materially adverse" standard. Many of AA's objections can be lumped into one general objection, that the ALJ's analysis allegedly contradicts Board precedent in AIR 21 cases and other cases.<sup>43</sup> AA also argues that *Burlington Northern* did not change the meaning of "adverse action" in ARB cases, despite the substitution of the "materially adverse" test for the "tangible job consequences" test. Additionally, AA argues that the substantial evidence of record does not support the ALJ's finding that the ETOPS CR-1 materially affected the terms and conditions of Williams's employment. Finally AA argues that subsequent revisions to the ETOPS CR-1 negated the ALJ's finding of "material adversity."<sup>44</sup> Naturally, Williams argues that the ALJ correctly relied on *Burlington Northern* and that she correctly applied the materially adverse test.

---

<sup>40</sup> 548 U.S. 53 (2006).

<sup>41</sup> 42 U.S.C.A. § 2000e (West 2003) (Title VII). *See* D. & O. at 45.

<sup>42</sup> D. & O. at 50.

<sup>43</sup> *See, e.g., Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 6-7 (ARB Mar. 14, 2008).

<sup>44</sup> Initial Brief of Respondent AA (Jan. 30, 2009), at 21-29.

For the following reasons, we find that both CR-1s were adverse action, as a matter of law, and that the ALJ correctly applied ARB precedent. We also find that the ALJ’s “totality of circumstances” approach was correct and is supported by substantial evidence and sound legal reasoning.

Fundamentals of statutory construction dictate that, in determining whether or not the February 2005 CR-1s constitute adverse action within the meaning of AIR 21, the starting point “is the language of the statute itself”<sup>45</sup> and the implementing regulations construing the relevant statutory text,<sup>46</sup> which we are duty bound to follow in AIR 21 cases.<sup>47</sup> As previously discussed, AIR 21 prohibits “discrimination” against an employee with respect to the employee’s “compensation, terms, conditions, or privileges of employment.”<sup>48</sup> The term “discriminate” is not defined in the statute, but it is further defined in the implementing regulations.<sup>49</sup>

By implementing regulation, the Department of Labor has interpreted AIR 21’s prohibition against discrimination to include efforts “to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee” because the employee has engaged in protected activity.<sup>50</sup> We view the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are

---

<sup>45</sup> *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). See, SINGER & SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION, § 46.1 (7th Ed.).

<sup>46</sup> *Alaska, Inc. v. Southeast Alaska Conservation Council*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2458, 2469 (2009).

<sup>47</sup> See 75 Fed. Reg. No. 15, 3925 (Jan. 25, 2010) (“The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations and shall observe the provisions thereof, where pertinent, in its decisions.”).

<sup>48</sup> 49 U.S.C.A. § 42121(a).

<sup>49</sup> In the context of sexual harassment cases, the Supreme Court has construed similar language found in Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a)(1), as “not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

<sup>50</sup> 29 C.F.R. § 1979.102(b). The prohibitions listed in 29 C.F.R. § 1979.102(b) are identical to those under 29 C.F.R. § 24.102. The Department of Labor’s explanation accompanying adoption of Section 24.102’s predecessor provision listing these prohibitions (29 C.F.R. § 24.2(b)) emphasized that, “The language is simply a fuller statement of the scope of prohibited conduct, which encompasses discrimination of any kind with respect to the terms, conditions or privileges of employment.” 63 F.R. 6614, 6616, 1998 WL 46040 (Feb. 9, 1998).

coupled with a reference to potential discipline.<sup>51</sup> In fact, given this regulation, we believe that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.<sup>52</sup> Neither the ALJ nor the parties on appeal addressed the prohibitions set forth in the AIR 21 regulation. Nevertheless, we consider the prohibitions of Section 1979.102(b) controlling. The ETOPS CR-1 issued February 5, 2005, in the immediate aftermath of the January 2005 ETOPS/Brake Change incident, memorialized a discussion between Williams and his supervisor on that date wherein the supervisor reviewed AA's Rules of Conduct with Williams, and "encouraged" Williams "to correct his performance as any future performance issues or violations of AA Rules of Conduct can result in corrective action up to and including termination."<sup>53</sup> The Revised CR-1 amended the memorialized discussion to instead reflect that, "[Williams] was told that any future performance issues or violation of AA rules of conduct could result in corrective action."<sup>54</sup> This "warning" of what Williams could expect, if he did not change his conduct at work, clearly falls within the list of prohibited retaliatory actions under 29 C.F.R. § 1979.102(b), particularly

---

<sup>51</sup> Notably, under the Sarbanes-Oxley Act (SOX) a covered entity may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in protected activity. 18 U.S.C.A. § 1514A(a)(West Supp. 2010). Commenting on the scope of SOX whistleblower protection, which is virtually identical to the prohibitions listed under AIR 21, the ALJ in *Hendrix v. American Airlines*, 2004-SOX-010; 2004-AIR-023 (Dec. 9, 2004), commented: "The distinctive language of the Sarbanes-Oxley Act supports a broad reading of the meaning of adverse action for claims arising under this Act. . . . By explicitly prohibiting threats and harassment, the Sarbanes-Oxley Act has included adverse actions which are not necessarily tangible and most certainly are not ultimate employment actions." Slip op. at 14, n.10. We find the ALJ's commentary consistent with our analysis under AIR 21.

<sup>52</sup> We believe it is irrelevant whether the employer's personnel policies allow its employees to appeal or formally challenge a written warning. A great number of workers are "at will" employees who have no right to appeal a suspension or termination, much less a written warning. Personnel policies are often drafted solely by the employer and hinge on the employer's unilateral assessment as to the extent of appellate procedures it can address given limited resources. Consequently, we respectfully disagree with the Sixth Circuit Court's statement that it is "counterintuitive" to declare a written warning a "materially adverse" employment action where the employee had no right to appeal it pursuant to internal employment policies. See *Melton v. Yellow Transp., Inc.*, 2010 WL 1565494, at \*6 (6th Cir. 2010) (it seems "counterintuitive" to declare illegal an employment action that cannot be appealed internally).

<sup>53</sup> RX 28.

<sup>54</sup> RX 29. The fact that the revised CR-1 provided an amended account of the supervisor's February 5th warning to Williams does not negate the content of the February 5th warning, particularly where no evidence was introduced (nor argument made) suggesting that the warning was not as initially recounted in the original CR-1.

the prohibitions against intimidation<sup>55</sup> and threatening<sup>56</sup> an employee for engaging in protected activity.<sup>57</sup>

American Airlines cites to the Board's decision in *Simpson v. United Parcel Serv., supra*, in support of its contention that the "warnings" memorialized in the CR-1s do not constitute adverse employment action. Notwithstanding that *Simpson* involved a claim arising under AIR 21, we do not consider *Simpson* controlling, for several reasons. To begin with, *Simpson*'s discussion of whether or not the warning letters at issue constituted adverse action was dicta, inasmuch as the Board dismissed Simpson's claim because she "failed to prove that she engaged in protected activity, a requisite element of her case."<sup>58</sup> and thus did not need to address the question of adverse action. Secondly, in reaching its decision, the Board relied on ARB precedent that not only pre-dated the Supreme Court's decision in *Burlington Northern* (upon which the ALJ in this case relied), the precedent arose under the Surface Transportation Assistance Act (STAA), whose implementing regulations did not contain a provision similar to that found in the AIR 21 regulations specifying intimidation or threats as prohibited activity. Ultimately, we consider *Simpson* of no precedential consequence to our decision in the instant case because *Simpson* did not expressly address the significance of 29 C.F.R. § 109.102, but simply quoted it, while applying instead a judicially-created "tangible job consequence" test to find implicitly that a "warning letter" does not "threaten." Having failed to address the applicability of the binding regulations, we are constrained to reject *Simpson* as controlling precedent.

Given the clear mandate in Section 1979.102(b), it is unnecessary in this case to turn to Title VII cases like *Burlington Northern*. Nevertheless, the ALJ's resort in this case to *Burlington Northern*'s "materially adverse" test does not change the result and, if anything, lends support for the conclusion that the CR-1s constitute adverse employment action under AIR 21.<sup>59</sup>

---

<sup>55</sup> The definition of "intimidate" encompasses "to make timid or fearful," "to compel to action or inaction." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1993).

<sup>56</sup> "Threaten" is defined as, inter alia, "to promise punishment, reprisal, or other distress," "to warn," "to announce as intended or possible." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1993). While a "warning" is commonly understood as a "threat," we also note that lexicographers accept "warning" as a synonym for "threaten" as noted by the following verbatim statement: "Threaten: (1) To give warning signs of (impending peril)." ROGET'S II, EXPANDED EDITION (1988).

<sup>57</sup> The "warning" Williams received just as readily can be said to constitute coercion on the supervisor's part to the extent that the "warning" sought to compel Williams to act or refrain from acting in a certain manner in the future.

<sup>58</sup> *Simpson*, ARB No. 06-065, slip op. at 6.

<sup>59</sup> As previously noted, we have often looked to Title VII law in adjudicating the various whistleblower laws within our jurisdiction and it has often been very useful (e.g., the evidentiary framework explained in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)). However,

In construing the anti-retaliation provision of Title VII of the Civil Rights Act of 1964,<sup>60</sup> the Supreme Court in *Burlington Northern* held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in the protected activity].”<sup>61</sup> In *Burlington Northern*, the Court resolved a split in the circuit courts by adopting the Seventh and D.C. Circuit Courts’ “materially adverse” test for retaliation claims under Title VII. It reached its resolution by contrasting Title VII’s anti-discrimination clause, Section 703(a),<sup>62</sup> with the anti-retaliation clause of Section 704(a).<sup>63</sup> The Court rejected rather quickly the option of applying the straightforward meaning of the anti-retaliation clause. The Court reasoned that such an application would go too far and include “petty slights or minor annoyances that often take place at work and that all employees experience.”<sup>64</sup> The Court also very briefly discussed the “tangible employment test,” but implicitly rejected it as a way of measuring the seriousness of an unfavorable employment action.<sup>65</sup> The Court explained that the “materially adverse” test would apply only to those unfavorable employment actions that were more than “trivial harms” in light of the totality of circumstances of a case. The specific test for “materiality” was to consider whether a reasonable employee in the same circumstances would be dissuaded from filing a Title VII claim if subjected to the employment action in question.<sup>66</sup> The “materiality” test arose from the Court’s understanding of the purpose behind the Title VII anti-retaliation clause, “to prevent employer interference with ‘unfettered access’ to Title VII’s

---

borrowing Title VII principles must be done with “careful and critical examination” and against the backdrop of the many safety issues faced in AIR 21 cases, or other hazard-laden, regulated industries. *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008). For example, in this case, the ETOPS/Brake Change Incident involved a disagreement regarding the need for a more recent inspection of a plane bound for a trans-Atlantic flight. A too narrowly drawn definition of “adverse action” could discourage the wrong whistleblower and unintentionally jeopardize the safety of a plane and its passengers. We must strive to consider this additional factor when interpreting the terms “other discrimination” or “conditions of employment.”

<sup>60</sup> 42 U.S.C.A. § 2000e-3(a) (“Section 704(a”).

<sup>61</sup> 548 U.S. at 68.

<sup>62</sup> 42 U.S.C.A. § 2000e-2(a).

<sup>63</sup> 548 U.S. at 60-64.

<sup>64</sup> *Id.* at 68. This reasoning seems somewhat contradictory. If the employer’s discriminatory actions are actions experienced by all employees, then it seems that it would not be “discriminatory” conduct and not fall within the anti-retaliation provision.

<sup>65</sup> *Id.* at 64-65 (recognized that the Court adopted it for hostile work environment claims).

<sup>66</sup> 548 U.S. at 69.

remedial mechanisms.”<sup>67</sup> Among other things, this requires examination of the particular circumstances (the context) in which the employment action takes place.<sup>68</sup> As the Court stated, “The real social impact of work-place behavior often depends on a constellation of surrounding circumstances, expectations, and the relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>69</sup> “[A]n act that would be immaterial in some situations is material in others.”<sup>70</sup> In the end, it seems clear that the Court intended a broad degree of coverage under the Title VII anti-retaliation statute, excluding only trivial employment actions. The examples of excluded trivial actions illuminates this point (“petty slights,” “minor annoyances,” “personality conflicts,” or “snubbing by supervisors and coworkers”).<sup>71</sup>

Even under *Burlington Northern*, we believe that the supervisor’s warning and threatening counseling session in this case constitutes a materially adverse action (more than trivial). Employer warnings about performance issues are manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*. Such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them. We simply doubt that the Court intended to consider a supervisor’s written warning or reprimand or threatened discipline as “trivial.” To the contrary, we are of the opinion that they are patently not trivial and, therefore, presumptively “material” under *Burlington Northern*.

We recognize that in some previous decisions we have used the terms “materially adverse” and “tangible consequence”<sup>72</sup> interchangeably, even suggesting that there is no

---

<sup>67</sup> *Id.* at 68, quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). We believe that the whistleblower statutes within our jurisdiction also have the additional and independent purpose of prohibiting any deliberate discriminatory conduct aimed at an employee because the employee engaged in protected activity, regardless of whether it would dissuade the reasonable worker. The concurring opinion in *Burlington Northern* suggested that the Title VII anti-retaliation clause also had this additional purpose. *Burlington Northern*, 548 U.S. at 76 (conurrence).

<sup>68</sup> *Id.* at 69.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Notably, the Court did not include “warning letters” and “reprimands” in its list.

<sup>72</sup> It appears that the term “tangible job consequence” prominently began appearing in ARB whistleblower decisions after the Court’s decision in *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). See, e.g., *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, ALJ No. 2004-STA-040 (ARB Dec. 29, 2005) (affirming summary judgment for the employer and finding that “a written warning” was not an adverse employment action without a tangible job consequence even in the face of evidence of “intimidation”); *West v. Kasbar*, ARB No. 04-155, ALJ No. 2004-STA-034 (ARB Nov. 30, 2005) (tangible job consequences); *Jenkins v. U. S. Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002 (ARB Feb. 28, 2003) (relied on *Burlington Indus.* tangible job consequence).

meaningful distinction between the two terms, thus potentially causing the confusion evidenced by the briefing in this case.<sup>73</sup> In Title VII jurisprudence, arguably, these terms are not always universally accepted as interchangeable. In any event, mixing these terms in whistleblower cases may cause unnecessary confusion. To settle any lingering confusion in AIR 21 cases, we now clarify that the term “adverse actions” refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.<sup>74</sup> Unlike the Court in *Burlington Northern*, we do not believe that the term “discriminate” is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee.<sup>75</sup> Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.<sup>76</sup>

---

<sup>73</sup> See e.g., *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 7-8 (ARB Sept. 30, 2008) (the Board expressly recognized that it has used these terms interchangeably). In *Melton*, the majority of the panel engaged in a fairly technical analysis of the *Burlington Northern* decision and ruled that its “materially adverse” test should apply in that case but then traveled full circle in its analysis by saying that the terms were interchangeable in ARB parlance. Appreciating the thorough analysis of the majority in *Melton*, we have been leery in the past to engage in hypertechnical interpretations of whistleblower statutes, which are intended as remedial measures to be broadly construed. See, e.g., *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) (discussing the Energy Reorganization Act).

<sup>74</sup> See *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (minor acts of retaliation can be sufficiently substantial and actionable when viewed together).

<sup>75</sup> In fact, we believe that some actions are per se adverse (e.g., termination of employment, suspensions, demotions) without any need to ask whether a reasonable employee would be dissuaded from engaging in protected whistleblowing. See, e.g., *McNeill v. U.S. Dep't of Labor*, 243 F.3d Appx 93, 98, n.4 (6th Cir. 2007) (In deciding a case under the Energy Reorganization Act, the Sixth Circuit was “puzzled” that a “discharge” was not an “adverse action” without having to consider whether such action would also dissuade a reasonable employee from engaging in whistleblower activity).

<sup>76</sup> Senator Kerry made the following introductory statement, March 17, 1999, pertaining to the AIR 21 legislation:

Flight attendants and other airline employees are in the best position to recognize breaches in safety regulations...Currently, those employees face the possibility of harassment, negative disciplinary action, and even termination if they report violations. ... For that reason, we need a strong whistleblower law to protect aviation employees from retaliation by their employers when reporting incidents to federal authorities.

Given our definition of an “adverse action,” we obviously agree with the ALJ’s finding that the CR-1s were materially adverse actions when considered in isolation or in the totality of circumstances.<sup>77</sup> On its face, the ETOPS CR-1 recorded that Williams’s supervisor, Philip Joshua, “reviewed Rules of Conduct” with Williams and “encouraged [him] to correct his performance as any future performance issues or violations of AA Rules of Conduct can result in corrective action up to and including termination.”<sup>78</sup> Even the Revised CR-1 referenced the “Rules of Conduct” and referenced the potential of future “corrective action.”<sup>79</sup> In addition, the ALJ found that under the collective bargaining agreement, AA had complete discretion to issue a “first advisory” or a CR-1.<sup>80</sup> The ALJ also observed, citing the testimony of witnesses, that a CR-1 was a permanent record unless AA elected to remove it, while a “first advisory” was removed automatically from an employee’s file within two years.<sup>81</sup> The ALJ’s factual findings are supported by substantial evidence and supported the ultimate legal conclusion that the CR-1s were materially adverse employment actions standing alone or under the totality of circumstances.

We turn next to the ALJ’s determination that the CR-1s constituted illegal retaliation for the ASAP Williams filed related to the January 2005 ETOPS/Brake Change incident.

#### B. Due Process

The ALJ found that the ETOPS ASAP Williams filed constituted protected activity and that it was a contributing factor leading to the CR-1s.<sup>82</sup> This conclusion was based on the ALJ’s sua sponte expansion of Williams’s complaint to include a claim of retaliation based on the January 2005 ETOPS ASAP filing. As the ALJ’s Decision and Order notes, Williams’s claim exclusively focused on his complaints to the FAA and Human Resources about the July 2004 Torque Wrench Incident as the protected activity that resulted in AA retaliating against him.<sup>83</sup> Acknowledging that neither party had addressed the matter, the ALJ nevertheless concluded that

---

145 Cong. Rec., S2855 (Mar. 17, 1999).

<sup>77</sup> D. & O. at 35, citing RX 25, Tr. at 245, 258; D. & O. at 53-55.

<sup>78</sup> RX 28.

<sup>79</sup> RX 29.

<sup>80</sup> *Id.* at 49, citing RX 47.

<sup>81</sup> D. & O. at 49-50, citing Tr. at 364-367, 434.

<sup>82</sup> D. & O. at 40-41, citing CX 8, 9; RX 12, 27.

<sup>83</sup> D. & O. at 2.

because the evidence of record “raises the issue of whether the ASAPs the Complainant filed ... constituted protected activity,” the issue was properly before the ALJ for resolution.<sup>84</sup>

On appeal, AA argues that the ETOPS ASAP was not protected activity and that the ALJ’s determination of retaliatory liability based on a different legal claim from that Williams presented, without affording AA notice and an opportunity to respond, violated its due process rights.<sup>85</sup> As further explained below, we agree with AA that a due process violation occurred and conclude that the proper remedy is a remand to the ALJ.<sup>86</sup>

The fundamental elements of procedural due process are notice and an opportunity to be heard.<sup>87</sup> The Administrative Procedure Act, at 5 U.S.C.A. § 554(b)(3), mandates: “Persons entitled to notice of an agency hearing shall be timely informed of ... (3) the matters of fact and law asserted.” For this reason, as the District of Columbia Circuit Court of Appeals noted, “it is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change.”<sup>88</sup>

---

<sup>84</sup> Substantial testimony and a number of exhibits centered on the ETOPs incident and related to the ASAP. In fact, AA submitted at least eight exhibits directly related to the ETOPs incident and related ASAP and CR-1s. (RX 26 through RX 33).

<sup>85</sup> See Initial Brief of Respondent at 5-6, 7-14; Reply Brief of Respondent at 1-5.

<sup>86</sup> In the ASAP, Williams expressly complained that a “management supervisor requested that [he and another co-worker] sign for ETOP insp[ection] without doing the insp[ection] within the required 3 h[ou]rs before departure time.” RX 27, p.3. As the ALJ explained below, reports under ASAP involve the Federal Aviation Administration and are by definition safety issues when they are “accepted” (RX 27) for review and patently involve a safety issue like required airplane inspections. RX 43 (ASAP policy). D. & O. at 40-41. See also Complainant’s Exhibit 5 (“Summary of Aviation Safety Action Partnership (ASAP)”). We note that the ALJ ultimately concluded that the ASAP was protected activity. *Id.* However, as we explain in discussing AA’s due process claim, AA was focused on the Torque Wrench Incident and not on the ASAP related to the ETOPS. Therefore, we believe that ETOPS ASAP should be considered only after AA has had a full opportunity to challenge this evidence with evidence of its own and argue the merits before the trier of fact as to whether or not the preponderance of the evidence supports the conclusion that the cited activity constitutes protected activity along with the issue of causation.

<sup>87</sup> *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992).

<sup>88</sup> *Rodale Press v. Federal Trade Comm’n*, 407 F.2d 1252, 1256 (D.C. Cir. 1968), citing *NLRB v. Johnson*, 322 F.2d 216, 219-220 (6th Cir. 1963), and *NLRB v. H.E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962). In *Rodale Press* the theory upon which the complaint was based and under which the hearing before the examiner was held differed from the theory upon which the complaint was, without notice to the parties, ultimately decided. The justification of the hearings commissioner for having done so was that the evidence of record supported the alternative theory. To this the court of appeals responded: “The evil at which the [APA] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the opportunity to present argument under the new theory of violation which must be supplied.” 407 F.2d at 1257.

When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.<sup>89</sup> Implied consent cannot be automatically attached to every potential issue related to evidence introduced at trial.<sup>90</sup> In the case before us, the question is whether there was sufficient notice to AA that the ETOPS ASAP was also being considered as protected activity and a contributing factor for Williams's retaliation claim.

In opposing AA's claimed lack of sufficient notice, Williams points to numerous occasions in the administrative investigation and litigation proceedings where reference was made to the ASAP as protected activity. The most important and direct reference is Williams's responses to written discovery where he specifically referenced the ASAP as a contributing factor to AA's allegedly illegal retaliation.<sup>91</sup> Williams also points to OSHA's findings where OSHA unequivocally found that the ASAPs were protected activity,<sup>92</sup> and that AA requested a hearing before the ALJ on "all of the items" addressed in OSHA's findings.<sup>93</sup> Williams also points to AA's motion in limine where AA tried unsuccessfully to prohibit the admission of evidence of the ETOPS incident and related ASAP and CR-1s.<sup>94</sup>

Despite the many references to the ASAP as protected activity, and other than the single reference in discovery responses, Williams never claimed nor expressly argued that the ETOPS

---

<sup>89</sup> 29 C.F.R. § 18.5(e) (2010). *See also Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095; ALJ No. 2002-STA-035, slip op. at 9-11 (ARB, Aug. 6, 2004) (concluding ALJ did not err in finding that complainant's protected activities involved both internal and external complaints, although complainant alleged only internal complaints, because complainant's counsel asserted the theory in opening statement, employer did not object, and defended against that theory).

<sup>90</sup> *See, e.g., Douglas v. Owens*, 50 F.3d 1226, 1237 (3d Cir. 1995) (fact that evidence introduced at trial relates to more than one potential claim does not prove implied consent to litigate an unpled claim without clear evidence of such consent); *Carlisle Equip. Co. v. United States Sec'y of Labor*, 24 F.3d 790, 794-795 (6th Cir. 1994) (due process violation where introduction of evidence did not fairly serve notice that new safety violation was entering case).

<sup>91</sup> See Complainant's Brief, at 11 (Williams said that "management" had been out to retaliate because he filed "a whistleblower complaint to the FAA in August 2004 and also for this past incident where J. Urso and myself filed an ASAP concerning a supervisor's attempt to get us to illegally sign for an ETOPS insp.").

<sup>92</sup> See Complainant's Brief, at 9 (quoting OSHA's findings verbatim and showing direct discussion about the ASAP being "protected activity"). Again, we do not treat OSHA's findings as substantive evidence but merely as relevant to the due process issue on appeal.

<sup>93</sup> See AA's request for hearing, which is part of the ALJ's file and record on appeal.

<sup>94</sup> See Complainant's Brief, at 6.

ASAP was protected activity and a contributing factor to the allegedly illegal retaliation. He did not testify to this theory during the evidentiary hearing, other than one instance where he seemingly rejected any claim based on the ASAP constituting a contributing factor to the retaliation of which he complained.<sup>95</sup> The fact that the ALJ expanded Williams's claim in the manner she did to include a theory of liability that Williams neither claimed, nor alleged, nor testified about, deprived AA, among other procedural rights, of the opportunity to question Williams or present witnesses and rebuttal evidence about the claim, as AA argues on appeal.<sup>96</sup>

Since AA was never given notice or an opportunity to defend against such a claim, it was deprived of due process with respect to the findings concerning the ASAP report. Therefore, the ALJ's findings and conclusion that filing the ASAP report was protected activity that contributed to adverse action under AIR 21 is reversed and vacated. The next task is to determine the proper remedy.

For several reasons, we believe the proper remedy is remanding this case for the ALJ to accept additional evidence and argumentation properly offered by the parties. First and foremost, as we previously noted, Williams's responses to discovery identified the ASAP as one example of protected activity Williams believed was a cause of retaliation.<sup>97</sup> Consequently, AA cannot claim complete surprise by the ALJ's finding of illegal retaliation. Second, the ASAP and related CR-1s were a substantial part of Williams's case, not to mention the central focus of AA's motion in limine to exclude this evidence. Third, OSHA also included the ASAP and related CR-1s in its investigation, ordering the expungement of the Revised CR-1. Fourth, AA appealed "all the issues" included in OSHA's investigation. Considering all of these factors and the record as a whole, and balancing the interests of all the parties, a remand is a reasonable and fair remedy in this case for the due process violation.<sup>98</sup> Upon remand, the ALJ should contact the parties and work with them to decide how to ensure that all parties have a full and fair opportunity to address the claim of retaliation based on the ASAP, including additional testimony by additional witnesses about the relationship between the ASAP and the CR-1s. After considering and accepting any additional evidence as appropriate, the ALJ is free to fully

---

<sup>95</sup> This testimony is ambiguous, given the context of the questioning. *See* Tr. at 215. In rapid succession, Williams was asked about Exhibits 38 and 39 in front of him during the hearing, then about deposition testimony, and then one isolated question about the significance of the "ASAP forms" generally.

<sup>96</sup> *See* Initial Brief of Respondent at 5-6, 7-14; Reply Brief of Respondent, at 1-5.

<sup>97</sup> *See* Complainant's Brief, p. 11.

<sup>98</sup> Accordingly, this case is different from previous cases where we felt the complainant would have received an unfair "second bite of the apple." *See, e.g., Kelley v. Heartland Express, Inc.*, ARB No. 00-049, ALJ No. 1999-STA-029, slip op. at 1-2 (ARB Oct. 28, 2002) (affirming ALJ's decision not to consider new theories after hearing and declining to remand to provide complainant with "second bite at the apple").

reconsider whether the ASAP was a contributing factor to the CR-1s as part of illegal retaliation.<sup>99</sup>

## CONCLUSION

Having reviewed the issues raised by AA, we essentially reach three conclusions. First, we accept as final the ALJ's rejection of Williams's theory of liability centered on the Torque Wrench Incident. Second, we affirm the ALJ's finding that the CR-1s were adverse actions. Third, we find that the ALJ violated AA's due process rights in finding illegal retaliation tied to the ASAP. In support of the remand, we find that there was sufficiently substantial focus on the ASAP in OSHA's investigation and the litigation proceedings, including Williams's very specific discovery responses, warranting further proceedings. The ALJ should seek the parties' input on what may be required for a fair opportunity to present additional evidence and legal arguments, and then decide on a course within the ALJ's discretion. Additional evidence may include witnesses and documents. The ALJ is free to fully reconsider whether the CR-1s constituted illegal retaliation against Williams's filing of the ASAP and enter a judgment as warranted. Given the order of remand, the issue of damages is moot and will not be addressed.

## ORDER

For the above-stated reasons, the ALJ's finding and conclusion that Williams's ASAP reports constituted protected activity that contributed to the alleged adverse action is **VACATED**. This matter is **REMANDED** for further proceedings consistent with this Order.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

---

<sup>99</sup> *Accord, Rodale Press, supra* (ordering remand for further hearing and argument on the new theory of violation).