

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 10 August 2004**

**Case No.: 2003-AIR-00045**

**In the Matter of:**

**RIAD MAJALI,  
Complainant,**

**v.**

**AIRTRAN AIRLINES,  
Respondent.**

Appearances:

Edward Gay, Esq., Orlando, FL  
For Complainant

Dawn Millner, Esq. and R. Paul Roecker, Esq., Greenberg Traurig, P.A., Orlando, FL  
For Respondent

Before: PAMELA LAKES WOOD  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

The above captioned matter arises from a claim under the employee protection (whistleblower) provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, 49 U.S.C. §42121 (“AIR 21” or “the Act”). The pertinent implementing regulations appear at Part 1979 of Title 29 of the Code of Federal Regulations (hereafter “CFR”), as amended at 68 C.F.R. 14100 *et. seq.* (March 21, 2003). Section 519 of AIR 21 prohibits an air carrier, contractor, or subcontractor from discharging, or otherwise discriminating against any employee regarding pay, terms or other privileges of employment because the employee engaged in protected activity. Such activity includes providing either to the employer or to the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of Federal law relating to air carrier safety.

## **PROCEDURAL BACKGROUND**

### **Procedural History**

On or about October 11, 2002, Complainant Riad M. Majali (hereafter "Complainant") filed a discrimination complaint under AIR 21, alleging that Respondent, AirTran Airlines (hereafter "Respondent" or "AirTran"), "reprimanded, retaliated against, [and] constructively discharged<sup>1</sup>" Complainant on or about July 15, 2002, in retaliation for raising safety complaints regarding Respondent's compliance with maintenance and safety regulations. Complainant asserts that he was retaliated against for raising concerns about the overfly of aircraft 935 on February 24, 2002 from Atlanta to Miami. Following an investigation by the Occupational Safety and Health Administration (OSHA) in Atlanta, Georgia, on August 18, 2003, the Regional Administrator for the Occupational Safety and Health Administration of the United States Department of Labor (hereafter "DOL"), found no reasonable cause to believe that Respondent violated the Act and dismissed the Complaint.

Specifically, OSHA determined that Complainant engaged in protected activity but that Respondent did not terminate Complainant; rather Complainant chose not to return to work and was then placed on unpaid leave status. Complainant filed a timely appeal of the dismissal of his original complaint by letter of September 17, 2003. On October 28, 2003, the undersigned issued a Notice of Assignment, Notice of Hearing and Order advising Complainant and Respondent that a hearing on this matter was scheduled for December 4 to December 5, 2003 in Orlando, Florida.

Complainant filed a second AIR 21 complaint on July 18, 2003, which related to Respondent's final discharge of Complainant on April 25, 2003. OSHA forwarded the second complaint to the Office of Administrative Law Judges on November 6, 2003, with the recommendation that it be consolidated with the first. Inasmuch as the same events were involved, no new docket number was assigned and the forwarded papers were associated with the pending case.

Respondent submitted a motion for continuance on November 6, 2003 via facsimile, which was opposed by Complainant, via facsimile, on November 11, 2003. Respondent withdrew its request for a continuance on November 17, 2003.<sup>2</sup> By my Order of November 17, 2003, I denied the request for a continuance, without prejudice to its renewal upon a showing of good cause or agreement of the parties. No further continuance requests were filed, and the hearing remained scheduled for December 4 to 5, 2003 in Orlando, Florida.

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<sup>1</sup> On July 18, 2002, Respondent's Human Resources Department contacted Complainant and assured him that he had not been terminated and advised him to return to work on July 24, 2002, or be placed on unpaid leave. Complainant did not return to work and was placed on unpaid leave until April 25, 2003, when he was officially discharged. Complainant filed a subsequent AIR21 discrimination complaint after he was formally terminated on April 25, 2003, and the two complaints have been consolidated in this case before the undersigned.

<sup>2</sup> Respondent moved for a continuance because its newly appointed counsel was scheduled to be away conducting depositions in another case, however the conflict was resolved and so the continuance request was withdrawn.

## Record of Hearing/Evidence

A hearing on this matter was held in Orlando, Florida on December 4 and 5, 2003.<sup>3</sup> The parties were represented by counsel and received a full and fair opportunity to present evidence and arguments. The following witnesses testified: Complainant, Mr. Riad Majali, manager of Maintenance Planning for AirTran Airlines (hereafter "AirTran") (Tr. at 37-300, 660-66); Mr. Reuben Wenger, maintenance planner for AirTran (Tr. at 304-25); Mr. James ("Jim") Buckalew, director of Maintenance Planning for AirTran (Tr. at 356-514); Mr. Patrick Collins, maintenance planner for AirTran (Tr. at 515-32); Mr. Loral Blinde, vice president of Human Resources for AirTran (Tr. at 533-606); and Mr. Nick Drivas, director of Quality Control for AirTran (Tr. at 607-59).

Both parties stipulated that the sworn statements taken by the FAA in connection with their investigation into the overfly of aircraft 935 were conducted in February 2003. Mr. Buckalew gave his statement on February 11 and 12. (Tr. at 492).

At the end of Complainant's case in chief, Respondent moved for judgment as a matter of law. (Tr. at 347). After hearing arguments from both sides, the undersigned denied the motion and the trial proceeded. (Tr. at 355).

The following exhibits were offered and received during the hearing: Complainant's Exhibits (CX) 1-11, 16-19, 23-25, 28, 30-31 (Tr. at 117-126, 633); Respondent's Exhibits (RX) 11, 17-21, 21A,<sup>4</sup> 22-25, 27- 33, 35, 37, 39, 43-63, 71-73, 75, 79, 82-87, 89-90, 93 (Tr. at 147, 141, 637, 573, 233, 180, 429, 431, 129, 625, 509, 514, 577, 545, 548, 272, 548, 670, 193, 550-7, 291, 370, 639, 674, 397, 629, 375, 280, 184, 156, 378, 380, 169, 384, 386, 388, 391, 358). RX 77 was offered but not admitted and additional exhibits were withdrawn.<sup>5</sup> (Tr. at 344). The record was held open for the submission of post-trial briefs to be received by January 30, 2004, with responses to be received by March 1, 2004. (Tr. at 668). Both parties mutually requested an extension of the deadline for submission of post-hearing briefs, which I granted. Complainant submitted a closing brief on February 6, 2004 and Respondent submitted a closing brief on February 9, 2004. Both parties submitted reply briefs. The record is now closed and the findings of fact and conclusions of law detailed herein are based solely on the testimony and evidence admitted at the hearing. Where pertinent, I have made credibility determinations concerning the evidence and testimony.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Factual Background

#### **Nature of Employment Relationship:**

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<sup>3</sup> References to the hearing transcript appear as "Tr." followed by the applicable page number(s). Exhibits offered by Complainant and Respondent will be referred to as "CX" and "RX," respectively, followed by the exhibit number.

<sup>4</sup> RX 21A, a copy of RX 21 with Complainant's annotations, was also admitted. (Tr. 178-82).

<sup>5</sup> RX 12-16, 36, 40, 41, 64-70, 74, 76, 78, 80, 81, 88, and 92 were withdrawn and RX 77 was rejected; however, they were still submitted and appear within the bound evidence submitted by Respondent. (Tr. at 335-346). I have not considered these documents for purposes of this decision.

### *Complainant's Employment and Supervision*

Complainant began employment with Respondent on February 26, 2001. (Tr. at 37-39, 140; RX 17). Complainant was assigned to be Manager, Maintenance Planning, under the supervision of Jim Buckalew, director of Maintenance Planning and Control. (Tr. at 141-42; RX 17). At the time he was hired, Complainant possessed a bachelor's degree in aeronautical studies and master's degree in aviation management; an A & P (Airframe and Powerplant) license, which authorized him to work on aircraft; and at least 12 years of relevant work experience at other major airlines. (Tr. at 38-39; CX 1). Mr. Buckalew hired Complainant to be the manager of maintenance planning because he believed based on Complainant's relevant experience that Complainant was well suited for the job. (Tr. at 363, 365).

Complainant's supervisor, Mr. Buckalew, had worked for Respondent for a little more than three years. He had worked in the aviation industry for about 13 years and possessed a master's degree in Aviation Business from Embry-Riddle Aeronautical University. (Tr. at 357-60; RX 93). Mr. Buckalew was hired by Respondent in September 2000 because AirTran lacked basic tools and skills in its planning department. (Tr. at 365). As the director of maintenance planning, Mr. Buckalew was responsible for planning all of the maintenance and engineering programs of the airline. He supervised 10 employees in the planning department who executed the maintenance program, whereby they ensured all maintenance tasks were accomplished within prescribed time periods. (Tr. at 361-62).

During his tenure with AirTran, Complainant's responsibilities included managing the operations planning portion of the maintenance planning department, helping to implement a new computer system, and enforcing FAA safety regulations. (Tr. at 44-46; CX 1).

In operations planning, Complainant became responsible for overseeing the day-to-day execution of the maintenance program, which (according to Mr. Buckalew) entailed "coordination of the maintenance task, the aircraft, the station, the parts, and the people to get the work done within the prescribed limits of the maintenance program." (Tr. at 363-64). Complainant testified that when he was hired, the office was open only from 8:00 a.m. to 5:00 p.m., Monday through Friday and Complainant was supposed to create a "24/7 department that deals with all issues." (Tr. at 40-41). Complainant further stated that they decided to start the new department in March [2001], because a hiring freeze was planned. (Tr. at 41). However, Mr. Buckalew denied that a new department was formed. (Tr. at 364).

Initially, Complainant worked on the implementation of a new computer system called "TRAX." Although the system was scheduled to be operational by September 2001, its implementation was delayed and the first phase was not completed until the end of 2001. (Tr. 42-43). As part of the initial implementation of the program, Complainant was responsible for Dulles airport (IAD) in Washington, DC. (Tr. 43). By letter of December 26, 2001, Complainant was commended by Guy A. Borowski, Vice President Maintenance & Engineering and Mr. Buckalew's supervisor, for his "outstanding effort in getting the first phase of TRAX live." (Tr. 42; CX 2.)

Complainant started with no subordinates but ultimately supervised five employees -- Tim Lussier (mistranscribed as “Lucia” and “Luciere”), Brian Miceli, Reuben Wenger, Christine O’Sullivan and Pat Collins. (Tr. at 46; RX 11, 23) Ms. Sullivan was the first planner under Complainant’s supervision, and she began working for him in April 2001 or earlier. (Tr. at 45). Mr. Miceli joined the staff in May 2001; Mr. Collins was so employed beginning in July 2001; Mr. Wenger worked as a maintenance planner beginning in August 2001 (when he transferred from another department); and Mr. Lussier joined the staff some time between August and December 2001. (Tr. at 305, 431, 515-17; RX 11, 23, 85). Mr. Collins described the duties of a maintenance planner as forecasting maintenance that comes due on aircraft to ensure the maintenance is scheduled in a timely manner and handling operational issues that arise in the course of maintenance planning. (Tr. at 517).

### *General Performance Problems*

Mr. Buckalew testified that not long after Complainant was hired, they became aware that despite his extensive experience, he lacked an understanding of common industry practices relating to maintenance planning. (Tr. at 365). As an example, Mr. Buckalew commented that Complainant did not “take the time and necessary detail to complete [the three-day router<sup>6</sup>] correctly.” (Tr. at 366). Mr. Buckalew explained that the three-day router was a routing sheet prospectively covering a period of three days that was given to the oncoming shift to inform them of the status of Respondent’s aircraft and he characterized it as “one of the minimum requirements [needed] to communicate to the operations where the aircraft need to be or need to be routed to accomplish the maintenance.” (Tr. at 365-66, 390). Complainant’s inability to properly complete this task and the resulting errors and omissions prompted complaints to be made to Mr. Buckalew by both planners on the third shift (who received the three-day routers) and personnel in the operations group. (Tr. at 367).

In August 2001, Complainant scheduled a maintenance inspection past an aircraft’s due date, resulting in Complainant and at least three of his subordinates being disciplined. (Tr. at 147-53; RX 11). The incident resulted in a memorandum issued by Mr. Buckalew on August 1, 2001, which attributed the problem to “poor situational awareness during irregular operations with eight aircraft out of service” and he documented the improvements to be made regarding past due reports in the planning department. (RX 11). Complainant received verbal and written counseling as a result of the incident and new procedures were implemented to prevent similar incidents from occurring. (RX 79).

Tim Lussier, a maintenance planner under Complainant’s supervision, received a Letter of Reprimand for his responsibility in allowing an overfly of aircraft 735 to occur on December 28, 2001. (Tr. at 431, RX 23). This occurrence prompted Complainant to adopt new procedures, and specifically the use of a Past Due Report, by Memo of January 24, 2002. (RX 79; *see also*

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<sup>6</sup> The three-day router is an important tool used by the maintenance planning department to communicate to the operations department where particular aircraft need to be routed to accomplish required maintenance tasks. (Tr. at 365-66, 520-1). The three-day router is part of the turnover documents that are validated and then given to the next person to come onto shift. (Tr. at 390). A typical turnover package includes the written details of the turnover from one shift to another, the push maintenance report, the three-day router, and the MEL (Minimum Equipment List) status for the fleet. (Tr. at 393, RX 62).

RX 21). Complainant understood the past due report to be used for determining whether maintenance that had occurred in the past three days had been accomplished and was in closed/verified status. (Tr. at 188-90).

### *Power Struggle*

Complainant, though hired as a manager, believed that he did not possess any true decision making authority and was not allowed to perform as a manager. (Tr. 43). Complainant felt that he was treated as a “coworker,” rather than a supervisor, because he did the same work as those that he was supposed to be supervising. (Tr. at 79). Mr. Buckalew, Complainant’s supervisor, on the other hand, believed that Complainant possessed complete authority to manage his subordinates but that he failed to exercise it. (Tr. at 373). Complainant’s problems with his subordinates increased following the February 2002 flight 935 overfly incident, discussed below.

Mr. Buckalew testified that Complainant was not acting in a supervisory capacity and failed to prepare routine performance appraisals for the maintenance planners under his supervision. (Tr. at 383). It was Mr. Buckalew, not Complainant, who conducted the performance evaluations of most of Complainant’s subordinates. (Tr. at 144, 313; *see generally* Tr. at 313, 382-3). On one occasion, in April 2001, Complainant prepared a performance evaluation for Ms. O’Sullivan. (Tr. at 45-46, 461). Complainant claims that Ms. O’Sullivan’s April 2001 evaluation was the only one he was permitted to perform, and that he was not asked to perform another when her evaluation became due the following year. (Tr. at 45-48). During his testimony, Mr. Buckalew denied that Complainant was not allowed to evaluate the other planners and maintained that such evaluations were a part of his job. (Tr. at 382). Complainant did not conduct the annual review of Reuben Wenger, who in both 2002 and 2003, received performance evaluations and associated merit pay increases from Mr. Buckalew. (Tr. at 47, 313). Additionally, Brian Miceli sent a request to Complainant and Mr. Buckalew for a performance evaluation upon his one year anniversary in May 2002. (Tr. at 168, 382, RX 85). Mr. Buckalew explained that even though it was Complainant’s duty to perform the evaluations, Mr. Buckalew actually wrote the evaluations himself after consulting with Complainant due to Complainant’s limited communication skills. (Tr. at 383, 461-2).

Furthermore, Complainant’s subordinates regularly went over his head and registered complaints with his supervisor rather than himself, particularly during the period of time following the 935 overfly. (Tr. at 144, *see generally* Tr. at 313, 382-3). On these occasions<sup>7</sup>, Mr. Buckalew did not ask whether the employees had first consulted with their supervisor, nor did he suggest that they speak directly with him, although Mr. Buckalew believes that would be the proper way to channel the information. (Tr. at 450-2). Mr. Collins explained that he brought his concerns directly to Mr. Buckalew and not to Complainant, his direct supervisor, because other planners in the department had ineffective results when they followed such protocol. (Tr. at 529-30). Mr. Collins testified that he did not recall any incidences of Complainant calling into the office when he was not there to check on the department but does recall occasions where Mr. Buckalew would phone in to check on things. (Tr. at 528-9). At an unspecified time, Ms.

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<sup>7</sup> Some of these occasions include complaints brought by Mr. Miceli (RX 59), Ms. O’Sullivan (RX 72) and Mr. Collins (RX 83). (Tr. at 50-2).

O'Sullivan complained about Complainant's oversight, resulting in Mr. Buckalew asking Complainant to stop checking her work. (Tr. at 229-30).

On October 27, 2001, Mr. Collins sent an e-mail complaint to Mr. Buckalew addressing the need for a common system of manual revisions and he complained that he had found the record relating to the revisions lying on Complainant's desk. (RX 83).

Other documented incidents of subordinates complaining about Complainant occurred after the 935 overfly incident:

(1) In March 2002, Mr. Wenger alerted Mr. Buckalew to a particular instance where Complainant left incomplete turnover documents, failing to include the two-day router entirely. (Tr. at 174, 391-2, RX 90).

(2) In April 2002, Mr. Miceli contacted Mr. Buckalew to complain that Complainant was not filling out the two-day router<sup>8</sup> correctly. (Tr. 370-2, 388; RX 89).

(3) In May 2002, Mr. Miceli stated that Complainant did not pay attention, could not correctly complete the router and did not provide detailed turnovers. (Tr. at 158-9, RX 59).

(4) In May 2002, Mr. Collins and Ms. O'Sullivan forwarded Mr. Buckalew an e-mail that Complainant had sent to them, complaining that they did not understand the procedures Complainant was describing in his e-mail, which they were to follow. (Tr. at 384-6, 524; RX 86, 87). Mr. Collins found Complainant's e-mail to be "incomprehensible." He also had difficulty understanding directions from Complainant generally based on phone and e-mail conversations, which was their main source of communication since their different work shifts precluded in-person conversations. (Tr. at 384-6, 524, RX 86, RX 87). Mr. Buckalew added that the e-mails from Complainant were incoherent because of grammatical errors, misspellings and incomplete thoughts, and to resolve the problem, Mr. Buckalew had to talk to Complainant to ascertain the content of the e-mails. (Tr. at 463-5). Mr. Collins did not notice Complainant's performance as manager improve throughout his tenure working for Respondent. (Tr. at 532).

(5) In June 2002, Ms. O'Sullivan wrote to Mr. Buckalew to register complaints about Complainant regarding the three-day router and turnover forms in addition to questioning Complainant's extended absences. (Tr. at 164-5, 374, RX 72). She also questioned complaints made to Human Resources by Reuben Wenger at Complainant's instigation and stated that "it is sad the amount of back stabbing those 2 do about everyone" which "doesn't make for a healthy environment." (RX 72).

Complainant acknowledged the "power struggle" that existed, which he thought pinned him and Mr. Wenger<sup>9</sup> against the other maintenance planners. (Tr. at 170-173). Mr. Wenger testified that whenever Complainant "tried to become a manager, Mr. Buckalew would step in

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<sup>8</sup> During this time period, Respondent was phasing in the three-day router to replace the two-day router. Thus, these terms are used interchangeably throughout the testimony and refer to essentially the same document.

<sup>9</sup> Reuben Wenger was fired by Respondent shortly after Complainant's separation. He is also reportedly pursuing an AIR21 complaint against Respondent. (Tr. at 317).

and micro-manage.” (Tr. 321). However, Mr. Wenger agreed that Complainant was not a good manager, in part because he was not accepted as a manager and in part because he lacked the necessary skill to do the job. (Tr. 321-23).

### **Alleged Violation:**

#### *The Overfly of Aircraft 935*

Complainant testified that around 8:30 p.m., on Saturday, February 23, 2002, Christine O’Sullivan called him from the control center and informed him that aircraft 935 was more than 38 hours past due for a heavy maintenance check.<sup>10</sup> (Tr. at 52). Complainant, in turn, called his supervisor, Mr. Buckalew. (Tr. at 53, 405). Complainant then advised Ms. O’Sullivan to proceed with the heavy maintenance check in Atlanta, where the plane was then located; however, Ms. O’ Sullivan called him back and advised that Atlanta maintenance would be unable to complete the maintenance because they lacked the necessary equipment . (Tr. at 55-56). Complainant testified that he then told her to have maintenance borrow the equipment from another airline and to notify dispatch that the airplane needed to be in the out-of-service log. (Tr. at 55).<sup>11</sup> He also testified that he told her, “if you are looking for me to allow that airplane to go, I will not be the person to make that decision, you call your boss, Mr. Buckalew.”<sup>12</sup> (Tr. at 57, 223). Complainant heard from Ms. O’Sullivan one final time that night around midnight and she informed Complainant that Mr. Buckalew had told her to call Larry Larivee, the Chief Inspector for Respondent, to discuss the possibility of obtaining an escalation allowance.<sup>13</sup> *Id.* According to Complainant, Ms. O’Sullivan told him that Mr. Buckalew had advised her to tell Mr. Larivee that there were computer problems and he responded, “don’t you lie to anybody.” (Tr. at 58).

Mr. Buckalew testified that late in the evening on Saturday, February 23, 2002, Complainant called him to inform him of the overdue situation regarding aircraft 935 and suggested that they swap the aircraft. (Tr. 405-06). Following that phone conversation, according to Mr. Buckalew’s testimony, he called Ms. O’Sullivan and learned that the operations department wanted to use the 935 aircraft to adjust the maintenance schedule, but he told her not to fly it. (Tr. at 406-407). After further inquiry, Mr. Buckalew claims that she told him that she believed the computer was incorrect about the “thirty-some” hours overdue because she had rescheduled the item herself. In this regard, Ms. O’Sullivan had rescheduled the necessary 3-L Lube Maintenance for February 22, 2002, as evidenced in the audit report which showed when the last change in scheduling was made and who made it. (Tr. 408-409, RX 30).

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<sup>10</sup> The maintenance record showed over 30 hours overdue but the total was actually over 38, because of the flights that took place on Saturday. (Tr. at 52 to 53.)

<sup>11</sup> According to Complainant, Ms. O’Sullivan called him back 15 minutes later (at about 10:15 p.m.) to say that the maintenance people had been unable to borrow the equipment from another airline. He suggested then that they fly the equipment down to Atlanta from Orlando on a 6 a.m. flight the following morning. (Tr. at 55 to 56).

<sup>12</sup> Complainant explained that Mr. Buckalew or someone higher in the chain of command, such as the vice president, could explain the situation to the FAA and get permission for the flight. (Tr. at 222-23).

<sup>13</sup> A short term escalation on a 3-L lube is an approved procedure by the FAA where an airline can exceed the permissible time limit for a required maintenance task by 10 percent for scheduling reasons. It is typically only employed in unforeseen circumstances. The application for an escalation clause must be submitted prior to the aircraft going overdue. (Tr. at 412-414).

Mr. Buckalew testified that Ms. O'Sullivan then asked him if she could contact Larry Larivee, Respondent's Chief Inspector, to get a short term escalation. He further testified that he was convinced by Ms. O'Sullivan's prediction that the computer was in error because Ms. O'Sullivan herself had rescheduled the maintenance check and he had encountered problems with the computer in the past. (Tr. at 487-88). Because they did not know exactly how many hours were left on the aircraft, Mr. Buckalew told Ms. O'Sullivan that they would be unable to get a short term escalation, which required a more exact calculation. However, he did not think they needed one if Ms. O'Sullivan had accurately determined that the overdue figure was incorrect and the aircraft had allowable flying hours remaining. (Tr. at 410, 489). Finally, Mr. Buckalew gave Ms. O'Sullivan the okay to contact Mr. Larivee about obtaining a short term escalation. (Tr. at 413).

According to Mr. Buckalew, Ms. O'Sullivan would have had to contact Maintenance Control to stop the flight and he did not direct her to do that. (Tr. 479). Mr. Buckalew testified that if he had known that the computer entry was correct, he would have stopped aircraft 935 as he has done several times in the past. (Tr. at 489). However, he reasoned that the computer-generated showing of 30 hours overdue was incorrect because were the aircraft really to be 30 hours overdue, it would have appeared on the past due report for the previous six days and would have been discovered by employees in the maintenance planning department. (Tr. at 416-7, 503). After hanging up the phone with Ms. O'Sullivan that evening, Mr. Buckalew did not discuss the status of aircraft 935 again until the following morning. (Tr. at 415, 418).

Ms. O'Sullivan did not testify at the hearing before me, but her deposition from proceedings before the FAA on February 11, 2003 was admitted as an exhibit.<sup>14</sup> (CX 31). At that time, she testified that on the evening of February 23, 2002, she called both Complainant and, at his direction, Mr. Buckalew, and advised of the overflight. (*Id.* at 10-11.) She also testified that Mr. Buckalew told her that he thought the computer was wrong and asked her to call Larry [Larivee] to ask for a short term escalation. (*Id.* at 9.) After calling Mr. Larivee, she stated that she called Mr. Buckalew back to say that she was uncomfortable faxing a request for a short term escalation. (*Id.* at 19). The escalation was granted but not used. (*Id.* at 20.) At that time, the aircraft was already in Atlanta but remained in service. (*Id.* at 19). She was told that the scheduled maintenance could not be completed because "they were out of grease." (*Id.* at 18-19). Ms. Sullivan stated that she did not know that aircraft 935 would be taking a revenue flight. (*Id.* at 18). She also testified that Complainant asked her to tell Mr. Larivee, falsely, that he had already filled out the paperwork for a short term escalation, but she refused. (*Id.* at 24 to 25.)

Complainant was scheduled to work the next morning, Sunday, February 24, 2002, at 7:00 a.m. (Tr. at 215, RX 82). At the end of his conversation with Ms. Sullivan the previous evening, Complainant indicated that he would be arriving a bit late. He arrived at the office around 8:30 or 9:00 a.m. (Tr. at 216-7). This was the first time he was in the office since Tuesday, February 19. (Tr. at 59). When Complainant arrived in the office, he first reviewed the off-shift turnover documents, which indicated that aircraft 935 was going to swap with 939. (Tr. at 60, 218). Shortly after his arrival, around 9:00 a.m., Complainant received a call from Mr.

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<sup>14</sup> Ms. O'Sullivan's deposition before the FAA (CX 31) is admissible as the statements made therein formed part of the basis for Respondent's actions. In weighing this evidence, I have taken into consideration that neither party participated at the deposition. (Tr. at 629-33).

Buckalew, who informed him that aircraft 935 would fly and was scheduled to leave that morning at 9:30. According to Complainant, Mr. Buckalew told him he had spoken with Nick Drivas, the director of Quality Control, and worked out an arrangement. Complainant assumed this meant that Respondent had gotten permission from the FAA to overfly because Mr. Drivas is Respondent's contact with the FAA. (Tr. at 220-1, 224, 227).<sup>15</sup> Complainant testified that during the same conversation, Mr. Buckalew also indicated that the aircraft 935 situation would be discussed the following day and that Complainant was not to discuss the issue with anybody other than the internal investigators. (Tr. at 60-61, 223, 227-8). After the plane had left, Complainant did some investigating and found that aircraft 935 had left without permission and therefore was an illegal revenue flight, rather than a ferry flight for maintenance purposes.<sup>16</sup> (Tr. at 224, 298). Complainant could have contacted Maintenance Control himself that morning before the plane left but "as a subordinate, [he] went along with it." (Tr. at 225-228, 237).

Mr. Buckalew denied telling Complainant not to discuss the 935 overfly situation with anyone. (Tr. at 418). He claimed to be unaware that evening that aircraft 935 would proceed as a revenue flight and to be under the impression that aircraft 935 was repositioning to accomplish its required maintenance check the next morning and would therefore not exceed its allowable flight hours remaining. (Tr. at 416, 418). However, when Mr. Buckalew asked Complainant to print the overdue report on the morning after the overflight, February 25, he discovered that the computer had correctly determined that aircraft 935 had been 30 hours overdue, and he had an overfly situation on his hands. (Tr. at 503-4).

On the evening of February 24, at 10 p.m., Dan Imiolo, who works for another department, wrote to Mr. Buckalew (on Ms. O'Sullivan's E-mail account, because his own E-mail was "down") because he could not locate Complainant during the three-hour period from 3:30 p.m. to 6:30 p.m. when he needed assistance to deal with aircraft that were scheduled for maintenance in Atlanta. (Tr. at 165-66, 379, RX 84). Complainant explained that each Saturday and Sunday, he would drive to the hanger with "the package of maintenance. (Tr. at 166-67).

### *Investigation of the Overfly*

Nick Drivas, the director of Quality Assurance, first learned of the overfly on the morning of Monday, February 25, the day after it occurred, when his chief inspector called him. Later that day, Mr. Buckalew phoned him to inform him of the same, prompting a formal investigation. (Tr. at 612, 65). Mr. Drivas, who has worked in the aviation industry for 19 years, was the primary liaison and communication point between Respondent and the FAA. (Tr. at 608-09). Although he did not routinely work with Complainant, his department was an independent body responsible for investigating regulatory lapses. (Tr. at 610-11). Mr. Drivas assigned Steve Morrison, a regulatory compliance specialist, to lead the investigation and report

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<sup>15</sup> During his direct testimony, Complainant testified that after his conversation with Mr. Buckalew on the morning of February 24<sup>th</sup>, he checked the out-of-service log and discovered that 935 was not listed; he then realized that aircraft 935 had proceeded as scheduled, flying as a revenue flight to Miami without having resolved the 3-L issue, resulting in the overfly. (Tr. at 60-61).

<sup>16</sup> A revenue flight is a flight on which paying passengers are on board. (Tr. at 61). Alternatively, a "ferry flight," also known as a "maintenance ferry flight" occurs when the FAA allows an airplane to go from point A to point B in an overfly situation for the purpose of accomplishing the required maintenance without any passengers. (Tr. at 62).

back to him. (Tr. at 66, 230, 608, 610). In March 2002, Complainant was interviewed by Mr. Morrison as part of Respondent's internal investigation. (Tr. at 67, 241).

At the conclusion of the investigation, Mr. Morrison summarized what he learned during the course of his investigation into the overfly of aircraft 935 in a memorandum he wrote to Mr. Drivas on April 14, 2002. (RX 39; *see also* CX 4; Tr. at 70-72, 501-03). The summary and attachments reveal the following schedule of events relating to maintenance of aircraft 935:

12/26/01	O'Sullivan generates work order scheduling 3L (lube) check <sup>17</sup> to be performed in Tampa on 02/06/02.
12/28/01	Lussier reschedules check to be heavy maintenance (HVY) <sup>18</sup> on 02/08/02.
01/30/02	Lussier reschedules check to be performed as HVY on 02/15/02.
02/13/02	O'Sullivan reschedules check to be C-check <sup>19</sup> on 02/22/02 in Miami, based upon hasty calculations.
02/18/02	Inspection due; aircraft 935 flies <b>10</b> hours on this date. <sup>20</sup>
02/19/02	Aircraft 935 flies <b>5.7</b> hours.
02/20/02	Aircraft 935 flies <b>8.5</b> hours.
02/21/02	Collins generates work order scheduling A-check in IAD (Dulles) when he notices 3L check is 14.2 hours past due; mistakenly assumes "escalation" was given to push inspection to C-check; no follow up. Aircraft 935 flies <b>8.1</b> hours.
02/22/02	Aircraft 935 flies <b>8.7</b> hours.
(unclear)	C-check rescheduled to 02/24/02 due to problems with aircraft 939.
02/23/02	O'Sullivan finds out about problem routing aircraft 935 to Miami on 02/24/02 due to crew availability; when she checks to see if any items would become overdue if C-check is rescheduled she discovers aircraft 935 is 31.7 hours past due for 3L check; calls Complainant and Buckalew. O'Sullivan's shift turnover log says: "Nothing much going on. 935 to swap with 939 to check. Talk to you later. I talked to Jim and everything is okay for now." Aircraft 935 flies <b>6.7</b> hours.
02/24/02	Aircraft 935 flies <b>1.2</b> hours <b>on revenue flight</b> from Atlanta to Miami to complete 3L check and C-check

*Id.*; *see also* CX 28. The memo also indicates that Mr. Buckalew told Ms. O'Sullivan to contact the chief inspector, Larry Larivee, to get an approval for a short term escalation by telling him the aircraft had eight to ten hours remaining.<sup>21</sup> (RX 39, CX 4). It also states that Mr. Larivee approved the escalation internally because he "was led to believe that [Ms. O'Sullivan] was unsure of the time remaining for the check and she was guessing there [were] eight to ten hours remaining." *Id.* The escalation was not submitted to the FAA for approval, however. (RX 39,

<sup>17</sup> A 3-L check or lube includes a lubrication of the pilot's cockpit seat, a checking of the APU oil, the starter oil, and also some minor cosmetic interior items. It is one of the least critical maintenance checks. (Tr. at 63, 613).

<sup>18</sup> Complainant explained that a heavy maintenance check was the same as a C-check or comprehensive check. That type of maintenance cannot be performed in Atlanta; it is completed in Miami. (Tr. at 53-54, 61-65).

<sup>19</sup> See footnote 18 above. C-check items do not appear upon the nightly maintenance forecast report. (RX 39).

<sup>20</sup> It appears that .7 hours of this time may have been overflight (listed by O'Sullivan but not Collins). (CX 23).

<sup>21</sup> Mr. Buckalew denies giving those instructions. (Tr. 503).

CX 4). Instead, an attempt was made to perform the required 3-L lube in Atlanta where the aircraft was then stopped. (Tr. at 70-1, RX 39, CX 4). The check was not performed in Atlanta however, because the maintenance crew in Atlanta did not have the grease required to complete the check and there was insufficient time to fly the grease out on an early morning flight. (RX 39, CX 4).

The investigation also revealed that aircraft 935 had previously been granted a short term escalation, allowing the aircraft to exceed its allowable hours before going in for its required maintenance check. (Tr. at 74, CX 25, RX 39 – Exhibit E).<sup>22</sup> Mr. Collins misunderstood the aircraft record when he reviewed it and believed that aircraft 935 was operating under a short term escalation clause, but in actuality, the short term escalation clause that he had noted was granted previously and had already expired. (Tr. at 525-6, RX 39 - Exhibit E, CX 25)

Mr. Majali testified that the computer generated list detailing the hours flown by the aircraft each day verified that aircraft 935 was 30 hours beyond its allowable limit on February 23, 2002, as Ms. O’Sullivan had stated.<sup>23</sup> (Tr. at 71). Therefore, any suggestion that the computer had mistakenly overstated the overage amount was inaccurate. (Tr. at 72). After the flights of February 23, there was a total overfly of 38.4<sup>24</sup> hours. (Tr. at 73-4, CX 23, CX 24). On February 24, 2002, the plane was dispatched from Atlanta to Miami as a revenue flight, adding another 1.2 hours of overfly time to aircraft 935, resulting in a total overflight of 39.6 hours.<sup>25</sup> (Tr. at 73-4, CX 24). A Past Due list generated on February 28, 2002 reflected that aircraft 935 was 39.6 hours overdue for a “3L CHECK.” (RX 75).

In other words, aircraft 935 should have received a maintenance check when it arrived on Monday, February 18, 2002. Some time on that date, it began accruing negative hours of flying time. (Tr. at 77, 191, 196, 620, 656, CX 28, RX 39). Complainant testified that before he left the office on February 18, he reviewed the overdue report and believed that the aircraft was going for maintenance that evening. (Tr. at 182, 185, 196). Because the aircraft required a heavy maintenance check, Complainant alerted Mike Devito, the individual responsible for dealing with heavy maintenance checks for the aircraft, and Mr. Devito assured him that aircraft

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<sup>22</sup> Complainant claims that because two escalations will not be granted, when the overfly was discovered, requesting a second escalation was not an option. (Tr. at 75). However, Respondent has disputed this assertion. (RX 18).

<sup>23</sup> Actually, Ms. O’Sullivan discovered it was 31.7 hours overdue but advised Complainant it was “about 30 hours” overdue. (RX 39; CX 31 at p. 10).

<sup>24</sup> There is some discrepancy in the evidence regarding the total number of hours that aircraft 935 overflew on February 23, 2002 (the day before the revenue overfly from Atlanta to Miami), as this number has also been reported as 38.3. (CX 24). There has also been a reference to 31.7 hours on that date; the discrepancy is apparently due to the hours flown on February 23. The Aircraft Tail Inquiry Form showed that aircraft 935 flew another eight hours and eleven minutes on February 23. (CX 23). However, according to the investigation summary documents, the plane flew 6.7 hours on February 23, which would result in a total of 38.4 when added to the 31.7 hours referenced. (CX 28). An Aircraft Records Master File generated on February 24, 2002 reflected that aircraft 935 was scheduled for a 3L check at 1650 hours but that 1688.4 hours had elapsed, reflecting an overflight of 38.4 hours, consistent with the past due list. (CX 25; RX 39, 75). The flight time on February 24 has been variously reported as 1.2 and 1.3 hours; the figure of 1.2 would result in the amount of 39.6 hours found by the investigator, Stephen Morrison. (CX 24, 28). Mr. Morrison’s report and summary attached as Exhibit E are consistent with the written documentation. (CX 4, 25 and RX 39). Mr. Drivas’ explanation that the past due list was “a forecast report that uses nine or ten hours a day to forecast that the item is overdue” fails to explain the discrepancies. (Tr. at 621-23).

<sup>25</sup> See footnote 24 above.

was being swapped with another and it was “under control.” (Tr. at 186, 202, 467). However, a work order generated on February 13, 2002, indicates that on that date the maintenance check for aircraft 935 (previously scheduled for February 15) had been changed to February 22 by Christine O’Sullivan.<sup>26</sup> (Tr. at 623, RX 39). Therefore, the maintenance check as scheduled was late, and this information was available as of February 15 but never noticed upon review. (Tr. at 200, 623, RX 39 – Exhibit D). Complainant was in the office during the period when the maintenance check was scheduled beyond the allowable time frame, from February 15 through the morning of February 19. (Tr. at 657). Thus, Complainant had the opportunity to discover the impending overfly with aircraft 935, which appeared on the past due report.<sup>27</sup> (Tr. at 202-203, 210).

All of the changes made to the aircraft’s maintenance schedule were done by planners in the department which Complainant supervised. (Tr. at 200). Complainant acknowledged there was an oversight on the part of the planners because the documentation shows that aircraft 935 as scheduled would go overdue and should have been noticed by the planner/planners responsible for reviewing the report, and he accepted responsibility as the manager of the planning department for the mistake made by one of his planners. (Tr. at 202-03). However, Complainant would not accept direct responsibility because he did not join in the decision to allow the revenue flight to go. (Tr. at 77-78; RX 21A).<sup>28</sup>

#### *Reprimand of Complainant and Others*

On May 14, 2002, Complainant received a Memorandum/Letter of Reprimand from Mr. Buckalew based upon his failure to discover the aircraft 935 overfly during a review of the overdue report that he was expected to perform daily. (RX 21A). The Memorandum also referenced a previous overfly situation and Complainant’s subsequent failure to ensure daily review of overdue reports, and it directed Complainant “to develop, document and implement procedures which maintain compliance” or face “immediate and final disciplinary action.” *Id.* Complainant wrote a handwritten note on the Memorandum, indicating that he was not responsible for the revenue flight, as discussed below. *Id.*

Complainant, responded further to the letter of reprimand, in a letter to Mr. Buckalew of May 15, 2002, the day after the reprimand was issued. (Tr. at 82, RX 24). Complainant reiterated that past due reports were not used for the purpose of examining current and forward maintenance, but only to assess whether they were “closed” or closed/verified.” (Tr. at 204-5, RX 24). Complainant acknowledged that when he left the office midday on February 19, aircraft

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<sup>26</sup> Prior to this final scheduling change for maintenance on aircraft 935, there had been other scheduling changes that affected the timing of the maintenance check. (Tr. at 197-200, RX 39).

<sup>27</sup> Complainant testified that past due reports were not used to examine current and forward maintenance. The exclusive purpose of reviewing the report was to ensure that maintenance three days prior to the date of the report was completed and deemed “closed/verified.” (Tr. at 188-9). Thus, Complainant does not connect the 935 overfly with an oversight by one of the planners or himself in reviewing the past-due report. *Id.* However, Mr. Collins testified that the primary task of the past due report is to ensure that an aircraft is not overflown. (Tr. at 518).

<sup>28</sup> Mr. Drivas opined that not only was Complainant indirectly responsible as manager, but he was also personally responsible for not stopping the plane because he was aware of the situation and could have taken action to prevent the plane from flying and causing the violation. (Tr. at 624). As the manager of maintenance planning, Complainant had the authority/ability to stop the plane if he had chosen to take that action. (Tr. at 642).

935 was in an overfly situation. (Tr. at 208, RX 24). Furthermore, Complainant stated that one of the planners under his supervision “missed the boat,” referring to Ms. O’Sullivan’s calculation errors. (Tr. at 209-210). Again, Complainant noted that he was responsible for the failings of the department as a whole because the planners were under his supervision, but he stated that “the letter of reprimand should not have my name on it; it should have been for someone else.” (RX 24). The response also mentioned the revenue flight, as discussed below.

Ms. O’Sullivan did not receive a Letter of Reprimand for her part in the overfly until March 31, 2003, more than one year after the incident occurred; in that letter she was also commended for her honesty in admitting her calculation error, for her refusal to be involved in improper conduct by backdating a document, and for being proactive and helpful in recommending new processes and procedures. (RX 22).

Mr. Buckalew testified that he was also reprimanded by his superiors as a result of the incident. Eventually, Mr. Buckalew received an “ultimatum” that he correct the problems in the maintenance planning department or be without a job. (Tr. at 420-21).

#### *Self-Reporting of the FAA Violations*

On February 25, 2002, when the overfly was discovered, Mr. Drivas reported the overfly situation to Sal Cecere, Respondent’s principal maintenance inspector with the FAA.<sup>29</sup> (Tr. at 230-2, 616-7). On April 16, 2002, Mr. Drivas again contacted Mr. Cecere to let him know that the written submission would follow shortly. (Tr. at 618). Respondent submitted the written disclosure on May 13, 2002, which included not only the 935 overfly but two others that had occurred between January and April 2002 as well. (Tr. at 230-2, 618, 620, RX 20). The document submitted to the FAA was signed by Mr. Drivas, but he explained that it was prepared by the manager of regulatory compliance. (Tr. at 618). Mr. Drivas disclosed to the FAA a total of 31.7 hours overfly of aircraft 935 through February 23, instead of the 39.6 hours through February 24 found by its investigator, Mr. Morrison. (Tr. at 243, 627-8, RX 20, 39). Specifically, this written submission did not include the additional overfly revenue flight<sup>30</sup> of 1.2 hours that occurred on February 24, 2002. (Tr. at 233-4, 628; RX 71). It also apparently omitted the 6.7 hours flown on February 23, 2002, as discussed above.<sup>31</sup> Mr. Drivas explained that he intended for the document to reflect the whole overfly but made an oversight when he neglected to include the revenue flight from Atlanta to Miami on February 24. (Tr. at 621-23).

On June 11, 2002, the FAA contacted Respondent via letter from Mr. Cecere, informing the company that the case had been considered and did not warrant legal enforcement action and was being closed. (Tr. at 625-26, RX 25). However, this response related only to the initial voluntary disclosure from May 13, 2002 relating to the 31.7 hours of overfly reported. *Id.*

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<sup>29</sup> Mr. Drivas had been in contact with Mr. Cecere about investigations into other overflights that had occurred so that they could work together to put corrective action into place. (Tr. at 616-7).

<sup>30</sup> Mr. Majali contends that overflights are a normal occurrence, but it is more serious for an airline to knowingly send a revenue flight after the overfly situation has been discovered. (Tr. at 300; RX 24).

<sup>31</sup> See footnotes 22 through 25 above and accompanying text. As pertinent information concerning the flights was disclosed, this omission is a clerical error of no apparent significance. (Tr. at 621-23).

## **Protected Activity:**

### *Internal Reporting of Revenue Flight by Complainant*

Shortly after the overfly situation, on March 15, 2002, Complainant wrote a Memo to Mr. Buckalew to address some of the problems within the maintenance planning department. (Tr. at 78, CX 3, RX 19). In addition to discussing some of the general problems in the department, Complainant stated that “the inspection [of aircraft 935] should have been done prior to further flight” and “allowing the airplane to fly...on a revenue...was illegal and unsafe.” (CX 3, RX 19). Mr. Buckalew testified that the first time he saw this Memo was in July 2002, when Mr. Blinde showed it to him, but I did not find his testimony on that point to be credible (Tr. at 472).

At the beginning of March 2002, Complainant was interviewed by Mr. Morrison as part of Respondent’s internal investigation. He told Mr. Morrison that he believed the airplane took an illegal flight. (Tr. at 67, 241). Complainant emphasized the “illegal” revenue flight that occurred on February 24, 2002 because the investigation appeared to be focused on only the overfly hours through February 23, not the revenue overflight that was not disclosed in the documents submitted to the FAA. (Tr. at 299). Complainant never spoke with Mr. Drivas during the investigation, only Mr. Morrison. (Tr. at 241). Complainant deemed the flight illegal because this was not an overfly resulting from human error. Instead, somebody deliberately dispatched an airplane that would violate the FAA’s hourly limits without the knowledge of maintenance control. *Id.*

In Complainant’s May 15, 2002 response to the Letter of Reprimand dated the preceding day, Complainant also asserted that the initial overfly was minor when compared with the revenue flight that occurred on February 24. (RX 24). Mr. Buckalew testified that when he received Complainant’s response, they discussed the matters addressed, including the revenue flight. (Tr. at 472-474.). Mr. Buckalew also testified that Complainant’s annotation on the Letter of Reprimand relating to the revenue flight was made in his presence. (Tr. 473) That annotation consisted of the following handwritten note: “I was not responsible for sending A/C [aircraft] to MIA [Miami] on Revenue.” *Id.*

Complainant later sent Joe Leonard, Respondent’s CEO, a certified letter on July 29, 2002, “asking him to investigate the corruption in the maintenance department led by Mr. Buckalew.” (Tr. at 102-103).

### *Complainant’s Letter to the FAA*

On August 23, 2002, Complainant wrote to the FAA, advising of the illegal revenue flight of aircraft 935 that took place on February 24, 2002 and other incidents, which led him to believe that “AirTran [was] running borderline, dangerous technical operations department that continue [ ] to break minimum FAA standards” and often their own internal standards as well. (Tr. at 109; CX 5). Specifically, Complainant mentioned contacts that he had made with the director of planning [Mr. Buckalew] and more recently the director of planning and vice president of technical operations [Mr. Leonard] concerning the revenue flight of aircraft 935 and he stated that he had made it very clear to Mr. Buckalew that the aircraft was dispatched

illegally, and that Mr. Buckalew had requested that he not discuss the matter with anyone. (CX 5; Tr. at 234-5). He further stated that “here was a deliberate attempt to mislead, lie to the chief inspector of AirTran” followed by “a series of lies and a deliberate cover up between the planner on duty [Ms. O’Sullivan], the director of planning, and the vice president of technical operations.” (CX 5). Complainant did not send a copy of the letter to anyone at Respondent and did not pursue any of the available mechanisms set up by Respondent for dealing with these types of problems internally.<sup>32</sup> (Tr. at 643-4)

### **Respondent’s Knowledge of Complainant’s Protected Activity:**

#### *Complainant’s Internal Complaints*

As discussed above, Complainant mentioned his concerns about the revenue flight both to Mr. Buckalew, his supervisor, and to Mr. Morrison, the investigator, in March 2002. He also expressed these concerns to Mr. Buckalew in May 2002, in response to the letter of reprimand. He sent a letter to Respondent’s CEO in July 2002.

Mr. Buckalew testified that he did not realize that Complainant was making an issue of the revenue overfly until he received Complainant’s response to his letter of reprimand.<sup>33</sup> (Tr. at 474, RX 24). He also testified he did not learn of Complainant’s complaints to the FAA until September or October 2002, after Complainant had already been placed on unpaid leave. (Tr. at 405).

Mr. Blinde testified that he was aware that sometime in August 2002, Complainant contacted the FAA about the 935 overfly situation but did not figure that into his decision to terminate Complainant on April 25, 2003. (Tr. at 565, *see also* 605). By that point, Mr. Blinde knew that the FAA investigation had ended and Respondent had been cleared. *Id.*

Mr. Drivas testified that he never saw the letter that Complainant had written to the FAA prior to these proceedings, but he knew that Complainant had contacted them because the investigation into the overfly of aircraft 935 was reopened. (Tr. at 641).

#### *FAA Investigation*

On February 24, 2003, Raul Flores, Aviation Safety Inspector at the FAA, notified Respondent that they were investigating the revenue flight of aircraft 935 that had occurred on February 24, 2002, which was not included in the self-disclosure of a “3L lubrication function that was over flown” from February 18 through 23, 2002” and “was not voluntarily disclosed.” (Tr. at 58, RX 71). The letter stated: “This action is contrary to Title 14 Code of Federal Regulations (14 CFR).” (RX 71). As part of the investigation (which had already commenced),

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<sup>32</sup> Respondent has several avenues to disclose safety violations such as contacting Mr. Drivas or calling a hotline designed to allow someone to address a safety violation while remaining anonymous. (Tr. at 43).

<sup>33</sup> Complainant composed a memo to Mr. Buckalew on March 15, 2002, regarding problems in the department, and specifically the 935 overfly, which he deemed to be an illegal revenue flight; however, Mr. Buckalew claims to have never received this memo until July 2002 when Mr. Blinde showed it to him. (Tr. at 471-2, RX 19).

the FAA took sworn statements in the form of depositions, transcribed by a court reporter. (Tr. at 628; CX 31 [Ms. O’Sullivan’s February 11, 2003 Statement/Deposition]).

On March 7, 2003, Mr. Drivas wrote back to Raul Flores, an aviation inspector with the FAA, acknowledging the mistake he made in not disclosing the overfly of aircraft 935 and explaining that the error was an administrative oversight. (Tr. at 637-8, RX 58). Mr. Drivas denied that the omission had anything to do with the fact that the additional overfly was flown revenue. (Tr. at 646).

The FAA sent the results of their preliminary investigation into the matter to Complainant on March 20, 2003. They found that a “violation of an order, regulation, or standard relating to air carrier safety may have occurred.” (Tr. at 110-11, CX 18).

When Respondent received the transcripts from the investigation, Mr. Drivas learned of Ms. O’Sullivan’s testimony that Complainant had directed her to falsify a document. (Tr. at 629, 633). Ms. O’Sullivan alleged that Complainant had asked her to back date the short term escalation approval forms so that aircraft 935 could proceed, even though it was already in an overfly situation, but that she had refused to do so. (Tr. at 629-34; CX 31). Complainant denied asking Ms. O’Sullivan to falsify any document. (Tr. at 660-1). Ms. O’Sullivan testified that she did not tell Mr. Buckalew or any of the investigators about that request but she did mention it to Mr. Drivas, Mr. Larivee, and others. (CX 31 at 27 to 30). Mr. Drivas did not recall ever learning that information from Ms. O’Sullivan and noted that it was not included in the investigative report. (Tr. at 636-7, 639-50).

With this new knowledge, Mr. Drivas wrote Mr. Flores at the FAA again on March 31, 2003, further explaining the events surrounding the additional revenue overfly of aircraft 935, including Complainant’s instruction to falsify a document. He also asked that appropriate sanctions be instituted against Complainant. (Tr. at 637, RX 18).

The investigation into the additional revenue overfly on February 24, 2002 was closed on April 1, 2003. The FAA told Respondent that it was forwarding the report to the Southern Region Counsel in Atlanta for appropriate action. (Tr. at 639-40, RX 60). As of the date of trial (December 5, 2003), this was the last correspondence that Mr. Drivas had with the FAA regarding this matter, although typically action is taken within six months. (Tr. at 639-40).

### **Adverse Action:**

#### *Work Conditions After the 935 Overfly*

Complainant believed that after the overfly of aircraft 935 in February 2002, Mr. Buckalew tried to make Complainant’s life more difficult. (Tr. at 243). Complainant felt that he was being nit-picked. (Tr. at 244). As discussed above, most of Complainant’s difficulties with his subordinates, including subordinates going over his head to Mr. Buckalew, occurred following the aircraft 935 overfly. By June 2002, Complainant and Mr. Wenger were pitted against Mr. Buckalew and the other planners.<sup>34</sup> (RX 72).

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<sup>34</sup> See the section relating to Power Struggle, above.

### *Scheduling Complainant's Extended Vacation*

The last time that Complainant worked in his ordinary capacity for Respondent was before he took vacation, which began on June 23, 2002.<sup>35</sup> (RX 27). Complainant was scheduled to be on leave through July 7, 2002, using accrued vacation days to cover the period he would be gone; however, Complainant attempted to extend his vacation by using comp. [compensatory] days on July 9 and 10, and asking a subordinate to work his scheduled shift on July 8, a Monday. (Tr. 82-85, 250; CX 6). To cover the July 8 shift, Mr. Wenger agreed to work for Complainant, and Complainant alerted Mr. Buckalew to this arrangement the day before he left town. (Tr. at 305, 249). Complainant requested the additional time because he was going to Jordan to visit his ailing mother and he so advised Mr. Buckalew. (Tr. at 82-84). As Complainant did not normally work on Thursdays, Fridays, and Saturdays, he would not have to return to work until Sunday July 14 if his requests were granted. (Tr. at 86).

Mr. Buckalew received an e-mail vacation request from Complainant, dated June 18, 2002 at 9:12 a.m. (Tr. at 432, RX 26). Prior to receiving that e-mail, he and Complainant had discussed Complainant's plans to extend his vacation using comp days and swapping shifts; however, Mr. Buckalew explained that he would approve only Complainant's vacation time, which consisted of two weeks, and would not allow the use of creative methods to extend the vacation beyond that because he was needed in the office. (Tr. at 433-5). Mr. Buckalew testified that he never sent a reply to Complainant's e-mail request, but consistent with usual practice, only verbally responded to Complainant's request. (Tr. at 436, 494). Complainant stated that he never received a response from Mr. Buckalew but was under the impression Mr. Buckalew had implicitly approved the plan since he was not expressly told he could not take the extended vacation.<sup>36</sup> (Tr. at 85, 251-2). Complainant did not submit any sort of official leave form. At that time, Respondent did not have a strict process by which employees filled out forms for approval of vacations. (Tr. at 508). Complainant did not verify the schedule prior to his departure, but the schedule reflected that Complainant was to work on July 8, 9, and 10. (Tr. at 86, 253, 438, RX 27).

Complainant acknowledged that Mr. Buckalew had reservations about the practice of trading days but testified as to his belief that Mr. Buckalew would be willing to make an exception for him under the circumstances, as he stated in the e-mail. (Tr. at 250; RX 26). Mr. Wenger testified that the practice of trading days was common and that Mr. Buckalew routinely approved such schedule changes. (Tr. at 307). On this occasion, however, Mr. Buckalew told Mr. Wenger that he need not cover Complainant's shift and could take his regularly scheduled day off. (Tr. at 306, 435). Mr. Buckalew testified that he was under the impression that Complainant was going to return at the end of his approved two-week vacation, as reflected by the work schedule. (Tr. at 433-38; RX 27).

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<sup>35</sup> Complainant was scheduled to be off on June 20, 21, and 22, so his first vacation day was Sunday June 23. (RX 27). He was scheduled to be off his regular days of July 4, 5, and 6 as well as Sunday July 7 as a holiday. *Id.*

<sup>36</sup> Although Complainant was generally a credible witness, his testimony on this point was contradictory. However, he ultimately admitted that Mr. Buckalew did not agree in advance to the three additional days of leave and he did not state a plausible basis for his assumption that it was approved. (Tr. at 250-53).

### *Upon Return from Vacation*

Complainant did not report to work on July 8, 9 or 10. (Tr. at 438-9). Mr. Buckalew called Complainant to address his absence on July 9 or 10.<sup>37</sup> (Tr. at 439, 475). When Complainant got back into town on July 10, he called Mr. Buckalew after his friend and co-worker, Mr. Wenger, told him that there were rumors in the office that his job was in jeopardy<sup>38</sup> and another planner had occupied his desk and removed his possessions. (Tr. at 88, 308-9, 325). Mr. Buckalew “did not indicate...there was anything wrong” when Complainant spoke to him on July 10. (Tr. at 88).

Complainant stopped by the office on July 13, 2002, the day before he was again scheduled to work. (Tr. at 255-57). When Complainant arrived, his key no longer provided access to the building, his password no longer logged him onto his computer, and Patrick Collins, one of the maintenance planners was occupying his desk. (Tr. at 88-89, 258). It was not, however, unusual for maintenance planners to share desks. (Tr. at 258, 324). In fact, Mr. Collins explained that he asked Mr. Buckalew if he could occupy that particular desk when he began working the day shift so that he could sit adjacent to another day shift planner who was training him. (Tr. at 527). Mr. Buckalew claims that he did nothing to prevent Complainant from logging onto the computer network or gaining access to the building. (Tr. at 442, 483).

However, when Complainant did not show up for work on July 8, 9 and 10, Mr. Buckalew sought advice from his boss, Mr. Guy Borowski, vice president of Maintenance Engineering, and Mr. Loral Blinde, vice president of Human Resources, about the situation on or about July 10 or 11. (Tr. at 439-440). Mr. Blinde, Mr. Buckalew and Mr. Borowski had all been involved in the hiring of Complainant and participated in the interview process. (Tr. at 535). Mr. Blinde has worked extensively in the human resources field and specifically in airline human resources since 1992 and for Respondent since 1999. (Tr. at 533-4). Because Mr. Buckalew had raised other concerns about Complainant’s job performance in addition to his being absent from work for three days and there was apparent confusion about the duration of Complainant’s vacation, Mr. Blinde suggested that they hold a meeting with Complainant to address the situation. (Tr. at 440, 506-07, 536-07). The meeting was scheduled for Monday morning, July 15, because that was when Mr. Blinde would next be in the office. (Tr. at 537). Mr. Blinde testified that it was standard procedure to require an employee to be away from the workplace while an employment issue was being examined. (Tr. at 569).

To prepare for the meeting, Mr. Blinde asked Mr. Buckalew to prepare a performance summary relating to Complainant to be used to familiarize the human resources department with the history of Complainant’s job performance.<sup>39</sup> (Tr. at 444, 511-2, 543, 572, RX 28). Mr. Buckalew completed the Memorandum on July 12, 2002 and addressed it to Mr. Borowski, his

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<sup>37</sup> The testimony consisted of a great deal of debate over whether Mr. Buckalew left a message for Complainant on July 9 or 10, and whether he tried to reach Complainant on his cell phone at that time; however, the outcome of such a debate is not determinative on any of the issues before me. (Tr. at 439, 616).

<sup>38</sup> Mr. Collins, another maintenance planner in the department, denied hearing rumors that Complainant had been or was going to be terminated. (Tr. at 532).

<sup>39</sup> The probative value of this evidence is limited because to prepare this document Mr. Buckalew reconstructed through his recollection events that had occurred throughout the past year. He did not create records contemporaneously documenting the events as they occurred. (Tr. at 514-5).

supervisor. (RX 28). In this document, Mr. Buckalew summarized the matters for which Complainant had required counseling, including failure to complete required work, time and attendance deficiencies, issues concerning quantity and quality of work, and lack of computer literacy.<sup>40</sup> *Id.* With respect to quantity of work, the memorandum indicated that Complainant had to be prodded to give assistance to his overworked planners. *Id.* On quality of work, the memorandum mentioned his failures with respect to the three-day routing form and his carelessness in written communication, particularly written turnovers. *Id.* The memorandum also mentioned overuse of the Internet as a potential issue but Mr. Buckalew indicated that he had not counseled Complainant on the matter. *Id.*

On July 13, 2002, the day that Complainant came by the office, Mr. Buckalew contacted Complainant to inform him that he need not come to work as previously scheduled the next morning at 6:00 a.m., but instead should hold off returning to work until Monday, July 15, when he should report to Human Resources for a meeting. (Tr. at 41, 88-90, 259, 438-9). According to Complainant, Mr. Buckalew told Complainant to “stay outside, we’ll escort you in.” (Tr. at 92). Mr. Buckalew does not remember requesting Complainant wait in the lobby. (Tr. at 484).

Complainant asked Ann Giles, a human resources manager for Respondent, to attend the meeting with him, so after Mr. Blinde escorted Complainant from the reception area into a conference room, the three of them met the morning of July 15<sup>th</sup>. (Tr. at 92-5, 537). Ms. Giles took notes at the meeting and Mr. Blinde believed they accurately portrayed what transpired there. (Tr. 538-9, RX 29). At the meeting, Complainant explained that Mr. Buckalew’s lack of response about the extended vacation request convinced him it had been approved. Complainant also expressed his feeling that his relationship with Mr. Buckalew had soured since the overfly of aircraft 935 had occurred a few months earlier but reiterated his desire to continue working for the company. (RX 29).

At the end of the July 15 meeting, Mr. Blinde told Complainant that he would look into the issues and get back to him within the next few days. (Tr. at 538-9, RX 29). Complainant was under the impression that Mr. Blinde would contact him the following day. (Tr. at 261). When Complainant did not hear back from Mr. Blinde the day after their meeting, he contacted an attorney to address the matter. (Tr. at 96).

Mr. Blinde gathered documents regarding Complainant’s concerns and discussed the situation with Mr. Buckalew and Mr. Borowski on Tuesday, July 16. (Tr. at 578). His investigation, however, was cut short by the demands made in a letter he received from Complainant’s attorney the next day, July 17. (Tr. at 590).

#### *Negotiations between Complainant’s Counsel and Respondent*

On July 16<sup>th</sup>, Complainant hired an attorney, who wrote to Mr. Blinde on July 17, 2002, when Complainant had not heard from Mr. Blinde as expected. (Tr. at 97, 262-264; RX 30, CX 8). The letter alerted Respondent to Complainant’s belief that he was terminated on July 15,

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<sup>40</sup> The memorandum also mentioned that Mr. Buckalew had counseled Complainant several months after he was hired because a co-worker reported that she was uncomfortable when he made remarks about her appearance, but no formal complaint was made. (RX 28).

2002 because of his involvement in aircraft maintenance and safety issues. It further states that “reinstating [Complainant] is not an acceptable resolution of this matter due to a number of circumstances.” (RX 30; Tr. at 268). Mr. Blinde was surprised to receive this letter because the meeting with Complainant had ended on a positive note, with Complainant expressing his desire to continue working for Respondent. (Tr. at 540). Additionally, Mr. Blinde was confused by Complainant deeming himself “constructively discharged” since he was still being paid by Respondent. (Tr. at 541-42). According to Complainant, after Mr. Blinde received the letter from his attorney, Mr. Blinde called him on July 18 and said, “Why do you need a lawyer, I can save you time and money.” (Tr. at 97-98). Mr. Blinde followed up by calling the attorney, J.A. Jurgens, and informing him that there had been no “constructive discharge” and there appeared to be merely a difference of opinion. (Tr. at 542-43).

Mr. Blinde faxed a letter to Attorney Jurgens on July 22, 2002 to clarify that Complainant had not been discharged, that he expected to hear from him by Tuesday July 23 regarding Complainant’s return to work on July 24, and that if Complainant did not return to work on July 24 he would be placed on unpaid leave. (Tr. at 99, 544-5, 574, 606, RX 31, CX 9). Attorney Jurgens responded to Mr. Blinde’s letter by facsimile on July 23, reemphasizing that the events that occurred constituted constructive discharge and inquiring about Complainant’s reemployment status i.e. “what department to report to, who his supervisor may be, the nature of the work, the pay for the intended work and related matters.” (Tr. at 101, CX 10). Mr. Blinde never wrote back because Complainant had been given a direct order to return to work on July 24 and he was not interested in negotiating terms and conditions with Complainant’s attorney. (Tr. at 557-58, 606). Mr. Blinde testified that Complainant’s failure to show up to work two days in a row without calling was grounds for termination under the company handbook but that he wanted to see if they “could still bridge the gap” and get him back to work. (Tr. at 546, 572).

#### *Complainant’s Suspension/Placement on Unpaid Leave.*

Complainant did not report to work on July 24 and he was subsequently placed on an unpaid leave of absence. (Tr. at 545-46, 558-59). Because the status change was effective July 24, Complainant received a check from Respondent on August 5, 2002, which reflected his pay through July 24.<sup>41</sup> (Tr. at 104-06). Complainant continued to receive health benefits from Respondent after that date. (Tr. at 110).

Complainant’s placement on leave without pay status was tantamount to a suspension. (Tr. at 458). Mr. Blinde instructed Mr. Buckalew to place Complainant in that status because of his prior job performance and his AWOL (absence without leave) situation. *Id.* Mr. Blinde testified that Complainant was not suspended prior to July despite his performance problems because each incident/complaint alone was not enough to warrant action but taken together, his

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<sup>41</sup> The pay period ended on July 28, therefore Complainant’s pay reflected 56 hours of pay, three days short of his usual two week pay for 80 hours of work. (Tr. at 104-6). RX 80 was not admitted into evidence. Although Complainant was scheduled for 10 hour days from Sunday through Wednesday in July, he had previously worked 8 hours a day, Sunday through Thursday. (RX 27, 82). Despite the suspension, Complainant received pay for 80 hours on August 19, 2002 for the period ending August 11, 2002 and pay for 80 hours on August 30, 2002 for the period ending August 25, 2002. (Tr. at 106, RX 61). The latter two payments made to Complainant, which were direct deposited into his bank account, were reversed on September 3, 2002. (Tr. at 108, CX 17). Complainant was never made aware that those payments would be reversed. (Tr. at 108-09).

past performance and failure to report to work as scheduled were enough to justify his suspension. (Tr. at 458-460). Prior to that time, Complainant had not received any other disciplinary reprimands. (Tr. at 78-80). Mr. Blinde described a progressive step disciplinary system in which an employee receives a written reprimand, then a suspension and then may be finally terminated; however, there was no written policy for non-union employees such as Complainant, and it was left to Mr. Blinde's discretion. (Tr. at 570-71).

Complainant testified that he received a check from Respondent on August 5, 2002 covering the pay period ending on July 27; he did not receive pay for 24 hours, because he was on unpaid suspension for July 24, 25, and 26 (eight hours for each of the three days). (Tr. at 105-06). However, he continued to receive full pay for the following two pay periods. (Tr. 106). Complainant's bank statements from his account at Wells Fargo reflect that AirTran direct deposited payroll checks (for \$1,227.64, \$1,726.26 and \$1,726.25) in his account on August 5, August 19, and August 30, 2002, but reversed two checks for \$1,726.26 and \$1726.25 on September 3, 2002, resulting in his account being overdrawn. (CX 16, 17).

#### *Direct Negotiations with Complainant.*

Mr. Buckalew did not hear from Complainant again until August 5, 2002, at which time Complainant personally explained that he would return to work under certain conditions, including his right to redress the wrongs that he felt Respondent had done to him. (Tr. at 103, 559, RX 55, CX 11). Mr. Blinde indicated to Complainant that he could not communicate directly with him because he was represented by counsel but he believed they could work something out if they could talk directly. (RX 57). The next day, August 6, Complainant notified Mr. Blinde that he was no longer represented by an attorney. (RX 56).

On August 7, Complainant e-mailed Mr. Blinde, beginning a series of e-mails that continued through mid-November 2002. (RX 32, *see also* RX 48, 49, 51, 52, 53, 54). In the August 7 e-mail, like many of the others sent during this period, Complainant reasserted his belief that he had been constructively terminated but offered to return to work; however, he also stated that he would not sign any release "not to address the matters of [aircraft] 935 and other maintenance issues, or the issue of [his] vacation with any government agency." He also offered to resolve the situation through some type of amicable financial settlement. (RX 32, CX 13; *see also* RX 48, 49, 51, 52, 53, 54).

The same day, Mr. Blinde replied to Complainant, asking for a suggestion as to a "separation package." (Tr. at 585-6, CX 13). On August 8, Complainant proposed a financial settlement and separation package from Respondent, consisting of three years of pay, one year of medical benefits, six months of flight privileges, and a letter of recommendation. (RX 33; Tr. at 272-75, Tr. at 560-1). The letter contained a deadline for response and stated that the terms relating to the three years of pay and letter of recommendation were not negotiable, and if the terms were unacceptable, Complainant would "have to seek justice somewhere else." (RX 33). On August 14, Complainant wrote to Mr. Blinde to inform him that Complainant planned on pursuing legal action against Respondent for discrimination, which Complainant contended was really retaliation for Complainant's concern about safety issues. (Tr. at 278-9, RX 73).

On August 16, 2002, Complainant wholly reneged on his reinstatement refusal, offering to accept reinstatement unconditionally and referencing a conversation with Mr. Blinde in which it was suggested that he return to work on August 19. (Tr. at 281, RX 35 – pages 2-3). Complainant received no response to that e-mail. (Tr. 281-82). Mr. Blinde testified that he did not accept Complainant’s offer because Complainant also mentioned the possibility of settlement and “at that point it was fruitless to have him come back because of the demands he continued to make.” (Tr. at 585-88).

Meanwhile, it was not until August 23, 2002 that Complainant wrote to the FAA for the first time to report Respondent’s safety violations. (Tr. at 282-83, CX 5). Complainant did not copy anyone at Respondent on the letter he sent to the FAA. (Tr. at 283). In September, Complainant hired another attorney who only represented him for about a month because Complainant then resumed e-mailing Mr. Blinde. (Tr. at 284).

On October 23, 2002, Complainant again offered to return to work and also advised Mr. Blinde that he was seeking protection under federal whistleblower laws. In this letter, he also reduced his proposed settlement package, offering to accept three months of pay, one month of lost wages, one year of flight benefits and one year of health coverage. (RX 35). Upon suggestion from OSHA, Complainant offered to stop the OSHA investigation into the employment issues if Respondent would provide him with a severance package. (Tr. at 284-87, RX 35). On October 29, Complainant wrote to Mr. Blinde revoking his previous offer and stating that compensation was not as important as maintenance compliance and safety issues.” (Tr. at 289, RX 47). Mr. Blinde replied that he had just returned from two weeks of traveling and “remained willing to try to reach a resolution” but could not address him directly if he had an attorney. (RX 47). On October 30, Complainant replied that he was no longer represented and he proposed the same severance package. *Id.* Mr. Blinde responded that based upon his length of service, Complainant’s transition benefits “would be in the range of 2 months pay, 2 months of benefits and travel” and COBRA benefits for up to 18 months, but that a release of all claims against the company would be required.<sup>42</sup> *Id.* In response, Complainant indicated that he would not accept less than four months of severance pay. (*Id.*; Tr. at 289). At this point, Complainant was working for Homeland Security. (Tr. at 290). On November 4, 2002, Complainant indicated that he had not received a response to his previous e-mail and informed Mr. Blinde that the FAA was investigating the overfly of aircraft 935 and he planned to fully cooperate with them. (RX 46).<sup>43</sup> Mr. Blinde responded that his demand for payment, although reduced, continued to be “much higher than is fair or consistent with others.” (RX 45). Later that same day, Complainant extended the same offer, but in a followup e-mail, Complainant stated that the offer was “off the table” and that “anything short of reinstatement and compensation of back pay, [would] be selling [him]self short.” (RX 44, 45).

Mr. Blinde explained that while these e-mails continued to be exchanged, generally Complainant made what seemed to be ingenuous offers to return to work coupled with threats to bring various lawsuits and demands for financial compensation. (Tr. at 561, 580-7, 601-2; *see*

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<sup>42</sup> Mr. Blinde testified that he advised Complainant that a standard severance package consisted of two weeks of pay per year of service with company. (Tr. at 560-61).

<sup>43</sup> Complainant asserted that he tried to keep the safety and compensation issues separate but Mr. Blinde tried to bring both issues together. (Tr. at 289-90).

also RX 32, 35). Given the tenor of the negotiations, Mr. Blinde believed it “would have been fruitless to try to return [Complainant] to a productive interaction at work.” (Tr. at 588-9). Mr. Blinde testified that he made a professional determination that Complainant’s return to work was unlikely to be successful given the anger and passion with which Complainant pursued seeking money from Respondent. (Tr. at 602-03). By the time the e-mails ceased, Respondent “had been served with a variety of other lawsuits and actions.” (Tr. 603).

### *Complainant’s Formal Termination*

Respondent formally terminated Complainant on April 25, 2003, converting his employment status from unpaid leave of absence.<sup>44</sup> (Tr. at 562, 574-5, RX 37). Mr. Blinde explained that Respondent had learned through the FAA investigation into the overfly of aircraft 935 that Complainant directed a subordinate to falsify a document by backdating it. (Tr. at 111, 563, 589; CX 19). Mr. Blinde testified that some time after the transcripts were received, Steve Kolski, senior vice president of Operations, discussed the matter with him and they jointly decided that Complainant had committed a terminable offense and would be terminated. (Tr. at 596-99, 564). Falsifying a document is a direct violation of the rules and regulations, established by Respondent and set forth in the employee handbook and is sufficient grounds for termination, even though Ms. O’Sullivan did not obey the order. (Tr. at 566, 634). Respondent never questioned Complainant about the matter because Ms. O’Sullivan had provided clear and factual answers under oath.<sup>45</sup> (Tr. at 596). The termination decision was also a culmination of the failed negotiations discussed above. (Tr. at 603-04). Mr. Blinde also considered the previous performance problems of Complainant<sup>46</sup> but admitted that the new information they obtained about Complainant directing a subordinate to falsify a document was “certainly the straw that broke the camel’s back.” (Tr. at 564, 603-04).

Mr. Buckalew did not participate in the writing of Complainant’s April 25, 2003 termination letter, and the letter was signed only by Mr. Blinde. (Tr. at 493, CX 19). Mr. Buckalew informed the other employees in the planning department about Complainant’s suspension when specifically asked about the matter, but he did not make an official announcement. (Tr. at 493). According to Mr. Wenger, however, after Complainant was “suspended,” Mr. Buckalew told some of the maintenance planners “that it’s not in the department’s best interest to speak to people who are no longer with the department,” referring to Complainant because he was the topic of that conversation. (Tr. at 315).

### **Complainant’s Damages:**

Respondent placed Complainant on unpaid-leave employment status on July 24, 2002. Respondent formally terminated Complainant on April 25, 2003. (Tr. at 545-6, 558-9, RX 37). Complainant began working for Homeland Security Corporation on August 29, 2002 as an

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<sup>44</sup> This change in employment status caused Complainant’s medical benefits to cease. From July 24, 2002 to April 25, 2003, Complainant remained an employee of Respondent and therefore received medical benefits. (Tr. at 562). On April 25, Respondent issued a COBRA notice, formally cutting off all employment benefits. (Tr. at 563).

<sup>45</sup> In credible testimony, Complainant vehemently denied ever directing Ms. O’Sullivan to falsify a document. (Tr. at 664). Ms. O’Sullivan did not testify.

<sup>46</sup> Mr. Blinde was aware of at least one written reprimand of Complainant from Mr. Buckalew regarding his performance as well as the counseling matters. (Tr. at 571; RX 28).

instructor, and continued until November 2002. During that period, Complainant earned \$16,250. (Tr. at 112-113). After that, Complainant obtained his real estate license and is currently selling timeshares, a business in which he made \$3,500 for two and a half months of work. (Tr. at 114).

Complainant presently seeks reinstatement or monetary compensation. (Tr. at 115-6). At the time of separation from Respondent, Complainant made \$55,000 annually, and \$1057.69 per week. (Tr. at 48-9). Because 71 weeks have elapsed since July 28, 2002 to the time of trial, Complainant seeks \$75,096.00, less \$19,750.00, the amount he has earned since that time for a total back pay compensation of \$55,346.00. (Complainant's post hearing brief). Though the testimony indicated that Complainant's former position as manager of maintenance planning is available,<sup>47</sup> "the hostilities of [Respondent] against [Complainant are] tremendous," and therefore Complainant seeks front pay as a more practical solution. *Id.* Complainant thus seeks five years compensation at \$35,000 per year (\$55,000 salary less \$20,000 received in mitigation) for a total of \$175,000 for front pay.

Including both front and back pay, Complainant is claiming entitlement to \$230,246.00 in lost wages. Additionally, because Complainant's family has suffered from the income loss and based on Complainant's continued damage to his career, he seeks additional compensatory damages in an equal amount to wages owed. (Tr. at 115-116). In sum, Complainant claims \$460,692.00 as full compensation.

### **Legal Background**

The employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21) provide the following:

**(a) Discrimination against airline employees** – No air carrier...may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

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

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

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<sup>47</sup> Complainant's former position was filled by another person around January 2003, but that person only stayed for about six months. The position was vacant at the time of trial. (Tr. at 506).

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

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

42 U.S.C. §42121(a).

Subsection (b) of the same section sets forth specific procedures for addressing “whistleblower” complaints filed under AIR 21 and provides for burdens of proof unique to AIR 21. Specifically, subparagraph (i) of subsection (b)(2)(B) provides that the complaints shall be dismissed unless the complainant has made a prima facie showing that the behavior complained of was a contributing factor in the unfavorable personnel action alleged in the complaint. Subparagraph (ii) of subsection (b)(2)(B) provides that no investigation shall be conducted if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. The criteria for ultimately prevailing at hearing is set forth in subparagraphs (iii) and (iv) of subsection (b)(2)(B):

(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complaint demonstrates that any behavior described in subparagraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. §42121(b)(2).

To establish a prima facie case warranting an investigation under AIR 21, a complainant must establish: 1) the complainant engaged in protected activity; 2) the respondent employer was aware of complainant’s engagement in protected activity; 3) the respondent employer subjected complainant to an adverse action with respect to his compensation, terms, conditions or privileges of employment; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. §1979.104(b)(1) and (2).

If an AIR 21 case proceeds to a hearing, a complainant must prove by a preponderance of the evidence that an activity protected under AIR 21 was a contributing factor in the unfavorable personnel action alleged in the complaint. 49 U.S.C. § 42121(b)(2)(B)(iii). *See generally Dysert v. United States Sec’y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) [ERA case].<sup>48</sup> Courts have defined “contributing factor” as “any factor which, alone, or in connection with other factors tends to affect in any way” the decision concerning the adverse personnel action. *Marano v. U.S. Dept. of Justice*, 2 F.3d 1137, 1140 (1993). Only if the complainant meets this

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<sup>48</sup> Congress modeled AIR 21 section 519 (b)(2)(B) on section 211 of the ERA, 42 U.S.C. § 5851. The ERA was amended in 1992 (Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776) to incorporate, inter alia, the same gatekeeper test. The AIR 21 provision is similar to the amended version of the ERA. 67 Fed. Reg. 15453, 15454 (April 1, 2002). Accordingly, the ERA precedent will be discussed where applicable.

burden does the burden shift to the respondent to produce clear and convincing evidence<sup>49</sup> establishing that it would have taken the same unfavorable personnel action in the absence of such activity. *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, 2000-ERA-31 (ARB Sept. 30, 2003). *See also* 49 U.S.C. §42121(b)(2)(B)(iii-iv).

A nexus between the protected activity and the adverse employment action may be established inferentially or directly. Temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for complainant's protected activities. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *see also Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). Alternatively, a lack of temporal proximity is also a consideration, particularly where the record reveals a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply System*, 1995-ERA-52 (ARB July 30, 1996) (citing *Williams v. Southern Coaches, Inc.*, 1994-STA-44 (Sec'y Sept. 11, 1995)). In an "inferential" case, when a respondent has articulated a nondiscriminatory basis for its action, the inference of discrimination disappears, and the complainant must then demonstrate that the reasons proffered by the respondent were not the true basis for the adverse action, but were a pretext for discrimination, under the framework of proof for title VII cases. *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, 1997-ERA-53 (ARB April 3, 2001). In a "direct" case, where the employer has established legitimate reasons and the complainant also proves illegal motive (through evidence directly reflecting the use of an illegitimate criterion in the challenged decision), the case is a "dual motive" or "mixed motive" case, and the burden shifts to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *Talbert v. Washington Public Power Supply Systems*, ARB No. 96-23, 1993-ERA-35 (ARB Sept. 27, 1996).

To be actionable, the alleged adverse employment action must involve a tangible job detriment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, 1997-CAA-2 (ARB Feb. 29, 2000). *See also Martin v. Dept. of Army*, ARB No. 96-131, 1993 SDW-1 (ARB July 30, 1999). "Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action." *Jenkins v. EPA*, ARB No. 98-146, 1988-SDW-2 (ARB Feb. 28, 2003.)

### **Discussion**

To prevail in a whistleblower case under AIR 21, complainant must establish that he was employed by an employer covered by AIR 21; that he engaged in protected activity during the course of that employment; that the employer was aware of his involvement in the protected activity; that he was subjected to adverse employment action; and that there is a nexus between the protected activity and the adverse employment action.

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<sup>49</sup> While not defined in the statute, courts have characterized clear and convincing evidence as a heightened burden of proof – more than a mere preponderance of the evidence but less than evidence meeting the "beyond a reasonable doubt" standard. *See White v. Turfway Park Racing Association*, 909 F.2d 941 (6 Cir. 1990), *citing Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

### **Status as Employee and Employer:**

At the outset, I note that Respondent has not disputed that it is an employer for purposes of the Act; nor has it disputed that Complainant is an “employee” under AIR 21. Complainant began working for Respondent on February 26, 2001 as the manager of maintenance planning. He continued to work in this capacity until he was placed on unpaid leave status on July 24, 2002 and subsequently terminated on April 25, 2003.

### **Adverse Employment Action:**

#### *Formal Termination*

It is clear from the undisputed facts that Complainant suffered adverse employment action when his employment was terminated effective April 25, 2003. (See RX 37). Complainant was employed by Respondent from February 26, 2001 through the date of his termination, though during his final months, Complainant was placed on unpaid leave status. Such a discharge from employment is an adverse action under the Act.

#### *Suspension/Unpaid Leave of Absence*

The circumstances of Complainant’s suspension/unpaid leave of absence present a closer question. After Complainant did not report to work for three days in a row at the end of an extended vacation, his supervisor informed him not to report to work as regularly scheduled and instead attend a meeting with human resources the following Monday. At the meeting, Complainant indicated his desire to return to work for Respondent; however, two days after the meeting, Complainant’s attorney wrote to Respondent’s vice president of human resources, Mr. Blinde, informing him that his client believed he had been constructively discharged, that he sought a severance package, and that reinstatement was not an acceptable resolution. Mr. Blinde replied to the attorney, inviting Complainant to return to work on July 24 and denying that Respondent had constructively terminated Complainant. When Complainant did not report to work that day, Respondent changed Complainant’s employment status to unpaid.

In *Smith v. Western Sales & Testing*, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004), the ARB found that after the employee had been asked to take a leave of absence, he engaged in discussions with the employer about the terms of his return to work. Because the employee had presented an ultimatum during the negotiations, setting conditions for his return to work that were unacceptable to his employer and therefore refusing to accept reemployment, the ARB held that the employer had not terminated the employee’s employment. *See also Griffith v. Wackenhut Corp.*, ARB No. 98-067, 1997-ERA-52 (ARB Feb. 29, 2000) (suspension that was promptly rescinded had resulted in no tangible job consequence).

The circumstances in the instant case are similar to those in *Western Sales* because Respondent sought Complainant’s return to work but Complainant refused to report to work, leaving Respondent with little choice but to place him on unpaid leave. Despite Complainant’s refusal to work, Respondent did not formally terminate Complainant at that time. In fact, Complainant continued to receive medical benefits which would be unavailable to someone who

was not an employee. Complainant failed to appear at work on July 24, when directed to do so. As Complainant did not perform any work due to his failure to return to work, he did not earn any wages. Therefore, Respondent's placement of Complainant on nonpay status was not tantamount to a termination of employment because Respondent reasonably responded to Complainant's refusal to report to work. In other words, the suspension did not constitute a constructive discharge.

Notwithstanding the above, I find that the act of changing Complainant's employment status from paid to unpaid on July 24, 2002 constituted adverse action in light of the language employed in the AIR 21 regulations, which defines adverse action broadly: "*any* change with respect to compensation, terms, conditions, or privileges of employment [emphasis added]." Once suspended and placed on nonpay status, Complainant could not simply show up at his former work site and expect to be paid, so there was clearly a change with respect to compensation, terms, conditions, and privileges of employment, and the change was tangible. The Supreme Court has defined a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760-61 (1998) (Title VII case defining standard without adopting it). *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Martin, supra*; *Berkman, supra*. A suspension placing an employee in a nonpay status involves a "significant change in employment status" and therefore would constitute an adverse action under the broad language in the regulation. *Compare Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, 1995-CAA-19 (ARB March 30, 2001) (oral reminder, which was the first step in a formal disciplinary process that could ultimately lead to an employee's termination, does not sufficiently implicate "tangible job consequences" as to be actionable) *with Gutierrez v. Regents of the University of California*, ARB No. 99-116, 1998 ERA-19 (ARB Nov. 13, 2002) (negative comments in performance evaluation are actionable when accompanied by subsequent limitation of pay increase.) While I find that the suspension would constitute an adverse employment action under AIR21, Complainant still needs to show that his protected activity was a contributing factor to his suspension.

#### *Constructive Discharge and Change in Work Conditions after Vacation*

An even more difficult burden for Complainant to overcome is showing that the circumstances prior to his July 24 suspension constituted constructive discharge or changed work conditions and are therefore deemed adverse action taken by Respondent. Before Complainant was officially placed on unpaid leave, Complainant went to his work place after returning from an extended vacation, on a day when he was not scheduled to work (July 13).<sup>50</sup> At that time, his key failed to gain entry into the building, he found his desk occupied, and his access to the computer system was denied when he attempted to log on. Later that day, Complainant's supervisor, Mr. Buckalew, informed Complainant that he should not report to work as previously scheduled but should report for a meeting with human resources the following day. Although Mr. Buckalew does not recall having done so, Complainant asserts that Mr. Buckalew told him to wait outside to be escorted into the building. Then, after he attended the meeting with Mr. Blinde, Complainant was under the impression that Mr. Blinde would report back to him on his

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<sup>50</sup> His vacation included three days for which he had not obtained prior approval for his absence -- July 8, 9, and 10.

employment status the following day (which was contrary to Mr. Blinde's recollection), but Complainant did not hear from Mr. Blinde the next day. Thus, all of these circumstances led Complainant to believe that his work conditions had changed and that he was going to be or had already been terminated.<sup>51</sup>

Complainant is therefore arguing that these circumstances are tantamount to a constructive discharge or an actionable change in the terms and conditions of employment. He has failed to establish an actionable adverse action on either basis.

The Administrative Review Board has held that employees are protected against a broad range of discriminatory adverse actions, ranging from non-monetary losses to constructive discharge. In *Van Der Meer v. Western Kentucky University*, 1995-ERA-38 (ARB Apr. 20, 1998), the Board found that even though an associate professor was paid during an involuntary leave of absence, he was subjected to adverse employment action by his removal from campus and consequent negative publicity. Because the ARB believed that denying a professor the opportunity to teach was significant and his removal from campus impinged upon his reputation, they deemed it to be adverse action. Moreover, the Board has found that when significant, harassing action is taken by an employer, a complainant can be deemed constructively terminated even where complainant has resigned. See *Talbert v. Washington Public Power Supply System*, 1993-ERA-35 (ARB Sept. 27, 1996) (finding adverse action if Complainant could establish that Respondent had rendered his continued employment so unpleasant or unattractive that a reasonable person would have been compelled to resign.) Cf. *Marcus v. EPA*, 1996-CAA-3, 7 (ALJ, Dec. 15, 1998) (Wood) (finding adverse action when the EPA "pigeonholed [Marcus] in a meaningless position where his actions [could] be closely monitored.")

However, in *Freels v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-2, 1994-ERA-6 (ARB Dec. 4, 1996), the Administrative Review Board found no adverse action when Complainant returned from six months of disability leave and found her office, phone and computer occupied. Inasmuch as it was undisputed that Ms. Freels' office was reassigned because there was a critical shortage of office space, she was temporarily placed in the only available space, and the space was small but adequate; the Board found that the temporary office assignment was not discriminatory as a matter of law.

In the present case, Respondent's alleged restriction of Complainant's access to his work station on July 13 did not constitute an adverse action. In this regard, the situation is very similar to that involved in *Freels*. In contrast to the *Van Der Meer* case, although Complainant believed that he was denied access to the building, his work station and computer, it is not entirely clear that Respondent intentionally prevented Complainant's entry or access. Desks were shared by maintenance planners and Complainant found his occupied on a day he was not scheduled to work. Further, while Respondent has offered no cogent explanation for the problems with Complainant's key and computer access, there is no indication that Complainant's incidences of restricted access were more than temporary in nature or would have had any permanent impact on his employment status.

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<sup>51</sup> Complainant asserts that at this point he had been constructively discharged.

Complainant's limited access in conjunction with Mr. Buckalew's requesting Complainant report to work a day later than originally scheduled for a meeting with human resources and Mr. Wenger's report that there were rumors around the office that Complainant was going to be terminated make Complainant's belief of constructive discharge more reasonable. However, while Complainant may have reasonably believed that his job was in jeopardy, in view of his failure to return from vacation when scheduled to do so, Complainant may have been able to straighten the leave situation out with Respondent (or at least he may have been subjected to a disciplinary action less severe than termination or suspension) if he had allowed the internal disciplinary process to work.<sup>52</sup> While being asked to hold off his return to work until Monday when he could meet with human resources changed the nature of Complainant's work that week, it did not change the terms, conditions or privileges of his employment generally. In the short span of time, from July 13 through July 17, 2002, the date on which Complainant's attorney wrote to Respondent indicating that reinstatement was not an acceptable resolution, it was unreasonable for Complainant to believe he had been constructively terminated because the conditions of his employment had been only minimally and temporarily altered. Complainant's multiple absences from work required an investigation to be conducted regarding the matter. It is reasonable for an employer to require an employee to stay away from the office during the course of a personnel investigation, and Mr. Blinde's testimony makes it clear that Respondent handled this situation consistent with its usual procedures.<sup>53</sup> (Tr. 541-42, 567-70). Notably, Complainant remained in pay status during this short period. As Complainant did not participate in Respondent's personnel investigation process and even advised Respondent that simple reinstatement was not an option, he made his return to work problematic.

In view of the above, I find that Complainant has failed to establish an adverse employment action prior to the time of his suspension based upon either constructive discharge or a change in terms and conditions of employment. Prior to the time of his suspension, Complainant's belief that he was constructively discharged was unreasonable, and as he did not allow the human resources personnel to complete the disciplinary process, its outcome is uncertain. Moreover, Complainant's temporary lack of access to his work station on a date when he was not scheduled to work may not be deemed to be significant and does not constitute an actionable change in the terms and conditions of his employment.

#### *Hostile Work Environment*

Prior to his vacation, Complainant believed that his work environment had grown more tense and he was subject to extra scrutiny from his supervisor, leading to disparate treatment up until the time of his suspension. Thus, Complainant is arguing that he was subject to a hostile work environment.

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<sup>52</sup> As Complainant points out (Complainant's Brief at p. 5), he may have been entitled to leave under the Family and Medical Leave Act as his extended absence was due to his mother's illness; it may therefore have been excused. However, Employer asserts that he provided insufficient notice of the reason for his leave, as he requested the leave two days before he left while the FMLA requires 30 days notice. (Respondent's Reply Brief at 13 to 14.)

<sup>53</sup> With respect to bargaining level employees, Respondent's procedures manual provides that employees may be suspended with pay pending the outcome of an investigation into performance issues. (See also RX 37, p. 34.)

A complainant must establish the following to establish a hostile work environment claim:

- 1) that he engaged in protected activity;
- 2) that he suffered intentional harassment related to that activity;
- 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;
- 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the Complainant.

*Berkman, supra.* See also *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, 1997-ERA-14 (ARB Nov. 13, 2002) *aff'd sub nom Williams v. Administrative Review Board*, -- F.3d --, 2004 WL 1440554 (5th Cir. July 15, 2004) (No. 03-60028).<sup>54</sup> Relevant factors include the frequency and severity of the harassment; whether the harassment was physically threatening or humiliating, or merely offensive; and whether it unreasonably interfered with the complainant's work performance. *Id.* As the Supreme Court noted in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (in the context of a title VII sex discrimination case), a hostile work environment is one that is "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."

Here, Complainant has not presented evidence to indicate his work environment changed in any significant manner after the overfly incident at the end of February. Although Complainant stated at the July 15 meeting that his relationship with Mr. Buckalew had "soured" as a result of the overflight (RX 29), he did not support that assertion with any specific details. Complainant's vague assertions of disparate treatment are insufficient to establish a hostile work environment under any objective standard and no reasonable person would find the environment hostile or abusive. While the evidence shows that Complainant had increased difficulty dealing with his supervisor as well as his subordinates after the overfly incident, he has failed to establish "severe or pervasive" harassment or an abusive working environment.<sup>55</sup> See *Williams, supra.* Claimant has also failed to establish that his work environment was made so unpleasant that a reasonable person would have resigned. See *Talbert, supra.* Although Complainant was disciplined for his part in the overfly situation, the discipline itself, consisting of a written reprimand, does not constitute an adverse action, and the reprimand was clearly warranted. (see *Shelton, supra.*) Further, the actions taken toward him after his vacation, discussed above, even if volitional, were temporary and trivial in nature and were not so severe or pervasive as to constitute a hostile work environment. Therefore, Complainant has failed to establish that he was subjected to a hostile work environment following the overflight, either before his departure for vacation or after his return.

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<sup>54</sup> While affirming the denial of a whistleblower claim brought under the ERA, the Fifth Circuit in *Williams* found that the ARB had erred in failing to apply the *Ellerth/Farager* standard applicable to title VII cases. The Fifth Circuit noted that constructive discharge requires proof of a more offensive work environment than is needed to establish a hostile work environment. *Williams, supra.* In the instant case, Complainant cannot establish a hostile work environment claim under the *Ellerth/Farager* standard or any other standard.

<sup>55</sup> Complainant has not alleged that the actions of his subordinates were taken in retaliation for protected activity. In any event, such actions by nonmanagerial employees could not be imputed to Respondent.

## **Protected Activity:**

For Complainant to establish illegal discrimination as a whistleblower, he must show that he engaged in actionable protected activity under AIR 21. The Secretary has broadly defined “protected activity” as a report of an act which the complainant reasonably believes is a violation of the subject statute. The ultimate outcome of the allegations of perceived violations need not be substantiated to constitute protected activity, the allegations must merely be “grounded in conditions constituting reasonably perceived violations.” *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (citing *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998) and *Leach v. Basin Western, Inc.*, 2002-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003)). Additionally, the standard involves an objective assessment of reasonableness rather than a subjective belief of the complainant. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95 CAA 12 (ARB Apr. 8, 1997).

Claimant essentially asserts that he engaged in protected activity on three occasions, two of which involved internal complaints. First, in his first AIR 21 complaint, Complainant alleges that he engaged in protected activity, which contributed to his suspension when he voiced concerns regarding the overfly of aircraft 935, specifically the last leg of that flight which was flown revenue from Atlanta to Miami on February 24, 2002. Soon after the overfly occurred, on March 15, 2002, Complainant wrote to his supervisor, Mr. Buckalew, to inform him that Complainant believed the 935 overfly was “illegal and unsafe.” Complainant also raised these concerns in a July 15 meeting with human resources. Second, Complainant wrote a letter on July 29, 2002 to Respondent’s CEO informing him of the problems within the maintenance department. This correspondence occurred after Complainant’s employment status was changed; therefore, it only factors into the adverse action complained of subsequent to his suspension. Third, in Complainant’s second AIR 21 complaint, which addressed his subsequent termination on April 25, 2003, Complainant alleges that he engaged in a third protected activity because on August 23, 2002, Complainant contacted the FAA to report the overfly of aircraft 935, at which time he addressed the general problems he believed Respondent had with their operations.

All of Complainant’s complaints directly dealt with air safety regulations, specifically violations of FAA regulations that describe how many hours an aircraft may fly before undergoing required maintenance. Furthermore, Complainant’s concerns were objectively reasonable, especially given the FAA’s findings after the supplemental investigation into the revenue overfly that a “violation of an order, regulation, or standard relating to air carrier safety may have occurred.” Thus, even though Complainant’s complaints need not be substantiated, in this case, the FAA gave credence to the complaints, showing that Complainant’s concerns were objectively reasonable. Therefore, Complainant engaged in protected activity under AIR 21 shortly after the overflight, prior to his suspension, by registering internal complaints with his supervisor and with human resources. Between the time Complainant was suspended on July 24, 2002 and finally terminated on April 25, 2003, Complainant engaged in subsequent protected activity by raising concerns regarding the overfly and other safety violations in a letter to Respondent’s CEO and by contacting the FAA to investigate the additional revenue overfly that had not been included in Respondent’s disclosure to the FAA. Complainant’s report regarding

Respondent's violation of FAA regulations both internally and to the FAA constituted protected activity under AIR 21.

**Employer's Notice of Protected Activity:**

In *Peck, supra*, the ARB stated that an element of an AIR21 whistleblower case is that the employer knew about the protected activity. The Board wrote:

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996) (ERA employee protection provision). This element derives from the language of the statutory prohibitions, in this case that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity. 49 U.S.C.A. § 42121 (a). Section 519 provides expressly that the element of employer knowledge applies even to circumstances in which an employee "is about to" provide, or cause to be provided, information about air carrier safety or "is about to" file, or cause to be filed, such proceedings. 49 U.S.C.A. § 42121(a)(1) and (2); H.R. Conf. Rep. No. 106-513, at 216-217 (2000), reprinted in 2000 U.S.C.C.A.N. 80, 153-154 (prohibition against taking adverse action against an employee who provided or is about to provide (with any knowledge of the employer) any safety information).

The evidence is somewhat contradictory as to when Respondent's managers first received notice of Complainant's protected activity. Mr. Blinde, who played an integral role in the decision to both suspend and terminate Complainant, recollected that he did not become aware that Complainant had contacted the FAA to report his concerns regarding the overfly of aircraft 935 until August 2002, but it is clear that he was aware of Complainant's internal complaints weeks earlier, prior to Complainant's suspension. In this regard, a summary of the July 15 meeting sent to Mr. Blinde on July 22, 2002 from Ann Giles reflects that Complainant "felt that the relationship between he and Jim [Buckalew] had been damaged earlier this year when Flt 935 was overflowed which resulted in an investigation by the FAA and ultimately a disciplinary written notice for [Complainant]." (RX 29). Moreover, the overfly was discussed extensively in the letter from Complainant's counsel to Mr. Blinde dated July 17, 2002. (RX 30). Mr. Buckalew, Complainant's direct supervisor, testified that he realized Complainant was "making an issue" of the revenue overfly when he received Complainant's response to his letter of reprimand, dated May 15, 2002.<sup>56</sup> Even before that date, although Mr. Buckalew denied telling Complainant to keep quiet about the overfly incident, it is clear that Mr. Buckalew had some awareness that Complainant was concerned with the revenue portion of the overfly occurring on February 24, 2002 and was potentially willing to draw attention to the matter either internally, to the FAA, or through both avenues.

In view of the above, it is clear that the decision to suspend Complainant was made by agents of Respondents who were aware of the protected activity. Since the decisionmakers in

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<sup>56</sup> As noted above, I did not find Mr. Buckalew's testimony that he first saw this memorandum in July 2002 to be credible.

Complainant's suspension were the same as those that eventually terminated the employment relationship with him, clearly that decision was with knowledge of the protected activity as well.

It is also clear that, by the time of the actual termination, Mr. Blinde, the person responsible for the decision, was aware of Complainant's August 2002 contact with the FAA concerning the revenue flight.

### **Causal Relationship:**

Complainant has already shown by a preponderance of the evidence that his employment relationship with Respondent falls within the purview of AIR 21, he was subject to one or more types of adverse action, he engaged in protected activity both internally and before the FAA, and Respondent was on notice thereof. To establish actionable unlawful discrimination, he must also show through direct or circumstantial evidence that his protected activity was a contributing factor to the adverse action. The causal relationship element is the crux of this case.

#### *Direct Evidence of Causal Relationship*

Under the first approach, Complainant must show through direct evidence that it is more likely than not that Respondent engaged in unlawful discrimination. Complainant is unable to meet this burden based upon the direct evidence of discrimination before me. Specifically, the performance summary completed by Mr. Buckalew at Mr. Blinde's request on July 12, 2002 before Complainant's meeting with human resources, which detailed Complainant's performance problems, did not in any way describe Complainant's involvement in reporting the overfly violation.<sup>57</sup> It is noteworthy that the memo did not address Complainant's engagement in protected activity since it was compiled and used for the purpose of evaluating Complainant's performance prior to his suspension and eventual termination. Therefore, this direct evidence tends to show that Mr. Buckalew and Mr. Blinde did not consider Complainant's protected activity in their decision to suspend and eventually terminate him.

Additionally, Complainant failed to produce direct evidence of discrimination based on statements made by Mr. Blinde during their July 15 meeting. As testified to by Complainant and Mr. Blinde, and as reported by Ann Giles, who took notes at the meeting, Complainant expressed his feeling that his relationship had soured with Mr. Buckalew since the overfly of aircraft 935 and specifically since he had told the FAA that Mr. Buckalew was responsible for the incident during the investigation;<sup>58</sup> however, in response, Mr. Blinde only stated that he would look into the matter and get back to Complainant after the investigation. The possibility of Complainant's termination from employment with Respondent was not addressed at the meeting. Rather, Mr. Blinde concentrated discussions on the misunderstanding about Complainant's extended vacation and Complainant's willingness to return to work and be employed by Respondent.

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<sup>57</sup> The performance summary tangentially refers to overdue violations by pointing to Complainant's failings in properly completing the overdue report, which is used to prevent overfly occurrences. (RX 28).

<sup>58</sup> Although this statement was reported by Ann Giles in her e-mail to Mr. Blinde summarizing what occurred at the meeting, there is no other evidence indicating that Complainant directly contacted the FAA prior to August 2002.

Nor was there direct evidence of discrimination in any of the e-mails or correspondence between the parties after the meeting, prior to Complainant's termination on April 25, 2003. Once correspondence/negotiations ensued between Mr. Blinde and Complainant or his representative, depending on whether he had counsel at the time, none of Mr. Blinde's responses provided any indication that Respondent was taking action against Complainant because of his whistleblower activities. Throughout their negotiations, Complainant discussed severance packages that he would accept and potential claims he could bring against Respondent because of their safety violations; however, Mr. Blinde restricted the discussion to possible resolutions of the employment situation.

The only direct evidence linking the overflight situation relates to the termination. Specifically, Mr. Blinde indicated that statements made about Complainant's conduct during the course of the FAA's revenue flight investigation led to his termination, as it was through those statements that Respondent learned of Complainant's alleged direction to a subordinate to falsify records. However, it was the alleged attempted falsification, rather than the protected activity, that was the stated justification for Respondent's termination of Complainant. Therefore, Complainant has not met his burden of showing that he was terminated as a result of protected activity through direct evidence.

#### *Indirect Evidence of Causal Relationship*

There is, however, a second method by which Complainant can prove unlawful discrimination using circumstantial evidence. *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980). To establish the causal relationship between the protected activity and adverse employment action, a complainant need not have direct evidence of discriminatory intent; rather, circumstantial evidence is permissible evidence of discriminatory intent. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996).

Temporal proximity may be a factor in showing an inference of causation; however, a lack thereof is also a consideration, particularly where the record reveals a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply System*, 1995-ERA-52 (ARB July 30, 1996). The overfly incident giving rise to this action occurred on February 25, 2002. Complainant was not suspended until July 24, 2002 and not terminated until April 25, 2003. Therefore, the timing of these events does not suggest that Respondent retaliated against Complainant for his protected activity.

Significantly, despite ongoing problems with Complainant's performance as manager, his status as an employee was not even questioned until months later, when he failed to report to work for three days in a row after extending his vacation under the mistaken belief that his supervisor had implicitly approved it. This unauthorized absence gave rise to a series of events leading to his suspension on July 24, months after the overfly incident and the internal complaints he raised in March, 2002.

Similarly, a lengthy span of time passed between Complainant's protected activity after he was suspended (made internally on July 29 and to the FAA on August 23) and Complainant's eventual termination on April 25, 2003. Five days after Complainant was placed on unpaid leave, he wrote to Respondent's CEO, complaining of safety problems, and he continued to do so during the course of negotiations with Mr. Blinde. Respondent continued to provide Complainant employee benefits for eight months after he reported the revenue overfly to the FAA. Although the actual termination was effected after discovery of Complainant's alleged direction to a subordinate to backdate a document, negotiations between the parties had come to a standstill prior to that point, by late 2002, and the employment relationship had effectively ended prior to the formal termination. Nevertheless, I find that the temporal proximity of these events does not establish a nexus between the protected activity and the actual termination.

In his brief, Complainant asserts that his pay was terminated immediately after he reported the revenue flight to the FAA, not at the time of his suspension, and he has therefore established temporal proximity. (Complainant's Trial Brief at 19 to 20.) Specifically, Complainant states that he contacted the FAA requesting an investigation into the revenue overfly on August 23, 2002, nearly one month after he was allegedly placed on unpaid leave (on July 24), and that the reversal of pay through his bank account occurred on September 3, 2002, coinciding with the time period that Mr. Blinde learned of his complaints. (Complainant's Trial Brief at 19 to 20, citing CX 5). Complainant testified that he received a direct deposit on August 5, 2002 for the pay period ending on July 27 (less three days, July 24, 25, and 26, when he was suspended); but that he then received full pay for the following two pay periods. (Tr. at 105-06). The latter two payments were reversed on September 3, 2002, resulting in his account being overdrawn. (CX 16, 17). In view of Respondent's failure to provide an explanation for the delay in implementing the suspension, Complainant has arguably shown temporal proximity between his suspension of pay and his protected activity of reporting the revenue flight to the FAA. However, I give little credence to this argument because it fails to explain why Complainant was not paid for July 24, 25, and 26, reflecting that he was, in fact, suspended on July 24 and suggesting that the continuation of his pay was due to clerical error or a delay in processing the necessary paperwork. I do not, therefore, find that this temporal proximity is sufficient to establish an inference of causation.

#### *Legitimate Basis for Employment Action/Pretext*

Assuming, arguendo, that Complainant has established that his protected activity contributed to the adverse employment actions taken against him, Respondent has established that management had legitimate business reasons for carrying out the suspension and termination, and Complainant's engagement in protected activity did not factor into those employment decisions. The weight of the evidence shows that Respondent suspended Complainant because he refused to report to work as scheduled on July 24, 2002 and reasonably determined that he should not continue to receive pay at that time. Further, Respondent had two additional reasons for formally terminating Complainant on April 25, 2003. First, shortly before the termination, Respondent discovered information, which led them to believe that Complainant had asked a subordinate to falsify a document and second, Complainant did not actually attend work for over 10 months, and negotiations for his return proved to be fruitless. While

Respondent clearly was justified in suspending Complainant when he did not report to work as scheduled on multiple days in July, the rationale for his eventual termination is less convincing.

It was reasonable for Respondent to place Complainant on unpaid leave/suspension when he stopped reporting to work as scheduled. Respondent's human resources department met with Complainant to investigate his multiple absences from work following his two-week approved vacation on July 15, 2002. After discussing the various personnel problems that existed between Respondent and Complainant, Mr. Blinde, the human resources manager, told Complainant he would look into the matter and respond within a few days. On July 17, 2002, Mr. Blinde received a letter from Complainant's attorney, in which he stated that "reinstatement [was] not an acceptable resolution." This statement led Mr. Blinde to propose an ultimatum of sorts. Because Complainant had not been terminated at that point in time, Mr. Blinde notified Complainant that he should return to work on July 24, 2002 or be placed on unpaid leave. When Complainant did not attend work, his employment status changed from paid to unpaid (although, as noted above, Complainant continued to receive payments that had to be recovered.) A reasonable action for an employer to take when an employee refuses to report for work is to stop paying that employee.

Respondent's reasons for Complainant's eventual termination are not as clear. Mr. Blinde testified that when the transcript of the FAA investigation was forwarded to Respondent, they discovered that Complainant asked Ms. O'Sullivan to falsify a document by backdating the short term escalation application; however, Ms. O'Sullivan's allegation is not credible. Ms. O'Sullivan, though she did not testify before the undersigned, does not appear to be a reliable source of information. First, although Ms. O'Sullivan told the FAA investigators that she had revealed the information during the internal investigation to Mr. Drivas and Mr. Morrison, neither Mr. Drivas, as he testified, nor Mr. Morrison, who reported his findings in the investigation summary, recalled learning this information from Ms. O'Sullivan. Additionally, the evidence shows that Ms. O'Sullivan did not respect Complainant's authority nor work well with Complainant as reflected in the numerous e-mail complaints she sent to Mr. Buckalew, and therefore I cannot exclude the possibility that she misconstrued her communications from Complainant or embellished Complainant's role in the event. Finally, Respondent never asked for Complainant's response to the allegation, which would have been a reasonable response given the seriousness of the allegations; however, in sworn testimony before the undersigned, Complainant denied ever asking his subordinate to falsify a document. Despite some inconsistencies in his testimony on other points, I found Complainant generally to be a credible witness and he stated unequivocally and credibly that he never suggested that Ms. O'Sullivan back date a document. Therefore, Respondent's primary reason, the "straw that broke the camel's back," for terminating Complainant is deficient.

However, Respondent's alternative ground for Complainant's termination is valid and precludes Complainant from establishing a connection between Complainant's protected activity and adverse employment action. Negotiations between Complainant and Respondent carried on from mid-July, shortly after the July 15, 2002 meeting, through at least late 2002. Complainant repeatedly asserted his position that he was concerned about Respondent's safety violations, while interjecting varying demands for severance payment. At first, Complainant stated that reinstatement was not an option, but later offered to return to work. Complainant negotiated

with Respondent himself and through various representatives that he hired throughout that period. These negotiations were complicated by Complainant's repeated threats and unreasonable demands. Finally, on April 25, 2003, Respondent mailed Complainant a letter officially terminating his employment, which had the effect of cutting off his medical benefits since pay had ceased since July 24, 2002. It is valid for an employer to terminate an employee who has not actually reported to work in 10 months. Mr. Blinde was reasonable in construing Complainant's offers to return to work as equivocal, given the tenor of the negotiations and the repeated threats and demands. Furthermore, in Mr. Blinde's professional opinion, the relationship between Complainant and Respondent had deteriorated throughout the extended negotiations and he believed reconciliation between the parties to be unlikely, a determination that was reasonable under the circumstances. Complainant's termination was the logical and reasonable result of the process that began with his unauthorized absence and extended through his suspension and his protracted negotiations with Respondent, through Mr. Blinde. Therefore, Respondent has presented a legitimate business reason for the final termination.

Notwithstanding Respondent's other legitimate business reasons discussed above, Complainant's performance as the manager of maintenance planning was not up to par and in and of itself would have been reason enough for Respondent to terminate its employment relationship with Complainant, a factor which colored the negotiations between the parties. Though Complainant had a manager position at Respondent, he did not carry out many of his supervisory duties and exercised little authority in dealing with his subordinates. Complainant did not primarily conduct the evaluations of the employees who worked for him and his subordinates did not bring concerns directly to him but instead went to his supervisor. While there is some support for Complainant's assertion that he was never allowed to do his job as a manager, it is equally apparent that his lack of authority was primarily the result of his own shortcomings in dealing with his subordinates. Furthermore, not only did Complainant fail to properly complete some of the turnover documents, which are done at the end of every shift in the maintenance planning department, but because of his limited skills, he did not train his employees well and mistakes were prevalent throughout the department. He also had difficulty communicating with at least two of his subordinates, who complained that they were unable to understand the substance of Complainant's e-mails, which detailed procedures and tasks that they needed to accomplish. On multiple occasions, employees within the maintenance planning department complained to Complainant's supervisor about the disconnect they believed existed between themselves and Complainant, which created a poor working environment and a maintenance planning department fraught with problems. Complainant's time and attendance was also a matter of concern. The myriad problems Complainant had on the job are chronicled in Mr. Buckalew's memorandum of July 12, 2002 (RX 28).

With regards to the particular overfly complained of by Complainant on February 24, 2002, in which a revenue flight proceeded from Atlanta to Miami, after it came to Respondent's attention that the C-check was past due on aircraft 935, Complainant is partly to blame for the incident. Notably, this was at least the second incident of an overfly for which Complainant was partially responsible and it occurred during his watch. Although Complainant's perception that his relationship with his supervisor deteriorated after this incident may be accurate, any such deterioration most likely resulted from his apparent failures in handling the situation.

First, Complainant did not exhibit leadership skills in dealing with the incident. On the evening of February 23, 2002, Ms. O'Sullivan called Complainant at home to determine what to do about aircraft 935 being more than 38 hours past due for a heavy inspection. Eventually, after bringing the situation to his supervisor's attention, Complainant told Ms. O'Sullivan that he would not grant permission for the plane to fly but instructed her to contact his supervisor, Mr. Buckalew, instead of directly resolving the matter with Mr. Buckalew. After hanging up the phone with Ms. O'Sullivan late that evening, Complainant was not aware of how the situation would be resolved. Then, even knowing that the flight was scheduled to leave the morning of February 24 at 9:30 a.m., Complainant arrived at work almost two hours late and upon arrival, learned that the flight was scheduled to depart on time around 9:30 a.m. Complainant mistakenly assumed Respondent had gotten permission for the aircraft to fly and did not question or seek assurance of such approval before the aircraft left Atlanta. Complainant chose to remove himself from playing a role in the difficult situation by shifting the responsibility to his subordinate and his supervisor and ignoring the possibility that a violation could occur. Unfortunately, because Complainant was manager, he had a duty to be involved with and manage the situation that had arisen and by shifting the responsibility and showing up to work late, he shirked his management duties. For that reason, Complainant is partly to blame for the violation of which he complained to the FAA.

Second, Complainant could and probably should have discovered the potential overfly situation well in advance of Ms. O'Sullivan's phone call the evening of February 23. When the aircraft's maintenance check was rescheduled by Ms. O'Sullivan, a planner under the supervision of Complainant, it was scheduled past its due date of February 18, to take place on February 24, 2002. The work order was rescheduled on February 13; therefore Complainant had the opportunity to discover the mistake between February 13 and February 19, the last date on which Complainant worked before the overfly occurred. It was the manager's duty to review the forecast overdue report daily. Complainant testified that he believed the aircraft was going for the C-Check on the evening of February 18 but there is no evidence to substantiate this belief and Complainant did not ensure that the maintenance check was completed when he returned to work on the morning of February 19. Though Complainant's failings in the overfly situation do not constitute the type of deliberate actions that would lead to automatic dismissal of his claim under 29 C.F.R. §1979.102(c),<sup>59</sup> his mishandling of the situation is evidence that Complainant did not perform his job as manager of the maintenance planning department well, providing further justification for his suspension and ultimate termination. Indeed, his failures as a manager, as reflected by the aircraft 935 incident, explain the lack of interest by Respondent in accepting any conditions for his return to work during the course of negotiations with him.

After the overfly of aircraft 935, by Memorandum of May 14, 2002, Mr. Buckalew issued a letter of reprimand to Complainant for his responsibility in allowing the overfly to occur. That Memorandum emphasized the need for different procedures to be implemented to avoid the recurring problems plaguing the maintenance department and cautioned him that his failure to take initiative to ensure procedures designed to maintain compliance were "developed and

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<sup>59</sup> Under section 1979.102(c), the whistleblower provisions are inapplicable to an employee who, acting without direction from an air carrier, deliberately causes a violation of any requirement relating to air safety. *See also Dotson v. Anderson Heating & Cooling, Inc.*, 1995-CAA-11 (ARB July 17, 1996) (environmental whistleblower case).

maintained” would “result in immediate and final disciplinary action.” (RX 21A). No other formal disciplinary action was taken against Complainant until he was suspended on July 24, 2002.

Complainant’s job performance problems set the stage for Respondent’s failure to tolerate his unauthorized absence for three shifts following his vacation as well as his subsequent suspension when he refused to return to work on an unconditional basis. Complainant’s job performance coupled with his failure to report to work warranted Respondent’s suspension and later formal termination.

In view of the above, I find that Respondent has articulated a nondiscriminatory basis for its action, and the Complainant has failed to demonstrate that the reasons proffered by the Respondent were not the true basis for the adverse action, but were a pretext for discrimination. *See Overall, supra.* As Complainant is unable to prove that his protected activity was a contributing factor to the adverse action taken against him by Respondent, Complainant has failed to establish an essential element of his claim for damages.

**Conclusion:**

As Complainant cannot prove that the protected activity was a contributing factor to the adverse employment actions taken against him, he cannot prevail in this action. Accordingly, I recommend that the complaints in this matter be dismissed.

**ORDER**

**IT IS HEREBY RECOMMENDED** that the claims of Complainant, Mr. Riad Majali, for unlawful discrimination under the provisions of AIR 21 be **DISMISSED**.

**A**  
PAMELA LAKES WOOD  
Administrative Law Judge

Washington DC

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor ("Secretary") pursuant to 29 C.F.R. 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. If a timely petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. The Board will specify the terms under which any briefs are to be filed. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. 1979.109 (c) and 1979.110 (a) and (b).