

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 06 July 2009

Case No.: **2005-AIR-00014**

In the Matter of:

MIKE COOLEY,
Complainant,
v.
HYANNIS AIR SERVICE,
Respondent.

Appearances: Michael C. Tice, Esq.
For the Claimant

Joan Ackerstein, Esq.
Erik Winton, Esq.
For the Employer

Before: Richard K. Malamphy
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“the Act”), as implemented by 29 C.F.R. 1979 (2008). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

BACKGROUND

A. Procedural History

On or about April 9, 2004, the Complainant filed a complaint with the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”), alleging that Hyannis Air Services (“Respondent”, “Hyannis” or “Cape Air”) had engaged in adverse action against him in

violation of Section 42121 of the Act. After conducting an investigation of the complaint, the Regional Administrator for OSHA issued a determination dated March 3, 2005 that concluded that the investigation disclosed no violation of the Act's employee protection provisions. The Complainant objected to the findings and requested a formal hearing before an Administrative Law Judge pursuant to 49 U.S.C. § 42121(b)(2)(1).

The case was assigned to the undersigned on April 8, 2005. By Notice dated January 28, 2007, a hearing was scheduled for April 10, 2007 in Fort Myers, Florida. The hearing was continued in order to provide the parties with an opportunity to settle the matter. When settlement negotiations failed, the hearing was rescheduled for February 24-25, 2009.

My decision in this case is based on the sworn testimony presented at the hearing and the following admitted evidence: Complainant's Exhibits ("CX") 1-7 and Respondent's Exhibits ("RX") 1-30. Transcript ("TR") at 7. During the hearing CX 8-9 and RX 31-36 were added. TR at 182, 295-296, 303. Post-hearing briefs have been received and the record is now closed.

B. Complainant's Statement of the Case

The Complainant contends that he engaged in protected activity when he filed flight discrepancies and mechanical interruption reports to report safety concerns. He further alleges that his employment was terminated in part because of the protected activity and that the "fuel issue" was a pretext for the dismissal.

C. Respondent's Statement of the Case

The Respondent argues that filing flight discrepancies and mechanical interruption reports does not constitute protected activity under the Act. Furthermore, the Respondent asserts that the Complainant would have been discharged for poor judgment regardless of his participation in a protected activity.

ISSUES

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

TR at 6.

SUMMARY OF THE EVIDENCE

A. Testimony of Complainant

The Complainant currently lives in Ocala, Florida with his wife and two children. TR at 49-50. After working as a deputy sheriff and for Costal Helicopters, he got his airline transport pilot's license on May 4, 2000. TR at 50-55. He began working for Cape Air in Florida in October of 2000. TR at 79.

During the Complainant's time at Cape Air, he was required to go on check rides every six months. TR at 131. Scott LaForge conducted a check ride on June 22, 2002. RX6. According to the form LaForge filled out, the check ride was conducted a month late:

Q: Now do you see where [the check list] says, "Remarks: Grace a month late?"

A: Yes.

Q: Part of the check ride is an oral examination of the pilot in the sense that the check airman asks questions?

A: Yes.

...

Q: [You] started [the check ride] earlier, he had some concerns about your level of knowledge, he gave you something to read, and he said, "You know what. Let's re [sic] get together in another few weeks and I'll give you the check ride after you read this material?"

A: I don't remember him giving me anything to read, but I think that's correct; other than giving me anything to read, I don't recall that.

TR at 130.

After going through ground school in Hyannis, Massachusetts, the Complainant had another check ride on November 22, 2002 with Daniel Duda. TR at 131-133; RX7. Duda found the Complainant to be unsatisfactory in respect to aspects of takeoffs, landings, instrument procedures and judgment. TR at 134; RX7. As a result, Duda disapproved the Complainant's performance. *Id.*¹ The Complainant stated that Duda was "widely known as the absolute worst guy to take a check ride with" and that Duda set him up for failure by the way he conducted the test. TR at 308.

Following the failed check ride, Cape Air provided additional training for the Complainant with the Director of Training, Evan Cushing. TR at 134. The Complainant then flew with Scott LaForge three times between November 26 and November 29. TR at 135; RX9. During the first flight on November 26, LaForge noted that the Complainant's performance was unsatisfactory on flows, checklists, emergencies, instrument work and approaches. TR at 136-137; RX9a. During the second flight on November 27, LaForge only noted that the Complainant

¹ Dan Duda was later terminated after testing positive on a random drug test. TR at 297.

was unsatisfactory in regard to approaches. TR at 138-140; RX9b. After the final flight on November 29, LaForge wrote that the Complainant was satisfactory on all procedures and was ready for a check ride. TR at 139; RX9c. On November 30, LaForge conducted a retest check ride and approved the Complainant's performance. TR at 141; RX10. Following the check ride, the Complainant was put on probation for six months. TR at 142. LaForge wrote a report that stated "Difficulty in passing recurrent checkride. Required many retraining hours." RX11. If the Complainant failed to adhere to cockpit flows, checklist procedures and general aircraft operation, he would be suspended or his employment terminated. RX11.

On November 29, 2003, the Complainant flew a Cessna 402 with the call letters 69SC from Tampa, Florida to Fort Myers, Florida (Block time: 50 minutes; Hobbs time: 0.6 hours), he then returned to Tampa (Block time: 50 minutes; Hobbs time: 0.7 hours), and finally he flew back to Fort Myers (Block time 50 minutes; Hobbs time 0.7 hours). TR at 143-145; see RX13 for the flight log. The flight log lists the Block time and the Hobbs time. Block time is the length of time it takes for the wheels to start moving, the plane to go up in the air, reach its destination, land and return to the gate with the engine shut off. TR at 108. The Hobbs time is the length of time that the plane is actually in the air. TR at 109.

Before arriving in Fort Myers on the first leg of the flight, he ordered fuel for the plane. TR at 146. However, for reasons that are unclear, the fuel never arrived. TR at 146. The Complainant decided that he had enough fuel to complete the flight back to Tampa and the return to Fort Myers, so he did not wait for fuel. TR at 154. Since on the second leg of the flight back to Tampa there were passengers, the Complainant was required to do a weight and balance form to determine the weight of the passengers, fuel and cargo. TR at 148; RX14. The form is completed to ensure that the plane is within safe limits for flight. At the time the Complainant completed the form, he expected the plane to contain 650 pounds of fuel. TR at 152. While the Complainant was unaware that the fuel had not arrived when he completed the weight and balance form, he realized that less fuel would be less weight so the plane was still within the limits. TR at 155. When asked why he ordered fuel on the flight to Fort Myers if he had enough to return to Tampa, he answered:

Because I think I knew that I didn't have a full load, that were [sic] are told not to buy fuel in Tampa to save the few cents or whatever it is up there, and to buy it in Fort Myers. So trying to comply with what the company wanted, I was taking on -- there's been memos to the affect, "Take on fuel if weight permits for the roundtrip."

TR at 156.

Once the Complainant landed in Tampa, he decided that he did not need to purchase fuel for the final leg back to Fort Myers:

Leaving Fort Myers I didn't specifically [read how much fuel was in the tank]; I knew that okay, I'm going to have to particularly pay close attention when I leave Tampa, and when I leave Tampa I'm going to evaluate and see if I need to go get fuel or not, which I

did. Made the evaluation, I had no passengers, there would have been no reason for me not to go get fuel if I needed it, was perfectly aware that I had adequate, and I landed with more than adequate fuel.

TR at 157, 169. On his way into Fort Myers, he ordered enough fuel to bring the level up to 650 pounds of fuel as a courtesy to the next pilot. TR at 158. But the plane was not refueled overnight. TR at 159. The next morning, it was determined that he landed with an insufficient fuel reserve:

Q: How was it determined that you landed with too little fuel?

A: It wasn't determined. What they say happened was they came out the next morning after the plane had set unattended, and they came out, turned on some battery switches, tapped the gauges, and came up with this precise reading of 128 pounds according to what they had said.

Q: Which is how many gallons short?

A: One gallon.

TR at 33-34. While referring to a blown up version of RX2, the Complaint explained that the gas gauge does not give a very accurate reading of how many gallons remain in the tank:

The width of a line is more than a gallon I believe. I would not, and I don't believe anybody would attempt to distinguish a gallon of fuel, and this is split between these two sides, this representing the left tank, this representing the right tank. So, I could not tell you how you can distinguish a gallon on this.

TR at 36. He noted that the best way to measure the amount of fuel in a tank is to drain the tank or fill the tank. TR at 35.

After the Complainant read 14 C.F.R. § 135.209² into the record, he testified as follows:

Q: ...Now, when you left, when you took off from the airport with this flight in question, did you have enough fuel to go 45 minutes?

A: And some, yes.

² 14 C.F.R. § 135.209 VFR: Fuel Supply.

- (a) No person may begin a flight operation in an airplane under VFR unless considering wind and forecast weather conditions, it has enough fuel to fly to the first point of intended landing and, assuming normal cruising fuel consumption—

- (1) During the day, to fly after that at least 30 minutes; or
- (2) At night, to fly after that for at least 45 minutes.

Q: All right. Does this regulation say anything at all about the end of a flight?

A: No, it does not.

Q: Based on your understanding as a pilot, does this regulation refer only to the beginning of a flight?

A: It's clearly what you must begin a flight with.

TR at 34. According to the Complainant, being one gallon short would have given him a 42-minute reserve rather than the 45-minute reserve required by the Regulations. TR at 40. He also noted that the fuel was not measured until the day after his flights, so something could have happened to the plane before it was looked over by Scott LaForge:

A mechanic could have started the plane, someone else could have moved it. I kind of doubt it but there's the possibility -- well, no one would siphon the one-gallon of fuel, but there's also sorts of explanations.

TR at 40.

On December 11, 2003, the Complainant got a call from Steve Phillips letting him know that his employment was being terminated for poor judgment in leaving on a flight from Tampa to Fort Myers with inadequate fuel. TR at 160, 162. After the call, the Complainant tried to determine whether there was inadequate fuel:

Q: Okay. So after you got the call saying that the fuel was inadequate in Fort Myers you immediately called Jeff Sarmiento?

A: I believe I did. I mean --

Q: And he told you didn't he that he fueled it to 720 pounds, and that he did that in Fort Myers?

A: Yes, he brought it up to 720 plus.

Q: And then he flew from Fort Myers to Tampa and that's where you picked up the plane?

A: That's correct.

...

Q: So, if you were to add the total time that the plane was moving, the wheels were moving, with the engine on, from the leg that Jeff Sarmiento says he flew after he fueled it and yours, you get your flying the plane for a total of 150 minutes and he for an additional 45; do you see that?

A: I haven't added it up but that's -- okay.

...

Q: So, if you use 200 pounds as an average, and the plane was flown for three and a quarter hours, that means it used 650 hours, 650 pounds on the flight that Sarmiento flew from Fort

Myers to Tampa and the three that you flew? You're shaking your head, why is that not correct?

A: Because there is a big difference between engines sitting at idle versus what you are flight planning. Okay, the 200 pounds as I was taught is the time that you anticipate being in the air. You add that extra twenty pounds for the climb. You make some time back because you pull power back. To imply that that is spread across taxi time is not at all accurate.

...

Q: If you had to do it again, would you still make the judgment to have taken off from Fort Myers without the fuel that you ordered?

...

A: Absolutely, there was no problem there. I had -- I mean, I had not only completed that flight, which is the one you're taking issue with there, came back and completed the next flight with over, with an hour reserve left in the airplane. ... As far as the safety of that aircraft, taking off from Fort Myers to Tampa, there was no issue of anything but more than adequate fuel, and exactly twice the fuel that was required or more.

TR at 164-167. The Complainant also testified that he cleaned the aircraft, crossed the seat belts, and chocked the plane before leaving it that night. TR at 308, 314.

On December 12, the Complainant flew to Hyannis to explain what had happened to Linda Markham, Larry Gaultieri, and Steve Phillips. TR 161. He also appealed the decision to Cindy Beaton. TR at 162.

On February 13, 2004, the Complainant received a letter from Cindy Beaton, Vice President/General Manager of Cape Air, informing him why his employment was terminated:

After meeting which [sic] you, Dan and I had regarding the termination, I looked further into the fuel issue and the other issues you raised at the meeting. As a result of that further review, including my discussions with the Chief Pilot and others, we concluded that your termination resulted from the fuel issue and not from the other issues you raised.

CX1; TR at 31. The letter also offers to let the Complainant resign instead of being terminated. CX1.

The Complainant believes that his employment was terminated in retaliation for filing too many discrepancies and mechanical interruptions:

Q: Did you file discrepancies on aircraft?

A: Yes.

Q: Did you file mechanical interruption reports?

A: I believe far more than the average for Florida, yes.

Q: Tell the Judge about your interaction with the company regarding write-ups?

A: The write-up is what was alluded to earlier as a discrepancy entered at the bottom of the flight logs. One level above that are mechanical interruption reports, which are required. As a matter of fact, we don't have any leeway on these discrepancies. It's not our option to write up a violation of a safety problem on an aircraft. ... I was doing this, following the guidelines as best I knew how, and taking a tremendous amount of heat for doing that.

...

Q: You heard Mr. Sam Mason testify about a meeting concerning write-ups; did you have any meetings concerning write-ups?

A: I was never called up to Hyannis specifically as he was in that meeting, no.

Q: Why did you get the impression you were perhaps doing too many write-ups?

A: Well the ultimate impression was, was when the senior pilot [John Kappeyne] in Florida came and told me in no uncertain [terms], "you're costing this company needless money by doing all these write-ups."

...

Q: How did it cost the company money, how did that work?

A: Well obviously if you can look the other way on what, on an issue, the mechanics are not required to invest their time, you know, in fixing it and it doesn't come out of the bottom line of the profit. It costs money to fix planes.

...

Q: Did you call anybody at Cape Air management about any discrepancy you filed?

A: I was called by Cape Air management, initiated by them, referencing some discrepancies I filed. As far as a specific discrepancy, I don't recall a specific, but I certainly called and talked about issues that were going on.

Q: I'm just talking about the discrepancies now?

A: No, I did. But it was also one because a mechanical interruption; I specifically remember calling [Evan Cushing, Dave O'Connor, and Steve Phillips] about the heater issue that I had with the plane.

...

Q: Okay. The problem was that you noted a problem with a heater, and you caused a plane to be taken out of service while the heater was repaired?

A: The defect caused the plane to be taken out. I wrote the discrepancy out, yes.

Q: Okay. And then John Kappeyne, who was a pilot in Florida, took issue with you and said you didn't need to take the plane out of service because the heater didn't work, right?

A: Correct.

Q: And so you called to complain about John Kappeyne's treatment of you, making fun of you because you did that?

A: No. I believe I called first and told Evan [Cushing, the Director of Training] specifically, asked him about the write-up, at which point he assured me he would have done the same thing. ... I told him that I'm taking a whole lot of heat for following the regulations in Florida, and he wanted me to be a part of the new way of doing things, and getting away from some of the old bad habits.

TR at 40-43, 45, 118-119. He noted that John Kappeyne is senior to him, but is not his supervisor. TR at 102-103. His supervisor was Steve Phillips in Massachusetts. TR at 103. He also testified that he had never submitted a safety report. TR at 87; *see* RX19. The Complainant stated that he did not know how many mechanical interruption reports were filed by other Cape Air pilots. TR at 123.

The Complainant pointed out one instance when he filed a mechanical failure on November 20, 2001 regarding a double alternator failure. TR at 123. His supervisor, Steve Phillips, then called to discuss the report:

Q: Okay. And Steve Phillips after he received this, called you and just asked you about what happened?

A: He wanted me to explain why, why I took that action I think was the --

...

Q: And did he say anything after you told him?

A: Not to me, no.

Q: So he just inquired as to what happened?

A: Well it was kind of unusual. I mean getting the call is kind of the implication that you perhaps have done something wrong. Steve didn't call me and say, "Hey, everything's great, you're doing a good job." I only heard when there was eyebrows raised or there was some concern. And this was a concern, a write-up concern that he had that he called to ask me about, which I think the report spoke for itself.

Q: Okay. But you don't think it's inappropriate for a chief pilot to call a pilot and just say, "I got this. Can you just fill me in, what happened?" That's not a bad thing to do is it?

A: It's unusual, as far as my experience, uh, does. But no, I don't think, uh, he was wanting to know, you know the specifics. He

also asked me why didn't [I], um, get the manual, um, out, and the implication was to continue the flight on. He said there's, you know, "Did you reset the breakers?" And, basically the implication was he was concerned that I aborted the flight and came back.

...
Q: And, he didn't call you on any of the other mechanical interruption reports you filed?

A: I do not remember.

...
Q: Well, did anybody call you about the discrepancies in general or did you just have a conversation with people about a particular discrepancy?

A: Had conversation about discrepancies. Other than the glaring issues that I addressed, I don't know what you're asking exactly.

Q: Well Steve Phillips, the chief pilot was your supervisor. He never told you that you were making too many discrepancies, did he?

A: No, he did not.

Q: And, while you were employed by Cape Air, you never filed any report or complaint with the FAA, did you?

A: No.

...
Q: Steve Phillips, your supervisor, never told you that you were costing the company too much money, did he?

A: No, ma'am, he did not.

Q: And, nobody else at Cape Air, other than John Kappeyne, ever made that remark to you?

A: The direct remarks, the verbal direct remarks came from John Kappeyne.

TR at 124-125, 173-174, 177.

The Complainant also testified that he is not very good at math, so he usually keeps a calculator with him. TR at 100-101, 172.

B. Testimony of Sam Mason

Sam Mason was a pilot for Cape Air starting in 2002 and worked there for approximately a year and a half. TR at 11-12, 15. He worked with the Complainant from approximately October 2002 until May 2003. TR at 19. He left Cape Air voluntarily in February 2004. TR at 19; 26.

Regarding the companies attitude towards safety and maintenance issues, Mason stated that:

I think that to -- for the most part the company tried to do the right thing, but they were balancing that with revenue generation in a cyclical and a seasonal business with narrow margins. And I think the culture was, you're supposed to get the job done, and sometimes there was a conflict with what was the letter of the law and what they wanted you to do.

TR at 12. Mason testified that the Larry Gaultieri, Director of Flight Operations, and Ed Braz, the Assistant Chief Pilot, called him in to ask why he had been filing more mechanical discrepancies in his logbooks than normal. TR at 12. He noted that the two men did not tell him to stop writing up the discrepancies, but that he felt intimidated by the questions:

Q: Did the airline suggest any policy concerning write-ups to you?

A: No. In fact, they would never, because of their legal obligation they would never suggest that I shouldn't write an aircraft up. I was made to believe that I was being watched.

...

Q: And why were you under closer scrutiny?

A: Because they were, I guess perhaps because I was interrupting revenue generation by writing up aircraft that had inoperative components.

...

Q: Why was your meeting unusual that you attended?

A: Because it really should, unless there was something, some real unusual circumstances it should have just gone in -- the write-ups should have gone into the aircraft maintenance log, gone to maintenance and then been fixed. There shouldn't -- that's the authority that the pilot command has is to enter a discrepancy based on the way he or she sees it, not based on the way that they have been coached or led to believe it should appear in the aircraft maintenance log.

TR at 13, 15, 28.

C. Testimony of Edward Zeglan

Edward Zeglan is the general manager of maintenance for Cape Air in Hyannis, Massachusetts. TR at 183. He has been employed at Cape Air since 1987 and has been employed in airline maintenance continuously since 1980. TR at 184-185. He testified that the maintenance headquarters is in Hyannis, but there are maintenance departments throughout the United States, Guam and Puerto Rico. TR at 185.

Cape Air is regulated under Part 135 of the FAR, which covers airlines that fly planes that hold ten or less passengers, by the Federal Aviation Administration. TR at 188. Zeglan testified that he has frequent contact with the FAA office in Boston and invites FAA examiners

to the company on a regular basis. TR at 188-189. The airline also follows the Approved Aircraft Inspection Program based on manufacturer's recommendations and approved by the FAA. TR at 191.

Zeglan noted that when a pilot records a maintenance discrepancy in the flight log, he is required to call maintenance to let them know that there is something wrong with the plane. TR at 190. The flight logs do not go to anyone else in Cape Air other than maintenance, and are then kept in the maintenance records. TR at 190.

Zeglan was in charge of maintenance during the time that the Complainant was a pilot with Cape Air. TR at 192. He testified that he never heard of any of the Complainant's maintenance issues:

Q: Did you ever hear anything about Mr. Cooley writing up discrepancies?

A: Never.

Q: Did you ever hear anything about any maintenance report or mechanical interruption report that he filed?

A: No.

Q: As the head of maintenance, the general manager of maintenance at Cape Air, how important is safety to you?

A: Safety is our number one priority.

...

Q: On occasion do pilots call you to talk to you about a maintenance issue?

A: On occasion, sure.

Q: And, if they are reporting a problem how do you feel?

A: Well I'm always happy to talk to someone so they can understand what the problem they're having is with the airplane. I talk to people all the time.

Q: Did you ever get a call from Mr. Cooley about any complaint he had about a plane?

A: No, I did not.

Q: Have you ever heard of anyone at Cape Air being told not to report a safety issue?

A: Never.

TR at 192, 194-195.

D. Testimony of Stephen Phillips

Stephen Phillips has been employed by Cape Air since June 1995 and became the chief pilot in 2000. TR at 196-197. His duties include overseeing the flight department, insuring that all procedures, policies, and FAA regulations are complied with, hiring pilots, and maintenance of records. TR at 197. He testified that safety is the "number one priority" for Cape Air:

Q: What action does Cape Air take to try and assure that the airline flies its passengers safely?

A: We've developed our own policies above and beyond what's required of us by the Federal Aviation Administration, and we document these in our manuals. And we have a safety officer, who is in charge of overseeing all this, as well as instilling this in all of our employees as well as pilots.

...

Q: What is the role of the safety officer?

A: To report directly to the [president] any potential safety problems and to have meetings with other managers to review, um, all matters concerning safety.

...

Q: There is a form for employees to file safety reports with the safety officer?

A: Yes.

Q: Can they do that anonymously?

A: They can.

...

Q: Do the safety reports come to your attention if they are filed?

A: No, only if the safety director brings one to my attention for input.

Q: And, the discrepancies that are noted on the flight logs, do those come to your attention?

A: No. ... Those go to maintenance.

...

Q: What was a mechanical interruption report, now an EIA?

A: That's a report that all employees can use. ... It's a form of feedback in our system Safety Program, and it's really used to describe any reportable occurrence that happens, uh, that could affect a flight and cause a diversion or abnormality.

Q: Do the mechanical interruption reports come to your attention?

A: Only on occasion.

...

Q: Do you know how many mechanical interruption reports Mr. Cooley filed when he was a pilot at Cape Air?

A: No.

Q: Mr. Cooley testified earlier today about preparing a flight interruption report in November of 2001; I'm sorry, mechanical interruption report. And he said that he thought that you called him because he recalls speaking with you and you questioned him about an alternator light; do you have any recollection of that?

A: I don't recall that conversation, no.

...

Q: Have you ever told, or did you ever tell Mr. Cooley that he filed too many mechanical interruption reports?

A: No.

TR at 200-204.

Concerns regarding the Complainant's skill as a pilot came to Phillips's attention in June of 2002 after a check ride with Scott LaForge. TR at 206. While the Complainant passed that check ride, LaForge felt that he had some difficulty completing the tasks and recommended that he receive more training prior to his next check ride. TR at 206. The Complainant then went to Hyannis to complete ground school and simulator preparation. TR at 206. Phillips was also informed when the Complainant failed a check ride with Dan Duda in November of 2002. TR at 207.

After the failed check ride, Phillips arranged additional training for the Complainant with Evan Cushing, then the director of training. TR at 208. Cushing informed Phillips that he was "not able to get him to a standard that he would have needed to pass a check ride, and that it would require additional flight training beyond what he has done with him." TR at 208. Phillips then met with the Complainant to discuss his issues with training and flight performance. TR at 209. Since the Complainant felt that he would be able to perform better with additional training, Phillips made arrangements for Scott LaForge to continue the training in Florida. TR at 209. Phillips testified that the additional training given to the Complainant was "far beyond" that given to most pilots:

Q: Was there any ulterior motive that you had in allowing the additional training of Mr. Cooley other than to help him be successful?

A: No.

TR at 210. Following the training with LaForge, the Complainant passed a check ride and was placed on probation. TR at 210.

Following the Complainant's flights between Tampa and Fort Myers on November 29, 2003, Phillips received a voice mail from LaForge:

The voice mail was basically describing that he and another check airman were to take that aircraft the following morning after Mike flew it and found the aircraft with an alarmingly low quantity of fuel, as well as a couple of other items; I believe it was wheels not chocked and the rudder not locked.

TR at 211. He then spoke with the Complainant:

He believed that he had enough fuel in the aircraft, and we had a conversation about, um, how he did his fuel planning, and whether or not he fueled it that night, because it was also reported in that

voice mail that the aircraft, you know, was at that low fuel. And it's normally procedure to fuel it up when you finish flying it for the night for the people the next day.

I had asked him initially what he intended to fuel it to that night, because he told me that he did place the order but apparently the fuel had not arrived after he left the airport. So he said that he intended to fuel the aircraft to 600 pounds, which would be a normal fuel level to leave the aircraft overnight in Fort Myers with. I then asked him how much fuel he had ordered that night prior to leaving, and he responded that he ordered 45 gallons a side [or 540 pounds total].

TR at 212.

After Phillips spoke with LaForge, Ed Braz, the assistant chief pilot, Larry Gaultieri, Director of Operations, and Linda Harkham, head of Human Resources, the decision was made to terminate the Complainant's employment:

Q: And, what did you base that decision on?

A: We based that decision, um, I mean on the fact that he used poor judgment in departing on his last leg that night with insufficient fuel, to comply with FAA regulations, as well as previous poor performance on training and check rides.

...

Q: Was the prior issues that you were aware of with Mr. Cooley's performance a factor in your mind when you made the decision to terminate?

A: Yes.

Q: Now, Mr. Cooley suggests that he wasn't short very much fuel, and yet you seem concerned about his judgment in leaving without adequate fuel; why are you concerned about his judgment in making that decision?

A: I was concerned about his judgment because, uh, first of all did it meet the required regulations even if it was just a little bit short. And Cape Air is a safety-plus compliance company that does things conservatively and safely, above and beyond what's required of us, and to use judgment to fly the aircraft at night with just below the required legal limits is not how we operate. ... I think that was very poor [judgment]. He obviously ordered the fuel in Fort Myers, when he first went into Fort Myers that evening, and he acknowledged that he ordered fuel so he expected to get fuel, departing without, knowing without, knowing that he did not receive that fuel. Then left Tampa when he had an additional opportunity to get the fuel after he departed Fort Myers without getting it, and

elected consciously not to get fuel in Tampa and fly an additional trip without the fuel, now that he had originally ordered two legs of fuel.

...

Q: At the discussion you had prior to making the decision, termination that you communicated on December 11, when you spoke with Scott LaForge, and Larry Gaultieri and Ed Braz and Linda Markham and yourself, was there any mention made of any complaint that Mr. Cooley had ever filed?

A: No.

Q: Was any issue about discrepancies or mechanical interruption reports any part of that discussion?

A: No.

Q: You're aware that Mr. Cooley and Mr. Kappeyne did not get along well?

A: Yes.

TR at 219-221, 223. Following the termination of the Complainant's employment, he went to Hyannis to speak with Phillips:

Q: And, what was your reaction to Mr. Cooley at that meeting?

A: It was very disappointing. And, you know, it reinforced in my mind and I believe the others in the meeting that we made the correct decision, because Mike still did not comprehend the seriousness of the issue at hand. As well as, uh, um, when he tried to explain his calculations for the fuel that evening it was also a concern for me, uh, because of the fact that he ordered 540 pounds to bring the aircraft up to a fuel level of 600 pounds, it was a clear indication that he had very little fuel onboard. Regardless of whether it was just under the limits it was a very low fuel quantity, and it would indicate, according to his calculations that it was lower than what he thought.

Q: So if he said to you that he ordered 540 pounds to bring it up to 600 pounds, that would mean that he had only 60 pounds of fuel left?

A: If he placed his order correctly, yes.

Q: And, how many gallons of fuel would that be?

A: Five hundred and forty pounds is 90 gallons.

Q: And, 600 pounds that he wanted to bring it up to, is how many gallons?

A: Six hundred pounds is a hundred gallons.

Q: And the difference between the ninety pounds that he wanted to add and the one hundred pounds that he thought he would get is what?

A: Ten gallons.

Q: Is ten gallons sufficient fuel to fly for 45 minutes?

A: No, it's not. The aircraft has a takeoff limitation, that you can't take off a Cessna 4022 with less than 240 pounds.

...

Q: Mr. Cooley suggested today that somehow you didn't give enough thought to the decision because you didn't speak with Jeff Sarmiento about how much fuel he had in the plane; why did you not speak with Jeff Sarmiento?

A: That wasn't a factor. And it, you know, the pilot is responsible to assure that fuel, adequate fuel for each leg that he flies not depend on what someone else had put in it prior in the day.

TR at 221-223, 224.

Phillips testified that John Kappeyne was hired as a pilot for Cape Air in Florida in 1992 or 1993. TR at 205. Kappeyne was a captain, but did not hold any other title. TR at 205. At least one other pilot had a problem with Kappeyne:

Q: Are there any pilots who complained to you about Mr. Kappeyne?

A: There was, I recall one pilot that complained about besides Mike, yes.

Q: And his name?

A: Eric Samson.

Q: Is Eric Samson still employed by Cape Air?

A: Yes.

TR at 223-224.

Phillips also discussed pilots whose employment was terminated for safety issues without a related accident. TR at 225. One pilot was terminated in 2004 or 2005 for not following instructions from air traffic control. TR at 226. Another pilot was terminated in 2004 for an unsafe departure from Nantucket Airport and unprofessional interactions with fellow employees. TR at 227.

E. Testimony of Scott LaForge

Scott LaForge worked for Cape Air from 1994 until 2004. TR at 240. During his time at Cape Air, he was a line captain, check airman, training pilot and the Executive Vice President. TR at 240. His duties included overseeing operational standards for the airline and working in the training department as a check airman and training pilot. TR at 241. As a check airman, he is certified by the FAA to certify pilots by taking them on check rides and assuring that they meet certain standards and criteria for safe operating practices. TR at 240. He is now the Chief Executive Officer and President of Island Airlines. TR at 238.

LaForge testified that a general operations manual (or GOM) is given to each pilot and includes safety standards. TR at 241. He stated that safety is “[n]umber one paramount to everything, safety number one.” TR at 241.

Each pilot that worked for Cape Air has to go on a check ride every six months. TR at 242. The rides are scheduled in advance and the pilots are given at least one week notice to prepare. TR at 242. LaForge conducted a check ride for the Complainant on June 22, 2002. TR at 243; RX6. This was the second scheduled check ride because:

I recall a check ride that I tried to initiate with him...where we were having difficulty through what we call the oral written portion. Before we fly we ask questions, it could be some written questions or numbers he'd be asked to answer, and there was some difficulty on a session so I actually suggested we stop right there because he was not prepared for that. And I, at that point, I don't recall if I gave him additional information to study or instructed him to study the information that he already possessed. ... I recall there was some struggles on airspeeds. ... From that point I moved on to ask questions about systems. I asked questions about fuel system and the electrical system, and there were enough struggles there that I called the session off.

TR at 244. The Complainant passed the June 22 check ride, but LaForge still had concerns:

The ride met standards. What I don't -- um, it met standards but I felt that, uh, for someone who had been flying the airplane already, commercially with scheduled passengers and had at that point hundreds of hours in the aircraft, I felt there was, if you will, rust. And so I was, uh, I do recall after the flight encouraging Mike, and if anything ... that I would help schedule the next training session and check ride up at headquarters in Hyannis where there were just more facilities and training aids.

TR at 245.

After the Complainant failed the check ride with Dan Duda, LaForge provided him with additional training. TR at 246. The training took place in Florida to bring the Complainant up to the required standards. TR at 248. After approximately six and a half hours of in flight training, LaForge felt that the Complainant was ready to take another check ride:

Q: Why did you engage in this effort with Captain Cooley to take him out for three days and review the flows and procedures with him?

A: Because I'm a nice guy? I'm not sure. I believe it was, I thought -- I didn't think it would take six and a half hours to bring him up to standard. I've been doing this for a lot of

years. I thought I could bring him in a comfortable environment, back to his own back yard. He was up in Hyannis at headquarters, I thought maybe he was intimidated up there, even though it was originally my idea to send him up north where we have simulators and just, you know, the best of training aids available, nice ground school environment, classroom. So then I thought, "Well, maybe I can help him, bring him back to his back yard right here in Naples." I never thought it would be six and a half hours of flying time.

TR at 250-251. The Complainant then passed the retest ride on November 30, 2002. TR at 251.

On November 30, 2003, LaForge and Edward Kelly took out a plane with the call letters 69SC for check rides. TR at 253. This is the same plane that the Complainant flew the day before on November 29. RX13. LaForge and Kelly picked up the plane from the Fort Myers hanger:

Q: And what did you observe about the plane?

A: What I observed, as Captain Kelly and I walked towards the aircraft, immediately was the rudder on the vertical fin was swaying in the wind. And I also observed that none of the wheels were chocked, no blocks of wood under the wheels to prevent the aircraft from rolling.

Q: Why is it important to secure the rudder?

A: It's a very large fin that will sway freely, and when on the ground, meaning when the aircraft is not flying, if the wind, the ground wind is coming at the tail it can actually rip that rudder fin off and/or damage it, which of course can create a flight safety problem.

...

Q: And what was the appearance on the inside of the plane?

A: The appearance of the inside I immediately noted that seatbelts were on the floor, meaning that they were just left the way the last passengers got off the aircraft, it was untidy inside. I went up into the cockpit, and because I was particularly in tune now with no rudder control lock, I found that there was no yoke lock, the lock that would -- it's kind of an angled pin that would lock the steering wheel if you will to keep the other controls from being damaged on the ground, that was not installed.

...

Q: And, when you noticed it what did you note about the frequency of the radio?

A: It was actually Captain Kelly. What happened is, when I got on the aircraft with Captain Kelly; he was actually still outside the aircraft. I initially entered the cabin and saw this

untidiness, no control lock; that disturbed me. At that point I put on the batter[y] switch to check the fuel level, and to make, ascertain that there was adequate fuel for our flight, and looked at the fuel gauge. When I cited very low fuel in the aircraft I actually called to Captain Kelly to observe what I am observing. That sort of drove some discussion about how the aircraft was left. And at some point, whether it was immediately at that stage or when the radios were turned on -- probably when the radios were turned on to call for fuel Captain Kelly noted the navigation frequencies.

Q: And what navigation frequency was it on?

A: They were on Tampa. They were not on Fort Myers' frequency.

...

Q: Do you have a recollection of what fuel you observed recorded on the fuel gauge?

A: I remember -- yes. I remember eight [on one side] and thirteen gallons [on the other side].

...

Q: And, so when you observed this fuel gauge showing eight gallons on one side and thirteen on the other, what was your reaction?

A: I was very uncomfortable and was questioning my own eyes, is why I actually at that point called Captain Kelly in. I actually tapped the side of the gauge too because it was actually lower than that, probably by a gallon or two, but by tapping the gauge it helped bring the level up just a little bit more to see am I seeing things, and that's sort of the nature of the gauge. So a little light tap-tap brought it up another gallon or so, which gives a very, from my experience, accurate reading. So it was very low, which told me someone had to land with that fuel amount. And we also have a company policy at the time that we would fuel the aircraft at night to prepare for the next day. I don't recall what Fort Myers would be but it was either fifty gallons a side, 45-50 gallons a side should have been what I'd been looking at based on a company procedure that we had on that, of expectations.

Q: Now when you made the observations of the fuel gauge and were concerned at the low amount of fuel, did you at that point yet know who the pilot had been?

A: No, I did not.

...

Q: And, after you ordered fuel, did you make any calculation with the new fuel to confirm your original observation?

A: I did. I tried to order a fairly even number of fuel, gallons of fuel per side, so I could take what I ordered, and then take what

I visually saw and look for the similar or approximate total to be reassured that the gauge was accurate.

TR at 254-258. According to LaForge, the plane only contained enough fuel to operate for twenty to thirty minutes. TR at 266. LaForge then contacted Steve Phillips to inform him of his findings. TR at 260.

LaForge testified that he did not recall the Complainant making any safety complaints to him prior to November 30, 2003. TR at 262. After discovering the plane short on fuel, LaForge spoke with the Complainant:

Q: Okay. And can you tell us what Captain Cooley said to you in that conversation about the fuel?

A: ...I recall that Captain Cooley called me after he was queried by, mostly Steve Phillips, it was after and so he called me, to discuss a little bit about -- he seemed upset and probably concerned in what I had reported.

Q: And did he try and explain why he landed with that amount of fuel?

A: He did, and I thought it was a very comfortable conversation. I can remember him trying to convince me that this really wasn't a problem. And I said, ... I had never seen fuel gauges so low in a Cessna 402 in thirty years after coming in on a flight. So I just told him, "Boy, those fuel gauges were really low." And, you know, "What was your thinking, because from pilot to pilot even you were flying certainly at dusk into the evening, and what if there had been a problem, what if you had to divert to another airport, there was just no cushion of fuel."

Q: And what did he say to you?

A: Well, I remember him saying that, uh, I was -- in my own words -- he was fully aware. He indicated he was fully aware that there were airports all along the way, that he'd be flying over if he ever felt there was a problem, with low fuel he could always land at the airport. ...

Q: Were you still concerned about it after the conversation you had with Captain Cooley?

A: Well yes, because I remember talking about gallons of gas. ... I was trying to pin him down like to see if he understood that a gallon of gas weighed six pounds... So, "How many gallons did you order? What were the pounds?" He said, "Well I don't know I need a calculator." I said, "C'mon." I said, "These are basic numbers that as student pilots we learn, six pounds a gallon, and these are numbers are divisible by six." ... And I could remember getting fairly animated in the phone call saying, "You're having difficulty with this. That's why

people are feeling uncomfortable.” That was sort of the gist of the conversation.

TR at 262-265.

F. Testimony of Linda Markham

Linda Markham is the Vice President of Human Resources at Cape Air and has worked for the company for seven years. TR at 271. Her duties include employee relations, including terminations, and overseeing ground training. TR at 272. Markham helps to conduct annual “town meetings” at the different locations of Cape Air to discuss safety and other employee issues and the company holds safety summits to discuss safety and compliance with their employees. TR at 274-275, 281.

Markham testified that Cape Air has a relationship with Jet Blue in which Jet Blue passengers fly a segment of their flight on Cape Air. TR at 276. The relationship allows Jet Blue to conduct audits of Cape Air, including emergency response drills. TR at 277. Markham also noted a safety concern regarding power settings for which the company shut down operations until the engines were repaired and the settings were changed. TR at 278. The company held a press conference in the maintenance department to explain the shutdown. TR at 279. She stated that the company has a very good safety record, there has been one accident since she has been with the company, and there were only two more before she arrived. TR at 279-280. The company also has a safety report form which employees can submit in hard copy or on-line anonymously. TR at 281-282.

Respondent’s exhibit 3 lists the number of discrepancies filed by each pilot for the six planes that the Complainant flew. RX3. Of the pilots listed in the summary, only three pilots were terminated by Cape Air: (1) the Complainant, (2) a pilot who failed to follow directions from an airport tower, and (3) a pilot who was rude to a fellow employee and started the plane with a ramp agent planeside. TR at 285-287. No one was injured in the safety violations by the three pilots who were terminated. TR at 287. The rest of the pilots listed in RX3 either still work for Cape Air or left voluntarily. TR at 287. Markham testified that confidence in the pilot in command is very important for their flights because they run single pilot operations, so the pilot is the only one on the plane who can fly. TR at 288.

Markham first learned of the concerns about the Complainant from Steve Phillips. TR at 289. She was then involved with the decision to terminate the Complainant’s employment: “The basis of the decision was that we felt it was, again a significant safety issue, um, and it was fully supported by myself and, um, Larry Gaultieri, and at the time, Ed Braz.” TR at 289. She noted that in deciding to terminate the Complainant’s employment, there was no discussion of any complaints that he had made. TR at 290. Markham was also present when the Complainant came to Hyannis on December 12, 2003 to discuss his termination:

Q: What was your reaction in listening to Mr. Cooley describe what had occurred?

- A: My reaction was I was -- my first reaction was I was kind of, um, shocked that he was, um, unprepared for the meeting, um, he seemed unorganized, he seemed not to have a lot of facts straight. Steve and Larry, you know, tried several attempts to try to get Mr. Cooley to explain, you know, how much fuel he had and, um, he did use a calculator and kind of fumbled. ... But he had a very difficult time really communicating to us, I think effectively on really what happened that day.
- Q: Did you have confidence in him as a pilot as a result of that meeting?
- A: I did not.

TR at 292-293. Following the meeting, Markman, Steve Phillips and Larry Gaultieri determined that the right decision had been made and they would not overturn the termination. TR at 293.

G. Other Evidence

1. Mechanical Interruption Reports

The Complainant submitted eight mechanical interruption reports that he filed during his time at Cape Air:

- September 9, 2001: Door warning light came on during take off and take off was aborted. CX7a.
- November 7, 2001: After lift off and gear retraction, the red gear unlocked light remained illuminated. Landed without incident. CX7b.
- November 20, 2001: Noticed liquid coming from a light on the instrument panel. Elected to land in Naples instead of continuing on to Fort Myers. CX7c.
- November 20, 2001: Light alternator failure lights came on followed by low voltage light. Elected to return to airport to evaluate problem. CX7d.
- November 20, 2001: Fuel observed on preflight was lower than desired, so taxied back to the gate to take on more fuel. CX7e.
- September 22, 2002: Right mag could not keep the engine running smoothly during pre-take off. CX7f.
- January 6, 2003: Altitude indicator failure. CX7g.
- July 12, 2003: Right engine became rough and vibrated during flight, so returned to airport to resolve the problem. CX7h.

2. Summary of Flight Logs in RX1

The following charts show the number of discrepancies noted on flight logs by pilot:

Aircraft 69SC for the period of 10/19/03 to 11/29/03 RX3a

Pilot's Name	Days	Flights	Discrepancies
Antoine Akoury	1	2	1

Pilot's Name	Days	Flights	Discrepancies
Spencer D. Day	4	6	1
John Kappeyne	5	25	4
Michael J. Szymanski	10	50	5
Peter C. Smith	9	54	4
Samuel J. Mason	1	3	0
Sean Gear	2	4	0
David Curry	1	7	0
Michael Cooley	5	21	0

Aircraft 7037E for the period of 1/1/01 to 12/31/03 RX3b

Pilot's Name	Days	Flights	Discrepancies
Samuel J. Mason	1	3	1
Michael J. Szymanski	3	18	4
Suzanne Daily	8	31	5
David Ribiero	5	30	4
Michael Balderi	5	19	3
Craig A. Bentley	22	121	15
Sean H. Maloney	11	81	10
Michael Soccoccio or Michal J. Szymanski	8	33	4
Spencer D. Day	12	73	6
Elin Heggland	14	93	5
Sean Gear	29	117	6
John Kariotis	5	20	1
Peter C. Smith	44	181	7
Brenda Birr	12	81	3
Michael Cooley	45	173	6
John Kappeyne	51	196	5
Dieter Becker	2	10	0
James Kubesch	6	31	0
Antoine Akoury	7	35	0
David Curry	9	55	0

Aircraft 258PB for the period of 1/1/01 to 12/31/03 RX3c

Pilot's Name	Days	Flights	Discrepancies
Craig A. Bentley	7	39	7
Sean H. Maloney	13	73	11
Samuel J. Mason	15	108	11
James Kubesch	3	11	1
Spencer D. Day	11	47	4
Michael Soccoccio or Michal J. Szymanski	3	14	1

Pilot's Name	Days	Flights	Discrepancies
Sean Gear	10	43	3
John Kariotis	7	31	2
Michal J. Szymanski	10	49	3
John Kappeyne	80	343	20
Michael Balderi	6	31	1
Peter C. Smith	57	255	7
David Ribiero	11	59	1
Elin Heggland	13	70	1
Michael Cooley	39	202	2
Antoine Akoury	11	41	3
David Curry	2	12	0
Brenda Birr	8	61	0

Aircraft 67786 for the period of 1/1/01 to 12/31/03 RX3d

Pilot's Name	Days	Flights	Discrepancies
Dieter Becker	2	5	2
Michael Soccoccio or Michal J. Szymanski	4	13	2
Sean Gear	27	103	6
Peter C. Smith	202	900	42
John Kappeyne	157	707	21
Michael Cooley	129	544	11
Michael Soccoccio	1	1	0
Antoine Akoury	1	2	0
Brenda Birr	3	17	0

Aircraft 106CA for the period of 1/1/01 to 12/31/03 RX3e

Pilot's Name	Days	Flights	Discrepancies
Sean H. Maloney	2	13	3
Brenda Birr	4	10	2
Michael J. Szymanski	6	23	4
Craig A. Bentley	3	22	3
John Kappeyne	86	356	19
Suzanne Daily	3	27	1
Sean Gear	22	82	2
Dieter Becker	27	138	3
Peter C. Smith	87	431	9
Craig Bentley or Conrado Beckles	24	207	3
Michael Cooley	70	293	4
Antoine Akoury	17	87	1
David Curry	1	1	0

Pilot's Name	Days	Flights	Discrepancies
Michael Balderi	2	3	0
Spencer D. Day	4	11	0
Michael Soccoccio or Michal J. Szymanski	5	18	0
David Ribiero	6	52	0

Aircraft 401TJ for the period of 1/1/01 to 12/31/03 RX3e RX3f

Pilot's Name	Days	Flights	Discrepancies
Spencer D. Day	2	7	2
Michael Balderi	3	20	4
Sean H. Maloney	19	112	18
Sean Gear	27	121	12
Craig A. Bentley	24	157	12
Elin Heggland	6	40	3
Michael Soccoccio or Michal J. Szymanski	9	28	2
David Curry	6	30	2
Samuel J. Mason	12	41	2
Michael Cooley	53	221	9
Peter C. Smith	94	379	14
Brenda Birr	9	66	2
John Kappeyne	100	485	11
James Kubesch	4	13	0
Joan Kariotis	2	15	0
Suzanne Daily	2	16	0
David Ribiero	6	23	0
Antoine Akoury	13	54	0

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of the Law

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

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

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

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

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

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

49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(b)(1)-(4). An employee's complaint may be oral or in writing, but must be specific in relation to a given practice, condition, directive, or event. *Peck v. Safe Air International Inc.*, ARB Case No. 02-028, ALJ Case No. 2001-AIR-00003 (ARB January 30, 2004). The complainant must have a reasonable belief that his complaint is valid. *Id.*

The AIR21 Act requires a complainant to establish a *prima facie* showing that the protected activity described at 49 U.S.C. § 42121(a) was a contributing factor in the unfavorable personnel action taken against him. *Taylor v. Express One International, Inc.*, ALJ Case No. 2001-AIR-00002 (Feb. 15, 2002). Once the complainant presents a *prima facie* case, then the respondent must "demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Stoneking v. Avbase Aviation, LLC*, ALJ Case No. 2002-AIR-00007, slip op. at 2 (Mar. 7, 2003); 49 U.S.C. § 41212(b)(2)(B)(iv). The respondent need only articulate a legitimate reason for its action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

If such evidence is presented, then the complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is a pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In addition to discounting the employer's explanation, "the fact finder must believe the [complainant's] explanation of intentional discrimination." *Id.*; *see also*, *Blow v. City of San Antonio, Texas*, 236 F. 3d 293, 297 (5th Cir. 2001). The proper focus of the inquiry is whether the complainant has shown that the reason for the adverse action was his protected safety complaints. *Pike v. Public Storage Companies Inc.*, ARB Case No. 99-071, ALJ Case No. 1998-STA-00035 (ARB Aug. 10, 1999). "When a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not

proven his claim of discrimination and it is unnecessary to rely on a ‘dual motive’ analysis.” *Mitchell v. Link Trucking, Inc.*, ARB Case No. 01-059, ALJ Case No. 2000-STA-00039, slip op. at 2 (ARB Sept. 28, 2001).

If the employer shows that the adverse action was taken for reasons other than the protected activity, then the presumption ceases to be relevant and falls out of the case. *Burdine*, 450 U.S. at 253, 256. Instead, the complainant must prove the same elements as required for the *prima facie* case, with the exception that complainant must prove them by a preponderance of the evidence and not by mere inference. *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ Case No. 2002-AIR-00008 (ARB Jan. 31, 2006); *Dysert v. Sec’y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Until the complainant meets his burden of proof, the respondent need only articulate a legitimate business reason for its action. *Clemmons v. Ameristar Airways, Inc.*, ARB Case Nos. 05-048, 05-096, ALJ Case No. 2004-AIR-00011, slip op. at 9 (ARB June 29, 2007). The onus falls on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action.

B. Analysis

1. Adverse Action

The Complainant must establish that a reasonable employee or job applicant would find the employer’s action “materially adverse,” which is described as “actions [that are] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Hirst v. Southeast Airlines, Inc.*, ARB Case Nos. 04-116, 04-160, ALJ Case No. 2003-AIR-00047 (ARB Jan. 31, 2007) (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also *Melton v. Yellow Transportation, Inc.*, ARB Case No. 06-052, ALJ Case No. 2005-STA-00002 (ARB Sept. 30, 2008) (“[T]he test is whether the employer action could dissuade a reasonable worker from engaging in protected activity”).

It is uncontroverted that the Complainant was terminated from his employment with the Respondent. I find that his discharge constitutes a materially adverse action.

2. Protected Activity

The first requisite element to establish illegal discrimination against a whistleblower is the existence of a protected activity. The Secretary, United States Department of Labor, has broadly defined “protected activity” as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it does not matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.” *Minard v. Nerco Delamar Co.*, ALJ Case No. 1992-SWD-00002, slip op. at 8 (Sec’y Jan. 25, 1995). The alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. United States Dep’t of Labor*, 143 F.3d 1292 (6th Cir. 1998) (citing *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995)). In other words, the complainant's concern must at least “touch on” the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, ALJ Case No. 1991-SWD-00002, slip op. at 8-9 (Sec’y Feb. 1, 1995); *Dodd v. Polysar Latex*, ALJ Case No. 1988-SWD-00004 (Sec’y Sept. 22, 1994).

Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient. *Kesterton v. Y-12 Nuclear Weapons Plant*, ALJ Case NO. 1995-CAA-00012 (ARB Apr. 8, 1997).

A protected activity under AIR21 has three components. First, the report or action must involve a purposed violation of a Federal law or FAA regulation, standard or order relating to air carrier safety and at least “touch on” air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complainant must communicate his safety concern to either his employer or the Federal Government. 49 U.S.C. § 42121(a)(1).

In ERA cases, internal complaints made to company supervisors concerning safety and quality control have been held to be protected activities. *See Bassett v. Niagara Mohawk Power Corp.*, ALJ Case No. 1985-ERA-00034 (Sec’y Sept. 28, 1993). Because of the statutory connection between cases under ERA and AIR 21 Act, I find that holding pertinent to the instant matter, and conclude that specific complaints of safety made to Complainant’s superior could constitute protected activity.

However, carrying out of required, safety-related duties is not, standing alone, protected activity under AIR21. Rather, to be protected, the employee must provide information to the employer or to the federal government that relates to FAA orders, regulations or standards, or other provision of law related to air carrier safety. Thus carrying out duties to ensure safety does not, standing alone, constitute protected activity. In *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109, ALJ Case No. 2004-AIR-28 (ARB Jan. 30, 2008), the ARB found that the Complainant did not engage in protected activity regarding incidents in which information was not provided to the employer or to a Federal entity, but that he did engage in protected activity when he refused to override a maintenance crew’s decision to take a plane out of service because it would have been “wrong” (i.e., it would have violated the FAA rule at 14 C.F.R. § 135.443).

The Complainant’s claim of protected activity in this case is based on his completion of safety reports through flight log discrepancies and mechanical interruption reports. His main allegation is that he filed more flight discrepancies and mechanical interruption reports than other pilots in the Florida division of Cape Air, and was fired in retaliation for filing the safety reports. However, there is no evidence to support his claim. The charts above summarizing the number of discrepancies filed in flight logs by pilot show that the Complainant did not file as many discrepancies as some pilots who are either still employed by Cape Air or who left the company voluntarily. The Complainant also provided eight mechanical interruption reports that he filed between September 9, 2001 and July 12, 2003, but he stated that he did not how many reports were filed by other pilots that worked for Cape Air. TR at 123. Furthermore, the Complainant testified that Cape Air pilots are required to fill out flight log discrepancies and mechanical interruption reports when they are warranted. TR at 190. I find that the argument that he filed more safety reports than other pilots is unsubstantiated and not specific enough of a complaint to rise to protected activity.

Furthermore, the flight log discrepancies and mechanical interruption reports were given to Cape Air’s maintenance crew, but were not reported to the Complainant’s superiors or the

FAA. TR at 190, 200-204. The Secretary has held that knowledge of a complainant's protected activity on the part of the alleged discriminatory official is an essential element of a complainant's case. *Martin v. Akzo Nobel Chemicals, Inc.*, ALJ Case No. 2001-CAA-00016 (Dec. 20, 2001), *aff'd*, ARB Case No. 02-031 (July 3, 2003). The complainant must show that those responsible for the adverse action had actual or constructive knowledge of the alleged protected activity. *Mace v. Ona Delivery Systems, Inc.*, ALJ Case No. 1991-STA-00010 (Sec'y Jan. 27, 1992). Steve Phillips testified that he was unaware of how many mechanical interruption reports were filed by the Complainant and that discrepancies and mechanical interruption reports usually do not come to his attention. TR at 200-204. The Complainant also never contacted Ed Zeglen, General Manager of Maintenance, Linda Markham, Vice President of Human Resource, or Scott LaForge, Executive Vice President, to voice safety concerns. TR at 195, 290, 262.

The Complainant testified that a fellow pilot in Florida, John Kappeyne, told him that he was costing the company money by completing so many write-ups and gave him the impression that he should stop filing the write-ups. TR at 43. However, Kappeyne is not his supervisor. The Complainant also stated that Cape Air management called him in reference to some discrepancies that he filed, but he did not recall specific issues that they called about. TR at 118. He testified that no one else at Cape Air, including his supervisor Steve Phillips, told him that he was filing too many discrepancies or costing the company too much money. TR at 173.

The Complainant did note two instances where he "took heat" for writing up discrepancies or mechanical interruptions. First, he noted a discrepancy in which he wrote-up a heater issue. After John Kappeyne took issue with him taking the plane out of service for the heater to be fixed, the Complainant spoke with Evan Cushing, Dave O'Connor and his supervisor Steve Phillips. TR at 118-119. Although Complainant felt pressure from a more senior pilot, Kappeyne, to not take the plane out of service, the heater was fixed. Furthermore, no actions were taken that violated a safety regulation since the plane was taken out of service so that the heater could be fixed. Evan Cushing, the director of training at Cape Air, also told the Complainant that he agreed that the airplane should be taken out for service.

Second, the Complainant mentioned an instance when Steve Phillips, his supervisor, called him regarding a mechanical interruption report dated November 20, 2001 when he returned the plane to fix a double alternator failure. TR at 123. The Complainant testified that Phillips wanted to know why he took the action that he did:

Q: But you don't think it's inappropriate for a chief pilot to call a pilot and just say, "I got this. Can you just fill me in, what happened?" That's not a bad thing to do is it?

A: It's unusual, as far as my experience, uh, does [sic]. But no, I don't think, uh, he was wanting, you know the specifics. He also asked me why didn't eye [sic], um, get the manual, um, out, and the implication was to continue the flight on. He said there's, you know, "Did you reset the breakers?" And, basically the implication was he was concerned that I aborted the flight and came back.

Q: But he didn't say that to you, did he?

A: He didn't call up and say, "I'm concerned that you aborted the flight and turned back," no.

Q: He asked what happened, and he asked if you took certain actions after it happened right?

A: To continue the flight, yes.

Q: And, he didn't say anything else other than okay, right?

A: Well he realized that, um, it was my decision to not continue to fly, he was making the suggestion that I could have, and it ended at that.

TR at 124-125. There is no indication that Steve Phillips wanted the Complainant to engage in any unlawful activity or stop filing safety reports.

The Complainant failed to indicate that any of the issues he raised violated an FAA order, regulation or standard and the Complainant must relate an event to a violation of a federal aviation safety regulation in order for it to be protected activity. *Lanigan v. ABX Air, Inc.*, ALJ Case No. 2007-AIR-00010, slip op. at 17 (April 30, 2008). Moreover, "competently or aggressively carrying out one's duties to ensure safety does not by itself constitute protected activity." *Id.* Thus, the Complainant was merely carrying out his duties to ensure the safety of the aircraft he was flying and he has failed to relate any of the incidents to violations of federal aviation safety regulations, so the incidents do not constitute protected activity.

3. *Legitimate Business Reason for Adverse Action*

Assuming, *arguendo*, that the Complainant had demonstrated that his protected activity contributed to Cape Air's adverse employment action, the Respondent then has the burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. 49 U.S.C. § 42121(b)(2)(B)(iv). Relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1979.109(a).

In the instant matter, Steve Phillips, the Complainant's supervisor, and Linda Markham, Vice President of Human Resources, testified that the Complainant's employment was terminated for his poor good judgment during the events of November 29, 2003. Allegedly, the Complainant completed a flight with less than the FAA minimum required fuel.

On November 29, 2003, the Complainant flew a Cessna 402C between Fort Myers and Tampa three times. TR at 145-146. The next morning, Scott LaForge and Ed Kelly, two Cape Air pilots, found that the plane flown by the Complainant the day before was low on fuel, its tires were not secured, the rudder was unlocked, and the plane's radio was not set to the correct frequency. TR at 254-256. According to LaForge, the plane only contained enough fuel to operate for twenty to thirty minutes, instead of the forty-five minute supply required by law. TR at 266. While speaking with the Complainant, LaForge told him that he had "never seen fuel gauges so low in a Cessna 402 in thirty years after coming in on a flight." TR at 262. The pilots then contacted Steve Phillips to inform him of their findings. TR at 260.

After listening to the voicemail from LaForge concerning an “alarmingly low quantity of fuel,” Phillips spoke with the Complainant about whether he had fueled the plane the previous night. TR at 212. The Complainant informed Phillips that he had ordered fuel on one of the legs of his flight and at the end of the night, but that it had not arrived either time. Phillips then discussed the situation with Ed Braz, Larry Gaultieri and Linda Harkham and the decision was made to terminate the Complainant’s employment for poor judgment and poor performance during training and check rides. TR at 219. Phillips testified that Cape Air “is a safety-plus compliance company that does things conservatively and safely, above and beyond what’s required of us, and to use judgment to fly the aircraft at night with just below the required legal limits is not how we operate.” TR at 220-221. Phillips stated that there was no discussion of the Complainant’s safety report filings while determining whether to terminate his employment. TR at 223. He also mentioned two other pilots who were terminated for safety issues that did not have a related accident. TR at 225.

Once the Complainant was informed that his employment was terminated, he traveled to Cape Air in Massachusetts to speak with Phillips, Linda Markham, and Larry Gaultieri. Phillips testified that the meeting reinforced the decision to terminate because the Complainant “did not comprehend the seriousness of the issue at hand” and had problems calculating the amount of fuel correctly. TR at 221-222.

Linda Markham testified that the decision to terminate was based on a “significant safety issue.” TR at 289. She also noted that there was no discussion of the safety reports filed by the Complainant. TR at 290. As a result of the meeting with the Complainant in Hyannis, Markham no longer had confidence in him as a pilot. TR at 293.

I find that the Respondent has met its burden of production and has stated a legitimate business reason for its adverse action against the Complainant. The record establishes that Respondent would have discharged Complainant due to the perception that he had poor judgment, regardless of whether Complainant had participated in protected activity.

4. *Pretext for Discrimination*

Since the evidence does not support a finding that Complainant engaged in protected activity, the issue of whether Respondent’s stated legitimate business reasons were pretextual is moot. However, even if the Complainant could show that filing mechanical interruption reports constituted protected activity, the last report was filed in July 2003, four months before he was terminated. *See Stoneking*, 2002-AIR-00007, slip op. at 14 (holding that “with such a gap in time – [five months] that it cannot even raise a circumstantial inference” that the protected activity led to adverse employment action). There is only evidence that Steve Phillips was informed of the November 2001 mechanical interruption report. During 2002, the company went to great lengths to provide additional training to the Complainant after he failed a check ride. It is unlikely that the company would have incurred the expense of training the Complainant if it intended to fire him in retaliation for filing safety reports filed in 2001.

Furthermore, protected activity has been found not to be a contributing factor to the decision to terminate employment when, among other things, other pilots made similar complaints and none of the other pilots had any disciplinary actions taken against them. *See Herchak v. American West Airlines, Inc.*, ALJ Case No. 2002 AIR-00012, slip op. at 19 (Jan. 27, 2003).

C. Damages

Since the Complainant has failed to carry his burden of proof, the issue of damages is not relevant.

CONCLUSION

The Complainant failed to establish that he engaged in protected activity that contributed to the termination of his employment with Cape Air. Complainant did not establish that the adverse personnel action was a pretext for any of Complainant's filings regarding Respondent's safety violations and or procedures. Therefore, Complainant has failed to prove the essential elements of his case. Accordingly, I find that Respondent did not violate the employee protection provisions of the Act.

ORDER

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

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ahk
Newport News, Virginia

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law

Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

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