

**U.S. Department of Labor**

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**Issue Date: 23 October 2008**

Case No.: 2007-AIR-00004

**BRIAN WILLIAMS**

Complainant

v.

**AMERICAN AIRLINES**

Respondent

Appearances: Michael G. O'Neill, Esquire  
For the Complainant

Donn C. Meindertsma, Esquire  
For the Respondent

Before: ADELE HIGGINS ODEGARD  
Administrative Law Judge

**DECISION AND ORDER**

**Jurisdictional Basis**

This proceeding arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Public Law 106-181, 49 U.S.C. § 42121 (“AIR21” or “the Act”), as implemented under regulations promulgated at 29 C.F.R., part 1979.

**Procedural History**

On or about October 20, 2004, Brian Williams, the Complainant, filed a Complaint with the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against his employer, American Airlines (“AA” or “Respondent”). On December 14, 2006, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, issued the Secretary’s Findings and Order. The Secretary found that the Respondent had violated the Act because the Complainant “suffered unfavorable personnel actions” and the Respondent’s managers “constrained, threatened and singled out Complainant” and subjected him to harassment “in relation to his protected acts.” Findings at 7. The Secretary ordered relief for the Complainant.<sup>1</sup>

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<sup>1</sup> The relief the Secretary ordered consisted of the following: expungement of the CR-1 dated February 15, 2005 (regarding ETOPS incident) from the Complainant’s records; payment to the Complainant of \$10,000 for “mental pain and suffering;” posting of a copy of poster FAA-WBPP-01 at each of the Respondent’s facilities in the United States for a period of at least 180

Thereafter, by correspondence dated January 4, 2007, the Respondent objected to the Administrator's findings and requested a hearing before an administrative law judge. The matter was subsequently assigned to me.<sup>2</sup>

On August 2, 2007, the Respondent filed a Motion for Summary Decision, which the Complainant opposed. The Complainant filed a Cross Motion for Summary Affirmance. On September 6, 2007, the Respondent filed a Motion in Limine seeking to exclude evidence not pertaining to alleged adverse actions the Complainant identified in his initial complaint to OSHA. In the Motion in Limine, Respondent's counsel expressed frustration that OSHA had apparently permitted the Complainant to add new allegations to his initial complaint, with the result that OSHA did not issue a final report until December 2006.

By Order dated September 24, 2007, I denied the Motions, but informed the parties I would not entertain evidence on any alleged actions that occurred after February 15, 2005, the most recent date mentioned in the OSHA investigation.<sup>3</sup>

Hearing was held before me in New York City on January 22, January 23, and February 23, 2008.<sup>4</sup> The parties submitted post-hearing arguments.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law. I have considered all of the evidence of record, including items not specifically referred to or discussed herein.

### **The Parties' Contentions**

As set forth in their post-hearing briefs, the parties' principal positions are as follows:

The Complainant asserts the following:

- In addition to the Complainant's complaint to the FAA, the Complainant's complaint to Human Resources about the torque wrench incident constituted protected activity under the Act. Complainant's brief at 8-9.

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consecutive days; and posting of a copy of the Secretary's decision, with personal identifying information deleted, at the Respondent's facility at JFK Airport for at least 180 consecutive days.

<sup>2</sup> This matter was initially assigned to Administrative Law Judge Paul H. Teitler. Judge Teitler died on May 10, 2007, before a hearing was held. On May 22, 2007, I informed the parties of my assignment to the matter.

<sup>3</sup> By Order dated December 17, 2007, I informed the parties I would entertain testimony on two specific incidents that occurred after February 15, 2005, because these incidents were mentioned in OSHA's final report. It appears that one of these incidents in fact occurred in August 2004, and OSHA's report refers to an incorrect date (the "cargo compartment incident"), see discussion below. No testimony was offered as to the other event, which allegedly occurred in December 2005.

<sup>4</sup> Citations to the hearing transcript are designated as "T."

- The Respondent subjected the Complainant to “a pattern of negative and disparate treatment.” Brief at 5.
- Issuance of CR-1s to the Complainant constituted adverse employment actions. Brief at 12-15.
- The Complainant’s protected activity was a factor causing the Respondent’s subsection of the Complainant to adverse employment actions and other negative treatment. Brief at 16-17.
- The Complainant has established an entitlement to damages due to the Respondent’s conduct. Brief at 26.

The Respondent’s position is as follows:

- The Complainant did not establish that he engaged in protected activity under the Act. Respondent’s brief at 55-58
- The Complainant did not meet his burden to prove the Respondent retaliated against him for his protected activity. Brief at 22-29
- The Respondent’s actions against the Complainant were not adverse, as a matter of law. Brief at 35-54
- The Complainant has not established any entitlement to damages under the AIR21 statute. Brief at 58-59

### Issues

The following issues are presented for adjudication:

- 1) Whether the Complainant engaged in protected activity, as defined by the Act;
- 2) Whether the Respondent was aware of the Complainant’s protected activity;
- 3) Whether the Respondent subjected the Complainant to adverse employment action;
- 4) If the Respondent did subject the Complainant to adverse action, whether the Complainant’s protected activity was a contributing factor to the Respondent’s adverse action;
- 5) Whether the Respondent subjected the Complainant to a hostile work environment;
- 6) If the Respondent subjected the Complainant to a hostile work environment, whether the hostile work environment was created in retaliation for the Complainant’s protected activity;
- 7) If the Complainant has established that the Respondent violated AIR21, whether the Respondent has established, by clear and convincing evidence, that it would have taken the same action in the absence of any protected activity;

- 8) If the Complainant has established a right to recovery under AIR21, what remedies should be adjudged?

### **Summary of the Complainant's Allegations**

The Complainant's case involves many allegations against the Respondent, American Airlines, and his former and current supervisors, who also were employed by the Respondent. For purposes of clarifying this Decision and Order, I summarize the Complainant's allegations as follows:

The Complainant was involved in an incident with his supervisor, A.J. Murray, on July 30, 2004. The matter involved the proper tool to be used to lock out a thrust reverser on an aircraft. The Complainant's position was that the only permitted tool was a dial-type torque wrench, because the applicable maintenance manual specified that type of tool. Mr. Murray's position was that a click-type torque wrench was acceptable. The Complainant refused to use a click-type wrench, and he and Mr. Murray got into an argument. During the argument, Mr. Murray told the Complainant that "getting the product out" was important and the Complainant's actions were interfering with that goal. Mr. Murray also used abusive language, and argued with the Complainant in front of other employees. Eventually a dial-type wrench was found, but because the Complainant's shift was ending, he did not participate in the repair. In this Decision, I will refer to the incident of July 30, 2004 as the "torque wrench incident."

Almost immediately after the incident, the Complainant contacted the FAA and the Respondent's Human Resources department, to complain about Mr. Murray's actions. According to the Complainant, he was concerned that Mr. Murray's attempt to get him to use the incorrect type of wrench showed willingness to compromise on safety.

The Complainant's initial complaint to OSHA was received on November 1, 2004. RX 1. The Complainant asserted that his complaints to the FAA and to Human Resources constituted protected activity under AIR21, and he averred that the Respondent subsequently violated AIR21 by subjecting him to various adverse actions and treating him differently from other mechanics. Subsequently, after receipt of the Complainant's initial AIR21 complaint, OSHA permitted the Complainant to supplement his initial complaint by adding additional allegations.

The Complainant's OSHA Complaint included the following alleged violations of AIR21:

- Issuance of a "first advisory," on November 1, 2004, based on the Complainant's alleged failure to document a temporary wheel replacement, on August 27, 2004. In this Decision, I will refer to this matter as the "wheel change incident".
- Discussions with supervisors regarding the Complainant's alleged pattern of lateness, on August 7, 2004 and other dates, and documentation of those discussions.

- Docking the Complainant's pay for arriving late, in a discriminatory manner, in September and October 2004.
- Failing to accurately record the Complainant's attendance, by overriding the "swipe-in" system, or permitting the system to inaccurately record the Complainant's attendance, at various dates and times.
- A CR-1 regarding the Complainant's failure to wear hearing protection while inspecting a cargo compartment, on August 30, 2004. In this Decision, I will refer to this matter as the "cargo compartment incident."
- A CR-1 regarding the Complainant's actions regarding the requirement for an ETOPS inspection after a brake change, on January 8, 2005. In this Decision, I will refer to this matter as the "ETOPS incident."
- Failing to apologize for subjecting the Complainant to a 29-F hearing in November 2004, but apologizing to a co-worker who also had been subjected to the same hearing.<sup>5</sup> In this Decision, I will refer to this matter as the "thrust reverser incident."

The OSHA Final Report addressing the Complainant's AIR21 complaint was not issued until December 2006. Pursuant to my Order of September 24, 2007, evidence was limited to the specific timeframe between July 2004 and February 2005. The parties submitted evidence on one matter that was not covered in the OSHA Findings, but which occurred in the relevant timeframe, which was as follows:

- Placing the Complainant on a "doctor's note restriction" regarding his use of sick leave, on January 6, 2005.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Summary of the Evidence**

#### **Documents Submitted by the Parties**

#### **Complainant**

The Complainant submitted the following exhibits, which were admitted: T. at 6.

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<sup>5</sup> Article 29-F of the union contract provides a right of union representation at any discussion with management regarding work performance, which may result in disciplinary action. See RX 20.

CX 1: American Airlines "M & E Bulletin," dated September 2005, regarding equipment to be used for wheel changes.

CX 2: Computer Printout, information on estimated time for brake changes (4.0 hours).

CX 3: Transcript of the Complainant's state workers' compensation hearing, March 15, 2006.

CX 4: Court and Panel Decisions in the Complainant's state workers' compensation case, dated March 21, 2006 and October 18, 2006 respectively.

CX 5: Summary Description of Aviation Safety Action Partnership (ASAP) program, dated April 1998.<sup>6</sup>

CX 6: Extracts from American Airlines GPM, Sections 02-01 (M&E Responsibilities Governing Maintenance Operations) and 02-02 (Maintenance Action Requirements/Responsibilities).

CX 7: Copy of 14 C.F.R. § 43.12 (Prohibiting falsification, reproduction, or alteration of aviation maintenance records).

CX 8: ASAP Form submitted by Complainant, dated January 14, 2005 (re: ETOPS incident).

CX 9: ASAP Form submitted by Complainant, dated August 29, 2004 (re: Wheel change incident).

CX 10: Notes of "Investigation Hearing" dated February 8, 2005 (re: ETOPS incident).

CX 11: Complainant's Attendance Records, weeks of 01/29/05-02/04/05 and 10/16/04-10/22/04.

CX 12: Discussion Records of conversations between Complainant and various supervisory personnel, covering time periods between July 7, 2004 and January 8, 2005.<sup>7</sup>

CX 13: Employee Hearing Form, dated August 28, 2004, memorializing informal hearing between Complainant and management (re: wheel change incident).

CX 14: Complainant's Attendance Records, with handwritten annotations, for the following weeks: 09/11/04-09/17/04; 09/04/04-09/10/04. Attendance records for other employees, with the Complainant's handwritten annotations, for the following weeks: 10/02/04-10/08/04; 09/11/04-09/17/04 (two employees).

CX 15: Complainant's Attendance Records, with handwritten annotations, for the following weeks: 08/28/04-09/03/04; 10/02/04-10/08/04.

CX 16: Computer Printout, Record of discussion between supervisor and the Complainant, dated October 19, 2004. Subject of discussion: Complainant's RL [reported late] record.

CX 17: First Advisory to Complainant, dated November 1, 2004. Subject: failure to document maintenance (tire removal) on August 28, 2004.<sup>8</sup>

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<sup>6</sup> The specific source of this document is not noted in the Exhibit.

<sup>7</sup> This consists of discussions regarding attendance dated 10/13/04; 8/9/04, 8/5/04, 1/6, 05, 11/2/04, and 10/19/04; and CR-1s dated 7/7/04 (hearing protection); 9/5/04 (cargo compartment incident); 10/20/04 (wheel change incident); 11/1/04 (wheel change incident); 11/24/04 (Complainant requested copies of records); 2/5/05 (ETOPS incident), with revised version dated 2/15/05; 1/25/06 (Complainant's rebuttal on ETOPS incident).

<sup>8</sup> This item relates to the wheel change incident. Based on the evidence of record, it appears the date of the incident cited in the document is incorrect. The evidence establishes this incident occurred on August 27, 2004. See CX 13.

CX 18: Doctor's Slip Requirement issued to Complainant, dated January 6, 2005, requiring, for 90 days, that Complainant present a medical note for any illness/injury causing absence from work.

### Respondent

The Respondent's admitted exhibits consist of the following:<sup>9</sup>

RX 1: Complainant's Complaint to OSHA, dated October 20, 2004, and OSHA's acknowledgment of receipt, dated November 1, 2004.<sup>10</sup>

RX 2: Respondent's "MAS System" notes, dated between May 26, 2003 and October 20, 2003 regarding Complainant's prior complaint about inappropriate workplace conduct by a supervisor.

RX 3: Minutes of meeting, dated May 31, 2003, regarding the Complainant's 2003 complaint (see RX 2).

RX 4: Letter to Complainant, dated August 18, 2003, from AA Management Advisory Specialist, regarding resolution of the Complainant's prior complaint.<sup>11</sup>

RX 7: Respondent's "MAS System" notes, dated between July 31, 2004 and August 9, 2004, regarding torque wrench incident. Complainant's complaint is logged in at 11:11 [a.m.] on July 31.

RX 8: Letter to Complainant, dated August 9, 2004, from Devon Erriah, AA Manager of Production, regarding resolution of the Complainant's complaint of July 31, 2004.

RX 9: AA Rules of Conduct, dated January 5, 2006.

RX 10: AA Standards of Business Conduct, Extract, undated (date document downloaded from internet: February 9, 2006).

RX 11: AA Work Environment Policy Overview, dated May 5, 2004; and extract from Employee Responsibilities Guide, "Reporting Harassment," dated July 16, 2004.

RX 12: ASAP Form submitted by Complainant, dated August 27, 2004 (re: wheel change incident)[same as CX 9, above]; letter to Complainant from AA's ASAP program

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<sup>9</sup> The respondent's exhibits were admitted except as follows: I sustained the Complainant's objection to RX 6 (Statement from supervisor, Anthony J. Murray, dated February 15, 2006, regarding torque wrench incident). T. at 456-58. I sustained the Complainant's objection to RX 34 (Letter to Complainant, dated April 20, 2006, from AA Investigator, responding to complaints Complainant made via e-mail on January 9, 2006). However, the parties stipulated that the Complainant met with an investigator from the company's Human Resources department in early 2006 to discuss his allegations. T. at 462-468. I sustained the Complainant's objection to RX 5 (Computer printout, complaint from AA pilot dated July 30, 2004, subject: "JFK Maintenance Slow Mechanic," describing torque wrench incident). T. at 629-30. The Respondent withdrew RX 35 (Handwritten "Statement of Grievance," submitted by Complainant, dated October 26, 2006, regarding crediting of sick leave for absences). T. at 468.

<sup>10</sup> This item consists of pages marked as follows: 1A, 2A, 1B, 1C, 1D, 2D, Addendum 1, Addendum 2, and Addendum 3. No pages are dated. The Complaint is not signed.

<sup>11</sup> I admitted these exhibits for the limited purpose of establishing that the Complainant made a complaint in 2003; it was investigated, and a communication was sent to the Complainant regarding the investigation. T. at 469.

manager dated November 17, 2004, informing him of issuance of FAA warning notice; letter to Complainant from FAA ASAP representative, dated November 26, 2004, informing him FAA letter of warning to remain in his file for two years.

RX 13: AA CR-1 (Discussion Record), dated September 15, 2004, from supervisor Philip Joshua, regarding Complainant's failure to complete required training and certifications.

RX 14: ASAP Form submitted by Complainant, dated September 15, 2004 (re: failure to obtain required certifications); letter to Complainant from AA's ASAP program manager dated November 17, 2004, informing him of issuance of FAA warning notice; letter to Complainant from FAA ASAP representative, dated November 26, 2004, informing him FAA letter of warning to remain in his file for two years.

RX 15: AA CR-1, dated October 20, 2004, regarding supervisor Joseph Ambrosio's conversation with Complainant about wheel change incident on August 27, 2004.

RX 16: Handwritten statement, undated, from supervisor Louis Gonzalez regarding the wheel change incident.

RX 17: Handwritten statement, dated September 2, 2004, from Complainant's co-worker regarding wheel change incident.

RX 18: Handwritten statement of Complainant, dated August 30, 2004, regarding wheel change incident.

RX 19: AA General Procedures Manual, Section 09-03 (Maintenance Records), dated July 15, 2004.

RX 20: AA Collective Bargaining Agreement, Section 29 (Representation), undated.<sup>12</sup>

RX 21: Handwritten notes of Complainant, dated October 2, 2006, regarding the ETOPS incident of January 8, 2005.

RX 22: Handwritten notes of Complainant, undated, regarding the ETOPS incident.

RX 23: Handwritten notes of Complainant, undated, regarding the thrust reversal incident of November 15, 2004.

RX 24: AA CR-1, dated July 7, 2004, regarding medical report of "threshold shift" in Complainant's hearing, and requirements to address condition.

RX 25: AA CR-1, dated September 5, 2004, regarding Complainant's failure to wear hearing protection in the cargo compartment on August 30, 2004 ("cargo compartment incident.")

RX 26: AA CR-1, [RX 25, above] with Complainant's handwritten comments, dated January 6, 2005.

RX 27: ASAP Form submitted by Complainant, dated January 14, 2005, regarding the ETOPS incident [same as CX 8]; additional statement naming Philip Joshua; letter to Complainant from AA ASAP Manager, dated January 14, 2005, acknowledging receipt of ASAP report; letter to Complainant from AA ASAP Manager, dated February 17, 2005, informing Complainant of resolution of report.

RX 28: AA CR-1, dated February 5, 2005, regarding ETOPS incident of January 8, 2005, signed by Philip Joshua, with additional note dated February 15, 2005.<sup>13</sup>

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<sup>12</sup> By letter dated February 1, 2008, counsel for the Respondent informed the parties that the version of this Exhibit submitted prior to the hearing was erroneous, and provided the appropriate version in substitution of the version earlier submitted.

<sup>13</sup> This is the initial version of the CR-1.

RX 29: AA CR-1, dated February 5, 2005, regarding ETOPS incident of January 8, 2005, signed by Philip Joshua, with additional note dated February 15, 2005, by Devon Erriah.<sup>14</sup>

RX 30: Handwritten "Statement of Grievance,"<sup>15</sup> submitted by Complainant, dated February 22, 2005, concerning CR-1 issued to the Complainant regarding the ETOPS incident.<sup>16</sup>

RX 31: Handwritten "Statement of Grievance," submitted by Complainant, dated February 22, 2005, concerning CR-1 issued to the Complainant regarding the ETOPS incident, and specifically naming Philip Joshua.<sup>17</sup>

RX 32: Handwritten "Statement of Grievance," submitted by Joseph Urso, dated February 3, 2005, concerning CR-1 issued to him on January 27, 2005 regarding the ETOPS incident.

RX 33: Handwritten "Statement of Grievance," submitted by Complainant, dated October 27, 2005, concerning CR-1 on the ETOPS incident. Disposition of grievance, dated November 11, 2005, which deleted references to the ASAP program in the CR-1 regarding the ETOPS incident; the grievance was otherwise denied.

RX 36: Extract from AA "Attendance Discussion History" records, reflecting discussions with Complainant, covering time period between December 2003 and November 2004.

RX 37: Complainant's statement to OSHA, dated November 17, 2004.

RX 38: Complainant's handwritten note to Dr. Silverstein, undated.

RX 39: Complainant's typed letter to Dr. Silverstein, undated, subject: "preponderance of evidence." This letter relates to torque wrench incident.

RX 40: Medical Treatment record, Dr. Silverstein, dated November 26, 2004.

RX 41: Medical Treatment record, Dr. Silverstein, dated January 4, 2005.

RX 42: Handwritten letter from Dr. Silverstein, dated February 15, 2005, regarding Complainant's medical condition, with typewritten cover letter.

RX 43: AA's "ASAP Home Page and Information," dated November 16, 2004.

RX 44: AA's record of "29-F hearing" for Complainant on August 30, 2004, regarding wheel change incident.<sup>18</sup>

RX 45: Copy of letter to AA employee [not the Complainant], dated September 1999, requiring the employee to present doctor's notes to justify absences due to illness for a period of 90 days.<sup>19</sup>

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<sup>14</sup> This is the second version of the CR-1, substituted for the initial version at a later time. See T. at 519-20.

<sup>15</sup> All "Statement of Grievance" submissions were made on a Transport Workers Union of America form.

<sup>16</sup> The copy of the document submitted prior to the hearing is not very legible. By letter dated February 1, 2008, the Respondent submitted a more legible copy of this Exhibit. The February 1, 2008 submission also included a copy of the denial of the grievance, dated March 1, 2005.

<sup>17</sup> The copy of the document submitted prior to the hearing is not very legible. By letter dated February 1, 2008, the Respondent submitted a more legible copy of this Exhibit. The February 1, 2008 submission also included a copy of the denial of the grievance, dated March 1, 2005.

<sup>18</sup> By letter dated February 1, 2008, the Respondent submitted an additional copy of this exhibit.

<sup>19</sup> By letter dated February 1, 2008, the Respondent submitted an additional copy of this exhibit.

RX 46: Copy of notification to the same AA employee mentioned in RX 45, dated March 2002, requiring the employee, for a period of 90 days, to present doctor's notes to justify absences due to illness.<sup>20</sup>

RX 47: AA's "Peak Performance through Commitment Policy," various dates.<sup>21</sup>

RX 48: Article 28 of collective bargaining agreement between AA and the Transport Workers Union.<sup>22</sup>

RX 49: Computer Printout, AA's "Supervisor's Record of Discussion and Action," pertaining to the Complainant, covering the time period between January 2000 and January 2008.<sup>23</sup>

### Testimony at Hearing

#### Brian Williams

The Complainant testified under oath at the hearing. He briefly recounted his professional background, and stated he has held an aircraft mechanic's certificate since 1983. The Complainant stated he has been employed by the Respondent as an "aviation maintenance technician," or aircraft mechanic, since 1991. T. at 27-31.

The Complainant described an incident that occurred on July 30, 2004. At that time, he was attempting to "lock out" a thrust reverser on an aircraft. According to the Complainant, the applicable maintenance manual prescribed a specific type of torque wrench that had a dial indicator for the procedure. This type of torque wrench was not available at the terminal where the Complainant and the aircraft were located, but was at the maintenance hanger, several miles away. The supervisor, A.J. Murray, went to get the torque wrench. However, the Complainant stated, the supervisor came back with a wrench with a click indicator. The Complainant stated that the supervisor told him to do the job with the wrench provided, but the Complainant refused, because it was not the correct type of wrench. The Complainant stated the supervisor continued to berate him, and yelled at him in front of the other personnel present. The Complainant stated that the following day he called the Human Resources Department to complain about the supervisor. He also testified that the following Monday he called the FAA to complain that the aircraft might not have been repaired properly, which could have caused a dangerous situation. The Complainant stated that he followed his telephonic complaint with a written statement, and that the FAA investigated his complaint. The Complainant stated he was later told the FAA investigated his complaint and verified that the repair had been properly done. T. at 31-48.

The Complainant then testified about an incident that occurred on August 27, 2004. On that date, he stated, an aircraft was noted to have a flat tire. When the wheel was removed, it was noted that the over-temperature fuse had melted, so additional trouble shooting was required. The plane was taken out of service for repair, and was to be taxied to the hangar for the repair.

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<sup>20</sup> By letter dated February 1, 2008, the Respondent submitted an additional copy of this exhibit.

<sup>21</sup> This item was submitted by letter dated February 1, 2008, in response to my request for information on the Respondent's policies and was later admitted. T. at 638.

<sup>22</sup> This item was submitted by letter dated February 18, 2008 and was later admitted. T. at 638.

<sup>23</sup> This item was admitted during the hearing. T. at 729.

The Complainant testified that he and a co-worker put a new tire on the plane temporarily, to enable it to get to the hangar. The Complainant testified that he filled out an E-58 form to document the removal and change of the tire, and noted that a complete inspection of the wheel had not been done. He stated he took the form to the crew office, but the supervisor there said he did not need the paperwork. The Complainant stated that he left the E-58 on the counter and went home. The Complainant testified that a day or two later, when he reported for work, he was immediately told by a supervisor to “get a shop steward because he needed to speak to me;” he did so, and had a meeting with the supervisor, Joe Ambrosio, regarding the incident. The Complainant stated that he had filed an ASAP form prior to the meeting. He described the ASAP program as “a procedure that if you find a safety hazard, or you realize that maybe you made a mistake and you want to self-disclose you can do that to the FAA, and the union and the company. And they’re in agreement that if you self-disclose you will not be held accountable...with a disciplinary action.” The Complainant stated that, during the meeting, the shop steward told Mr. Ambrosio the Complainant had filed the ASAP form. T. at 48-61.

Later, the Complainant testified, there were more meetings about the incident and he was given a “CR-1 entry” in his file. The Complainant testified he considered the CR-1 to be adverse because of the “tone and language that was (sic) used.” The Complainant stated he was also issued a “first advisory” regarding the same incident (CX 17). To his knowledge, the Complainant testified, none of the other personnel he worked with on the wheel change were disciplined. T. at 68-74. He also commented that he was never told to do a complete wheel removal replacement, and that he believed he had been instructed by his crew chief to put the tire on temporarily to expedite the aircraft out of the gate. T. at 107-08.

The Complainant testified regarding an incident on January 8, 2005, in which an ETOPS inspection showed a problem that required a brake change.<sup>24</sup> He testified the brake change itself took about two and a half hours, and it also took another several hours to find the proper equipment (a tire dolly) to perform the repair. In addition, the delay required the ETOPS inspection to be re-done, because the applicable rules required the inspection to be accomplished within a certain timeframe before takeoff. The Complainant testified that the supervisor asked him to sign off on the aircraft without re-doing the ETOPS inspection, but he refused, and they argued about it. The Complainant testified that he told the supervisor, Philip Joshua, that he would submit an ASAP, because he felt it was improper to sign off on the aircraft without another ETOPS. The Complainant stated that “tech services” was contacted, and “tech services” agreed that the ETOPS would have to be re-done, and so it was. He said that then he was criticized for failing to inform the supervisors that the ETOPS would have to be re-done. The Complainant commented that the supervisor spent more time arguing about whether the ETOPS would have to be re-done than the actual inspection would have required. The Complainant stated he eventually submitted an ASAP form on the incident (CX 8). He also stated that he attended a meeting on the incident (CX 10). T. at 90-99.

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<sup>24</sup> According to the Complainant, an ETOPS (Extended Twin-Engine Operation) inspection is required for two-engine aircraft that will be departing on over-water flights (e.g., to Europe). T. at 90.

The Complainant testified that a CR-1 entry was placed in his file, regarding this incident, referencing the company rules of conduct 12, 15, and 24.<sup>25</sup> He stated the initial CR-1 entry was changed, to delete references to the ETOPS inspection, because of the ASAP filing, but the references to the brake change remained in the CR-1. T. at 100-103.

The Complainant also testified about incidents in which he believed he was treated differently from other employees. One such incident occurred on approximately August 30, 2004; the Complainant stated he was counseled for failing to wear hearing protection when conducting an inspection of a cargo area. T. at 62-67. The Complainant also stated that there were discrepancies in his attendance records, in that the computer printout at times failed to reflect that he had “badged in” for work; that he was docked for reporting late while others were not; and that, in July 2004, he was warned about being late, and had not received such a warning before. T. at 75-84. The Complainant also stated he was counseled about absences and put on a restriction, which required him to get a doctor’s note in order to have his absences excused. T. at 99-101. He stated that he was counseled for being late three times in a one month period, including one instance in which he was three minutes late, and a CR-1 entry regarding the counseling was made. T. at 102-103.

The Complainant stated he filed a workers’ compensation claim based on work-related stress and received a decision in his favor. T. at 85-89. The Complainant testified that the Respondent’s action have made him “very insecure” and a “very, very angry person.” He also commented that the situation at work has affected his home life and relationships within his family. T. at 105-06.

On cross-examination, the Complainant conceded he did not tell anyone in management that he had contacted the FAA regarding the July 30, 2004 incident, and stated he was told by the FAA personnel that they had done an investigation. The Complainant also conceded that the ASAP form he filled out regarding the wheel change incident (RX-12) reflected he was informed on August 28 that he had failed to fill out the proper paperwork for the event, and agreed it was possible he filed the ASAP form, on August 29, after a meeting with management on the incident on August 28. The Complainant confirmed he received a warning from the FAA regarding the incident. T. at 112-124.

Regarding the ASAP program, the Complainant testified that he understands that if an employee self-discloses an error, then the employer is not to take disciplinary action based on that disclosure. He also stated that he understands an employee “has a 24-hour window of opportunity to self-disclose.” The Complainant stated he believed the “first advisory” he was given based on this incident was wrong, because of the ASAP he filed, and also because he “was being singled out, I felt.” The Complainant commented there were a lot of meetings about the incident, and confirmed that one of those meetings was on August 30, 2004 (RX 44). He stated he felt he was being singled out, because others also were involved, and confirmed that the “first advisory” he received was eventually removed from his personnel file. T. at 130-141.

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<sup>25</sup> The CR-1 is at CX 12, and also at RX 28 and 29; the Company rules of conduct cited in the CR-1s deal with “cooperation with other employees;” “loafing or intentional restriction of output;” and “consideration of the welfare of the company and fellow employees,” respectively.

The Complainant stated he felt the incident in which he was counseled for failing to wear hearing protection was retaliatory because the supervisor, Devon Erriah, did not tell him he was making a CR-1 entry or give him a copy of the entry. He confirmed that Mr. Erriah may have mentioned the hearing protection issue during a meeting, and he conceded that hearing protection was required in the cargo area. The Complainant also commented that Mr. Erriah did not remind him of the hearing protection requirement at the time he observed him not wearing the hearing protection equipment. The Complainant also stated he believed he made a reasonable effort to communicate the problems he found in the cargo compartment, and commented that he normally communicated through his crew chief; he conceded Mr. Erriah had the prerogative to discuss the matter of any delay caused by the cargo compartment problems with him. T. at 142-155.

Regarding his attendance, the Complainant stated he was not paid for his time on September 7 until he got a supervisor involved, but he eventually was paid. He also stated he was certain he “swiped-in” and “swiped-out” and cannot explain why this was not recorded. The Complainant confirmed that he had a discussion with the supervisor regarding lateness on September 7 and again regarding lateness on October 7, and conceded the October 7 lateness was a third occurrence. The Complainant stated that he felt singled out because the supervisor chose to charge him for being late, and commented that he was being treated differently from others. T. at 157-66.

On the issue of whether CR-1 entries are considered “discipline,” the Complainant commented that some of the CR-1s pertaining to him “appear to be discipline” because of the way they were written. The Complainant stated he believed the entries had an impact on him, but conceded they did not affect his pay. The Complainant agreed that a “first advisory” and “second advisory” were considered disciplinary, but stated he was not aware that the CR-1 form was not considered part of the Employer’s “Peak Performance through Commitment” (PPC) policy. He stated he wanted all of the CR-1s relating to him removed from his file, and in particular he sought the removal of the CR-1 entry regarding the ETOPS incident. The Complainant stated he did not recall a discussion with the supervisor regarding the imposition of a doctor’s note requirement, but confirmed the date of the document memorializing the discussion was January 6, 2005. T. at 176-180.

Regarding the ETOPS incident, the Complainant stated that the repair did not take an unusually long time, once he had the right equipment, and confirmed the whole process that day took about five hours. The Complainant stated it was not appropriate for management to have a meeting about the matter because they knew what happened, and he stated he believed the meeting was retaliatory. The Complainant acknowledged that both he and the other mechanic, Joe Urso, met with the supervisors, and both received CR-1 entries; he also acknowledged they both filed ASAPs and both filed grievances, and acknowledged the CR-1 entries were eventually modified. The Complainant stated he believed that Philip Joshua was the person who retaliated against him in this matter. The Complainant stated the CR-1 entry was unfair because he did not have the proper equipment to do the job, and the equipment was not available at its usual place. The Complainant commented that Mr. Joshua should have known the ETOPS inspection would have to be re-done after the delay, and he stated that he told Mr. Joshua so after the brake change was completed. The Complainant agreed that the supervisor had a different interpretation of the

ETOPS requirement, and stated that the supervisor was trying to intimidate him into signing the paperwork. The Complainant confirmed that Mr. Urso, his co-worker, called tech services on the issue and stated that he believed tech services called back and agreed that the ETOPS must be re-done. The Complainant confirmed he received a written response from the ASAP program, in which it was acknowledged that the written instructions may be confusing (RX 27). The Complainant acknowledged that he and Mr. Urso filed grievances regarding the CR-1s they received (RX 30, 31, 32). He confirmed the CR-1 entry had been revised, and identified the CR-1 that was still in his file (RX 29). T. at 181-199.

Regarding the torque wrench incident, the Complainant stated that he and the other mechanic had gone to “Stores” to get the proper wrench but it was not there. He acknowledged that the supervisor, Mr. Murray, had a reputation for having a bad temper. He also acknowledged that both he and the other mechanic told Mr. Murray that the torque wrench the latter wanted to use was incorrect, and confirmed his understanding that the correct torque wrench was eventually used. The Complainant confirmed no CR-1 entry was made regarding the incident, and he was not subjected to a hearing about the matter. He confirmed he received a letter from Devon Erriah dated August 9, 2004, regarding his complaint to Human Resources about Mr. Murray (RX 8). The Complainant also confirmed he received a letter regarding the company’s investigation of the matter (RX 34). T. at 200-206.

The Complainant was questioned regarding visits to his physician, Dr. Silverstein. He acknowledged that if he told Dr. Silverstein in January 2005 that his employer was trying to fire him, it was because that was his belief. (RX 41). The Complainant also acknowledged that he wrote notes to Dr. Silverstein, providing information for the Complainant’s worker compensation case (RX 38, 39; see RX 42). T. at 207-215.

On redirect examination, the Complainant confirmed that the ETOPS incident occurred after he had filed his complaint with OSHA, and agreed with the contention that a CR-1 entry could be used as a “stepping stone for discipline.” The Complainant also confirmed that the CR-1 entry on the ETOPS incident (CX-12) accurately reflected Mr. Joshua’s conversation with him regarding the rules of conduct and performance. The Complainant also stated he was not counseled in a threatening way until after the torque wrench incident. T. at 219-33.

#### Joseph Urso

The Complainant called Joseph Urso as a witness, and he testified under oath. Mr. Urso stated he has been employed by the Respondent as a mechanic for more than 16 years, that he currently holds a leadership position in his union, and he was formerly a union shop steward. Mr. Urso stated he witnessed the torque wrench incident. He stated Mr. Murray was raising his voice and shouting “how he could talk to anybody the way he wants to get the product out on time” and said “why don’t you just use the torque wrench I’m giving you.” Mr. Urso stated that, based on his observations, management has changed in its interactions with the Complainant since that incident, and with the Complainant now there “just seemed to be one [investigative] hearing after another one” regarding aircraft items or delays. Mr. Urso stated that in his opinion, a 29-F hearing or a CR-1 entry could be part of the discipline process. He also stated he never received a CR-1 about his job performance in the 12 years he worked for the Employer until he

worked with the Complainant, when he received a CR-1 regarding the ETOPS incident. Mr. Urso confirmed that employees are entitled to have a union representative present at any discussion with management, so the union would be aware of all such discussions, unless the employee declined representation. He stated that the “reported late” code is not automatically generated, and that supervisors can override the automated “swipe-in” system. T. at 238-248.

Mr. Urso stated he was aware the Complainant had filed a complaint with the FAA regarding the torque wrench incident because the Complainant had told him. He stated he was working with the Complainant on the date of the cargo compartment incident and he too was not wearing hearing protection. He said no one had a discussion with him about his lack of hearing protection. He stated that Mr. Erriah also was in the cargo area that day but was not wearing hearing protection. T. at 250-253.

Mr. Urso stated he recalled the ETOPS incident very well. He stated that after the ETOPS inspection one of the brakes was worn beyond limits, so it needed to be changed. He stated he told the crew chiefs and the supervisor. He stated they tried to get the tools to set up for the job but realized there was no tire dolly available, and a tire dolly had to be retrieved from the hangar. Mr. Urso stated:

It took them a good hour or so, maybe more, to get the tire dolly to the work area. Then when the tire dolly got to the work area it was just about lunchtime, started taking the tire off. Then we finished the job, it was about 9:15 or 9:30. Then the APU had to be worked. There was a cracked bracket. And we came in, and they had changed the trip, management changed the trip on the plane, the trip number, and it had been past three hours since we looked at the ETOPS. And I told them at the ETOPS, did anybody redo the ETOPS? The ETOPS, you know, is past three hours, it has expired, you should do another ETOPS, you changed the trip, the time elapsed. Nobody was keeping track of it. You know we were out there working. Management should have been keeping track of it and they didn't. So we offered to go out and do the ETOPS again. Instead of telling us just go back out there and do the ETOPS, basically Phil Joshua decided to have a one-hour debate about trying to say we should sign it....I did do it, the time elapsed, so [to] sign it now would be incorrect, it[']s past three hours. So he decided to continue to have the debate. And I decided to call Tech.... So eventually Tech did call back and say, Joe's right, the ETOPS should be redone. It's been past three hours....So we then again volunteered to redo the ETOPS, which was almost time to go home, it was about twenty after ten. And he took us off the job and decided to waste more time and get two people from the hangar, that were on their way home, to come back and do it rather than us. .... He did say that we were going to talk about this paperwork issue when I come back from my days off.

T. at 253-256.

Mr. Urso stated he received a CR-1 regarding that incident and that it “looked like a letter of discipline but they labeled it CR-1.” He also commented that under the contract a CR-1 is supposed to be a record of discussion. He also commented that “you were marked” for working with the Complainant. Mr. Urso also stated that he has known the Complainant for ten years, and that he is not the same person he used to be in that he is stressed out and gets upset. Mr. Urso said that the Complainant's personality has changed. According to Mr. Urso, CR-1s are not

grievable “to the point of removal,” but are grievable only as to their accuracy. Consequently, he stated, the CR-1 can become a “paper trail” and can lead to a mechanic getting fired. T. at 256-61.

On cross-examination, Mr. Urso said that management ignores the Complainant. He stated that the CR-1s he and the Complainant received were disciplinary in nature. He agreed that from the union’s perspective a CR-1 was not a form of discipline, but again stated it could lead to discipline. He stated that he believed the CR-1 he received was unjust, because the brake change was never an issue until it was determined that he was correct on the ETOPS issue. He also remarked that a CR-1 should not contain disciplinary rules or warnings. Mr. Urso confirmed that both he and the Complainant received CR-1s on the incident, both filed ASAPs, and both CR-1s were modified. He acknowledged that he is still unhappy because he believes the CR-1 should not be in his file at all. He stated he filed a grievance on the matter but his grievance was not processed. In response to a hypothetical question regarding whether the union would object if management tried to use a CR-1 to support disciplinary action, Mr. Urso said the union would object but the objection “would not stand,” and also commented that management may have used a CR-1 rather than a first advisory on the ETOPS incident because CR-1s are not grievable. Regarding attendance issues, Mr. Urso stated that a mechanic who is late needs to talk to the supervisor, otherwise he would not get paid, and confirmed that it is standard practice for someone who comes in late to make up the time at the end of the shift. He also confirmed that such issues are handled on a case-by-case basis. T. at 261-85.

Regarding the cargo compartment incident, Mr. Urso stated that he was there with the Complainant and Mr. Erriah. Mr. Urso confirmed that hearing protection is required in that area; he said that neither he nor Mr. Erriah had hearing protection on, because it was a “rush situation” and he forgot. He stated the company has recently gotten more conscious about personal safety protection equipment, and agreed it would not be a disciplinary matter to remind someone about the need to wear hearing protection. Mr. Urso confirmed he filed at least one grievance on the ETOPS incident (RX 32). He stated he recalled asserting that the Employer was trying to cover up its mistakes by blaming the Complainant. He also stated that if a mechanic did not do a certain job, he would not be expected to sign off on it. T. at 285-95.

On redirect examination, Mr. Urso stated he would not appreciate receiving a CR-1 entry about wearing hearing protection, and stated that it was “unheard of” to have such an entry. He stated he has seen CR-1s used in discipline proceedings and arbitrations, and reiterated that a CR-1 is not grievable and cannot be removed, although its accuracy can be disputed. T. at 296-99.

On recross-examination, Mr. Urso conceded that under the union contract, CR-1s are not disciplinary in nature. He again stated that he had no knowledge of anyone other than the Complainant getting a CR-1 for not wearing hearing protection, but also stated he was unaware the Complainant was informed that his hearing level had changed. In response to my question, Mr. Urso stated that a CR-1 is a permanent entry, and can be removed only by the supervisor who entered it or someone above that person. He also stated that the CR-1s remain for the lifetime of employment if management wishes. T. at 300-06.

Gary Santos

Gary Santos testified under oath as a witness for the Complainant. He stated he has been employed by the Respondent as an mechanic for almost 20 years, and has known the Complainant for about 15 years. He stated that under the seniority rules, the bids for crews are six months, so that after that time it is possible to move to a different crew. He stated he has been on the same crew with the Complainant for about 10 years, and had daily contact with him. He stated he was not at work the day of the torque wrench incident, and was not aware of any “sour relations” between the Complainant and management prior to that date. Mr. Santos agreed that, after the incident, he observed a change in management’s attitude toward the Complainant. He stated “it became almost confrontational. I would even call it a witch hunt.” Mr. Santos stated that the Complainant was “constantly being brought into hearings for taking delays, and no other mechanic was, you know, confronted with that scrutiny.” He stated that he was called into a hearing regarding a delay when he was working with the Complainant, within a couple of months of the torque wrench incident, and stated he did not believe there was a CR-1 made on the matter. He said that in his entire career there was only one other instance he was called into a meeting to discuss a delay. T. at 318-24.

Mr. Santos stated the purpose of a CR-1 is “general counseling” and noted it could even be used for good behavior, but also commented that the form has “been abused” when management uses language that reads like discipline. He stated this “was not the intent of a, a CR-1 entry because disciplining procedures have other steps which can be grieved by the union and the employer.” He stated he would not like to have a CR-1 on his record because it is a reflection on his work and cannot be purged from the record. T. at 325.

Mr. Santos stated that at the session where he was called in to explain the delay, he told Mr. Erriah he felt as though he were being singled out. He stated he also asked Mr. Erriah why he was having a hearing with him and the Complainant, and Mr. Erriah told him it was information gathering or something similar. In his experience, Mr. Santos said, this was very unusual. About a month later, Mr. Santos testified, Mr. Erriah apologized to him for the session, explaining he was new on the shift and unfamiliar with the workings of the shifts. According to Mr. Santos, the Complainant is a “totally different person” since the incidents with management. Mr. Santos stated the Complainant is not as carefree, is a lot more reclusive, is more negative, and has been stressed out. T. at 325-28.

On cross-examination, Mr. Santos confirmed he had filed an AIR21 complaint against the Employer. He conceded that he has been critical about the company’s management, in particular regarding the company’s maintenance practices. Regarding CR-1s, Mr. Santos confirmed that inaccurate statements in CR-1s can be grieved. He recalled complaining to Human Resources in April 2004 that management was issuing CR-1s to mechanics “left and right.” In particular, Mr. Santos commented that CR-1s issued regarding long-ago training matters were unjust. He stated he filed an AIR21 complaint on a CR-1 he received in November 2001, and he stated his current complaint related to a request that he falsify a maintenance entry regarding the serviceability of an aircraft tire. He agreed that he has felt harassed by management, but stated that the Complainant is treated worse. Regarding the incident in which he was called into the hearing with Mr. Erriah, Mr. Santos stated he believed it was a 29-F hearing; he also stated he recalled

that Mr. Erriah actually apologized that he had made it a 29-F hearing, but does not know whether Mr. Erriah talked to the Complainant. Mr. Santos stated he did not have a problem with Mr. Erriah talking to him to try to get information, because that is necessary to improve the company's operations. He stated his opinion that any "strong worded" discipline should go in an advisory and not a CR-1, because a first advisory "I could remove through a grievance process" and "if an arbitrator rules that I am correct that first advisory is removed." T. at 333-43.

### Herb Kreuz

Herb Kreuz testified under oath as a witness for the Complainant. He stated he is an aircraft maintenance technician and holds numerous licenses. He stated he has been a mechanic for about fifteen years, and has been employed by the Respondent for nine and a half years. He also stated he has been union steward for about six years. In that capacity, Mr. Kreuz testified, he has represented employees in connection with issues with management on a daily basis. T. at 352-55.

Mr. Kreuz testified that, in his opinion, management dealt negatively with the Complainant, as compared to other employees, and there was an escalation of incidents between the Complainant and management after the torque wrench incident. He stated that the Complainant told him he felt singled out regarding the cargo compartment incident. He stated he was made aware, through the union and by the Complainant, that the Complainant had contacted the FAA regarding the torque wrench incident. T. at 355-57.

Mr. Kreuz recalled being involved in a 29-F hearing regarding the wheel change incident (CX 13). He commented regarding employees who arrive late, that the issue of making up the time is usually up to the supervisor, but if an employee has a constant problem, then management may start documenting it and recording "RL" [reported late]. He stated that the Complainant brought to his attention an incident in which he was given an "RL." Mr. Kreuz characterized a "constant problem" with lateness as "two or three times a week" and stated he never heard that the Complainant had that problem. Mr. Kreuz stated the "swipe-in" system could be overridden by managers. He also stated he has heard of incidents in which an employee swiped in and out and did not get paid, and stated that an employee reported such an incident to him that morning.

Mr. Kreuz recognized the first advisory issued to the Complainant in November 2004 (CX 17). He stated that a first advisory is a disciplinary action. He stated that management tends to use CR-1 entries as a tool for progressive discipline, and commented that is not its main purpose. Mr. Kreuz commented that a CR-1 entry is a record of discussion, which could be positive or negative, but generally tends to be negative. He also stated that he is often involved when employees receive CR-1s, and commented that management is supposed to investigate before making an entry to ensure that the facts are accurate. Mr. Kreuz testified that the union advises employees who disagree with a CR-1 entry to "immediately put a rebuttal in, and again state the facts accurately, and actually, and point out exactly what is objectionable what the company put down." He also stated that a CR-1 stays in the employee's file as long as the individual works for the company, unless decided otherwise "between management and union." Mr. Kreuz stated he had seen CR-1s used as part of the discipline process and used in arbitration hearings to support discipline. T. at 364-67.

Mr. Kreuz testified that a first advisory is supposed to be removed from an employee's file in two years or less. If it is still in the employee's file after that time, the employee can grieve it. He testified that the Complainant "seemed a little upset" after the torque wrench incident and told him he felt he was being singled out. He also stated that in his opinion, a "selected few" employees were subjected to the same treatment as the Complainant. He stated in his opinion the Complainant's treatment by the company was atypical. T. at 367-69.

Mr. Kreuz stated that management rarely wrote up a mechanic who "took a delay" on an aircraft (meaning that the aircraft did not meet a scheduled departure time due to a mechanical issue). He stated he recalled the ETOPS incident, and that he walked in as it was unfolding. Mr. Kreuz stated that Mr. Joshua wanted the aircraft to be released, without performing the checks. Upon examination of the Complainant's CR-1 involving this incident, Mr. Kreuz stated that it was unusual, because CR-1s generally do not contain specific language about discipline or termination. T. at 370-73.

On cross-examination, Mr. Kreuz indicated he was not present for the discussion that was memorialized on the CR-1, so he could not make any conclusion whether the company's rules of conduct were discussed with the Complainant. He also commented that the language in the CR-1 was "the kind of language you would use on a first-step advisory." Regarding the general issue of the use of CR-1s, Mr. Kreuz stated the union is currently negotiating possible changes with management, as the union membership is concerned with management's use of CR-1s, especially those that are more than two years old. He also stated that any meeting with management that is going to lead to discipline should be classified as a 29-F. T. at 373-382.

Regarding attendance issues, Mr. Kreuz commented that at JFK Airport, employees who come in a little late are generally allowed to make up the time if they want to stay late. He acknowledged that he had been put on a doctor's slip requirement at one time, and stated that management imposes this requirement when suspecting an individual of abusing the sick leave benefit. He stated he was unable to recall specifically how many times he was in hearings with the Complainant, as there were 400 mechanics and he attended a lot of hearings. He recalled an instance involving a specific supervisor, and agreed it may have been in 2003, commenting that management's close attention to the Complainant started after that (T. at 382-393).

In response to my question, Mr. Kreuz identified the handwriting on CX 13 as his own (T. at 395). On redirect examination, Mr. Kreuz stated that he wrote "informal conversation" on CX 13 to try to get management to clarify the purpose of its conversation with the Complainant. He also testified that he wrote a statement in February 2005 in which he indicated that management's attitude toward the Complainant changed a couple of months or the summer before. T. at 395-98.

#### Michael Fanizzi

Michael Fanizzi testified under oath as a witness for the Complainant via telephone. He stated he was employed as a aircraft mechanic for American Airlines from 1991 to 2005. He stated he worked with the Complainant on the same afternoon shift for about a year; at other

times, when he was on rotating shifts, he would end up on the same shift as the Complainant for four weeks every third month. He recalled the torque wrench incident of July 30, 2004. Mr. Fanizzi stated that management's relationship with the Complainant was "not the greatest" and changed "from that point on" in that management often had the Complainant in the supervisors' office, in sight of everyone, "I guess reprimanding or whatever." Mr. Fanizzi stated that other mechanics were treated that way "very rarely," and in his estimation he saw the Complainant in a supervisor's office "I could say almost three days a week." Mr. Fanizzi stated he considered a CR-1 "a first reprimand basically" and commented that if a mechanic got enough CR-1s, it was grounds for "further disciplinary action." On the issue of time and attendance, Mr. Fanizzi stated that if someone was late he would be called into the office, and "some people would kind of get a CR-1 for it" and that "if you got enough of them then those were grounds also for higher, higher disciplinary actions." He stated that it was within a supervisor's discretion whether to mark someone as "RL." T. at 415-20.

On cross-examination, Mr. Fanizzi stated that he recalled supervisors discussing his attendance with him, and recalled a specific event with Lou Gonzalez, whom he characterized as a "pretty good" guy who was fair to him. He said he was sometimes irritated because he was legitimately sick, and felt the way he was spoken to as if he were being pressured to come in whether he was sick or not sick. Mr. Fanizzi commented that supervisor A.J. Murray would sometimes get irate, use inappropriate language, yell at people, and throw things. Mr. Fanizzi acknowledged he was not present for management's meetings with the Complainant, and he did not know what was said. He also commented that he would hear from the crew chief that the Complainant was in a discussion about "such and such an aircraft and a delay." T. at 421-25.

### Steve Gukelberger

Mr. Gukelberger testified under oath as a witness for the Complainant by telephone. He stated he has worked for American Airlines for almost 30 years, and is a section chairman with the union. He also stated he was a chief union steward for almost 25 years. He stated he did not specifically recall the incident involving supervisor A.J. Murray, but did recall the wheel change incident, and stated he was on duty and was called into a hearing that night. He commented that, in his opinion, management's attitude toward the Complainant changed drastically. He stated: "I can just surmise in my own words, that it was, the triggering point was is that when Brian was allowed to work an aircraft and thought it came in with a problem. They just, it seemed to be like they just labeled him as a troublemaker, a guy that looked to[o] hard at aircrafts." He stated that he believed at one point in time "they were looking at him as a troublemaker." Mr. Gukelberger agreed that management treated the Complainant differently from other employees in the 2004 to 2005 timeframe, and continued to do so to the present. T. at 428-433.

Mr. Gukelberger characterized a CR-1 as "an entry that[']s] put in your electronic file, that you can rebut it but it stays there forever, and its; it[']s] not a good thing." He stated a mechanic would not like a CR-1 in his file because it is "a permanent imprint on his record that cannot be removed" and cannot be grieved. He stated that, as a union representative, he would rather see an unfair charge of poor work performance in the form of a first advisory than a CR-1, because the former can be grieved, and the arbitrator will rule, and also it can stay in someone's record for two years at the most. He stated that, in his opinion, the Complainant was "at the top of the

discussion list” with management regarding performance issues. Mr. Gukelberger stated that supervisors used to be able to override the swipe-in and swipe-out system more easily, and that in 2004 supervisors were able to take “RLs” in and out. T. at 434-437.

On cross-examination, Mr. Gukelberger stated that he is a negotiator for the union and was currently in Texas negotiating contracts. With regard to when management’s attitude toward the Complainant changed, he stated that the particular incident that stuck out in his mind was the wheel change incident. He stated from that point on, things just seemed to get worse and worse. He stated he could not remember every incident with the Complainant, but as time went on it seemed to him that management in general was questioning the Complainant’s professionalism. On redirect examination, Mr. Gukelberger indicated he has seen CR-1s used both to support disciplinary actions and in arbitration proceedings. T. at 438-46.

### Devon Erriah

Devon Erriah testified under oath on behalf of the Respondent. He stated he is currently the station manager for aircraft maintenance at JFK Airport, and has worked for the Respondent, American Airlines, for almost ten years. He stated he has held his current position since January 2006, and prior to that he was a production manager, shift manager, and production supervisor. Mr. Erriah testified that as a supervisor he was assigned to a specific shift, and was responsible for workload assignments and job progress. In 2003, when he became production manager, supervisors reported to him, and he became more accountable for the overall operation of the shift. At present, Mr. Erriah testified, he is responsible for the entire maintenance operation at JFK Airport, which runs 24 hours a day. T. at 470-473.

Mr. Erriah testified that in 2004 and 2005, management’s structure consisted of a station manager, administrative managers, shift managers and supervisors; and the workforce consisted of crew chiefs, tech crew chiefs, and AMTs (mechanics). He stated he has a background as a mechanic, from about 20 years ago, and was familiar with the things that mechanics do. Mr. Erriah described the crew chief job as a leader who makes job assignments, observes work progress, assists mechanics with getting their jobs done, and who reports to management. T. at 473-475.

He stated he has absolute responsibility for the safety and airworthiness of aircraft that come into and leave from JFK, and discussed various mechanisms for communicating safety issues to the workforce. Mr. Erriah also stated he has the responsibility to interact with the FAA, which makes site visits and also investigates specific allegations. He stated that in 2004 he was not involved with the Complainant’s complaint to the FAA, and was not aware the Complainant contacted the FAA. T. at 475-77.

Mr. Erriah stated he was familiar with the Respondent’s ASAP program. He described the ASAP program as follows:

It[']s basically a system of self disclosure, that if a technician realizes after the fact that, there may have been some hindsight in following a task, and something was not done, or something may have been done incorrectly that he ... can use this program to self-disclose. And, if was done for the reason of

catching a mistake and probably correcting. If it was an aircraft that departed maybe stopping it at the next station and correcting the problem, and that[']s why it got joint approval from everybody.

He stated there is no penalty for a mechanic who submits an ASAP, and there is a benefit in that there may not be any punitive repercussions from the FAA or the company “if the ASAP is approved.” T. at 479-481.

He stated he knew the Complainant and at times had been a shift manager on the Complainant’s shift. He stated, in his opinion, the Complainant had a lower level of confidence, as compared with his peers. He also stated that supervisors wanted to talk to employees about issues that created delay, so as to correct any problems, but the Complainant “did not care to talk to supervision” and “if he needed to talk we would normally have to drag in a union representative to make it like an official discussion.” He also commented that the Complainant avoids even saying hello to him. T. at 481-84.

Mr. Erriah defined a CR-1 as “basically a record of discussion,” and stated that issuance meant that the discussion and facts were being made a matter of record. He also stated a CR-1 could be a commendation. Mr. Erriah stated the CR-1 is an electronic entry that goes into the employee’s personnel file, and stated it is not disciplinary and is not intended to be a disciplinary action. He acknowledged that a CR-1 cannot be grieved and remarked: “It[']s just a record of discussion and there is no reason for it to be grieved.” Mr. Erriah commented there have been occasions when he was trying to have a conversation with mechanics, including the Complainant, about reasons for a delay; but the mechanics wanted to have a 29-F hearing with union representation, which was not his intent. T. at 484-86.

Mr. Erriah identified Respondent’s rules of conduct for employees from the employee policy guide (RX 9), and he stated that mechanics were aware of the rules. He stated that “29-F” is an article in the collective bargaining agreement with the union that discusses management’s right to speak to an employee (RX 20). He stated the Peak Performance through Commitment (or PPC) process is a layered disciplinary process that consists of a first step advisory, second step advisory, and a career decision day or final advisory. The employee has the right to grieve the process. The grievance would go through the employee’s management chain up to the station manager and, if not resolved, would go to arbitration. According to Mr. Erriah, a first step advisory is likely the result of a 29-F investigation at which the employee was determined to be at fault. T. at 487-89.

Regarding the cargo compartment incident, Mr. Erriah testified that he was the shift manager that day, and he noticed the Complainant at the microfilm reader doing some research. The crew chief told him that the Complainant found some items that needed to be fixed. He stated he tried to find out why this issue was happening so close to the aircraft’s departure, so he went to the aircraft himself. He observed the Complainant and Mr. Urso in the cargo compartment, and the Complainant was not wearing hearing protection. He himself was not wearing hearing protection because he was only in the area a short time. Mr. Erriah stated he did not discipline the Complainant for that incident, and only mentioned the hearing protection issue on a later day, when discussing the aircraft delay with the Complainant. He stated he called the Complainant in because he felt it was unacceptable for him to learn about a delay 10 minutes

prior to departure, and he wanted to get some facts. The Complainant wanted a union representative present. Mr. Erriah stated that the delay was basically preventable and he wanted to tell the Complainant that if such problems come up to let the crew chief and management know earlier, so they can help on the aircraft and prevent the delay. He stated at the end of the conversation he mentioned the issue of the hearing protection, and he told the Complainant he was going to document the conversation because of the Complainant's medical notification regarding his hearing level. Mr. Erriah stated that the Complainant did not object at that time. He denied that the conversation he had with the Complainant regarding the hearing protection was prompted by the torque wrench incident the previous month. T. at 489-96.

Mr. Erriah identified RX 24 as a discussion record regarding the results of the Complainant's medical hearing test, and stated that he was present for this discussion. He stated the discussion was accurately noted in the CR-1 and the Complainant did not object to the discussion. Mr. Erriah also opined there was nothing wrong with putting the information in a CR-1. Mr. Erriah identified RX 25 as the CR-1 relating to the discussion regarding the cargo compartment. He stated the date of the entry, September 5, 2004, reflected the date the discussion was held, and said the discussion took place after the incident because he did not have an opportunity to speak with the Complainant on the date of the incident. He stated the entry accurately reflected the discussion, the Complainant did not raise any objection at the time, and that two union representatives, Mr. Kreuz and Mr. Lewis, were present. Mr. Erriah also stated that Mr. Kreuz never said to him, in 2004 or 2005, that he was treating the Complainant unfairly. T. at 496-501.

Mr. Erriah identified RX 23 as notes pertaining to the thrust reverser incident in November 2004. He stated at one time there were two aircraft, with similar problems, and only one took a delay. He stated that after the aircraft had left, he wanted to talk to the Complainant and Mr. Santos (the other mechanic) about the incident, but they would only speak with him with a union representative present. Mr. Erriah stated he just wanted to find out the details and get some facts, but before he knew it the union representative, Mr. Gukelberger, was telling him he need to have a 29-F hearing. He stated a hearing was not his intent. Mr. Erriah stated he never apologized to Mr. Santos and stated that if anything, he told Mr. Santos he did not intend to have a 29-F investigation. He stated he did not say anything similar to the Complainant because he was "not approachable" and speculated that the Complainant would want to get a union representative involved in any conversation. He stated the Complainant was not punished because of the delay. T. at 503-506.

Regarding the ETOPS incident on January 8, 2005, Mr. Erriah stated he heard about the incident from the supervisors, Philip Joshua and Lou Gonzalez. He stated he evaluated the situation and determined there was a job performance issue. He stated there were two factors: the length of time it took to do the brake change, and the failure to communicate about the ETOPS requirement. Mr. Erriah stated it was his understanding that the need for the brake change was discovered in a timely manner, but there was an problem securing the tire dolly to remove the wheel. However, even with that in consideration, he felt the matter took a very long time. He stated that the mechanics failed to communicate that the delay caused by the brake change meant that the ETOPS inspection lapsed, and he stated the mechanics should have known about that. Mr. Erriah identified RX 28 as the original CR-1 to the Complainant relating to the

incident, and identified RX 29 as the revised CR-1 that was substituted, explaining that the revision was due to the ASAP results which required the issue involving the ETOPS to be deleted. He stated that Mr. Urso, the other mechanic involved in the incident, also received a similar CR-1. He stated that at that time he was not aware the Complainant had filed a charge of discrimination, and stated that the torque wrench incident between the Complainant and A.J. Murray did not have anything to do with the CR-1 entries on the ETOPS matter. With regard to Mr. Urso's allegation that he had said there would not have been a hearing if the ETOPS paperwork had been signed off, Mr. Erriah admitted making that comment. He stated that it was in the context of what additional matters needed to be signed off on. T. at 507-513.

Mr. Erriah stated he was a shift manager at the time of the torque wrench incident, and learned of it when Human Resources or the shift manager called him to tell him there had been a complaint made against Mr. Murray. He stated he was told to investigate the matter and he did. He said he spoke with Mr. Murray. Mr. Erriah stated that something Mr. Murray said was "on the borderline" of being interpreted the wrong way, and he reminded Mr. Murray of the employee policy guide and rule 32, and counseled him he "needed to tone it down and not be confrontational."<sup>26</sup> Mr. Erriah identified RX 8 as the letter he provided to the Complainant as a follow-up to the investigation. He stated that the Complainant did not contact him to complain he was being harassed, and stated that American Airlines has a policy against harassment. Mr. Erriah identified RX 11 as the Respondent's work environment policy, which prohibits (among other things) unlawful harassment. Mr. Erriah identified RX 7 as the paper trail of the Complainant's complaint against Mr. Murray, and commented that the Complainant followed company policy correctly when he lodged his complaint. He stated that it did not upset him that the Complainant complained against Mr. Murray, and that he is offended by any allegation that he retaliated against the Complainant. Mr. Erriah stated he has tried to reach out to the Complainant but has gotten nowhere. T. at 514-518.

Mr. Erriah identified RX 15 as a CR-1 entered by supervisor Joe Ambrosio regarding the wheel change incident. He stated the Complainant received a first advisory because of the incident, but it was removed from the Complainant's file because it "was ASAP'd." Regarding attendance policies, Mr. Erriah stated that a lateness of more than two minutes generates an "RL," and the employee is paid only if the entry is corrected. Mr. Erriah stated there is a tracking system for generating discussions with employees about tardiness or absences; a discussion between the employee and supervisor on the matter closes it out in the tracking system. He stated that currently, supervisors cannot override an employee's swipe in and swipe out, but that at the time concerned, supervisors could, and stated the change was implemented "well over a year ago." T. at 519-523.

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<sup>26</sup> Rule 32 of the Employer's Rules of Conduct states: "Behavior that violates the company's Work Environment Policy, even if intended as a joke, is absolutely prohibited and will be grounds for severe corrective action, up to and including termination of employment. This includes, but is not limited to, threatened, intimidating, interfering with, or abusive, demeaning or violent behavior toward, another employee, contractor, customer, or vendor, while either on or off duty ...." RX 9.

Mr. Erriah stated that Mr. Gukelberger, the union representative, did not tell him that actions involving the Complainant have caused other mechanics to change their willingness to use their judgment. He denied treating the Complainant differently from other mechanics, and stated he was never instructed to treat the Complainant differently. He indicated the Complainant never came to him and requested assistance because of any job-related stress issues. T. at 523-25.

On cross-examination, Mr. Erriah stated he knew that the Complainant had reported the torque wrench incident to the FAA, but stated he did not learn about the report until weeks after the incident. He also acknowledged he knew the Complainant had complained to "HR" [human resources] about the incident with Mr. Murray, and that part of that complaint was that Mr. Murray was trying to get him to use the inappropriate tool for the job. Mr. Erriah acknowledged that a complaint about a supervisor attempting to pressure a mechanic to use the wrong tool on a repair would be a safety issue, and conceded that Mr. Murray should have been disciplined if it was a safety issue. Mr. Erriah did not agree that if the manual required a dial type torque wrench, only that type of wrench would do, and he stated this incident brought up the need to revise the manual to state that the equivalent of a dial type torque wrench could be used. Mr. Erriah stated that a mechanic can decide what an equivalent tool would be. He stated he was not concerned about the type of torque wrench used, so long as it covered the criteria of the check. Mr. Erriah stated he works with torque wrenches often and was not offended that the Complainant chose to contact the FAA, but he did not know what drove the Complainant to do so, as he did not think contacting the FAA was warranted in that situation. T. at 525-539.

Regarding the ASAP policy, Mr. Erriah stated that discipline is still possible after an employee files an ASAP if a performance issue is involved. He stated he was aware that the policy provided that, with certain exceptions, the content of an ASAP report will not be used to initiate or support any disciplinary action, or for an FAA enforcement action. Mr. Erriah stated it was his opinion the Complainant always lacked confidence in his work. He confirmed that he has supervised the Complainant, both directly and indirectly, and has received feedback on the Complainant from others. He stated he did not know that prior to August 2004, there were no CR-1s relating to the Complainant's work performance in his file. He stated he has made multiple attempts to reach out to the Complainant, but has been told by two union section chairmen "not to even bother." T. at 539-545.

On the cargo compartment incident, Mr. Erriah stated the procedure is that as soon as the mechanic realizes there is a potential for delay, he is to notify the crew chief, supervisor or manager on duty. Mr. Erriah confirmed he did not speak to the Complainant about the need to wear hearing protection at the time in question, and said he did not notice whether the Complainant had protective muffs wrapped around his neck. He stated he knew the repair in the cargo compartment took more than 45 minutes, and said he never saw the Complainant put on his hearing protection. Mr. Erriah admitted that the rule requiring hearing protection whenever one is in the ramp applies to everyone. He stated he did not tell the Complainant at the time to put on his hearing protection because he was distracted; he noted the letter about the Complainant's hearing threshold change was still on his desk a week later, and it reminded him that he had seen the Complainant on the ramp without wearing hearing protection. Mr. Erriah stated he also spoke to the crew chief about the delay but did not put it on a CR-1 form, because

he determined the crew chief was not directly involved with the delay. He stated his conversation with the Complainant was not to criticize, but was an attempt to get facts regarding the delay. T. at 545-558.

Mr. Erriah remarked that if he pushed an issue with the Complainant that he needs to discuss a matter with him, the Complainant wants to bring in somebody from the union before they can talk. He indicated the Complainant has always been this way, so far as he knows, but more so in recent years. Mr. Erriah identified RX 24, the CR-1 regarding the Complainant's hearing threshold, and confirmed he was present at the conversation. He confirmed the Complainant has a right to union representation at any conversation with management, and noted the CR-1 regarding the event did not list any union representative present. He stated he could not remember whether the Complainant had union representation at that session. Mr. Erriah admitted he could verify whether the Complainant has received more CR-1s than other mechanics but has never investigated whether that is true. He reiterated that his purpose in discussing the cargo hold incident was fact finding, and stated he was not trying to blame anyone but just wanted to know what had happened. T. at 559-564.

As to the thrust reverser incident, Mr. Erriah confirmed he wanted to discuss the matter with Mr. Santos and the Complainant to find out the cause of the delay. As to the ETOPS incident, he confirmed that management, the crew chiefs, and the mechanics should all know about an expiring ETOPS inspection. He stated he spoke with the crew chief about the incident, but admitted there is no CR-1 on that conversation. He stated he did not consider the CR-1 regarding his conversation with the Complainant to be a "write-up" but just a record of discussion. He stated that Mr. Urso, who was also assigned to the aircraft, also received a CR-1, and he disagreed with the conclusion that the two mechanics were "written up." T. at 565-579.

Mr. Erriah stated he became aware of the charge the Complainant filed with OSHA when he was told there was someone coming to interview management, and a woman from OSHA came. He stated he could not remember the date, but guessed it was in 2005. He stated he could not remember whether Phil Joshua discussed with him that the Complainant had filed a charge of discrimination, but conceded he would be surprised if Mr. Joshua knew and did not tell him, because he was Mr. Joshua's direct supervisor. Mr. Erriah stated he made a "memo to file" regarding his conversation with Mr. Murray involving the July 30, 2004 incident, and did not make a CR-1 entry. T. at 580-584.

### Lou Gonzalez

Lou Gonzalez testified under oath as a witness for the Respondent. He stated he is employed by the Respondent and is currently manager of aircraft maintenance on the midnight shift at LaGuardia Airport. He stated he was hired by American Airlines in 2002, and from July 2002 until 2005 he worked at JFK Airport as supervisor of aircraft line maintenance on the afternoon shift. He stated he had 27 years experience as a mechanic and as a supervisor, prior to his employment with American Airlines. T. at 586-88.

Mr. Gonzalez stated he supervised the Complainant on the afternoon shift between November 2002 and early to mid 2005. He stated he was familiar with the incident in 2003

involving the Complainant and supervisor Bill Doyle, and spoke with the Complainant afterward in order to understand facts relating to a delayed aircraft. Regarding the wheel change incident on August 27, 2004, Mr. Gonzalez confirmed that he wrote a statement about the incident at the request of supervisor Joe Ambrosio (RX 16). He stated he had been the night supervisor on the date in question, and he saw the Complainant had the E-58 form sticking out of his jacket pocket. Mr. Gonzalez stated he told the Complainant to drop off the document with the crew at the hanger because they were looking for it, and the Complainant told him as soon as he got back there he would give it to them. He testified that later that night, the acting manager on the nightshift called him and asked him if he knew what had happened to the E-58, because the mechanic who was going to work on the plane would not continue with the work until he knew exactly what was needed. Mr. Gonzalez stated the E-58 was needed to document what work been done with the aircraft to ensure a proper turnover of work, and it was not proper to just drop off the document. T. at 588-98.

Mr. Gonzalez identified the record of his conversation with the Complainant about the Complainant's attendance, and stated that it took him 12 days to have the conversation after the attendance issue was noted, because he was bogged down with many counseling sessions, involving many different individuals, to get done (RX 36). He stated his practice was to sit down with a mechanic after every absence or lateness. Regarding the Complainant's session, he stated it was the Complainant's second lateness in a month, and he wanted to find out what the problem was. He stated that the Complainant told him he had been delayed by an accident. Mr. Gonzalez confirmed that the incident involved a RL of 0.1 hour. He stated that if an employee does not make up the lateness, documented by a later time swiping out, the employee is reported as having worked less than a full eight hour day, and then is only paid for the amount of time worked. He stated that he will adjust time for mechanics who work late if they ask, but stated the Complainant did not ask him on the date in question. Mr. Gonzalez also testified that he told this to the Complainant, but the Complainant responded that he did not want any favors. He stated he also discussed the matter with Mr. Gukelberger, the union representative, who had been present at his conversation with the Complainant. Mr. Gonzalez denied he was trying to punish the Complainant by making an entry of the conversation in the Complainant's attendance record. He stated he needed to discuss the matter with the Complainant, per company policy, because the Complainant had already been late that month. Regarding the Complainant's allegation that he was being singled out, Mr. Gonzalez responded that he was singled out because he was late, and he did not stay late to adjust the time, so there was a record of lateness to be addressed. T. at 598-608.

On cross-examination, Mr. Gonzalez stated he knew about the torque wrench incident with A.J. Murray from conversations he had with other mechanics within a week or two of the incident. He stated he did not discuss the incident with Mr. Murray. Regarding the 2003 matter, he confirmed he had a discussion with the Complainant. He also stated he did not make a CR-1 entry of that conversation, remarking "I didn[']t have to because I was not taking any kind of ... any disciplinary action for what had occurred....it was just for information only as to what he should do in the future." Regarding the wheel change incident, Mr. Gonzalez stated the Complainant told him and Mr. Ambrosio at a hearing the next day that he had left the E-58 on the desk. He said the Complainant also reported he had gone into the office and there was no one there, and had gone to the aircraft and there was nobody there either, so he left the

paperwork on the desk. He also stated he did not hear the Complainant remark, at the hearing, that no one would take the paperwork. T. at 609-17.

Regarding his conversations with mechanics about attendance issues, Mr. Gonzalez clarified that he reviews attendance every pay period, and every seven days he reviews the files on all mechanics who called in sick during that week. He stated that every time he had a conversation with a mechanic about attendance, he made an attendance record entry. He agreed that the Complainant generally arrived fifteen or twenty minutes early, “except a couple of instances that he was late.” He confirmed the time that the Complainant was three minutes late the Complainant told him he was delayed by an accident on the highway. Mr. Gonzalez examined CX 14 and confirmed the Complainant was docked for six minutes of pay because of lateness, and that Mr. Urso was not docked at all on that date. He agreed he could see why the Complainant felt he was being singled out, but remarked that the computers have since been modified. He stated the conversation where the Complainant told him he did not want any favors was not reflected in the attendance record entry, because it took place after the entry had been made. T. at 618-25.

On redirect examination, Mr. Gonzalez stated he had no idea why there was a discrepancy between the Complainant’s and Mr. Urso’s time records, and also commented that the Complainant did not come to him with time records to demonstrate why he felt singled out. T. at 626-27.

### Philip Joshua

Philip Joshua testified under oath as a witness for the Respondent.<sup>27</sup> He stated that he has been employed by Pratt & Whitney since August 2006, and that prior to that he worked for American Airlines from August 2002 to July 2006. He stated that he was supervisor of production for aircraft maintenance at JFK Airport when he worked for the Respondent, and supervised between 25 and 35 mechanics on a given shift. He stated he supervised the Complainant in the 2004-2005 timeframe; he stated he tried to see each employee he supervised every day and commented that the Complainant usually would not respond to his greeting. Mr. Joshua stated he had the opportunity to observe the Complainant, and he considered him to be a “very closed person” who did not talk much and hung out with a very few people. Mr. Joshua stated there were times he needed to talk to the Complainant about work-related issues, and the first response from the Complainant would be that he wanted a shop steward present. T. at 648-53.

Mr. Joshua stated he was familiar with the company’s Peak Performance through Commitment policy, which included training managers in how to sit down and talk to an employee and the steps necessary to ensure that corrections were made. He stated the program is progressive so that as the advisories go up there are greater consequences. Mr. Joshua defined a CR-1 as “a discussion that a supervisor and employee have” and commented that it could be a “good discussion.” He stated that the CR-1 record should reflect exactly what was discussed with the employee, and should not be vague. He stated that a CR-1 is not a form of discipline

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<sup>27</sup> This witness testified on February 26, 2008, when the hearing reconvened.

and stated he personally wrote CR-1 entries when it was necessary. Mr. Joshua identified RX-13 as a CR-1 he wrote regarding the Complainant's expired mechanic qualifications, and stated that he wrote the CR-1. He stated he discussed this matter with the Complainant, and does not recall the Complainant alleging that this discussion was harassment for the torque wrench incident. T. at 653-58.

Mr. Joshua stated that as a manager he was responsible for ensuring that employees left on time, were properly paid for overtime, and that latenesses and absences due to sickness were addressed. He stated that employees who reported late received an "RL" and were docked for the lateness. He also stated that employees were given the opportunity to make up time that they were late, but needed to come and see him in advance. However, he said on occasion an employee would come to him after reporting late and request to make up time. Mr. Joshua stated that after a shift began he pulled out a roster, which would tell him who had not punched in, and remarked that if an employee did not punch in it meant that either he did not come in or that he came in and "it didn't register," so he would go and look for the person. He stated that he recalled on one occasion the Complainant may have come in late, but did not say anything to him, and he left the day blank on his records. Because the Complainant never came in and told him why he came in late, he left the date open, and the Complainant did not get paid for the day. Later the Complainant came to him, and he asked the Complainant what happened, and that is when the Complainant told him he was late, and the pay was adjusted. Mr. Joshua described the "swipe in" system, and stated that supervisors could not override the times that employees "swiped" in and out, but supervisors could adjust times, and then the adjusted times would also show in the time records. T. at 658-63.

Mr. Joshua identified RX 36 as an attendance record discussion regarding the Complainant's time off from July 10, 2004, to July 17, 2004, and he acknowledged making the entry on August 5, 2004. Mr. Joshua commented that it was the latter date, or perhaps the day before, that he had the discussion with the Complainant. He stated the Complainant had numerous "open segments" in his attendance records, and so he decided to do a "twelve-month" review, discussing all of the Complainant's attendance issues in the prior year. Mr. Joshua commented that the previous Christmastime the Complainant had called in sick prior to a scheduled day off, and he wanted to bring this pattern to the Complainant's attention.

Mr. Joshua stated he had a discussion on September 7, 2004, regarding the Complainant's lateness. At that time, he stated, the Complainant called in and said he was going to be late, but he never contacted management when he came in, and the date consequently had an "RL" code. Mr. Joshua stated that had the Complainant come to him when he arrived on that date he would have overridden the "RL" code and allowed the Complainant to make up the time he had missed. He also stated he told the Complainant that "RLs" can lead to disciplinary action, but he did not consider his discussion with the Complainant regarding his attendance issues to be discipline. Mr. Joshua examined CX 14, regarding the September 7, 2004 conversation, and stated the Complainant was ultimately paid for that day. Mr. Joshua stated that the Complainant told him he was not paid, and so he made the adjustment. T. at 663-70.

Mr. Joshua identified CX 12 and stated it dealt with a discussion he had on January 6, 2005, about the Complainant calling in sick during Christmas week. He stated that he placed the

Complainant on a 90-day requirement that all absences must be accompanied by a physician's note, and he commented that this procedure is used when a manager suspects an employee has abused sick time. Mr. Joshua also stated that he had noticed a pattern with the Complainant calling in sick every year during Christmas, if he did not already have the day off. Mr. Joshua also stated that he offered the Complainant assistance and the Complainant responded that he had had enough, and walked away. Mr. Joshua said a shop steward was present at the meeting, and he told the shop steward to tell the Complainant to return, because he was not done with the meeting, or he would fire the Complainant for insubordination. The Complainant returned and they continued the meeting. Mr. Joshua denied that he took these actions because of the torque wrench incident. T. at 671-674.

Mr. Joshua recognized RX 28 as a record of a discussion he had with the Complainant regarding the ETOPS incident. He stated that the Complainant and another mechanic told a crew chief at 4:00 [p.m.] that the brake change needed to be done, and this caused the aircraft to be late, and then at 10:00 pm he was told that the brake change had been done but the ETOPS needed to be done again. Mr. Joshua acknowledged that CX 2 indicated a brake change was to take four hours, but stated that was an approximation, and also stated that for someone who was used to doing brake changes, it normally took two or two and a half hours. Mr. Joshua stated that in this instance he believed it took five hours to change the brake, and commented that he did not know about the tire dolly problem. He remarked that there are usually tire dollies kept chained at the terminal, but sometimes they are out of service, and stated he would not expect anyone to remove a tire without a tire dolly because it is too unsafe. Mr. Joshua stated he was present when the Complainant and Mr. Urso insisted the ETOPS needed to be re-done. He said he stated they should call engineering in Tulsa, which advised that the ETOPS did have to be re-done. At that point it was close to the end of the shift for the Complainant and Mr. Urso, he stated, so he told them he would get someone else to do the ETOPS. Mr. Joshua stated his problem with the incident was that he was not told in a timely way of the problem with the ETOPS inspection and stated it was the mechanics' responsibility to tell the crew chief about the ETOPS. T. at 675-82.

Mr. Joshua explained his purpose in writing the CR-1 on the ETOPS incident was that, in his opinion, the Complainant and Mr. Urso did not have a "sense of urgency" about getting the aircraft off in a timely way and did not adequately communicate to management that they were having problems with the aircraft. He also commented that had he been told before 10:00 p.m. about the ETOPS requirement, he could have had time to recover, but he had no choice but to reschedule the airplane and push back the departure even further. He stated that he had similar discussions with both the Complainant and Mr. Urso, and wrote similar CR-1s for them both. Mr. Joshua acknowledged that he discussed the company's rules of conduct (set forth in RX 9) with the Complainant, as reflected in the CR-1. He noted that rule 12 requires communication, to avoid delays and poor service to the public; rule 15 prohibits intentional restriction of output (and he stated that he felt that applied in this incident); and rule 24 requires consideration of the company and fellow employees, and prohibits acts that are detrimental to either. Mr. Joshua stated he believed he cited those same rules of conduct in the CR-1 he wrote for Mr. Urso. Mr. Joshua acknowledged that A.J. Murray was present at his discussion with the Complainant on this matter, but stated Mr. Murray was present to take notes, and did not contribute to the discussion. Mr. Joshua also stated that the Complainant had several union representatives

present. Mr. Joshua denied that his discussion with the Complainant had anything to do with the Complainant's complaint regarding A.J. Murray. He also stated he did not attempt to get the Complainant and Mr. Urso to sign off on something they did not want to sign off on. Later, Mr. Joshua stated, the rule on ETOPS changed, and he held a meeting to tell the mechanics that the three-hour requirement for ETOPS had been eliminated. T. at 682-89.

Regarding the CR-1 he wrote memorializing his conversation with the Complainant about the ETOPS incident, Mr. Joshua stated that he repeatedly asked the Complainant if he fully understood, and the Complainant responded that he did not, and the Complainant refused to sign the form, and then wrote a rebuttal. He also commented that the crew chiefs were not fully aware of the situation when it was happening. T. at 698-91.

On cross-examination, Mr. Joshua explained that changing the departure time of a flight requires him to have a series of conversations with Ramp Control. Mr. Joshua acknowledged that an ETOPS could not be done until the brake change was completed, and that the Complainant and his co-worker could not do the ETOPS while they were working on the brake. Mr. Joshua stated that the brake change repair requirement should have taken two or two and a half hours, which would have left ample time to finish the ETOPS before departure. He acknowledged that the crew chief informed him that the mechanics were having trouble getting a dolly, and agreed that he was getting updates on the situation as the matter progressed. He stated he was upset not only about the ETOPS not being done, but also that the Complainant and his partner had not communicated about the ETOPS having to be redone. He estimated it would have taken the Complainant about 45 minutes to do the ETOPS, which was quicker than having two new mechanics do it, but the Complainant was near the end of his shift, so he would have to be paid overtime if he stayed to complete the job. T. at 693-711.

Mr. Joshua acknowledged that the training he received included training on CR-1s. He stated he was required to issue a CR-1 anytime he had a discussion with an employee, if he believed the discussion needed to be documented. He also stated that issuance of a CR-1 is a matter of the supervisor's discretion. Regarding the swipe-in procedure, Mr. Joshua testified that if an employee swipes in late, the work time is not fully accounted for, and so the employee is not paid for the shift until the supervisor makes the adjustment and determines how to account for the missing time. He indicated this is what he meant by the pay record being "left open," and he reiterated that he reviewed mechanics' open pay records every pay period to ensure they were properly paid. Regarding RX 36, Mr. Joshua agreed that he pulled up all "open items" on August 5 [2004]; he acknowledged that an entry showed he discussed the Complainant's attendance over Christmastime 2003 on March 2, 2004, and he stated that in August he was addressing the same issue. He also agreed that in March 2004 he had told the Complainant his attendance was excellent (RX 49). T. at 712-23.

Upon being shown CX-12, Mr. Joshua acknowledged that he wrote the CR-1 entry about the doctor's note requirement on January 6, 2005, and acknowledged the CR-1 statement did not show that the Complainant walked away and he called him back and warned him about insubordination. Mr. Joshua clarified his earlier testimony, and stated he told the shop steward about insubordination, not the Complainant. T. at 724-28.

On re-direct examination, Mr. Joshua indicated it was not uncommon for mechanics on the next shift to pick up a job that mechanics on the previous shift had started. He stated there was no need to have the Complainant finish the ETOPS because there were other people on the next shift ready to do the work. He denied that his discussion with the Complainant about attendance was intended as retaliatory, and indicated no one told him to have that discussion. T. at 729-732.

In response to my questions, Mr. Joshua stated that once a CR-1 entry is made, it cannot be changed. He indicated he has access to CR-1s written for any mechanics, even those he does not supervise, because any mechanic could potentially report to him. He remarked this is the practice because supervisors have rotating shifts. T. at 733-36.

### Joseph Ambrosio

Joseph Ambrosio testified under oath as a witness for the Respondent.<sup>28</sup> He stated he no longer works for American Airlines but was employed by American at the JFK Airport facility from 1999 to 2005. He stated that he wrote the first advisory at CX 17, which involved the wheel change incident, and that it went into the Complainant's personnel file about November 1, 2004. However, he stated, the first advisory was removed almost immediately, after a meeting with the union president and his manager. He stated he determined the Complainant had elected to fill out an E-58 form, but also indicated that the Complainant did not tell him that he could find no one to accept the form. Mr. Ambrosio recognized RX 44 as notes of the 29-F hearing held regarding the same incident.

Mr. Ambrosio recognized CX 12 as a CR-1 documenting a discussion with the Complainant, in which it became clear the Complainant had submitted an ASAP about the incident. Mr. Ambrosio stated he agreed to wait to see if the ASAP would be accepted, and he documented that on the CR-1 entry. However, he later issued the first advisory, because there was no immediate response on the ASAP, as he had anticipated. He denied there was any relationship between the first advisory he wrote and the torque wrench incident. Mr. Ambrosio identified RX 17 as a statement written by another mechanic, at his request, regarding the wheel change incident. He stated he considered whether to issue a first advisory to this mechanic, who had assisted the Complainant with the wheel change, as well as to others, but decided no one else merited such action. Mr. Ambrosio stated that at the 29-F meeting, the Complainant stated he had filed an ASAP. T. at 744-756.

On cross-examination, Mr. Ambrosio conceded the only person subjected to a 29-F hearing on the wheel change incident was the Complainant, and that the mechanic who was helping the Complainant did not receive a CR-1. T. at 756-69.

### **Credibility of the Witnesses**

During the course of the three day hearing, I had the opportunity to observe all of the witnesses who testified, with the exception of those witnesses who testified by telephone. As a

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<sup>28</sup> Mr. Ambrosio testified when the hearing reconvened on February 26, 2008.

factfinder, I must consider the credibility of the witnesses. Among the factors to consider in weighing witness testimony are the following: the relationship of the witnesses to the parties; the witnesses' interest in the outcome of the proceedings; the witnesses' demeanor while testifying; the witnesses' opportunity to observe or acquire knowledge about the subject matter of the testimony, and the extent to which witness testimony is supported or contradicted by other evidence (including documentary evidence.). See Jeter v. Avior Technologies Operations, ARB Case No. 06-035 (ARB: Feb. 29, 2008), slip op. at 13.

All of the witnesses are either present or former employees of the Respondent. All of the Complainant's witnesses were mechanics or other "line" employees; all of the Respondent's witnesses were supervisors or managers. As would be expected, the witnesses testified regarding the incidents in question from their own point of view, either employee or management. In addition, the witnesses who held positions within the union evidenced the point of view specific to union officials with regard to management-employee relations.

I find the Complainant and the Complainant's witnesses to be credible. In this regard, I have considered that not only the Complainant but also some of the Complainant's witnesses have current AIR21 actions pending, and thus some of the Complainant's witnesses have an additional incentive to testify adverse to the Respondent. Nonetheless, I found all of the Complainant's witnesses to be credible. I find that the Complainant's witnesses were forthright in their testimony, even on matters which could be interpreted unfavorably (such as past clashes with management). Based on my observations, I discerned that Mr. Urso and Mr. Santos were somewhat apprehensive about testifying, but I conclude this apprehension was a result of general nervousness and not the result of pressure or undue influence from any party.

The Complainant's demeanor was calm and quiet. He testified with certainty and clarity. I note that he was careful to confine his testimony to matters he observed or had knowledge of. In general, the Complainant refrained from speculation regarding any retaliatory motive for the Respondent's actions. I find that the Complainant's testimony regarding his perception of the Respondent's actions, in particular his comments that he felt "singled out," is evidence only of his state of mind, and not his employer's intent.

Similarly, I find the Respondent's witnesses to be generally credible. I find Mr. Gonzalez, whose testimony did not evince any defensiveness, to be particularly forthright. Although Mr. Erriah showed some resentment during his testimony, I infer this attitude was focused against the proceedings, rather than the Complainant personally. Notably, Mr. Erriah (who sat in on the proceedings as the Respondent's representative) was courteous toward the Complainant at all times. Mr. Joshua seemed somewhat irritated during his testimony, and I infer that he resented the requirement to testify. However, I did not observe that he was hostile toward the Complainant personally.

As will be explained in greater detail below, there are few facts that are in dispute in the instant case. Rather, the matters in dispute revolve around the interpretation that various parties give to the same set of facts. This is not unexpected in a whistleblower case, where the parties' intent and states of mind may play critical roles. Consequently, I am not surprised that witnesses for opposing parties will have differing opinions about the same facts, and I find that these

differing opinions are not a basis for concluding that any witness, or witnesses, may lack credibility.

### **Undisputed Facts**

Based upon the evidence of record, I find the following undisputed facts:

- 1) The Respondent, American Airlines, is an air carrier covered under AIR21.
- 2) The Complainant, Brian Williams, is employed as a licensed aviation maintenance technician (AMT) by American Airlines, at its facility at JFK Airport, and was so employed during the period in question, July 2004 to February 2005. T. at 29-30.
- 3) The Respondent's maintenance operation at JFK Airport operates 24 hours per day, every day, and runs various shifts throughout each day. T. at 472-73.
- 4) The Complainant filed a complaint with OSHA under the whistleblower provisions of the AIR21. RX 1.
- 5) The Complainant's AIR21 complaint was recorded as "Received" at OSHA on November 1, 2004; OSHA's acknowledgment letter to the Complainant states that his complaint was dated October 20, 2004. RX 1.
- 6) The OSHA Findings were issued on December 14, 2006. The OSHA investigation covered incidents that occurred in 2004 and 2005. OSHA Findings.
- 7) The Complainant is represented by a union. T. at 43, 353.
- 8) All parties agree that, per the union contract, the Complainant has the right to union representation at any discussion with management regarding his work that could result in disciplinary action. RX 20.
- 9) In 2003, prior to his AIR21 complaint, the Complainant made a complaint to the Respondent about a supervisor whom he alleged had harassed him. RX 2, 3.
- 10) The Respondent promptly investigated and resolved the Complainant's 2003 complaint. RX 4.
- 11) On or about July 31, 2004, the Complainant complained to the Respondent's Human Resources department about the incident involving his supervisor, A.J. Murray, on July 30, 2004 (the "torque wrench incident"). RX 7.
- 12) The Complainant also filed a complaint with the FAA shortly after the "torque wrench incident." RX 1.

- 13) In a state worker's compensation action, the Complainant successfully asserted that the Respondent's actions, after the torque wrench incident, injured him by causing him anxiety and depression. CX 3, 4.
- 14) Because the Respondent's practice has been to rotate supervisors through the various shifts, the Complainant has worked under various supervisors. T. at 447, 481.
- 15) The Respondent's ASAP Program [Aviation Safety Action Program] permits certain employees, including mechanics such as the Complainant, to "self-report" safety-related concerns, including violations of federal safety rules, via a dedicated channel within the company. This program was in existence during the time period in question. RX 43; CX 5.
- 16) On or about November 1, 2004, the Respondent issued a "first advisory" to the Complainant, based on the Complainant's alleged failure to document a temporary wheel replacement on August 27, 2004 (the "wheel change incident"). CX 7.
- 17) Under the Respondent's published policies, a "first advisory" is considered a disciplinary action. RX 47.
- 18) The "first advisory" was later withdrawn from the Complainant's records because the Complainant had filed an ASAP regarding his failure to document the wheel replacement. T. at 519-20.
- 19) Under the Respondent's published policies, a "first advisory" can remain in an employee's file for not longer than two years. RX 47.
- 20) Under the Respondent's published policies, a CR-1 (performance counseling record) may be maintained for an employee. RX 47.
- 21) On or about July 7, 2004, the Respondent recorded, via a CR-1, a discussion with the Complainant regarding a measured change in his hearing threshold. In this discussion, the Complainant was reminded to wear hearing protection. RX 24.
- 22) On or about September 5, 2004, Devon Erriah recorded a CR-1 regarding the Complainant's failure to wear hearing protection while inspecting a cargo compartment on August 30, 2004 (the "cargo compartment incident"). RX 25.
- 23) On or about February 5, 2005, supervisor Phil Joshua entered a CR-1 in the file of the Complainant regarding his actions as to ETOPS inspection in conjunction with a brake change, on January 8, 2005 (the "ETOPS incident"). This CR-1 included language referring to several provisions of the company's Rules of Conduct. Mr. Joshua executed a similar CR-1, regarding the same incident, and placed it in the file of Joseph Urso. RX 25; T. at 245, 258.

- 24) The Complainant's CR-1 regarding the January 8, 2005 incident was later revised to eliminate references to the ETOPS inspection, because the Complainant had filed an ASAP, but references to the brake change and the language regarding the Rules of Conduct remained. RX 29.

Additional Findings of Fact are set forth in the Discussion below.

## Discussion

### Elements of a Complaint under the Act

The AIR21 Act states the following:

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 standards 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;...

By its terms, the Act prohibits an Employer from discharging, or otherwise discriminating against an employee “with respect to compensation, terms, conditions or privileges of employment” because the employee has engaged in protected activity as defined in the statute. 49 U.S.C. § 42121(a).

To prevail on a claim under the Act, a complainant must establish the following elements:

- 1) He engaged in protected activity, as statutorily defined;
- 2) The Employer was aware of the Complainant's protected activity;
- 3) The Employer subjected the Complainant to adverse action, as statutorily defined; and
- 4) The Complainant's protected activity was a contributing factor in the adverse action.

Clark v. Pace Airlines, Inc., ARB Case No. 04-150 (ARB: Nov. 30, 2006), slip op. at 11; Barker v. Ameristar Airways, Inc., ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5. A complainant is required to establish each of these elements by a preponderance of the evidence. Patino v. Birken Manufacturing Co., ARB Case No. 06-125 (ARB: July 7, 2008), slip op. at 5; Sievers v. Alaska Airlines, Inc., ARB Case No. 05-109 (ARB: Jan. 30, 2008), slip op. at 4.

If a complainant proves by a preponderance of the evidence that the employer has violated the statute, the complainant is entitled to relief unless the employer establishes, by clear and convincing evidence, that the same adverse action would have been taken in the absence of the protected activity. 29 C.F.R. § 1979.109(a); see also Barker v. Ameristar Airways, Inc., ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; Hafer v. United Airlines, Inc., ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

Creation of a hostile work environment may constitute an adverse action. Berkman v. U.S. Coast Guard Academy, ARB Case No. 98-056 (ARB: Feb. 29, 2000), slip op. at 16. The Administrative Review Board has explicitly held that the concept of a hostile work environment applies in whistleblower cases. Lewis v. U.S. E.P.A., ARB Case No. 04-117 (ARB: June 30, 2008), slip op. at 5; see also Varnadore v. Oak Ridge Nat'l Lab., ARB Case No. 1992-CAA-002, slip op. at 71 (ARB: June 14, 1996)(CAA case), aff'd sub nom. Varnadore v. Sec'y of Labor, 141 F.3d 625 (6th Cir. 1998).

#### Whether the Complainant engaged in Protected Activity

Under the statute and its implementing regulations, protected activity includes providing information “to the employer or Federal Government” 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.” 49 U.S.C. § 42121(a)(1); 29 C.F.R. § 1979.102(b)(1). At the hearing, the Respondent indicated that to the extent the Complainant established that he contacted the FAA to report a violation, it did not dispute that his action was protected activity. T. at 24; see also T. at 457-58.

The Respondent contends, however, that the Complainant did not sustain his burden to establish that he engaged in protected activity when he contacted the FAA. Respondent’s brief at 55-58. According to the Respondent, the Complainant’s testimony on this point was vague, establishing only that he contacted the FAA to complain about his supervisor’s conduct. The Respondent asserts that the following testimony from the Complainant constitutes the only evidence regarding the substance of his report to the FAA: “The following Monday I contacted the Federal Aviation Administration to report his conduct, and the possibility that maybe this aircraft wasn’t correctly, either repaired or deferred, it might have been a potentially dangerous situation.” T. at 45.

The Complainant testified that he first contacted the FAA by telephone and subsequently went to the FAA office, where two investigators interviewed him. T. at 45-46. The Respondent is correct that the Complainant does not establish exactly what he reported to the FAA, and that the Complainant’s statement constitutes the entirety of his testimony regarding the substance of what he reported. However, the record contains several other references to the Complainant’s

FAA report. For example, in his state worker's compensation hearing, Complainant questioned a witness as follows: "Are you aware that [on] July 30, 2004, I notified the FAA about A.J. Murray's unsafe maintenance practices, in my opinion?" CX 3 at 33. Additionally, in Complainant's deposition to OSHA, he stated: "During the first week of August 2004, I notified the FAA of the incident." RX 37 at 2.<sup>29</sup>

The Respondent also implies that the Complainant's report to the FAA is the sole instance of protected activity in which he engaged. In its brief, the Respondent does not address the evidence that, immediately after the incident with A.J. Murray, the Complainant made a complaint to the company Human Resources department, or that the Complainant filed several ASAP reports.

Under the AIR21 statute, a complaint made "to the employer" regarding an alleged safety violation also constitutes protected activity. 49 U.S.C. § 42121(a)(1). In order for the provision of "information" to constitute protected activity, the information must be "specific in relation to a given practice, condition, directive or event," and the complainant must reasonably believe "in the existence of a violation." Peck v. Safe Air International, Inc., ARB No. 02-028 (ARB: Jan. 30, 2004), slip op. at 9. It is not necessary for a Complainant to actually establish that the matter complained of constituted a violation; it is sufficient for the Complainant to show that he "genuinely believed" there was or would be a violation of an FAA standard or a federal law relating to air safety, and that his concern was objectively reasonable under the circumstances. Rougas v. Southeast Airlines, Inc., ARB Case No: 04-139 (ARB: July 31, 2006), slip op. at 14.

At the hearing, the Complainant testified that he called the Respondent's Human Resources department the morning after the torque wrench incident and reported "that A.J. Murray had acted very inappropriately and he was threatening me, and he used – demanding that I deviate from aircraft maintenance manuals in order to, in his words, get the product out." T. at 44. The Respondent's records establish that the Complainant submitted this complaint on July 31, 2004. As the records relate: "Brian called to report being harassed, intimidated, belittle[d] and berated by his spvr [supervisor] AJ Murray....Brian did not have the right tool at the terminal so AJ went to the hangar to get it but brought the wrong tool to him. Brian told him he could not use the tool per the manual and nn (sic) the right tool....Brian insisted that he wanted to help but he could not make it work with the wrong tool and it is not on the tool list for the job, he was just being safe...." RX 7 at 4.

The Complainant's call to Human Resources was directed to the employer and involved the Complainant's allegation that he was being directed to use an incorrect tool "per the manual." In his complaint to Human Resources, the Complainant specifically cited "safety" as the reason

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<sup>29</sup> The OSHA Findings include the following: "Complainant specifically alleged to the FAA, that Respondent had provided him with an improper tool for the maintenance of aircraft, and had pressured him to use said tool to meet scheduled departure time." OSHA Findings (December 14, 2006) at 1.

he raised the issue.<sup>30</sup> RX 7 at 4. The Complainant testified that he followed his call with a written statement, which he provided to a manager.<sup>31</sup> T. at 44-45; 534.

Based on the evidence before me, I find the Complainant contacted the FAA and the Human Resources office almost immediately after the incident with supervisor A.J. Murray on July 30, 2004. The written record establishes that the Complainant reported that Mr. Murray directed him to use an “incorrect tool” that was not authorized for use, under the governing repair manual; and that the Complainant feared that use of this tool would be unsafe.<sup>32</sup> I find that, based on the written record and the Complainant’s testimony, the Complainant’s complaint was specific with regard to the event, and that the Complainant genuinely believed that the use of the tool he was directed to employ would jeopardize aircraft safety. I also find the Complainant’s belief was objectively reasonable, because it was based on an aircraft maintenance reference manual.<sup>33</sup> Based on this evidence, I find that the Complainant’s call to Human Resources on July 31, 2004, constituted protected activity.

Although the specific contents of the Complainant’s report to the FAA are not mentioned in detail, the references in the record are complete enough for me to conclude that the contents of the Complainant’s report to the FAA were similar to the Complainant’s report to Human Resources. I find, therefore, that the Complainant has established, by a preponderance of evidence, that he made a complaint to the FAA about A.J. Murray’s direction that he use an inappropriate tool, and that the tool Mr. Murray directed him to use was not approved under “the

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<sup>30</sup> The Complainant’s uncontradicted testimony was that at the time of the incident the aircraft’s maintenance manual required a dial-type torque wrench, not the click-type torque wrench Mr. Murray wanted him to use. T. at 37-41. Devon Erriah, the Director of Maintenance at JFK, agreed that at the time of the incident the manual required the dial-type wrench. This witness did not agree that the only appropriate tool for the job would be the dial-type torque wrench, but he also stated that a mechanic would know whether the other type of wrench would adequately suit the task, and he noted the manual has subsequently been changed to permit “the equivalent” of a dial-type wrench. T. at 534-36.

<sup>31</sup> There is no written complaint in the record, however.

<sup>32</sup> The Complainant testified about differences between the dial-type torque wrench and the click-type torque wrench. T. at 39-42. Although the written record does not establish that the Complainant’s complaint specified the issue regarding the two different types of wrenches, I find it more likely than not, based on my observation of the Complainant during his testimony, that he did include such detail in his complaints. Even if he did not, however, I find that the Complainant’s reference to a specific incident, on a specific date, involving a named supervisor, and his comment that the supervisor instructed him to use an “incorrect tool” meets the specificity requirement for protected activity. See Rougas v. Southeast Airlines, Inc., ARB Case No: 04-139 (ARB: July 31, 2006), slip op. at 14.

<sup>33</sup> The Employer’s witness, Devon Erriah, who has more extensive experience in maintenance procedures than the Complainant, testified that there was no difference between the use of the two different types of wrenches, and in fact asserted that a click-type wrench might be more accurate in applying a measured amount of torque. I find that, for a mechanic of the Complainant’s knowledge and experience, it is reasonable to presume that, when a maintenance manual requires a specific tool, a different tool may not be substituted.

manual.” I find, therefore, that the Complainant has established, by a preponderance of evidence, that his complaint to the FAA constituted protected activity.

The Complainant testified, and also informed OSHA, that he submitted reports through the company’s ASAP program. RX 1; RX 37.<sup>34</sup> Although neither party has addressed the matter in its brief, the evidence raises the issue of whether the ASAPs the Complainant filed, at various times, constituted protected activity, as defined in AIR21 and the applicable regulation.

Under the Respondent’s policies, the Aviation Safety Action Program (ASAP) permits a mechanic to make a written notification of a “possible FAR violation or potential safety of flight concern” through a dedicated company channel. RX 43; CX 5. A committee, consisting of representatives from the company, the FAA, and the union, determines whether an ASAP notification is “accepted.” “Accepted” notifications are investigated. An individual who submits an ASAP notification that is accepted is, in general, protected from receiving employment disciplinary action or FAA adverse action.<sup>35</sup> However, an individual may receive FAA administrative action, such as a warning letter, as a consequence of filing an ASAP.

I find, based on the documents describing the ASAP and the testimony of the witnesses, that the ASAP program is intended principally to protect individuals who promptly “self-report” potential violations of applicable maintenance procedures. However, by its terms, the ASAP program is not limited to self-reports. It is consistent with the goals of the ASAP program to accept notifications on “possible FAR violations” or “potential safety of flight concerns” naming individuals other than the person who makes the report. Consequently, I also find that an ASAP report can constitute protected activity. In making this finding, I note that ASAP reports are submitted through the Respondent’s channels and that the Respondent (employer) and the FAA are aware of all ASAP reports.

The evidence in this case establishes that the Complainant filed ASAPs as follows:

- On August 29, 2004, regarding the wheel change incident of August 27, 2004. This notification recounted the Complainant’s side of the incident involving the E-58 documentation; it did not cite any individuals by name, but discussed actions by the “hangar supervisor” and “tech crew chief.” The Complainant checked the box indicating the event concerned “improper/incomplete paperwork” and also noted that communications “between mechanics” “between shifts” “between maintenance crew and crew chief” and “between crew chief and management” were all involved. The ASAP was accepted. As a result, on November 26, 2004, the Complainant received a warning letter from the FAA. CX 9; RX 12.

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<sup>34</sup> At the hearing, counsel for the Respondent stated that the Respondent did not receive the pertinent page of the Complainant’s OSHA Complaint until March 2005, during the course of the OSHA investigation. T. at 403-410.

<sup>35</sup> There are exceptions for situations involving abuse of drugs or alcohol or intentional falsification. None of these exceptions are relevant in the Complainant’s case.

- On September 15, 2004, regarding his failure to maintain certifications. The ASAP was accepted. As a result, on November 26, 2004, the Complainant received a warning letter from the FAA. RX 14.
- On January 14, 2005, regarding the ETOPS incident of January 8, 2005. This notification specifically named Mr. Joshua, the Complainant's supervisor, and checked boxes indicating the event concerned "improper aircraft release" and "improper/incomplete paperwork." The ASAP was accepted. As a result, on February 17, 2005, the Complainant received a letter from management stating that the applicable instructions "can be confusing" and a "revision for the card has been initiated to address some of the issues." CX 8; RX 27.

These ASAPs concerned the Complainant's perception that the incidents involved provisions of federal law relating to safety regarding "improper/incomplete paperwork," such as failure to document a maintenance action (the wheel change incident) and differing perceptions regarding the requirement for the ETOPS inspection (the ETOPS incident). Additionally, as noted above, the ASAPs were submitted to the Employer; the Employer, in conjunction with the FAA, "accepted" them. I find, therefore, that the Complainant's ASAPs, filed in conjunction with the wheel change incident and the ETOPS incident, constituted protected activity as defined in the AIR21 statute and associated regulations.<sup>36</sup>

#### The Respondent's Knowledge of the Complainant's Protected Activity

The Complainant is required to establish, by a preponderance of evidence, that the Respondent had knowledge of his protected activity. Jeter v. Avior Technologies Operations, Inc., ARB Case No. 06-035 (ARB: Feb. 29, 2008), slip op. at 8-9; Rooks v. Planet Airways, Inc., ARB Case No. 04-092 (ARB: June 29, 2006), slip op. at 6-8. In general, it is not enough for a complainant to show that the employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions or hostile work environment were aware of his protected activity. Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028 (ARB: Jan. 30, 2004), slip op. at 11. Alternatively, a complainant may establish this element by showing that, although the manager who ultimately took adverse action was unaware of the protected activity, another individual who had substantial input into the alleged adverse action knew of the protected activity. Kester v. Carolina Power and Light Co., ARB No. 02-007 (ARB: Sept. 30, 2003)(CAA Case), slip op. at 4. In Peck, the Administrative Review Board upheld the administrative law judge's dismissal of the action, where the complainant did not establish that the two managers who decided to terminate his employment were aware of his complaint to the FAA. In Kester, the Board agreed with the administrative law judge, who found that knowledge of a complainant's protected activity was imputed to a senior manager who relied on the recommendation of another manager, who actually knew of the complainant's protected activity, when the senior manager terminated the complainant's employment.

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<sup>36</sup> I make no finding regarding the ASAP the Complainant filed regarding his failure to maintain certifications, as the Complainant's ASAP did not address any individuals other than himself.

The Complainant stated that someone in the company mentioned something to him about the FAA “coming in to do an investigation.” However, his statement was vague, and does not mention any specific individuals, but only “the head of the inspection department.” T. at 47-48. The Complainant also admitted he did not tell any of the supervisors that he had contacted the FAA and that he may have asked his co-workers to keep quiet about his contact with the agency.<sup>37</sup> T. at 112-113. Devon Erriah initially stated he was not aware of the Complainant’s FAA complaint. T. at 477. On cross-examination, however, Mr. Erriah stated that he heard about the Complainant’s FAA report “weeks after” the incident from “probably the other shift managers or Mike Torrance,” the station manager. T. at 529-31.

In contrast, it is clear that Mr. Erriah knew about the Complainant’s complaint to Human Resources. As the record reflects, he was the supervisor charged with addressing the complaint the Complainant made to Human Resources against Mr. Murray. He also testified that he discussed the matter with Mr. Murray and reminded him of the Respondent’s policies (and specifically Rule 32 prohibiting harassment). Lastly, Mr. Erriah testified that he provided a letter to the Complainant as a “follow-up” to his investigation of the incident. T. at 514-15; RX 5. The Respondent’s records regarding the Complainant’s complaint to Human Resources refer to Mr. Erriah, but none of the other individuals the Complainant has alleged subjected him to adverse action or harassed him are mentioned in these documents. RX 5; RX 7.

Based on the foregoing, therefore, I find the Complainant has established that Mr. Erriah was aware of his complaints to the FAA and to Human Resources. I find the exact date Mr. Erriah became aware of the Complainant’s complaint to the FAA is not known, and I find Mr. Erriah was aware of the complaint to Human Resources on or about July 31, 2004. I also find the Complainant has not established that any managers or supervisors, other than Mr. Erriah, were aware of his complaints to the FAA or Human Resources.<sup>38</sup>

As set forth above, I have found that the ASAPs the Complainant filed regarding the wheel change incident and the ETOPS incident constituted protected activity. The Complainant, therefore, must establish whether any of his supervisors or managers were aware that he submitted ASAPs. Mr. Ambrosio testified he learned the Complainant had filed an ASAP on the wheel change incident, at a meeting on August 30, 2004. T. at 510. The evidence establishes that on October 20, 2004, Mr. Ambrosio wrote a CR-1, advising the Complainant that action on the incident would be deferred until the ASAP was resolved. RX 15. Mr. Erriah testified that the first advisory the Complainant received was ultimately withdrawn from his record because of the ASAP he filed regarding the wheel change incident. T. at 519-20. Consequently, it is clear

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<sup>37</sup> Mr. Gonzalez testified he knew about the torque wrench incident “from the mechanics” but he was not asked any questions about the Complainant’s complaint to Human Resources. T. at 609. Mr. Joshua testified he knew about the incident, but did not testify about the Complainant’s complaint to Human Resources. T. at 761. Both denied that they did anything adverse to the Complainant in retaliation for the incident involving Mr. Murray.

<sup>38</sup> Although it certainly is possible that the subject of the complaints, Mr. Murray, discussed this matter with other supervisors, there is no evidence that any such discussions occurred, and I decline to infer, in the absence of any evidence, that the Complainant’s complaints against Mr. Murray were known to other supervisors. Mr. Murray did not testify at the hearing.

that, as early as August 30, 2004, at least one of the Complainant's supervisors knew about this instance of protected activity, and that later Mr. Erriah knew of the Complainant's activity.

Likewise, the Complainant's supervisors were aware that the Complainant filed an ASAP regarding the ETOPS incident. The Complainant's ASAP is dated January 14, 2005, and was acknowledged by the company that same day. RX 27. Mr. Joshua, who wrote the CR-1 the Complainant received regarding the incident, testified that he discussed the incident with the Complainant the same day he wrote the CR-1, which was February 5, 2005. T. at 689-91; see RX 28. The evidence indicates the CR-1 was revised, based on the Complainant's ASAP report. RX 28, 29; T. at 510. Mr. Erriah testified he discussed the ETOPS incident with Mr. Joshua, prior to the CR-1 being issued. T. at 510.

There is no direct testimony regarding precisely when Mr. Erriah and Mr. Joshua became aware that the Complainant filed an ASAP on the ETOPS incident. However, based on the evidence of record, I find it is highly likely that they knew of the ASAP before February 5, 2005, the date Mr. Joshua testified the CR-1 was written. The Complainant received a letter, dated February 17, 2005, from the company ASAP manager informing him of the results of the investigation into the incident. RX 27. The letter to the Complainant informed him that the matter he raised in the ASAP (regarding the necessity for ETOPS inspections), was coordinated with the engineering department, and adjustments were made. Therefore, the investigation must have been ongoing between January 14 (the date the company acknowledged receipt of the ASAP) and February 17 (the date the company closed out the matter). Presuming, as the record indicates, that the entirety of the investigation, coordination and determination was accomplished in the short time period between January 14 and February 17, much of the work toward the resolution of the ASAP must have been done prior to February 5. Indeed, it is highly likely that initiation of the investigation would have required obtaining information from Mr. Joshua, who was named in the Complainant's ASAP report, and therefore Mr. Joshua was contacted shortly after the company received the Complainant's ASAP.

Based on the foregoing, although there is no direct evidence Mr. Joshua was aware of the ASAP the Complainant filed regarding the wheel change incident, prior to issuing the CR-1 on the ETOPS incident, I find it is likely he had knowledge of that activity as well. Mr. Joshua testified that as a supervisor he had access to CR-1s written on mechanics. T. at 733-35. It is known that Mr. Joshua reviewed records relating to the Complainant, because he testified that he reviewed the Complainant's attendance records at various times.<sup>39</sup> T. at 719-30. As set forth above, Mr. Ambrosio wrote a CR-1 on October 20, 2004 referring to the ASAP the Complainant filed on the wheel change incident. Therefore, it is likely that Mr. Joshua was aware of the ASAP through the CR-1 that Mr. Ambrosio wrote.

Even assuming arguendo that Mr. Joshua was not aware the Complainant filed any ASAPs, the evidence establishes that Mr. Erriah was aware that the Complainant filed the ASAP regarding the wheel change incident. See T. at 519-20. The evidence also establishes that Mr.

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<sup>39</sup> In fact, Mr. Joshua entered the notation of the discussion in August 2004 regarding the Complainant's pattern of suspected sick leave abuse at Christmastime, and imposed the doctor's note restriction in January 2005. See T. at 670-74; 717-21; RX 36; CX 18.

Erriah discussed the ETOPS incident with Mr. Joshua prior to the issuance of the CR-1 on February 5, 2005. T. at 510. Mr. Erriah also knew that the CR-1 regarding the ETOPS incident was revised because of the Complainant's ASAP. RX 29.

Based on the foregoing, therefore, I find that, at a minimum, Mr. Ambrosio, Mr. Erriah and Mr. Joshua, knew that the Complainant engaged in protected activity, because they were aware that he filed ASAPs regarding the wheel change incident and/or the ETOPS incident.

#### Whether the Respondent took Adverse Action against the Complainant

In his pre-hearing statement, the Complainant alleged various actions constituted retaliatory adverse action by the Respondent. These incidents include:

- Issuance of a "first advisory," on November 1, 2004 based on the Complainant's alleged failure to document a temporary wheel replacement, on August 27, 2004 (the "wheel change incident").
- Discussions with supervisors regarding the Complainant's alleged pattern of lateness, on August 7, 2004, and other dates, and documentation of those discussions in the company's records.
- A CR-1 dated September 5, 2004, regarding the Complainant's failure to wear hearing protection while inspecting a cargo compartment, on August 30, 2004 (the "cargo compartment incident").
- A CR-1 dated February 5, 2005, regarding the Complainant's actions regarding the requirement for an ETOPS inspection after a brake change, on January 8, 2005 (the "ETOPS incident")
- Docking the Complainant's pay for arriving late, in a discriminatory manner, on several occasions in September and October 2004.
- Placing the Complainant on a "doctor's note restriction" regarding his use of sick leave, on January 6, 2005.

In addition to the incidents listed above, the Complainant also alleged the Respondent engaged in a pattern of discriminatory and/or harassing behavior. These include the following:

- Failing to apologize for subjecting the Complainant to a 29-F hearing in November 2004 regarding a specific incident (the "thrust reverser incident") but apologizing to the co-worker who also had been subjected to the hearing.
- Failing to accurately record the Complainant's attendance, by overriding the "swipe-in" system, or permitting the system to inaccurately record the Complainant's attendance at various dates and times.

The Respondent denies that any of the actions the Complainant's supervisors took were "adverse." The Respondent's position is that workplace discussions between the Complainant and supervisors, which constitute many of the actions the Complainant complains about constitute "typical workaday interactions between a worker and supervision about routine job matters." Respondent's brief at 30 (emphasis in original). The Respondent also avers that memorializing discussions between the Complainant and his supervisors, in CR-1 records or otherwise, are not adverse actions because they did not result in "tangible, material harm" to the Complainant. Respondent's brief at 46-53.

Regarding what acts of an employer constitute "adverse actions," the Administrative Review Board has applied to AIR21 cases the standard the Supreme Court enunciated in Burlington Northern & Santa Fe Railway Co. v. White that actions must be "materially adverse." 548 U.S. 53, 68 (2006). The Board has held that "ordinary tribulations of the workplace do not rise to the level of adverse actions because they do not result in tangible job consequences or deter employees from engaging in protected activity." Allen v. Stewart Enterprises, Inc., ARB No. 06-081 (ARB: July 27, 2006), slip op. at 16.<sup>40</sup> The Board also has adopted the Supreme Court's definition from Burlington Northern that "materially adverse" actions were those 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 (ARB: January 31, 2007), slip op. at 11.

In Burlington Northern, the Supreme Court grappled with what actions constitute retaliation under Title VII of the Civil Rights Act of 1964. The Court commented: "The anti-retaliation provision [of Title VII] protects an individual not from all retaliation, but from retaliation that produces an injury or harm." 548 U.S. at 67. The Court further noted, "we believe it is important to separate significant from trivial harms," and went on to observe that the anti-retaliation provision is designed to prohibit employer actions that are likely to deter other victims from making complaints. Id. In this regard, the Court stated: "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." Id. at 69. (emphasis added).

The Supreme Court went on to explain the importance of context by giving several examples. For instance, the Court indicated, changing an employee's schedule may make little difference to some workers, but may be burdensome to a mother with young children; or failing to invite a worker to lunch may be trivial, unless the lunch is a training session that contributes significantly to the employee's professional advancement. The Court concluded: "Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others'." 548 U.S. at 69, (quoting Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)).

In Hirst, the Board considered a case in which the complainant was discharged due to his protected activity. However, within a day or two, the employer quickly recognized its actions

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<sup>40</sup> The Board cited the Burlington Northern case, which had been decided several weeks earlier, but did not conduct an extensive analysis of the Supreme Court's holding. Allen, slip op. at 16.

violated AIR21 and promptly corrected itself by immediately informing Hirst he was still employed, confirming that fact in writing, and making sure that Hirst suffered no economic loss. The Board held that, although Hirst was discharged because he engaged in protected activity, a reasonable employee would see that the employer corrected its mistake promptly and that Hirst, at most, suffered only temporary unhappiness. Therefore, the Board found that, applying the standard in Burlington Northern, a reasonable employee would not be dissuaded from engaging in protected activity, and therefore, the employer's rescinded termination of Hirst was not an adverse action. Hirst, slip op. at 12.

In at least one case, an administrative law judge has found that American Airlines' issuance of a CR-1 to an employee did not constitute adverse action under AIR21. Robichaux v. American Airlines, Case No. 2002-AIR-27 (ALJ: May 2, 2003), Decision and Order at 6. In Robichaux, the administrative law judge based his determination on his finding that a CR-1, of itself, cannot result in a tangible job consequence such as demotion, loss of pay, or termination. Therefore, he concluded that the "CR-1 entry alone is not sufficient to be considered adverse action." Id. However, the Robichaux case pre-dates Burlington Northern, which requires that the "context" of an action be considered. It also pre-dates Hirst, in which the Board required that the potential "chilling" effect on other employees be considered when assessing whether an employer's act constitutes an adverse action. Consequently, its value as a precedent is diminished.

In a recent AIR21 case, the Administrative Review Board held that a "warning letter" issued to an employee does not constitute adverse action. Simpson v. United Parcel Service, ARB No. 06-065 (ARB: Mar. 14, 2008). In Simpson, the complainant received a warning letter for insubordination for not clocking out and leaving the work premises when ordered to do so. The warning letter stated that it served as a "formal warning" in accordance with the union's bargaining agreement, and that "any further behavior of this nature will result in further disciplinary action up to and including discharge" during the remainder of a nine-month disciplinary period. Id., slip op. at 4. The Board stated that "the burden rests on the complainant to demonstrate that the personnel action in question is adverse" and that the complainant must show that the warning letter "affected the terms, conditions, or privileges or (sic) her employment." According to the Board, Simpson did not produce evidence that the letter caused a tangible effect on her employment, such as on her salary, employment status, or benefits. Accordingly, the Board affirmed the administrative law judge's denial of Simpson's complaint. Id.

Even though Simpson was issued well after Burlington Northern was decided, it does not cite Burlington Northern, much less attempt to apply its holding and reasoning to the AIR21 statute. Moreover, the standard the administrative law judge used in Simpson to determine whether an action was adverse, whether it had a "tangible job consequence," was incorrect. In Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE), ARB Case No. 04-111 (Aug. 31, 2007), a case under the AIR21 statute and several environmental whistleblower statutes decided several months before Simpson, the Board specifically stated that the "tangible job consequence" test for adverse action was "outmoded." Citing Hirst, the Board stated that the standard the Supreme Court used in Burlington Northern to determine whether an

action was adverse – that is, whether the action “could well dissuade a reasonable worker from making a charge of discrimination” was the correct test in AIR21 cases. Id., slip op. at 13, n. 23.

Notably, then, the Board’s discussion in Simpson as to what constitutes an adverse action is not in accord with its own precedents.<sup>41</sup> Based on my review of the Board’s decisions issued after Burlington Northern, I conclude that the proper standard for assessing whether an allegedly retaliatory action is adverse was enunciated in Burlington Northern and Hirst, and is not the standard the Board cited in Simpson.<sup>42</sup> Indeed, the only federal appellate court to have addressed the issue has stated that the Burlington Northern standard for determining whether an allegedly retaliatory action is “adverse” is applicable. Allen v. Administrative Review Board, 514 F.3d 468 (5th Cir. 2008).<sup>43</sup>

The Respondent has asserted that recent precedent in the Second Circuit, applying the Burlington Northern standard, has held that issuance of written or oral warnings, pursuant to an employer’s progressive discipline policy, does not constitute adverse action. Chang v. Safe Horizons, 254 Fed. Appx. 838, 2007 WL 3254414 (2d Cir., Nov. 5, 2007)(unpub.). In Chang, the appellate court upheld the district court’s grant of summary judgment to the employer, notwithstanding its recognition that the district court applied a different standard other than that enunciated in Burlington Northern. The Circuit Court noted: “oral and written warnings do not amount to materially adverse conduct in light of our reasoning in Joseph v. Leavitt,<sup>44</sup> 465 F.3d 87, 91 (2d Cir. 2006), in which we stated that ‘[t]he application of the [employer’s] disciplinary policies to [the employee], without more, does not constitute adverse employment action.’” Chang, 254 Fed. Appx. at 839. (emphasis added). The Second Circuit did not elaborate on what constituted “more,” with regard to the employer’s progressive discipline policy, but merely concluded that “oral and written warnings [among other things]... do not constitute ‘materially adverse’ actions in the view of a ‘reasonable employee.’”<sup>45</sup> Id.

I disagree with the Respondent’s assertion that Chang stands for the precept that application of progressive discipline can never be adverse, under the Burlington Northern standard. As the Supreme Court has emphasized, anti-retaliatory provisions are not limited to discriminatory actions that affect the terms and conditions of employment. Burlington Northern,

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<sup>41</sup> In Simpson, the Board also decided that the complainant failed to prove she engaged in protected activity, a requisite element of an AIR21 claim. Simpson, slip op. at 6. Therefore, any error in the Board’s use of an improper definition of what constituted an adverse action was immaterial to the outcome.

<sup>42</sup> In my review, I included cases brought under the Sarbanes-Oxley whistleblower provisions, because the Sarbanes-Oxley statute explicitly adopts the standard of proof required in AIR21 cases. See 18 U.S.C. § 1514A(b)(2).

<sup>43</sup> This case involves a complaint brought under the Sarbanes-Oxley Act.

<sup>44</sup> The Joseph case did not involve allegations of retaliatory discrimination, but rather the application of a disciplinary policy to an employee in a discriminatory way.

<sup>45</sup> The Court also held that the plaintiff was unable to survive summary judgment because there was an insufficient causal connection between the plaintiff’s termination and her protected activity and even if she could establish a causal nexus, the defendant proffered a legitimate, non-discriminatory reason for termination.

548 U.S. at 62-63. Indeed, in its directive in Burlington Northern that “context matters” the Supreme Court has indicated that it is the effect of the action, and not the action itself, that determines whether an action is adverse. 548 U.S. at 69.

Consequently, applying the Burlington Northern standard to determine whether the actions the Complainant alleged are adverse, I must assess whether they are harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination. In the instant case, the Complainant averred that all of the incidents listed in the beginning of this section of the Decision should be construed as adverse. He has provided additional evidence regarding some of the actions, in the form of testimony from fellow employees and union representatives. I do not necessarily presume that the Complainant’s fellow employees are quintessential “reasonable workers” as the Burlington Northern test demands. Nevertheless, their testimony, along with the testimony of union officials, helps to establish how most employees would construe the actions of which the Complainant complains.

Setting aside for the moment whether any of these actions create a hostile work environment, I find as follows:

First advisory: The evidence establishes that, in November 2004, the Complainant was issued a “first advisory” regarding the wheel change incident. However, the evidence also establishes that the Respondent later removed the “first advisory” from the Complainant’s personnel record. Under the AIR21 statute, where the employer promptly cancels an action and then makes the employee whole, no adverse action has taken place,. Hirst, slip op. at 12. I find, therefore, that the Respondent’s issuance (and later retraction) of the first advisory was not adverse.

CR-1s: The evidence establishes that CR-1 entries are “permanent,” in that they remain in an employee’s record during the entire course of his employment. The Complainant testified that, prior to his protected activity, management’s recording of CR-1 entries relating to him were “not too common,” but increased after his protected activity. T. at 69. The Complainant’s testimony in this regard is not directly rebutted by the Respondent. Notably, the Respondent did not enter the Complainant’s CR-1 record into evidence. However, I note that the Respondent did enter a CR-1 entry, regarding the Complainant’s hearing test results on July 7, 2004, which pre-dates the Complainant’s protected activity. Because this entry was made before the Complainant’s protected activity, I find it could not be retaliatory in nature. In light of the lack of evidence on the issue of the Complainant’s CR-1 record, and the Respondent’s control of that record, I will presume therefore, that, except for this single instance, the Complainant did not receive any CR-1 entries from the date of his entry into service with the Respondent, in 1991, until after his protected activity.

Although the Complainant alleges that all the CR-1 entries pertaining to him are adverse, I find that some of them are not adverse in any way, and may in fact have been made in order to protect the Complainant. The CR-1 regarding the cargo compartment incident serves only to remind the Complainant of his obligation to wear hearing protection; moreover, the entry was made shortly after management was informed that the Complainant had shown a change in his hearing, a situation that made adherence to the company rules regarding the wear of hearing

protection more urgent. Based on the totality of the circumstances surrounding this entry, I conclude that a reasonable employee would not be dissuaded from engaging in protected activity based on the prospect that a CR-1 entry would be made about this event. Therefore, I find this CR-1 is not an adverse action.

The CR-1 issued to the Complainant regarding the ETOPS incident presents a far different picture. At the hearing, in addition to the Complainant, Mr. Urso, Mr. Erriah, and Mr. Joshua all testified about the incident. The evidence establishes that the brake change took considerably longer than anticipated, because no tire dolly was available in the terminal area, and so the three-hour window for a valid ETOPS inspection had passed. The evidence also establishes that all personnel were well aware that an ETOPS was required for the aircraft in question. I also find, based principally on the testimony of Mr. Erriah and Mr. Urso, that, under the circumstances of a delay, the technical guidance for whether a new ETOPS inspection was required was vague. Based on the testimony of the witnesses, including the Complainant, Mr. Joshua, and Mr. Erriah, I find that responsibility for determining whether the aircraft's required maintenance is completed does not rest solely with the aircraft mechanics. Rather, that responsibility is shared among the mechanics, the crew chiefs, and the maintenance supervisors. The Complainant testified that Mr. Joshua, the supervisor, spent more time arguing with him and his co-worker, Mr. Urso, about the need for conducting a new ETOPS than actually conducting a new ETOPS would have taken. T at 97. I specifically find the Complainant's testimony in this regard to be credible. Mr. Joshua stated that, once he understood a second ETOPS inspection was necessary, he made the decision to assign the ETOPS inspection to a new crew rather than to the Complainant. Moreover, he conceded that assigning the job to the Complainant would require the Complainant to be paid for overtime. T. at 710. Nevertheless, notwithstanding the shared responsibility for ensuring that the ETOPS inspection was completed in a timely way, the CR-1 issued to the Complainant placed full responsibility for the aircraft's delay on the mechanics. RX 28, 29.

The Respondent's policies indicate that CR-1s are not considered disciplinary in nature. RX 47. See Robichaux v. American Airlines, *supra*. Notably, however, the tone and language of the CR-1 issued to the Complainant regarding the ETOPS incident clearly warn the Complainant about potential adverse consequences. The CR-1 invokes the Respondent's "Rules of Conduct" (as discussed above) and cautions the Complainant that his behavior violates them. Moreover, the Complainant is admonished that "his performance was completely unsatisfactory." He was also told "any future performance issues or violations of AA Rules of Conduct can result in corrective action up to and including termination."

Several witnesses testified the union contract permitted grieving a "first advisory," whereas the company's decision to write a CR-1 for an employee could not be grieved. See, e.g., T. at 267-72 (Urso); 324-25 (Santos); 364-66 (Kreuz); 433-34 (Gukelberger). I do not consider the issue of whether the Respondent's action could be grieved to be determinative of whether a matter is considered to be adverse. It appears that, under the contract, the Respondent has complete discretion as to whether to issue a "first advisory" or a CR-1 regarding incidents of this nature. RX 47. I do note that, as several witnesses testified, a CR-1 is a matter of permanent record unless the Respondent elects to remove it, whereas a "first advisory" is removed

automatically from an employee's file within two years. T. at 364-67 (Kreuz); 434 (Gukelberger).

Based on the evidence of record about the ETOPS incident, I find that the supervisor's action in issuing a CR-1 to the Complainant under these circumstances was adverse. I find that a reasonable employee would be dissuaded from engaging in protected activity, faced with the prospect of a CR-1 permanently in the record that records a workplace dispute over a matter of shared responsibility in which the employee is deemed to be at fault; invokes the company's "Rules of Conduct;" and warns about future disciplinary action, up to and including termination.<sup>46</sup>

Attendance Discussions. The Complainant alleges discussions with supervisors regarding his alleged pattern of lateness on August 7, 2004, and other dates, and documentation of those discussions in the company's records, constitutes retaliatory adverse action. The Complainant testified that he felt "singled out" when management discussed his attendance record with him. T. at 165. The Respondent has introduced records of management's discussions with the Complainant about his attendance.<sup>47</sup> RX 36, 49. In addition, Mr. Erriah testified that managers were required to review their subordinates' attendance records and discuss attendance issues with them regularly. T. at 522.

The Respondent's records at RX 49 cover the Complainant's attendance in the time period from the year 2000 forward. These records establish the Complainant reported in sick either shortly before or shortly after Christmas in the following years: 2000, 2001, 2002, and 2003.<sup>48</sup> I find, therefore, that the Complainant did demonstrate a pattern of suspicious sick leave use. The records also establish that the Complainant was not counseled about this pattern until August 5, 2004, which was shortly after his protected activity (complaints to FAA and Human Resources).<sup>49</sup> I find, consistent with Mr. Joshua's testimony that attendance discussions were often put off, management did not always discuss the Complainant's attendance with him in a timely way. See T. at 665-66.

The record reflects that the Complainant called in sick from July 10, 2004 to July 17, 2004. On August 5, 2004, Mr. Joshua discussed his attendance with him, specifically the recent week-long illness, and also commented on the Complainant's pattern of calling in sick around Christmastime.<sup>50</sup> RX 36. In addition, the record of this counseling reflects that Mr. Joshua warned the Complainant about the consequences of poor attendance, including termination.

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<sup>46</sup> The matter of the issuance of a similar CR-1 regarding the same incident to Mr. Urso is not before me, and consequently I make no finding regarding the Respondent's action regarding him.

<sup>47</sup> It appears that the Respondent's recorded discussions about attendance in a system that was separate from the CR-1 system.

<sup>48</sup> In 2002 the Complainant was recovering from a knee injury and surgery and was on "TD."

<sup>49</sup> In March 2004 the Complainant was counseled about his absence from December 24 to December 26, 2003 but no mention of a suspicious pattern was made.

<sup>50</sup> The record reflects absences on the following dates were also discussed: 4 hours on 05/08/04; 4 hours on 05/29/04. However, no specific comments about these absences appear in the record.

Based on the evidence before me, I find the Respondent's managers were not always diligent or timely about counseling their employees about attendance. I also find that it was reasonable for a supervisor to discuss with the Complainant, in early August 2004, his week-long absence the previous month. I also find the Complainant's habit of calling in sick around the Christmas holidays is evident, from an examination of the Complainant's attendance record. Although Mr. Joshua may have felt justified in raising the Complainant's pattern of calling in sick at Christmastime during the discussion in August 2004, the tone of the record of this conversation (including warnings about disciplinary action and potential termination) as well as its timing (coming many months after the alleged sick leave abuse) indicates this action is adverse. I find that a reasonable employee might well be dissuaded from engaging in protected activity if his or her alleged sick leave abuse from months earlier were to suddenly become a topic for counseling and warning by management.

Docking the Complainant's pay: Several witnesses testified regarding the Respondent's policy on lateness. See T. at 360-63 (Kreuz); 520-22 (Erriah); 600-04 (Gonzalez). In general, the witnesses agreed that the Respondent had a "swipe in" and "swipe out" system for the mechanics, and that the times of "swipe in" and "swipe out" were automatically recorded. The witnesses generally agreed that the system was not perfect, and on occasion failed to record an employee's "swipe-in" time correctly. The witnesses differed as to whether supervisors could override the "swipe-in" system.

The evidence established that the Respondent Employer could dock a mechanic's pay for reporting late ("RL"). Although the witnesses did not entirely agree on when pay was docked, they agreed that a mechanic who reported late could, with the approval of the supervisor, make up the time lost at the end of the shift so that pay would not be docked. See, e.g., T. at 360-61. Mr. Gonzalez, a supervisor, testified that he approved this practice when a mechanic came to him and requested to make up the lost time, but the Complainant would not do that. See T. at 600-06.

The Complainant alleged that he was docked for reporting three minutes late on October 7, 2004. T. at 103, 161. The pay record the Complainant submitted indicates he clocked in at 1533 for a shift that began at 1530 and was paid for 7.9 hours that day.<sup>51</sup> CX 15. The record indicates that the Complainant also was 1.7 hours late on September 7, 2004, and had reported car problems that day.<sup>52</sup>

The Respondent suggests that the practice of making up lost time is well established, but the burden is on the employee to request to make up the time, and the Complainant does not feel

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<sup>51</sup> For the other days in that workweek, the Complainant's swipe-in was recorded at the following times: 1511, 1510, 1512, 1506. On those occasions, the Complainant was paid for 8.0 hours. Supervisor Gonzalez made an entry on October 19, 2004 regarding the Complainant's lateness. The entry indicates that this was the second lateness in a one-month period and must be corrected immediately or "it will lead to corrective action." The CR-1 entry also reflects that Mr. Gonzalez asked the Complainant if he needed assistance.

<sup>52</sup> The Complainant alleged, at CX 14, that he was not paid for any of his time on this date. However, in his testimony he conceded that he eventually was paid, after he brought the matter to his supervisor's attention. T. at 156-57.

comfortable making such a request from his supervisor. The Complainant does not contest that he was late to work on several occasions, but he asserts that his lateness was treated differently than the lateness of his co-workers. Notably, the Complainant does not assert that he was refused the opportunity to make up time, so as to avoid being docked pay.

The evidence that the Complainant submitted indicates that, on the same date that he “swiped-in” at 1533 hours and was docked pay, a different employee “swiped-in” at 1624 hours and was credited with a full day’s pay. CX 14. There is no indication, from the document presented, that this employee “swiped-out” late to make up the time.<sup>53</sup>

Based on the evidence presented, I find the docking of the Complainant’s pay due to his admitted lateness was consistent with the Employer’s policy of docking pay for the time that a mechanic was late and did not make up. I also find there is no evidence the Complainant was treated differently from other mechanics in this regard. Hence, I find the Respondent’s action in docking the Complainant’s pay for lateness was not adverse.<sup>54</sup>

“Doctor’s note” restriction: The Complainant asserts that the Respondent’s action in putting him on a “doctor’s note” restriction in January 2005 was adverse and retaliatory. The Complainant’s attendance records indicate the Complainant called in sick from December 24 to December 26, 2004. The doctor’s note restriction, issued on January 6, 2005 by supervisor Philip Joshua, required the Complainant to show a note from a doctor in order to have any absences due to sickness in the next 90 days excused. CX 18.

The record of Mr. Joshua’s conversation with the Complainant indicates he discussed the Complainant’s alleged sick leave abuse during the Christmas holiday period, and also reviewed the Complainant’s two instances of lateness from the previous September and October. RX 49.

Based on the evidence of record, it appears that this action was prompted by the Complainant’s habit of once again calling in sick at Christmastime, a practice he was counseled about several months earlier. It appears that the supervisor’s action in imposing the “doctor’s note” restriction was a reasonable response to the Complainant’s suspected abuse of sick leave, which is well documented.<sup>55</sup> A similarly situated employee, with a like attendance pattern who was previously warned about sick leave abuse, would not be surprised by the issuance of a “doctor’s note” restriction, after again calling in sick. Consequently, such an employee would not be dissuaded from engaging in protected activity or filing a complaint, when faced with the prospect of a “doctor’s note” restriction. I find, therefore, that this action was not adverse.

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<sup>53</sup> This employee testified at the hearing, but the pay issue for this date was not addressed.

<sup>54</sup> Because the evidence indicates that the swipe-in system was prone to error, I cannot conclude that the Complainant was treated differently from another employee when his lateness was recorded and the other employee’s was not. Consequently, I am also unable to conclude that the net result to the Complainant, docked pay without the opportunity to make it up, constituted an adverse action by the Respondent.

<sup>55</sup> The Respondent’s policies regarding the issuance of “doctor’s note” requirements are not a matter of record. In the absence of any testimony to the contrary, I will presume the issuance of the letter to the Complainant comported with the company’s policies.

In summary, then, I find that the following actions on the part of the Respondent constitute adverse actions, as defined under the AIR21 statute and the applicable regulations:

- 1) the record of Mr. Joshua's discussion with the Complainant on August 5, 2004, regarding his practice of calling in sick at the Christmas holidays; and
- 2) the CR-1, dated February 5, 2005, Philip Joshua issued to the Complainant regarding the ETOPS incident on January 8, 2005.

#### Employer's Knowledge of Protected Activity

Because the Complainant has alleged a great number of actions by the Respondent are adverse, I have not heretofore discussed in detail the nexus, if any, between the Respondent's knowledge of the Complainant's protected activity and any adverse action. I will limit this discussion to the two actions I have found to be adverse. As set forth above, I have found that Devon Erriah knew immediately about the Complainant's complaint to Human Resources about the torque wrench incident, and at some later time he also knew about the FAA complaint. There is no evidence of record that Philip Joshua knew about the Complainant's complaint to the FAA or to Human Resources.

Because the discussion of August 5, 2004, predates the incidents about which the Complainant submitted ASAPs, knowledge of the ASAPs could not have played any role in the decision to make an entry regarding the Complainant's attendance record. There also is no evidence that Mr. Erriah played any role in Mr. Joshua's decision to make an attendance-related entry. I find, however, that the timing of this event is notable, in that the entry was made during the pendency of Mr. Erriah's investigation of the Complainant's complaint to Human Resources about the torque wrench incident.

The burden remains on the Complainant to establish all of the elements of an AIR21 complaint. As I find the Complainant has failed to establish that his supervisor Mr. Joshua knew that he had engaged in protected activity when the attendance-related entry was made, and also did not establish any link between Mr. Erriah and this action, I find the Complainant has failed to establish that the Employer violated AIR21 as to this adverse action.

Regarding the CR-1 entry pertaining to the ETOPS incident, although there is no evidence Mr. Joshua knew of the Complainant's protected activity regarding the torque wrench incident, there is evidence that Mr. Erriah, who did know of the Complainant's protected activity in this regard, was involved in discussions with Mr. Joshua about the ETOPS incident. See T. at 509-10. More importantly, there is evidence that Mr. Joshua and Mr. Erriah knew that the Complainant had submitted ASAPs, which I have found to be protected activity. It is not entirely clear exactly when these supervisors became aware ASAPs had been filed. However, it is likely they knew about the Complainant's action regarding the ETOPS incident before the CR-

1 entry was made, for the reasons explained above regarding the timeline for the investigation of the ASAP.<sup>56</sup>

Based on the foregoing, therefore, I find that the Respondent's supervisors, Philip Joshua and Devon Erriah, knew of the Complainant's protected activity before the CR-1 pertaining to the ETOPS incident was issued.

#### Whether the Complainant's Protected Activity was a Contributing Factor to Adverse Action

Under both the governing statute and the implementing regulation, a complainant must establish only that the protected activity was a "contributing factor" to the employer's adverse action. 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1979.109(a). A complainant need not establish that the employer's adverse action was "due to" or "because" of the protected activity. Clark v. Airborne, Inc., ARB Case No. 06-082 (ARB: Mar. 31, 2008), slip op. at 2. The Board has emphasized that a "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." Sievers v. Alaska Airlines, Inc., ARB Case No. 05-109 (ARB: Jan. 30, 2008), slip op. at 4, quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993); see also Clark v. Airborne, Inc., ARB Case No. 06-082 (ARB: Mar. 31, 2008), slip op. at 2.

The Administrative Review Board has recognized that a retaliatory motive may be inferred when an adverse action closely follows protected activity. Kester v. Carolina Power & Light Co., ARB No. 02-007, (ARB: Sept. 30, 2003), slip op. at 10 (ERA case). Temporal connection alone is not necessarily dispositive, however, in a whistleblower action. Barker v. Ameristar Airways, Inc., ARB No. 05-058, (ARB: Dec. 31, 2007), slip op. at 7. The Board also has indicated that "when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action." Keener v. Duke Energy Corp., ARB No. 04-091, (ARB: July 31, 2006), slip op. at 11 (ERA case). The Board also has noted that "if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised." Clark v. Pace Airlines, Inc., ARB No. 04-150, (ARB: Nov. 30, 2006), slip op. at 12-13. Indeed, if an employer has "established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." Barker, slip op., at 7.

As set forth above, I have found that two actions of the Employer are adverse: the entry of August 5, 2004 in the Complainant's attendance record discussing his apparent abuse of sick

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<sup>56</sup> As set forth above, Mr. Erriah knew about the ASAP the Complainant filed on the wheel change incident, and Mr. Joshua also likely knew, through reading the CR-1 Mr. Ambrosio had written, that the Complainant filed an ASAP. In any event, because the evidence establishes that the CR-1 regarding the ETOPS incident was modified as a result of the ASAP the Complainant filed, Messrs. Erriah and Joshua certainly knew about the ASAP before the modified version of the CR-1 was entered in the Complainant's records. RX 28, 29; T. at 519-20.

leave over the Christmas holidays; and the CR-1 issued to him in February 2005 regarding the ETOPS incident. I also have found there is no evidence that Mr. Joshua, who made the entry in the Complainant's attendance record, knew about his protected activity, or that Mr. Erriah, who did know about the activity, played any role in that action. Therefore, I confine my discussion to the nexus, if any, between the Complainant's protected activity and the issuance of the CR-1.

The date of the ETOPS incident, which prompted the CR-1 entry, was January 8, 2005. The date of the CR-1 entry was February 5, 2005, almost one month after the incident itself. Mr. Joshua testified that he decided to make a CR-1 entry at the time he discussed the incident with the Complainant, which was the date of the entry. He did not address why it took nearly a month to have a discussion with the Complainant regarding the incident.<sup>57</sup> Presuming that the incident was serious enough to justify a CR-1 entry, I would also presume that management would attempt to discuss the matter with the employee as promptly as possible.<sup>58</sup> In particular, I find it unlikely that if the ETOPS incident was as serious as the tone of the CR-1 indicates, a supervisor would wait almost a full month to make an appropriate record.

The date the Complainant filed the ASAP on the incident was January 14, 2005. Moreover, the Complainant's ASAP specifically mentioned Mr. Joshua. The Complainant alleged in the ASAP that Mr. Joshua had "requested that we sign for ETOP (sic) without doing the insp[ection] within the required 3 hours before departure time." RX 27.

According to the Respondent's policies, ASAPs are promptly addressed and investigated. RX 43. Based on the record, the Complainant's ASAP on the ETOPS incident was closed out on February 17, 2005. RX 27. If action on the ASAP ended no later than that date, then certainly the investigation of the ASAP was pending between January 14, 2005, the date it was submitted, and February 17, 2005, the date the action was completed. Any reasonable investigation of the Complainant's ASAP would involve contact with the supervisor mentioned in the submission, Mr. Joshua. I find it is likely, then, that airline officials discussed the Complainant's ASAP with Mr. Joshua, shortly after it was filed. In sum, I find that the fact that the CR-1 was written several weeks after the wheel change incident, but while the ASAP was still pending, tends to support the hypothesis that the two events are linked.

In addition, Mr. Joshua was the individual who wrote the CR-1 regarding the incident. The fact that Mr. Joshua, a first line supervisor, rather than the manager, Mr. Erriah, wrote the CR-1 is also consistent with the conclusion that the Complainant's submission of the ASAP was a motivating factor for the CR-1.<sup>59</sup> Because the Complainant named Mr. Joshua in the ASAP as

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<sup>57</sup> In contrast, the record reflects several meetings were held almost immediately, regarding the wheel change incident in August 2004. See e.g., RX 44, CX 13.

<sup>58</sup> By way of contrast, the CR-1 entry Mr. Erriah wrote concerning the Complainant's failure to wear hearing protection on August 25, 2004 (the cargo hold incident), was made on September 5, 2004. RX 25.

<sup>59</sup> The evidence indicates that Mr. Erriah was involved in discussions with Mr. Joshua regarding the incident. Although the testimony is somewhat unclear, it appears that Mr. Erriah did not address whether he played a role in the decision whether to issue the CR-1 to the Complainant.

a supervisor whose practices may have compromised safety, Mr. Joshua might well be resentful of the Complainant's actions.

The record before me contains no direct evidence of any linkage between the Complainant's ASAP and the CR-1, but the timing of the entry, its tone, and the identity of its author all suggest that the CR-1 followed the ASAP and was, at least in part, prompted by it.

Based on the foregoing, therefore, I find that the Complainant has established, by a preponderance of evidence, that his submission of the ASAP on the ETOPS incident was a contributing factor in the CR-1 entry Mr. Joshua wrote concerning that incident. As set forth above, I have found that the CR-1 entry was an adverse action, notwithstanding the Respondent's arguments to the contrary, because the entry casts responsibility for the incident completely on the Complainant (and his co-worker), its language and tone suggest a disciplinary action, and because it is a permanent fixture in the Complainant's personnel record.

Whether the Respondent Has Established that it would have Taken the Same Action in the  
Absence of the Protected Activity

Under the AIR21 statute and regulation, once the Complainant has established that the Employer has unlawfully retaliated against him, he prevails unless the Employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action, notwithstanding the protected activity. Clark v. Airborne, Inc., ARB Case No. 06-082 (ARB: Mar. 31, 2008), slip op. at 2. The "clear and convincing evidence" test is defined as imposing a burden greater than the "preponderance-of-the-evidence" standard and short of the "reasonable-doubt" standard. See generally Addington v. Texas, 441 U.S. 418, 431-33. The burden of persuasion on this issue remains with the Employer. Majali v. U.S. Dept of Labor, No. 07-15872 (11th Cir., Sept. 26, 2008)(unpub.), slip op. at 11.

The Respondent avers that the CR-1 entry on the ETOPS incident is not adverse, and also denies any nexus between any protected activity and the CR-1 entry. Respondent's brief at 23-25; 46-49. Consequently, the Respondent has not offered any rationale to justify its action in creating the CR-1 entry.

Setting aside for the moment the tone and language of the CR-1, I must determine whether management was justified in appropriately in making a CR-1 entry regarding the ETOPS incident.<sup>60</sup>

The Respondent's "Peak Performance through Commitment" policy states that CR-1 records should be maintained for each employee, and they should include "commendations" as well as entries on "unacceptable job performance or conduct." RX 47. At the hearing, the supervisors' testimony regarding the uses of the CR-1 was consistent with the published policy.

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<sup>60</sup> The Complainant has averred that the Respondent has "singled him out" for harsh treatment and has used CR-1 entries as a means of harassment against him. As set forth below, I find the Complainant has failed to establish that the Respondent created a hostile work environment. Therefore, I will not address this aspect of the Complainant's allegations concerning the CR-1.

See, e.g., T. at 364-65. The Complainant testified that receipt of a CR-1 was “not too common” until after his protected activity occurred. T. at 69. Mr. Urso, whose employment for the Respondent spans more than 16 years, testified he never received a CR-1 until he worked with the Complainant. T. at 239, 245.

The Complainant’s CR-1 file is not in evidence before me, so I am unable to assess whether the CR-1 regarding the ETOPS incident comported with the Respondent’s policies and was consistent with its general practice regarding when issuing a CR-1 is appropriate. Although the evidence establishes that Mr. Urso, the other mechanic involved in the ETOPS incident, also received a CR-1 regarding the incident, the text of the document is not in evidence, so I am unable to determine whether it differed in tone from the CR-1 issued to the Complainant.<sup>61</sup> RX 32; T. at 257.

Based on the foregoing, I find the evidence establishes that the Respondent’s policies provide a wide degree of discretion regarding when to issue a CR-1. However, because of the paucity of evidence regarding the Respondent’s actual practice regarding when CR-1s are used for its mechanics, I am unable to determine whether the Respondent would have issued a CR-1 to the Complainant, in the absence of his protected activity. In this regard, I also have considered that the Respondent issued a CR-1 to Mr. Urso as well. However, because Mr. Urso testified that employees felt “marked” when they worked with the Complainant, and he did not receive a CR-1 about his job performance until he worked with the Complainant, I find that issuance of a CR-1 to Mr. Urso does not tend to establish that the Respondent was justified in its actions concerning the Complainant. See T. at 257-59.

Consequently, I find that the Respondent has failed to establish, by clear and convincing evidence, that it would have taken the same action in the absence of the protected activity. Additionally, as set forth above, there is evidence that the language used in the CR-1 issued to the Complainant was similar to language the Respondent generally used in a first advisory, a disciplinary action. Assuming arguendo that the Respondent had the absolute discretion to issue a CR-1 regarding the ETOPS incident, I find the Respondent has not established, by clear and convincing evidence, that it would have included the specific language of the CR-1, referring to rules of conduct and warning of potential future adverse action up to and including termination of employment, in the absence of the Complainant’s protected activity.

Based on the foregoing, I find that the Respondent has failed to establish, by clear and convincing evidence, that it would have taken adverse action against the Complainant, in the absence of his protected activity. Therefore, I find that the Respondent’s issuance of a CR-1 to the Complainant regarding the ETOPS incident violated AIR21.

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<sup>61</sup> RX 32 is a grievance Mr. Urso filed regarding the CR-1, which he believed to be “unjust, unfair, and improper.”

## Whether the Respondent Created a Hostile Work Environment

In addition to his claim that the Respondent imposed adverse actions against him, the Complainant also has alleged that the Respondent created a hostile work environment in retaliation for his protected activity.

To prevail in a hostile work environment claim, a complainant must establish: 1) that he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and 4) the harassment that would have detrimentally affected a reasonable person and did detrimentally affect the complainant. Hoffman v. Netjets Aviation, Inc., ARB Case No. 06-141 (ARB: July 22, 2008), slip op. at 4-5; *see also* Brune v. Horizon Air Industries, Inc., ARB Case No. 04-037 (ARB: January 31, 2006), slip op. at 10-11, quoting Sasse v. Office of the United States Attorney, ARB Nos. 02-077, 02-078, 03-044 (ARB: Jan. 30, 2004), slip op. at 34-35, *aff'd sub nom.* Sasse v. United States Dep't. of Labor, 409 F.3d 773 (6th Cir. 2005)(CAA case). Claims alleging that an employer created a hostile work environment in retaliation for an employee's protected activity are cognizable under the AIR21 statute. Hirst v. Southeast Airlines, Inc., ARB Case Nos. 04-116, 04-160 (ARB: Jan. 31, 2007).

A hostile work environment may consist of actions which are not adverse in themselves but which, taken together, constitute a pattern of "severe" or "pervasive" harassment. *See generally* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). Relevant facts include the frequency and severity of the alleged harassment; whether it was physically threatening or humiliating, or merely offensive, and whether it unreasonably interfered with a complainant's work performance. Williams v. Mason & Hanger Corp., ARB No. 98-030 (ARB: Nov. 13, 2002)(ERA case), *aff'd sub nom.* Williams v. Administrative Review Board, 376 F. 3d 471 (5th Cir. July 15, 2004). In Hirst, the Board distinguished between cases alleging that an employer has subjected an employee to adverse actions, and those alleging that the employer created a hostile work environment. The Board commented that a complainant bringing a hostile work environment claim "is not required to prove an 'economic' or 'tangible' job detriment such as that resulting from discharge, failure to hire, or reassignment to an inferior position." Hirst, slip op. at 9, n. 22.

As the Supreme Court has noted, 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." Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998). The Court has also emphasized that anti-discrimination laws do not set forth a "general civility code for the American workplace." Burlington Northern v. White, 548 U.S. at 68, quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1988). The Court also stated (in the context of Title VII activity): "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Burlington Northern, Id. Moreover, if an employee establishes that a hostile work environment existed, the employee also must establish, by a preponderance of evidence, that the employer knew or should have known that the employee's supervisors and co-workers were harassing him, but failed to take appropriate remedial action. Overall v. Tennessee Valley Authority, ARB Case No. 04-073

(ARB: July 16, 2007 (final corrected version)(ERA case), slip. op at 16; see also Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

As set forth above, I have found that the Complainant engaged in protected activity. The Complainant described a series of incidents that took place over a number of months. In this regard, I have considered all of the incidents that have formed the basis for the Complainant's complaint, including those listed above that the Complainant characterized as adverse actions.

The Complainant has alleged that he has felt "singled out" because of the incidents, and also has stated that the Respondent's actions toward him, after he engaged in protected activity, evinced a different attitude toward him. This testimony establishes the Complainant's subjective response to the Respondent's actions, but does not necessarily show that the Respondent's actions would be considered objectively offensive. The Complainant has not alleged, and I do not find, that the Respondent has engaged in any activity that was physically threatening or objectively hostile. Rather, what these incidents have in common is the Respondent's use of management prerogatives (such as making entries in the Complainant's personnel records, or docking pay for admitted lateness), to the Complainant's irritation or opposition.

As the Board has emphasized, a complainant who alleges a hostile work environment must establish that the employer's conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Brune v. Horizon Air Industries, ARB Case No. 04-037 (ARB: Jan. 31, 2006), slip op. at 10, n. 23. The Board also has stated: "Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable....Circumstances germane to gauging a work environment include 'the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance'." Sasse v. Office of the United States Attorney, ARB Nos. 02-077, 02-078, 03-044 (ARB: Jan. 30, 2004), slip op. at 34-35, quoting Berkman v. U.S. Coast Guard Academy, ARB No. 98-056 (ARB: Feb. 29, 2000), slip op. at 16.

Based on the record before me, it does not appear that these events occurred with frequency, such as daily or even weekly. There is some evidence to support the Complainant's assertions that the Respondent applied these measures in a discriminatory fashion against the Complainant, for example making entries in his attendance record regarding his lateness when not doing the same for his co-workers. However, I find that, based on the evidence of record, the Respondent's actions in applying management prerogatives sporadically against the Complainant did not rise to the level of a "hostile work environment" because they are not sufficiently "severe" or "pervasive." Moreover, I find the Complainant has not established (or even alleged) that the employer's actions were objectively offensive, which is a requirement for establishing a hostile work environment. See Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

Based on the foregoing, therefore, I find the Complainant has not established a prima facie case of hostile work environment, because he has not established that the Respondent's actions created a workplace environment that was objectively hostile, as is required under the

applicable precedents, or that atmosphere of hostility was “severe” or “pervasive,” as also is required.<sup>62</sup> I find, therefore, that the Complainant has not established, by a preponderance of evidence, that the Respondent subjected him to a hostile work environment.

### Remedies

As set forth above, I have found that the Complainant has established that the Respondent violated AIR21 by placing a CR-1 entry in his personnel file regarding the ETOPS incident.

Under the AIR21 statute, the remedy for violations requires the Employer (“the person who committed such violation”) to –

- (i) take affirmative action to abate the violation;
- (ii) restore all terms, conditions and privileges associated with the employment, including reinstatement; and
- (iii) provide compensatory damages.

49 U.S.C. § 42121(b)(3)(B).

The appropriate corrective action for the CR-1 entry is expungement of the item. Therefore, I direct that the Respondent expunge the CR-1 entry, dated February 5, 2005, (with additional note dated February 15, 2005), related to the ETOPS incident of January 8, 2005, from the Complainant’s records. I also direct that the Respondent ensure that any mention of this CR-1 entry is removed from its records pertaining to the Complainant.

I find that, except as noted above regarding the placement of the CR-1 entry permanently in his employment records, the Complainant has not established that he has suffered any harm to the terms, conditions and privileges associated with his employment with the Respondent. The record indicates that he remains in his employ with the Respondent, with the title and seniority he enjoyed prior to the initiation of his Complaint. I find, therefore, that no further action from the Respondent is necessary to restore the Complainant to his position.

Compensatory damages are cognizable under the AIR21 statute, and may be awarded for emotional distress or mental anguish. Vieques Air Link, Inc., v. U.S. Dept. of Labor, 437 F.3d 102, 110 (1st Cir. 2006). See also Rooks v. Planet Airways, Inc., Case No. 2003-AIR-00035 (ALJ: Apr. 14, 2004), aff’d ARB Case No. 04-092 (ARB: June 29, 2006), slip op. at 10-11.

Regarding compensatory damages, the Complainant has alleged that the Respondent’s actions have caused him undue stress, and he has submitted a decision of the New York state worker compensation board acknowledging stress-related medical conditions. However, the board noted that the Complainant had not lost any time from work due to this condition and did

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<sup>62</sup> The Complainant has established, based on his state worker compensation award, that he experienced anxiety as a result of the Respondent employer’s actions. CX 3, 4. However, Complainant’s successful prosecution of his worker compensation claim is not helpful to the issue before me, because it does not establish the Complainant’s anxiety was related to an “objectively hostile” workplace.

not order any compensation. The Complainant has also testified that the Respondent's actions have turned him into an "angry person" and have caused marital tensions. T. at 105-06. There is also evidence that the Complainant has "changed" or has suffered anxiety, due to the Respondent's actions, and that he consulted a physician for treatment. CX 4; RX 40-42; T. at 259-60.

In awarding compensatory damages, it is appropriate to consider compensatory damages award made in comparable cases. Martin v. Fries, 121 F.2d 808, 813-14 (2d Cir. 1997). I have, therefore, reviewed the records of compensatory damages awarded in AIR21 and other whistleblower cases. See, e.g., Smith v. Esicorp, Inc., ARB Case No. 97-065 (ARB: Aug. 27, 1998), slip. op. at 4-5; Jones v. EG&G Defense Materials, Inc., ARB Case No. 97-129 (Sept. 29, 1998), slip op. at 21-23; Leveille v. New York Air Nat'l Guard, ARB Case No. 98-079 (ARB: Oct. 25, 1999), slip op. at 4-5. All of the cases I examined involved a complainant who had been terminated or blacklisted from employment, and suffered emotional distress based at least in part on the loss of employment. Compensatory damages in these cases ranged from \$5,000.00 (Rooks, supra.) to \$50,000.00 (Jones, supra.).

The Complainant has presented evidence of emotional distress, which his physician has linked to the Employer's actions. I find that appropriate damages to be awarded to the Complainant should not exceed \$5,000.00, the lowest award I found in a comparable case, because the Complainant has never been terminated or blacklisted from employment. Nevertheless, based on his testimony, as well as the other evidence of record, I find that the Complainant has evidenced that he suffered distress and anxiety as a result of the Respondent's actions. Therefore, compensatory damages that exceed a nominal amount are appropriate.

Upon due consideration, therefore, I find that an award of \$3,000.00 in compensatory damages for the Complainant's emotional distress is appropriate. I therefore award compensatory damages in that amount.

#### **Attorney's Fees**

The AIR21 statute authorizes recovery of all costs and expenses reasonably incurred by the Complainant in bringing the complaint upon which an order is issued. These costs specifically include attorneys' fees. 49 U.S.C. § 42121(b)(3)(B).

No award of attorney's fees for services provided to the Complainant is made herein because no fee application has been received. Within 30 days, Complainant's counsel shall submit a fee application, itemizing all costs and fees and setting forth his hourly rate, with appropriate justification therefore. The application must be served on all parties, including the Complainant, and a service sheet documenting such service must accompany the application. Parties have ten (10) days following the receipt of any application within which to file any objection.

## **ORDER**

As set forth above, I ORDER the following:

- The Respondent shall expunge the CR-1 entry dated February 5, 2005, with additional note dated February 15, 2005, from the Complainant's employment records.
- The Respondent shall expunge any reference to this CR-1 entry from its records pertaining to the Complainant.
- The Respondent shall pay the Complainant the sum of \$3,000.00 in compensatory damages.
- The Respondent shall pay the Complainant's reasonable costs and expenses, including attorney's fees, as determined by my subsequent Order.

**A**

**ADELE H. ODEGARD**  
Administrative Law Judge

Cherry Hill, New Jersey

**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, Room S-4309, 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).