



Issue Date: 21 May 2009

In the Matter of
TED FURLAND
Complainant

v.

Case Number 2008 AIR 00011

AMERICAN AIRLINES, INC
Respondent

Darin M. Dalmat, Esquire, James & Hoffman
For Complainant

Donn C. Meindertma, Esquire, Conner & Winters, LLP and Vincent S. Carver, Esquire,
American Airlines
For Respondent

RECOMMENDED DECISION AND ORDER

This case was brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the implementing regulations, 29 C.F.R. Subpart 1979. A hearing was held in Miami, Florida on November 18 and 19, 2008. The Complainant, Captain William O. Young, and Rhonda Theuer testified on the first day and Captain Brian Fields and Captain Thomas V. Hynes testified the second. Complainant also offered rebuttal testimony. I permitted, over objection, for good cause shown and in the interests of justice, the Complainant the right to amend his complaint to conform to the evidence adduced at hearing.

Prior to hearing, Respondent filed a Motion for Summary Decision which was denied. As a predicate, the parties stipulated to the following:

1. Complainant was a pilot asked to fly the following flight sequence on June 25, 2007:

June 25: Miami — New York — San Juan

June 26: San Juan — New York

June 27: New York — Miami — San Juan — Miami

He previously had been advised by Respondent that he had abused Respondent's sick leave policy. During the flight, he suffered gastrointestinal effects from the airline food on a flight from New York to Miami. On June 27, Complainant reported that he would not be completing the final two legs of the flight sequence.

2. Complainant's "illness" was fleeting. He went home, drank some fluids, and when he work up the next morning he "felt better."

3. He took sick leave and although he did not complete the final legs of the June 25-27 flight sequence, he received full pay for it.

4. On June 28, Complainant's supervisor asked Complainant to provide medical documentation to substantiate that he was entitled to sick leave pay for the missed June 27 flights.

5. Complainant did not comply, and his union objected to the request for medical documentation.
6. The supervisor scheduled another hearing re: a “failure to substantiate your use of paid sick leave on June 27th.” A second Notice of Hearing was sent on August 14.
7. On August 27, Employer issued a written advisory:

Due to your failure to substantiate your sick leave for June 27th, I will be converting the corresponding 5:01 hours from paid to unpaid sick leave. The total gross dollar value of the unsubstantiated sick hours is \$915.64. This amount will be deducted from your September 25th paycheck. Alternatively, at your option, you may mail in the full value of the payment...”
8. Complainant did not reimburse American the \$915.64. That amount was deducted from Complainant’s September 25th paycheck.
- 9 Employer restored 5.01 hours to Furland’s paid sick leave account.
10. Complainant filed a labor grievance on August 31, 2007 protesting the August 27 written advisory. “The grievance also asserts that American’s decision to convert the sick time to unpaid sick leave violated various provisions of the collective bargaining agreement between American and the APA.” The grievance remains pending.

For purposes of the Summary Decision Motion, Respondent argued that even if the Complainant were engaged in protected activity, he failed to establish an adverse action, because any paid sick leave he was not permitted to use for the June 27 absence remains available for him to use for any future sick leave. “Furland has not lost any compensation.”

Complainant argued that Respondent relied on “an attempted equation of the receipt of actual payment for benefits owed with the potential to receive payment from a sick bank if Furland can somehow document a future illness to American’s satisfaction.” Further, Complainant alleged that an actual, received payment is not equivalent to a potential, contingent benefit and Complainant will still have lost the time-value of that money. In addition, Complainant argued that a “Written Advisory with a warning that future occurrences of this nature may likewise result in a recouping of pay previously provided for the unsubstantiated leave, and may also lead to further discipline up to and including termination” is also an adverse action.

The issue on Summary Decision was whether Respondent’s conduct was materially adverse to Complainant. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), *Melton v. Yellow Freight*, 2008 WL 4462979, ARB 06-052, 18 (ARB Sept. 30, 2008) (Transue, J., concurring). An employer’s retaliatory personnel decision is actionable if it is “materially adverse” to the employee, in the sense that it is “harmful to the point that it could dissuade a reasonable worker from engaging in” protected activity. *Melton*, 2008 WL 4462979 at 17.

There were two allegations:

1. A letter of violation was placed in Complainant’s permanent file.
2. He was penalized by having his pay reduced by the amount attributed to the day of sick leave.

Based on the above standard, I found that I needed to determine whether there was a complete offset amounting to a “material” adverse activity. If the lost time value is measurable, it could have constituted part of an effort in the nature of *res gestae* to dissuade Complainant from

engaging in a protected activity. I also noted that there was a pending union grievance that “may constitute a further open factual issue and make all of this discussion moot.”

Joint exhibits were presented and entered as “JX”1 to JX 11. Complainant offered one exhibit, “CX” 1, and Employer offered fifteen exhibits, “EX” 1-EX 15. I entered CX 1, EX 1-EX 12, and EX 14-EX 15 into evidence. After the hearing, I left the record open for briefs. Both of the parties filed briefs and response briefs.

JURISDICTION

I am advised that the parties are engaged in ongoing disputes about pilot paid sick leave benefits under the parties’ Collective Bargaining Agreement (CBA). I am further advised that Complainant filed a grievance. RX-6. Respondent argues that the “Harris Award,” confirmed Respondent’s right to request medical documentation but set forth limitations on the process. Respondent argues that Complainant is abusing the AIR21 protections by attempting to use AIR21 “to impose their interpretation of the CBA.”

I find that there is no evidence to support this allegation and that I have jurisdiction in this case.

COMPLAINANT’S PROOF

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from “discharg[ing]” or “otherwise discriminat[ing] against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)” engaged in the air carrier safety-related activities the statute covers.¹

The employee is protected if he:

- (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States²

Respondent argues that Complainant did not engage in protected activity because he never reported a violation of aviation law. “He did not even attempt to demonstrate that he communicated any concern about FAA violations to American.” However, his letter at JX 9 refers to an alleged attempt to reduce sick leave through “pilot pushing,” which I find is a violation of law.

Both of the parties refer me to 14 CFR § 61.53 - Prohibition on operations during medical deficiency:

- (a) Operations that require a medical certificate. Except as provided for in paragraph (b) of this section, a person who holds a current medical certificate issued under part 67 of this chapter shall not act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person:

¹ 49 U.S.C.A. § 42121(a).

² Id. An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

- (1) Knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation; or
- (2) Is taking medication or receiving other treatment for a medical condition that results in the person being unable to meet the requirements for the medical certificate necessary for the pilot operation.

(b) Operations that do not require a medical certificate. For operations provided for in §61.23(b) of this part, a person shall not act as pilot in command, or in any other capacity as a required pilot flight crewmember, while that person knows or has reason to know of any medical condition that would make the person unable to operate the aircraft in a safe manner.

Over his career, Complainant had amassed a significant amount of sick time. In May 2006, he started to suffer dental problems. He had several teeth pulled and replaced by surgical implants. TR 27. Now over sixty (60) years of age, he testified that he has more frequent illnesses, and he maintains that because he flies internationally, he also occasionally experiences transient sicknesses associated with travel, including diarrhea and stomach distress. Id.

Respondent furnished documentation and Complainant admitted in testimony that he had thirty two (32) entries of sick leave from October of 2004 through June of 2007.

On April 16, 2007, Chief Pilot Hynes sent a letter to Complainant to discuss concerns use of sick leave. JX 4. At that meeting, Hynes indicated that Complainant's fourteen (14) episodes of sick leave in 2006 and 2007 "exceed[ed] the acceptable attendance guidelines established for employees at American Airlines." TR 27-28.

Complainant and Respondent met on or about May 18, 2007 and Complainant asserts that "[a]t no point prior to, during, or after the meeting, did Hynes require written medical documentation from Furland in order to substantiate the occasions of paid sick leave at issue. Similarly, Hynes never asked for any explanation of any of those uses of sick leave or accused Furland of not actually being sick when he took leave." TR 28. Complainant further alleges that Hynes stated that Respondents would not have enough pilots to cover the summer schedule if pilots continued to call in sick. TR 31. Hynes also indicated that he wanted "all hands onboard" and, in particular, he wanted Furland "to come to work." TR 31, TR 119: -120, TR 288. Captain Hynes stated that he meant by that was that "this is an opportunity where we need all participants involved in the organization to be as cooperative as possible, but at no time was that to be, uh, intended as unless you're on death's bed do not fly; that is absolutely ludicrous and offensive to me." TR 288. He further testified that although there had been fourteen instances he didn't know whether or not he was abusing it. TR 326.

Rhonda Theuer, Respondent witness, testified that she identified Complainant as a frequent sick leave user.

Complainant argues that Captain Hynes never instructed Complainant he could receive paid sick leave only if he provided medical documentation. TR 32. This is substantiated by Captain Hynes. TR 312.

The record shows that on June 27, 2007, Complainant alleged that he began to feel sick to his stomach after eating lunch on the flight from New York to Miami. He felt nauseous and told First Officer Mike Stone that he was suffering from food poisoning and felt ill. TR 33, TR 84. He asked Stone to send a message to crew scheduling in Dallas/Ft. Worth through the ACARS computer system, which allows pilots to communicate with crew scheduling. TR 34, TR 84. After landing, Complainant received an email from Dallas/Ft. Worth confirming that Respondent

had re-scheduled the rest of the sequence with another pilot and that he was free to go home. TR 34. He alleges that on his way home, he vomited in his car. TR 34. Once home, he rested and drank fluids. TR 35.

Respondent asked Complainant for a written note from a physician to justify the use of sick leave.

On July 9, 2007, the Union sent a letter in protest. JX 8. In the document, Complainant alleged the request for documentation “constitutes harassment and pressures pilots to fly when they are unfit to do so in violation of the FARs.” See also TR 125, TR 154. It also makes the statement about “pilot pushing.”

Subsequently, Complainant attended a hearing under the disciplinary provision of the Green Book, JX 3, on August 27, 2007. TR 38- 39 JX 10. Complainant attended the hearing along with his representatives. TR 39. Captain Brian Fields represented the Respondent at the hearing. Fields focused exclusively on the fact that Complainant had called in sick after having been warned by American representatives against calling in sick during the summer. TR 132. The Union representative, Young, objected that American’s demand for medical documentation pressured Complainant to fly when sick, in violation of his legal obligations under the FARs. TR 40, TR 132-133.

To prevail in an AIR 21 case, a complainant must demonstrate that:

- (1) he engaged in protected activity;
- (2) his employer knew that he engaged in the protected activity;
- (3) he suffered an unfavorable (“adverse”) personnel action; and
- (4) the protected activity was a contributing factor in the unfavorable personnel action.³

I find that the Complainant was engaged in a protected activity when he complained that sick leave is a safety issue under 14 CFR § 61.53, and find that it is axiomatic that a pilot should not fly when impaired, and that he placed Respondent on notice by sending Respondent JX 8. He also referred to “pilot pushing.”⁴

Respondent argues that notice was not given regarding a safety issue, citing to *Noeth v. Indiana Western Express, Inc.*, ALJ No. 06-STA-34, op. at 8 (Rec. Dec. & Order, Jan. 16, 2007). It argues that the act of notice was the incident on July 26. However, I find that notice was given at the August meeting and in JX 8. Restrictions on the use of sick leave may be a safety issue. “Pilot pushing” is a safety issue. I also do not accept Respondent’s characterization of what occurred at the August meeting and the accusation that Complainant was told how to proceed by his Union. A Complainant is free to seek representation and I accept that JX 8 may have been written by counsel, and is effective notice of a purported FAR safety violation.

Moreover, Complainant alleges that at the August “hearing” he was handed a letter indicating that he was docked \$915.64 and stated that it was deducted from a later paycheck. I accept these facts, also.

³ See 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov. 30, 2006).

⁴ Respondent also argues that one way to determine if an employee engaged in protected activity is to assess whether the employee’s report required the employer to consider remedial actions to bring it into compliance with federal law. It alleges that there was company policy to require compliance by providing a note, but failed to provide evidence of such a policy. In fact, Respondent advised me that the parties are engaged in ongoing disputes about pilot paid sick leave benefits under the parties’ Collective Bargaining Agreement (CBA), and referred to the “Harris Award,” and allege a right to request medical documentation “but set forth limitations on the process.” However, neither party set for what those limitations may be.

He testified that he had spent his pay on bills, his mortgage and food. When they deducted the \$915.64, he had to borrow money from a line of credit on his house to cover the bills he had to pay. The rate of interest on the loan was nine percent. TR 42.

In lieu of the \$915.64 deducted, Respondent returned sick time. When asked whether it was an even exchange, Complainant alleged, “[M]y creditors don’t take sick time for pay. My bank won’t.” TR 42.

He also alleged that the action made him hesitant to “call in” sick, “and when I do call in sick I, I call the chief pilot to see if they’re going to pay me, because I can’t afford not to, to call in sick and not get paid.” TR 42-43.

Respondent did not provide any evidence to controvert or impeach these facts.

I credit Complainant’s testimony on this issue and find that Respondent’s set off of the money was materially adverse to Complainant. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), I find that the Complainant has now established that his conduct was materially adverse to Complainant. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), *Melton v. Yellow Freight*, 2008 WL 4462979, ARB 06-052, 18 (ARB Sept. 30, 2008) (Transue, J., concurring). An employer’s retaliatory personnel decision is actionable if it is “materially adverse” to the employee, in the sense that it is “harmful to the point that it could dissuade a reasonable worker from engaging in” protected activity. *Melton*, 2008 WL 4462979 at 17.

I note that neither of the parties put on medical evidence or expert evidence to show the efficacy of providing a medical note after an exigent episode. I note that under Section 10 of the Union contract (the “Green Book,” JX 3), pilots accrue sick leave at the rate of five hours a month, up to a maximum of one thousand hours. Pilots cannot, upon retirement, cash out unused sick leave hours that they have accrued. TR 110. Any accrued sick leave hours are lost upon retirement. TR 225.

Complainant testified that until the July incident, no one ever asked him for a note, or for an explanation that he had taken sick leave. Complainant testified that it is hard to get a doctor’s appointment and he didn’t want to spend the money to have a doctor prescribe the same thing: stay in bed and, and take soup. TR 28 -29, 44, 46.

He also testified that Respondent did not have any official “guidelines” relating to sick leave. JX 4 does set forth that Complainant’s fourteen sick leave incidents violates “guidelines,” but none were entered into evidence.

As set forth above, the complainant must show that the warning letter affected the terms, conditions or privileges of employment. *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008).

I note that Captain Hynes also indicated that he wanted “all hands on board” and I note that Captain Hynes did not refute that he may have made the statement, and I accept that there may have been a reasonable inference that Complainant should have been wary of filing for sick leave, but the Complainant bears the burden of proof, and I find that he failed show that conditions or privileges were adversely affected by the letter at JX 7.

However, as to the money Complainant alleges was lost, at the August “hearing,” he was handed a letter indicating that he was docked \$915.64 and stated that it was deducted from a later paycheck. The parties stipulated to this fact.

I find that the preponderant evidence shows that the loss of use of the money was occasioned by the fact that the Complainant protested that he was required to provide a medical note. I accept Complainant’s protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i).

RESPONDENT'S BURDEN: SAME UNFAVORABLE ACTION

If Complainant proves that Respondent violated AIR 21, he is entitled to relief unless Respondent demonstrates by “clear and convincing” evidence that it would have taken the same unfavorable action in the absence of the protected activity.⁵

Respondent argues that employers “unquestionably” have a compelling business interest in obtaining medical proof of claimed sick absences. I am directed to ***Blackann v. Roadway Express, Inc.***, ARB No. 02-115, ALJ No. 00-STA-38 (Final Dec. & Order, Jun4 30, 2004), a driver contended that Roadway violated the employee protections of the Surface Transportation Assistance Act by, among other things, issuing a warning letter to him for an absence that he claimed was due to an illness that made him unfit to drive. Judge Tierney held that the driver was “fairly disciplined for failing to provide proper doctor’s excuse,” and the ARB affirmed. The ARB noted that “in contravention of company policy, Blackann failed to provide a medical excuse showing the days and type of disability.” Op. at 5. The U.S. Court of Appeals for the Sixth Circuit affirmed the ARB’s final order. No. 04-4026 (6th Cir., Dec. 15, 2005).

In reviewing the decision in ***Blackann***, Complainant was given a warning letter for an unexcused absence and told him to provide a proper medical excuse the next time he had an absence. Blackann's supervisor testified that the incident was not considered in the decision to discharge Blackann because he had already been disciplined for it when he was suspended in April 1998. Therefore, the ALJ reached no decision on the merits of Blackann's complaint. R. D. & O. at 16. Therefore Blackann is not valid precedent and does not provide persuasive guidance.

Complainant directs me to ***Rooks v. Planet Airways, Inc.***, ARB No. 04-092, ALJ No. 03-AIR-35 (DOL Adm. Rev. Bd., June 29, 2006). However, that case was a “refusal to fly” case and the fact pattern is irrelevant.

In this case, although the Respondent refers to “guidelines” in JX 4, there was no prior notice that because the Complainant had been “counseled” due to “atypical” use of sick leave in May (JX 5) and had been placed on a list, that he would have to go to a doctor or medical provider when and if he became sick. JX 4. A review of JX 6, the memorandum regarding counseling does not mention sick leave or a requirement to provide a medical note. JX 7 does state an obligation to provide a note, but it was required after the fact, *post litem motem*.

I am also directed to Federal law in general and the Americans with Disabilities Act and the Family and Medical Leave Act (FMLA).

I am also advised that public policy strongly supports the interests of employers in obtaining documentation to substantiate sick absences. I am advised that any pilot could at any time elect to skip an assigned flight simply by uttering that magic word — “sick” — and proceed to catch a sporting event or simply doze on the backyard hammock while collecting his regular pay.

Respondent also argues that Complainant concedes that Respondent could request him to provide medical documentation.

I am directed to “I think if they want it they can have it ... if you’re sick.” TR 53. “I’d give him ... all the medical ... stuff he wanted” — so long as the company paid for his doctor visit. TR 52.

Ms. Theuer testified she directed the company’s payroll department to recoup \$915.64 solely because Complainant did not provide documentation to substantiate his absence.

⁵ See 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

After a review of all of the evidence, I agree with Respondent that an employer may have an interest in ensuring that sick leave is not abused. However, in this case, I find that employer has failed to establish, by clear and convincing proof, that the June 28 request, JX 7, was based on company policy. None of the employer witnesses testified that a pilot *had* to provide a note. In fact, no one asked the Complainant why he was out sick until after the July 28 letter was presented to Complainant.

Complainant testified that he has been a pilot with Respondent since November, 1985. He started out as a flight engineer on the 727, then became a first officer on the Super 80, then a captain on the Folker 100, then a captain on the 75, then the 767, and eventually, captain on the Airbus A300. He had spent 22 years in the Air Force and Air National Guard.

Complainant testified that he was instructed not to fly with even a minor impairment. Before this incident, he never had been fined or had a written advisory placed into his record.

He had two prior requests for information from Respondent. One involved a flight sequence that “broke up” in San Juan, Puerto Rico, and he was too tired to fly home immediately. Respondent said he went to a hotel to rest, and Respondent wanted him to fly out at 6:00 a.m., but he was too tired, and flew on later. He stated that he is “getting up in age” and had a lot of dental work:

I’ve had three or four teeth pulled. I’ve had implants, which was a lot of that. And, uh, also I’ve, uh, you know, I fly international, I pick up, uh, I pick -- I eat some bad food, drink some bad water, uh, some places, and um, and get diarrhea, or stomach flu from the, from the different, uh, types of, uh, places I go.

A dentist prescribed pain medication, but as soon as he “felt well,” he “called off sick” and went back to work. He did not get or furnish Respondent a doctor’s note. He also testified that Respondent never asked for one.

Q (by Mr. Dalmat) Did they ask you for an explanation of why you called in sick?

A No.

Q Did they challenge you that you weren’t actually sick?

A No.

When he had diarrhea or flu, he just stayed in bed, “ate soup and, and, uh, just waited to get over it.” As soon as it was over, he would “call off sick” and go back to work. No one ever asked him for a note, or for an explanation.

Complainant testified that it’s hard to get a doctor’s appointment and he didn’t want to spend the money to have a doctor prescribe the same thing: stay in bed and, and take soup.

He also testified that Respondent did not have any official “guidelines” relating to sick leave.

At the May “hearing,” Complainant was told that the summer schedule was coming up and they didn’t have enough pilots, to fly the line if people kept calling in sick. “And he wanted all hands onboard was, uh, and he wanted me to come to work.”

Q What discussion if any did you have of legal obligations or FARs?

A Yeah, I told him, you know. He said we had an obligation to American Airlines. And I said, “I had an obligation if I was sick to the people and my license,” which the federal government gives me not American Airline, and, uh, that I couldn’t fly when I was sick. And he kept, uh, pressuring me to, that he needed all hands onboard and he needed, uh, people to come to work.

Q At any point during that meeting did Captain Hynes ask you to provide documentation for your prior uses of your sick leave?

A No.

Q Did he ever ask for an explanation of those sick days?

A Well, yeah, I explained to him my dental problems, uh, and my different problems but, uh, other than that no.

Q Once you gave that explanation did he accuse you of making it up or falsifying that?

A No.

Q Was there any discussion about guidelines, attendance guidelines?

A Not that I remember. I know, uh, Captain Young and, uh, First Officer Lackovic might have asked him about that but, uh, I just wanted to, uh, you know, tell him I was willing to come to work I just wasn't going to fly if I was sick.

Q Okay. And, at any point during that meeting was there any discussion about documentation for future instances of sick leave?

A No.

During a flight to Miami, and after lunch, Complainant started feeling sick on his stomach. He was nauseated and his stomach hurt, "Uh, I just didn't feel good." He told his first officer "I ate something bad. You know I, uh, I've got to call in sick when I get to Miami. I can't, uh, continue the flight."

He notified the proper authority and Complainant was permitted to go home. He alleges that on the way home, he vomited in the car, but went home and went to bed. He alleges that he could not have flown the next sequence.

He said that he started feeling better, and his mother-in-law cleaned up the car, and his wife gave him soup. The next day he felt better and called off sick. He assumed it was bad food, and, and, uh...

Complainant didn't go to the doctor because he had food poisoning before "and, uh, you know, when it clears itself up, uh, I feel better." He said that he probably would not have been able to go to the doctor on June 27.

Although he got JX 7, a letter from Respondent asking for a doctor's excuse, he stated: I didn't know how I could. I felt good now. I felt that if I went to the doctor now, uh, what's a doctor going to tell me, uh, "You look good to me." I don't know how I could have got a doctor's excuse.

In a letter, Complainant objected to the request for the note, "This was harassment and pressure [to] pilots to fly." He meant "to force, uh, people to, um, to fly with an illness, you know?" During the meeting, the Respondent was told:

... "we can't fly, according to the FAA we cannot fly when we're sick and, uh, jeopardize the peoples' lives."

At the "hearing," he was handed a letter indicating that he was docked \$915.64. That amount was deducted from a later paycheck. He had spent his pay on bills, his mortgage and food. When they deducted the \$915.64, he had to borrow money from a line of credit on his house to cover the bills he had to pay. The rate of interest on the loan was nine percent.

Complainant alleged that he had told Captain Fields at the August "hearing" he would give them a medical note "if they'd pay for the doctor I'd give him, uh, all the medical, uh, stuff he wanted. And he goes -- they weren't going to do it."

I asked:

JUDGE SOLOMON: Okay. Did you tell Captain Fields the same story that you told us here about getting sick and you had vomited?

THE WITNESS: No, he, he wasn't interested in that story. He wouldn't listen to me. I tried to but...

The Respondent has a burden to produce clear and convincing proof that it would have off set Complainant's pay in the absence of his protected activity. *Clemmons v. Ameristar Airways, Inc.* ARB Nos. 05-048, -096, ALJ No. 2004-AIR-011, slip op. at 10 (ARB June 29, 2007). Cf. *Bechtel v. Competitive Techs., Inc.*, ARB No. 06-010, ALJ No. 2005-SOX-033, slip op. at 7 (ARB Mar. 26, 2008).

Respondent concentrates solely on the request for a medical note, whereas the offset is the operative unfavorable ("adverse") personnel action in this case.

Accordingly, I find that Respondent has failed to meet its burden of proof.

RECOMMENDED ORDER

For the foregoing reasons, I hereby **RECOMMEND** that Complainant be awarded the following remedy:

1. Respondent shall repay Complainant \$915.64 plus interest from
2. Although Complainant requested that Respondent should immediately expunge Complainant's personnel records, that request is denied.
3. Complainant shall have fifteen (15) days from the date of this Order within which to file a petition for attorney fees and costs, and Respondent shall have fifteen (15) days thereafter to file a response to such petition;

SO ORDERED

A

DANIEL F. SOLOMON
Administrative Law Judge

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

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve

the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the 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).