



Issue Date: 25 June 2010

Case No.: 2009 AIR 28

In the Matter of

**Steven Gray,
Complainant,**

v.

DAL Global,

Respondent.

**RECOMMENDED DECISION AND ORDER¹
GRANTING RELIEF**

This case arises under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). The pertinent provisions of AIR 21 prohibit the discharge of an employee or discrimination against an employee with respect to compensation, terms, conditions, or privileges of employment in retaliation for the employee engaging in certain protected activity.

Procedural Background

On July 9, 2009, Complainant, Mr. Steven Gray, filed a complaint with the Department of Labor’s Office of Occupational Safety and Health Administration (“OSHA”), alleging that he had been discriminated against by the Respondent in retaliation for engaging in whistleblowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on September 11, 2009, concluding that the complaint, together with Complainant’s discussions with the Investigator, did not allege facts and evidence to meet the required elements of a *prima facie* case of discrimination under AIR 21.

On September 16, 2009, Complainant filed his formal objection to the findings of the Secretary with the Office of Administrative Law Judges (“OALJ”) and requested a hearing. The case was assigned to me, and I held a hearing on the merits in Oklahoma City, Oklahoma on

¹ Citations to the record of this proceeding will be abbreviated as follows: “Tr.” refers to the Hearing Transcript; “CX” refers to Complainant’s Exhibits; “ALJX” refers to Administrative Law Judge’s Exhibits; “RX” refers to Respondent’s Exhibits; and “JX” refers to Joint Exhibits.

February 17 and 18, 2010. During the hearing, I admitted Complainant's Exhibits 1 through 17, and 19 through 43; Respondent's Exhibits 1 through 46; and Administrative Law Judge's Exhibits 1 through 5. Complainant was represented at the hearing by Mr. Philip O. Watts, Esq.; the Respondent was represented by Ms. Marguerite H. Taylor, Esq., and Ms. Sheandra R. Clark, Esq. Complainant submitted his brief on May 17, 2010; Respondent filed its brief on May 7, 2010. I have based my decision on all the evidence, the laws and regulations that apply to the issues under adjudication, and the representations of the parties.

Factual Background

Mr. Gray was employed as a ramp agent for DAL Global Services ("DGS"), a wholly owned subsidiary of Delta Air Lines ("DAL") in 2006 and again in 2009. (Tr. 19).² As a ramp agent his primary job duty was to handle all the below wing aspects of aircraft handling. This included marshalling and moving aircrafts, loading and unloading aircrafts, occasionally boarding passengers, and generally any physical handling of the aircraft. (Tr. 19-20).

Airline safety is a central issue for ramp agents. When Mr. Gray first took employment with DGS in 2006 he went through complete and lengthy safety training as a new hire. (Tr. 20). He felt very confident in his ability to perform all the required tasks.

After leaving DGS in November 2006, Mr. Gray went to work for four different airline carriers (Airmark Aviation, United Airlines, Frontier, and Pinnacle) before returning to work for DGS in March 2009. (Tr. 131-136). He worked as a ramp lead for Airmark and as a cross-utilized agent, working above-wing and below-wing, for the other three carriers. As a ramp lead he had the same training and responsibilities as a ramp agent; however, as a ramp lead he had the added responsibility of directing personnel between the gates.³ As a cross-utilized agent, some days he worked the ticket counter, and other days he worked on the ramp. He did not receive any performance evaluations or any official feedback, or any coaching on interpersonal relations from these four employers.

Over the course of two years Mr. Gray received training in ramp related activities and training specific to his job duties, from five different airlines. He considered himself to be knowledgeable in what was required on the ramp, and his supervisors agreed. He was a "go-to source" regarding ramp policy and procedure.

When Mr. Gray returned to work for DGS in March 2009, Delta and Northwest Airlines were in the process of merging. (Tr. 21). Mr. Gray's supervisor and manager was Rahman "Rocky" McKaufman, and the station manager was Mr. Karl Stevenson. (Tr. 285).⁴ Mr. Gray performed above average during both periods of his employment with DGS. (Tr. 136-137). Mr. McKaufman testified that Mr. Gray was an outstanding employee and he had no issues with his performance. (Tr. 311-312).

² Mr. Gray initially worked for DGS from February 2006 to November 2006 and left when his contract ended. (Tr. 19-21; Tr. 130; RX-36).

³ The position is equivalent to an assistant supervisor.

⁴ Mr. Karl Stevenson was previously Mr. Gray's supervisor at Airmark.

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When Mr. Gray returned to work for DGS in 2009, he immediately had concerns that his safety training was incomplete. He testified that since he was treated as a new hire when he returned, he should have gone through training on both Delta and Northwest aircrafts, because while there are some commonalities between the two carriers, he needed to be completely trained on Northwest aircrafts and retrained on Delta aircrafts. Mr. Gray was scheduled for new hire training on February 23, 2009-February 26, 2009; however, he testified that only three days of training were offered, and the hours were approximately half of those scheduled. (Tr. 25-26; CX-1; CX-32). Based on his previous experience with Delta Global and other carriers, he felt that the training should have been, at minimum, a 40 hour week. (Tr. 57).

Mr. Gray testified that on the Delta side he received a quarter of the training in 2009 that he had received in 2006. (Tr. 22). Specifically, his 2006 training covered every aspect of the operation, whereas in 2009 the training was not only shorter, but less in depth. For example, ramp agents have a ground handling aspect to their job, which includes reading baggage claim tags. Mr. Gray testified that in 2006, they not only had to learn information on baggage claim tags but they also had to know a certain number of city codes, and demonstrate that they could read and interpret a bag tag in order to know where to route it. In 2009, this job duty was not covered at all. (Tr. 22).

DGS has submitted Mr. Gray's entry training records, along with the training records of his co-workers, Kenneth Carpino, Shannon Donahue, and Thomas Jones, who started at the same time. The records reflect that each employee went through the same entry training, completed on February 25, and that each completed 40 hours of Delta Ramp Procedure training. Mr. Terrence Donald, a DGS corporate trainer, stated that training was scheduled to start on February 23, from 7 am to 2 pm, and that all training was "completed" on February 25. He commented that Mr. Gray seemed to be very knowledgeable about policies and safety. (RX-38).⁵

Complainant's Exhibit 1 is a statement prepared by Mr. Gray on March 7, 2009, stating that he was scheduled for training from February 23 to February 26, from 7 am to 5 pm. On Monday and Tuesday he was released mid-day; on Wednesday, the training started later, and he was released early. He stated that he received about half of the scheduled training.

Claimant's Exhibit 32 is Mr. Gray's pay stubs for the pay period ending March 1, 2009, which reflect that he was paid for 16 hours of training; for the week ending March 15, he was paid for 9.17 hours of training.

Shortly after his entry training, Mr. Gray went to speak with Ms. Katherine Long, the DGS station manager's administrative assistant at Oklahoma City ("OKC"). (Tr. 23-24). He communicated to her that he was noticing things out on the ramp that had not been covered in training from a procedural perspective,⁶ and asked to see his training records. She responded

⁵ Mr. Donald stated that all the agents in the training had previous airline experience, so everyone in the class understood the roles of a basic ramp agent and the general makeup of an aircraft. (RX-38).

⁶ For example, placement of cones and the number of chocks used on planes differ from carrier to carrier. (Tr. 24; Tr. 160).

that it would take her several months before she could get his training records to him, and at that point in time she could not address his concern. Mr. Gray then asked to speak with the station manager, Ms. Sarah Bednarz, regarding his concerns, but she was out of town and was not able to meet with him. (Tr. 25).

The record includes a written statement from Ms. Long, in which she complains about, *inter alia*, Mr. Gray “pestering” her with questions. (RX 38).⁷ This exhibit also includes an email reflecting that Ms. Bednarz sent a copy of Mr. Gray’s training records to Mr. Hendrix on March 6, 2009.

Mr. Gray received an employee handbook in 2009, which he read “for the most part.” (Tr. 143; RX-40). He testified that the handbook provides an 800 number as the established method of reporting safety concerns; it does not state that there is a safety and compliance department or offer any other method of reporting. (Tr. 184). Ms. Melody Barnett testified that the 800 number was provided for employees who may not have wanted to go through the reporting chain of command, or employees who wanted to make their complaints anonymously. (Tr. 371).

The DGS Employee Handbook states that

Employees are encouraged to call the DGS Employee Hotline to report or raise any concerns relating to safety, compliance with any regulation or laws, ethics, threats, employee relations or any other area. All reports will be reviewed and investigated by DGS. Employees should immediately report any safety or compliance concerns to their local management team, as well as any other concerns or problems they may have. Employees who desire anonymity; or, who do not think their concerns were address; or, who do not feel comfortable reporting their concerns face-to-face, should contact the DGS Hotline.

(RX 40).

After attempting to speak about his concerns with Ms. Long and Ms. Bednarz, Mr. Gray then contacted the 800 hotline provided in the employee handbook, to report his training/safety concerns; he was told that his concerns would be reported but that they could not give him an immediate response. (Tr. 169-170; Tr. 177).

Mr. Gray then made calls to several DGS customers, including Conair, ASA, Sky West, and Pinnacle to notify them that he might have a potential safety concern, and to get clarification on their individual training requirements. (Tr. 172-175). He testified that he did not state to any of the carriers that he felt he had been improperly or incompletely trained.

⁷ Sometime around March 6, DGS solicited statements from employees regarding their dealings with Mr. Gray. With the exception of Mr. McKaufman, none of these employees testified at the hearing. Moreover, the substance of these statements has nothing to do with the issues raised in this claim. For example, several statements discuss a complaint by a female employee that Mr. Gray stared at her chest. One of the complaints discusses Mr. Gray allegedly disparaging Mr. Stevenson’s military career. It is difficult to discern the purpose of the submission of these statements, other than to paint Mr. Gray as a problem employee.

When Mr. Gray called Sky West he asked for the regional training manager for his area. When he told the training manager that he was from Oklahoma City, the manager was confused, because he was not aware that DGS had reacquired the contract. The training manager was upset because he had not been notified of the station change, which was a requirement. At the time, it did not occur to Mr. Gray that he was causing conflict for Sky West and DGS, because he was merely calling to ask about training requirements. (Tr. 173-174).

When Mr. Gray went to work on March 7, 2009, he was sent home and suspended by the station manager, Mr. Stevenson. Mr. Stevenson was very upset with Mr. Gray, and yelled at him about going outside the chain of command to report his safety concerns. (Tr. 176). Sometime after his suspension, Mr. Gray contacted Ms. Bednarz, who informed him that “corporate” had instructed her to suspend him, because he made phone calls to carriers. (Tr. 177-178). He was told that corporate would be doing a full investigation. (Tr. 178-179).

Ms. Melody Barnett, an HR Generalist for DGS who serves the OKC airport, testified that instead of following the company’s open door policy and expressing his safety concerns to the supervisor, manager, regional manager, corporate HR, or the safety department, Mr. Gray went outside the chain of command and the open door policy when he contacted DGS customers. (Tr. 375). She felt that contacting the customer directly was unprofessional, and that as a DGS employee he should be given some type of discipline.

On March 7, 2009, Mr. Gray filed an OSHA complaint in response to his safety training concerns and the conversation he had with Ms. Long. (Tr. 27; CX-2; RX-38).⁸ In his complaint under “hazard description” Mr. Gray stated: “Incomplete training and improper training circumvents some practices exercised for new hires...insufficient training to perform duties in a safe manner, (including training for use of industrial equipment); potential lack of training for existing employees....Company did not, and has not, provided the full training it is supposed to provide.” (Tr. 27; CX-2).

Mr. Gray also expressed concern about hearing protection. (CX-2). OSHA regulations require the company to provide a minimal level of hearing. Mr. Gray testified that the minimal hearing protection that is supposed to be provided to all employees, with full access, was being locked away, which required an employee to ask a certain individual for it. (Tr. 28). That individual may or may not be there during the hours of operation when the hearing protection was requested, with the potential that an employee would not have open access to it. He also reported that he had been suspended without pay for reporting the safety concerns to the company.

In addition to the OSHA complaint, Mr. Gray filed a concurrent complaint with the Federal Aviation Administration (“FAA”), because certain portions of his complaint were not

⁸ DGS submitted a letter from the U.S. Department of Labor notifying DGS of the reported safety complaints and instructing them to complete an investigation regarding: (1) aircraft tug and baggage handling training and (2) employee access to hearing protection. (RX-33). DGS also submitted its written response to OSHA regarding the complaints. (RX-34).

covered by OSHA. (Tr. 28-29; CX-3; CX-4). In his FAA complaint, Mr. Gray complained about improper J lines markings on the ramp and DGS' delivery of hazmat training.⁹

On March 12, 2009, a settlement agreement was reached between DGS, Mr. Gray, and OSHA. (CX-7; RX-32). Mr. Gray was given assurances that the training issues would be resolved. He testified that all the training that he requested in the settlement was completed, which included group servicing equipment (belt loader, jet tug, and mobile stairs), Pinnacle aircraft training, pit training, baggage tug training, lavatory service training, core training, tool place training, classroom training on an additional carrier (Freedom Airlines), and Conair aircraft search training. (Tr. 52-54).

Mr. Gray testified that he never underwent aircraft cabin search or aircraft exterior search training on June 8, 2009, despite the fact that his signature was next to his name on the training record, and these two trainings were listed as completed on his training transcript. (Tr. 192; CX-31; RX-45). Mr. Gray claims his signature was forged because he never attended either training. (Tr. 194; CX-31; RX-41).¹⁰ There is a company record which shows that on June 8, 2009 Mr. Gray clocked-in at normal time, with a slight amount of overtime at the end of the night. (Tr. 233-234; CX-35).

The settlement agreement stated that DGS was not to retaliate against Mr. Gray in connection with his March 2009 OSHA complaint. (Tr. 31). Under the terms of the settlement, Mr. Gray was reinstated to his position and was eventually paid back pay compensation.¹¹ There were general posting requirements that occurred within the agreed upon 60 days. (Tr. 32). DGS did not admit to anything improper, nor did the settlement agreement state that OSHA had found anything improper. (Tr. 180).

On the very same day the settlement agreement was signed, Mr. Gray received a warning letter from Ms Sarah Bednarz, the station manager. He took issue with this letter, which related to his safety complaints to the carriers, which were made at the same time as he made his OSHA complaint. He testified that he had contacted the carriers to obtain a copy of their training requirements. (Tr. 33; CX-8; RX-3). Mr. Gray refused to sign it.

The warning letter also states that ASA management concluded that he had received the appropriate training, including passing the required test, and that his complaint lacked substance. (Tr. 34-35; CX-8). Mr. Gray testified that he had spoken with Todd Hays, who he understood was the employee who oversaw the training program for ASA. Mr. Gray testified that although

⁹ According to Mr. Gray, under the FAA regulations, hazardous materials training is something every employee must take individually, and answer the test questions on his or her own. Mr. Gray testified that the 2009 ADA and Hazardous training testing was given in groups of 3-4 and that the group shared in answering the questions. (Tr. 29-30). Mr. Gray reported that this training test was taken in pairs at a computer; and therefore each person was not tested individually on his or her knowledge of hazardous materials. (CX-5)

¹⁰ Mr. Gray testified to signatures that were his, and stated that the signature on these training records was not his. (Tr. 232-233).

¹¹ Mr. Gray was suspended without pay for approximately a week before the settlement agreement was reached. (Tr. 51).

he never received the list of required training for ASA, as well as Delta's core training that Mr. Hays promised, he also did not receive any confirmation that his complaint lacked substance, or that any investigation had been conducted or completed. The first he heard of any "investigation" was the March 12 warning letter. (Tr. 35).

Reporting Additional Safety Concerns

Mr. Gray continued to report his safety concerns after the settlement of his OSHA complaint. An email dated March 24, 2009 from Ms. Barnett to Ms. Bednarz reflects that Mr. Gray had reported numerous safety violations, in connection with an on the job injury ("OJI"). (RX 43; Tr. 376-378). Ms. Barnett instructed Ms. Bednarz to obtain statements from the agents on Mr. Gray's shift, as he would not provide names. The record does not reflect the outcome of this investigation.

In addition, Ms. Bednarz was instructed to speak with Mr. Gray about a complaint of spreading rumors and discussing his personal opinion of someone's character, and to document her conversation with Mr. Gray when she initially approached him about these safety violations.

On April 23, 2009, Mr. Gray wrote a letter to Nick, a temporary station manager (the station manager who wrote the warning letter had separated from the company) in which he expressed extensive concerns about ramp operation and the supervisors not complying with their duties. He discussed specific incidents that occurred recently at the airport. He also wrote that he felt he was being retaliated against on the job site for bringing forth his safety complaints, and he provided several examples. (Tr. 35-36; CX-9).

Mr. Gray also testified about his conversation with Nick, who reprimanded him for not using a required whistle properly on the ramp. (Tr. 36). Mr. Gray testified that he was never trained on the use of the whistle, even though his training records (which he was not permitted to view) stated that he had been trained on the use of the whistle. (Tr. 36-37).

On June 12, 2009, Mr. Gray wrote two detailed emails to Mr. Harry Hendrix, after he spoke with him on the phone, about his safety concerns at the Oklahoma City station. (CX-12; CX-13). Mr. Gray detailed several examples involving management, safety, and overall operations.

Undelivered Final Warning Letter

Mr. McKaufman testified that he prepared a "final warning letter" for Mr. Gray at the direction of Ms. Barnett, with regard to his attendance issues and unauthorized break times, as documented at Respondent's Exhibit 3. (Tr. 301-303). According to Mr. McKaufman, he was in counsel with Ms. Barnett in regard to Mr. Gray's attendance issues, and he "was getting all the direction from corporate in regards to the flow of things;" he was "on the phone with her every day in regards to those." (Tr. 303-304).

Mr. McKaufman testified that he put together the payroll sign-in sheets, and turned them in to human resources at Ms. Barnett's request as supporting documentation for his final warning

letter. (Tr. 305-306, RX 46). He had no explanation as to why these documents were not provided to Mr. Gray until the morning of the hearing. (Tr. 306-307).

Respondent's Exhibit 3 contains the documentation of Mr. Gray's alleged attendance issues and unauthorized break times that was the basis for the "final warning letter" Mr. McKaufman prepared at Ms. Barnett's request. None of the six Counseling Forms contain Mr. Gray's signature, or a statement indicating that he refused to sign.

Respondent's Exhibit 3 also contains five absence or tardiness slips.¹² A slip for June 9, 2009 reflects that Mr. Gray called in at 4:00 pm to report that his workers' comp doctor appointment ran over; he arrived at 4:45 pm. A tardiness slip for June 13, 2009 reflects that Mr. Gray did not call, but came in late at 5:30 pm, because of a hurt foot.

The June 15, 2009 absence slip is very confusing, but indicates that Mr. Gray called to report that he would not be in to work, and spoke to "Harry."

The June 17, 2009 absence slip indicates that Mr. Gray called in at 3:55 pm to report that he would be late, and came in at 4:04 pm. A note by Ms. Long states that as of 4:05 pm Mr. Gray had not signed in, but was seen returning from the restroom area and placing his lunch in the refrigerator.

The June 22, 2009 absence slip, signed by Ms. Long, indicates that Mr. Gray left early that day, at 7:10 pm, because he was not feeling well.

Mr. McKaufman testified that he spoke with Mr. Gray about his unauthorized breaks on several occasions as his supervisor. (Tr. 321). He had similar conversations with other people on the team, and he acknowledged that compliance with the break policy was an issue for the whole team. (Tr. 322). Ms. Barnett instructed him to start counseling Mr. Gray, and he started documenting Mr. Gray's unauthorized breaks and undocumented break times.

Ms. Barnett testified that Mr. McKaufman had counseled Mr. Gray several times regarding his noncompliance with the break policy; she also talked with Mr. Gray to explain the local break policy. (Tr. 381; Tr. 367). Mr. McBurnett, HR Director for DGS, also testified that he would assume that unauthorized breaks—taking less than or more than the required break—occur at the company frequently. (Tr. 259).

At Ms. Barnett's direction, Mr. McKaufman prepared a Final Warning Letter dated June 29, 2009. (RX 26). On the morning of June 30, 2009, Mr. McKaufman forwarded this letter to Ms. Barnett, along with Mr. Gray's time sheet, highlighting times in June reflecting breaks that were "automatically deducted according to procedures outlined." (RX 42).¹³ The Final Warning Letter states as follows:

¹² At the hearing, Mr. McBurnett reviewed these documents, and acknowledged that they reflected just a small number of attendance issues. (Tr. 257-258).

¹³ The email forwarding the Final Warning Letter and Mr. Gray's time sheets was not produced until the hearing.

Mr. Gray, on 3/3/09 and 4/13/09 you were counseled regarding the proper documentation of authorized break times in conjunction with the hours worked. In addition,, you have been counseled on the following occasions: 3/12/09 Warning Letter; 3/30/09 Annotation of breaks and attendance; 5/17/09 Unprofessional conduct; 5/23/09 Unprofessional Conduct; 5/26/09 Job performance. Furthermore, your attendance, since these counseling's [sic] has resulted in 2 days tardiness on 6/9/09, 6/13/09, an absence on 6/15/09 and, one leave early on 6/22. Your attendance record and adaptation of DGS policies and procedures has not improved to an acceptable record. Since June 1st, you have written less than the authorized break time on 13 separate occasions and have not receive [sic] Supervisor's approval for the shortened break time.

Based on your failure of these policies and procedures regarding the documentation of authorized break times and recent poor attendance record, you are being placed on Final Warning. It is imperative that you understand the seriousness of your situation and take immediate steps to improve your attendance record. Additionally, it will be necessary for you to submit a doctor's certification for each absence in the future upon your return to work. Failure to show immediate and lasting improvement in this area, or any infraction of Company policy or failure to meet Company standards, will likely result in the termination of your employment.

Please understand the importance of maintaining a satisfactory attendance and reliability record. I am confident of your ability to improve your record and am willing to assist you, but the ultimate responsibility is yours.

Mr. Gray did not see this letter until it was produced in connection with this hearing. (Tr. 59).

Employee Incident on June 30, 2009

Mr. Gray testified that on June 30, 2009, a Northwest flight came in at Gate 20 a little after 9 pm. (Tr. 60; CX-14). Mr. Gray was the marshal around the gate, and he had two wing walkers, Lucia Martinez and Rudy Agustin.¹⁴ Mr. Gray marshaled the plane into the gate and brought it to a stop. One of the wing walkers chocked the plane and the jet bridge started to pull up. Mr. Gray went to connect the power to the plane while the jet bridge was still pulling up, and out of the corner of his eye he noticed Ms. Martinez, the wing walker on the number two side of the aircraft, walking behind the wing towards the engine, which was a tail-mounted engine not very high off the ground. Mr. Gray testified that Ms. Martinez was walking in towards the engine while it was still running, too fast for him to get around in time to stop her. (Tr. 60-61). She walked underneath the running engine, and towards the back of the aircraft. (Tr. 61). Mr. Gray immediately notified his supervisor and the station manager of the incident. (Tr. 61-62). Mr. Gray was concerned because employees are trained not to go toward a running engine, ever, for any reason, until the engines are cut off. The planes have flashing red beacons, and until those are shut off, the company trains its employees not to approach the aircraft. (Tr. 61).

¹⁴ Mr. Gray and Ms. Martinez were peers; Mr. Gray was not her supervisor. (Tr. 208).

Mr. Gray immediately reported his concerns to Karl Stevenson, who assured him that he would take care of the matter. (Tr. 203). Mr. Gray testified that Mr. Stevenson was upset that he brought the concerns to him, but he agreed to address it. (Tr. 204). Mr. Gray was not disciplined for reporting his concerns, and as far as he knew, Mr. Stevenson addressed the issue.

Later that day, when Ms. Martinez returned to the gate, she accused Mr. Gray of giving the supervisor false information. (Tr. 205). Mr. Gray testified that after she finished talking to him, she tried to get on the bag tug and drive off. At that point, Mr. Gray tried to call a “time out” at the gate. According to Mr. Gray, Ms. Martinez was standing parallel to the tug, as if she was about to get on it, and he put his hands on the seat and said, “Lucia, stop. Time out. We’ve got to get Karl and discuss this.” (Tr. 205). He felt that she was retaliating against him for reporting her to Mr. Stevenson. (Tr. 206). Mr. Gray claimed that Ms. Martinez slapped his arm away as she got on the tug. (Tr. 207; Tr. 236). She told him to get out of her way and drove off. (Tr. 206).

Mr. Gray reported the incident to Mr. Stevenson, who contacted Mr. McKaufman. (Tr. 207). Mr. Gray also contacted airport police to document the incident, which he had never done before. (Tr. 207; Tr. 209; RX-23). He provided a statement for the company that night as well. (Tr. 211; CX-14; RX-20).¹⁵ After the police completed their report, Mr. McKaufman told each of them that he was not sending them home, but would separate them for the rest of the day. (Tr. 209-210). Mr. McKaufman testified that he felt that Mr. Gray did the right thing by calling a time out, reporting his safety concerns, and contacting the police. (Tr. 300; Tr. 325).¹⁶ Ms. Martinez also submitted a statement regarding the incident. (RX-22).

Mr. Gray’s Suspension: July 1- July 7, 2009

Respondent’s Exhibit 18 is an email from Mr. Stevenson to Mr. McKaufman, sent on July 1, 2009 at 8:13 am, regarding his “personal feelings about Steven Gray.” In his lengthy message, Mr. Stevenson complained that Mr. Gray was alienating everyone, and “they are on pins and needles about what kind of things he is going to instigate next.” He stated that Mr. Gray was a loose cannon, and that he had entertained the idea of quitting because Mr. Gray was an instigator of problems. He felt that Mr. Gray was trying to give DGS a bad name, and run it out of town on a rail. He also complained that Mr. Gray “talked trash” about his military career. Mr. Stevenson stated that he suspected mental issues, or an “anger thing.” According to Mr. Stevenson, Mr. Gray’s actions were “seditious in nature,” and detrimental to the welfare of DGS, Delta, and its personnel.

The record does not include any description of the “antics and actions and the things he [Mr. Gray] says sometimes,” nor did Mr. Stevenson testify at the hearing.

The Respondent submitted another statement by Mr. Stevenson, prepared on July 1, 2009 (a telefax time stamp shows 9:05 a.m.), discussing Mr. Stevenson’s conversations with Mr. Gray

¹⁵ Mr. Gray sent Mr. McKaufman an email at 5:03 am the following day about the incident. (Tr. 62; CX-16).

¹⁶ Ms. Martinez and Mr. Gray had had minor conflicts in the past, which Mr. McKaufman had helped them to work through. (Tr. 326; RX-3; RX-44).

on June 17, June 22, and June 24, 2009. (RX 16). There is no discussion of the incident involving Ms. Martinez.

According to Mr. Gray, on July 1, 2009, he received a voicemail on his phone from Mr. McKaufman, stating that until “corporate” completed an investigation of the events of June 30, he was suspended. (Tr. 63). Ms. Martinez was also suspended because Mr. McKaufman concluded that both of them acted improperly. (Tr. 328).

Mr. Gray testified that he believes DGS was planning to terminate him, before the full investigation was completed as promised. (Tr. 28). Complainant’s Exhibit 33 is a copy of the local Oklahoma employee schedule that Mr. Gray alleges was posted after his suspension on July 1, 2009. (Tr. 57; CX-33). Mr. Gray was still listed as an active employee, but instead of his last name on the schedule, “open” was written in his timeslot.¹⁷ Complainant’s Exhibit 34 is the schedule that was posted two days earlier, which lists Mr. Gray on the schedule. (Tr. 57-58; CX-34). Mr. Gray felt that if DGS had already changed the schedule to show his position as “open,” and they told him that they would be doing an investigation, they had already decided to terminate him.

Ms. Barnett testified that she received a phone call from Mr. McKaufman on July 1, 2009, in which he informed her of the incident between Mr. Gray and Ms. Martinez, and that it had prevented him from giving Mr. Gray his final warning letter. (Tr. 384-385). The statements regarding the incident were faxed to her, and she concluded that there had been some type of physical altercation between the two employees. (Tr. 385). Based on the employee statements, she felt there were grounds for termination, because the company policy states that when there is any type of physical altercation employees can be immediately terminated regardless of their record.

Ms. Barnett testified that “at this point,” she asked Mr. McKaufman to send her all of Ms. Martinez’s and Mr. Gray’s disciplinary information and a recommendation for termination letter/package for both outlining the details of the incident.¹⁸ She instructed Mr. McKaufman to contact Mr. Gray and Ms. Martinez, and advise them that DGS had finalized its investigation, and that the conclusion was a recommendation for termination. (Tr. 260; Tr. 328; Tr. 407).

Respondent’s Exhibit 15 is a letter from Mr. McKaufman to Mr. Hendrix, dated July 6, 2009. (RX-15). Mr. McKaufman stated that they had been prepared to issue a Final Warning to Mr. Gray regarding his attendance, continued abuse of policy, and unauthorized break times, but he was involved in the incident with Ms. Martinez on June 30. Mr. McKaufman stated that “Steven Gray’s behavior is unacceptable and he has been clearly advised of the need for improvement in this area, but has failed to do so. Therefore, I recommend Steven Gray’s employment be terminated.”

Termination Process

¹⁷ There is no date on Complainant’s Exhibit 33 or 34.

¹⁸ Respondent’s Exhibit 13 is an email from Ms. Barnett, sent on July 7, 2009 at 2:43 pm to Mr. Mckaufman, requesting this packet of information. (Tr. 260-261; Tr. 328; RX-13).

Ms. Barnett testified about the normal process of termination after an employee engages in conduct that is against company policy. (Tr. 387-388). She testified that once a “trigger”—in this particular situation, the physical and verbal altercation—occurs, she determines whether the “trigger” warrants some type of immediate termination based on DGS policies. She then requests that the entire file be sent to her, plus a recommendation for termination letter. The recommendation for termination letter should include a summary from the manager stating the events of the trigger, and any previous disciplines that are in the file. Once she receives these documents, she reviews the company’s “comparables,” which show the actions the company has taken in similar situations.¹⁹ She then creates a very brief summary of what happened, which she puts with the recommendation for termination letter, the statements regarding the triggering events, and any previous disciplines, and the review of the comparables, and makes her recommendations to Mr. Boyd McBurnett.

Mr. McBurnett testified that in the termination process, a package is put together for him, and it is not unusual for HR to ask for copies of all the disciplines for his review as part of the package. (Tr. 263). Once he reviews the package and signs it, the termination becomes effective. (Tr. 263). He is the only DGS personnel who can officially terminate an employee. (Tr. 264; Tr. 388). Mr. McBurnett testified that he usually reviews the entire file and the employee’s employment history, including any disciplines that are in the file. (Tr. 268). When a termination is made it is based on the totality of the employment record. (Tr. 268-269).

First Termination Letter Effective July 7, 2009

Mr. Gray did not hear anything from DGS until July 7, 2009, when Mr. McKaufman called him late in the day to come to the office to receive a letter of termination. (Tr. 64; RX-12). Mr. McKaufman testified that he asked Mr. Gray to return to work the evening of July 7, but instead they agreed that they would meet the next day. (Tr. 355).²⁰

On July 8, 2009, Mr. Gray went into the office, where Mr. McKaufman gave him a letter of termination, drafted and dated July 7, 2009. (Tr. 68; Tr. 357; *See* CX-18). The letter states:

“On July 1, 2009 you were suspended pending the Recommendation for Termination. This letter is to advise you DAL Global Services, Human Resources, has reviewed your file²¹ and agrees with the Recommendation to Terminate your employment effective this date.”

(CX-17; RX-12). Mr. McKaufman read the letter to Mr. Gray, who in turn asked a series of questions trying to understand why he had been terminated, because the letter did not give a specific reason. (Tr. 68). The termination letter stated that he had been suspended pending the

¹⁹ DGS submitted examples of comparables that are used in making termination decisions. (RX-45; Tr. 395).

²⁰ Mr. McKaufman’s testimony regarding the chronology of events is confusing and contradictory; at one point, he stated that he issued Mr. Gray the termination letter on July 7. (Tr. 345-346). He later corrected himself, and stated that he issued the termination letter to Mr. Gray on July 8, as reflected in his memorandum of the events. (Tr. 354-355; RX 7).

²¹ According to the July 7, 2009 email she sent to Mr. McKaufman, Ms. Barnett did not request Mr. Gray’s file until that date, when Mr. McKaufman was instructed to advise Mr. Gray and Ms. Martinez that DGS had finalized the investigation, and was recommending them for termination. (RX 13).

“Recommendation for Termination,” but this was not what Mr. Gray had understood to be the terms of his suspension. (Tr. 65). According to Mr. Gray, he was told that he had been suspended pending an investigation of the incident with Ms. Martinez. When Mr. Gray asked Mr. McKaufman why he was being terminated, Mr. McKaufman told him that it was because of the events of June 30, 2009. (Tr. 212).

Mr. Gray understood the July 7, 2009 letter to mean that he had been fired. (Tr. 65-66). After he received this termination letter his badge was taken along with all of the company and airport property that he had on him. (Tr. 66).²² Mr. McKaufman escorted him off the premises and he returned to his home. (Tr. 69).

Mr. McKaufman agreed that Complainant’s Exhibit 17 did purport to fire Mr. Gray on July 7, 2009. (Tr. 291). However, both he and Ms. Barnett testified that they did not have the power to terminate Mr. Gray. (Tr. 290; Tr. 388). At the time, Mr. McKaufman was a new manager, and he did not really understand the processes that DGS had in place (Tr. 290). He testified that Ms. Barnett told him to call Mr. Gray and tell him that he had been recommended for termination. His administrative employee drafted Complainant’s Exhibit 17, and because he was a new manager, he thought that was the process, because his administrative employee had worked for the previous manager. (Tr. 291). According to Mr. McKaufman, this letter was drafted with no instruction whatsoever from Human Resources. (Tr. 356).

Complaint’s Exhibit 18 is the log of an audio recording of Mr. Gray and Mr. McKaufman’s termination conversation on July 8, 2010. It is consistent with Mr. Gray’s version of events. It also clearly reflects that Mr. McKaufman was acting at the direction of “corporate.” Thus, Mr. McKaufman stated that “Corporate made everything . . . they agreed amongst themselves to terminate . . . I didn’t do anything other than write pretty much what they told me.” The transcript clearly reflects that no decisions or recommendations were made locally.

After he issued the letter, Mr. McKaufman called Ms. Barnett to see if he had followed the right process, and she informed him that he had not. She told him to call Mr. Gray and Ms. Martinez (whom he had also terminated) immediately and let them know that they were not terminated. She instructed him to inform Mr. Gray that he was still suspended, that DGS had not made a decision on termination yet, and that they were still reviewing all the documents.²³ (Tr. 389).

Final Warning Letter July 8th, 2009

²² Mr. McKaufman testified that he asked for Mr. Gray’s badge and escorted him out of the area following the meeting. (Tr. 291).

²³ Ms. Barnett testified that she sent the email to Mr. McKaufman on July 7, instructing him to call both Mr. Gray and Ms. Martinez and tell them that DGS had finalized the investigation and was recommending them for termination, and instructing him to prepare a “signed copy” of Mr. Gray’s RFT (recommendation for termination) and any disciplines in his file. Mr. McKaufman’s response, about one hour later, asked her to call him ASAP; when she did, Mr. McKaufman stated that he had mistakenly given a termination letter to Mr. Gray and Ms. Martinez. At the hearing, Ms. Barnett insisted that this conversation with Mr. McKaufman occurred on July 7, or possibly the next morning. (Tr. 404).

After Mr. Gray returned home, he received a voicemail from Mr. McKaufman stating that he had been instructed by his corporate office to have Mr. Gray come pick up his badge and return to work that evening if he chose to do so.²⁴ (Tr. 69-70). As the voicemail message was coming in, Mr. Gray was drafting an email to Mr. McKaufman acknowledging receipt of his termination letter, and asking for information about the grounds of his termination. (Tr. 70; CX-19). He included a description of the message left on his voicemail to keep a record of it, and sent the email.²⁵

Mr. McKaufman responded by email at 4:59 pm, stating “I don’t know what you are talking about, none of what you have here is truth other than the issuance of the letter. What you do not have here is me saying to direct any and all questions that you have to Human Resource.” (Tr. 71; RX 10).

Mr. McKaufman called Mr. Gray back again, and spoke to him directly; he asked that he return to the airport to receive his “final warning letter.” (Tr. 72; CX-25).²⁶ Mr. Gray asked why he had to come in again, since he had already been terminated, and Mr. McKaufman responded that his corporate office had instructed him to deliver the letter to Mr. Gray regardless. (Tr. 73). Mr. McKaufman testified that he had not finished drafting the letter, and he asked Mr. Gray to come to the airport and wait for him to finish it.

Mr. Gray testified that he returned to the airport on July 8, not because he had decided to return to work, but because Mr. McKaufman told him to come back to get a final warning letter. (Tr. 214-215). He was not wearing work clothes²⁷ when he returned to the airport, and he testified that he did not perform any job duties while there. (Tr. 215). He was escorted onto the premises and told to “hang out” and wait for Mr. McKaufman to give him his letter. (Tr. 216; See RX-3).²⁸ Mr. Gray testified that he was not on the schedule that night, and Mr. McKaufman never told him that he needed to work a flight that night. (Tr. 217). Mr. Gray testified that he sat at the airport waiting for several hours. (Tr. 73).

Mr. Gray testified that when Mr. McKaufman gave him the letter he asked him to sign it, and he refused. (Tr. 98; Tr. 391; See CX-15). The “Final Warning Letter” states that Mr. Gray was being issued a final warning based on his failure to abide by policies and procedures regarding documentation of authorized break times, recent poor attendance record, and unprofessional conduct, and reprimands Mr. Gray for the events of June 30, 2009. It does not state that he was still suspended. (CX-25; RX-11).

²⁴ Ms. Barnett testified that she told Mr. McKaufman to call both Mr. Gray and Ms. Martinez right back, and tell them that no decision on termination had been made, and DGS was still reviewing documents; they were still suspended. (Tr. 389).

²⁵ He sent this email at 4:23 pm on July 8, 2009. (CX-19).

²⁶ Mr. McKaufman also contacted Ms. Martinez to tell her that he had made a mistake, and she was not terminated. He asked her to report to work that evening to receive a warning letter. (Tr. 329; RX-21).

²⁷ Mr. Gray testified that he brought work clothes with him and left them in the break room just in case Mr. McKaufman decided to reinstate him. When he left the airport he forgot the clothes and had to call Mr. McKaufman to request that he bring them to him. Mr. McKaufman agreed to do so. (Tr. 217-218).

²⁸ When Mr. Gray was escorted onto the premises he was given an airport badge (not a DGS badge) because without one someone would have had to stand with him at all times while he waited. Mr. Gray thinks that he still has this badge in his possession because he took it with him when he left. (Tr. 218-219).

Mr. Gray felt that there were several inaccuracies in the lengthy letter, so he asked to see his employee file to fact check. (Tr. 74-75; Tr. 331). Mr. McKaufman handed him his employee file, but Mr. Gray was only able to look at it for a minute before Mr. McKaufman took the file back and told him that he needed to sign the letter. (Tr. 75-76; CX-15). Mr. Gray stated that he could not sign the letter without challenging the inaccurate content. (CX-15). Mr. McKaufman then asked Mr. Gray if he was refusing to sign, and Mr. Gray said that he was refusing if he did not have time to review his employee file.

Mr. McKaufman became upset, and pulled in another employee, Abraham, to witness Mr. Gray's refusal to sign the letter. Mr. McKaufman told Mr. Gray to stop viewing his file, and Mr. Gray told him it was his right by law to view the file. Mr. McKaufman told Mr. Gray that he could view the file for a couple of minutes, but Mr. Gray did not feel that was enough time. Mr. McKaufman told Mr. Gray if he could not view the file in the few minutes he offered, he would have to send Mr. Gray home. Mr. Gray told Mr. McKaufman that he could not agree to this time frame and that Mr. McKaufman "should do whatever he needs to do." (CX-15).

According to Mr. Gray, Mr. McKaufman asked him to leave the premises, which he did. (Tr. 76). Mr. Gray stated that he asked Mr. McKaufman for confirmation that he wanted him to leave, and Mr. McKaufman said "Yep, bye" and waved his hand at him. (Tr. 76). As Mr. Gray was gathering his things, Mr. McKaufman asked him if he was separating his employment and Mr. Gray responded, "No, you just told me to leave." (CX-15). Mr. McKaufman did not respond. Mr. Gray did not have the impression that the warning letter meant he was no longer terminated. (Tr. 215).

Mr. McKaufman testified that Mr. Gray did return to active work duty on July 8. (Tr. 330). He stated that Mr. Gray reported to work between 4:00pm and 4:45pm, and began working. He was not initially in uniform, but he subsequently got dressed in his uniform. After they got to the point where the operation had wound down, Mr. McKaufman asked Mr. Stevenson to free up Mr. Gray so that he could speak to him. Mr. Gray reported to Mr. McKaufman's office, and Mr. McKaufman began to counsel him, and gave him the final warning letter. (Tr. 331).

Mr. McKaufman testified that when Mr. Gray asked to review his employee file to verify that everything in the final warning letter was actually in the file, he gave Mr. Gray 15-20 minutes to do so. (Tr. 331). He stated that he did not throw the file at Mr. Gray, but placed it down in front of him. (Tr. 334). He then got a call on the radio saying that a plane had been cleared to land; at that point he told Mr. Gray that they were done because they needed to get back to work. (Tr. 331). Mr. Gray wanted to continue to view his file, and Mr. McKaufman told him that he needed to either make an appointment to come back or view the file later, but at that time they needed to get back to work. According to Mr. McKaufman, Mr. Gray began to raise his voice, saying that it was his right by law to view the file and that he was going to take as much time as he needed. (Tr. 332). Mr. McKaufman told him to leave the file on his desk, get out of his office, and return to work. Mr. Gray became really angry and demanded copies of his files, which Mr. McKaufman could not provide him. According to Mr. McKaufman, Mr. Gray became angrier, and started shouting at him.

Mr. McKaufman testified that Mr. Gray stormed out of his office, went down the hall to the storage room right in front of operations, and told Mr. McKaufman that he was not going to do anything unless he had his file in hand. He continued to scream at Mr. McKaufman, demanding copies of his file. He then entered the storage room and got a little vacuum he had brought to work, and walked past Mr. McKaufman, back towards the operations window. (Tr. 332-333). Mr. McKaufman asked him if he was choosing to separate his employment with DGS at this time, and Mr. Gray responded that he “was not separating anything.” (Tr. 333). Mr. McKaufman again told him to return to work on the incoming flight, but Mr. Gray ignored him, and went out the door leading into the bag room, and then out the door of the SIDA area. (Tr. 333-334).

Mr. McKaufman testified that Mr. Gray called him about five minutes later, and asked him to bring him the clothes he left in the supervisor’s office; he also asked if his badge had been de-activated. Mr. McKaufman testified that he brought Mr. Gray the street clothes he wore to work that day out to Mr. Gray, who was in his uniform. Mr. Gray never returned to work again.

According to Mr. McKaufman, when Mr. Gray refused to sign the final warning letter, he brought in a witness to attest to that. (Tr. 335; Tr. 392). His interpretation of company policy was that when an employee refused to sign a final warning letter a witness of his peers must be there to sign as a witness of issuance. In fact, the witness was supposed to be a peer of Mr. McKaufman (a supervisor) and not a peer of Mr. Gray, but since Mr. McKaufman did not know that, he got an employee, Mr. Kushinyl Abraham, to sign as a witness. Ms. Barnett informed him of his error after the fact. (Tr. 336; Tr. 392).

Mr. McKaufman prepared a memorandum “To Whom It May Concern” dated July 9, 2009, recounting these events. (RX 7). He stated that he issued Mr. Gray a “separation letter terminating his employment.” Mr. McKaufman recounted that he then contacted his “HR Generalist” (Ms. Barnett) to brief her on the events, and she told him that “the final decision after the investigation of the confrontation that took place on June 30, 2009 between Mr. Gray and Lucia Martinez was to reinstate their employment with DGS.” Mr. McKaufman stated that he immediately called both employees, informed them that they were not terminated, and that they should report to work at their scheduled time that evening.

Respondents Exhibit 46 is the payroll sign-in sheet for July 8.²⁹ (Tr. 338). On the first sheet, line 12 is an entry for Steven Gray, indicating that he clocked in at 4:45 p.m., took an hour break, which was longer than allowed, and was paid for four hours on July 8, 2009. (Tr. 338-339). Mr. Gray’s initials are in the appropriate section, but the comment section is illegible. (Tr. 339). The second page reflects the hours that Mr. Gray worked for the week of July 6 through July 12, and shows that he worked a total of four hours that week, all on July 8, 2009.

However, the email correspondence between Mr. McKaufman and Mr. Gray on July 8, 2009, after Mr. Gray returned home with his termination letter, reflects that Mr. Gray sent his email to Mr. McKaufman at 4:23 p.m., and that Mr. McKaufman replied at 4:59. (CX 20). Mr. Gray returned to the airport after this exchange.

²⁹ This document was not produced by the Respondent until the hearing.

At the hearing, Ms. Barnett described the purpose of a “final warning” letter. She stated that from the standpoint of company policy, the final warning puts the employee on notice that there have been occurrences and opportunities where the employee should have improved, and perhaps the behavior that was the subject of discipline had repeated itself, or other behavior had occurred. The final warning letter says that “we’ve spoken about this before, we’ve addressed it, and this is the final time that we’re speaking to you about this,” before they needed to escalate and review a person for termination. She noted that Mr. Gray’s “final warning” letter stated that failure to show immediate and lasting improvement would likely result in termination of employment. The “final warning” was essentially a final warning before termination for additional infractions. (Tr. 382-383).

Final Warning Letter: Counseling/Disciplinary Forms

DGS has submitted the counseling forms referenced in Mr. Gray’s final warning letter. (RX-3). None of the counseling forms contain Mr. Gray’s signature, and he testified that he does not recall seeing any of these forms as an employee. (Tr. 84-92).

The warning letter cites to the March 12, 2009 warning letter that was given to Mr. Gray the same day he signed his settlement agreement. Next, the letter refers to a counseling session on March 30, 2009 concerning attendance, no call/no show, unprofessional conduct and “other.” The description of the incident states that Mr. Gray called in absent 30 minutes before the start of his shift. (RX 3). The form states that at the “counseling session,” Mr. Gray was made aware that he was required to take a full break and only sign in when scheduled to work, unless asked to sign in by a member of management. He was also counseled on professional misconduct when talking about members of the team.

Mr. Gray testified that he does not know what the allegation of professional misconduct refers to. (Tr. 85). He did not recall being late any time other than when he had physical therapy appointments in connection with his work injury. He also testified that there was never a time when he was told to take a specific amount of break, other than what was on the policy sheet regarding the company’s break policy, which was established March 3, 2009. (Tr. 85; CX-29).

The next counseling form is dated April 13, 2009, and the brief description states that Mr. Gray was counseled on improperly documenting breaks and instructed on how to comply with the policy going forward. (RX-3). Mr. Gray did not recall being counseled about breaks on this date.

The reason listed for the counseling on May 17, 2009 was “unprofessional conduct.” The description of the incident reports a conflict between Mr. Gray and Ms. Martinez. (RX-3; RX-44). Both had individually voiced concerns that the other was “bossing” the other around when neither had the authority to do so. They also had a problem with how the other person addressed them. It was expressed to both of them that their behavior would not be tolerated, and that they needed to work together as a team and respect one another. Mr. Gray testified that there were a few occasions when he and Ms. Martinez went into Mr. McKaufman’s office to talk, but he did

not recall a specific situation as described in this counseling form, and he did not recall being counseled on May 17, 2009. (Tr. 89-90).

The next counseling form is dated May 23, 2009, and it concerns “unprofessional conduct.” (RX-3). The form refers to the May 17 counseling, and describes another incident on May 23, 2009 where Mr. Gray reportedly used a stern and offensive tone with Ms. Martinez. He was cautioned on his tone when addressing other agents. Mr. Gray testified that he recalled five or six times when the two of them would speak to a supervisor or manager about something involving the other, but he did not feel that they necessarily had an ongoing issue. (Tr. 90). He did recall the incident on May 23, but he did not recall having an unprofessional tone with Ms. Martinez, or that she made any complaint about him having an unprofessional tone. (Tr. 91).

The last counseling form is dated May 26, 2009, and regards Mr. Gray’s job performance. (RX-3). It provides a brief summary of two incidents, on May 24, 2009 and May 25, 2009, where Mr. Gray improperly unloaded baggage. Mr. Gray testified that he did not recall these incidents, and specifically did not recall any issues with things being put on the belt or not. (Tr. 92).

Final Warning Letter: Unauthorized Breaks

Mr. McKaufman testified that DGS does not technically have a break policy, but that one was implemented on the local level at OKC. (Tr. 287). He explained that because breaks were being taken at irregular times and going longer than they should, employees were assigned a set amount of break time and told when they could take their break. The local break policy states that if an employee works less than 4.5 hours he or she is not authorized to take a break; if an employee works 4.5 hours, a 15 minute break is authorized; if an employee works 6.0 hours, a 30 minute break is authorized; and if an employee works 8.0 hours, a 60 minute break is authorized. (CX-29). Under the break policy, if an employee takes a shorter than authorized break, he or she is required to get the supervisor’s signature. An agent, such as Mr. Gray, is also required to initial next to the break time.

Mr. Gray was typically scheduled for a seven hour P.M. shift, starting at four o’clock. (Tr. 286). Mr. Gray’s shift fell in the “less than 8.0 hours” category, so he was authorized to take 30 minute breaks. (Tr. 86). Mr. McKaufman testified that, while the shifts are normally seven hours, due to irregular operations, Mr. Gray’s shifts often ran longer. If overtime was needed, supervisors typically informed Mr. Gray at least two hours before the end of the shift that he needed to stay to help with the operation. (Tr. 286).³⁰ If Mr. Gray had been compliant with the break policy during his regular seven hour shift, he would not be expected to take another 30-minute break unless the supervisor deemed another break to be necessary.

³⁰ Mr. Gray testified that employees were never told ahead of time if there were going to be held over for overtime. When it came time for an employee to clock out, a supervisor would request that the employee stay on the clock and continue working, either because they were short staffed or the work did not get completed in the scheduled amount of time. This was not a daily occurrence, but it happened very frequently. (Tr. 87). Oftentimes Mr. Gray would volunteer to stay when no notice was given. (Tr. 287).

During his testimony, Mr. Gray identified other employees' apparent violations of the local break policy as reflected on Respondent's Exhibit 4, which consists of payroll sign-in sheets for several days. (Tr. 101; RX-4). On the March 30, 2009 payroll sign-in sheet Mr. Gray identified five entries with reported breaks that are not in compliance with the local break policy, because they are either incomplete or lack a supervisor's signature to approve the noncompliance. (Tr. 102-103).

On the June 21, 2009 payroll sign-in sheet Mr. Gray identified four entries that are not in compliance with the local break policy and lack a supervisor's signature. (Tr. 103-106). On the April 12, 2009 payroll sign-in sheet Mr. Gray identified two entries that are not in compliance with the local break policy because they are incomplete or lack a supervisor's signature. (Tr. 106-107). On the May 23, 2009 payroll sign-in sheet Mr. Gray identified one entry that is not in compliance with the local break policy because it is incomplete and lacks a supervisor's signature. (Tr. 107). On the May 24, 2009 payroll sign-in sheet Mr. Gray identified two entries that are not in compliance with the local break policy and lack a supervisor's signature. (Tr. 107-108).

On the April 26, 2009 payroll sign-in sheet Mr. Gray identified one entry that is not in compliance with the local break policy because it lacks a supervisor's signature. (Tr. 108-109). On the April 18, 2009 payroll sign-in sheet Mr. Gray identified one entry that is not in compliance with the local break policy because it lacks a supervisor's signature. (Tr. 111-112).

On the June 22, 2009 payroll sign-in sheet Mr. Gray identified three entries where there are a supervisor's initials, but it is not clear whether the supervisor is signing off on the employee working late or taking an unauthorized break. (Tr. 112-113). On the June 18, 2009 payroll sign-in sheet Mr. Gray identified three entries that are not in compliance with the local break policy and lack a supervisor's signature. (Tr. 113). On the June 13, 2009 payroll sign-in sheet Mr. Gray identified two entries that are not in compliance with the local break policy because they lack a supervisor's signature or the "break" entry field is blank. (Tr. 113-114). Lastly, on the June 9, 2009 payroll sign-in sheet Mr. Gray identified four entries that are not in compliance with the local break policy because they lack a supervisor's signature. (Tr. 114-115).

Mr. Gray stated that these entries do not appear to be in compliance with the local break policy, but he acknowledged that he did not know whether any follow up occurred with these employees.

Final Warning Letter: Absences/Tardiness

Respondent's Exhibit 3 includes five absence/tardiness documents that were referenced in the final warning letter. (RX-3). Mr. Gray testified that none of these absence/tardiness documents were presented to him as an employee. (Tr. 97). The first is dated June 9, 2009, and states that Mr. Gray called in to report that he would be late to work because his workers compensation doctor's appointment had run over. Mr. Gray testified that these doctor's appointments were for physical therapy, and therefore there was no way for them to "run over." (Tr. 92). The appointments always lasted the same amount of time, and the appointment dates were assigned to him.

The second tardiness document is dated June 13, 2009, and states that Mr. Gray arrived to work late without calling, because of a hurt foot. Mr. Gray testified that he recalled one incident when he was leaving for the airport, and he fell off his porch and stubbed his toe; he thought that he had broken it. (Tr. 92-93). Mr. Gray testified that he called in immediately to report that he would not be making it into work,³¹ but after he iced his foot for awhile it seemed to be okay, so he did report to work.

The third absence document is dated June 15, 2009, and states that the reason for Mr. Gray's absence was unknown. Mr. Gray did not recall this absence. (Tr. 94).

The fourth absence document is dated June 17, 2009, and states that Mr. Gray was four minutes late clocking in for his shift. Mr. Gray did not recall this incident. (Tr. 97).

The last absence document is dated June 22, 2009, and states that Mr. Gray left early because he was not feeling well. Mr. Gray did recall leaving work early one day for this reason. (Tr. 98).

Mr. Gray and DGS Communication after July 8th

After Mr. Gray left on July 8, Mr. McKaufman contacted his boss, Mr. Harry Hendrix, the regional manager, to inform him of what had happened. (Tr. 341). Mr. Hendrix told him not to worry about it, and that he would take care of the matter the following day. The next day, Mr. McKaufman called Ms. Barnett, who had already been informed about the situation, and asked her questions regarding the situation. (Tr. 342).

Mr. Gray testified that on the night of July 8, he contacted Mr. Hendrix, whom he had had contact with before, to let him know what had occurred that day. (Tr. 77). After hearing Mr. Gray's account, Mr. Hendrix instructed him to write a statement of what happened and send it to him. (Tr. 77). Mr. Gray sent him a statement, dated July 9, 2009, detailing his version of the events. (Tr. 216; CX-21; RX-3)³². Mr. Gray sent Mr. Hendrix a confirmation letter by fax to confirm that he had sent the statement to the right location. (Tr. 77; CX-24). Mr. Gray never heard back from Mr. Hendrix. (Tr. 419).

Ms. Barnett testified that when Mr. McKaufman told her what happened at his final meeting with Mr. Gray, she instructed Mr. McKaufman and Mr. Stevenson to prepare a statement detailing the event. (Tr. 393).³³ Based on their statements, Ms. Barnett concluded that Mr. Gray had walked off the job, which is job abandonment. (Tr. 393-394). She testified that after she read Mr. Gray's account, she decided to make a recommendation for termination.³⁴ (Tr.

³¹ Mr. Gray specifically recalled calling in immediately after he fell and talking to an operations agent to let them know that he was not coming in.

³² Mr. Gray also sent a statement to Mr. McKaufman addressing the final warning letter and related events. (CX-21; RX-9).

³³ DGS submitted the statements of Mr. McKaufman and Mr. Stevenson. (RX-3; RX-5). Mr. Gray testified that Mr. Stevenson's comments looked accurate. (Tr. 95; RX-3).

³⁴ Of course, Ms. Barnett had already decided, as early as July 7, 2009, to recommend Mr. Gray for termination, and asked Mr. McKaufman to prepare a termination package.

395). She advised Mr. McKaufman to prepare a recommendation for termination letter, which she reviewed along with “comparables,” other situations where employees walked off the job. She then provided a summary of her investigation to Mr. McBurnett for final review. (Tr. 395; RX-5).

Mr. Gray testified that on July 9, 2009 he contacted Ms. Barnett. (Tr. 77; Tr. 245).³⁵ He explained to her that he had been terminated on July 7, 2009, then called back to sign a final warning letter after his termination. Mr. Gray testified that she told him that his account of what happened was her understanding of the events as well. (Tr. 77-78). She informed him that Mr. McKaufman did not have authorization to do the termination. (Tr. 78). Mr. Gray informed her that he had been given his termination notice and turned in his badge.

Mr. Gray testified that Ms. Barnett told him not to return to the airport until he was contacted. (Tr. 78). Ms. Barnett testified that she did not tell Mr. Gray not to return, but told him that he was still suspended. (Tr. 400). According to Mr. Gray, Ms. Barnett told him that she needed to speak with Mr. McKaufman, and that either she or Mr. McKaufman would contact him. (Tr. 78). Ms. Barnett testified that she never said this, but she told Mr. Gray that someone from the station would call him and let him know what his status was.³⁶ (Tr. 400). Mr. Gray testified that no one ever contacted him; he called Ms. Barnett back, and left a voicemail message a couple of hours after their initial conversation to check on the status, but she did not return his call. In fact, he never heard anything further from any DGS employee. (Tr. 421).³⁷

Second Termination Letter effective July 23, 2009

Mr. McKaufman prepared a letter dated July 16, 2009 (one week after Mr. Gray filed his whistleblower complaint), recommending Mr. Gray for termination of employment, and listing as grounds for his termination unprofessional conduct, unauthorized breaks, and abandonment. (RX-5). It is initialed by Mr. McBurnett, the HR Director for DGS, on July 23, 2009, with a notation of “OK.” Mr. McBurnett testified that the reason Mr. Gray was terminated was for refusing an assignment and leaving the work area. (Tr. 248). He testified that Mr. Gray was not terminated in the July 7, 2009 letter from Mr. McKaufman, because Mr. McKaufman did not have the authority to terminate Mr. Gray. Under the company policy, Mr. McBurnett is the sole person authorized to make a decision for termination. (Tr. 261-262). He did not know if Mr. Gray was aware of this policy. (Tr. 262).

There is no indication that this letter, or any other notification, was actually sent to Mr. Gray.

Current OSHA/FAA Complaint

³⁵ Ms. Barnett testified that he contacted her either the day he allegedly walked off the job or the following day, but before the final determination to terminate him had been made. (Tr. 397).

³⁶ Ms. Barnett prepared a memorandum regarding her conversation with Mr. Gray, dated July 6, 2009, indicating, *inter alia*, that she advised Mr. Gray that the termination letter issued to him was in error. (RX 14). At the hearing, she testified that the date could be a typographical error. (Tr. 399).

³⁷ Complainant has submitted his mobile phone records from June 30, 2009 through July 30, 2009 which reflect these phone calls to Ms. Barnett.

Mr. Gray filed his current whistleblower complaint on July 9, 2009. (Tr. 39; CX 42). He again reported his concerns about lack of training, including “lock-out tag-out” training,³⁸ and he raised additional safety concerns, such as improper J-line markings.³⁹ (Tr. 40-43). In addition to his written complaint, Mr. Gray filed a complaint with the local OSHA and FAA office over the telephone on July 9, 2009 at approximately 3 pm Central Time. (Tr. 43). Mr. Gray spoke with Jerry Young in the Oklahoma City OSHA office and told him that he was filing the OSHA portion of the whistleblower complaint. He communicated each of the issues set out in his written complaint. (Tr. 44).

Mr. Gray testified that he was not sure of the current status of the FAA complaint process, but that he had assisted in the onsite investigation in October 2009. (Tr. 45).⁴⁰

Mr. Gray's Life after DGS termination

Mr. Gray testified that he has not been able to gain re-employment in the airline industry since his termination on July 7, 2009. (Tr. 116). Since his termination he has applied for active openings with every airline in Oklahoma City. There has been at least one opening with every carrier, and there are roughly six or seven carriers in Oklahoma City. He has worked for three other carriers in Oklahoma City, and he had a clean separation with each of them.⁴¹

Since his termination Mr. Gray has sought employment in the airline industry, the IT industry, and the sound, video and lighting industry. (Tr. 227). In the IT industry he has sought at least 50 jobs as a field technician. (Tr. 227-228). He has sought about twenty to thirty jobs in the sound, video and lighting industry. (Tr. 228). He has not received any job offers, but he has had interviews.

The Will Rogers Airport in Oklahoma City is a small out-station (as opposed to a hub) with a small community of employees “where everyone knows everyone.” (Tr. 117-118). Mr. Gray testified that since his termination, he has talked to several people who work for other carriers, who are aware of his situation and heard about it through existing employees. Although Mr. Gray did not have specific names, he has heard that employees are saying that the company fired him because he was doing things wrong, and not following procedure or policy. (Tr.229-230).

³⁸ Lock-out tag out training is an OSHA program for industrial equipment, and it was Mr. Gray's understanding that this applied to baggage carousel equipment, which is the handling equipment within the airport baggage room. If the equipment malfunctions and has to be serviced, Mr. Gray understood that a person in his position would need to be trained on how to lock out that specific equipment for the facility/carrier. He would also need to be trained on how to recognize when it is locked out or out of service so that no one accidentally turns it back on as someone is servicing it. (Tr. 42-43).

³⁹ He explained that J lines are there to line up the aircraft at the gate, and if the lines are not marked correctly it could cause a lot of problems. For example, if the line is marked too far inward there is a possibility that the plane could hit the jet way or any equipment that is parked outside the envelope. If the plane comes in too far it can run into equipment, hurt personnel on the ground or put the people in the aircraft at risk.

⁴⁰ He was asked to come out and show facts and evidence to support his complaint. (Tr. 45-46).

⁴¹ Two of the carriers had made him offers to come back, as early as the previous year. (Tr. 117).

Mr. Gray was employed by Global Audio Video as a systems engineer while he worked with DGS. (Tr. 226). He testified that with the economy and other factors, his hours were cut back to the point where he was eventually reduced to no hours sometime in June.

Mr. Gray testified that he does not have any other source of income. (Tr. 228). He uses his unemployment benefits to pay his mortgage payment. Mr. Gray filed for unemployment in late July 2009, and became qualified for benefits on August 16, 2009. (Tr. 120-121; Tr. 228-229).⁴² He currently collects from \$200 to \$300 a week in unemployment benefits. (Tr. 121-122). Mr. Gray has not received counseling or therapy since separating from DGS; he is not taking any medications. (Tr. 229).

Compensation

Mr. Gray is seeking three years of front pay in lieu of re-instatement. (Tr. 119). He had been scheduled to work approximately 37 hours a week, at \$8.50 an hour. Mr. Gray is also seeking back pay from the date of his suspension, July 1, 2009, through February 15, 2010 (30 weeks). (Tr. 120). Mr. Gray testified that he would back out \$6,000 in unemployment benefits. (Tr. 122).

Miscellaneous

DGS submitted several employee statements regarding Mr. Gray's complaints to HR and OSHA in March 2009. (RX-38). These employees prepared statements in response to an HR request for statements regarding their individual dealings with Mr. Gray. Specifically, they were asked to detail such things as what training was provided and when, whether they received any concerns from Mr. Gray about his training, whether they received any concerns from Mr. Gray about hearing protection, whether they received any other concerns from Mr. Gray, if/when any customers called to say they had heard from Mr. Gray, what was said to the customer, whether any supervisors received concerns from Mr. Gray, when Mr. Gray was put on the ramp, in an orange vest, in the mentor program, etc.

Ms. Katherine Long submitted statements regarding her interactions with Mr. Gray dating back to when she was employed with Aramark, shortly after DGS returned to Oklahoma City; Mr. Gray's requests for training; allegations against Mr. Gray of sexual harassment; Mr. Gray's request for training records; and an orange vest incident. (RX-38).

Mr. Terrance Donald submitted a statement about his interactions with Mr. Gray during his initial orientation and the February 23-25, 2009 training. (RX-38).

Ms. Kathleen Woodward submitted a statement about an alleged sexual harassment incident. (RX-38).

Ms. Sarah Bednarz submitted a statement regarding an orange vest incident; accessibility of hearing protection; Mr. Gray's knowledge of ramp safety; Mr. Gray's lack of training

⁴² The Appeal Tribunal for the Oklahoma Employment Security Commission issued an award of benefits on November 4, 2009. (CX-26).

complaints; and Mr. Gray's initial suspension after contacting customers with his training concerns. (RX-38).

Ms. Laura Leick submitted a statement regarding the terms of Mr. Gray's employment as well as Mr. Gray's initial complaints concerning his badge and the understaffing of the ramp during the PM shift. (RX-38).

Mr. Harry Hendrix initially stated that he has never spoken with or had any direct contact with Mr. Gray. He stated that he was notified after Mr. Gray contacted one of DGS's customers regarding his training concerns, and he requested Mr. Gray's training records and ordered his suspension until a full investigation could be completed. (RX-38).

Mr. John Anderson's statement details a conversation he had with Mr. Gray regarding Mr. Gray's concerns about the ramp being understaffed, and discusses the orange vest incident. (RX-38).

Mr. Bob Wingo submitted a statement regarding Mr. Gray's contact with ASA Corporate Offices concerning his lack of training. (RX-38).

In Mr. Karl Stevenson's statement he reported that Mr. Gray never made any comments to him about lack of training, and that he first learned about Mr. Gray's training concerns when he was tapped as a witness to Sarah Bednarz placing Mr. Gray on temporary suspension for making calls to ASA regarding these concerns. He also reported on his work relationship with Mr. Gray; Mr. Gray's job skills; the availability of hearing protection; an orange vest incident; and an incident where he counseled Mr. Gray on how to speak to co-workers. (RX-38).

On March 11, 2009, there was an incident with a TSA agent who gained access to an aircraft during a safety check. (Tr. 37; CX-10).⁴³ TSA was conducting a spot check on the DGS ramp, and they sent out an inspector at night to try to gain access to the aircraft and to see if the aircrafts were secured and sealed off. That night an agent was able to gain access to one of the aircrafts, and the inspector notified Mr. Gray first. (Tr. 37-38). The inspector inquired about Mr. Gray's training and why he had been able to gain access to the aircraft. (Tr. 38). Mr. Gray directed the inspector to his supervisor, Mr. McKaufman, and when Mr. Gray could not locate Mr. McKaufman he referred him to a manager with Delta. (Tr. 38; Tr. 285).

None of these employees testified at the hearing. As Mr. Gray did not have the opportunity to cross examine these persons, I find that these statements have very little, if any, probative value. Moreover, much of what is discussed in these statements, such as the allegations of sexual harassment, the orange vest incident, and counseling on how to speak to co-workers, has nothing to do with the issues presented in this claim. The Respondent has not indicated its purpose in submitting these statements, or even referred to them in its brief; much of these statements appear to serve no purpose other than to cast Mr. Gray in an unfavorable light.

DISCUSSION

⁴³ According to the facts, Mr. Gray would have still been on suspended status on this date, which is before the March 12 settlement agreement. It is unclear what his work status was at the time of the incident.

I. Parties' Contentions

A. Complainant

The Complainant, Mr. Gray, alleges that he engaged in the following protected activities: (1) reporting his safety concerns to DGS personnel in March 2009; (2) reporting his safety concerns to the carriers in March 2009; (3) filing companion whistleblower complaints with OSHA and FAA on March 7, 2009; and (4) reporting safety concerns to DGS personnel, including his supervisor Mr. Stevenson, on June 30, 2009. Complainant's Closing Brief at 2. Mr. Gray alleges that DGS was aware of his alleged protected activities; DGS does not disagree with this contention.

Mr. Gray alleges that DGS subjected him to three unfavorable personnel actions: (1) the suspension of his employment on March 7 following his safety and employment records complaints of March 5 and 6 to both DGS and its certificate-holding carriers; (2) the suspension of his employment on July 1, 2009 following a safety report to his supervisor, Mr. Stevenson on June 30, 2009; and (3) the termination of his employment on July 7, 2009 when he was served an Employment Separation notice in person by his station manager, Mr. McKaufman, was required to surrender his badge, and was escorted off the premises.

Mr. Gray contends that his protected activities were a contributing factor to the unfavorable personnel actions he was subjected to, and he points to several events to support this contention. First, immediately following the execution of the March 12, 2009 settlement agreement between DGS and Mr. Gray, in which DGS agreed to not retaliate against Mr. Gray for his actions, DGS issued Mr. Gray a "warning letter" based in large part on his safety complaints that were the subject of the settlement agreement. Mr. Gray claims that the letter was placed in his file and used against him in future disciplinary matters.

Second, Mr. Gray points out that in DGS testimony as well as in Complainant's Exhibit 28, DGS stated that they were "prepared to issue a Final Warning Letter to Steven Gray in regards to Attendance and Unauthorized break times on July 1, 2009, but due to the altercation that took place on June 30, 2008 between Mr. Gray and Lucia Martinez, we [they] were unable to do so." In verbal statements, DGS also contends that they would have taken the same action regardless of the events of June 30.

Mr. Gray disputes this contention and argues that DGS was not preparing to issue a final warning letter before July 7, 2009. He argues that the evidence suggests that DGS intended to use Mr. Gray's March 12 warning letter as part of the basis for future disciplinary matters and in his ultimate termination. Third, Mr. Gray asserts that the additional reasons DGS provided as justification for his July 8 Final Warning letter (counseling and absence/tardiness) were made up in a scheme to retaliate against him, and are unsubstantiated by reliable evidence.

Fourth, Mr. Gray argues that DGS' allegation that he abandoned his job is inaccurate and not supported by the evidence. Mr. Gray argues that he was terminated effective July 7, and that he subsequently attempted to communicate with DGS personnel on several occasions after July

8. No one from DGS ever returned his phone calls or emails. The results of his termination investigation were never revealed to him, and he never received the second letter of termination dated July 16, 2009.

B. *Respondent*

The Respondent, DGS, does not dispute that Mr. Gray's March 2009 complaints to OSHA and FAA, as well as some of his written memos about safety at the OKC Airport qualify as AIR 21 protected activity. DGS does not dispute that it was aware of Mr. Gray's protected activities. DGS argues, however, that Mr. Gray's complaints about Ms. Martinez's June 30, 2009 conduct do not qualify as protected activity under AIR 21.

DGS does not dispute that Mr. Gray was subjected to unfavorable personnel action during his employment with DGS on two occasions: (1) the "mistaken termination" on July 7; and (2) the termination of his employment on July 23. DGS does not dispute that his incidents qualify as unfavorable personnel actions under AIR 21, but argues that Mr. Gray cannot establish a causal connection between his March 2009 complaints and the termination process.

DGS further argues that both Mr. Gray's reliance on temporal proximity and the presence of intervening events prevent him from establishing a causal connection between his federal and internal safety complaints and his "mistaken termination" arising out of his June 30 altercation with Ms. Martinez, as well as his termination effective June 23, following his refusal to perform an assignment and his decision to walk off the job on July 8. DGS argues that since Mr. Gray has no other evidence to meet his burden to show causation, his *prima face* of retaliatory discharge fails.

Even assuming Mr. Gray could make out a *prima face* case of discrimination, DGS argues that it has presented clear and convincing evidence that it would have terminated Mr. Gray in the absence of his protected activity. DGS argues that it would have recommended Mr. Gray for termination for either the June 30 co-worker incident or for failure to follow a work directive and walking off the job on July 8, regardless of his protected activity.

DGS finally contends that Mr. Gray cannot demonstrate that its reasons for the disputed personnel actions are a pretext for discrimination. DGS argues that all Mr. Gray relies on are "his own conjecture and speculations as to what may have been DGS' true motivation." Respondent's Brief at 26. DGS argues that despite his claims of disparate treatment, Mr. Gray admitted that he has no evidence to rebut the testimony of DGS personnel that other employees were violating the break policy and being held accountable. DGS argues that Mr. Gray did not receive disparate treatment in regards to his counseling forms, training and payroll records, or in the disciplinary actions taken after the June 30 incident. DGS also argues that there is no evidence to support the conclusion that Mr. Gray's protected activities played any role in Ms. Barnett's or Mr. McBurnett's investigating, reviewing or signing off on the termination decision, or that either harbored any type of discriminatory animus.

II. **Credibility**

I have carefully considered and reviewed the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, analyzing and assessing its cumulative impact on the record. *See, e.g., Frady v. Tennessee Valley Authority*, 92-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *See Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 15 n.5 (3d Cir. 1975). Based on the unique advantage of having heard the testimony firsthand, I observed the behavior and demeanor of the witnesses. To the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Credibility is that quality in a witness which renders his or her evidence worthy of belief. For evidence to be worthy of credit, [it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it. *Indiana Metal Prod.*, 442 F.2d at 51. Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

III. Statement of the Law

The employee protective provision of AIR 21 is set forth at 49 U.S.C. § 42121. AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against, any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provides 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 carriers safety" under subtitle VII of Title 49 of the United States Code or any other law of the United States. 49 U.S.C.A. § 42121(a) states:

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

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

- (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
- (3) testified or is about to testify in such a proceeding; or
- (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C.A. § 42121(a).

IV. Burdens of Proof under AIR 21

The evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) of AIR 21 require Complainant to establish "...a *prima facie* showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C.A. § 42121(b)(2)(B). To prevail in an AIR 21 claim, Complainant must demonstrate or prove his *prima facie* case by a preponderance of the evidence. *Clemmons v. Ameristar Airways et al.*, ARB Nos. 05-048, 95-096, (ARB June 29, 1007; 2004 AIR-00000 (ALJ Jan. 14, 2005). Preponderance of evidence is the greater weight of evidence or superior weight of evidence, which, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Brune v. Horizon Air Industries, Inc.* ARB Case No. 04-037, slip. op. at 13 (ARB Jan. 31, 2006).

After Complainant has established his *prima facie* case by a preponderance of the evidence, an employer is then required to demonstrate ". . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(b); 29 C.F.R. § 1979.104(c); *see also Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-00007 (ALJ Feb. 9, 2004). Thus, Respondent may avoid liability under AIR 21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. *Taylor v. Express One International, Inc.*, 2001-AIR-00002 (ALJ February 15, 2002). If Respondent meets this burden, the inference of discrimination is rebutted and Complainant then assumes the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Id.*

V. Prima Facie Case for Discrimination under AIR 21

To establish a *prima facie* case of discrimination under AIR 21, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;
2. The complainant engaged in protected activity as defined by the act;

3. The employer took adverse action against the employee;
4. The employer knew or had knowledge that the employee was engaging in protected activity; and
5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

Peck v. Safe Air Int'l., Inc., ARB 02-028 (January 30, 2004) slip op at 8-9; *Svendsen v. Air Methods, Inc.*, ARB 03-074 (August 26, 2004) slip op at 7; *Taylor*, 2001-AIR-2, slip op at 33. The fifth *prima facie* element can be shown by proving that the protected activity on the part of a complainant was a contributing factor to his adverse action bestowed by respondent. *Hirst*, ARB No. 04-116, 04-160, slip op. at 7; *see also Lanigan v. ABX Air, Inc.*, 2007-AIR-00010 (ALJ April 30, 2008).

There is no dispute that both Complainant and Respondent are subject to and covered respectively by the AIR 21 statute, and thus I find that this element has been proven.

VI. Merits of Complainant's Case

A. Whether Complainant Engaged in Protected Activity

A protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government. *Svendsen*, slip op. at 48; *see also Weil v. Planet Airways, Inc.*, 2003-AIR-18 (ALJ Mar. 16, 2004) (finding the FAA's announced intention to implement a rule is sufficient to establish protected activity).

Additionally, protected activity under AIR 21 must raise safety definitively and specifically. *Kinser*, slip op at 22; *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004) (violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud did not involve safety and did not constitute protected activity under the Act). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant must reasonably must believe in the existence of a violation." *Peck*, slip op at 13; *Leach v. Basin Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).

In this case, it is undisputed that Mr. Gray's safety and training complaints to OSHA and FAA, as well as some of his written memos about safety at the OKC airport, qualify as protected activity. However, I find that Mr. Gray's report of safety concerns to DGS certified carriers is not a protected activity, because under AIR 21 the purported safety complaint must be made to

either the complainant's employer or to the federal government. DGS certified carriers, who are essentially customers of DGS, do not fall within either of these categories.

DGS argues that Mr. Gray's complaints about Ms. Martinez's June 30, 2009 conduct do not qualify as protected activity under AIR 21, because in the complaint Mr. Gray fails to assert that DGS violated a FAA regulation or some other law targeted at aircraft safety. DGS also argues that these complaints do not qualify as protected activity because they concern the actions of a peer rather than DGS. I disagree, and find that Mr. Gray engaged in protected activity when he reported to his supervisor, Mr. Stevenson, that he had observed his co-worker, Ms. Martinez, walking underneath a running engine after marshalling in a plane.

I find that the safety of airport personnel while working in or around an aircraft is certainly related to air carrier safety, and at the very minimum "touches on" air carrier safety. Ms. Martinez put herself at risk by walking under the running engine, as well as any passengers on the plane, and the airline and airport crew. It does not take a safety expert to realize that walking under a live engine can create a safety hazard to the employee, as well as to the plane and any occupants, should that employee be caught up in the engine.

Based on all of these complaints, I find that Mr. Gray has established by a preponderance of the evidence that he engaged in protected activities under AIR 21.

B. *Whether Respondent Knew that Complainant Engaged in the Protected Activities*

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.

The ARB has stated that "[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity." *Peck*, ARB No. 02-028 at 14, citing *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996). 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 & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 4 (ARB Sept. 30, 2003).

In this case Mr. Gray asserts, and DGS does not contest, that the decision makers at DGS who subjected Mr. Gray to the alleged adverse actions were all well aware of his protected

activity. Thus, Mr. Gray has established by a preponderance of the evidence that DGS had knowledge of his protected activities.

C. *Whether Complainant Suffered an Unfavorable Personnel Action*

Section 42121(a) of AIR 21 proscribes employer retaliation, stating that 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 of the employee's protected activity. These provisions are the statutory foundation for the requirement that a complainant must show an adverse employment action. The implementing regulations specify that it is a violation of the act for an employer "to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee" for engaging in protected activity. 29 C.F.R. § 1979.102(b).

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB adopted the "materially adverse" deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The majority for the ARB wrote:

Burlington Northern held that for the employer action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." For purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. According to the Court, a "reasonable worker" is a "reasonable person in the plaintiff's position.

USDOL/OALJ Reporter at 19-20. The majority further stated that "the purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes." *Id.* at 20. Moreover, the majority believed that both ARB and federal case law demonstrated that the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action." *Id.* The majority summarized:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.... Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of "materially adverse" rather than "tangible consequence," or "significant change," or "materially disadvantaged," or the like, is of no consequence. Applying this test would not deviate from past precedent.

Id. at 23. Consequently, the finding of an adverse action in an AIR 21 statute will be based on the standards set forth in *Burlington Northern. Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, 04-160, ALJ No. 2003-AIR-0004, slip op. at 7 (ARB January 31, 2007). Further, suspensions and transfers have been found to constitute an adverse employment action under the *Burlington Northern* standard. *See, e.g., Negron v. Vieques Air Link, Inc.*, ARB No. 04-021 slip op. at 6-7 (ARB December 30, 2004). Recently, the ARB has 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)

An employee who believes that he or she has suffered unlawful discrimination in violation of AIR 21 may file a complaint not later than 90 days of the date on which the violation occurred. 49 U.S.C.A. § 42121(b)(1). Discrete adverse employment actions, however, are actionable only if they occur within the prescribed limitations period. *Lewis v. U.S. Environmental Protection Agency*, ARB No. 04-117, ALJ Nos. 2003- CAA-6, 03-CAA-5 (March 30, 2007), slip op. at 8 (referencing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-115 (2002); *Erickson*, slip op. at 21 n.60). Mr. Gray alleged that he was subjected to adverse actions on three separate occasions.⁴⁴

Mr. Gray filed his OSHA complaint on July 9, 2009. Of the three adverse actions described by Mr. Gray, the first is time-barred because his complaint was filed more than 90 days after his March 7 suspension.⁴⁵ However, Mr. Gray filed his complaint within 90 days of the July 1, 2009 suspension, and the July 7, 2009 termination. Because these actions took place within 90 days of the filing of Mr. Gray’s complaint, his filing is timely as to these discrete adverse employment actions.

D. Whether Complainant Has Proven by a Preponderance of the Evidence that His Protected Activities were Likely a Contributing Factor in Unfavorable Action

Under 49 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR 21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR 21 was a contributing factor in the unfavorable personnel action alleged in the complaint. *Taylor*, slip op at 33; *Hirst*, slip op. at 7.

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*, slip

⁴⁴ The letter of termination issued on July 16, 2009, effective July 23, 2009, is clearly an adverse employment action.

⁴⁵ Whether this suspension is actionable or not, it may be used as background evidence to support actionable claims. *Brune v. Horizon Air Industries Inc.*, ARB 04-037 fn 9 (noting *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)).

op. at 2. The ARB has recognized that a retaliatory motive may be inferred when an adverse action closely follows protected activity. *Kester*, slip op. at 10.

However, temporal connection alone is not necessarily dispositive. *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, (ARB: Dec. 31, 2007), slip op. at 7. 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. The Board 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.

In this case, I find that Mr. Gray has shown, by a preponderance of the evidence, both circumstantial and direct, that his protected activities were at least a contributing, if not the primary cause, in his suspension and termination. Moreover, I find that Mr. Gray has shown by clear and convincing evidence that the shifting grounds for his suspension and termination were a pretext for retaliation.

On March 7, 2009 Mr. Gray filed his first OSHA complaint against DGS alleging that he had been suspended after reporting training and safety concerns to DGS and a few of its certified-carriers/customers. On March 12, 2009 a settlement agreement was reached between Mr. Gray and DGS under which Mr. Gray was reinstated into his position, he was given assurance that the training issues would be resolved, and DGS agreed to not retaliate against him in connection with his OSHA complaint.

Yet the ink was not yet dry on this settlement agreement when DGS issued Mr. Gray a “warning letter,” based in large part on his safety complaints that were the subject of the settlement agreement. This “warning letter” was placed in Mr. Gray’s file; it is difficult to fathom any purpose for the issuance of this letter other than as documentation for future disciplinary action against Mr. Gray, which is indeed what happened.

Mr. Gray created problems for DGS from the beginning, by reporting what he considered to be serious training deficits, to DGS, as well as contacting DGS’s customers about their training procedures. Moreover, the evidence strongly suggests that DGS’s training records are not accurate. At least one customer contacted by Mr. Gray was not even aware that DGS had the contract, as the customer had not been contacted as required.

Over the course of the following five months, Mr. Gray continued to report his safety concerns. There is no suggestion in the record that Mr. Gray’s concerns were frivolous; nor is there any indication that anything was done to address these safety concerns. In the meantime, DGS claims that it was preparing a “final warning” letter regarding Mr. Gray’s unauthorized breaks and attendance. Yet Mr. Gray was never advised that he was in jeopardy because of his

alleged unauthorized breaks or attendance. Nor are the break records, which are unclear, persuasive evidence to justify such a letter. Mr. McKaufman, who testified that he was instructed to start documenting Mr. Gray's absence and tardiness record, began to do so in June 2009, documenting what Mr. McBurnett characterized as "a small number" of attendance issues.

Conveniently for DGS, on June 30, 2009, there was an altercation between Mr. Gray and Ms. Martinez, after Mr. Gray reported that Ms. Martinez had walked under a live engine. For his part, Mr. Gray reported this altercation to the police, as well as his supervisor, who agreed that it was appropriate for him to have contacted the police.

Viewed in a vacuum, the suspension of two employees pending the results of an investigation into such an altercation would appear to be a reasonable and non-discriminatory action by DGS. In this case, however, I find that the evidence clearly establishes that by the time of this incident, DGS was already in the process of building a case to terminate Mr. Gray, reaching back to his March 2009 complaints. This incident provided a convenient "trigger" to begin this process.

The attempts by DGS to document its termination of Mr. Gray were clumsy, with shifting and specious rationales. The sequence of events, beginning on June 30, 2009, is telling. According to Mr. Gray, he received a voicemail on his home telephone on July 1 from Mr. McKaufman, telling him that until the investigation into the incident with Ms. Martinez was completed, he was suspended. It is clear that Mr. McKaufman was consulting Ms. Barnett at this time, because he testified that he talked to her on that date, and told her that Mr. Gray's suspension prevented him from issuing his "final warning" letter that he had been preparing at her direction.

The "investigation" of this incident appears to have consisted of Ms. Barnett reading the statements by Mr. Gray, Ms. Martinez, and Mr. McKaufman, and concluding that there were grounds under company policy to terminate the two employees. Ms. Barnett testified that "at this point," that is, after she read the statements about the incident, she asked Mr. McKaufman to forward her the disciplinary files for Mr. Gray and Ms. Martinez, as well as a letter recommending them for termination.

Mr. McKaufman's letter recommending Mr. Gray for termination is dated July 6; Ms. Barnett sent an email to Mr. McKaufman on July 7, requesting the disciplinary records, and a signed letter of recommendation for termination for Mr. Gray. Indeed, Mr. Gray received the call from Mr. McKaufman to come in to receive a termination letter on July 7.

When Mr. Gray came in on July 8 for his termination letter, Mr. McKaufman gave him the letter he had prepared at Ms. Barnett's direction, and told him that he was being fired because of the altercation with Ms. Martinez. At the hearing, Mr. McKaufman conceded that this letter purported to fire Mr. Gray. Indeed, the taking of Mr. Gray's badge, and his company property, as well as Mr. McKaufman's escorting him off the premises bore all the indicia of a termination.

Unfortunately, when he reported back to Ms. Barnett, Mr. McKaufman was told that he made a mistake, and that he was supposed to give Mr. Gray a "final warning" letter. When Mr.

Gray got home, he had a voicemail from Mr. McKaufman, telling him to pick up his badge and come back to work. Mr. McKaufman followed this up with a phone call, telling Mr. Gray to come back for a “final warning” letter which, according to Mr. Gray, Mr. McKaufman told him was not yet finished; Mr. Gray would have to come to the office and wait for it.

One can imagine Mr. Gray’s confusion at this point. He had been told by Mr. McKaufman to come in and get his termination letter, and when he did, his badge and company property were confiscated, and he was escorted off the property. Certainly he had every reason to believe that he had been fired, regardless of whether Mr. McKaufman actually had the technical authority to do so.

Yet no sooner did Mr. Gray get home with his termination letter in hand than he was told to come back for a “final warning” letter. According to Mr. Gray, whose account I find to be credible, he came back in, and waited several hours for Mr. McKaufman to finish his letter; he did not go to work, as Mr. McKaufman testified.⁴⁶ This letter, which is dated July 8, 2010, appears to be the “final warning” letter that Mr. McKaufman testified he was preparing to issue to Mr. Gray, before the altercation with Ms. Martinez. The grounds for the “final warning” are unauthorized breaks, attendance issues, and “unprofessional conduct,” as well as the altercation with Ms. Martinez.

But this “final warning” letter was a sham. Despite the language of the “final warning” letter, which as Ms. Barnett testified, notified Mr. Gray that if he did not improve, or if he was involved in any additional incidents, his employment could be terminated, in fact Ms. Barnett had already decided to recommend Mr. Gray for termination, a process finalized when Mr. McBurnett gave his stamp of approval.

Despite the fact that she had already e-mailed Mr. McKaufman asking for a termination package, including disciplinary records and a recommendation for termination for both Mr. Gray and Ms. Martinez, Ms. Barnett testified that *after* she read statements from Mr. McKaufman, Mr. Stevenson, and Mr. Gray about the meeting between Mr. Gray and Mr. McKaufman on July 8, she *then* decided on a recommendation for termination, and asked Mr. McKaufman to prepare the letter.

Not surprisingly, the July 16 termination letter cites the same grounds - Mr. Gray’s unauthorized breaks, attendance issues, and “unprofessional conduct” – and adds his “abandonment” of his work duties on July 8. However, there is no mention of the altercation with Ms. Martinez.

I find that it is a rational inference from the sequence of events that, as reflected in her email, Ms. Barnett asked for a recommendation for termination package from Mr. McKaufman

⁴⁶ I do not give any weight to the records reflecting that Mr. Gray was paid for working four hours on July 8. These records, which were produced only on the date of the hearing, conflict with the times reflected on the email correspondence between Mr. McKaufman and Mr. Gray. I have no confidence in the validity of these records. I note that there was no witness, including Mr. McKaufman, who testified that Mr. Gray actually performed work on that date, or described his duties. I do not credit Mr. McKaufman’s testimony that Mr. Gray was wearing his work uniform, or that he took “street clothes” out to Mr. Gray after he left.

on July 7.⁴⁷ The fact that Mr. McKaufman, who was acting on directions from Ms. Barnett, told Mr. Gray that he was being fired because of the altercation with Ms. Martinez, indicates that this incident was the catalyst for Ms. Barnett's decision that Mr. Gray should be recommended for termination.

But Mr. McKaufman misunderstood his instructions, and instead of giving Mr. Gray the "final warning" letter he had been working on, he gave him the recommendation for termination letter he prepared on July 6. Both Mr. Gray and Mr. McKaufman interpreted this letter as terminating Mr. Gray's employment; in fact, Mr. McKaufman did not have the authority to fire Mr. Gray.⁴⁸ One wonders why Mr. Gray was not advised by telephone of this mistake, and told that he was still suspended.

A "final warning" connotes that there is still the opportunity to correct one's behavior before the ultimate sanction of termination, a characterization with which Ms. Barnett seemed to agree. Yet when Mr. Gray was called to come in and receive his "final warning," Ms. Barnett had already decided that the altercation with Ms. Martinez justified his termination, and had asked Mr. McKaufman to prepare the termination package. I find that the "final warning" letter was just a place holder, meant to create the appearance of an orderly process of termination, when in fact that decision had already been made.

Moreover, bringing Mr. Gray, who was told just the previous day that he was fired, in to receive this letter resulted, not surprisingly, in a confrontation between Mr. Gray and Mr. McKaufman. Mr. McKaufman claimed he told Mr. Gray to get back to work; Mr. Gray claimed that he left because he thought he was still fired. I believe Mr. Gray. But this gave Ms. Barnett another justification for his termination, his alleged abandonment of the job, making the grounds of the altercation with Ms. Martinez unnecessary.⁴⁹

I also find that DGS's reliance on Mr. Gray's alleged unauthorized breaks, attendance issues, and "unprofessional conduct" is nothing more than a pretext for retaliation against Mr. Gray for his safety complaints. The counseling forms do not have Mr. Gray's signature, and Mr. Gray did not recall seeing them.⁵⁰ Nor did Mr. Gray receive any documents in connection with the absence or tardiness issues identified by DGS. While Mr. McBurnett testified that there is a

⁴⁷ The recommendation for termination letter first prepared by Mr. McKaufman is dated July 6; I find it reasonable to infer that Mr. McKaufman, who was documenting Mr. Gray's break times and absences at Ms. Barnett's direction, also prepared this letter at Ms. Barnett's direction.

⁴⁸ There is no evidence that the July 16, 2009 recommendation for termination prepared by Mr. McKaufman, and initialed by Mr. McBurnett on July 23, was ever transmitted or communicated to Mr. Gray, who testified that he heard nothing from the Respondent. If the Respondent claims to have terminated Mr. Gray's employment effective July 23, 2009, they did not advise him of that.

⁴⁹ The Respondent argues that Mr. Stevenson's statement about the events on July 8 corroborate Mr. McKaufman's version of events, in other words, that Mr. Gray walked off the job. To the contrary, I find that Mr. Stevenson's statement is consistent with Mr. Gray's version of events. In any event, the Respondent did not call Mr. Stevenson as a witness so that he could be subjected to cross-examination, detracting from the reliability of any of his written statements.

⁵⁰ The Respondent argues, based on Mr. McBurnett's testimony, that the fact that Mr. Gray's signature is not on the counseling form is in line with company policy, and the form simply documents that a verbal counseling session occurred. The forms indicate that they are to be kept in the employee's local personnel file.

“local” break policy, he also acknowledged that compliance with this policy was an issue for the whole team. Indeed, Mr. McBurnett “assumed” that unauthorized breaks occurred frequently. Mr. Gray identified numerous time sheets that appeared to reflect chronic violation of the break policy. While Mr. Gray testified that he had no way of knowing if others who violated the policy were disciplined, by the same token, DGS did not present a shred of evidence to even suggest that the policy was uniformly and consistently enforced, and that persons who violated the policy were disciplined. Indeed, it appears that this local break policy was enforced only in the breach.

I find it telling that DGS chose to submit various statements from other employees regarding Mr. Gray’s alleged conduct, collected in connection with his March 2009 complaints, and which have nothing to do with the issues raised in this claim. DGS has offered no explanation of the relevance of this evidence, other than to attempt to tarnish Mr. Gray’s character.

In sum, I find that, despite its settlement of Mr. Gray’s March 2009 complaint, DGS began building a case to terminate him as early as the March 12, 2009 letter placed in his file. Indeed, Mr. McKaufman was working on a “final warning” letter when the altercation with Ms. Martinez took place, giving DGS what it saw as a justification for terminating Mr. Gray, a process Ms. Barnett put in place when she asked Mr. McKaufman for a recommendation for termination package on July 7, 2009.⁵¹ Although Ms. Barnett intended the altercation to be a basis for that termination, Mr. McKaufman’s misunderstanding of the process, and the ensuing series of events, culminating in what DGS characterized as job abandonment, gave DGS another justification for firing Mr. Gray.

I find that Mr. Gray has established by an overwhelming preponderance of the evidence that he was suspended, and then fired, in retaliation for reporting safety issues, in March 2009, in April 2009, and in June 2009. While DGS has proffered what would, in other circumstances, be a legitimate business reason for Mr. Gray’s suspension (his altercation with Ms. Martinez), and his termination (walking off the job), I find that Mr. Gray has established by clear and convincing evidence that these justifications were wholly pretextual, and that his termination was in fact motivated by his reports of safety issues.⁵²

Damages

Mr. Gray is not seeking to be reinstated with the Respondent, and I find that under the circumstances of this case reinstatement would be inappropriate in any event. Mr. Gray testified that since his termination, he has applied for openings with every airline in Oklahoma City. Although he worked for three other carriers in Oklahoma City, and had a clean separation with each, he has not been able to obtain employment with any airline. He testified that the Will Rogers Airport is small, with a small community of employees who all know one another.

⁵¹ It appears that Ms. Martinez, who was also suspended and then fired based on the altercation, may have been a casualty of DGS’s desire to get rid of Mr. Gray.

⁵² The Respondent argues that Mr. Gray relies on temporal proximity, without any other supporting facts, and thus cannot demonstrate a causal connection. I find that, given the evidence and the rational inferences therefrom, Mr. Gray has met his burden to establish, by a preponderance of the evidence, that his protected activities played a role in his suspension and termination, without the necessity of reliance on a temporal proximity argument..

Mr. Gray has also sought employment in the IT industry, and the sound, video, and lighting industry, but has not received any job offers.

Mr. Gray requests back pay from July 1, 2009 (the date he was suspended) to February 15, 2010, and front pay for three years from that date. Mr. Gray regularly worked 37 hours a week at \$8.50 an hour. The total compensation for this period of time comes to \$58,497 (\$9,435.00 for the 30 weeks of back pay, and \$49,062.00 for the three years of front pay.⁵³ Mr. Gray testified that he was willing to back out his unemployment compensation, which amounted to \$6,000.00.

Back pay is awarded to a complainant when it is necessary to make him whole again. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec’y Oct. 30, 1991). The purpose is to put “the employee in the same position he would have been in if not discriminated against.” *Id.* Complainant has the burden to prove the back pay he has lost. *Pillow v. Bechtel Construction, Inc.*, 87-ERA-35 (Sec’y July 19, 1993). However, any uncertainties are resolved against the discriminating party, the Respondents. *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002); *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB Sept. 24, 1997). Therefore, “unrealistic exactitude is not required” when calculating back pay. *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec’y Oct. 26, 1992), slip op. at 9-10.

A respondent has a duty to show that a complainant failed to mitigate damages. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001); *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998); *West v. Systems Applications International*, 94-CAA-15 (Sec’y Apr. 19, 1995). The Respondent must show that Complainant failed to use reasonable diligence to get the substantially equivalent positions that were available. *Id.* The benefit of the doubt ordinarily goes to the complainant. *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001).

In this case, the Respondent has not offered any evidence to establish a lack of mitigation on the Complainant’s part. Mr. Gray has credibly testified that he has sought employment in several fields, including the airline industry, but has been unable to obtain employment. Indeed, given the small size of the community of airline employees in Oklahoma City, it is not surprising that Mr. Gray has not been able to obtain employment with any of the local airlines. I find that the evidence supports a finding that Mr. Gray has used due diligence to attempt to mitigate his losses.

I find that Mr. Gray is entitled to the sum of \$58,497.00, representing compensation for 242 weeks, 37 hours a week, at \$8.50 an hour. I note that this is a very modest sum, and does not include any overtime, which Mr. Gray regularly worked. Nor does it include any amount for compensatory damages, which Mr. Gray has not requested.

⁵³ This does not include any amounts for overtime, which Mr. Gray regularly worked, or for any raises in pay rate.

I find that Mr. Gray is also entitled to an award of attorney's fees and costs to his counsel. 29 C.F.R. § 1979.109(b). Thirty (30) days is hereby allowed to Complainant's counsel for the submission of an application for attorney's fees and costs. A service sheet showing that service has been made upon all the parties, including Complainant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

The Respondent is also liable for reimbursement of any other expense reasonably incurred by the Complainant because of the termination of Complainant's employment. 29 C.F.R. § 1979.109(b). Mr. Gray has not requested or provided details as to any such expenses, but if he has reasonably incurred any such expense, a record of the expense may be submitted, served and responded to in the same manner as provided for attorney's fees and costs.

ORDER

Based on the foregoing, IT IS HEREBY RECOMMENDED that the complaint of Steven Gray for relief under the Act be GRANTED. IT IS FURTHER ORDERED that:

1. The Respondent shall pay to Mr. Gray back pay in the amount of \$9,435.00, together with interest on said sum at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621. This amount will be offset by the amount Mr. Gray received in unemployment compensation.
2. The Respondent shall pay to Mr. Gray front pay in the amount of \$58,497.00.
3. The Respondent shall pay to Mr. Gray the reasonable costs and attorneys fees incurred in prosecuting his claim, to be determined as discussed above.

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.