

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

Issue Date: 25 October 2012

OALJ NO.: 2009-AIR-00024

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**JOHN NAGLE,**  
*Complainant,*

v.

**UNIFIED TURBINES, INC.,**  
*Respondent.*

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*Before:* Daniel F. Sutton, Senior Administrative Law Judge<sup>1</sup>

*Appearances:*

Lisa M. Werner, Esq., *Clark, Werner & Flynn, P.C.*, Burlington, Vermont, for the Complainant

John L. Franco, Jr., Esq., Burlington, Vermont, for the Respondent

**DECISION AND ORDER ON REMAND**

**I. Statement of the Case**

This matter, which arises from a complaint of discrimination filed under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C.A. § 42121 (West 2007), and its implementing regulations, 29 C.F.R. Part 1979 (2011), is before the Senior Administrative Law Judge (“ALJ”) on remand from the Department of Labor’s Administrative Review Board (“ARB”). *Nagle v. Unified Turbines Turbines, Inc.*, ARB No. 11-004, ALJ No. 2009-AIR 024 (ARB Mar. 30, 2012) (“ARB Dec. and Ord.”)

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<sup>1</sup> The ALJ retired on December 31, 2010 after issuing the original decision and order in this matter, and returned as a Senior ALJ on July 30, 2012.

The AIR 21 proceeding began when John Nagle (“Nagle” or “Complainant”) filed a complaint alleging that his employer, Unified Turbines Inc. (“Unified Turbines” or “Respondent”), fired him from his position as a welder on December 24, 2008 in retaliation for his engaging in activities protected under AIR 21 and the Occupational Safety and Health Act of 1970 (the “OSH Act”), 29 U.S.C. § 651 *et seq.* After investigation, the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting for the Secretary of Labor, notified Nagle by letter dated July 28, 2009 of the Secretary’s finding that there was no reasonable cause to believe that Unified Turbines had violated either AIR 21 or the OSH Act. Nagle filed a timely objection to the Secretary’s AIR 21 determination pursuant to 29 C.F.R. § 1979.106, and he requested a formal hearing before an ALJ pursuant to 29 C.F.R. § 1979.107.<sup>2</sup>

Following a *de novo* evidentiary hearing, the ALJ concluded in a decision and order issued on September 27, 2010 (“ALJ Dec. and Ord.”) that although Nagle had proved that he engaged in activity protected by AIR 21 when he made complaints about a coworker’s abuse of prescription narcotics on the job,<sup>3</sup> he failed to establish that he had been fired or otherwise subjected to an adverse employment action. ALJ Dec. & Ord. at 13-15, 16-17. Rather, the ALJ determined that Nagle had voluntarily resigned from his job at Unified Turbines. *Id.* Accordingly, his complaint was dismissed.

Nagle appealed the dismissal of his complaint to the ARB.<sup>4</sup> In its decision, the ARB initially concluded that substantial evidence supported the ALJ’s finding that Nagle had engaged in protected activity under AIR 21 and that the ALJ had correctly concluded that Nagle had proved employer knowledge of his protected activity, both of which are necessary elements in an AIR 21 case. ARB Dec. and Ord. at 4. With respect to the adverse action element of Nagle’s AIR 21 claim, the ARB noted that the ALJ had looked to Vermont law in determining that Nagle had voluntarily quit and was not, therefore, subject to an adverse employment action. *Id.* at 5. However, the ARB stated that precedent under other whistleblower statutes enforced by the Department of Labor, not Vermont law, controls the determination as to whether there was an adverse action, and it remanded the case “for consideration of whether Nagle was discharged under ARB precedent. *Id.*”

On remand, the parties were permitted, on Unified Turbines’ unopposed motion, to file supplemental briefs addressing the issues to be considered on remand as well as reply briefs. Helpful briefs were received from both parties and are referred to herein as “Nagle Supp. Br.” and Unified Turbines Supp. Br.” Both parties also filed reply briefs which are referred to herein as “Nagle Rep. Br.” and “Unified Turbines Rep. Br.”

Upon further consideration of the evidence, the parties’ arguments, and controlling ARB precedent pursuant to the ARB’s instructions, I find and conclude for the reasons discussed below, that Nagle has met his burden of proving that he was discharged under ARB precedent,

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<sup>2</sup> Nagle’s claims under the OSH Act are not a part of this proceeding. Jurisdiction over retaliation claims under section 11(c) of the OSH Act lies in the district courts. 29 U.S.C. § 660(c).

<sup>3</sup> The co-worker is referred to as “M” in both the initial ALJ and ARB decisions due to the sensitive nature of the allegations regarding his conduct. Accordingly, he is referred to as “M” herein as well.

<sup>4</sup> The Secretary of Labor delegated her authority to the ARB to issue final agency decisions in AIR 21 cases. Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110(a).

that his protected activity under AIR 21 was a contributing factor to his discharge, and that Unified Turbines has not demonstrated by clear and convincing evidence that Nagle would have been discharged in the absence of his protected activity. Accordingly, Nagle is entitled to relief under AIR 21.

## **II. Prior Findings of Fact and Conclusions of Law**

My prior findings of fact are set out in detail in the first decision. ALJ Dec. and Ord. at 3-13. In the interest of brevity, I adopt the ARB's summary of my findings:

Unified Turbines is a contractor of an air carrier under AIR 21 and repairs, overhauls, and modifies components for various airline manufacturers. It is privately owned by two partners, Richard Karnes and Karl Deavitt. Unified Turbines employed Nagle as a welder beginning in October 2007.

In August of 2008, Nagle began to notice a change in the quality of one of his co-worker's work (hereinafter referred to as "M") and became aware that M was taking prescription pain medication. Nagle thought that M's work was deteriorating and that he seemed to be "high."

At some point during this time period, Nagle told Deavitt that the quality of M's work was poor, that he had seen M taking three or four pain pills at a time, and that M seemed high. Deavitt told him that he knew that M was taking prescription medication, but he was unaware that he was abusing it.

After this conversation, in September or October of 2008, Nagle saw M open the drawer of an absent co-worker. Nagle knew that this co-worker stored prescription pain pills in the tool drawer on his bench. Nagle later removed the bottle of pills, gave them to Karnes or Deavitt, and told them that he believed that M had an interest in the pills and that he did not want to be implicated if the pills went missing since he was working at the absent co-worker's bench.

On December 16, 2008, Nagle saw what he believed was M selling pills on the street outside of the work shop. He told Deavitt that he saw M selling pills and that M had problems. Deavitt told Nagle that he could not do anything unless he witnessed M doing something improper. On the same day, Nagle made a complaint to the Winooski, Vermont Police Department, that he saw M selling prescription drugs on the street.

M later confirmed that he was abusing prescription opiates during the fall of 2008 when Nagle made complaints to his superiors. M's job performance deteriorated during this time period.

On the morning of December 24, 2008, Nagle and M engaged in a minor shoving match that ended without any third-party intervention. It is not clear who began the altercation or who pushed whom first. Following the altercation, M told Deavitt about the incident and said that he could not work with Nagle anymore.

and that Deavitt had to do something about it. Shortly thereafter, Deavitt spoke to Nagle, informed him that he had “gone too far,” instructed him to leave, and told Nagle to think things over during the upcoming holiday weekend. Deavitt did not say that Nagle was fired.

Nagle believed he was fired, so he went back into the shop to retrieve his welding helmet and left. M was not sent home after the incident and continued to work for the remainder of the day. The workday on December 24, 2008, Christmas Eve, ended at noon.

On December 27, 2008, Nagle called his co-worker, Dan Hubbert, to discuss the incident. Nagle told Hubbert that he believed he was fired based of what was said even though Deavitt did not use the words “you’re fired.” Hubbert suggested that Nagle go into work the following Monday or at least call Deavitt or Karnes.

That same day, Nagle followed Hubbert’s suggestion, telephoned Karl Deavitt’s personal cell phone, and left a voicemail message on the cell phone during the Christmas holiday asking for a return call. Karl Deavitt did not return Nagle’s call.

Unified Turbines paid Nagle for Christmas Eve, for Christmas Day, and for “Boxing Day” (Friday, December 26, 2008). Nagle did not return to work on Monday, December 29, 2008, or any time thereafter. Unified Turbines discontinued paying Nagle beginning on December 29, 2008. At some point during the week of December 29, 2008, Hubbert told Deavitt about his phone conversation with Nagle on December 27, 2008, and Nagle’s belief that Deavitt had fired him.

ARB Dec. and Ord. at 2-3 (footnote omitted).

On these facts, I concluded that Nagle’s complaints to Unified Turbines management about M’s suspected drug abuse were protected under AIR 21 because “a reasonable person with Nagle’s training and experience could believe that M’s ongoing abuse of drugs and deteriorating performance was in violation of [applicable Federal Aviation Administration] regulations. ALJ Dec. and Ord. at 15. I further concluded that Nagle’s report to the Winooski Police on December 16, 2008, was not protected because the report was not made to the federal government or at the direction of a federal entity. *Id.* at n. 11. As discussed above, I also found that Unified Turbines had knowledge of Nagle’s protected activity, but I concluded for the following reasons that the termination of his employment at Unified Turbines was not an adverse employment action that could be remedied under AIR 21:

First, it is undisputed that Deavitt never told Nagle that he was fired, that his employment was terminated, or that he should not return to work at Unified Turbines. Second, the ALJ finds that the weight of the evidence establishes that Deavitt did not simply tell Nagle to go home in a profanity-laced tirade in the

parking lot outside of Unified Turbines on the morning of December 24, 2008. Dan Hubbert testified that Nagle called him on December 27, 2008. Hubbert testified that Nagle relayed that Deavitt had told him “to put his F-ing truck in gear . . . [and] take the long weekend to think about what he had done . . . .” HT at 325. Based on observation of his demeanor and in consideration of his testimony in light of the entire record, the ALJ finds that Hubbert is a particularly credible and neutral witness who showed no tendency to color or shape his testimony despite his long friendship with Nagle and continued employment relationship with Unified Turbines. Moreover, while the ALJ does not credit Deavitt’s testimony that he repeated his directives to Nagle after he had returned to the shop, Hubbert’s testimony that Nagle acknowledged being told to take the long weekend to think about what he had done, is consistent with William Kinsell’s testimony that Deavitt stated upon reentering the shop from the parking lot “that he told John that he had four days, because we had a four-day vacation, to think about if he wanted to still work at Unified Turbines and, if not, he could leave.” HT at 308. Noting that Deavitt made these statements moments after his heated conversation with Nagle in the parking lot, the ALJ finds that it is highly probable that the statements are accurately reflective of what Deavitt said to Nagle. Therefore, the ALJ finds that not only did Deavitt not tell Nagle that he was fired, he told him to think things over during the upcoming holiday weekend. Finally, the fact that Unified Turbines paid the Claimant for the duration of his shift on December 24, 2008, and for both the Christmas and Boxing Day holidays is corroborative of Unified Turbines’ claim that Deavitt did not fire Nagle on December 24, 2008. Consequently, the ALJ finds that Nagle was not fired on December 24, 2008, but rather that he was sent home two hours early without loss of pay because he had been involved in a physical altercation in the shop with M.

The ALJ further finds that the evidence related to the events following December 24, 2008, establish that Nagle abandoned his job and was not subjected to any adverse personnel action. When Nagle called Deavitt [sic]<sup>5</sup> on December 27, 2008, and expressed a belief that he’d been fired, Hubbert got Nagle to recognize that Deavitt had not said that he was fired. Hubbert also tried to persuade Nagle to return to Unified Turbines on Monday after the holiday weekend to discuss his status. Nagle declined to return to work on Monday and he instead called Deavitt over the weekend and left a message that was not returned. Nagle’s claim that these facts -- essentially an unreturned telephone call -- removed any ambiguity lingering from December 24<sup>th</sup> and confirmed that he’d been fired is simply untenable. Under Vermont law, an employer’s statement that an employee has the option of either “shaping up or shipping out” does not equate to an involuntary or coerced termination. *Lane v. Department of Employment Sec.*, 134 Vt. 9, 11, 347 A.2d 454, 456 (1975); *see also Hamilton v. Department of Employment Sec.*, 139 Vt. 326, 328-29, 428 A.2d 1108, 1109 (1981) (resignation after warning of termination if performance did not improve was not involuntary or coerced). Nagle was told to go home and think things over which

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<sup>5</sup> The reference to Deavitt in the earlier decision was in error as the record shows that Nagle called Hubbert on December 27, 2008 to express his belief that he’d been fired. HT at 69-70.

at most is tantamount to a “shape up or ship out” directive. However, the more appropriate reading is that Deavitt simply told Nagle to think about what he had done and if he wanted to stay at Unified Turbines – a decision to be made on Nagle’s own accord – as Deavitt never expressly mentioned the possibility of Nagle being fired. There is ample evidence in the record that Nagle was dissatisfied with his job and planned to quit. There also is uncontradicted evidence that Unified Turbines accommodated Nagle’s family situation and tolerated his chronic tardiness. In these circumstances, the ALJ finds that Nagle’s professed assumption that he’d been terminated and his decision not to report to work on Monday, December 29, 2008, were objectively unreasonable and can only be characterized as a voluntary resignation.

ALJ Dec. and Ord. at 16-17 (footnote omitted). Based on the finding that Nagle failed to establish the adverse employment action element of his AIR 21 claim, I dismissed his complaint. ALJ Dec. and Ord. at 17-18.

### **III. Instructions on Remand**

In remanding the case, the ARB provided the following instructions:

Accordingly, we remand for consideration of whether Nagle was discharged under ARB precedent in *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026 (ARB Oct. 31, 2007) and *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Sept. 30, 2010). In these cases, “discharge” has been interpreted to include the situation where the employment relationship “was ended by one-sided or perhaps mutual assumption by the parties – i.e., by means of behavior from which the parties deduced that the employment relationship was at an end.” In the absence of an actual resignation by the employee, “an employer who decides to interpret an employee’s actions as a quit or resignation has in fact decided to discharge that employee.” *Minne*, ARB No. 05-005, slip op. at 14 (footnotes omitted). The determination on remand may require additional findings of fact as it is unclear from the D. & O. what importance the ALJ gave to the evidence that Nagle called Deavitt to discuss his continued employment, that Deavitt did not call him back, and that, during the OSHA investigation, Deavitt denied that Nagle called him. The ALJ also did not analyze the importance of the evidence that Hubbert told Deavitt that Nagle believed he was fired and that Deavitt took no action when he learned that Nagle believed he was fired. D. & O. at 13.

ARB Dec. and Ord. at 5.

#### IV. Supplemental Findings of Fact<sup>6</sup>

In light of the ARB's instructions, additional fact-finding is necessary with respect to the following evidence in the record: (1) that Nagle called Deavitt to discuss his continued employment, that Deavitt did not call him back, and that Deavitt denied during the OSHA investigation that Nagle called him; and (2) that Hubbert told Deavitt that Nagle believed he was fired and that Deavitt took no action when he learned that Nagle believed he had been fired. It also is necessary to make additional findings regarding the origins of the altercation between Nagle and M on December 24, 2008 as such findings are relevant to the issue of causation should I find on remand that Nagle was discharged under ARB precedent. I will address these matters in chronological order.

##### A. Who initiated the December 24, 2008 altercation and why?

Nagle testified that the confrontation on the morning of Christmas Eve was initiated when he was approached by M who launched into a verbal assault that included several profane names and a statement that M hated him. Hearing Transcript ("HT") at 63-64, 374-375.<sup>7</sup> Nagle further testified that he initially turned from M and started to walk away, but M followed him, continuing his verbal barrage, whereupon he stopped and told M not to talk to him in that manner. *Id.* at 63-64. According to Nagle, M then came forward and pushed him with both hands, and he responded by pushing M back with one hand. *Id.* at 64. M testified that the altercation began with an argument, that Nagle pushed him, and that he did not push back. *Id.* at 142-143.

The incident was witnessed by two co-workers, both of whom testified at the hearing. Dan Hubbert, a friend of Nagle's who was called as a witness by Unified Turbines, testified that the altercation took place approximately five feet in front of where he was working on the morning of December 24, 2008. HT at 323. Hubbert provided the following account:

I recall John coming out of the inspection room and [M] following him. Something was said. I'm not sure what [M] said to him. I didn't catch that part. Then they came over to where my bench was, and John got over in his face and said, "Don't talk to me that way." [M] shoved him with two hands. I mean not hard, but he pushed him back. And then John pushed him, pushed [M] back with one hand, his left hand as I remember. And then it kind of broke up, and I think John went down to the welding booth. And I'm not sure if [M] went up front to tell them what happened or where he went.

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<sup>6</sup> In its reply brief, Unified Turbines acknowledges that the ARB stated that additional findings of fact could be made on remand "but nowhere stated that those already made could be vacated, rescinded or revised." Unified Turbines Rep. Br. at 1. The supplemental findings made herein are limited to matters on which findings were not previously made.

<sup>7</sup> In the initial decision, I noted that while Nagle asserted in his post-hearing that M had stated during their altercation that he hated Nagle, I could not find where Nagle testified to these words in the transcript. ALJ Dec. and Ord. at 9, n.5. As Nagle correctly points out in his brief on remand, this finding was erroneous as the transcript reflects that he did in fact testify that M stated, "I hate you." Nagle Supp. Br. at 8-9, ¶ 29 (citing Hearing Transcript at 375).

*Id.* at 323-24; *see also* JX 3. William Kinsell, who was also called by Unified Turbines, provided this account:

I was working at my bench, and I noticed out of the corner of my eye and heard some noise, you know, some arguing. And I happened to turn my head and look over, and they were in each other's face, you know, kind of yelling back and forth. And I had to take off my headset, and then I saw John push [M]. And then I thought they were playing around at first, but then I noticed the expressions on the face, and it wasn't playing around.

*Id.* at 306. Kinsell further testified that after Nagle pushed him, M put both of his arms up at shoulder height as he was stepping backward, but he did not actually touch Nagle. *Id.* at 307, 311. Kinsell continued to point out that M is smaller than Nagle and "just a scared individual . . . kind of timid," and he described M's actions as "more of a defensive reaction" to Nagle. *Id.* Kinsell testified that the incident took place approximately four feet from where he was working, and he was sure that Nagle pushed M first, though he did acknowledge that he was working when he first heard the argument and had to look up and turn to observe what was transpiring between Nagle and M. *Id.* at 306, 310-15. He said that the incident was "pretty much over" by the time he removed his headset. *Id.* at 307. Kinsell stated that Nagle then went back to his work area and that M came over to Kinsell's work area and said "they were having an argument about some words that were going back and forth." *Id.* Kinsell testified that M then "went into the front, over by the inspection area." *Id.*

After careful review of the pertinent testimony in light of the entire record, I credit Nagle's testimony that M initiated the confrontation. First, M, while maintaining that he could not remember what he and Nagle were arguing about and denying that he pushed Nagle, did not contradict Nagle's very specific testimony about what was said, by whom and in what sequence. Further, Nagle's account that M was the aggressor is corroborated by Hubbert, who saw M following Nagle and then push Nagle with both hands. To the extent that Kinsell's testimony differs from Hubbert's, I credit Hubbert who witnessed the entire altercation over Kinsell who had to turn, remove his headset, and look up from his work to observe the altercation which was by then already in progress. I also find that M's denial of his role as the aggressor in the incident is not fully credible because he was under the influence of opiates at the time and admitted that his opiate addiction affected his thinking and made him more argumentative with his girlfriend. HT at 144, 158. Finally, as discussed below, M was upset with Nagle for complaining to Unified Turbines management about M's substance abuse problems. For these reasons, I find that M initiated the December 24, 2008 confrontation with Nagle and was the aggressor.

As for why he confronted Nagle on the morning of December 24, 2009, M professed at the hearing to have no recollection what the argument was about. HT at 166. For his part, Nagle could not identify the source of M's anger, stating that he "had no interaction with him prior, that day prior to that." *Id.* at 63. However, the circumstantial evidence reveals the likely reason. On December 16, 2008, Nagle reported to Deavitt that he had witnessed M engaged in an apparent drug transaction outside of the Unified Turbines shop. M acknowledged that he had been confronted by Unified Turbines management over Nagle's report that he was selling drugs outside of the shop, and that he was upset by Nagle's allegations. *Id.* at 147-148. M initially

testified that he had learned of Nagle's complaint from Unified Turbines management before Nagle left Unified Turbines in December of 2008, but upon cross-examination by Unified Turbines' attorney, stated that he did not learn of Nagle's complaint until January or February of 2009, after Nagle had left Unified Turbines. *Id.* at 147, 160. M's attempt to shift the date of his awareness of Nagle's complaint to sometime after the December 24, 2008 confrontation is completely undermined by the testimony of Unified Turbines' managers. Deavitt testified that the nature of Nagle's December 16, 2008 allegation was such that it would have been addressed promptly, either that day or the next. *Id.* at 191. Deavitt also confirmed that he and Rick Karnes spoke to M about Nagle's allegation, and he believed that M would have been aware of the fact that Nagle had accused him of selling pills before December 24, 2008. *Id.* at 223-224. Rick Karnes similarly testified that he and Deavitt confronted M about Nagle's December 16, 2008 allegation, most likely that same day or the next day. *Id.* at 289-290. Given the vague and contradictory nature of M's testimony, and noting his admission that his abuse of and addiction to opiates affected his thinking, I give little weight to his sequence of events and instead find that the weight of the evidence establishes that he was confronted by Unified Turbines management with Nagle's allegation of drug dealing prior to the December 24, 2008 altercation. I further find in the absence of evidence of any other reason for M being upset with Nagle on December 24, 2008 that it is far more likely than not that M verbally and physically assaulted Nagle on the morning of December 24, 2008 because he was upset over Nagle's complaint to Unified Turbines management that he had been seen selling drugs outside of the shop.

- B. What is the importance of the evidence that Nagle attempted to call Deavitt and that Deavitt failed to call back or take any other action once he learned from Hubbert that Nagle believed he was fired?

As I previously found, when Nagle called Hubbert on December 27, 2008 and related that he had been fired by Deavitt on December 24<sup>th</sup>, Hubbert got him to concede that Deavitt had not actually used the word "fired" and recommended that he report to work on Monday or at least call Deavitt or Karnes to discuss his status. ALJ Dec. and Ord. at 11-12. At Hubbert's suggestion, Nagle did place a call to Deavitt's personal mobile phone on December 27<sup>th</sup> and left a message asking Deavitt to call him back. *Id.* at 12. HT at 70; 205-06; JX 11.<sup>8</sup> While the evidence does not establish that Nagle stated in this message that he wanted to discuss his job, Deavitt admitted that he assumed from the message that Nagle wanted to discuss the situation at work. *Id.* at n.9. The importance of this evidence is that it establishes that Nagle did not resign from his position at Unified Turbines. Rather, it shows that Nagle believed that he had been fired by Deavitt on December 24, 2008 and that Hubbert convinced him during their conversation on the 27<sup>th</sup> that because Deavitt had not actually used the word "fired," it was in his interest to go back to Unified Turbines or at least call Deavitt or Karnes to clarify his status. Additionally, I find that it is reasonable to infer from this evidence that Nagle did not wish to voluntarily leave or otherwise abandon his job at Unified Turbines in December of 2008. That is, it would make no sense for Nagle to call Deavitt in December 27, 2008 if indeed it was his intention not to return to Unified Turbines because he was dissatisfied with his working conditions there.

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<sup>8</sup> Nagle testified that he had both Deavitt's and Karnes's mobile phone numbers and that he had several conversations with both men on their mobile phones during 2007 leading up to his being hired by Unified Turbines. HT at 31-34. This testimony was not contradicted by either Deavitt or Karnes.

It is undisputed that Deavitt never returned Nagle's December 27, 2008 call. At the hearing, Deavitt asserted that the message had been left on a non-work day on his "personal cellphone" and that he expected Nagle to come into work the following Monday to discuss things. HT at 205-207, 220-221. As the ARB pointed out, Deavitt stated in an affidavit provided to OSHA that Nagle "never returned to work *or called* to discuss the issues he was having, or to tell his side of the story of the altercation that took place." JX 4 at ¶ 2 (emphasis added). Deavitt attempted to blunt the adverse implications of this misleading statement at the hearing by explaining, "He never called work. He called my personal cellphone. At the time of writing this letter I was talking about work." HT at 221.<sup>9</sup> Further, Deavitt opted to do nothing even after he was informed by Hubbert on December 29<sup>th</sup> or 30<sup>th</sup> that Nagle had called Hubbert to express his belief that he was fired, that Hubbert had persuaded Nagle to call, and that Hubbert had witnessed the December 24, 2008 altercation and reported that M had been the aggressor, not Nagle as Deavitt may have initially believed. *Id.* at 202-203, 222-223; 333-334. The importance of this evidence is that Deavitt, despite knowing by December 27, 2008 that Nagle had called him to discuss the December 24, 2008 incident and the status of his employment and despite his subsequent knowledge on December 29<sup>th</sup> or 30<sup>th</sup> that Nagle had not been the aggressor and believed that he had been fired, decided to do nothing and let events play out into a scenario where it appeared that Nagle had abandoned his job at Unified Turbines. I further find that Deavitt's misleading statement in his OSHA affidavit that Nagle had never called after the December 24, 2008 incident constituted an attempt to withhold evidence that ran counter to Unified Turbines' position that Nagle had voluntarily abandoned his job. Moreover, Deavitt's efforts to build a circumstantial case that Nagle abandoned his job supports the finding that there was no actual resignation.<sup>10</sup>

## V. Supplemental Analysis and Conclusions

### A. What did Nagle do that was protected by AIR 21 and when?

Upon review of the arguments offered by the parties on remand, I find that it is necessary as a preliminary matter to clarify my prior conclusions, which were affirmed by the ARB, regarding the nature and timing of Nagle's protected activity. In this regard, Unified Turbines asserts in its brief on remand that I previously found that Nagle's protected activity occurred in late September or early October of 2008. Unified Turbines Supp. Br. at 5. Unified Turbines further asserts that I previously found that "Nagle's allegation in December of 2008 that his co-worker was illegally selling prescription drugs 'is not completely reliable' and concluded it was *not* protected activity." *Id.* at 5-6 (italics in original; citations to the record omitted). This argument reflects a misreading of my initial decision.

At the outset of my analysis of the protected activity element of Nagle's complaint, I noted that "Nagle contends that he engaged in three acts protected by [AIR 21]: (1) informing his employers at Unified Turbines Turbine that he believed that M was abusing his prescription medication; (2) informing his employers that M appeared to have an interest in K's prescription

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<sup>9</sup> The statement that Nagle did not call was made in a sworn affidavit, not a letter. JX 4.

<sup>10</sup> It is noted that Deavitt confirmed in his OSHA affidavit that Nagle "did not inform us that he was quitting." JX 4 at ¶ 2.

medication; and (3) informing his employers that he had seen M selling narcotics while at work.” ALJ Dec. and Ord. at 14. After discussing the pertinent FAA regulations relating to use of prohibited drugs in regulated workplaces, I found that “a reasonable person with Nagle’s training and experience could believe that M’s ongoing abuse of drugs and deteriorating performance was in violation of FAA regulations,” and I concluded that “Nagle engaged in activity protected by the [AIR 21] when he provided information to his employers at Unified Turbines that M was abusing his prescription narcotic medication on the job.” *Id.* at 15. In a footnote to this conclusion, I held that “Nagle’s report to the Winooski Police on December 16, 2008, was not protected . . . because the report was not made to the federal government or at the direction of a federal entity.” *Id.* at n. 11. While I stated earlier in the decision that discrepancies between Nagle’s testimony at hearing and the police narrative of his complaint led to the conclusion that his testimony regarding the particulars of M’s behavior was not completely reliable, *Id.* at n. 3, I did not, as implied by Unified Turbines, find that his action in reporting to Unified Turbines management on December 16, 2008 that he had observed M engaged in what appeared to be an illicit drug transaction outside the shop was unprotected. Rather, Nagle’s report to Unified Turbines on December 16, 2008 was one of the three separate, specific communications to Unified Turbines management regarding M’s suspected abuse of prescription medication that were determined to be protected under AIR 21. I adhere to this conclusion, and I also reject Unified Turbines’ argument in its post-hearing memorandum that Nagle’s complaint on December 16<sup>th</sup> was unprotected because it concerned a *sale* of drugs outside of work and not *abuse* of drugs on the job. *See* Unified Turbines Post-Hearing Memo. at 7. That is, the record shows that Nagle brought M’s conduct on December 16<sup>th</sup> to management’s attention because he believed that it was further evidence that M had a “problem” with abusing prescription pain medication that was impacting on his performance. HT at 60.

#### B. Was Nagle discharged under ARB Precedent?

The ARB has instructed the ALJ to determine whether Nagle was discharged under the precedent established in *Minne* and *Klosterman* cases where “discharge” was interpreted to include a situation where the employment relationship “was ended by one-sided or perhaps mutual assumption by the parties – i.e., by means of behavior from which the parties deduced that the employment relationship was at an end.” ARB Dec. and Ord. at 5 (quoting *Minne*, ARB No. 05-005, slip op. at 13). The ARB held in *Minne* that in the absence of an actual resignation by an employee, “an employer who decides to interpret an employee’s actions as a quit or resignation has in fact decided to discharge that employee.” *Minne*, ARB No. 05-005, slip op. at 14 (footnotes omitted).

In its brief on remand, Unified Turbines points out that the *Minne* and *Klosterman* cases involved protected refusals to drive unsafe vehicles under section 405 of the Surface Transportation Act of 1982 (the “STAA”), as amended, 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305) where issues were raised regarding whether the employees had engaged in protected refusals to drive or simply quit. Unified Turbines Supp. Br. at 1-2. Unified Turbines notes that in these STAA cases the employees were given ultimatums to either “drive or be fired” or “drive or go home” by employers who refused to address the employees’ safety concerns and instead chose to treat their refusals to drive unsafe vehicles as voluntary quits. *Id.* at 3. Building on these points, Unified Turbines argues that the instant case is distinguishable from *Minne* and

*Klosterman* because AIR 21 does not contain a protected “refusal to work” provision comparable to the STAA, there was no “work or be fired” edict issued to Nagle and because Nagle’s failure to report to work on December 29, 2008 was “collateral” to his protected activity and not a “protected refusal to work.” *Id.* at 2-3.<sup>11</sup> Nagle responds that these arguments “would have been good . . . had the ARB not already ruled that [the *Minne* and *Klosterman* precedent] . . . is applicable.” Nagle Rep. Br. At 3 (underlining in original). I agree. “No rule of American jurisprudence is better established than the salutary one which requires a lower court to carry out faithfully the express mandate of its appellate superior.” *Slotkin, by Slotkin v. Citizens Cas. Co. of New York*, 698 F.2d 154, 155 (2d Cir. 1983) (citing *Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 281 U.S. 1, 11 (1930); *Ex parte Union Steamboat Co.*, 178 U.S. 317, 318-19 (1900); *Ex parte Sibbald v. United States*, 37 U.S. 488, 492, (1838)) . The ARB very clearly directed the ALJ to determine on remand whether Nagle was discharged under the *Minne* and *Klosterman* precedent. If the ARB believed this precedent inapplicable as a matter of law in an AIR 21 case, it would not have ordered the ALJ to follow it on remand. Moreover, The ARB effectively rejected Unified Turbines’ “apples and oranges” argument about the STAA and AIR 21, stating that “[t]he statutory scheme established by AIR 21 essentially mirrors the protective provisions of the STAA (as well as other whistleblower statutes) and jurisprudence developed under that statute should be applied to this case.” ARB Dec. and Ord. at 5 (citing *Sylvester v. Paraxel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 35 (ARB May 25, 2011) (the Board interprets whistleblower statutes in a parallel manner)). Therefore, the ALJ is bound to faithfully determine whether Nagle was terminated under the precedent deemed applicable by the ARB.

While I previously concluded that Nagle’s failure to report for work on December 29, 2008 was “objectively unreasonable” under the circumstances and constructively constituted a voluntary quit under Vermont unemployment law, the ARB reversed this conclusion as legally erroneous. There is no evidence that Nagle actually resigned. He simply failed to report to work after being sent home on December 24<sup>th</sup> and after not receiving a response to the mobile phone message that he left for Deavitt on December 27<sup>th</sup>. Deavitt, on the other hand, chose not to return Nagle’s December 27<sup>th</sup> call despite admitting that he assumed that Nagle wanted to discuss the situation at work, and he also chose not to act after Hubbert informed him on the 29<sup>th</sup> or 30<sup>th</sup> that Nagle thought he’d been fired and that M was the aggressor in the December 24<sup>th</sup> altercation. Instead, Deavitt chose to interpret Nagle’s failure to report for work as a voluntary quit, and he misled OSHA in his affidavit when he stated, in an effort to bolster Unified Turbines’ “voluntary quit” defense, that Nagle had never called Unified Turbines after December 24, 2008. Further, Deavitt admitted on cross-examination that he had called another employee in accordance with his protocol when that employee had failed to show up for work before concluding, when the employee did not call back, that the employee had abandoned his job. HT at 224-225. On these facts, I conclude that Unified Turbines, having departed from its normal protocol of calling an absent employee and deciding instead to interpret Nagle’s failure to report for work on December 29<sup>th</sup> as a voluntary quit in the absence of an actual resignation, decided to

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<sup>11</sup> While Unified Turbines is correct that AIR 21 does not contain a specific “protected refusal to drive” provision comparable to the STAA, the ARB has held that “a pilot’s refusal to fly when he or she reasonably believes that an aircraft is unsafe is fully consistent with the purposes of AIR 21.” *Sitts v. COMAIR, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-7, slip op. at 16 (ARB May 31, 2011). However, I need not dwell on this point as Nagle has not claimed that his failure to return to Unified Turbines on December 29, 2008 was protected under AIR 21.

discharge Nagle under the ARB precedent articulated in *Minne* and *Klosterman*.<sup>12</sup> Since discharging an employee for engaging in protected activity is expressly prohibited by AIR 21, 49 U.S.C.A. § 42121(a), I further conclude that Nagle has met his burden of proving by a preponderance of the evidence that he suffered an adverse employment action. *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, slip op. at 11 (ARB Sept. 30, 2009) (“Termination of employment is an adverse action.”).<sup>13</sup>

C. Was Nagle’s protected activity a “contributing factor” to his discharge?

Having established the first three elements of his claim (*i.e.*, that (1) he engaged in activity protected by AIR 21, (2) Unified Turbines knew of his protected activity, and (3) he suffered an adverse employment action), Nagle must next “prove by a preponderance of the evidence that his protected activity was a contributing factor to the alleged adverse action.” ARB Dec. and Ord. at 4 (citing 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a)); *see also Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006). A contributing factor is “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-60-62, slip op. at 17 (ARB July 27, 2006) (quoting *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)).<sup>14</sup> The contributing factor standard was

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<sup>12</sup> The determination that Unified Turbines discharged Nagle when Deavitt decided to interpret Nagle’s failure to report to work on December 29, 2008 as a voluntary quit in the absence of an actual resignation is based on an application of the ARB’s *Minne* holding as it was articulated in the ARB’s decision and order in this case. In this regard, the ARB cited its 2007 opinion in *Minne* for the proposition that “[i]n the absence of an actual resignation by the employee, ‘an employer who decides to interpret an employee’s actions as a quit or resignation has in fact decided to discharge that employee.’” ARB Dec. and Ord. at 5 (quoting *Minne*, ARB No. 05-005, slip op. at 14). However, in a subsequent decision in *Minne*, the ARB stated its prior holding a little differently: “An employer who decides to interpret an employee’s protected activity as a resignation has in fact decided to discharge that employee.” *Minne v. Star Air, Inc.*, ARB Nos. 09-066, 09-082, ALJ No. 2004-STA-26, slip op. at 8 (underlining supplied). If the *Minne* precedent were to be strictly limited to those cases where an employer elects to construe an employee’s protected activity, *e.g.*, a protected refusal to drive under the STAA, as a voluntary quit, finding a discharge on the facts of this case would be problematic since there is no claim that Nagle’s failure to report to work on December 29, 2008 was a protected by AIR 21. Indeed, this is thrust of Unified Turbines’ argument that the ARB’s STAA precedent is inapplicable to this case. However, for the reasons discussed above, I find that this argument is foreclosed by the ARB’s clear mandate that the *Minne* and *Klosterman* precedents be applied to the facts of the instant case.

<sup>13</sup> In concluding that Nagle met his burden of proving the adverse action element of his claim under ARB precedent, consideration was given to Unified Turbines’ argument that the ARB’s decision in *Smith v. Jordan Carriers*, ARB No. 05-042, ALJ No. 2004-STA-47 (ARB Aug. 26, 2006) does not support a proposition that an employer’s “erroneous assumption that an employee has quit is alone enough *under any circumstances*” to establish that the employee was discharged. Unified Turbines Rep. Br. at 2 (*italics in original*). However, *Smith* is distinguishable because the ALJ in that case found that the complainant walked off the job because he was upset with another employee’s misconduct, not because of protected safety-related concerns, and that he never subsequently contacted the employer about his status or returned to work. *See Smith*, ALJ No. 2004-STA-47, slip op. at 18-20 (ALJ Dec. 16, 2004). Unlike, *Smith*, Nagle did not simply walk off the job for reasons unrelated to any protected activity. Rather, he was ordered to go home by Deavitt, and he thereafter attempted to call Deavitt to discuss his status.

<sup>14</sup> *Allen* involved the employee protection provisions of the Corporate and Criminal Fraud Accountability Act (known by its popular title as the “Sarbanes-Oxley Act”), 18 U.S.C. § 1514A(a)-(d) which incorporate the evidentiary burdens established by AIR 21. *Allen*, slip op. at 9; 18 U.S.C. § 1514A(b)(2)(C).

“intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” *Id.* Further, “[p]roof of ‘retaliatory motive’ is not necessary to a determination of causation under the contributing factor standard. *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-5, slip op. at 31 (ARB Sept. 13, 2011) (quoting *Marano*, 2 F.3d at 1141)).

Nagle engaged in AIR 21 protected activity on December 16, 2008 when he reported M’s suspected drug dealing outside the shop to Unified Turbines management, and he was discharged on December 29, 2008 when he failed to report to work. While the close temporal proximity between Nagle’s final protected action and his discharge are suggestive of a causal relationship, consideration must be given to two significant intervening events, neither of which directly involved any activity protected by AIR 21: (1) the altercation with M on December 24, 2008 and (2) Nagle’s failure to report for work on December 29, 2008. *See Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 12-13 (ARB Nov. 30, 2006) (retaliatory motive may be inferred when an adverse action closely follows protected activity, “[b]ut 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.”). Nagle makes no claim that he was engaged in protected activity during his altercation with M or when he didn’t report to work. However, in light of my finding on remand that M started the altercation because he was upset that Nagle had reported his suspected drug dealing to management, it cannot be concluded that there is no relationship between Nagle’s protected activity and these subsequent events. That is, if Nagle had not engaged in his protected activity on December 16, 2008 by reporting that he had observed M engaged in an apparent drug transaction outside the shop, it is far more likely than not that the altercation on the 24<sup>th</sup> would not have occurred and, by logical extension, that Nagle would not have been sent home and would not have failed to report for work on December 29, 2008 thinking that he’d been fired when Deavitt declined to return his telephone call. Further, it is significant that Unified Turbines provided a crucial link in the chain of causation when it informed M that Nagle was the source of the complaint that he had been observed in an illicit drug transaction outside the shop. Unified Turbines’ motives in making this disclosure are irrelevant since the focus is on the effect of an employer’s action, not its motivation. *Menendez*, slip op. at 31-32 (holding that an employer’s breach of a whistleblower’s confidentiality, “however well meaning, nonetheless demonstrates a lack of understanding of the foreseeable consequences and does not absolve [the employer] of responsibility” and that “[t]he ALJ erred as a matter of law in deciding that lack of retaliatory motivation precluded a finding of causation.”).<sup>15</sup> Here, the proximate and foreseeable effect of Unified Turbines’ action in informing M of Nagle’s protected complaint was the December 24<sup>th</sup> altercation for which Nagle was erroneously blamed and which precipitated a series of events which began with Nagle being angrily ordered by Deavitt to leave the premises and concluded with Deavitt’s decision to not return Nagle’s call and instead let Nagle believe that he’d been fired. Clearly, none of this would have occurred had Nagle not engaged in protected activity and had Unified Turbines not disclosed his protected activity to M. On these facts, I conclude that Nagle has proved by a preponderance of the evidence that his protected activity under AIR 21 was a contributing factor to his discharge since it tended to affect the outcome which was

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<sup>15</sup> Unified Turbines’ motives in revealing Nagle’s identity as the source of the drug abuse complaints to M were not addressed at the hearing.

Unified Turbines' decision not to return Nagle's telephone call and instead interpret his absence from work on December 29, 2008 as a voluntary quit.

D. Has Unified Turbines demonstrated by clear and convincing evidence that Nagle would have been discharged in the absence of his protected activity?

Because Nagle has established the elements necessary to prove his claim that Unified Turbines violated AIR 21, he is entitled to relief unless Unified Turbines demonstrates "by clear and convincing evidence" that it would have taken the same unfavorable action in the absence of his protected activity. ARB Dec. and Ord. at 4. The ARB has defined a respondent's evidentiary burden at this stage of an AIR 21 case as follows:

Clear and convincing evidence denotes a conclusive demonstration; it indicates "that the thing to be proved is highly probable or reasonably certain." This standard of proof is more rigorous than the preponderance-of-the-evidence standard but lower than clear than the beyond-a-reasonable-doubt criterion of criminal cases. Thus, clear and convincing evidence that an employer would have fired the employee absent protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability

*Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR-27, slip op. at 9-10 (ARB Sept. 30, 2010) (footnotes omitted; internal quotation marks in original).

There is ample evidence in the record that Nagle had a difficult personality, that he missed significant time from work due to his child care responsibilities, and that he repeatedly voiced dissatisfaction with his pay at Unified Turbines and even stated that he was thinking about quitting. However, there is no evidence or even a claim that he was ever counseled or warned about any of these behaviors or that that Unified Turbines had any plan to terminate his employment prior to the events that unfolded during the final two weeks in December of 2008. The absence of any evidence that Nagle was warned or otherwise placed on notice that his attendance and / or attitude were problematic militates against a finding that that Unified Turbines proved by clear and convincing evidence that it would have terminated his employment for these reasons. See *Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11, slip op. at 9-10 (ARB July 27, 2011); *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, slip op. at 17, n. 108 (ARB Sept. 30, 2009) (employer's burden is to prove by clear and convincing evidence that it "would have," not "might have" or "could have" terminated employment for reasons unrelated to protected activity). There also is the matter of Nagle's altercation with M, but Deavitt testified that neither Nagle nor M was disciplined for this incident. HT at 210, 224. Moreover, as the evidence establishes that M initiated the confrontation and was the aggressor, facts which Unified Turbines knew by December 29 or 30, 2008, there was no legitimate basis for taking any action against Nagle for his role in the incident. Accordingly, I conclude that Unified Turbines has not demonstrated by clear and convincing evidence on this record that Nagle's employment would have been terminated in the absence of his protected activity.

## VI. Remedy

When an AIR 21 complainant establishes retaliation for protected whistleblowing activities, the Secretary of Labor shall order the employer to “(i) take affirmative action to abate the violation; (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and (iii) provide compensatory damages.” *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9, slip op. at 13 (ARB Jan. 31, 2012) (footnotes omitted). A successful complainant is also entitled to “all costs and expenses (including attorney’s and expert witness fees) reasonably incurred” in bringing the complaint. *Id.*

### A. Reinstatement

Subsequent to his discharge from Unified Turbines, Nagle eventually found another job, and he has not asked to be reinstated to his former position at Unified Turbines. Instead, he has requested make-whole relief in the form of lost pay plus interest, compensatory damages and attorney’s fees and litigation costs. Nagle Proposed Findings of Fact and Conclusions of Law at 31-32, Nagle Supp. Br. at 30-31. Nagle’s silence on reinstatement is not dispositive since reinstatement is an “automatic remedy” under AIR 21 “except where impossible or impractical.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-00011, slip op. at 12 (ARB May 26, 2010), *aff’d in part, rev’d in part sub nom. Ameristar Airways, Inc. v. Administrative Review Bd., U.S. Dept. of Labor*, 650 F.3d 562 (5<sup>th</sup> Cir. 2011); *see also Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-00030, slip op. at 4 (ARB Mar. 31, 2005) (ALJ erred in accepting at face value a statement from the complainant that he was not seeking reinstatement). While it might be uncomfortable, at least initially, for Nagle to return to Unified Turbines, there is no evidence or claim that reinstatement would be impossible or impractical. Therefore, it would constitute legal error to not order Unified Turbines to make a *bona fide*, unconditional offer of reinstatement to Nagle. *Id.* Nagle may well elect not to accept the offer, but it nonetheless must be made.

### B. Back Pay

“The purpose of a back-pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him; calculations of the amount due must be reasonable and supported by the evidence.” *Clemmons*, slip op. at 12. Nagle submitted evidence that he lost \$25,065.00 in income during 2009 and an additional \$943.50 from January through April of 2010 based on the \$1.50 hourly pay rate differential between his job at Unified Turbines and his current employment. Nagle Supp. Br. at 30-31. Unified Turbines has not challenged Nagle’s lost wages evidence or introduced any contrary evidence. As of May 5, 2010, Nagle obtained a new job which paid him \$17.25 per hour which is \$.25 per hour less than his pre-discharge rate of pay at Unified Turbines. *Id.*, Affidavit of John Nagle (May 16, 2010) at ¶ 6. Nagle further stated in this affidavit that his pay rate was due to increase to \$17.50 per hour after 90 days from May 5, 2010. *Id.* This represents an additional 13-week period of lost pay at the rate of \$.25 x 37 x 13 which equals \$120.25. Thus, I find that Nagle’s total wage loss from

January 2009 through August 5, 2010 was \$26,128.75.<sup>16</sup> Accordingly, I will order Unified Turbines to pay Nagle \$26,128.75 in back pay plus pre- and post-judgment interest calculated pursuant to 26 U.S.C.A. § 6621(a)(2) and compounded quarterly. *Clemmons*, slip op. at 15; *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-22, slip op. at 17-21 (ARB May 17, 2000).<sup>17</sup>

### C. Compensatory Damages

Nagle seeks compensatory damages for “pain and suffering” that he endured as a result of losing his job at Unified Turbines. Nagle Supp. Br. at 31. His evidence of damages comes from his testimony at the hearing. Specifically, he testified that after being discharged from Unified Turbines, he had no income until he received welfare benefits in February of 2009, followed by unemployment benefits in March. HT at 76-77. He had only “a couple hundred dollars” in savings and no credit cards so he had to rely on aid from the “Salvation Army, Community Action Group, Catholic Charities, mostly every public assistance thing out there I was hitting and knocking on doors trying to get a job.” *Id.* at 77-78. He fell behind in his rent and received an eviction notice, though he ultimately was able to avoid eviction by talking to his landlord who was willing to work with him. *Id.* at 78. He described this period as “very stressful.” *Id.* Nagle testified that he is divorced with sole custody of his daughter. *Id.* at 78-79. He ex-wife has been ordered to pay child support, but he has never received any payments as she has apparently evaded the child support enforcement authorities. *Id.* at 79. Nagle testified that his daughter suffers from post-traumatic stress disorder (“PTSD”) related to abuse that she suffered at the hands of her mother when she was between two and three years old. *Id.* at 80. Because of his daughter’s condition, Nagle stated that she is under the care of a psychologist, and he has tried to provide her with stability and a consistent routine. *Id.* at 82-83. He further testified that when he lost his job and health insurance at Unified Turbines, his daughter had to stop counseling for a period of time:

I lost insurance. I no longer had it. I still don’t have insurance so that [counseling] stopped. So I had to find different avenues to approach and get her back on track. So it affected her school work, because she is kind of – it’s hard to hide that situation, to know that Dad’s not going to work today. So it added stress to her, which caused her behaviors to jump around at school.

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<sup>16</sup> It is noted that Nagle has requested to reopen the record to admit updated testimony regarding his income and benefits since leaving Unified Turbines. Nagle Supp. Br. at 31. The applicable rule states that “[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.” 29 C.F.R. § 18.54(c). *See also Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, slip op. at 19 (ARB Sept. 30, 2009); *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-22, slip op. at 7 (ARB Nov. 30, 2009). Reopening might be warranted if, for example, Nagle did not receive the scheduled pay increase in August of 2010 or if he subsequently lost his replacement employment. However, as no such claim has been made, I find that sufficient grounds for reopening the record have not been demonstrated.

<sup>17</sup> The ARB’s decision in *Doyle* contains specific instructions on how to calculate the interest awards which are incorporated herein.

*Id.* at 84-85. He had to stop his daughter's therapy because he was could not afford the cost until he was able to find a government-subsidized health insurance plan for his daughter. *Id.* at 86-87. As for the impact of job loss on him, Nagle testified,

It was very stressful. It was very hard trying to find a job around here. It's a small town. The amount of corporations and the economy itself is limited. I was just persistent enough to get a job. And thank God I did.

*Id.* at 85. Nagle has not made a specific monetary demand for compensatory damages.

Compensatory or non-economic damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-22, slip op. at 20 (ARB June 30, 2009) (footnotes omitted). While a "key step" in determining the appropriate amount of such damages is a comparison with awards made in similar cases, ultimately the determination is "subjective based on the facts and circumstances of each claim." *Id.* at 20, 22. To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Id.* The ARB recently elaborated on the nature of a complainant's burden of proving damages in *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012). In that case, the ARB stated,

A complainant's burden of proof is no different when the claim is for lost wages based on the complainant's medical or psychological condition. Thus, the circumstances of the case and lay testimony about physical or mental consequences of retaliatory action may support such awards. The ARB has held that while the testimony of medical or psychiatric experts "can strengthen the case for entitlement to compensatory damages, it is not required." The ARB has affirmed compensatory damage awards for emotional distress, even absent medical evidence, where the lay witness statements are "credible" and "unrefuted."

*Luder*, slip op. at 16 (footnotes omitted, internal quotation marks in original). However, the Board went in *Luder* to clarify its precedent with respect to cases where damages are sought for a "specific and diagnosable medical condition." *Id.* at 17. With respect to such claims, the ARB stated,

However, in other cases, such as *Gutierrez [v. Regents of the Univ. of Cal.]*, ARB No. 99-116, ALJ No. 1998-ERA-019 (ARB Nov. 13, 2002)] for example, where the claim for an award of damages for emotional stress is based solely on the complainant's testimony that he suffered a specific and diagnosable medical condition, the ARB has reasonably required "medical or other competent evidence" showing that the complainant suffered from the medical condition and that it "was causally related to the unfavorable personnel actions" the respondent took. Absent such evidence, the ARB held in *Gutierrez* that complainant "failed

to meet his burden of proving a causally-related condition, even under the generous evidentiary standards of 29 C.F.R. § 24.6(e).”

*Id.* at 17 (internal quotation marks in original).

Here, Nagle has made no claim that his discharge from Unified Turbines caused him to suffer any specific and diagnosable medical condition, but he has alleged that his daughter’s PTSD, which is a specific and diagnosable medical condition, was exacerbated by his job loss. Under *Luder*, Nagle can prevail on his claim for damages related to the stress and difficulties that he and his daughter experienced as a result of his job loss based on lay testimony that is credible and unrefuted, but he cannot meet his burden with respect to any claim for damages based on an alleged exacerbation of his daughter’s PTSD without medical or other competent evidence. With this guidance in mind, I will now turn to an assessment of compensatory damages.

First to be considered is the amount of damages awarded in similar cases. In *Evans*, the ARB affirmed an ALJ’s award of \$100,000.00 in compensatory, non-economic damages based on the credible and unrefuted testimony of the complainant and his wife. Slip op. at 22. The ARB summarized the lay testimony in *Evans* as follows:

Evans testified that his firing took his confidence away—he was accused of being afraid to fly, of being too nitpicky about the aircraft, and that had made him second-guess his judgment, even now. He added that the biggest upset was that he could no longer provide for his family—his wife trusted him to make a living and did not renew her teaching contract when their son was born in February 2005 after twenty years of waiting. Evans stated that he and his wife were in and out of therapy together and individually, that they were still in family counseling, and that a doctor prescribed Paxil for depression and anxiety.

Evans’s wife, Tamyka, testified that Evans “loves flying” and CareFlight was his “dream job” which he took to avoid the long commute he had with his previous employer. She added that the termination “devastated” Evans, who came home, told her about it, and basically withdrew from their lives, just “shut down.” Mrs. Evans added that for three months her husband was “unavailable, both physically, emotionally, in all facets of our life.” She had planned to be a stay-at-home mother with their son, Ryan, but after Evans’s firing she had to return to teaching. Mrs. Evans stated that Evans was better but would never be the same because the termination took away his integrity, what he believed in, and “drained him.”

*Id.* at 136 (footnotes omitted, internal quotation marks in original). In *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Dec. 30, 2004), *aff’d sub nom. Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102 (1<sup>st</sup> Cir. 2006), a retaliatory transfer / constructive discharge case, the ARB affirmed an ALJ’s compensatory damage award of \$50,000, holding that substantial evidence supported the award because the Complainant had credibly testified that he had two young children including an infant and that, among other hardships, he was forced to sell his automobiles and deplete his savings. Slip op. at 9.

The *Evans* and *Negron* cases suggest that a compensation award in the range of \$50,000.00 to \$100,000.00 for non-economic damages is appropriate where credible lay testimony is introduced to show that a complainant and his or her family suffered financial and emotional stress as a result of an employment termination in violation of the employee protection provisions of AIR 21. In this case, I find Nagle's unrefuted testimony regarding the family impact of his job loss to be fully credible. He impressed me as a caring parent, and his devotion to his minor child's welfare is corroborated by the time he took off from Unified Turbines to attend to her academic and mental health needs. In my view, the impact of Nagle's loss of employment is comparable to the situations in *Evans* and *Negron*. There is, however, a difference as well. That is, Nagle's failure to do anything to preserve his employment at unified Turbines other than place a call to Deavitt on December 27, 2008, albeit not legally determinative of whether he was discharged under ARB precedent, allowed Unified Turbines and the Vermont Department of Employment and Training to interpret his actions as a voluntary quit which disqualified him from receiving unemployment benefits for a period of time. *See* 21 V.S.A. § 1344(a)(2)(A); JX 4 at ¶ 2. Consequently, I find it reasonable to award compensatory damages in the amount of \$50,000.00, which represents the lower end of the range, in recognition of Nagle's contributory role in his own misfortunes.

#### D. Attorney's Fees

Nagle is entitled to attorney's fees and litigation costs. 49 U.S.C.A. § 42121(b)(3)(B)(iii); 29 C.F.R. § 1979.109(b). Accordingly, Nagle will be permitted to file an application for attorney's fees and costs, and Unified Turbines will be allowed an opportunity to file any objections to the requested fees and costs.

### VII. Order

Based on the foregoing findings and conclusions, the following order is entered:

- (1) Respondent Unified Turbines shall make a *bona fide*, unconditional offer to reinstate Complainant John Nagle to his former position together with the compensation, terms, conditions, and privileges associated with his employment that he would have enjoyed but for his termination on December 29, 2008;
- (2) Respondent Unified Turbines shall remit to Complainant John Nagle back pay in the amount of \$26,128.75 plus pre- and post-judgment interest calculated pursuant to 26 U.S.C. § 6621(a)(2) and compounded quarterly;
- (3) Respondent Unified Turbines shall pay Complainant John Nagle compensatory damages in the amount of \$50,000.00; and
- (4) Complainant's attorney shall have **30 days** from the date of this order to file a fully supported petition for fees and litigation costs. Should Respondent object to any fees or costs requested in the petition, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result

of these discussions shall be filed with the ALJ in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, Respondent's objections shall be filed not later than **30 days** from the receipt of the fee petition. **The objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with Complainant's attorney prior to the filing of the objections.**

**SO ORDERED.**

**DANIEL F. SUTTON**  
Senior Administrative Law Judge

Boston, Massachusetts

## NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) **within ten (10) business days of the date of issuance of the administrative law judge’s decision.** The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

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

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1979.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. 29 C.F.R. § 1979.110(b).