

U.S. Department of Labor

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Issue Date: 29 September 2010

CASE NO.: 2009-AIR-00007

In the Matter of:

PHILIP ZURCHER,
Complainant,

v.

SOUTHERN AIR, INC.,
Respondent.

Appearances: Kevin Peck, Esq.
Seattle, Washington
For Complainant

Steven W. Fogg, Esq.
Seann C. Colgan, Esq.
Seattle, Washington
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER

This case arises 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. § 42121, *et seq.* A hearing was held over several days in June and July, 2008: June 30-July 1, and July 20-22. All parties have had a full opportunity to present testimony, offer evidence, and submit post-hearing briefs.

The parties dispute what motivated Respondent to terminate Complainant's employment on March 25, 2008. Complainant, Phillip Zurcher, contends that Respondent, Southern Air, Inc., terminated his employment in retaliation for his having complained to management of several scheduling-related safety violations. Respondent argues that it terminated Complainant's employment for his alleged use of abusive language with one of its scheduling personnel while complaining of an alleged breach of his Guaranteed Days Off ("GDO") under the collective bargaining agreement ("CBA") in place at the time.

At trial, the parties offered, and I admitted, the following exhibits: Administrative Law Judge Exhibits ("AX") 1-6; Complainant's Exhibits ("CX") 1-8, 10-12, 14-16, 18-29, 31-41, 42-67; Respondent's Exhibits ("RX") 1-5, 7-39, 41, 43, 47-48, 50-52, 55-61.

Based upon the evidence introduced, my observations of the demeanor of the witnesses, and consideration of the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

ISSUES

1. Whether Complainant engaged in any protected activity. Respondent's Post-Trial Brief at 1.
2. Whether Complainant's engagement in protected activity caused Respondent to terminate his employment. *Id.*

FINDINGS OF FACT

At the time of trial, Complainant was a 42 year-old man, married with four children, and was living in Seattle, Washington. Trial Transcript ("TR") at 268. His formal education amounted to a high school diploma, along with some coursework towards an associate's degree. *Id.* His aviation career began in 1985, when he joined the Air Force, where he performed a variety of duties during his years of service. *Id.* at 269. He ultimately attained the rank of tech sergeant, and served primarily as a flight engineer until he retired from duty in 1991. *Id.* Following his retirement, he served as a flight engineer in the Air Force Reserve for eleven more years, until 2002. *Id.* To that point, Complainant had tallied some 6,000 hours of flight time. *Id.* at 270. In 2002, Complainant transferred to a desk job as a scheduling manager, earning the rank of master sergeant. *Id.* He remained in that position until retiring from the Air Force Reserve on August 6, 2007. *Id.* Complainant testified that his retirement from the Air Force Reserve was irreversible, except under a few extreme circumstances. *Id.* at 271.

Concurrent with his Air Force Reserve service, Complainant at times also worked as a flight engineer for air cargo companies. *Id.* at 272-73. He spent a year in 1998 working as a flight engineer for a predecessor company to Respondent, until he was furloughed. *Id.* at 272-73. From 1999 to 2002, he worked for Express International. 273. From 2002 to 2007, he parented his children fulltime, while his wife worked. 273-74. Then, in 2007, Claimant sought work with Respondent. *Id.*

On August 7, 2007, Complainant began working as a flight engineer for Respondent. *Id.* Complainant spent his initial months with Respondent undergoing training, and then began crewing flights in October, 2007. *Id.* at 276-79. Complainant crewed flights for roughly eight months, until Respondent terminated his employment, effective March 25, 2008. RX 35 at 1.

Complainant was at all relevant times within his one-year probationary period of employment with Respondent, per the CBA. *Id.*; also RX 3 at 55. The Respondent's Employee Handbook ("EH") nonetheless provides that the one-year probationary period's purpose "is to provide the employee with an opportunity to demonstrate basic qualifications and a desire to perform work as assigned. The probationary period also provides the Company with an opportunity to observe the employee, his work habits and attitude." RX 7 at 98-99. The parties dispute both whether Complainant received a copy of the EH, and whether it even applies at all in view of the CBA.

In February, 2008, Complainant embarked on the course of action that led him to file this AIR 21 complaint. Complainant raised a variety of scheduling and safety-related complaints. As early as November, 2007, as Complainant testified, he began to experience routine violations of Federal Aviation Regulation (FAR) 121.503's "one-in-seven" requirement—that crew members be afforded at least one day of rest out of every seven. TR at 280. According to Complainant, the "one-in-seven" rule requires that crew members be given advance notice of when their twenty-four hours of rest will occur. *Id.* at 281. Complainant testified that he was never given such advance notice in eight months of working for Respondent. *Id.* Complainant also complained of "twelve-in-twenty-four" violations under FAR, which restricts crew members to flying a maximum of twelve hours out of each twenty-four period. Complainant additionally complained of infringements of his GDOs. Under the CBA, GDOs were days on which Respondent could schedule crewmembers in return for additional pay. *Id.* at 460-61. GDOs were not, in other words, absolutely guaranteed as days off. *See id.*; *see also id.* at 148-50.

On February 2, 2008, Complainant raised his first scheduling complaint. *Id.* at 284. He complained to a scheduler who attempted to schedule him on a return flight to Anchorage, Alaska, from Inchon, South Korea, shortly after arriving in Inchon. *Id.* at 284. He asserted that this would violate the "twelve-in-twenty-four" rule, since the flight was between roughly nine and ten hours each way. *Id.* 286-87. The crew's captain agreed with Complainant, and instructed him to travel with the crew to a hotel to rest. *Id.* at 288; also CX 46. The captain reported this to Chief Pilot William Cline, who responded by postponing the return flight to allow Complainant twelve hours of rest. TR at 289-90.

Once on board for the return flight, Complainant raised further complaints. Complainant noted that the plane's engines were of an unfamiliar type, and that the plane lacked a Quick Reference Manual. *Id.* at 292. Complainant reported this to the plane's captain and Dave Thiel in management, both of whom allegedly instructed Complainant to continue on the flight without the manual. *Id.* Complainant compiled an *ad hoc* manual from other documents and completed the flight. *Id.*

On February 6, 2008, Complainant also sent an email to Steve Dent in the scheduling department. *Id.* at 296. He complained that Respondent's scheduling practices left crew members unable to know in advance when they could relax. *Id.* at 297. He further complained that this inability to predict rest periods was a safety issue, as it affected crew members' abilities to safely perform their duties. *Id.* at 297-98.

Later in February, 2008, Respondent began transitioning to a new flight-scheduling computer system, called "Blue One." *Id.* at 738. On February 29, 2008, anticipating a turbulent transition, Chief Pilot Cline sent a company-wide email apprising crew members of the changes and thanking them for their patience. RX 13 at 147. The transition period indeed proved chaotic. On March 7, 2008, Respondent's President, Brian Neff, sent a company-wide email apologizing for the difficulties:

As many of you have experienced first-hand already, the changeover to the Blue One System has not gone according to plan . . .

I want to apologize to each of you for the subsequent difficulties. There can be nothing more frustrating that [*sic*] not being able to see beyond the next 12 or 24 hours. I am very sorry that we have put you in this situation. . . .

I would also ask for your patience over these coming days. . . . Again, I am sorry that this plan has gone sideways, and we will make sure it gets fixed.

RX 18 at 154.

Respondent's scheduling problems sparked a series of complaints from Complainant. On March 7, 2008, for instance, Claimant wrote to the entire scheduling department:

Thank you for sending my "Flown schedule." I know what I have flown . . . This "schedule" does me no good. I know what I bid . . .

I await a real schedule!

RX 47 at 230.

On March 8, Complainant sent another email to the entire scheduling department:

You need to find a way to give us our pairings even one day in advance. This would be better than nothing. I should be able to see at least a week in advance. Anything less is unacceptable . . .

Very tired and annoyed with scheduling and management, . . .

RX 19 at 156.

On March 9, 2008, Complainant wrote an email to Richard Macri, Respondent's Director of Systems Operations:

Today was another day where we waited for a flight plan. I wait for a flight plan at every stop, in every location that Southern Air flies. I do not understand why it is my responsibility to chase down our flight plans . . .

The system is broke and I do not see any improvement in our ongoing operations . . . Operations contribution of flight plans to the crew members is unacceptable. We are not getting them, period.

RX 20 at 157-8.

On March 9, 2008, Complainant wrote yet again to the entire scheduling department. In an email bearing the subject line "I quit!," he wrote:

Why can't I have any idea what my pairings are? If I get an out of the blue call without any rest ability. [*sic*] I will not fly. It is not safe. I flew today very sick and not rested. I have done my part. I don't want to hear any excuses from Norwalk anymore. If you are all working for free than [*sic*] please vent. If not there is a job to be done and I don't feel there is enough effort from Norwalk to help the crews. There is no excuse for my crew to hear of our flight today two hours prior to T/O . . . We have all be pleading for flight info. We receive nothing.

RX 21 at 160. Concurrently, as Timea Kovach, manager of crew scheduling, testified, that Complainant also developed "a reputation among the schedulers," as being "very rude and disrespectful" in his phone calls. TR at 634-35.

On March 10, 2008, Chief Pilot Cline ultimately respondent to Complainant's "I quit!" email. He wrote:

I know that you have been very frustrated with the current events. I find it interesting that you feel you have to say "I quit!" to get attention, however, that may not be the attention you would prefer.

Please remember you are not the only person who is being affected by change. The jabs that people take at scheduling, being they are an easy target, doesn't make it right. There are a lot of people who are working very hard to make things as good as they possibly can.

RX 22 at 163-64. Chief Pilot Cline thus specifically forewarned Complainant to moderate his tone in dealing with scheduling. Also on March 10, 2008, Complainant responded to Chief Pilot Cline's admonishment. He wrote: "I will watch my wording and ensure only constructive input is sent by me. Leason [*sic*] learned." RX 22 at 163.

On March 13, 2008, however, Complainant renewed his emails to the scheduling department. Complainant had arrived in Brussels from an assignment in Ethiopia, where he contracted what was later diagnosed as infectious diarrhea. TR at 333. Once in Brussels, Complainant went to sleep in his hotel, until a call from scheduling at 1:00 a.m. awakened him, asking if he could crew a return flight to Ethiopia. Complainant initially resisted because he was supposed to have returned to his home in Seattle on GDOs, but relented, and accepted the flight. *Id.* at 335. Complainant instead offered to postpone his GDOs until the end of the month. *Id.* 336. Then, it seems that while awaiting a follow-up phone call with crew-pairing details, Complainant

wrote an email to complain: "What is going on!? This is not right. I am supposed to be home today." RX 27 at 170. Within minutes, complainant wrote again in an email with the subject header, "I am waiting in [a Brussels] hotel for phone call [*sic*] explaining what is going on!":

GDO's are guaranteed days off. They are not arbitrary days at your discretion . . .
If you are waiting for six engineers where are they? When will they be here? The
14th is my GDO. Today is the 13th. I am nowhere near home. It is already a given
I would be at least traveling on my first day off.

RX 28 at 172.

Respondent ultimately switched Complainant from the return flight to Ethiopia, to a flight to Miami via New Jersey from Ramstein Air Base, Germany. TR at 658; RX 31 at 176. Ms Kovach testified that she thought this would better accommodate Complainant, since he would be headed homewards rather than to Africa. TR at 658. Complainant testified to having protested under the FAR that the new itinerary would not afford him adequate rest. TR at 337. Complainant was referred to Chief Pilot Cline, but discussed only his entitlement to GDOs, rather than his interpretation of the FAR. *Id.* at 338. Chief Pilot Cline told Complainant that he had no choice about flying on his GDOs. *Id.* Complainant thus relented and agreed to undertake the Ramstein-to-Miami itinerary. *Id.*

Complainant testified that, after being awoken by the 1:00 a.m. phone call from scheduling, he remained awake until he left the Brussels hotel at 8:00 a.m. for his flight to Ramstein via Frankfurt. *Id.* at 339-41. Upon arriving in Ramstein, Complainant checked into his hotel at 3:15 p.m., and went to sleep at 4:00 p.m. *Id.* at 340. He was awoken one hour later by a call from scheduling telling him to take the crew transport shuttle to Ramstein Air Base. *Id.* At that point, as Complainant testified, he claimed that he was too fatigued. *Id.* Complainant then spoke to another scheduler, reiterating his complaint of fatigue. *Id.* Complainant was routed to Kovach, to whom he repeated his complaint of fatigue. *Id.* at 341. Complainant testified that she responded by asking, "Are you sure you want to go down that route?" *Id.* Complainant testified he assumed this to mean that he would next have to speak to Chief Pilot Cline, or worse yet, that he would be fired. *Id.* at 341, 346-47. Complainant later testified to being especially concerned about the risk of termination because he believed at the time that fellow crew member Jim Sposito had been fired for complaining of fatigue. *Id.* at 347. Wanting to avoid this, he accepted the flight order, but told Kovach that he was doing so only under duress, and that he would file complaints. *Id.* at 341.

Once at the plane, Complainant relayed his schedule since 1:00 a.m. to the flight's captain, Captain Rich Dunlop, who agreed that Complainant's twenty-four hour clock under the "twelve-in-twenty-four" rule under the FAR had begun to run at 8:00 a.m. that morning. TR 344. He accordingly asked Complainant only to fly to New Jersey, where he could rest before continuing to Miami. *Id.* While en route, Respondent re-routed the flight to New York City's JFK Airport, where the crew ultimately landed. *Id.*

On March 15, 2008, Complainant arrived at JFK Airport. *Id.* at 352. Once at JFK Airport, Complainant contacted maintenance manager Grasio about the plane having been excessively dirty; Grasio admitted the problem. *Id.* at 345; *also* CX 36 at 4-5. Complainant also testified to, at some point earlier in the day, speaking to Chief Pilot Cline about the need under his reading of the CBA to have nine hours of rest prior to each flight, and at least eight hours under his reading of the FAR. TR at 348. Complainant then slept at his hotel until sometime on March 16, 2008, still suffering the effects of his infectious diarrhea. *Id.* at 353. At some point, Complainant sent a call for help on the employee internet message board, because his physical condition continued to worsen. *Id.* 354. Complainant recalled Guy calling him, but the next thing he could remember at trial was waking up in the hospital. *Id.* Complainant had been quarantined in the isolation ward because of his recent time in Africa, but his test nonetheless came back negative, except for dehydration. *Id.* at 356. Complainant was released the next morning. *Id.* According to Respondent's count, Complainant spent only six hours in the hospital. *Id.*; *also* RX 5 at 81, 84. On March 17, 2008, Complainant returned home to Seattle, with instructions to follow up with his doctor in seven days, and to refrain from working for seven days. TR 360; *also* RX 5 at 81.

On March 19, 2008, Complainant spoke to Kovach, asking to reschedule his GDOs so as to minimize his need to use sick days. TR at 664; *also* *Id.* at 361-63; CX 21. Kovach obliged his request, rescheduling his GDOs and placing him on reserve starting March 27. *Id.* This allowed Complainant to use only two sick days during his expected medical recovery. *Id.* Kovach asked Complainant to inform scheduling if he felt well enough to return to duty at any point after March 27, and he agreed to do so. *Id.* at 664-69; *also* RX 53 at 500, 54 at 501.

On March 25, 2008, Ms. Kovach asked scheduler Larissa Lytwyn to call Complainant, to inquire as to his progress in recovering, and his expected return to work date. TR 635-36; *see also* RX 33 (email from Ms. Kovach to Respondent's travel coordinator stating, "We're calling Zurcher, as he was sick and just wanted to make sure that he's ready to take his comm'l."). Ms. Lytwyn had only recently joined Respondent's employ, having started through a temporary agency one week prior. TR at 198. She testified at trial, and described her phone call to Complainant:

He picked up and I started to talk and he got very, kind of agitated, and then basically said he didn't appreciate being called on a GDO, and hung up on me . . .
. The exact words were, "What part of fucking GDO do you not understand?"

Id. at 210-11. Respondent's phone records document this call lasting thirty-seven seconds in duration. RX 45 at 226. Complainant maintains that this conversation never took place, or, at least if it did, that he did not use abusive language towards Ms. Lytwyn. TR 365-68, 378-80, 453. Claimant also admitted, at trial, on direct, that it was at least possible that he spoke with Ms. Lytwyn on that day. *Id.* at 380. On cross, he further admitted to remembering that he said to some scheduler that day, "What part of GDO do you not understand?" *Id.* at 467.

On balance, I credit Respondent's version of events. Ms. Lytwyn's account of the phone call is credible because it is consistent with the tone of Complainant's other communications to Respondent's scheduling and management personnel in evidence. Furthermore, both Ms. Kovach

and Chief Operating Officer Gillies witnessed Ms. Lytwyn's reaction immediately following the call. *Id.* 863-64. Yet further, because of inconsistencies in Complainant's version of his subsequent conversation with Chief Pilot Cline, which I discuss below, I doubt the accuracy of his recollection of his conversation with Ms. Lytwyn. There may be some legitimate dispute about precisely when the phone call occurred, but not that some phone call matching Ms. Lytwyn's description occurred on March 25, 2008.

The phone call with Ms. Lytwyn precipitated Complainant's termination. Ms. Lytwyn described her reaction to Complainant's behavior as "surprised and stunned." *Id.* at 211. Both Ms. Kovach and Chief Operating Officer Gillies witnessed Ms. Lytwyn's immediate reaction to, and heard her description of, the call. *Id.* at 863-64. After speaking with Chief Pilot Cline, learning that Complainant remained in his probationary period, and learning that Chief Pilot Cline had previously reprimanded him for being rude towards schedulers; Mr. Gillies decided to terminate his employment. *Id.* at 864.

On March 26, 2008, Mr. Cline spoke to Complainant by phone and informed him that his employment had been terminated. *Id.* at 766. According to Respondent, the conversation lasted forty-five minutes, during which time Mr. Cline told Complainant that he was being fired because of his abusive language towards Ms. Lytwyn, and because of prior instances in which he had been disrespectful to schedulers. *Id.* at 768. Complainant did most of the talking, expressing his frustration with scheduling, and attempting to talk Mr. Cline out of firing him. *Id.* at 769. He also agreed with Mr. Cline that he "hadn't been professional with the crew schedulers." *Id.* Mr. Cline followed-up with an email that same day, in which he stated that Respondent had elected to terminate Complainant's employment effective March 25, 2008, explaining that "Pursuant to the provisions of the [CBA], the company is permitted to terminate a crewmember's employment at any time during the first twelve months of the crewmember's active service with Southern Air." RX 35 at 180.

Complainant's version of events differs somewhat. He alleges that upon being told he had been fired, he asked Mr. Cline whether it was because he had complained of being sick. TR at 387. Complainant testified that Mr. Cline responded merely that it was because he was "not a good fit." *Id.* Most saliently, Complainant has contended that Respondent has never—not at the time of his firing or any other time—provided him with a reason for being terminated. *E.g. id.* at 400, 436-37. Several facts undercut this contention, though. On March 28, 2008, Complainant wrote to Mr. Gillies, asking for his termination to be reversed, and apologizing for "any sarcastic remarks I made to scheduling." RX 37 at 182. Complainant was also aware that he was still a probationary employee. TR at 456. He additionally seemed to be aware that abusive language could lead to termination. TR at 450-51; RX 49 at 67. Yet further, Complainant testified at trial that he recalled Mr. Cline telling him that he was unemployable because he would not work on his GDO, a justification he relayed to Mr. Guy in a March 26, 2008, email, and posted on the employee internet message board on March 26, 2008. TR at 472-73, 477; RX 38 at 187. The inconsistencies in Complainant's testimony on this point cause me to credit Respondent's version of events, and to generally treat Complainant's testimony with diminished credibility.

Complainant additionally introduced the testimony of three other of Respondent's employees in order to attempt to establish that Respondent had developed a pattern of retaliating against employees for raising safety complaints: Thomas Arrieta, Jeremy Hobbs, and Jim Sposito. Thomas Arrieta testified to being a flight engineer with thirty-four years of experience, and to having worked for Respondent from July 9, 2007, until April 4, 2008. *Id.* at 41. Mr. Arrieta also testified to believing that Respondent had terminated him for raising complaints about "one-in-seven" rule violations. *Id.* at 41, 73-74. Mr. Arrieta further testified that Ms. Kovach had revealed to him that she planned to conceal scheduling violations from FAA investigators, saying, "[i]t's not tough. These guys don't know what they are talking about." *Id.* at 55.

Jeremy Hobbs testified to being a flight engineer with roughly twenty years of experience, and to having worked for Respondent from May, 2005, through April, 2008. *Id.* at 84. Mr. Hobbs testified that he once complained to Respondent's Chief Operations Officer, Dave Thiel, that he and his crew were too fatigued to fly. *Id.* at 88. Mr. Hobbs recounted that, according to his memory, Mr. Thiel replied, "[i]t's not in the best interest of your career to make this decision." *Id.* Mr. Hobbs felt that he had later been passed over for a promotion as a result of this incident. *Id.* at 90-91.

Jim Sposito testified to being an airline captain with decades of experience. *Id.* at 593-94. Mr. Sposito had flown as a captain for Respondent From July, 2007, through November, 2007. *Id.* at 594. He testified that he had complained to COO Thiel of fatigue and refused to fly a flight from Bogotá, Columbia, to Quito, Ecuador. *Id.* at 597-98. He further testified that, according to his version of events, "Subsequently that day I was terminated for refusing to fly." *Id.*

Complainant has additionally sought to introduce the deposition of Vice President of Safety and Security Peter Raymond, who Complainant alleges was terminated for raising safety complaints. Deposition of Peter Raymond ("DPR"). Respondent objects, relying on my pretrial order denying discovery with respect to Mr. Raymond because he is not "similarly situated" to Complainant under *Barker v. Admin Review Board, U.S. Dept. of Labor*, No 08-60128 (5th Cir. December 8, 2008). Order Denying in Part & Granting in Part Complainant's Motion to Compel Third Requests for Production of Documents, slip op. at 4-5. (June 1, 2009). Respondent concedes that certain portions of the deposition—page 35, lines 5 to 21; and page 168, line 17, to page 169, line 11—should be admitted as they pertain to Complainant's termination. Complainant contends, however, that Respondent's objections should be stricken as untimely.

I reject Complainant's position and exclude Mr. Raymond's deposition, except for 35:5-21, and 168:17-169:11. Complainant's timeliness argument is accompanied by not a single citation to law, but in any event would ring hollow. Complainant has been on notice since my June 1, 2009, order denying discovery that evidence regarding Mr. Raymond's termination is inadmissible as he and Complainant are not "similarly situated" under *Barker*. I therefore admit only 35:5-21, and 168:17-169:11. Both portions relate Mr. Raymond's version of a conversation he and Complainant had after Complainant was fired, in which Complainant related his opinion that he had lost his job for refusing a flight due to his illness. This substantially duplicates evidence already otherwise admitted, so I weigh it minimally.

CONCLUSIONS OF LAW

In order to prevail, an AIR 21 complainant "must prove that he is an employee covered under the statute, that he engaged in activity protected by the statute, and that an air carrier . . . subjected him to unfavorable personnel action because he engaged in protected activity." *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 4 (ARB January 30, 2008) 49 U.S.C. 42121(a). An AIR 21 complainant must therefore meet four elements: (1) covered employee; (2) protected activity; (3) unfavorable personnel action; and (4) causation, such that the unfavorable personnel action was made in retaliation for the protected activity. The parties dispute only whether Complainant engaged in protected activity, and whether Complainant's engagement in protected activity caused Respondent to terminate his employment.

Burdens of Proof and Burden-Shifting Analysis

An AIR 21 complainant carries the initial burden of proving the elements of his/her case by a preponderance of the evidence. *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 12-13 (ARB January 31, 2006). A complainant may carry his burden of proof through either direct or circumstantial evidence of a statutory violation.

Where, as here, the complainant relies on circumstantial evidence, the Title VII's burden-shifting pretext framework guides the analysis. *Id.* at 14. Under this framework, the ALJ may consider "the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action. *Id.* The initial burden of persuasion nonetheless remains with the complainant; the employer's burden at this stage in the analysis is one of production, not persuasion. See *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11, slip op. at 7-9 (ARB June 29, 2007); *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-012, slip op. at 8 (ARB December 31, 2007).

At this initial stage, the employer's burden of production is to "'articulate some legitimate, nondiscriminatory reason' for its actions . . . to rebut the presumption of discrimination." *Brune* at 15 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1993)). The burden of proof remains on the complainant to show by a preponderance that this legitimate, nondiscriminatory reason is pretext. See *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALD No. 2004-AIR-028, slip op. at 5 (ARB January 30, 2008).

If a complainant carries his burden of proof, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same adverse action in any event, absent the protected activity's occurrence. *Clemmons* at 10.

Protected Activity

Protected activity under AIR 21 consists of "providing to the employer or the Federal Government information relating to a purported violation of a regulation, order, or standard relating to air carrier safety." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No.

2007-AIR-008, slip op. at 7 (ARB July 2, 2008; 49 U.S.C. § 42121(a)(1)). The complainant must provide information that is "specific in relation to a given practice, condition, directive or event" that gives rise to a violation that s/he reasonably believes occurred. *Malmanger* at 7; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB January 30, 2008). Complaints made to co-workers may be protected activities. *Davis v. United Airlines, Inc.* 2001-AIR-5 (ALJ July 25, 2002) at 26. Furthermore, the aspiring whistleblower must actually blow the whistle. *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 04-AIR-3, slip op. 9 (ARB July 31, 2006) ("the employee does not 'provide information' [concerning an alleged violation] unless he actually expresses his concerns"). What was protected activity at one moment does not remain so indefinitely, as "once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Malmanger*, slip op. at 8. It lastly bears emphasizing that it is not enough merely to complain of safety problems, rather the complainant must have addressed an alleged violation of federal law relating to air carrier safety. *Sievers*, slip op. at 5.

Guaranteed Days Off

Complainant made several complaints about Respondent calling and scheduling him for flights on his GDOs. However, the FAR does not have a provision for GDOs. TR at 460. GDOs derive from the CBA and provide that Southern is within its rights to contact a crew member on his GDO and schedule them to fly on those days. *Id.* at 147-8. Therefore, even if Chief Pilot Cline did tell Complainant that he had no choice but to fly on his GDOs there is still no violation or potential violation for which Mr. Zurcher could have blown the whistle. *Id.* at 338.

Alleged Dirtiness of Aircraft

Zurcher alleges that he engaged in protected activity when he complained to Mr. John Graziano, Vice President for Technical Services for Southern about the dirty condition of the aircraft he crewed on March 15, 2007. TR at 544. According to 32 C.F.R. § 861.4(e)(4)(viii), the aircraft's interior must be "clean and orderly." Complainant asserts that it was "filthy" and there were "cut wires found on floor." CX 36 at 4. An unclean or poorly maintained aircraft is a violation of the C.F.R. and could result in nonfunctioning and unsafe equipment. Therefore, I find that alerting management of the condition of the aircraft was protected activity.

Alleged Incorrect Flight Plans and Flight Plans through Eritrean Air Space *14 C.F.R. § 121.597*

Complainant additionally alleges that he engaged in protected activity when he alerted Macri to the problems with the flight plans. Testimony from both sides established that flight plans contain crucial information concerning payload, wind, temperatures, and fuel requirements for the aircraft. TR at 312-3; 804-5. Further, Complainant established that getting flight plans at the last minute and flight plans that contained incorrect data were a potential safety hazard as the crew relied upon that information in preparing for the flight. *Id.* at 312-3. In regards to flight plans over Eritrea, Southern Air flight plans over Eritrean air space were in violation of SFAR 87. *Id.* at 815, 897-8.

However, the two sides disagree about who had responsibility for making the flight plan. Mr. Zurcher testified that the plan came from the company and this is supported by his email to Macri alerting him of the problem. CX 14. Employer contends that it was the responsibility of the pilot to make the plan and cites the language in 14 C.F.R. §121.597 in support of this. Resp. Post Trial Brief at 24. However, Mr. Cline testified that when he would hear of problems with getting the flight plans to the crews he would ask Macri if there was an issue or problem that needed to be addressed. TR at 813-4. This indicates that the company did have at least some role in producing the flight plans for the crews. In addition, Gillies admitted that he was ultimately responsible for the flight plans. *Id.* at 924. Therefore Complainant was engaging in protected activity when he made these complaints.

Alleged Missing Manual

Zurcher alleges that he engaged in protected activity when he complained about the absence of a Quick Reference Manual. He testified that it was a violation of the FARs to fly without a Quick Reference Manual in the cockpit but neglected to give a specific section of the FAR supporting his contention. TR at 291-2. Complainant alleges that flying without a quick reference manual is a safety concern because in an emergency it provides a way to rapidly reference and react to specific mechanical problems that may arise. *Id.* However, Cline testified that it was a violation of FAA regulations to fly without that information *in some form* and gave un rebutted testimony that the same information was in the aircraft operating manual that was onboard. *Id.* at 790. Therefore Zurcher's complaint regarding the missing manual is not protected since the complaint did not address any violation or potential violation of federal law relating to air carrier safety.

Alleged Duty Time Violations

Mr. Zurcher alleges that he did not get the required period of rest prior to some flights and that he was not provided the required twenty four hours off in a seven day period.

On February 2, 2008, when Complainant informed the crew captain that he would be in violation of the "twelve-in-twenty-four" rule if he took the flight from Incheon to Anchorage, he was brought to the hotel with the crew to rest. TR at 288. His email to scheduling and Cline alerting them to the violation was protected activity under AIR 21.

Claimant complained to several individuals in scheduling, including Steve Dent about violations of the "one-in-seven" rule from 14 C.F.R. §121.503. However he did not address these concerns with management. *Id.* at 544. ("I did not specifically talk to Mr. Cline or Mr. Gillies concerning one in sevens.") Nevertheless, complaints made to co-workers can be protected activities. *Davis v. United Airlines, Inc.* 2001-AIR-5 (ALJ July 25, 2002) at 26. Therefore, Claimant's complaints regarding this issue are protected activities.

Complainant's Illness

On March 16, 2008 Mr. Zurcher was hospitalized for the infectious diarrhea he contracted while in Africa. TR at 333; CX 6, 21. FAA order 8900.1 and 14 C.F.R. §63.19 preclude crewmembers from flight duty while they have a known medical or physical deficiency. Zurcher had conversations with Ms. Kovach in scheduling and Mr. Cline concerning his illness and inability to fly while ill. *Id.* at 361, 373-4, 380, 385-7. Because the conversations specifically related to a potential violation of a regulation related to air carrier safety they are protected activities under AIR 21.

Complainant's Alleged Fatigue on March 14, 2008

Here there are two possible instances that could constitute protected activity. The first was Zurcher's conversation with Cline on March 14, 2008 at 5 am. *Id.* at 338. During this exchange, Zurcher told first the scheduler and then Cline that taking the flight out of Germany would not give him the requisite minimum eight hours of rest. *Id.* at 337-8. Cline assured him he would get the necessary rest and Zurcher accepted the flight. *Id.* at 338; 763. Here, Zurcher engaged in protected activity when he voiced his reasonable belief that he would not get the FAR mandated rest for the flight.

The second instance was his 5 pm conversation with Kovach on March 14, in which Zurcher told her he was too fatigued to fly. *Id.* at 341. Zurcher alleges that she put pressure on him by saying "are you sure you want to go down that route? If you do, you have to talk to Mr. Dave Thiel or Mr. Bill Cline." *Id.* at 341. Kovach denied coercing or pressuring him and testified that company policy dictates that when a crew member "calls fatigue" they speak with the chief pilot. *Id.* at 662. She and Zurcher agree that he declined to speak with Cline and accepted the flight. *Id.* at 663; 341. 14 C.F.R. §121 mandates that crew members must have adequate rest time. Therefore, Zurcher was engaging in protected activity by discussing this issue with Ms. Kovach.

Causation

To establish causation, an AIR 21 complainant must show that protected activity was a "contributing factor" in the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)B(iii). In this vein, "[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint." *Peck* at 10. In *Peck*, the ARB relied upon "uncontroverted" testimony by a manager "that she reached her decision to terminate [the complainant] . . . without knowledge of [the complainant]'s complaint to the FAA." *Id.* at 11. The Complainant in *Peck* argued that he received the letter of termination two days after he made the complaint to the FAA. *Id.* at 10. However, the FAA inspector testified that she never directly or indirectly revealed Peck's identity as whistleblower. *Id.* Further, such inspections "occurred routinely" and Respondent claimed that they only learned about the complaint mere days before the hearing. *Id.* at 11. Complainant must show that the person making the adverse employment decision actually had knowledge of the protected activity. Thus the ARB rejected the complaint in *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB January 31, 2006): "Even if [the recruiter who interviewed the complainant]

did know about the [prior] lawsuit, [the complainant] still had to show that [the Director of Training] knew about it too since it was . . . [he] who terminated his employment." *Id.* at 6.

A complainant may, nonetheless, rely on circumstantial evidence. "[A] temporal connection between protected activity and an adverse action may support an inference of retaliation." *Barber v. Planet Airways, Inc.*, ARB Case No. 04-056, ALJ No. 02-AIR-19, slip op. at 6 (ARB April 28, 2006). However, "inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused the adverse action." *Id.* (emphasis original); *also Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. 13 (ARB November 30, 2006); *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB November 30, 2005).

A complainant may also rely on evidence regarding retaliation against other employees in order to demonstrate a pattern or established practice of discrimination. Such evidence is only relevant, however, to the extent that the other employees are "similarly" situated to the complainant. *Barker*, at 3-4.

A breach of company rules may suffice to support a finding of an independent cause for the adverse action. *Sievers*, slip op. at 11 (the employer "clearly had a legitimate reason" because "[c]ompany rules specifically prohibited altering, punching or making entries on another employee's timecard, and [the complainant] admitted he had 'padded' and 'punched' timecards."). But if an employer breaches its own rules in disciplining a complainant, it may suffice to show that the employer's stated reason for the action is pretextual. *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. 10 (ARB May 21, 2009) ("while [the employer] relied on [the complainant]'s alleged violations of the manual to fire him, the company disregarded the pre-termination procedures contained in the same manual.").

Here, although Complainant engaged in the protected activity discussed above, it has not been shown that it was a contributing factor in the decision to terminate his employment with Southern. For the reasons discussed above I credit Respondent's version of the telephone call on March 25, 2008 between Complainant and Lytwyn, which Gillies witnessed.

The employer responsible for making the decision to terminate must have knowledge of the protected activity engaged in by the Complainant. *Peck* at 10. Here, the decision to terminate was made by Southern Air Chief Operating Officer Thomas Gillies. TR at 861. Gillies testified that he had no knowledge of any of the complaints constituting protected activity that Zurcher had made. *Id.* at 863. In fact, he testified that at the time of the incident with Ms. Lytwyn, he did not even know Complainant. *Id.* at 864. After witnessing the exchange between Lytwyn and Complainant, Gillies called Chief Pilot William Cline. *Id.* at 733, 864. Gillies testified to asking Cline only two questions; whether Complainant was a probationary employee and if there had been prior instances of this type of behavior. It was only upon learning that the answer to both was yes, that the decision to terminate was made. *Id.* Because only Gillies and Cline were involved in Zurcher's termination, only their knowledge of the prior protected activity is relevant. *Peck* at 10. Therefore, although Cline was informed of several of Zurcher's complaints that constituted protected activity it was not known to Gillies who decided to fire him and had

the ultimate decision making power given his superior position in the company. Although Complainant alleges that Gillies was aware of the fact that SA was understaffed, and had problems with scheduling and flight plans, no evidence has been submitted to support a finding that Gillies knew Zurcher had complained about these or any other issues. Comp. Post Trial Brief at 86-88. Therefore Complainant has failed to show causation.

Circumstantial evidence showing a temporal relationship between the time of the protected activity and the time of the termination can be evidence of retaliation. *Barbar* at 6. Here, it is not disputed that some of Zurcher's complaints took place close in time to his termination. However, the incident with Ms. Lytwyn was the kind of event that "*independently* could have caused the adverse action." *Id.* (emphasis original). The tone and manner of the emails he sent prior to his conversation with Ms. Lytwyn show Complainant engaging in a pattern of unprofessional and rude behavior and support Respondent's argument that the reason for termination was simply that "he crossed the line" in his comments to Ms. Lytwyn. *Id.* at 864. *See also Sievers* at 11.

Here, "the use of profanity or abusive language" was explicitly forbidden in the Employee Handbook. RX 7 at 112-3. It is common knowledge that Employers do not tolerate this kind of behavior, so whether or not Zurcher read or received the Employee Handbook is irrelevant. Companies employ standards and practices to protect them from liability should one employee harass or create a hostile work environment for another employee. There is no reason to believe that Southern did not have the same common expectations about behavior, nor that Mr. Zurcher did not know about them. Complainant may have had good reason for the frustration he exhibited; however, he was warned in an email from Cline to keep his communications constructive and adjust his tone with a recently employed and overworked scheduling crew. RX 22 at 163-4. The use of profanity and abusive language is specifically set out as "behavior that will not be permitted" and is likely done so to emphasize the seriousness of the offense. RX 7 at 113. Southern had the right to terminate the employee without giving any prior warnings for such behavior. RX 7 at 112-3. Mr. Zurcher did not modify his behavior as he promised Cline; in fact his behavior became more offensive. RX 22 at 163. The contention that Respondent failed to follow the proper procedures for termination is not credible because they acted in accordance with the Employee Handbook. Therefore is it not unduly surprising that Respondent took a more drastic step in terminating him.

Complainant alleges that his evidence regarding the termination of other employees shows that the company engages in a pattern of discrimination. However, there is no evidence showing that these employees were terminated for cursing or any other behavior issues which would make them "similarly" situated to Complainant. *Barker* at 3-4. I therefore find Complainant presented insufficient evidence that any protected activity on his part played a contributing role in his termination.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Respondent did not unlawfully discriminate against Complainant because of his protected activity and, accordingly, his complaint is hereby **DISMISSED**.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

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

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

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