

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 August 2010

CASE NO.: 2010-AIR-8

IN THE MATTER OF

LINDA S. COLLARD

Complainant

v.

SKYWEST AIRLINES, INC.

Respondent

APPEARANCES:

LINDA S. COLLARD, Pro Se

For The Complainant

TODD C. EMERSON, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the employee protective provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (herein AIR 21), 49 U.S.C. § 42121, et seq., Public Law 106-181, Title V, § 519 and the regulations thereunder at 29 C.F.R. Part 1979, brought by Linda Collard (Complainant) against Skywest Airlines, Inc. (Respondent). These statutory provisions prohibit discrimination by air carriers or contractors/subcontractors of air carriers from discharging or otherwise discriminating against an employee for providing the employer or the Federal Government with information relating to any violation or alleged violation of

orders, regulations, or standards of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety.

I. PROCEDURAL BACKGROUND

Complainant filed a complaint with the Occupational Safety and Health Administration (herein OSHA) on November 3, 2008, alleging that Respondent discharged her in reprisal for raising aviation safety issues with management officials and the Federal Aviation Administration (herein FAA). The OSHA Regional Administrator dismissed Complainant's complaint on November 16, 2009, after determining that it had no merit. Specifically, the Regional Administrator determined that although Complainant engaged in protected activity, a preponderance of the evidence supported Respondent's position that Complainant's negligence in following Respondent's drug testing policy/procedures was the sole reason for her termination, and dismissed her complaint.

On November 16, 2009, Complainant filed a request for formal hearing with OALJ.

On December 18, 2009, this matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing in Salt Lake City, Utah, which commenced on April 28, 2010. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs.

The following exhibits were received into evidence: Administrative Law Judge Exhibit Numbers 1-9; Complainant Exhibit Numbers 1-2, 3-25, 26 pp. 68-89, 27, 29-31, 33, 35, 39-44, and 53-54; and Respondent Exhibit Numbers 1-31.^{1,2} Subject to post-hearing development, the record was formally closed on May 27, 2010.

Post hearing briefs were received from Complainant and Respondent by the brief due date of July 19, 2010.

¹ References to the transcript and exhibits are as follows: Transcript: Tr. ___; Administrative Law Judge Exhibits: ALJX-___; Complainant's Exhibits: CX-___; and Respondent's Exhibits: RX-___.

² Only the typed portion of CX-2 was received.

Based on the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

II. STIPULATIONS

The parties stipulated, and I find:

1. That Respondent is a commercial airline subject to AIR 21. (Tr. 51-52).
2. That Complainant was employed by Respondent as a flight attendant. (Tr. 52).
3. That Complainant engaged in protected activity when she reported fellow flight attendant Raeshelle Larson's sleeping in-flight. (Tr. 221-222).

III. ISSUES

1. Whether Complainant suffered an adverse action(s) as a result of engaging in protected activity.
2. Whether Complainant's activity was a contributing factor in Respondent's alleged discrimination against Complainant.
3. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainant having engaged in protected activity.

IV. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Linda Collard

Linda Collard (Complainant) testified she worked as a flight attendant for Respondent from October 10, 2006, to August 8, 2008. Her duties included ensuring the safety of passengers, administering emergency equipment, giving directions in the event of water or land evacuations, and communicating with pilots. (Tr. 53). She had not been previously employed as a flight attendant with another airline prior to her employment with Respondent. (Tr. 53-54).

Complainant testified that on July 3 or 4, 2008, she observed another flight attendant, Raeshelle Larsen, sleeping in a first class passenger seat during a four-day trip. (Tr. 54-55). Complainant assumed that since Raeshelle Larsen was asleep, she was probably not fit for duty, so she did the in-flight beverage and snack services herself. Complainant did not complain to anyone at that time because Raeshelle Larsen stated she was really tired and apologized for falling asleep. (Tr. 55).

Complainant testified that as the trip progressed, more violations occurred that she pointed out, and "the communication broke down" to the point that she "felt that in the event of an emergency, [she] would not feel comfortable with [that] crew and the way things had progressed." Examples of violations included the main cabin door being closed before the carry-on baggage was secured in the overhead bins and the bins were closed.

Complainant informed the pilot and Ms. Larsen of the violations. (Tr. 56-57). "[T]he Captain was ordering the flight attendant to close the main cabin door, and when I addressed it to him, I said, 'We're not allowed to do that according to Federal Aviation regulations,' and his remark was, 'Oh, sorry, my bad.'" (Tr. 56). Complainant testified that there were many occasions during the trip that the cabin door was closed before the cabin was secure. (Tr. 60). After three days on duty, Complainant called Chris Merrill, the Manager on Duty, and requested to be taken off the flight. (Tr. 57, 60). She informed Ms. Merrill that Raeshelle Larsen had fallen asleep and had instructed her to delay the service. She was told no reserves were available to take her place on the plane, but that Ms. Merrill would be available in the event things either did not get better or got worse. (Tr. 58).

Complainant testified that once, although it was her job, the pilot jumped out of his seat and counted the passengers himself after Complainant made a mistake. (Tr. 58-59). She further testified the pilot was constantly edgy and looked at her, and the pilot and other flight attendants talked behind her back and giggled at her expense. (Tr. 61). For example, once she misplaced her manual and another flight attendant made fun of her. (Tr. 62). One of the flight attendants elaborated on all of Complainant's errors to another flight attendant, and they both made fun of her, calling her "old" and "grandma," and stating she should not be a flight attendant. (Tr. 62).

Complainant related to Ms. Merrill that the other flight attendants were calling her old and making fun of her. She testified that Ms. Merrill responded, "Well, that's not right, and you need to make the necessary reports." (Tr. 64). Complainant was supposed to make an ASAP report, the purpose of which was to identify all the federal aviation regulations that were broken, along with any irregularities that occurred during the flight. (Tr. 64-65). By filing the ASAP report, the Complainant would not be personally subject to any fines or penalties. (Tr. 65). Complainant testified she completed the ASAP report online, but no one ever spoke to her about it or questioned her about the events she reported. (Tr. 64-65).

On August 5, 2008, while in flight, Complainant was told by the pilot that she needed to report to the administrative offices in Salt Lake City. (Tr. 66-67). The flight she was on landed at 4:19 p.m. As is customary, Complainant waited for the "bags to appear," let the passengers off, cleaned the plane, crossed the seat belts, picked up the trash, picked up her own bags, and got off the plane. She testified the whole process took ten to fifteen minutes. Complainant then made her way to the administrative offices as requested, which took an additional five minutes. (Tr. 67).

Complainant reported to Kristy Johnson's office, who is the in-flight supervisor. (Tr. 67-68). Complainant testified she was told to go to the administrative offices, but not to a specific person. (Tr. 68).

Ms. Johnson escorted Complainant to Holly Larsen, the administrative assistant, and then went back to her office. (Tr. 68-69). Complainant was then told that she was scheduled for a random drug test. (Tr. 69). This was only Complainant's second random drug test, and the first that she was instructed to take outside the airport. Complainant was presented a sheet of paper which contained three testing locations. Holly Larsen told her that generally employees go to the facility closest to their homes. At that direction, Complainant picked a facility and was given the custody and control form and paperwork to bring back with her on her next duty day. (Tr. 69).

Complainant testified she knew she was to report without delay to the facility, but was not aware of its closing time. She stated she was not told that any of the locations remained open later than others. She further stated she was not told what to do if she experienced problems upon arriving at the chosen location or completing the random drug test. (Tr. 70).

Complainant stated she proceeded to the testing location she chose without delay. Her car was not at the airport, so she had to call her daughter to pick her up. Complainant's cell phone's battery had died, so she went to the crew room where her bags were stored, laid the paperwork by her bags, and called her daughter after plugging in her cell phone at 4:40 p.m. (Tr. 71). She informed her daughter that she had to report for drug testing without delay. Her daughter responded that she was on her way, but she was going to be driving there in "the top of the traffic hour," so it may take a few minutes longer than usual. Complainant hung up the phone and left it to charge while she went to speak with Kristy Johnson regarding Ms. Larsen's falling asleep during the flight on July 3 or 4, 2008. (Tr. 71-73). Instead of having the actual conversation, Complainant made an appointment to speak with Ms. Johnson at the end of August regarding the incident. (Tr. 72). Complainant later stated she left the drug testing paperwork in the crew room, and it was brought out to her in Ms. Johnson's office by Holly Larsen. (Tr. 290).

Complainant left Ms. Johnson's office at 4:45 p.m. She thereafter turned in her liquor paperwork, grabbed her bags, and walked out to passenger pickup while calling her daughter to determine her location. Within a minute, Complainant's daughter pulled up. Complainant put her bags in the car and drove directly to the testing facility. (Tr. 73). The facility was approximately 8.3 miles from the airport, and it took 23 minutes to get there. Complainant arrived at the facility at 5:23 p.m., but the facility had closed at 5:00 p.m. (Tr. 74).

Complainant reviewed the paperwork, which indicated that there was another facility that was open until 5:30 p.m., but it would take her an additional twenty minutes to get there. The third facility listed was the same company at which Complainant had already arrived, so she assumed it closed at 5:00 p.m. as well. (Tr. 74).

Complainant called the "1-800" number for crew support to let them know she would have to reschedule the drug test because the facility was closed, but was placed on hold for three minutes and her phone died. She called the "1-800" again and was placed on hold for one minute when her phone again died. (Tr. 75-76). Complainant decided she would report to the facility at 7:00 a.m. the following morning for the drug test.

She did not call Holly Larsen or Kristy Johnson because her phone was dead and she recalls her daughter's telephone may have not been charged. She did not have a telephone to use; Respondent does not require crew members to carry cell phones. (Tr. 76).

On August 6, 2008, on her way to take the test at 7:00 a.m., Complainant called Holly Larsen and informed her of what had transpired the previous evening. (Tr. 76-77). Complainant stated to Holly Larsen that she did all she thought she could do. Complainant thereafter spoke with Kristy Johnson regarding the incident. Complainant stated she was not given enough time to arrive at the testing facility. Ms. Johnson asked Complainant "why didn't [she] call somebody when [she] got to the facility and realized it was closed." (Tr. 77). Kristy Johnson thereafter stated Holly Larsen informed her that Complainant was given notice the test was required at 4:20 p.m., giving her plenty of time. Ms. Johnson added, "You realize on the paper that it says that you must report without delay to the testing facility or you may be terminated." (Tr. 78). Complainant was not told to do anything further, and Ms. Johnson stated she would have to talk to the manager of drug testing and she would get back with her. (Tr. 78-79).

Complainant had four scheduled days off and had plans to go out of town to Twin Falls with friends. The trip had been planned for months. She delayed her trip six hours, and after being told that Ms. Johnson would take one to three days to get back with her, Complainant kept her plans. (Tr. 79). While en route to Twin Falls, Ms. Johnson called Complainant and stated, "First, you don't show up for your drug test, then you don't call anybody, and now you're leaving town. Do you know how suspicious that looks?" (Tr. 80). Complainant called her Skywest In-Flight Association (SIA) representative, Ruth Lawrence, who advised her to let Ms. Johnson know she could submit to the test in Twin Falls, and was otherwise available to test anytime. (Tr. 80). However, Ms. Lawrence attested in an affidavit that she felt Respondent was correct in its decision because there was a testing facility open until 7:00 p.m. (Tr. 81).

Later that evening, Kelly Storm-Bowles called Complainant and informed her she needed to be in the office the following day for a meeting. Complainant caught the 6:30 a.m. flight from Twin Falls the following day and arrived in Salt Lake City at approximately 8:00 a.m. Ms. Bowles had not yet arrived at the office. (Tr. 82).

When Ms. Bowles finally arrived, Ms. Johnson called Complainant into the office and asked Complainant, "Do you have anything else to say for yourself?" Complainant responded that she should have persevered and called someone when the facility was closed. Complainant was then informed "under the circumstances, we decided to terminate you," and she was informed of the appeals process. Complainant elected to appeal at that time. She testified Ms. Johnson stated to her, "You can file the appeal, but there's never been a case like this that's ever been overturned." (Tr. 83). The appeal was ultimately denied. Complainant thereafter filed complaints with OSHA, the Office of the Inspector General, and the FAA. (Tr. 84).

Complainant testified that the violations and irregularities she observed on July 3 and 4, 2008, were never mentioned in any discussions after she was ordered to take the random drug test. (Tr. 84). She does not understand why she was terminated, but recalls that the sleeping flight attendant, the administrative assistant, and the person who usually performs the drug testing at the airport all share the same last name (Larsen). (Tr. 84-85).

Complainant testified she thinks there were instances where pilots and rampers failed drug tests and were not terminated, but never flight attendants. (Tr. 85).

On cross-examination, Complainant agreed that the crew member policy manual requires crew members to report any federal aviation regulation violations directly to the Chief or Director of Operations. (Tr. 88). Complainant stated that she did not know whether she had an obligation to immediately report Raeshelle Larsen, and did not immediately report her because Raeshelle Larsen apologized and said she would not do it again. (Tr. 89-90). "I know at the end of the trip, I would report anything that I felt went wrong or was wrong with the trip. But the trip didn't last long enough for me to do that. I called Chris Merrill to report." (Tr. 90).

Complainant testified that Raeshelle Larsen's sleeping on the job is a violation of company policy, but does not know for certain if it is a Federal Aviation Regulation (FAR) violation. (Tr. 93). She stated she would assume it was a FAR violation, however. (Tr. 93-94).

Complainant testified that a "principle safety inspector" from the FAA who was there to inspect the pilots informed her that the regulation requiring all carry-on items to be properly stowed before the main cabin door closes is the violation most flight attendants do not usually know. She could not point to a specific FAR, however. (Tr. 95).

Complainant agreed that the Captain's getting up and redoing the passenger count was neither a FAR violation nor unsafe, but was a mocking of her job. She agreed that mocking her job was not a FAR violation. (Tr. 98). She also agreed that the crew talking behind her back and giggling is not a FAR violation. (Tr. 99).

Complainant stated she believed the contents of her ASAP report were discussed with management because Chris Merrill told her to file all the necessary paperwork, which she did. (Tr. 102). She stated it would surprise her if the Chief Pilot or members of Respondent's management did not see the ASAP report. The same complaints were also made to the Manager on Duty, Chris Merrill. (Tr. 103). She further stated that nobody ever discussed with her the complaints in her ASAP report, and she had no interaction with anyone about her complaints. (Tr. 104-105).

Complainant testified she did not know what happened after she reported Raeshelle Larsen and did not see her until approximately six weeks prior to the hearing. (Tr. 107). She did not dispute that Raeshelle Larsen was likely disciplined by Respondent for falling asleep on the flight. (Tr. 108).

Complainant testified that she arrived at the gate at 4:10 p.m. on August 5, 2008. (Tr. 108). She agreed that the flight was nearly full with forty-seven passengers. (Tr. 109). She could not recall exactly how long it took for the passengers to get off the airplane, but stated that the standard time is approximately ten to fifteen minutes if there is no wheelchair on the flight. (Tr. 109-112). The time it takes to accomplish her end-flight duties depends on how long it takes the passengers to get off and how much trash there is to pick up. She testified that she has never cleared the plane and cleaned the cabin in five minutes. (Tr. 111).

Complainant testified that prior to her landing, she received a message from her Captain that she had to report to the administrative offices. She did not agree that the Captain told her she had a mandatory meeting with the in-flight administration. (Tr. 112). She testified she did not know to

whom she was supposed to report, and that she never goes directly to Holly Larsen for anything, unless she is specifically called in about liquor paperwork. (Tr. 113).

Complainant testified she saw Kristy Johnson approximately ten to fifteen minutes after she got off the plane, which was about "4:30-something." (Tr. 113-114). She told Ms. Johnson she had to report to the administrative offices and Ms. Johnson got up and escorted her to Holly Larsen, who gave Complainant the paperwork and instructions for the random drug test. (Tr. 114).

Complainant further testified she was instructed to report without delay and she, in fact, reported without delay to the testing facility as she had been trained to do. (Tr. 115). She stated that calling her daughter to pick her up took the same amount of time as it would have taken for her to get to the parking lot to her own car, had it been there (20 minutes). She agreed that the company policy was that transportation to the testing facility will be provided for you "if you're out of domicile." (Tr. 116). She stated, however, that it never occurred to her to get a taxi because she believed that waiting for a ride was acceptable. She had never taken a random drug test outside the airport. (Tr. 117).

Complainant stated she was notified at 4:40 p.m. to take the drug test, and not at 4:30. (Tr. 119-120). When reviewing her telephone records from August 5, 2008, Complainant agreed that there were no phone calls between 12:00 and 4:00 because she was flying and her phone was dead.³ She stated that she believes it appears on her bill if she gets phone calls while her phone is dead. (Tr. 120). She agreed that she called her daughter at 4:40 p.m, but stated she called her within the same minute she was given the drug testing paperwork. (Tr. 121). She further stated that she called her daughter again at 4:52 p.m., then again at 4:59 p.m. to determine her location. While on the last call with her daughter, her daughter pulled up to pick her up. (Tr. 122).

Complainant testified that her next call was at 5:23 p.m., to Crew Support. (Tr. 123). She called Crew Support to notify them she had been sent to a closed facility, and the test would have to be rescheduled. (Tr. 124). She stated she was not aware

³ See RX-23.

that there were 24-hour testing facilities at the time and had never been tested on Saturday or Sunday. (Tr. 125). She testified she always knew that testing was available at the airport, but did not know drug tests were sometimes administered off-site. (Tr. 126).

Complainant testified she had not been trained to call any of the testing facilities to find out if they were closed. (Tr. 126).

Complainant further testified that her phone died while waiting on hold for Respondent. She did not have a phone charger in her car, but did have one in her bags; however, she did not have a wall to plug in the charger. (Tr. 127-128). She did not remember why she did not use her daughter's phone, but thought it was dead as well. (Tr. 128).

When questioned regarding an incoming call at 5:29 p.m., Complainant maintained that her phone was dead. She explained she was not exactly sure how Verizon works. (Tr. 130). She admitted to calling back the incoming caller at 6:50, after her phone was charged. (Tr. 130-131).

Complainant testified that she did not call Respondent after her phone was charged because she had not been trained to do so. "I had assessed that all the facilities were closed, there was nowhere else I could go that night, there was nothing else that could be done. I was not trained to call another facility. I was given the designated facility to test at. That designated facility was not available for me to test at." (Tr. 131). She denied going home and foregoing her attempts to call Respondent because of tiredness. (Tr. 133). She admitted she called neither Kristy Johnson nor Holly Larsen. (Tr. 135).

Complainant stated she once called the Manager on Duty because she ran out of peanuts on the plane, but only because she mistakenly pressed the wrong buttons. (Tr. 135-136).

Complainant testified she did not know whose decision it was to terminate her employment, and that she reported without delay to the designated testing facility. (Tr. 136). She further testified she did not know why her employment was terminated. "It is apparent that I was fired for some reason, but not reporting without delay to the drug testing facility. The only other instance or problem that I had was with Raeshelle Larsen. Now, Holly Larsen is the one that ultimately gave information which everybody accepted as truth that got me fired.

That information was incorrect." She does not know whether Holly and Raeshelle Larsen are related. (Tr. 137).

Complainant admitted that she untimely signed a verbal warning for liquor discrepancies. However, she explained that she "was out of base a lot, working a lot, and I didn't have a chance to get in base to sign that." (Tr. 139-140).⁴

Complainant did not definitively remember being issued a non-working scheduled assigned deviation (SAD) on May 7, 2008. (Tr. 140).⁵ She agreed that she signed it, but did not recall why it was received. She agreed that SADs may be received for being late, not working an assigned flight, or a number of other things a flight attendant may be scheduled to do. (Tr. 141). She stated that she did not admit to guilt, but only signed it in acknowledgement of receipt of the form. (Tr. 142).

Complainant agreed she received discipline in March 2007 for allowing another flight attendant through a secured access door without the other attendant using her security badge. (Tr. 142).⁶ She reasoned that she thought she was only helping out. "[S]he worked with me, she was on the flight, and she wanted to turn her paper liquor (sic) work in, and we were on the B Concourse accessible to that facility, that I was just helping her turn it in. I didn't see her as a threat." (Tr. 143).

Complainant admitted to signing a verbal warning for five occurrences of not completing her schedule as assigned and receiving SADs. (Tr. 144).⁷ Complainant could not recall what the occurrences were. She admitted she has probably been late to work. She recalled she once left her badge at home. She admitted to calling Crew Support ten minutes after her show time to report she did not have the badge and went home to get it, but would not be back in time for an on-time departure.⁸ Another flight attendant from ready reserve took her place. (Tr. 146).

⁴ See RX-1.

⁵ See RX-2.

⁶ See RX-3.

⁷ See RX-5.

⁸ See RX-8.

Complainant admitted to having made past errors on her liquor paperwork but could not "for sure say that money wasn't there. That money touches so many different hands, and I can't say that I didn't put it in there. I was told I didn't put it in there. But that doesn't mean that necessarily happened." (Tr. 148).

Complainant agreed that she is required to report without delay to take random drug tests, and that the failure to do so may result in termination. (Tr. 153-154). She understood that it is Respondent's policy to terminate all employees deemed to have refused to comply with its testing program. (Tr. 156). Complainant stated she was only aware of pilots and rampers being reinstated, but not flight attendants, after non-compliance or failed drug tests through Angie Panos's statement. (Tr. 156). She testified she does not know of anyone who has not reported without delay to a drug testing facility, and that she does not know of another employee that shared her circumstantial facts. (Tr. 157-158).

Complainant would not admit that she failed in her employment, but agreed that the next time she would have persevered and called to inform someone she had missed her drug test because Respondent expected her to do so. (Tr. 159).

Complainant testified she could not have called any of the other testing facilities because her phone was dead. (Tr. 161-162). She agreed that Respondent's position was that she failed to report without delay to her drug test. (Tr. 162).⁹

With regard to Ruth Lawrence, Complainant testified that she understood that under the Railway and Labor Act, a flight attendant's labor representative can be an in-house association instead of a union. (Tr. 163). She testified she spoke with Ms. Lawrence and the Vice-President of SIA about the circumstances surrounding her drug test. (Tr. 164-165). She stated she spoke with Ms. Lawrence several times thereafter, but did not know with whom Ms. Lawrence had spoken. Complainant did not know Ms. Lawrence was not a flight attendant. (Tr. 165). She testified she understood that Ms. Lawrence's position was that she could not help Complainant based on the information that she was

⁹ See RX-27.

given. Ms. Lawrence had been informed by Chris Merrill that Complainant had three facilities to choose from, one of which was open until 7:00 p.m., and that she did not inform the company that she missed her testing appointment until the following day. (Tr. 166-167).

When presented with her statement to the State Unemployment investigator, Complainant agreed that it stated she got off the plane at 4:20 p.m. and was able to leave the airport by 4:40 p.m..¹⁰ (Tr. 168-169). Complainant explained the discrepancy. "Well, this is how [the investigator] interpreted what I said, and . . . when this came to trial, I disputed what his interpretation of those events were, because, clearly, that's wrong." (Tr. 169).

Katie Todd Collard

Ms. Collard testified at the formal hearing. She is Complainant's daughter. Ms. Collard agreed that Complainant called her for a ride on August 5, 2008. She testified Complainant informed her that she was selected for a random drug test and she needed to pick Complainant up as soon as possible. Ms. Collard testified she left immediately. She stated that Complainant called her two or three times thereafter to determine where she was. Ms. Collard testified she told Complainant she was taking a while because there was traffic. She also told Complainant that her phone was dying. (Tr. 173). She testified that the last time Complainant called her, Complainant was out by passenger pick-up and they were on the phone so that they could find each other. (Tr. 173-174).

Ms. Collard testified that she and Complainant made no stops on the way to the testing facility. She further testified that when they got to the testing facility, Complainant went in, came back out, and told Ms. Collard the facility was closed. She and Complainant looked on the paperwork, and the facility that had times listed on it was already closed at that time. Ms. Collard testified her phone was dead. (Tr. 174). She further testified that she saw Complainant making phone calls and knew it was because the facility was closed. (Tr. 174-175).

¹⁰ See RX-32.

On cross-examination, Ms. Collard testified she saw Complainant enter the building and leave her view. She stated Complainant was gone "a couple of minutes maybe, maybe less." (Tr. 175). She further stated she did not recall exactly what time Complainant called Respondent. (Tr. 176).

On examination by the undersigned, Ms. Collard testified she and Complainant looked over the paperwork with the times listed and "didn't think to call anybody else to see if they were open, because, I mean, any store you go into, if they have posted times, it says they're closed, they're closed." (Tr. 177). She did, however, recall the paperwork listing a facility open until 5:30 p.m. (Tr. 177). She thought it might be the Sandy location (Sandy, Utah), but was not certain. She testified she believes she and Complainant had a conversation about trying to get to the Sandy location before it closed, but stated, "I know that we wouldn't have been able to make it to Sandy. I mean, we were closer downtown Salt Lake." She did not know whether the Redwood location was closer because she did not know the address. (Tr. 178).

Ms. Collard stated her cell phone battery was dead and that she does not charge it often when she's at home. She stated that Complainant's phone was also dead, but that she made some calls before it died. (Tr. 177, 179). Ms. Collard went home after Complainant's phone died and she does not know what transpired thereafter. (Tr. 179).

Christine Merrill

Christine Merrill testified at the formal hearing via telephone. She has been employed with Respondent for sixteen years, and has been Director of In-Flight Operations and Training for Respondent for nine years. (Tr. 181). Her job entails overseeing close to 2,000 flight attendants and ensuring that all policies and procedures are followed. (Tr. 181-182).

Ms. Merrill testified that a Manager on Duty (MOD) has a cell phone that may ring at any time for questions or needs from flight attendants. (Tr. 182). She further testified that she is not always MOD because the position rotates. (Tr. 183) She stated she did not know Complainant personally, but had previously spoken with her. (Tr. 182).

Ms. Merrill stated she was MOD from July 3-8, 2008. She further stated that on July 4, 2008, she received two calls from Complainant, approximately ten to fifteen minutes apart from one another. (Tr. 183-184). Complainant reported to Ms. Merrill that one of the flight attendants on the flight appeared to be sleeping while on duty. (Tr. 184). Ms. Merrill testified she documented the information and told Complainant she would follow up with her Chief Flight Attendant during the next available office hours, and that she could call again if there were further problems. (Tr. 184).

Ms. Merrill testified she forwarded her MOD report to the Chief Flight Attendants in Salt Lake City, and was not at all upset that Complainant made the report against Raeshelle Larsen. (Tr. 186). In fact, she testified she was happy Complainant brought the information forward because it did not appear that Raeshelle Larsen was fit for duty. (Tr. 186-187). She further testified although it was uncommon that a flight attendant would be reported for sleeping, she has received reports from time to time from passengers or other flight attendants. Sleeping or giving the appearance of sleeping while on duty is grounds for discipline. (Tr. 187).

Complainant filled out an Irregular Operations Report (IOR) and an ASAP report. (Tr. 186). Ms. Merrill testified that ASAP reports go only to a committee for review, and are not submitted to Respondent's management. Therefore, if Complainant completed an ASAP report, neither Ms. Merrill nor the Chief Flight Attendant in Salt Lake City would have seen it. (Tr. 188). The MOD report, however, would have been sent to either Complainant's Chief Flight Attendant or the Regional Chief Flight Attendant (Laralee Anderson). "All the Chief Flight Attendants get a copy of that, and -- and they are expected to follow up on the information with the appropriate flight attendant." (Tr. 189).

Ms. Merrill testified she was informed Complainant had been notified of a drug test and that she subsequently left a long time after she had been notified to take the test. She did not know Complainant did not actually take the test until the following day. (Tr. 189). She further testified, "failure to report to a drug collection site would -- would designate to the company that it's a refusal, and it's automatic termination." Ms. Merrill stated that although she did not actually weigh in on the decision to terminate Complainant, it is Respondent's standard company policy to terminate employees for refusal to submit to random drug testing. (Tr. 190). She further stated that Chief Flight Attendants do not have any discretion not to

terminate Complainant after learning she failed to appear for her drug test unless a mistake had been made. "[I]f we are notified of a flight attendant not reporting to the drug collection site, it's immediate dismissal." (Tr. 190).

Ms. Merrill testified that it did not change her view one way or another that Complainant had reported Raeshelle Larson was sleeping on the job. She stated, "I wouldn't have given that a second thought." She further testified that even if Complainant were her favorite flight attendant, there is nothing she could have done to help her after she failed to appear for her drug test. Ms. Merrill was not aware of any flight attendant who was not terminated for failing to take a drug test. (Tr. 191).

Ms. Merrill testified she received a call from Ruth Lawrence and Jenny Nicolay, the Vice-President of SIA. (Tr. 191). She stated Ms. Lawrence questioned whether Complainant had been given adequate time to take the test, to which Ms. Merrill responded in the affirmative. She told Ms. Lawrence that there was more than one address for the drug collection site offered. She added that neither Ms. Lawrence nor Ms. Nicolay were "pushovers." (Tr. 192). Ms. Merrill did not hear back from Ms. Lawrence after their conversation, and Ms. Lawrence did not continue to advocate for Complainant thereafter. Ms. Merrill stated she believed Ms. Lawrence agreed with the termination. (Tr. 193).

Ms. Merrill testified she has taken three drug tests as a qualified flight attendant. She stated that the policy is to report without delay, which means immediately. She further testified that if on break, flight attendants are paid a per diem to take the test and if called before or after duty, they are paid \$20.00. (Tr. 194).

Ms. Merrill stated that often times Respondent will call a cab company if requested. (Tr. 194). She stated further that the collection sites are often located on the property, but transportation will be provided if not. (Tr. 194-195).

Ms. Merrill testified that all flight attendants are trained to report to the testing facility without delay per company policy, and it is in the Crew Member Policy Manual. (Tr. 195).

On cross-examination, Ms. Merrill clarified that a mistake that may lead to reinstatement of the employee may be notifying the wrong employee or a false positive test. (Tr. 196-197).

Ms. Merrill testified that "report without delay" means once an employee is notified, they are to take the paper to the collection site and immediately produce a sample. "[I]f you had to leave the premise, then you would get into your car or a means of transportation and go to the drug collection site immediately. We can't wait for hours or days. It has to be right away." (Tr. 198).

On examination by the undersigned, Ms. Merrill testified that "IOR" means Irregular Operations Report. She also testified that sleeping on the job is a violation of a FAR, but does not recall which one. (Tr. 199). She agreed that someone sleeping on the job could affect the safety of the flight. (Tr. 199-200). She did not know whether the FAR that prohibits sleeping on the job was intended as a safety measure. (Tr. 200).

Ms. Merrill further testified that an employee in domicile is expected to have his or her own transportation, and transportation is not provided unless requested by the employee. She added, "We would never turn somebody down providing documentation if that was communicated to us that they did not have means to get to a drug collection site" even if they were in their own domicile. (Tr. 201).

Kelly Storm-Bowles

Ms. Bowles testified at the formal hearing. She is the SIA Secretary for Respondent, and her job is to act as an intermediary between flight attendants and management. (Tr. 203). She stated she believed Ruth Lawrence was a vigorous advocate for flight attendants, and is not intimidated by management. (Tr. 204).

Ms. Bowles stated she was Chief Flight Attendant in Salt Lake City in July 2008, and had been chief for approximately six months at that time. (Tr. 204). Thereafter, she "flew the line" for nine months before going to work as SIA Secretary. (Tr. 204-205). Ms. Bowles testified that when she was the Chief Flight Attendant, she received a MOD Report from Chris Merrill and an IOR from Complainant about Raeshelle Larsen sleeping on the job. (Tr. 205). She thereafter interviewed Raeshelle Larsen, who "categorically denied every accusation that was made." Other accusations included her being difficult to get along with, causing problems with the crew and conspiring with the flight

deck crew against Complainant. (Tr. 206). Ms. Bowles ultimately believed Complainant because Raeshelle Larsen's "story was a little bit sketchy," and there were inconsistencies. "At one point, she became a little confused and said, 'Well, maybe.'" (Tr. 208).

Ms. Bowles authenticated a Letter of Instruction she issued to Raeshelle Larsen for appearing to be sleeping while on duty and in flight.¹¹ A Letter of Instruction is the second level of discipline, followed by a counseling statement, and then, termination. (Tr. 207). Ms. Bowles testified that she was neither embarrassed nor disturbed that Raeshelle Larsen's sleeping was brought to her attention. She stated that while not an everyday occurrence, "it's not unheard of." (Tr. 209). Complainant was not disciplined, was not given a bad schedule, given a pay cut or given time off as a result of making the report. Ms. Bowles agreed that it was Respondent's policy to require all employees to report any FAR violations. (Tr. 210).

Ms. Bowles testified she was informed by Kristy Johnson that Complainant failed to take a drug test. She stated that after hearing Complainant testify, "[h]er timeline had quite a few inconsistencies that didn't sound quite right." (Tr. 211). Specifically, Ms. Bowles noted Complainant's spending time in the crew lounge after notification, leaving her paperwork in the crew lounge, and that Holly Larsen "had to go find her and remind her that she had a drug test that she needed to go to." (Tr. 211-212).

Ms. Bowles testified company policy dictates that a "no-show for a drug test is automatic failure." She further testified that after listening to Complainant's explanation of the events, she heard [n]othing that changed [her] mind as to what the policy states." She stated Complainant did not tell her about any efforts to call the company other than her phone was dead, and that she had spoken with Holly Larsen the following day at approximately 9:00 a.m. (Tr. 212). She further stated she had no discretion in deciding whether to terminate Complainant. "My hands were tied at that point." (Tr. 213).

Ms. Bowles testified that Respondent's policy is to report to the testing facility without delay upon notification to take a drug test. Respondent's employees are paid to take the tests, and taking them is a job duty they are required to perform. Ms. Bowles further testified that it is unacceptable to wait twenty minutes before leaving for a drug test, and is tantamount to a

¹¹ See RX-28.

refusal to test. (Tr. 213). She stated it has always been her understanding that transportation is provided by Respondent for employees who do not have a way to immediately get to a testing facility. (Tr. 213-214). She has been personally tested and has always reported without delay. (Tr. 214).

Ms. Bowles stated that, to her knowledge, no employees who have refused to take a drug test have remained employed by Respondent. (Tr. 214).

Ms. Bowles further stated that all flight attendants, including Complainant, have been trained on the drug policy. Complainant was specifically trained to call her manager during regular business hours and her Manager on Duty after hours. Complainant should have done so upon arriving at the facility after it had closed. (Tr. 214).

On cross-examination, Ms. Bowles testified that an IOR must be written as soon as possible. If the incident is not major, it can be written at the end of the trip. (Tr. 215). However, Ms. Bowles agreed that an IOR must be reported within twenty-four hours.¹² She also agreed that it is the flight attendant's own judgment that determines whether an occurrence is reportable. (Tr. 217).¹³ Ms. Bowles agreed, "[i]f a flight attendant has seen nothing wrong, or has done nothing wrong, there would be no reason to call the MOD." (Tr. 217-218).

Ms. Bowles agreed that asking someone for a ride to the designated testing facility is a form of transportation. (Tr. 218-219).

Upon examination by the undersigned, Ms. Bowles testified that as Secretary of the SIA, she both acts as an official of the SIA and is concerned with clerical functions. She stated she has been associated with the SIA since May 2009. (Tr. 220).

Ms. Bowles testified that she was on vacation or out of town when Complainant was ordered to take the drug test, but discovered she failed to take the test the following day. (Tr. 220). Ms. Bowles and Kristy Johnson made the decision to terminate Complainant's employment, but had no discretion because company policy was "very clear." (Tr. 221).

¹² See CX-27.

¹³ Id.

On re-direct examination, Ms. Bowles testified that under company policy, it was Complainant's responsibility to call the Manager on Duty when she was unable to take her drug test. (Tr. 226). She stated the crew member policy manual dictates if any question arises that is not covered by any manuals or bulletins, the crew member is required to communicate with the Chief Pilot, Assistant Chief Pilot, Chief Flight Attendant or Assistant Flight Attendant. (Tr. 224-225). She further testified that although the policy manual had been revised, the foregoing statement had not changed in any way since she has been employed with Respondent, and it was in place when she was Complainant's Chief Flight Attendant. (Tr. 230-231).

Holly Larsen

Ms. Larsen testified at the formal hearing. She is the Administrative Assistant in the In-Flight Department for Respondent, and has been so for two and one-half years. (Tr. 212). She testified her responsibilities include assisting flight attendants and pilots, and notifying employees of random drug and alcohol tests. (Tr. 233). Prior to that employment, she was employed by Respondent in both the Customer Service and Operations departments. (Tr. 212). Ms. Larsen testified that she has been subjected to drug testing as an employee for Respondent in all three capacities. (Tr. 232-233).

Ms. Larsen testified she notified Complainant of her drug test on August 5, 2008. On that date, Ms. Larsen received an e-mail from Respondent's Safety Department in St. George, Utah, with a list of who was to be tested that day. (Tr. 233). She testified she receives from two to five of those types of lists per day, and that Complainant was not the only employee selected for a drug test on August 5, 2008. She stated that all other employees who were notified of their drug test actually took it. (Tr. 234).

Ms. Larsen further testified that as soon as she receives notification, she completes a notification form and the Operations Agent communicates "Mandatory non-emergency. Must see admin" on the radio when the pilot is ten minutes from landing. (Tr. 234-235). The pilot then repeats the message to the flight attendant. (Tr. 235). Ms. Larsen testified pilots generally repeat the message verbatim and would be surprised to learn that a pilot did not correctly repeat a mandatory message to a flight attendant. (Tr. 236).

Ms. Larsen stated that upon notification, the flight attendants must report to her, she gives them the testing notification form, and they are verbally notified they have been randomly selected for a drug or alcohol test. (Tr. 236).

Ms. Larsen testified that on August 5, 2008, Complainant's plane arrived into Gate 9 at 4:19 p.m. She further testified that Gate 9 is two gates from the entrance and quite close to her office. She stated Complainant reported to her office between 4:25 and 4:30 p.m. (Tr. 237). Ms. Larsen testified Complainant told her she had first seen Kristy Johnson. She then testified she told Complainant she was selected for a random drug test and had to go to an off-site location because the person who usually performs the testing on-site was off. Complainant selected an off-site facility and was told to go there immediately. (Tr. 238).

Ms. Larsen stated that ten minutes after notifying Complainant she had to leave immediately, she found Complainant's notification form in the employee lounge. Ms. Larsen picked up the form and brought it to Kristy Johnson. (Tr. 239).¹⁴ Ms. Larsen stated Kristy Johnson then told Complainant she needed to go right away to take the test. To Ms. Larsen's knowledge, Complainant heeded her instructions and left. (Tr. 240).

Ms. Larsen testified she sent an e-mail to Rise Baush, the assistant in the Drug and Alcohol Program, at 4:41 p.m., notifying her that all of the selectees had been notified of their selection for random drug testing. Ms. Larsen stated she stayed at work until 5:58 p.m. that day, and never received any indication that Complainant had difficulty taking her drug test. (Tr. 241). Her phone did not ring and she received no messages. (Tr. 241-242). She further stated that the consequence for failing to report for a drug test without delay was termination of employment. (Tr. 242).

Ms. Larsen stated that as an administrator, she has called cabs and arranged rides for employees to report for drug testing, and that while not "super common," it's "not unheard of." (Tr. 242-243).

¹⁴ Complainant was apparently in Ms. Johnson's office at that time.

Ms. Larsen further stated that when she gave Complainant her paperwork, Complainant said nothing about not having a vehicle or a working cell phone. She testified if Complainant had informed her that she could not be at the testing site for thirty minutes, she would have arranged for Complainant to go to a different clinic. (Tr. 243).

Ms. Larsen testified that she has notified hundreds of employees of their drug tests. She has never witnessed one employee keeping his or her job after failure to report for a drug test. (Tr. 244). She additionally stated that other employees who have had difficulty with reporting for drug tests were terminated. (Tr. 244-245).

On cross-examination, Ms. Larsen testified that although Complainant was given the information to report for drug testing at 4:25 or 4:30 p.m., the official paperwork indicated she was informed at 4:20 p.m. (Tr. 246-247).¹⁵

Ms. Larsen also admitted that the way the company policy is written, it implies that employees are only entitled to transportation if outside of domicile. However, she stated, "we definitely make exceptions." (Tr. 248). She admitted an employee could take a bus, Amtrak, TRAX or the subway to the facility, so long as the employee could report immediately for testing. (Tr. 249).

Upon examination by the undersigned, Ms. Larsen testified she is not related to Raeshelle Larsen and does not know her other than as a flight attendant. She further testified that she is not related to the Larsen at the drug testing facility. (Tr. 257).

Kristy Johnson

Kristy Johnson testified at the formal hearing. She is the Salt Lake City Chief Flight Attendant and has been so employed since May 2008. Her job duties include overseeing the day-to-day operations of the flight attendants, including discipline, termination, and recognition. She oversees approximately 700 flight attendants. Her immediate supervisor is Laralee Anderson, the Regional Chief Flight Attendant. (Tr. 259).

¹⁵ See CX-2, p. 1; CX-39, p. 203.

Immediately above Ms. Anderson in supervision is Christine Merrill. (Tr. 259-260). Ms. Johnson testified that Ms. Bowles was a chief with her in 2008, and that they had equal power and responsibilities. (Tr. 260).

Ms. Johnson testified she is currently qualified as a flight attendant and still flies every so often. (Tr. 260). She further testified she has flown on the 50-seat Canadair Regional Jet, and has years of experience in de-planing, cleaning, and re-boarding the plane. (Tr. 260-261). Ms. Johnson stated that the longest time allowed to de-plane and re-board the plane is twenty-four minutes. She further stated it generally takes approximately ten minutes to de-plane forty-seven passengers. (Tr. 261).

Ms. Johnson testified Complainant was one of the flight attendants she oversaw in Salt Lake City. (Tr. 263). She further testified that on August 5, 2008, Complainant "popped her head in the office, said that she had been told she needed to come to the office." (Tr. 263). After Ms. Johnson told Complainant she did not have a meeting scheduled, she directed her to speak with Holly Larsen. (Tr. 263-264). In an effort to assist her in finding Ms. Larsen, Ms. Johnson got out of her chair, walked to the door and pointed Complainant around the corner. (Tr. 264).

Ms. Johnson testified that ten minutes later, Complainant came into her office and stated she had received an e-mail from Ms. Bowles regarding the IOR Complainant filed. Because Ms. Bowles was out of the office, Ms. Johnson attempted to reschedule the meeting between Ms. Bowles and Complainant. While looking at the calendar, Ms. Larsen walked in with Complainant's drug testing paperwork and stated, "These are hers." Once Ms. Johnson saw it was drug testing paperwork, she told Complainant, "You need to go do this now." She testified Complainant then got up and walked out of her office. (Tr. 264). Ms. Johnson stated the IOR had nothing to do with Raeshelle Larsen, as that file had been closed a month before. The IOR was a new issue. (Tr. 265).

Ms. Johnson stated Complainant walked out of her office at 4:41 p.m. (Tr. 266). She testified, "When she originally popped her head in, I didn't know it was for a drug test. So when she came back, I still didn't know she'd been notified until I saw the paperwork." Ms. Johnson added she was "very surprised to see that [Complainant] hadn't left if she had been notified." (Tr. 266).

Ms. Johnson testified Complainant is not required to report to her when she is notified to take a drug test. (Tr. 266). She further testified she stayed in the office until just after 6:30 p.m., and Complainant did not call her when she arrived at the closed testing facility. She added that Complainant had previously called her with smaller problems than a missed drug test. (Tr. 267).

Ms. Johnson stated she was informed by Holly Larsen on the morning of August 6, 2008, that Complainant did not take her drug test. She further stated that it amounted to a refusal as per company policy. (Tr. 268). Thereafter, Ms. Johnson had a conference call with Francine Cox, the manager of the Drug and Alcohol Safety Department, and Kelly Healy, the Employee Relations Manager. They did not discuss Complainant's previous safety report against Raeshelle Larsen the previous month. (Tr. 269). Ms. Johnson testified she was not involved in the complaint against Raeshelle Larsen other than receiving a copy of the MOD report, "as all Chiefs do." She added that she was not troubled by Complainant's reporting Raeshelle Larsen for sleeping and, to the contrary, encourages such reporting. (Tr. 270).

Ms. Johnson testified that waiting twenty minutes to report for drug testing is too long. (Tr. 271). She further testified that when conflicts between renewing security credentials and taking a drug test without delay arise, testing comes first. She stated that, to her knowledge, no one who has refused a drug test has kept his or her job, and some of the flight attendants she oversees have been terminated for a positive drug test. She testified that Georgia Royale, another employee, did not take a drug test because she had taken her roommate's diet pills. Ms. Royale was terminated. (Tr. 274). She further testified to having terminated an employee for failing a drug test after a co-worker reported her using marijuana. The other employee was not disciplined, and, to the contrary, was thanked for her report. (Tr. 275).

Ms. Johnson testified Complainant should have called someone when she missed her drug test. "She had several options. I was still in the office, Holly was still in the office, there's the MOD, Crew Support can put her through to any manager So with her not notifying anybody, not telling anyone anything, we have no way of knowing that she actually went to the drug site collection (sic). So it was deemed a refusal." (Tr. 276). She testified that every clinic has after-hours services. "[W]e can make arrangements if we are notified that there's a problem." Ms. Johnson stated she had no

discretion on whether or not to terminate Complainant's employment after her refusal to take the drug test. (Tr. 277).

On cross-examination, Ms. Johnson testified that she did not know whether Georgia Royale ever attempted to take the test or just refused to go test at all. (Tr. 280).

Ms. Johnson further testified that specific types of transportation are not listed in the policy. "We will just do whatever needs to be done to provide appropriate transportation to get you there if we're notified you need it." (Tr. 283). She further testified that it would take ten to fifteen minutes at the most to get to the parking lot. (Tr. 284).

Ms. Johnson testified that Complainant appeared in her office the first time at approximately 4:30 p.m., and left her office the second time at 4:41 p.m. (Tr. 286). She agreed she told Complainant she needed to immediately report for the drug test after Ms. Larsen came in the office. She stated Complainant did not bring up any transportation issues and did not state she was waiting for a ride. (Tr. 287).

Ms. Johnson testified she did not know Complainant was notified to report for a drug test because she is not privy to that information as a Chief Flight Attendant. Further, although Complainant informed her that she had a mandatory meeting, mandatory meetings with administration do not necessarily indicate a drug test. They can be called also for alcohol tests, alcohol discrepancies or other reasons. (Tr. 288).

Ms. Johnson testified she is trained in reasonable cause, drug and alcohol procedures. When questioned regarding whether she had reasonable cause to believe Complainant was impaired, Ms. Johnson first stated Complainant was notified to take a random drug test, and not one for reasonable cause. She thereafter stated she was only with Complainant for a few minutes, which was not enough time to make an accurate assessment of impairment. (Tr. 292).

Ms. Johnson testified Laralee Anderson stated to her in an e-mail that she should give Complainant an opportunity to come in and explain her side, but termination is warranted. (Tr. 292-293). Ms. Johnson further stated that the decision to terminate Complainant was not based on Holly Larsen's statement regarding the time sequence. "I was in the office that day. I am aware of the timeline. It was clear to us that it was not reporting without delay." (Tr. 294). When questioned regarding whether Complainant's waiting for a ride was a delay, Ms. Johnson

testified, "coming back to my office to ask about setting up a meeting, hanging out in the crew lounge, charging your phone, talking to people," is considered not reporting without delay. (Tr. 294).

Ms. Johnson stated that random drug tests are required by DOT and company policy as a safety requirement. (Tr. 296). She further testified that the policy is written in a manner that implies transportation is only provided out of domicile, but "we all know how important [drug testing] is, and we will make the exception with the expense report and reimburse it, because it's policy and you have to do it." (Tr. 298-299).

Francine Cox

Francine Cox testified at the formal hearing. She is the manager of the Drug and Alcohol Program, and has been so employed for twelve years. (Tr. 307-308). Her job is to ensure compliance with federal regulations and establishing company policy regarding drug testing. (Tr. 308).

Ms. Cox testified that for random drug testing, the names of all of Respondent's safety-sensitive employees (approximately 10,000) are placed in a random testing pool. (Tr. 309). A random selection is made using a number-based computer program. Every employee has an equal chance of being tested. (Tr. 310). In July 2008, Complainant's name appeared on a list for random drug testing with 850 other employees. (Tr. 313). Ms. Cox testified Complainant's reporting another employee is not the reason her name appeared on the list. She further testified she was not even aware Complainant had reported another employee for sleeping on the job, and that anyone's reporting of another employee violating a FAR has nothing to do with the Drug and Alcohol Department. (Tr. 311).

Ms. Cox testified that Complainant was notified to take a drug test on August 5, 2008, because the end of her trip would be a good time to test. (Tr. 313-314). "Ideally, it would be during the middle of a trip, but they are eligible for testing just prior, during or following their duty." (Tr. 313). She sent an e-mail to Holly Larsen on August 5, 2008, listing several names for drug testing, including Complainant. The e-mail also included the time Complainant should report for her test. (Tr. 314).

Ms. Cox testified that Complainant would still have been eligible to be notified for testing if her flight had gotten in an hour later because there are facilities within the Salt Lake City area that would have accommodated her for testing. (Tr. 315). She stated drug testing is performed "24/7." (Tr. 315-316). She further testified that no one else reported having trouble reporting for their tests on August 5, 2008. (Tr. 315). Ms. Cox stated Complainant needed to report without delay for testing, meaning that she should immediately proceed to the collection site. (Tr. 316). She agreed that waiting twenty minutes was inappropriate. She also stated Complainant's waiting for her daughter to drive through traffic to come get her was not reporting without delay, nor was speaking with friends in the crew lounge or making appointments with her Chief Flight Attendant for other issues. (Tr. 317).

Ms. Cox stated that Respondent provides transportation to employees who have trouble getting to testing centers, even if the employees are in their own domicile. She further stated she has personally approved transportation for employees in their own domicile when they had to wait too long for a ride or otherwise expressed difficulty with reporting without delay. (Tr. 318).

Ms. Cox testified that she has overseen over 60,000 drug tests while working for Respondent, and no employee who has refused a drug test has ever kept their employment. (Tr. 321). She agreed that it is Respondent's decision to determine whether an employee has reported within a reasonable time for drug testing. (Tr. 322). She further agreed that the time allotted and given to Complainant to appear for her drug test did not violate any FAA regulations. (Tr. 323). She stated that not once in the past five years has the FAA found fault with Respondent's notification process in its auditing process, nor have they raised any concerns regarding the time allotted for employees to report for testing. (Tr. 323-324).

Ms. Cox stated she was on the conference call with the Chief Flight Attendants and the HR Department regarding Complainant's termination after refusal to appear for her drug test. (Tr. 325). After reviewing the facts and circumstances, specifically the time Complainant was given, the time she spent in Ms. Johnson's office, in the crew lounge, charging her phone and calling for a ride, she determined Complainant had an appropriate amount of time to report for her drug test and refused to appear. (Tr. 326-327). Thereafter, Ms. Cox instructed the Chief Flight Attendants to terminate Complainant's employment. The Chief Flight Attendants had no

discretion. (Tr. 326). Ms. Cox testified that one hundred percent of employees who refuse drug tests are terminated, without regard to race, religion, age, or whether they are safety whistleblowers. (Tr. 327).

Ms. Cox agreed that some people have missed their drug tests because of fortuitous events. (Tr. 327). She testified that one employee called her because his car had been broken into, he had to call the police, and he could not drive it to the testing facility. Ms. Cox did not excuse the drug test and provided him with a taxi. (Tr. 328). The employee immediately left and took his drug test. (Tr. 329).

Ms. Cox testified that commuters who have to catch flights to go home and are selected for random drug testing must immediately take the test, regardless of whether they miss their flight home. No one may be excused from a drug test after notification. (Tr. 330). She stated that Respondent tries to accommodate all employees although she is aware that the drug test is an inconvenience, it has to be done. However, if the employee does not make Respondent aware of the obstacle, no accommodations can be made. (Tr. 331).

Ms. Cox testified that at the time she made the decision to terminate Complainant's employment, she did not know Complainant made a report against Raeshelle Larson for sleeping, but stated that it would not have mattered anyway. (Tr. 332).

On cross-examination, Ms. Cox testified that drug tests can be cancelled by the medical review officer in situations such as if the specimen collector doesn't follow proper procedure, the specimen leaked in transit, or the specimen did not arrive at the lab. (Tr. 332). She further testified that she may relieve an employee from taking the test if the employee were in a verified accident on the way to the testing facility. She stated that is the only reason for which she has excused testing. (Tr. 333).

Ms. Cox testified that she has probably had an employee report without delay to a closed testing facility. (Tr. 333). She further testified that she would not relieve an employee of the responsibility to test if that employee weren't notified with a proper amount of time to get to the testing facility if other arrangements could be made. "If I was made aware of the situation, and [Respondent] knowingly sent someone to a facility that was closed, or did not allow enough time to get there, other arrangements would be made." She stated that she would not have relieved Complainant of the responsibility to take the

test if she knew Complainant had only nineteen minutes to get to the facility because there are numerous testing facilities in Salt Lake Valley. (Tr. 334). She agreed that it is company policy that the collection sites are open and available to the employees to test upon notification, and if the employee reports without delay, the facility will be open. (Tr. 335)

Ms. Cox stated that employees receive training upon hiring, additional training thereafter, and that the policies are available online, the Drug and Alcohol Manager can be reached at all times, her own cell phone number is available, and MOD lines are available for questions. (Tr. 335). She admitted that there were no specific procedures prescribed for what an employee is to do if he or she reports to a testing facility without delay and it was closed, but she did not think such specific information would be necessary. (Tr. 336).

Ms. Cox testified her decision to terminate Complainant's employment was primarily due to her failing to complete the drug test, and that Holly Larsen's report was a secondary reason. (Tr. 337). She admitted she testified under oath at a previous hearing that she would have relieved Complainant of the responsibility to test if she had known Complainant had only twenty minutes to arrive at the testing facility. (Tr. 339).¹⁶

Ms. Cox testified it is not company policy that all paperwork dealing with random drug testing be accurate, but that it would be the best practice. (Tr. 339-340).

Ms. Cox stated there was no list of acceptable transportation, and it is the employee's responsibility to complete the test. (Tr. 340). She testified that if the employee reports without delay to a closed facility, the employee must contact Respondent, either direct report, supervisor, the person who notified the employee, MOD, or someone. (Tr. 342). Ms. Cox stated that no employee has ever been knowingly sent to a closed facility. She further stated that when an employee has been sent to a closed facility, she is usually directly contacted by the employee's manager and apprised of the situation. If there are no other facilities available, Ms. Cox has the authority to relieve the employee of his or her responsibility to test. (Tr. 343).

On re-direct examination, Ms. Cox clarified that an employee would be relieved of testing if sent to a closed facility only if Respondent had exhausted all other resources to have the test performed at that time. (Tr. 344). However, with

¹⁶ See also CX-26, pp. 68-69.

Complainant, there were other options. Ms. Cox stated Complainant would not have been relieved of her responsibility to take the drug test because there are plenty of facilities in the Salt Lake area. (Tr. 345).

Upon examination by the undersigned, Ms. Cox testified that the other facilities that were not listed on the paperwork were not normally used, and that she has access to a twenty-four-hour number to call and request someone to come on site for probable cause or post-accident testing. (Tr. 345-346).

Ms. Cox further testified that her guess as to why the paperwork Complainant was given had incorrect times for one of the testing facilities is that the facilities are not required to notify Respondent when their hours change.¹⁷ She added, "that's why I'm available 24/7." (Tr. 346).

Hillary Garrett

Ms. Garrett did not testify at the formal hearing, but her deposition was taken by the parties on May 7, 2010, in Salt Lake City, Utah. (CX-53).

Ms. Garrett testified that when she worked for Respondent as a flight attendant, she failed an alcohol test when her blood alcohol content tested at 0.026, which resulted in her immediate termination. Upon Ms. Garrett's request, Respondent allowed her to resign so her record would not reflect a termination. (CX-53, pp. 1-11).

Dr. Angela Panos, Ph.D.¹⁸

Dr. Panos did not testify at the formal hearing, but her deposition was taken by the parties on May 6, 2010, in Sandy, Utah. She is a Department of Transportation substance abuse professional. Though she does not work directly for Respondent, Respondent often consults with her. (CX-54).

Dr. Panos testified that in August 2008, Complainant came to her seeking an employee assistance program to return to her safety sensitive job. She testified that pilots have been sent back to their safety sensitive programs after involvement in

¹⁷ CX-13 listed the three site locations and the times of operation, however the latest time shown was 5:30 p.m. at the Redwood Rd. location of Concentra, when in actuality the site remained opened until 7:00 p.m. See CX-12.

¹⁸ Dr. Panos's credentials are located at CX-54, Ex. 1. She classifies herself as a "substance abuse professional."

Human Intervention and Motivation Study (HIMS) programs and clearance from an FAA physician. The HIMS program was developed through agreement between the pilots's union, DOT and the FAA. Such a program is not currently available for flight attendants. (CX-54, pp. 1-12).

Dr. Panos further testified that she has never encountered a flight attendant who did not report to a drug test and was not terminated. "[T]hat's been pretty consistent that they've always terminated." She stated that the reason for the requirement to report without delay for testing is substances can either get completely out of an employee's system or otherwise alter or dilute the results. (CX-54, pp. 12-13).

Dr. Panos testified she believes that employees other than pilots, rampers, or baggers have gone back to work after completing the required DOT/FAA programs. She stated that the length of time it takes to return to a safety sensitive position after completing a program varies greatly from weeks to over a year, and is determined on a case-by-case basis. (CX-54, pp. 16-17).

Ruth Lawrence

Ruth Lawrence did not testify at the formal hearing, but her interrogatories were submitted as CX-42.¹⁹ She testified she was the President of the flight attendant's labor representative to management (SIA) on August 5, 2008. She stated she spoke with Complainant via telephone prior to Complainant's termination, and Complainant told her she missed her drug test because the facility she was sent to had closed. Ms. Lawrence further stated she thereafter spoke with Christine Merrill to advocate Complainant's position that she was not given enough time to take the drug test. Ms. Lawrence testified that during the conversation with Christine Merrill, she learned that when Complainant missed her test she neither promptly informed Respondent nor attempted to go to other available testing facilities. Ms. Lawrence thereafter determined Respondent's decision to terminate Complainant was correct and she could not be of assistance to Complainant. (CX-42).

Laralee Anderson

Laralee Anderson did not testify at the formal hearing, but her interrogatories were submitted as CX-43. She testified that she has been the Western Regional Chief Flight Attendant since

¹⁹ I note that Ms. Lawrence did not sign her interrogatories.

her promotion from Salt Lake City Chief Flight Attendant in April 2008. She stated she oversees four Chief Flight Attendants, including Kristy Johnson, as well as operations for approximately 1,000 flight attendants. She additionally oversees the reliability program, leaves of absence, discipline, and acts as the MOD several days per month. Ms. Anderson stated that on August 6, 2008, she determined Complainant's employment should have been terminated, but decided to speak to her in person, so that Complainant could have an additional opportunity to explain her circumstances. She further stated failing to take a drug test after notification always results in termination of employment. (CX-43).

V. CONTENTIONS OF THE PARTIES

The parties have stipulated that Complainant engaged in protected activity by reporting Raeshelle Larsen's sleeping while in-flight. Generally, Complainant contends she suffered an unfavorable personnel action; her protected activity was a contributing factor in the adverse job action; and the same unfavorable job action would not have resulted absent her protected activity. Specifically, Complainant argues Respondent subjected her to a random drug test without enough time to actually take the test, resulting in her ultimate termination, in "retaliation of her complaints with regards to Safety, (sic) discrimination and work ethics."²⁰ She further contends she does not understand why her employment was terminated, but intimates that Raeshelle Larsen, the administrative assistant, and the person who usually performs the drug testing at the airport all have the last name "Larsen" and that she was conspiratorially not provided sufficient time after notification to travel to and take the random drug test. Complainant additionally contends that a urine test does not ensure job performance, and "[e]ven a confirmed 'positive' provides no evidence of present intoxication or impairment."²¹

Respondent, on the other hand, avers Complainant can point to no facts indicating that her protected activity had anything to do with her termination. In brief, Respondent argues that Complainant repeatedly testified she was terminated because she did not take a mandatory drug test **not** because she engaged in protected activity. Respondent further contends Complainant was terminated for failing to report for random drug testing upon notification without delay as required by company policy and

²⁰ See Complainant's Closing Brief, p. 1.

²¹ Id. at 4.

Complainant does not argue that her missed drug test was a pretext for her termination.

VI. ANALYSIS AND DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses. Here, although I question the plausibility of Complainant's testimony regarding both her and her daughter's cell phones being "dead," I

otherwise found little to no inconsistency in any of the testimony and objective evidence. Therefore, I find all of the witnesses in this matter to be generally credible.

B. The Statutory Provisions

The employee protective provision of AIR 21 is set forth at 49 U.S.C. § 42121. AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against, any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provides to the employer or Federal Government, information relating to any violation or alleged violation "of any order regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carriers safety" under subtitle VII of Title 49 of the United States Code or any other law of the United States.

49 U.S.C.A. § 42121(a) states:

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

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

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of

Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C.A. § 42121(a).

C. The Burden of Proof

The evidentiary or burden of proof requirements of the complaint procedure embodied in subsection (b)(2)(B) of AIR 21 require Complainant to establish ". . . a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C.A. § 42121(b)(2)(B). To prevail in an AIR 21 adjudication, Complainant must demonstrate or prove her prima facie case by a preponderance of the evidence. Clemmons v. Ameristar Airways et al., ARB No. 08-067, slip op. @4-5, ALJ Case No. 2004-AIR-011 (ARB May 26, 2010); Malmanger v. Air Evac EMS, Inc., ARB No. 08-071, ALJ Case No. 2007-AIR-008 (ARB July 2, 2009). Preponderance of evidence is the greater weight of evidence or superior evidence, weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Brune v. Horizon Air Industries, Inc., ARB Case No. 04-037, slip op. @13, ALJ Case No. 2002-AIR-08 (ARB Jan. 31, 2006).

After Complainant has established her prima facie case by a preponderance of the evidence, an employer is then required to demonstrate ". . . by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(b); 29 C.F.R. § 1979.104(c); see also Kinser v. Mesaba Aviation, Inc., ALJ Case No. 2003-AIR-007 (ALJ Feb. 9, 2004). Thus, Respondent may avoid liability under AIR 21 by producing sufficient evidence that clearly and convincingly demonstrates a legitimate purpose or motive for the personnel action. Taylor v. Express One International, Inc., ALJ Case No. 2001-AIR-002 (ALJ Feb. 15, 2002). If Respondent meets this burden, the inference of discrimination is rebutted and complainant then assumes the burden of proving by a preponderance of the evidence that

Respondent's proffered reasons are "incredible and constitute pretext for discrimination." Id.

Complainant's Prima Facie Case

No employer subject to the provisions of the AIR 21 may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the "employee . . . engaged in any [protected activity]." 29 C.F.R. § 1979.102(a) (2004). Accordingly, to establish a prima facie case of discrimination under AIR 21, the complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;
2. The complainant engaged in protected activity as defined by the act;
3. The employer took adverse action against the employee;
4. The employer knew or had knowledge that the employee was engaging in protected activity; and
5. The adverse action against the employee was motivated by the fact that the employee engaged in protected activity.

Peck v. Safe Air Int'l., Inc., ARB No. 02-028, slip op. @8-9, ALJ Case No. 2001-AIR-003 (ARB Jan. 30, 2004); Svensen v. Air Methods, Inc., ARB No. 03-074, slip op. @7, ALJ Case No. 2002-AIR-16 (ARB August 26, 2004); Taylor, supra, slip op. @33. The fifth prima facie element can be shown by proving that a complainant's protected activity was a contributing factor to any adverse action bestowed by respondent. Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160, slip op. @7, ALJ Case No. 2003-AIR-47 (ARB Jan. 31, 2007); see also Lanigan v. ABX Air, Inc., ALJ Case No. 2007-AIR-010 (ALJ April 30, 2008).

In order to more suitably address the issues in this matter, the undersigned shall address each of these prima facie elements separately. The undersigned notes that all prima facie elements must be proven by Complainant by a preponderance of the evidence.

Regarding the first element of a prima facie case under AIR 21, the parties stipulated that Respondent is a commercial airline subject to the provisions of AIR 21 and that Complainant was an employee of Respondent.

(1) Did the Complainant engage in Protective Activity under AIR 21?

A protected activity under AIR 21 has three elements. First, the complaint must either: a) involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government. Svendsen, supra, slip op. @48; see also Weil v. Planet Airways, Inc., ARB No. 04-074, slip op. @3-4, ALJ Case No. 2003-AIR-18 (ARB Oct. 31, 2005) (finding the FAA's announced intention to implement a rule is sufficient to establish protected activity).

In this matter, the parties have stipulated that the complaint made by Complainant to the Manager on Duty regarding Raeshelle Larsen's sleeping in-flight was protected activity as a complaint that constituted a violation of a Federal Aviation Regulation (FAR) regarding safety.

Complainant testified there were other FAR violations she witnessed, including the main cabin door being closed before carry-on baggage was secured in the overhead bins and the bins were closed. Complainant stated she informed the pilot, Ms. Larsen and Ms. Merrill of the violations. Complainant had an objective and reasonable belief that closing the main cabin door before carry-on baggage was secured was a safety violation. In fact, Complainant testified that an FAA principal safety inspector informed her that such a regulatory requirement is one that flight attendants do not usually know. Complainant's testimony was undisputed. When Complainant's communication of the violations to Ms. Larsen and Ms. Merrill failed to illicit a supportive response from Respondent, Complainant requested removal from the flight. To the extent Respondent contests Complainant's objective and reasonable belief, or the fact such belief was communicated to Respondent, such assertions are incredible and unfounded as detailed above. I find Complainant thus engaged in protected activity when she reported the cabin door being closed prior to securing carry-on baggage.

I note that Complainant additionally testified she relayed to Ms. Merrill that the other flight attendants and pilots were making fun of her and her age, to which Ms. Merrill responded Complainant needed to file the necessary reports, including ASAP reports. Ms. Bowles testified that Complainant also reported Raeshelle Larsen as being difficult to get along with, causing problems with the crew, and conspiring with the flight deck crew against her. However, other than being mentioned briefly, these issues were addressed neither at hearing, nor in Complainant's post-hearing brief. Moreover, the reports are not related to safety violations or any other FAR violations. Protected activity under AIR 21 must definitively and specifically raise safety issues. Kinser, supra, slip op. @22; Fader v. Transportation Security Administration, ALJ Case No. 2004-AIR-27 (ALJ June 17, 2004) (violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud did not involve safety and did not constitute protected activity under the Act). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation." Peck, supra, slip op. @13. Accordingly, I find that, even if Complainant had addressed these issues either at the hearing or in her post-hearing brief, they would not constitute protected activity under AIR 21.

(2) Did Complainant experience an adverse employment action, and, if so, was her protected activity a contributing factor?

Section 42121(a) of AIR 21 proscribes employer retaliation, stating that no air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because of the employee's protected activity. These provisions are the statutory foundation for the requirement that a complainant must show an adverse employment action. The implementing regulations specify that it is a violation of the Act for an employer "to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee" for engaging in protected activity. 29 C.F.R. § 1979.102(b).

[T]he purpose of the employee protections that the Labor Department administers is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the

public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes.

Melton v. Yellow Transportation, Inc., ARB No. 06-052, ALJ Case No. 2005-STA-2 (ARB Sept. 30, 2008). Moreover, the terms "tangible consequences" and "materially adverse" are "used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action." Id. The majority summarized:

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

Id. In this matter, Complainant alleges, although she does not understand why her employment was terminated, that Raeshelle Larsen, Holly Larsen (the administrative assistant), and the person who usually performs the drug testing at the airport all have the last name "Larsen." From this, she contends that her employment was terminated as a result of her reporting Raeshelle Larsen's sleeping on the job, in violation of certain FARs.

However, Complainant is unable to show that the protective activity in which she engaged was a contributing factor to either her being chosen for random drug testing or her ultimate termination. 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." Marano v. Dept. of Justice, 2 F.3d 1137, 1148 (Fed. Cir. 1993). Temporal proximity between the

protected activity and adverse employment action, without more, is insufficient to establish that the protected activity was a contributing factor. Clemmons, supra, slip op. @6-7; Hendrix v. American Airlines, Inc., ALJ Case No. 2004-AIR-10 (ALJ Dec. 9, 2004).

I find Complainant's reporting of Raeshelle Larsen's sleeping on the job and failure to keep the cabin door open until all carry-on baggage was secured were not contributing factors to Complainant's being chosen for drug testing. Respondent's Drug and Alcohol Misuse Prevention Standard Practice 153 provides that all safety sensitive employees, including flight attendants, are subject to random drug testing while on duty, immediately prior to going on duty, or immediately following the conclusion of a shift. (CX-20). Further, Ms. Cox testified that Complainant was randomly selected for drug testing by a computer program, along with 850 of Respondent's other safety sensitive employees. Complainant's specific testing date was August 5, 2008, because it was the conclusion of her shift. Ms. Cox further testified, undisputedly, that she was not aware of Complainant's reports of FAR violations. I find, therefore, that Complainant has failed to satisfy her burden in proving that her protected activity was a contributing factor in Complainant's being chosen for drug testing.

Additionally, Complainant has failed to show that her protected activity was a contributing factor in Respondent's decision to terminate her employment. Respondent's stated reason for Complainant's termination was Complainant's failure to report for random drug testing without delay after notification. Complainant testified that she knows of no flight attendants who have kept their jobs after failing to report for drug testing. There is no record evidence that Respondent deviated in any degree from its published drug and alcohol policy. Further, Ms. Merrill, Ms. Bowles, Ms. Larsen, Ms. Johnson, Ms. Cox, Dr. Panos and Ms. Anderson all testified that termination is automatic upon failing to report for drug testing without delay. Finally, Ms. Merrill and Ms. Johnson both testified that they were not troubled by Complainant's safety reports, and, to the contrary, encouraged such reporting. Ms. Bowles testified that Respondent's company policy requires all employees to report FAR violations, and Ms. Cox testified that she was not even aware Complainant reported anything. Ms. Larson testified she is not related to the flight attendant who

was reported, and that she only knows of her in a professional capacity. Accordingly, I find Complainant failed to establish that her protected activity was a contributing factor in Respondent's determination to terminate Complainant's employment.

Finally, assuming, **arguendo**, Complainant had shown any protected activity to be a contributing factor for any of the adverse employment action she alleges, Respondent has satisfied its burden of rebuttal by showing through **clear and convincing evidence** it would have taken the same adverse employment action regardless of Complainant's engagement in protected activity. I note Complainant had been issued numerous SADs and other forms of discipline, and had made past errors on her liquor paperwork. (RX-1 to RX-17). Despite her prior infractions, however, Respondent's stated reason for Complainant's termination was her failure to report without delay for random drug testing. Complainant argues she was not given an adequate amount of time to arrive at the testing facility, and by the time she arrived at 5:23 p.m., the facility was closed.

First, Complainant was given a list with three facilities, one of which was open until 7:00 p.m. (CX-12). Complainant did not call or attempt to go to any of the other facilities on the paperwork. Also, Complainant did not inform Respondent that she arrived at a closed facility and was unable to take her drug test until the following morning (August 6, 2008). Ms. Johnson was in her office until 6:30 p.m. on August 5, 2008, and could have been contacted.

Second, the record evidence suggests Complainant did not report for testing without delay. Instead, she called her daughter to pick her up at the height of the traffic hour, and completed other tasks prior to leaving the airport. As Ms. Johnson testified, "coming back to my office to ask about setting up a meeting, hanging out in the crew lounge, charging your phone, talking to people," prior to reporting for testing after notification is considered not reporting without delay. Ms. Cox also testified that she made the decision to terminate Complainant's employment after learning the time she spent in Ms. Johnson's office, in the crew lounge, charging her phone, and calling for a ride. She determined that Complainant had an appropriate amount of time to report for her drug test and refused to do so. Again, Ms. Merrill, Ms. Bowles, Ms. Larsen, Ms. Johnson, Ms. Cox, Dr. Panos and Ms. Anderson all testified that termination is automatic upon failing to report for drug testing without delay.

Complainant seemingly contends she was disparately treated because of her protected activity, and argues for resignation in lieu of termination to be placed in a similar situation to her former co-worker, Hillary Garrett. However, Complainant does not refer to Ms. Garrett's hearing testimony or resignation in her post-hearing brief. Assuming **arguendo**, she had, however, I note Ms. Garrett was terminated/resigned as the result of a positive alcohol test at her request. Complainant, on the other hand, was terminated for failure to report without delay for a random drug test, a wholly different violation of company policy. Therefore, whether Complainant is terminated or asked to resign as a result of her failing to appear without delay for random drug testing is a management decision, which is not an issue before this Court.

VII. CONCLUSION

Complainant has failed to show her protected activity was a contributing factor to her adverse employment action; even if she had, however, Respondent has successfully rebutted such a contention by showing a legitimate business reason for the adverse employment action alleged by Complainant.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against Linda Collard because of her alleged protected activity and, accordingly, Linda Collard's complaint is hereby **DISMISSED**.

ORDERED this 16th day of August, 2010, at Covington, Louisiana.

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LEE J. ROMERO, JR.
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).