

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



**Issue Date: 21 October 2010**

CASE NO.: 2010-AIR-00011

*In the Matter of:*

EDWARD MIZUSAWA,  
Complainant,

v.

UNITED PARCEL SERVICE,  
Respondent.

*Appearances:* Daniel M. Faber, Esq.  
Law Offices of Daniel Faber  
For Complainant

David T. Barton, Esq.  
Rachel L. Robertson, Esq.  
Quarles & Brady LLP  
For Respondent

*Before:* Russell D. Pulver  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (“AIR 21”), 49 U.S.C. § 42121, *et seq.*, as implemented by 29 C.F.R. 1979 (2002). A hearing was held on April 21-22, 2010, in Albuquerque, New Mexico. The following exhibits have been admitted into evidence: Complainant’s exhibits (“CX”) A-Y; Respondent’s exhibits (“RX”) 1-29 and 31-39; Administrative Law Judge exhibits (“ALJX”) 1-5. All parties have had a full opportunity to present testimony, offer evidence, and submit post-hearing briefs.

The parties dispute what motivated Respondent to terminate Complainant’s employment on February 17, 2009. Complainant, Edward I. Mizusawa contends that Respondent, United Parcel Service (“UPS”), terminated his employment in retaliation for reporting several safety issues to management. Respondent argues that it terminated Complainant for improperly authorizing a subordinate employee to use UPS facilities and equipment to film a video for a school project in violation of its internal policies.

## ISSUES

1. Did Complainant engage in activity protected under AIR 21?
2. Was Complainant's protected activity a contributing factor in Respondent's decision to terminate him?

## FINDINGS OF FACTS

At the time of trial, Complainant was a 46 year old man living in Albuquerque, New Mexico with his wife and two children. Trial Transcript ("TR") at 31. Complainant graduated from the University of Mexico, the Robert O. Anderson School of Business with a concentration in Computer Information Systems in 1986. *Id.* Complainant started his employment with the respondent, United Parcel Service (UPS), on April 30th, 1984 and was promoted to the position of gateway manager at the Albuquerque and Tucson airports in October of 2007. *Id.* at 34.

As gateway manager, Complainant was responsible for every aspect of operating a safe gateway. *Id.* at 32-33. His primary responsibility was to ensure that the gateway complied with all UPS policies and procedures as well as FAA regulations. *Id.* at 33, 73. UPS provided its gateway managers and other employees with extensive training. *Id.* at 73. Each UPS employee would have up to 100 certifications. *Id.* at 76. Each one of these certifications would expire at certain times during the course of the year. *Id.* As a UPSCO coordinator for the district, Complainant received additional training on all policies and procedures. CX A at Ex. 5. UPSCO coordinators were responsible for conducting training sessions for other employees in the district. TR at 75.

Within the UPS corporate hierarchy, gateway managers report to division managers who, in turn, report up the chain of command to the district manager. *Id.* at 328. At the time Complainant was promoted, Craig Wiltz served as the district manager of the Desert Mountain District, which was comprised of Arizona, New Mexico, Colorado and Utah. *Id.* at 328. In April 2008, John Farley, who was working as a Hub Manager in Albuquerque, was promoted to Hub & Feeder Division Manager. *Id.* at 165. Part of Farley's job was to oversee Complainant's work and the operations of the Albuquerque gateway. When Farley became District Air Manager Complainant began informing him of various safety issues at the gateway. *Id.* at 166. At that time, Farley was not yet experienced with the details of running the air operation, and Complainant was increasingly frustrated that Farley did not raise his concerns with higher management. *Id.* at 41-42.

### ***Reports of Protected Activity***

Throughout his employment as a gate manager, Complainant expressed concerns that Top Deck Designees, employees involved in the process of loading an aircraft, were making critical safety errors. *Id.* at 44. In 2008, UPS added the Top-Deck Designee position as part of a companywide-initiative to eliminate weight and balance problems on its planes. CX A at 5. Weight and balance problems occur when a plane departs from a facility with an incorrect

weight onboard or when the containers on the plane are improperly positioned on the plane. TR at 301.

In its air shipping process, UPS utilizes large plastic containers. CX A at 4. After individual packages are placed inside these containers, the containers are weighed and assigned positions inside the airplane. *Id.* These positions are designated by the UPS Load Planner who ensures that the aircraft is properly balanced. *Id.* The information about each container is recorded on a load manifest form. *Id.* This form is provided to a UPS Load Supervisor, an employee who is responsible for monitoring the loading process. *Id.* at 296, 299. Load supervisors watch from the ground as containers are raised to the aircraft door by a deck loader and placed into their designated positions. CX A at 4. During the final step of the loading process, Top-Deck Designees complete a Ramp Action Summary form. TR at 297-98. On this form, Top Deck Designees record the weight of each container and its actual location on the plane. *Id.* at 297-99. After the aircraft is loaded, the Top-Deck Designees meet with the Load Supervisor and the Load Planner for a side by side comparison. *Id.* at 298-99. During the side-by-side comparison, the Load Planner and Load Supervisor compare their load manifests with the Top-Deck Designees' Ramp Action Summaries. *Id.* If the numbers on the three documents don't match, the problem is identified and corrected before the aircraft departs. In some cases, this involves removing all of the containers from the plane and reloading it. *Id.* at 299. The entire process is designed to ensure that containers are actually placed in the position indicated on the Load Planner's load manifest form. *Id.* at 299.

Complainant was concerned that his Top-Deck Designees were making mistakes in the process of filling out their Ramp Action Summaries. *Id.* at 43-45. He believed that these employees needed formal training and drug testing before they could perform their assigned task. *Id.* at 45. At that time, UPS did not have a formal certification process for Top-Deck Designees. *Id.* Complainant was instructed to pick the best employees and train them himself. *Id.* at 43-44. He persistently discussed this issue with John Farley and made reports of specific mistakes. *Id.* at 43-44, 165-66, 220. In an August 22, 2008 e-mail Complainant wrote:

John, I feel that the safety of the aircraft and our people are compromised with the current procedures outlined in our training and manual...I have been auditing this procedure at the gate and have found too many discrepancies in the cargo compartment designee's work."

CX V.

Complainant believed that Farley was not taking appropriate steps to address his complaints. *Id.* at 42. According to Complainant, the "[s]afety issues that [he] had reported in the past were acted upon in a constructive way with Terry Christopher. When John took reigns, he felt that [Complainant] needed to keep [his] mouth shut..." *Id.* at 42. According to Complainant, his conversations with Farley regarding the Top-Deck Designee issue were "head butting conversations." RX 115-16.

Complainant's frustration with the Top-Deck Designees and their performance was well known to UPS. CX A at 5. Complainant raised the issue during the July 2008 conference call

with corporate management. *Id.* at 43, 46, 167. About a month after the conference call, UPS instituted certification for the Top-Deck Designees. *Id.* at 47, 298.

In the course of his employment, Complainant voiced several other concerns. In 2007, he reported a weight and balance error to Terry Christopher, the district air manager at that time. *Id.* at 301. The error occurred when the load planner put the wrong information into the DWB. The error was not caught during the read back. Consequently, the plane was sent out with the wrong information. *Id.* at 302.

Complainant likewise criticized the poor Air Dangerous Goods training at the extended centers. *Id.* at 51. On August 29, 2008, Complainant sent an e-mail to Farley and Mick Maguire about the increasing failure to properly train hazardous materials personnel throughout the district. RX 4. In the email Complainant states:

The initial 14 hour acceptance auditor training and the 5 hour ADG5 training that is required needs to be looked at closely...if you had a smart FAA inspector who asked specific questions like I have, they would find that our Extended Feeder Aircraft Centers Training are marginal at best.”

*Id.* Complainant reiterated this concern in his e-mail to Farley on August 22, 2008. CX V.

On January 7, 2009, Complainant reported problems with an inbound flight. TR 174. The plane from Phoenix had hazardous materials on board, but the hazardous materials paperwork, which should have been placed in the Notice to Crew envelope (“NOTAC”), was not provided to the captain. *Id.* at 51-53, 174, CX U. The same flight also had a weight and balance error. *Id.* One of the containers in the designated position weighed much more than the weight designated on the load manifest. *Id.* A part-time supervisor brought this to Complainant’s attention, and Complainant notified the Phoenix operations. *Id.* Complainant also informed Farley who reported the problem to Christopher. *Id.* at 307.

Complainant made his last reports on February 17, 2009. *Id.* at 53-54. A flight from Kentucky arrived with a weight and balance error. *Id.* Several of the containers were not loaded according to the load plan paperwork. *Id.* Complainant reported this problem to Farley. On the same day, Complainant was terminated. *Id.*

### ***Audits***

In order to ensure that all its facilities comply with internal UPS guidelines, FAA regulations and other government laws, UPS conducts external and internal audits. *Id.* at 180-81. At the time Complainant was gateway manager, internal audits, or self-assessments, were conducted by the air facilities themselves on a monthly basis. CX A at 2. External audits, or National Air Audits, were conducted annually by UPS’s National Air Team. *Id.* These audits were unscheduled, and each UPS facility had to receive a score above 97/100 to pass the audit. *Id.* at 182, CX A at 3. Failing scores on the National Air Audits reflected poorly not only on the gateway manager but likewise on the division manager. TR 336.

These audits typically took several days to complete. *Id.* at 180. On the last day of the audit, the audit team met with gateway management for a round table discussion of the results. *Id.* at 184. Round table discussions were conducted prior to the conference call with corporate management and were designed to allow management, auditors and employees to voice all of their concerns. *Id.* Round table discussions also provided management with an opportunity to persuade auditors to add points to the final score. *Id.* at 185-86. Points were almost never subtracted as a result of the round table discussion. *Id.* at 208. Following the final round table discussion, the audit team would confer with management and conduct a conference call with the corporate group. During this call, gateway management presented the corporate group with results. *Id.*

During the time that Complainant was gateway manager, his gateway underwent three national audits. The Albuquerque gateway failed its 2007 National Audit receiving a score of 95. *Id.* at 331, RX 1. The audit took place several months after Complainant was promoted to the position of gateway manager. *Id.* Following the audit, Wiltz asked Complainant to come to Phoenix for an in-person meeting. *Id.* at 331. During the meeting, Wiltz expressed his disappointment in the audit scores and discussed corrective measures to be implemented. *Id.* Wiltz advised Complainant that he was fully responsible for every activity at the Tucson and Albuquerque Airports and would be held ultimately responsible for the shortcomings of his subordinates. *Id.* at 333. According to Wiltz, Complainant was not “taking responsibility for the things that were identified in the audit at the time.” *Id.* at 332. In order to obtain Complainant's understanding of the expectations, Wiltz asked Complainant to prepare a write up. *Id.* at 127, 332-33. During the meeting, Complainant stated that if the gateway did not pass the 2008 audit he would resign. *Id.* at 333.

In July 2008, UPS's National Air team conducted another national audit for the Albuquerque gateway. The gateway once again did not receive a passing score. *Id.* at 182, RX 7. The total score on the audit was a 97%; however, the gateway regulation compliance score was a 95. *Id.* According to Farley, during the 2008 round table discussion, Ed was acting unprofessionally and essentially yelling at the auditors. *Id.* at 183, CX A at 3. Instead of addressing the problems that were identified, he began to question the qualifications of the individuals conducting the audit. *Id.* Complainant felt that the auditors did not receive sufficient training to conduct the audits. *Id.* In a memo to Farley, Complainant himself acknowledged that “[d]uring the meeting [his] passion and audit knowledge got the best of [him] and [he] was too animated and was totally over the edge.” RX 6.

The July 2008 conference call was conducted with the entire audit team, two division managers, an operations manager, and the district manager of Desert Mountain, Craig Wiltz. TR 113-114. During the conference call, Complainant once again raised the problems which he experienced with his Top Deck Designee employees. *Id.* Farley testified that he did not expect Complainant to bring up the issue during the conference call. *Id.* at 209. According to Farley, the conference call was designed as nothing more than a conduit to review the information that was on the audit. *Id.* at 208-209. There was an expectation that all the differences would be resolved during the round table discussions. *Id.* Complainant testified that after the conference call, Farley told him to keep his “mouth shut.” *Id.* at 46, 169-70. Complainant felt that Farley was tired of

hearing Complainant's weight and balance complaints and wanted to keep those issues in the district. *Id.* at 42.

After the gateway failed the 2008 audit, Complainant was placed on a performance improvement plan ("MPIP"). *Id.* at 189-90, 337. MPIPs were designed to help employees improve their performance by identifying problem areas. *Id.* at 190. Wiltz was concerned that Complainant failed to take responsibility for the audit results and was not holding his employees accountable for their mistakes. *Id.* at 187, 191. In order to assist Complainant in passing the next audit, Wiltz asked Farley to spend more time training Complainant and overseeing his work. *Id.* at 337. Wiltz also instituted weekly self audits that were conducted by the operation manager and would be reviewed with the Complainant. *Id.* at 337.

### ***Video Incident***

In October of 2008, Zak Abad, a part time supervisor at UPS, contacted Complainant and asked him for permission to film a video at the Albuquerque gateway for a class that he was taking at the University of New Mexico. *Id.* at 59, 313. According to Complainant, the brief conversation took place as Complainant was exiting the building. *Id.* at 142. Abad told Complainant that he wanted to bring in two of his classmates to film a five minute video at the gateway and needed a picture of a container and a tug as a backdrop. *Id.* at 58-59. Abad promised to properly badge the guests and escort them while at the facility *Id.* at 59, CX A at Ex. 10. After instructing Abad to follow all procedures and certifications, Complainant gave Abad permission to shoot the video without making any further inquiries. *Id.* at 59, 143.

On November 22-23, 2008, Abad began filming inside the UPS facility. The plot of Abad's film involved a character who was kidnapped and eventually escaped an aircraft while he was being transported to a prison facility. CX A at Ex. 10. On November 24th between 5:30pm and 8:15pm, Abad and his classmates returned to the facility during a Monday night operation. *Id.* According to Abad, the scenes were filmed during the down time of the operation. Before coming to the gateway, Abad called Phil Stevens, a full time supervisor, and asked him for permission to film. *Id.* Phil Stevens told UPS investigators that he gave Abad permission after learning that the filming was authorized by Complainant.

During the scene that was filmed on November 24th, one of Abad's "actors" was placed in a UPS container and strapped in. CX A at Ex.10, TR 314-15. The container was driven up to the plane on a tug and positioned on a K-loader (aka deck loader). *Id.* The K-loader was then used to lift the container onto the UPS plane. *Id.* The equipment was operated by UPS employees Eric Leaton, Tim Payne, Joe Guzzo and Jeff Baca. *Id.* All the individuals in the scene descended from the plane using proper methods. *Id.* Abad subsequently filmed a scene where the actor escaped from the belly of the plane and ran down the belt loader. *Id.*

The investigation into the making of the Abad video began when a Human Resources supervisor came across a different video on YouTube which featuring UPS employees. TR at 312-13. This video was shot at the Albuquerque gateway by Complainant's ground handlers (Steve Ramirez, Mike Blea, Todd Lindblaum, and David Bianco). *Id.* at 60, 67-68. Chuck Martinez, the director of security for the Desert Mountain District, and John Farley conducted interviews with these employees. Three employees eventually chose to resign for their roles in

the video. Todd Lindblau was terminated for his part in the video but regained employment after grieving the termination. *Id.* at 69-70; RX 10. During the investigation, Martinez learned that Zak Abad filmed a movie at the gateway a few months earlier. *Id.* at 312-313.

Martinez followed up on the allegation and learned that Abad shot the video after receiving permission from the Complainant. *Id.* at 313. Between February 10th and 11th 2009, UPS investigators interviewed Zak Abad, Phil Stevens, Mark Pacheco, and Paul Chavez. CX A at Ex. 10. As part of the standard UPS Security Department Protocol, these employees were asked to provide write-ups. *Id.* at 317.

On February 17, 2009, Chuck Martinez interviewed Complainant. *Id.* at 315. During the preliminary discussion, Martinez asked Complainant general questions about the company's video policy. *Id.* at 315-316. According to Martinez, Complainant stated that UPS does not allow cameras on ramps and that employees should be working instead of taking videos. *Id.* Complainant also noted that recording on UPS property raises security concerns. *Id.* at 315-16. When Martinez asked Complainant about the procedure for authorizing videos, Complainant replied that employees should follow the protocol and go through their immediate supervisor, who in turn, would go through the manager and division manager. *Id.* at 316. According to Martinez, Complainant confessed to authorizing the filming before consulting with John Farley. *Id.* at 317.

When Martinez asked Complainant to provide a write-up of the interview, Complainant refused and asked to speak with Harvey Hill first. *Id.* at 317. While Complainant was making a phone call to Hill, Martinez telephoned Gary Fernandez, the Desert Mountain Human Resources Manager, and provided him with the facts gathered in the course of the investigation. *Id.* at 318-19. Fernandez indicated that he was going to follow up with the region and told Martinez to stand by. *Id.*

The decision to terminate Complainant was ultimately made by Craig Wiltz, the UPS Desert Mountain District Manager with input from Mary Sue Allen, the UPS Pacific Region Human Resources Manager and Gary Fernandez, Desert Mountain Human Resources Manager. *Id.* at 340, 346-47. In the process of making the decision, Wiltz did not consult Farley or take into consideration safety reports made by Complainant. *Id.* at 338, 340.

It took Wiltz less than sixty minutes to reach the decision. Gary Fernandez telephoned Martinez and told him that Complainant will be terminated. *Id.* at 319. Martinez then called Farley and asked him to come over to the Aspen facility where the meeting with Complainant would take place. *Id.* at 320. At the Aspen facility, Martinez and Farley telephoned Gary Fernandez and discussed what Farley would say to Complainant. *Id.* at 321. Since Farley was the district manager that Complainant reported to, he was assigned the task of giving Complainant the news. *Id.* at 248, 320. Farley told Complainant to report to the Aspen facility. When Complainant arrived, Farley informed Complainant that his employment was being terminated. *Id.* at 322. The parties dispute as to whether Complainant was provided with a reason for the termination at that time.

Of the six other employees that participated in Abad's video, two received written warnings and four were discharged. One individual was able to regain his employment.

## LAW AND ANALYSIS

The statutory provisions of AIR 21 prohibit an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee 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 (FAA) or any other provision of Federal law relating to air carrier safety..." 49 U.S.C. § 42121(a). To prevail on an AIR 21 claim, Complainant must prove the following four elements by a preponderance of the evidence: 1) he engaged in protected activity; 2) the employer had knowledge of his protected activity; 3) he suffered an adverse personnel action, and; 4) his protected activity was a contributing factor in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii); *See Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35 (ARB June 29, 2006); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

Once the Complainant makes out a prima facie case, the respondent must bring forth evidence demonstrating by clear and convincing evidence that it would have taken the same employment action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). If such evidence is presented, then the Complainant must prove by a preponderance of the evidence that the employer's articulated legitimate reason is a pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). At that point, the focus of the inquiry becomes "whether the complainant has shown that the reason for the adverse action was his protected safety complaints." *Pike v. Public Storage Companies Inc.*, ARB No. 99-072, ALJ No. 1998 STA-35 (ARB Aug. 10, 1999). However, "[w]hen a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.*, ARB 01-059, ALJ No. 2000-STA-39, slip op. at 2 (ARB Sept. 28, 2001).

If the employer is found to have violated the Act, the complainant is entitled to (1) an order directing the employer to abate the violation, (2) reinstatement to his former position with back pay and (3) compensatory damages. 49 U.S.C. § 42121(B)(ii).

### **I. Complainant Engaged in Protected Activity.**

Complainant asserts that he engaged in protected activity when he: 1) reported that Top-Deck Designees were unqualified to perform their job and were making dangerous mistakes; 2) reported weight and balance errors; 3) reported an issue with hazardous materials notification on an inbound flight in January of 2009.

The Administrative Review Board ("ABR") has construed "protected activity" under AIR 21 broadly. *Baker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-ARI-12, slip op. at 9 (ARB Dec. 31, 2007). "The Board applies a three-part test to determine whether a

complainant has engaged in protected activity: 1) the complainant must genuinely believe there was or would be a violation of an FAA order, regulation, standard, or federal law relating to air carrier safety; 2) the concern must be objectively reasonable under the circumstances; and 3) the concern must be expressed in a manner that is specific to the practice, condition, directive or event giving rise to the concern.” *Sitts v. Comair, Inc.*, 2008 –AIR-7, slip op. at 8 (ALJ July 31, 2009); *see also Rougas v. Southeastern Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14 (ARB July 31, 2006); *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22, slip op. at 13 (ARB June 30, 2009). *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12, slip op. at 9 (ARB Dec. 31, 2007). An employee is not required to “cite to a specific violation” and his concerns must only “relate” to violations of FAA orders, regulations, or standards. *Simpson v. United Parcel Serv.*, ARB No. 06 -065, ALJ No. 2005-AIR-081, slip op. at 5 (ARB Mar. 14, 2008). Likewise, protection under the Act is not contingent on an objective showing of a violation, nor on a complainant’s reasonable apprehension of injury, nor that the complaint has merit. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 356-57 (6th Cir. 1992); *Pittman v. Goggin Truck Line, Inc.*, 1996-STA-25 (ARB Sept 23, 1997). The employee may circumvent employer’s prescribed channels of reporting safety violations and report outside the chain of command. *Davis v. United Airlines, Inc.*, 2001-AIR-5 (ALJ July 25, 2002); *see also Lockert v. Pullman Power Co.*, 867 F.2d 513, 518 (9th Cir. 1989).

#### **A. The Top Deck Designees**

##### **a. Complainant’s Safety Complaints Were Based on Perceived Violations of Regulations Relating to Air Carrier Safety.**

Throughout his employment as a gateway manager, Complainant expressed concerns that top deck designees were making numerous mistakes while recording information on their Ramp Action Summaries. *Id.* at 44. Complainant believed that UPS should institute formal training for these employees in order to ensure that they were competent to perform their assigned tasks. *Id.* at 45. Complainant raised the issue on numerous occasions with John Farley, his immediate supervisor, and voiced his concerns during the July 2008 conference call in the presence of regional air managers, corporate managers, and the district manager, Craig Wiltz. *Id.* at 43-44, 46, 166- 67, 220. UPS admitted that Complainant’s concerns about the top-deck designees’ lack of training and qualifications were well known to UPS. CX A at 5, CX V.

First, Respondent argues that Complainant’s concerns were merely personnel issues rather than safety issues and that it was ultimately Complainant’s responsibility to train his employees. The two are not mutually exclusive. Although Complainant felt that he could not follow the UPSCP training procedures without compromising the safety of the aircraft, he also brought specific safety mistakes to management’s attention in order to back up his assertions. CX V, *Id.* at 43, 44, 165-66, 220. For example, in the August 22, 2008 e-mail to Farley, Complainant outlined three specific discrepancies which he discovered while auditing the work of his subordinates. CX V. Complainant writes: “Today on UPS2871, Mike Blea the ground handler and cargo compartment designee had indicated an incorrect container number. I had the ground crew unload the aircraft and confirmed his paperwork was incorrect.” *Id.*

Second, Respondent argues that Complainant did not report that any physical injuries had occurred as a result of these employees, or that any UPS property or aircraft had been damaged. It is irrelevant that some of the defects identified by the Complainant did not implicate serious safety concerns. *Carroll Sievers v Alaska Airlines, Inc.*, 2004-AIR-0028 (May 23 2005). In *Carroll Sievers v. Alaska Airlines*, the judge found that Complainant's participation in the identification and reporting of relatively minor safety problems like the "wing slat droop, cracked window covers, defective hydraulic reservoir, and missing wing place cards was protected activity under AIR 21." *Id.* The Judge rejected Respondent's argument that these episodes were merely routine, isolated matters that were indistinguishable from normal day-to-day operations of the Maintenance Department and held that "for a finding of protected activity, it is sufficient that Complainant carried out his required, safety -related duties: supervising the maintenance of Respondent's aircraft and reporting, repairing, or deferring the repair of any documented defects." *Id.* As in *Sievers*, Complainant identified specific errors which were made by his subordinates and brought those errors to management's attention. Furthermore, the fact that the FAA launched an investigation into the issue further supports Complainant's contention that the lack of training was indeed a safety concern. CX C, TR 33-34.

**b. Complainant's Safety Complaints Were Objectively Reasonable Under The Circumstances.**

The objective reasonableness of a belief is evaluated on the knowledge available to the reasonable person "in the same circumstances with the same training and experience" as the complainant. *Shane Sitts v Comair, Inc.*, 2008-AIR-7, slip op. at 10 (ALJ July 31, 2009). Under certain circumstances, a reasonable belief can lose its "protected status after the perceived hazard has been investigated and, if found safe, is adequately explained to the employee. *Eltzroth v. Amersham Medi-Physics, Inc.*, ARB No 98-002, ALJ No. 97-ERA-031, slip op. at 4 (ARB April 15, 1999).

As a gateway manager, Complainant was in the best position to supervise his employees and identify their mistakes. Complainant testified that he found numerous mistakes during internal audits of top deck designees' work. Some of these employees could not speak English and had a hard time writing down numbers. TR at 44. Likewise, since many designees at the Albuquerque gateway were union members, Complainant testified that he could not take serious disciplinary measures and weed out incompetent employees. *Id.* at 44. When Complainant became gateway manager, UPS sent out a Safety Memo relieving top-deck designees from performing the duty of putting up locks on voided position. *Id.* at 45. Complainant was concerned that if top-deck designees could not perform a simple task of checking a lock they also could not be trusted with accurately recording positions and weights of containers. CX V. Complainant's reasonable belief never lost its protected status. There is no evidence that UPS investigated Complainant's concerns prior to July 2008. According to Complainant, his reports led to "head-butting conversations" with Farley who was being unresponsive. TR 43. For all the foregoing reasons, the court finds that it was reasonable for Complainant to conclude safety violations were taking place.

### ***B. The Weight and Balance Claims***

In 2007, Complainant reported a weight and balance error to Terry Christopher, the district air manager. *Id.* at 301. The error occurred when the load planner put the wrong information into the DWB. The error was not caught during the read back. *Id.* Consequently, the plane was sent out with the wrong information. *Id.* at 302. Complainant also faxed the information concerning the problem to the Phoenix gateway. CX U. Complainant's report was based on a perceived violation of a regulation relating to air carrier safety. If the weight and balance errors are critical enough, the airplane may crash. TR 47. The FAA Aircraft *Weight and Balance Handbook* describes proper procedures for weighing an aircraft and for loading an aircraft before flight. See *Aircraft Weight and Balance Handbook*, FAA-H-8083-1 (Oct. 15, 2010), available at <http://www.faa.gov/library/manuals/aircraft/media/FAA-H-8083-1A.pdf>. Numerous other FAA regulations deal with proper weight and balance procedures for specific types of planes. For example, the structure of a normal category airplane must be strong enough to sustain a load factor of 3.8 times its weight. An aircraft operated in the utility category must sustain a load factor of 4.4, and acrobatic category aircraft must be strong enough to withstand 6.0 times their weight. 14 CFR §23; see also 14 CFR §121, §135.

Complainant's concerns about weight and balance errors were also objectively reasonable. In the Pacific Region alone, UPS had more than 50 weight and balance incidents on file in 2008 even though none of these originated from the Albuquerque gateway. *Id.* at 126, 302-03. As Respondent points out, Complainant received extensive training on weight and balance issues and had sufficient experience to identify them. Accordingly, Complainant's weight and balance reports constitute protected activity for the purposes of AIR 21.

### ***C. The Hazardous Material Claims***

On January 7, 2009, Complainant reported problems with an inbound flight from Phoenix. TR 174. The captain of the plane did not receive appropriate notification identifying the hazardous materials on-board. *Id.* at 51-53, 174, CX U. After Complainant noticed the problem, he brought it to Farley's attention. Farley said he would report the problem to Christopher, the Division Manager in Phoenix. *Id.* at 174, 225.

Complainant's report constitutes protected activity because it relates to the perceived violation of 49 CFR §172. This FAA regulation deals specifically with appropriate shipping descriptions of hazardous materials. The crew needed the hazardous material documentation in order to respond appropriately in case of an emergency. *Id.* at 51-52.

### ***D. FAA Claim***

The Complainant also reported several safety issues to the FAA after his termination on February 17, 2009. *Id.* at 33, 105-107. His complaint primarily concerned the lack of training that UPS provides Top Deck Designees. *Id.* at 33-34. The FAA completed a preliminary investigation of the safety allegations contained in the complaint and has established that a violation of an order, regulation, or standard relating to air carrier safety may have occurred. CX C, TR at 34. Generally, protected activity must precede the adverse action. Here, there is no evidence that Complainant was planning to file a complaint with the FAA at any time during his

employment. Therefore, the FAA complaint is not protected activity for the purposes of his action.

## **II. The Decision Maker Who Terminated Complainant Knew That Complainant Engaged in Protected Activity.**

Complainant must establish by a preponderance of the evidence that the relevant decision makers knew about his protected activity. *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001 –AIR-3 (ARB Jan 30, 2004); *Shirani v. Comed/Exelon Corp.*, ARB No. 03-100, ALJ No. 2002-ERA-28 slip op. at 9-10 (ARB Sept. 30, 2005). The Complainant may meet his burden of proof by presenting circumstantial evidence which indicates that someone in the chain of command engineered the adverse action. *See Ezell v. Potter*, 400 F.3d 1041, 1051 (7<sup>th</sup> Cir. 2005); *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77 (1<sup>st</sup> Cir. 2004).

The decision to terminate Complainant was ultimately made by Craig Wiltz, the UPS Desert Mountain District Manager with input from Mary Sue Allen, the UPS Pacific Region Human Resources Manager and Gary Fernandez, Desert Mountain Human Resources manager. *Id.* at 340, 346-47. The evidence supports Complainant’s contention that Craig Wiltz knew about the Top Deck Designee complaints. Complainant raised the issue during the July 2008 conference call which followed the audit. Craig Wiltz and other corporate and regional managers were present during this call. *Id.* at 3, 46. UPS likewise admits that Complainant’s concerns about the top-deck designees’ training, qualifications, and lack of certification were well known to UPS. CX A at 5. Although Wiltz testified that he did not recall any specific complaints about safety issues, he noted that “if anything would come up on any of the conference call interactions that we had... I would have suggested to Mr. Mizusawa that ultimately I hold him accountable.” TR 339-40. Complainant failed to show that Wiltz, Fernandez or Allen were aware of his other protected activities. Complainant did not copy Craig Wiltz about safety complaints because “he was just a figure head” and anything “that you said to him would get back to John or one of the other UPS managers.” *Id.* at 90. Complainant also testified that he did not report weight and balance problems directly to Wiltz, Fernandez or Allen. *Id.* at 119, 150.

## **III. Complainant’s Protected Activity Was Not A Contributing Factor to The Adverse Personnel Action.**

To establish causation, the complainant must demonstrate that his protected activity was a “contributing factor” to the adverse personnel action. 29 U.S.C. § 42121 (b)(2)B(iii). The protected activity must only “tend to affect in any way the outcome of the [adverse personnel] decision.” *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). The desire to retaliate against the whistleblower does not have to be the main reason for the adverse employment action. It must only play a part, alone or in connection with other factors, in the overall motivation to fire the Complainant. “The existence of retaliatory motive may be established by circumstantial evidence.” *Sievers*, 2004-AIR-00028, slip op. at 26 (ALJ 23 May 2005). In evaluating the merits of the circumstantial evidence, courts may consider the following factors: 1) the timing of the adverse action in relation to the protected activity; 2) disparate treatment of the Complainant; 3) deviation from routine procedures; 4) the attitude of

the supervisors towards the whistleblower and protected activity in general; 5) Complainant's work performance rating before and after he engaged in protected activity. *Id.*

### A. *Timing*

"Temporal proximity between employee's protected activity and an employer's unfavorable personnel action may be circumstantial evidence of discrimination." *See Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004). However, while a "temporal connection between the protected activity and the adverse action may support an inference of retaliation," the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov 30, 2005); *Barber v. Planet Airways, Inc.*, ARB Case No. 04-056, ALJ No. 02-AIR-19, slip op. at 6 (ARB April 28, 2006). For example, "inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused the adverse action." *Id.* (emphasis original); *see also Clark v. Pace Airlines, Inc.*, ARB No. 05-150, ALJ No. 2003-AIR-28, slip op. 13 (ARB Nov. 30, 2006). In cases where the employee presents solely circumstantial evidence, the ARB has advised judges to "examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether" an employee can meet the "contributing factor" element. *Peck v. Safe Air International*, 2001-AIR-3, D&O of ARB, at 7 (Jan. 30, 2004); *see also Kester v. Carolina Power and Light Co.*, 2000-ERA-31, D&O of Remand by ARB, at 3 (Sept. 30, 2003).

Here, although Complainant's protected activity was sufficiently close in time to his termination, the inference of retaliation is destroyed by two intervening events. First, in October of 2008, Complainant authorized his subordinate, Zack Abad, to make a film on UPS premises in violation of several UPS policies. CX A at 7. Abad's video was a project of significant proportions and took several days to complete. On November 24th, Abad conducted filming during the airport's night operation and utilized heavy UPS equipment without any supervision. *Id.* During the filming, Abad placed a classmate into a UPS container, placed the container on a "K-loader," lifted it up to the aircraft, and then pushed it inside into position." TR at 314. Next, he filmed a scene where the actor escaped from the belly of the aircraft and ran down a belt loader. TR at 314-315.

"A breach of company rules may suffice to support a finding of an independent cause for the adverse action." *Zurcher v. Southern Air, Inc.*, 2009-AIR-00007 at 14 (29 September 2010); *see also Sievers*, 2004-AIR-00028, slip op. at 11. The filming at the gate violated the UPS video policy, which provides that "the use of all recording devices in any UPS facility for anything other than authorized business purposes is prohibited. Employees may possess cell phones with cameras, or other devised capable of recording pictures, video, or audio, while on UPS facilities provided that the recording capabilities are not used." *See* UPS Recording Devices Policy, RX. 36, 37, 38. The video policy was located in UPS's Information Use and Standard Practice Manual, and was part of UPS's Information Use and Security Compliance Training, which is a computer based training ("CBT"). *Id.* at 230-31, 274, 285-86. UPS also had a media policy. Under the media policy employees were required to direct media requests to UPS's corporate media officer. *Id.* at 58. In the course of filming, Abad also violated UPS's policy regarding personal use of company property, which is contained in UPS's Policy Book. TR 229, 231, 278,

330. That policy states that the use of “company time, labor, supplies, equipment, tools, buildings, or other assets for personal benefit is prohibited.” RX 10. The policy is contained in the Policy Book, which UPS discussed at meetings. The policy was also a part of the curriculum at UPS management leadership school, and its language is included in the UPS Code of Business Conduct. *Id.* at 290-291, RX 12.

From the testimony presented at the hearing, it is clear that UPS took violations of its policies seriously. *Id.* at 337. Specifically, the UPS video policy was a “zero tolerance” firing offense. *Id.* at 253, 273. Wiltz testified that if he had authorized the video without consulting corporate management, his job would be in jeopardy and he potentially could have been terminated. *Id.* at 343. The policy was designed not only to protect the security of the airport but also to protect UPS’s trade secret information such as its processes and procedures. *Id.* at 341. Likewise, the UPS lease with the Albuquerque Airport Authority specifically prohibited the use of the airport for anything other than air ship and freight operations without the city’s permission. *Id.* at 341- 42. The video also could have resulted in major property damage and bad publicity for UPS. In the course of filming, non-UPS employees whom Abad brought to the gateway could have been injured. Farley testified that he was worried whether Abad was really able to fully supervise “everyone and watch what’s going on,” and watch “what people are doing.” *Id.* at 230.

Complainant testified that he was unaware of any UPS video policy. The court credits the testimony of Harvey Hill and Chuck Martinez and finds that Complainant should have been aware of the policy. The video policy was contained in the annual training for all UPS Managers. *Id.* at 285. Harvey Hill testified that it was his responsibility to make sure that every manager in the district took this training. *Id.* at 285. He further stated that he remembered the video policy information being in UPS training as far back as early 2000. *Id.* at 286. Complainant took the Information Use and Security CBT in 2007. *Id.* at 57, 288. Several of the UPS managers who testified about UPS policies at the hearing also stated they were aware of UPS’s video policy that prohibited the use of recording devices. *Id.* at 273-74, 284-85. Furthermore, during his conversation with Chuck Martinez on February 17th, 2009 Complainant stated that UPS does not allow cameras on ramps and that employees should be working instead of taking videos. *Id.* at 316-17. Complainant likewise testified that he was aware of UPS’s media policy even though he believed it only applied to news reports. *Id.* at 57.

Ultimately, it was Complainant's responsibility to investigate the facts and question Abad about his plans. By authorizing Abad to conduct the filming without consulting Farley or the security department, Complainant essentially took on the responsibility to ensure that all UPS policies and procedures were followed. For all the reasons mentioned above, the court finds that authorizing the filming could have independently caused Complainant to lose his employment.

Second, in July 2008, Complainant’s gateway failed a consecutive audit. *Id.* at 331. When the gateway failed the 2007 audit, Wiltz asked Complainant to come to Phoenix for an in-person meeting. *Id.* During the meeting, Wiltz expressed his disappointment in the audit scores and discussed corrective measures to be implemented. *Id.* Wiltz advised Complainant that he was fully responsible for every activity at the Tucson and Albuquerque Airport operations. At that time, the consequences of failing the 2008 audit such as demotion and loss of raise were

discussed. *Id.* at 188. According to Wiltz, Complainant assured him that if the gateway did not pass the 2008 audit he would resign. *Id.* at 333. Complainant himself acknowledged the importance of the 2008 audit in his memo to Farley. Complainant wrote:

I was handing out with Dominic Valdez and Vince Krawic and they asked me what I was doing there so early. I said that I was going to get pummeled during the audit review and I probably was going to get reassigned to the Preload. I was kind of joking but I know this is a definite possibility when failing this audit. Craig Wilts and Bill Conrad flew me up to Phoenix last year and specifically told me I had to pass this next audit or there would be changes.

RX 6.

After the gateway failed the 2008 audit, Complainant was placed on a performance improvement plan (MPIP). *Id.* at 189-90, 337. MPIP's were designed to help employees improve their performance by identifying problem areas. *Id.* at 190.

Based on the evidence discussed above, the court finds that in this case temporal proximity alone is insufficient for a finding of retaliation. Granting authorization to shoot the video in violation of UPS policies and failing two consecutive audits could have independently caused Complainant to lose his job.

### ***B. Deviation from Procedures***

“Deviation from proper or routine procedure may be evidence that an employer’s proffered explanation is pretextual.” *Sievers*, 2004 –AIR-0028, slip op. at 24; *see also Porter v. California Dept. of Corrections*, 383 F.3d 1018, 1926-27 (9th Cir. 2004). Complainant fails to present evidence demonstrating that Respondent deviated from its routine procedure during the investigation or the termination stages. The investigation of the Abad video incident, which ultimately served as an impetus for the discharge, was conducted by an unbiased employee after a careful investigation of the facts. As mentioned above, the investigation was initiated by the Human Resources supervisor who came across the Lindblaum video on YouTube. The investigation zoomed in on Complainant’s involvement after a union steward indicated that it was improper for UPS to take disciplinary measures only against employees and not supervisors. *Id.* at 312. The lead investigator, Chuck Martinez, was disconnected from the day to day operations of the Albuquerque airport and was responsible only for gathering the facts and presenting them to management. *Id.* at 318.

The investigation began on February 10th. By February 13th, 2009 the summary of the Albuquerque Gateway Film Incident was prepared. CX A. The summary indicates that all of the key witnesses (Zak Abad, Phil Stevens, Mark Pacheco, and Paul Chavez) were interviewed and asked to provide write ups. The decision to terminate Complainant was ultimately made in less than an hour by Craig Wiltz, the UPS Desert Mountain District Manager, with input from Mary Sue Allen, the UPS Pacific Region Human Resources Manager and Gary Fernandez, Desert

Mountain Human Resources manager. Wiltz testified that he “went through every detail [of the investigation] to make sure that any recommendation or decision that was made would certainly be the right decision.” *Id.* at 347. According to Wiltz, the video incident was the primary reason for the termination. *Id.* at 330. Wiltz felt that the incident was a continuation of a “pattern of poor decision-making that [he] saw in the previous two audits, and ultimately” Complainant violated the company’s policies that UPS considered very important. *Id.* at 338. Wiltz testified that the top-deck designee issue or other safety reports made by Complainant never came up during the discussion. *Id.* at 338. Farley was not consulted during the discussion and, according to Wiltz, Farley’s previous statements and reports were not taken into consideration. *Id.* at 320, 340. Complainant fails to point out any deficiencies or abnormalities in the UPS investigation process.

### ***C. Disparate Treatment***

Disparate treatment of non-whistleblower employees who engaged in similar conduct may be proof of retaliatory intent. *See, e.g., Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990). However, such “evidence is only relevant ...to the extent that the other employees are similarly situated to the complainant.” *Zurcher*, 2009-AIR -00007, slip op. at 14; *see also Sievers*, 2004-AIR-0028, slip op. at 28 (finding the employer’s decision to terminate Complainant retaliatory and noting that even though the company’s rules specifically prohibited altering or making entries on another employee’s timecard, the only other supervisor who did have a previous record of timecard misuse received merely a disciplinary letter and a warning.). There is no evidence that any other gateway manager at UPS authorized a filming of a video without being disciplined. In an incident which took place before Complainant's termination, some of Complainant’s ground handlers (Steve Ramirez, Mike Blea, Todd Lindblau, and David Bianco) shot a video at the gateway in Albuquerque. *Id.* at 60, 67-68. The video showed these employees using profanity and pushing and shoving one another. *Id.* at 331. The UPS shields were clearly visible in the video which was posted on YouTube. *Id.* Complainant was informed about the incident before going on leave. *Id.* at 59, 245. Of the six employees that participated in the video, two received written warnings and four were discharged or voluntarily resigned. *Id.* at 312. Todd Lindblau was terminated for his part in the video but regained employment after grieving the termination. *Id.* at 69-70; CX A. Complainant stated that one of the retired regional air managers brought in cameras to the gateways and shot videos. *Id.* at 56-57. Complainant also testified that he was instructed on several occasions to take pictures. Complainant fails to describe the with particularity the circumstances surrounding these alleged incidents. *Id.* at 144. Accordingly, the undersigned finds no evidence of disparate treatment.

### ***D. Antagonism Towards Protected Activity***

Proof of animus towards the whistleblower and his protected activity may be sufficient to demonstrate discriminatory motive. *See Sievers*, 2004-AIR-0028, slip op. at 27. “[R]idicule, open hostile actions or threatening statements,” or even “simply questioning why the whistleblower did not pursue corrective action through the usual internal channels” may serve as circumstantial evidence of retaliation. *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996). The evidence presented by Complainant does not support a finding of antagonism towards his protected activities. The ultimate decision maker, Craig Wiltz, encouraged his gateway managers to identify safety violations and hold employees accountable

for their mistakes. For example, after Complainant's gateway failed the 2008 audit, Wiltz instituted an even more stringent audit procedure for the Albuquerque gateway in order to help Complainant identify safety errors. *Id.* at 337. He escalated the "review level of the internal weekly" audits and assigned Bill Conrad the responsibility of reviewing the results and ensuring compliance. *Id.* at 339. Wiltz also instructed Farley to assist Complainant in improving his performance. *Id.* at 337. Wiltz told Farley "to go over and spend more time with Mr. Mizusawa and try to influence his decision-making and train him on the things that he needed to do and see and how he needed to run ... a compliant gateway." *Id.*

The testimony of UPS employees and managers likewise supports the finding that UPS encouraged employees to report safety violations. Complainant himself testified that UPS is "number one when it comes to safety procedures." *Id.* at 78. John Farley testified that "it's part of what UPS is all about is safety. We talk at length about different things across the board. I mean, that's part of our lingo. It's part of what we do." *Id.* at 165. According to Farley, UPS encouraged its employees to report safety issues. *Id.* at 199, 201. Employees could report concerns to the UPS Safety Committee, call the UPS hotlines, or take their concerns to any UPS manager regardless of the manager's seniority level. *Id.* at 199-200, 206. Harvey Hill echoed this contention and stated that he is unaware of any employee being reprimanded for raising safety concerns. *Id.* at 284.

Complainant contends that although UPS appears safety oriented to the outside observer, it does not have enough resources to make sure that all procedures are followed. *Id.* at 78. According to Complainant, UPS management turned a "blind eye to all the struggles" that occurred at the district level. *Id.* In particular, Complainant directs his allegation of retaliation against Farley. Complainant felt that Farley was not taking appropriate steps to address his safety complaints. *Id.* at 42. Complainant testified that he felt dissuaded from making reports outside the district and sensed that Farley was annoyed with him for doing so. *Id.* at 46, 80.

Complainant fails to present evidence supporting this contention. Complainant himself testified that he did not hesitate to bring safety complaints to Farley. *Id.* at 115. Complainant presents evidence of only one incident which can be construed as a reprimand for making a safety complaint. *Id.* at 82-83. The incident took place after Complainant's gateway failed the 2008 audit. The 2008 failed audit reflected very poorly not only on Complainant but also on John Farley and the entire Albuquerque gateway. During the 2008 round table discussion, Complainant began acting unprofessionally and essentially yelling at the auditors. *Id.* at 183, CX A. During the conference call which followed the round table discussion, Complainant once again raised his top-deck-designee concerns. Farley felt that the conference call was not an appropriate time to bring up the issue. *Id.* at 185. According to Farley, the concern should have been discussed and addressed during the round table discussion. After the audit review, Farley snapped and told Complainant to keep his mouth shut. *Id.* at 42. According to Complainant, Farley indicated that "he was tired of me [Complainant] bringing up a lot of these issues on weight and balance" and stated that these "concerns could be fixed within the district" *Id.* at 46.

Even if the undersigned concludes that Farley harbored hostility towards Complainant for continuously raising the Top Deck Designee issue, there is no evidence that Farley played any role in Complainant's termination. Farley did not make any recommendations concerning the

termination of Complainant's employment. *Id.* at 246, 340. He also lacked the authority to terminate Complainant. *Id.* at 247-248. Wiltz testified that in the course of making the decision he did not consult Farley or take into consideration any of Farley's previous statements.

Furthermore, the evidence demonstrates that Farley had an interest in addressing and correcting Complainant's safety concerns. Farley worked through the management performance improvement plan (MPIP) with Complainant. *Id.* at 191-192. He also praised Complainant for his good work on numerous occasions, as evidenced by e-mails he sent to Complainant stating "Wow, that's what I'm talking about," and "NICE JOB! Ed is leading the way." CX. K, L, P. Farley also completed Complainant's Quality Performance Review ("QPR") in early 2009, and ranked Complainant's performance as "very effective," the highest level possible *Id.* at 198-199.

Based on this evidence, I find that Complainant has failed to prove a discriminatory motive.

### ***E. Work Performance***

High work performance rating prior to engaging in protected activity and low ratings thereafter may serve as circumstantial evidence of retaliation. *See Hale v. Baldwin Assoc.*, 1985-ERA-00037 (ALJ October 20, 1986) (stating that a pattern of suspicious circumstances may permit an inference that an employer's adverse action was unlawfully motivated). In this case, it is undisputed that Complainant was a hardworking employee who dedicated himself to the company. Complainant considered himself a true "Brown" UPS employee for twenty five years. *Id.* at 32. Complainant was never subject to any warning letters, write-ups, or other forms of discipline. At the same time, Complainant experienced some performance difficulties during his first two years as a gateway manager. As mentioned above, Complainant's gateway did not pass the 2007 and 2008 audits. Complainant also acted unprofessionally during the 2008 round table discussion. According to Terry Christopher, the District Air manager, "[Complainant] was somebody that worked hard but in my opinion had problems holding people accountable to do the job. He tended to do things on his own as opposed to taking those employees and documenting them and holding them accountable to do the jobs themselves." *Id.* at 295

Furthermore, Complainant's rankings and performance ratings improved *after* he made complaints to Farley and corporate management in the summer of 2008. Following the 2008 audit, he received a stellar performance review, a 4.71 out of 5, from his direct supervisor Farley. *Id.* at 198. On January 21<sup>st</sup>, 2009, UPS announced that Complainant's gateway was ranked number one in the nation. *Id.* at 265. The gateway ran at 100.9 percent efficiency in 2008. No other gateway in the country ran higher than at 100 percent efficiency in that year.

After taking into consideration UPS's policies and procedures, Claimants work performance as gateway manager, and the timing of the adverse employment action, the undersigned finds that Claimant's protected activity was not a "contributing factor" in his termination.

## CONCLUSION

Complainant engaged in protected activity when he raised concerns about the top-deck designees, reported weight and balance errors, and complained about the UPS hazardous materials training; however, he has failed to demonstrate that these reports motivated the adverse personnel action. The evidence in this case supports a finding that Complainant was discharged for authorizing Zak Abad to make a video at the UPS Albuquerque gateway without seeking approval from his superiors. In the process of filming the video, Zak Abad violated multiple UPS policies. As Abad's supervisor, Complainant was held ultimately responsible for these violations.

## ORDER

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

A

Russell D. Pulver  
Administrative Law Judge

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

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

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