



Issue Date: 21 December 2011

Case No. 2011-AIR-3

IN THE MATTER OF

JOHN ALEXANDER,
Complainant

vs.

ATLAS AIR, INC.
Respondent

**DECISION AND ORDER ON RESPONDENT'S
MOTION FOR SUMMARY DECISION**

This matter arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).¹ The Secretary of Labor is empowered to investigate and determine “Whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of their employment for taking any action relating to the fulfillment of safety or other requirements established by AIR 21.

Respondent argues that Complainant cannot meet the four required elements of an AIR21 claim as a matter of law, and seeks summary dismissal of the claim. Complainant argues that genuine issues of material fact exist for each element and summary decision is inappropriate.

BACKGROUND

Complainant joined Respondent as a pilot on 30 Aug 99. In 2008, Respondent initiated flights into Kabul and Kandahar in Afghanistan as part of the U.S. Air Force Mobility Command’s Civil Reserve Air Fleet (CRAF). Complainant had concerns about the safety and legality of these flights.² On 18 Dec 09, Complainant was administered an alcohol and drug test that was subsequently reported as positive for marijuana. Respondent informed Complainant he would immediately be removed from performing safety-sensitive duties. The Federal Aviation Administration (FAA) was notified of the test results and issued an Emergency Order of Revocation of Complainant’s medical certificate. Respondent then terminated Complainant’s employment in January 2010. On 22 Apr 10, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging Respondent had retaliated against him for making complaints about the safety of its operations in Afghanistan by selecting him for a faulty drug test and failing to reinstate him promptly after being informed of procedural flaws in the test.

¹ 42 U.S.C. § 42121 *et seq.*

² He alleges that he expressed those concerns in his workplace and to his union representative and refused to fly into those locations.

At a hearing on Complainant's appeal of the revocation on 14 Jul 10, a National Transportation and Safety Board (NTSB) Administrative Law Judge (ALJ) held that the test was invalid due to technical mistakes during the collection process and Complainant was therefore qualified to hold the airman medical certificate.³ In October 2010, Respondent reinstated Complainant, who continues in its employment today. OSHA found the whistleblower complaint to have no merit on 1 Nov 10. Complainant objected to OSHA's findings on 1 Dec 10 and the case was assigned to me.

Following a conference call with counsel for both sides, I ordered Complainant to file a clarifying complaint that specified his protected communications, the dates of those communications, the modes of those communications, and to whom the communications were made. I also directed Complainant to list each and every adverse action taken and to specify/quantify the damages that resulted.

His counsel, who no longer represents him, filed that document on 8 Feb 11.⁴ It included the following factual allegations:

In 2008, Respondent began operating into Afghanistan and published an FAA-approved Operation Specification requiring those operations be limited to daytime VMC.⁵ At the same time, Respondent issued station guides directing crews to fly only at night and without lights when below 18,000 feet. Respondent did not have a waiver from the FAA, DOT, or ICAO,⁶ and the operations were in direct contradiction of the FAA and ICAO regulations. He objected to both his Chief Pilot, Mike Bryant, and to Respondent's scheduling office and refused to fly into Afghanistan.

On 27 Jul 09 he emailed some concerns about the safety and legality of the Afghanistan operations to his union chairperson and attached a Department of State web site that warned travelers to Afghanistan and mentioned airborne artillery. His union chairperson responded that he had shared Complainant's concerns with management and it was a very hot topic.

On 16 Dec 09, he sent another email to his union representative informing him that a friend had indicated that one of Respondent's aircraft had sustained damages during operations in Afghanistan. He told the union chairperson that he was disgusted that Respondent and the union would sweep the incident under the rug.

On 16 Dec 09, he reported to work and was told to submit to drug testing. After being told his sample was positive, he immediately informed Respondent of procedural errors and technical violations that were involved in the collection of his sample. He also went to a different agency and had them test his urine, which was negative. He provided those results to Respondent, which failed to reinstate him.

Respondent terminated him on 4 Jan 10 and the FAA revoked his pilot's medical certification in late February, 2010. On 14 Jul 10, an NTSB ALJ invalidated the positive test, but Respondent did not reinstate him until 25 Oct 10 and when it did so, it reinstated

³ *Babbitt v. Alexander*, NTSB Order No. SE-18819 (July 14, 2010).

⁴ Contrary to the order, the complaint attempted to keep Complainant's options open for the subsequent addition of more protected activities by qualifying his description of his protected activities as "includ[ing], but ... not limited to the following[.]"

⁵ Visual meteorological conditions.

⁶ Department of Transportation; International Civil Aviation Organization.

him in New York rather than Miami, where he lives and had been assigned before his termination.⁷

In its answer to the complaint, Respondent either denied these allegations or submitted it lacked sufficient knowledge or information to admit or deny them.⁸ Following extensive discovery and continuances, Respondent submitted a Motion for Summary Decision on 11 Oct 11. Complainant was pro se at that time, but retained a second counsel who entered his Notice of Appearance on 24 Oct 11 and filed Complainant's answer to the motion on 21 Nov 11.

LAW

Summary Decision

Summary decision is a tool used to dispose of actions in which there is no genuine issue of material fact between the parties and which may be decided as a matter of law.⁹ An administrative law judge may grant a motion for summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.¹⁰ In a motion for summary disposition, the moving party has the burden of establishing the absence of evidence to support the nonmoving party's case.¹¹ The evidence is then viewed in the light most favorable to the nonmoving party.¹² To meet its burden, though, "the nonmovant must do more than simply show that there is some metaphysical doubt as to the material facts."¹³ The nonmoving party may not rest solely upon his allegations or speculations, but must present specific facts that could support a finding in his favor at trial.¹⁴

To determine whether there is an issue of material fact, the ALJ must first examine the elements of the complainant's claims to sift the material facts from the immaterial. Then, considering the materiality of a fact, the ALJ "must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute" over it.¹⁵ The moving party bears the burden of showing there is no genuine issue of material fact, which may be done by showing there is an absence of evidence for an essential element of the complainant's claim.¹⁶

The nonmoving party must "make a showing on every element that is essential to his or her case and on which the party will bear the burden of persuasion at trial."¹⁷ The ALJ will take all evidence presented by the nonmoving party as true, but "a properly crafted defense motion for summary judgment requires a complainant to exhibit admissible proof of facts crucial to his or her claim for relief...[which] must be grounded in affidavits, declarations and answers to discovery[.]"¹⁸ If the moving party presented admissible evidence in support of the motion for

⁷ Complainant's Objection and Request for Hearing.

⁸ Respondent Atlas Air, Inc.'s Original Answer, #7-11.

⁹ *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

¹⁰ 29 C.F.R. § 18.40 (d).

¹¹ *Wise v. E.I. DuPont de Nemours and Co.*, 58 F.3d 193, 195 (5th Cir. 1995), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

¹² *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

¹³ *Taita Chemical Co., Ltd. v. Westlake Styrene Corp.* 246 F.3d 377, 385 (5th Cir. 2001), *quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

¹⁴ *Hasan v. Enercon Services, Inc.*, ARB No. 10-061, 2011 WL 3307579 at *3 (July 28, 2011); 29 C.F.R. § 1840(c).

¹⁵ *Hasan* at *3.

¹⁶ *Id.*, *citing Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Celotex* at 322.

¹⁷ *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, 2007 WL 1578494 at 7 (May 24, 2007).

¹⁸ *Gallagher v. Granada Entertainment USA*, ALJ No. 2004-SOX-74 (April 1, 2005).

summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.¹⁹

AIR21

The basis for Complainant's case is the whistleblower provision of AIR21, which provides in pertinent part:

- (a) DISCRIMINATION AGAINST AIRLINE EMPLOYEES – No air carrier or contractor or subcontractor may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or 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.²⁰

To state a viable whistleblower claim under AIR21, a complainant must show by a preponderance of the evidence: 1) he engaged in protected activity under Section 42121(a); 2) his employer was aware or had knowledge of the protected activity; 3) he suffered an unfavorable or adverse personnel action at the behest of the employer; 4) the protected activity was a contributing factor in the unfavorable action.²¹

Under the Act, protected activity has two features: 1) the information the complainant provided involved a purported violation of a regulation, order, or standard relating to air carrier safety²² and 2) the complainant's belief a violation occurred was objectively reasonable.²³

To prevail on the current motion, Complainant need not show that he did indeed meet the requirements for a claim under AIR21. He must only show that a genuine issue of material fact exists that would allow a finder of fact to decide in his favor on each of these elements.

ANALYSIS

In its motion, Respondent argues that the complaint should be summarily dismissed because 1) Complainant did not engage in protected activity; 2) even if Complainant did engage in protected activity, Respondent had no knowledge of that activity; and 3) no causal relationship existed between any protected activity and any adverse personnel action. Respondent also argues that because the unfavorable personnel action would have taken place regardless of the protected activity, Complainant has no remedy under AIR21. Respondent submitted seven affidavits and deposition transcript excerpts in support of its motion. Complainant filed a number of documents and a brief in response.

¹⁹ *Hasan* at 3.

²⁰ 49 U.S.C. § 42121(a)(1).

²¹ *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008) (the Fifth Circuit has stated as a separate element of the *prima facie* case that the employer knew the employee engaged in protected activity, while the Eleventh Circuit finds that element implicit in the "contributing factor" element; see, e.g. *Majali v. U.S. Dept. of Labor*, 294 Fed. Appx. 562 (11th Cir. 2008) (unreported); *Edward Mizusawa v. United Parcel Service*, ALJ No. 2010-AIR-00011 at 8 (ARB Oct. 21, 2010)).

²² Complainant need not prove an actual violation.

²³ *Hindsman v. Delta Airlines, Inc.*, ARB No. 09-023, 2010 WL 2680567 at *3 (Jun 30, 2010).

Protected Activity

Respondent first argues that there is no material question of fact that would allow a finding that Complainant communicated any information concerning a violation of FAA orders, regulations, or standards or Federal law relating to air carrier safety. Respondent addressed the two emails sent by Complainant and identified in the complaint he filed for the purposes of specifying his protected communications. Respondent argued that the 27 Jul 09 email did no more than draw attention to a Department of State web site warning travelers to Afghanistan and had nothing to do with flying safety. It then argued that the 16 Dec 09 email similarly failed to raise anything that suggested Complainant reasonably believed Respondent was violating FAA orders, regulations, standards or Federal law relating to air carrier safety. As a result, Respondent contends, there is nothing in the record that raises a genuine issue of material fact that would allow a finding of a protected communication.

In his answer, Complainant responded that the e-mails show he was speaking up about the dangers of flying into Afghanistan on behalf of fellow pilots fearing for their jobs. He attached the emails in what he labeled “Composite Exhibit A.”

As “Composite Exhibit B” he submitted a collection of various documents.²⁴ They include 1) a page from a “general operations manual” that indicated FAA requirements limited Afghan operations to daytime; 2) Department of State travel warnings for Afghanistan from 23 Jul 09 and 8 Mar 11; 3) an extract from OSHA regulations requiring employers to provide an environment free from hazards of death or serious injury; 4) an unidentified extract from a document that appears to discuss the War Hazards Compensation Act; and 5) a copy of the Federal Register 26 May 10 publication of the FAA’s proposed rules to limit U.S. carrier operations in Afghanistan below Flight Level 160.²⁵ Complainant offered as his “Exhibit C” Respondent’s guidance for Afghanistan operations, which indicate that nighttime operations are allowed.

In its reply, Respondent argues that there is no evidence Complainant actually complained about the nighttime operations to either Respondent or the union and submits that Complainant testified that the first time he raised the issue was in April 2010.²⁶ The affidavit of Jeffrey D. Carlson, Respondent’s Vice President of Flight Operations, states he was not aware that Complainant had raised any concerns regarding the Company’s flight operations into Afghanistan. An excerpt from the deposition testimony of Steven P. Richards, the union head, states he did not forward either of Complainant’s emails to Respondent, nor did he ask anyone else to do so.²⁷ Respondent also notes that the operations were being conducted for the Department of Defense and in accordance with Air Mobility Command Directives.

²⁴ Claimant’s Counsel did not cite or even identify many of the documents in Exhibit B, much less attempt to explain why they are relevant to the motion.

²⁵ Approximately 16,000 feet.

²⁶ However, Respondent did not include an excerpt of Complainant’s deposition testimony or any other evidence that substantiates that alleged admission.

²⁷ Respondent’s Exhibit F at p. 12.

In sum, Respondent argues that neither email referred to any conduct that comes within the Act,²⁸ It also argues that Complainant never raised the issue of nighttime flying until well after the allegedly adverse actions took place, and even if he had done so earlier, he did not report any covered conduct.

The 27 Jul 09 Email

There is no indication from either parties' exhibits that the 27 Jul 09 email included anything but an attached Department of State traveler warning advising of the dangerous situation on the ground in Afghanistan. There is no reference to flying safety or statutes, rules, or regulations related to flying safety. The fact that the union head responded to Complainant that he "shared your concerns with management" about aircrew security does not raise a genuine issue of material fact that would allow for a finding that the email was a protected communication. A general State Department advisory about the dangers of traveling to Afghanistan, even with the mention of artillery, does not constitute directly or by implication "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."²⁹ The motion to dismiss as to the 27 Jul 09 email is granted, because I find as a matter of law that Complainant failed to offer anything to create a genuine issue of material fact that he reasonably believed he was reporting a covered violation.

The 16 Dec 09 Email

In his 16 Dec 09 email, Complainant says he heard from a friend that one of Respondent's aircraft received sniper fire somewhere in Afghanistan and that "they" were offered a great deal to keep quiet about it, with the company getting an extra \$12,000 to send crews into Afghanistan.³⁰ He requested that more information be shared and asked that such important safety information not be concealed from the crews. He next suggested only having volunteers fly into Afghanistan, as originally advertised. He noted he was speaking on behalf of many pilots, expressed concern about the hazards of overnighing in Afghanistan, and observed that flying into hostile areas was never part of the job description. Aside from the implication that the sniper fire occurred while the aircraft was airborne, there is no mention of flying operations or procedures by Respondent and no mention of any possible violation of any statutes, rules, or regulations related to flying safety.³¹ The fact that the union head responded that flying into Afghanistan raises major safety concerns does not raise a genuine issue of material fact that would allow for a finding that the email was a protected communication under the Act.

²⁸ The emails were communicated to the union representative, which raises the issue of whether they qualify as communications to his employer as required by the Act. That in turn creates the questions of whether the union representative was an agent of Respondent for the receipt of safety-related information or if there was a reasonable expectation that the union representative would forward that information. Whether the emails to the union rep themselves were communications to the Respondent was not directly addressed by the parties, although Respondent did raise it by arguing that the communication was never received by or known to the individual who was responsible for the adverse actions. In any event, it is rendered moot by the other grounds for my decision.

²⁹ 49 U.S.C. § 42121(a)(1).

³⁰ Complainant's Composite Exhibit "A," Respondent's Exhibit F2.

³¹ Indeed, Complainant's suggestion that Respondent use only volunteer pilots would be inconsistent with a concern or warning that Respondent was in violation of rules, orders, statutes, or regulations related to flight safety.

As with the previous email, I find Complainant failed to offer anything to create a genuine issue of material fact that he reasonably believed he was reporting a covered violation. The motion to dismiss as to the 16 Dec 09 email as a protected communication is granted.

Objection to Night Operations and Refusal to Fly

The only remaining protected communication alleged in the complaint is that Complainant objected to both his Chief Pilot and Respondent's scheduling office and refused to fly into Afghanistan, because of the violation of the FAA's limitation that carriers operate only in daytime and VMC. Respondent argues that this final allegation also fails because 1) at the outset of its Afghanistan flight operations, it informed the Union that the Company was asked by the U.S. Air Force Air Mobility Command to conduct flight operations in Afghanistan to support U.S. Military Operations in that country and 2) "by his own testimony," Complainant never communicated any concerns about that issue until April 2010.

In support, Respondent submitted the affidavit of its Vice President for Flight Operations. The affidavit stated that Respondent was operating into Afghanistan under the direction of Air Mobility Command, had so informed its pilots, had experienced no damaged aircraft due to sniper fire, and had not conducted any operation in violation of any flying safety statute, rule, regulation, or order. As noted above, the affidavit also stated that he was not aware that Complainant had raised any concerns regarding Respondent's flight operations into Afghanistan.

Complainant need not show that Respondent was in violation of any such standards. He must only show his reasonable belief that they were. However, for the purposes of the motion to dismiss, he must also establish a genuine issue of material fact that he communicated that belief. The complaint alleges that Complainant objected about the nighttime operations to both the chief pilot and the scheduling office. The affidavit of Jeffrey D. Carlson, Respondent's Vice President of Flight Operations, states he was not aware that Complainant had raised any concerns regarding the Company's flight operations into Afghanistan.³² That was sufficient to place on Complainant the burden of submitting any affidavits or other admissible evidence to support his assertion in the pleadings that he brought these things to the attention of Respondent's chief pilot or members of its scheduling department.

Complainant was required to respond to Respondent's submissions showing no genuine issue of material fact and could not rest on his allegations in the pleadings in the face of the Respondent's submission of such evidence. Since Complainant was pro se at the time the motion was filed, I set forth the specific requirements for opposing the motion. Following the adoption of federal precedent³³ requiring a judge to give pro se litigants notice of these requirements, I stated:

Complainant should be aware that: He has the right to file a response opposing Respondent's Motion. He may submit legal briefs and/or factual arguments in response. He must identify all facts in Respondent's motion with which he disagrees. However, simply stating that he disagrees is insufficient. He must set forth his version of the facts by submitting affidavits, sworn statements, or other responsive materials.³⁴

³² Respondent also argues that that allegation is impeached by Complainant's own testimony and he never raised the issue until April 2010, but I am unable to find such testimony in the deposition pages it provided.

³³ *Wallum* at 7, citing *Hooker v. Washington Savannah River Co.*, ARB No. 03-036 at 8 (August 26, 2008).

³⁴ 17 Oct 11 Order.

Although the law allows for these rules to be relaxed for pro se litigants,³⁵ Complainant was represented by counsel at the time he responded to the Motion. The only indication that Complainant communicated any concerns that Respondent's nighttime operations in Afghanistan were in violation of federal rules, statutes, orders, or regulations is in his pleading. Given the affidavit filed by Respondent, Complainant could not simply rest on his pleadings on that factual issue. I therefore find Complainant has failed to raise a genuine issue of material fact on the question of whether he made protected communications to Respondent regarding its night operations in Afghanistan.

Knowledge³⁶

Discrete from the initial question of whether Complainant communicated covered information to Respondent is the matter of whether the individual making the decision to take the adverse action was aware of the communication. Respondent submitted the affidavit of its Vice President for Flight Operations, who stated that he was responsible for the hiring and firing of pilots, including Complainant, and was not aware of any complaints made by Complainant about Respondent's Afghanistan operations. It also submitted the deposition testimony of Steve Richards, who had received the emails, stating that he did not forward them or disclose Complainant's identity.

Complainant responded by arguing that "he was the only complaining pilot who refused to fly into Afghanistan," thus implying that Respondent could infer his identity and know who was engaging in protected activity. However, while he offered a document showing he was assigned to fly into Afghanistan, he again failed to file anything that presented a genuine issue over whether or not he refused to fly there. He also relies on his pleadings, rather than affidavits or admissible evidence to argue that on 16 Dec 09, he "submitted another email to his union representative," and suggests that this indicates he "voiced concerns about violations to, [sic] Steve Richards, his Union Head, *and* a union representative" (emphasis added).³⁷ Complainant concludes that Steve Richards was not the only union person who knew of his complaints, and states "without a similar affidavit from the other union representative, Richard's deposition alone does not alleviate the issue of fact as to whether Atlas Air knew of the 'protected activity.'" Complainant's allegation that he communicated to another union official is only that, unsupported by an affidavit.

The guiding law is clear that the non-moving party must "go beyond the pleadings and designate specific facts" to survive summary decision.³⁸ It is very difficult for complainants to obtain first-hand information relating to a firing official's knowledge or state of mind and certainly great deference should be given to circumstantial inferences based on a temporal nexus in allowing complainants a chance to prove their case at hearing. Thus, if the emails had otherwise qualified as protected communications, I would have ruled against Respondent on the issue of knowledge. However, the question of Respondent's knowledge is imbedded in the question of whether Complainant made any communications to Respondent about nighttime

³⁵*Wallum* at 4 (ALJ erred in not considering references to employer's website made by pro se litigant in his pleadings). The ARB stated, "[m]indful of our duty to remain impartial and refrain from becoming an advocate for a pro se litigant, we are equally mindful of our obligation to construe complaints and papers filed by pro se litigants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude."

³⁶Complainant's failure to raise genuine issues of material fact on the question of protected activity means his complaint cannot withstand Respondent's Motion for Summary Decision. Because both parties briefed the issue in full, however, I will also address the question of knowledge.

³⁷ Claimant's Response at 2.

³⁸ *Celotex*, at 324.

flying. I find that no genuine issue of material fact was raised as to whether or not Respondent had knowledge of that communication.

Causation³⁹

Respondent offered affidavits from the employee responsible for coordinating with the company that conducts its drug testing program, the vice president of that company, and the third party's employee who was collector of Complainant's urine sample.⁴⁰ They showed that Complainant was randomly selected to provide a sample as part of the third party's quarterly computer selection program. The program was run in September 2009 and Complainant's sample collected on 18 Dec 09.

An affidavit from George Zemba, the third-party collector who administered Complainant's drug test, stated the selection of Complainant for testing was random and he had no contact with any employee or agent of Respondent regarding the selection and testing until the sample was reported as positive on 21 Dec 09.⁴¹ In the excerpt of Complainant's deposition testimony, he stated he had no evidence he was selected for drug testing on anything other than a random basis.⁴² He also stated he had no evidence Respondent spoke to anyone about altering the results of the drug test.

Indeed, in his answer to the Motion, Complainant does not offer any evidence or argue that Respondent had anything to do with his selection in the generation of the quarterly random selection roster or even the handling or testing of his sample. Complainant does suggest in his answer to the motion that Respondent failed to reinstate him in a timely fashion after having been made aware of the flawed test and the decision of the ALJ. He argues that delay and his relocation to New York were retaliatory acts. Respondent does not address the relocation issue. The Motion for Summary Decision to dismiss as adverse actions is granted as to the Complainant's selection for testing, the testing of his sample, and the positive report as adverse actions and denied as to the reinstatement and reassignment.

³⁹ Complainant's failure to raise genuine issues of material fact on the question of protected activity and employer's knowledge means his complaint cannot withstand Respondent's Motion for Summary Decision. Because both parties briefed the issue in full, however, I will also address the question of retaliation.

⁴⁰ Respondent's Motion, Exhibits D, A, G.

⁴¹ Respondent's Motion, Exhibit G.

⁴² Respondent's Motion, Exhibit E at page 32-33.

Conclusion

In summary, the record establishes genuine issues of material fact that would allow a finding that Complainant was concerned about the general safety of aircrews operating into Afghanistan and communicated those concerns to his union representative and that Complainant was concerned that Respondent's nighttime operations in Afghanistan were in violation of regulations or orders. It does not create a genuine issue of material fact that would allow a finding that Complainant communicated to Respondent a reasonable belief that it was in violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. For the reasons outlined above, I find that Complainant has failed to raise any genuine issue of material fact that would allow his claim in whole or in part to survive summary decision. Respondent's Motion is **GRANTED** and the Complaint is **DISMISSED**.

In view of the foregoing, the hearing scheduled on **25 Jan 12** in **Miami, Florida** is hereby **CANCELLED**.

A

PATRICK M. ROSENOW
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). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points

and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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).