



Issue Date: 20 September 2012

CASE NO.: 2012-AIR-9

IN THE MATTER OF:

GREGORY M. BURCH

Complainant

v.

GOODRICH AEROSTRUCTURES

Respondent

DECISION AND ORDER

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21” or “the Act”), as implemented by 29 C.F.R. Part 1979. This statutory provision, in part, prohibits 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).

On January 29, 2010, Gregory W. Burch (“Complainant”) filed a timely complaint with the Department of Labor against his former employer Goodrich Aerostructures (“Respondent”), alleging retaliation against him for his involvement in a matter regarding the assembly of the tail cone silencers and complaints previously made in 2007. (RX-2, pp. 11-12; ALJX-1). OSHA found that the complaint had no merit. Specifically, OSHA determined that Complainant’s protected activity was not a contributing factor in the adverse personnel action taken against him. Complainant appealed that decision, and the matter is now before me and was formally tried on July 6, 2012, in Mobile, Alabama. (ALJX-2; ALJX-3). The following exhibits were received into evidence¹: Administrative Law Judge’s Exhibits 1-3; Complainant’s Exhibits 1-6 and 8; and Respondent’s Exhibits 1-22. Following the hearing, both parties filed briefs.²

¹ References to the transcript and exhibits are as follows: Trial Transcript: Tr. ____; Administrative Law Judge’s Exhibit: ALJX-____; Complainant’s Exhibit: CX-____; and Respondent’s Exhibit: EX-____.

² Complainant, participating in this matter *pro se*, argues in his brief that the employee statements included in RX-17 were not given under oath and were not signed in agreement “after Linda Howser paraphrased everything.”

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They are also based on my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

STATEMENT OF THE EVIDENCE

Complainant has a college degree and worked in Respondent's engineering department from 1990 until he was terminated on November 2, 2009. At the time of his termination he held the position of Mature Review Board Engineer ("MRB"). Respondent is an assembly center where pre-made component aircraft parts are assembled. The parties agree they are each covered under the Act and that Complainant suffered an adverse action in the form of termination, Respondent however, denies that any protected activity played any role in his termination. Complainant seeks reinstatement, back pay, and an apology from Respondent. His salary at the time of termination was \$70,000 per year; he did not work again after termination until October 2011, and he now earns \$23,000 per year.

I. Testimonial Evidence

A. Complainant

In this instance, the assembly of a tail cone silencer was the project, which led up to Complainant's termination. According to Complainant's testimony, the tail cone silencer is "secondary hardware" and does not play a role in the plane maintaining flight. Rather, the proper piecing together of this part was a quality issue potentially affecting the component's cycle life rather than a safety issue, and in this instance the parts did not fit together in accordance with the blueprints.

Complainant was approached by Brandon Smith, a mechanic, who asked for help with the project; Complainant also spoke with Shane Johnson later that same day about the issue. Complainant told the mechanics that the Inspection Pick Up ("IPU") was the "wrong vehicle" to use to correct the issue. Complainant testified that the IPU does not allow for "repairs", and the problems the mechanics were having with the coupling of the tail cone silencer parts went beyond the allowances of the IPU; Complainant was concerned that the resulting product was "not to blue print".

Therefore, Complainant questions the credibility and integrity of the report. However, this exhibit was admitted at trial without objection. (Tr. 236). Complainant's objection goes to weight of evidence rather than admissibility and has been considered in my findings accordingly. Additionally, Respondent filed a Motion to Strike along with the post-hearing brief objecting to several statements made by Complainant in his brief as hearsay. I agree with Respondent; in his brief, Complainant appears to offer evidence that was not raised at trial, and as such, such statements will not be considered.

Upon first learning of the problem, Complainant did not contact the FAA, OSHA, or any other outside source. Rather, he made recommendations concerning the problem to his supervisor Mike Finerty. Complainant also inquired with Tommy Davis and Jane Martin, both Program Quality Engineers (RX-6), to determine who the Quality Engineer on the line was. After looking into the complaint, Mr. Finerty asked Complainant to call a meeting, although Complainant did not feel that this was within the purview of his position.

Meanwhile, Complainant suggested to Mr. Finerty that he would ask for a resubmit to bring the unit back to the customer's expected specifications; this was approved by Mr. Finerty. Complainant testified that at a second meeting about the project, "[t]he QE was mad because the ME had told him that I was doubting his work." (Tr. 20).³ Complainant did not want to compromise the product, but he finally resubmitted another disposition and approved the welds and repairs the team wanted to make. Ultimately, the client was unhappy with the product and the skins had to be replaced. Complainant was terminated before the final product went out.

Sometime after Complainant spoke with the mechanics, Complainant could not recall which day it was, Mr. Johnson brought the IPU on the tail cone silencer assembly to Complainant. Complainant testified he had not requested this paperwork, but he put it in the top drawer of his desk as he would do with any other paperwork at the end of a normal work day. Complainant kept it in his desk overnight, but he sent it back to Mr. Davis the following morning. Complainant acknowledged that this paperwork is usually kept on a platform where the related work is being performed as part of the company's enterprise excellent procedures ("EEPs"). However, for the length of time Complainant was in possession of the tail cone silencer IPU, the related work had been stopped.

Complainant, and everyone else involved, was questioned by Linda Howser, Respondent's Human Resources Manager, and Mr. Finerty about how the tail cone silencer problem was handled. Complainant was told he stepped out of line by getting involved in this issue. While he acknowledged that he never felt he should have a role in correction of this problem, he tried to do his best to do what he was told with the guidance he was given while keeping the customer's best interest in mind.

Complainant testified that he secretly recorded his meetings with Ms. Howser on several instances in October 2009 and even on other occasions prior, and he was unaware that this would violate any company policy about using recording devices in the workplace. About a year before his termination, Complainant had been required to have some counseling and take three or four days of decision-making leave. Also prior to his termination, Complainant had become concerned about several perceived violations over the years of Respondent's internal systems previously approved by the FAA. Complainant had made several complaints about these issues which went unaddressed, so he compiled the complaints and gave them to Ms. Howser. He was informed after his termination in 2009 that these complaints were investigated and no violations were found at that time.

³ Quality Engineer: QE; Manufacturing Engineer: ME. (RX-6).

After he was terminated, Complainant applied for positions with Fokker, an aerospace company in Foley, Alabama; Austell; Airbus; M.A.E.; and several other companies in Mobile, Alabama. He did not receive any offers except one from Fokker, which fell through. Complainant currently is employed as a custodian with the Baldwin County School System.

B. Michael F. Finerty

Mr. Finerty is the technical manager of Respondent's engineering division and Complainant's supervisor since 2002. Mr. Finerty explained that the role of the MRB engineer is to restore a discovered or documented defect to "blue print allowances or via the specification allowances." (Tr. 106). If the work cannot be done within allowance of these specifications a quality notification ("QN") is generated, which often triggers the involvement of an MRB engineer in the project. In this instance, a QN was not generated until October 26, 2009, according to Mr. Finerty.⁴ The MRB engineers provide support service for the operations and report directly to Mr. Finerty. (RX-5). There were five MRB engineers, including Complainant, in 2009.

While he believed Complainant to be a competent engineer, Mr. Finerty testified Complainant's communication and interpersonal skills needed improvement as they put a strain on Complainant's interactions with his co-workers. Mr. Finerty spoke to the collaborative nature of the work Complainant was involved in and the importance of cooperative teamwork.

To demonstrate what led to Complainant's termination, Mr. Finerty identified and explained several of Complainant's performance reviews and discipline records which had been generated over the years. (RX-8 through RX-16). In every instance, whether it was Mr. Finerty or another supervisor Van Halfacre⁵ conducting the reviews, the comments in the reports were the same dating all the way back to 2005: Complainant was a good engineer but lacked in skills regarding the way he interacted and communicated with his fellow employees. (RX-8, pp. 2-3, 5; RX-9, pp. 2-4; RX-10, pp. 4-5, 8; RX-11, pp. 2-4; RX-12, p. 2). Mr. Finerty testified that he had witnessed these behaviors himself, and the critiques in the reports would have often been prompted by negative feedback from the employees Complainant was assigned to support.

Aside from the reviews, Mr. Finerty also pointed out Complainant had prior verbal counseling given by Mr. Finerty outside of his annual performance reviews, then written counseling, and finally a "leave letter" was the last attempt requesting a change of Complainant's behavior or his resignation. (RX-13; RX-14; RX-15). The letter had come about only six months prior to the tail cone silencer episode. In pertinent part, the April 27, 2009 letter from Mr. Finerty to Complainant stated:

⁴ See RX-3 and CX-6.

⁵ Mr. Halfacre was one of the previous General Managers for Respondent. (RX-6).

This is to confirm our conversation about your continued demonstration of a behavior that is not respectful and/or responsible to the team and to the operation. You were given a verbal on October 11th, 2007, a written counseling on August 15, 2008. You have failed to correct your behavior.

Either turn in a letter of resignation or a letter acknowledging an understanding of exactly what's expected and your plan of action to accomplish this goal to continue your employment with Goodrich.

Be aware that if we decide to let you remain employed that immediate and sustained change in the above-described behavior will be required to continue employment with Goodrich.

(RX-15). Complainant pledged in his response to Mr. Finerty's letter that he would better his behavior:

I understand that I am expected to partner with and have trust in my co-workers and treat them with respect. If in the future I have concerns with activities/issues in Foley, I will use open, two-way communication to resolve them with the team member(s) involved. I understand also that this must be done in a timely manner. If I am unable to resolve these issues at that level, only then will I go to the next level (my supervisor or the team leader in that area/organization). I will accept the answer that comes from that level of management. If I need further clarification, I will respectfully work with my supervisor to pursue additional input from other subject matter experts (within or outside of Foley).

(RX-16).

According to Mr. Finerty, despite this written promise from April 29, 2009 (RX-16), Complainant struck out against the tail cone assembly production team. The Cell or Team Leader in the project, Lisa Butler, voiced concerns about Complainant's behavior on the tail cone line to Mr. Finerty. An investigation was conducted, by which it was determined Complainant was not being forthright. Complainant reported and complained about the tail cone issue to the improper internal sources. Additionally, Mr. Finerty testified that much of what Complainant did was on his own, that he withheld information he acquired, and separated the IPU paperwork from the tail cone project. Looking at the events in the past in combination with the tail cone assembly events, Mr. Finerty testified Complainant was terminated for his repeated behavioral issues and the pattern of how he dealt with his problems and co-workers.

C. Linda Howser

Ms. Howser is Respondent's human resources manager. She had many sessions with Complainant and only learned about a week prior to the trial that Complainant had secretly recorded many of those appointments.⁶ Additionally, Ms. Howser felt from her investigation of the complaints that Complainant was withholding information or misleading her because his account and timeline of the events did not match that of the other employees interviewed in the matter. For example, Complainant told Ms. Howser that the first time he became involved was when the mechanics first came to him, but from further investigation Ms. Howser learned that Complainant had "injected himself" first by inquiring about the tail cone silencer skins sitting "in the cell" a day or two prior to his conversation with the mechanics.

Complainant's prior behavior issues played a role in Ms. Howser's recommendation to terminate Complainant, as all other disciplinary avenues had already been exhausted as per company policy. Ms. Howser testified, as Mr. Finerty did, that it was not the fact that Complainant raised a concern or the substance of that concern, but rather the way he brought it up to the team leader and mechanics was in violation of his very promise set out in the April 2009 leave letter and response. (RX-15; RX-16).

On cross-examination, Ms. Howser testified that she recalled Complainant being unhappy with his performance reviews each year. Around 2006, Ms. Howser began working with Complainant, hoping to improve his communication style, but he refused to admit to a problem or write a development plan. Ms. Howser received a book of complaints from Complainant in 2007, and once they were investigated it was found that there were no existing problems. While Complainant never received a report from the Charlotte office conducting the investigation, Ms. Howser followed-up on the matter. Ms. Howser was not aware of any information directing employees to outside sources regarding complaints once internal sources were exhausted.

D. Kevin Murphy

Mr. Murphy is Respondent's corporate counsel. He testified that in January 2007, Complainant presented a three ring binder of misconduct complaints, which after investigation was found to have no merit. (RX-21). In 2009, Mr. Murphy interviewed Complainant and other relevant persons, considered Complainant's disciplinary record, and reviewed Ms. Howser's report and recommendation for Complainant's termination. (RX-21). Mr. Murphy concluded that termination was the appropriate action and reiterated that Complainant's termination was not based on any issues he had raised, but was due to his pattern of poor interaction with co-employees, which resulted in disruption in the workplace. Mr. Murphy also noted that after his termination, Complainant had filed complaints with both the FAA and OSHA and that neither agency had found any violations.

⁶ This was against company policy, and is an offense for which, according to Ms. Howser, Complainant would have been terminated regardless of any other conduct on his part. (Tr. 234; RX-1).

II. Documentary Evidence

A. July 3, 2007 Report from Peter Kern

Mr. Kern, an auditor, submitted a report regarding his investigation of Complainant's compliance complaints between 2004 and 2007. (RX-22). He concluded that Complainant inserts himself in issues that do not concern him and "seems to believe that every noncompliance is deliberate and an ethics issue." (RX-22, p. 1). Mr. Kern found this behavior outside of the thinking of the culture of this type of workplace. He also noted that Complainant was not usually apprised of the outcome when issues he raised had been acted on by management. (RX-22, p. 1). Mr. Kern's report summarized each of Complainant's reported complaints and the results of the investigation into each issue. (RX-22).

B. Problem Resolution Investigation Form

On October 27, 2009, Ms. Howser submitted a report of employees interviewed by her and Mr. Finerty regarding Complainant's involvement in the tail cone silencer issue. (RX-17). Ms. Butler stated that Complainant should have come to her or Ferrell Farver, a Team Leader (RX-5, p. 2; RX-6), first in reporting the problem. (RX-17, p. 2). Buford Foster, a Manufacturing Engineer, was also interviewed; Complainant came to him on October 13, 2009, asking Mr. Foster for a QN as per procedure. (RX-17, p. 3). Mr. Foster did not believe that this was necessary and referred Complainant to someone else for the QN. Mr. Foster stated that he had other problems with Complainant in the past and that Complainant "just looks for ways to cause disruption."⁷ Mr. Davis was interviewed and stated that Complainant's "heart is in the right place", but "[m]aybe he sticks his nose in where it shouldn't be." (RX-17, p. 4).

In his statement from the report, Mr. Farver indicated that he felt he should have been made aware of the situation, and he felt Complainant did not respect his role in the tail cone project. (RX-17, p. 6). Shane Johnson, an operator, stated that he had first gone to Mr. Foster regarding the problems with the tail cone silencer, but when Mr. Foster went on vacation, he asked Complainant for assistance. (RX-17, p. 8). Mr. Johnson went on to say that Complainant told him that "it should have been tagged," and Mr. Johnson brought Complainant the paperwork on the project. He also stated that Ms. Butler was the one to instruct him to stop working on the project the next morning. Complainant told Mr. Finerty and Ms. Howser that while he explained to the operators that the tail cone silencer IPU was vague, he stated he did not give the operators verbal instructions or tell them they could not continue to do work on the unit. (RX-17, p.7). In the report's conclusion, Ms. Howser stated that the "issue is with the way [Complainant] questioned the process", and she recommended termination. (RX-17, pp. 8-9).

⁷ In their interviews, Mr. Farver and Brandon Smith, an operator, both stated that it was well known that Complainant and Mr. Foster did not get along well. (RX-17, pp. 5-6).

C. Employee Emails

Complainant emailed Fawn Hudson on June 14, 2007, asking for a report on the investigation initiated earlier that year in response to Complainant's complaint about "questionable un-fair [*sic*] and unethical activities" at the Foley facility. (CX-3, p. 3). About a year later, Complainant inquired again as he had not been contacted. (CX-3, p. 2). Ms. Hudson asked if there had been any issues in the past 3 months, and Complainant reported that there had been but did not provide details. Complainant also expressed concern over his current pay rate. On August 18, 2008, Complainant emailed Ms. Hudson again giving more information about his complaints, and Ms. Hudson responded the same day that someone would come to the facility to meet with Complainant. (CX-3, p. 1).

On March 28, 2008, Complainant emailed Vince Edwards regarding a gap between the outer caps and the lip skin in a project, which Complainant understood was not allowed. (CX-5). Complainant dispositioned a resubmit to correct the issue. Mr. Redman, who was copied on the original email, responded on August 19, 2008, and found Complainant's concern legitimate. He explained the actions he took to address the situation and thanked Complainant for his diligence. (CX-5).

Complainant presented a chain of emails between himself and Mr. Finerty beginning July 25, 2008, raising concern over damaged V2500 tracks he found stored in the facility. (CX-2). When Mr. Finerty indicated he would contact "Henry" about the issue, Complainant requested that he wouldn't and stated that the mechanics had been reprimanded for talking with him about the issue. (CX-2).

On August 4, 2008, Complainant sent an email to Henry Mott, a Manager who was responsible for overseeing quality, EH&S tooling, and metrology. (RX-5, p. 1; CX-4, p. 1). Complainant expressed concern that "*several* people" were unaware of certain requirements, which may have resulted in product integrity issues. (CX-4, p. 1). Gary Farr expressed a similar concern on August 5, 2008, in an email to Mr. Mott and others. (CX-4, p. 2).

Another chain of emails between Complainant and Jane Martin was presented as CX-3. Complainant contacted Ms. Martin on August 11, 2008, questioning actions taken related to fastener installation on the V2500. (CX-3). Ms. Martin responded on August 13, 2008, explaining the actions she had taken in response to Complainant's concerns. She also informed Complainant that the V2500 track issue he had previously inquired about was resolved. (CX-3).

On October 28, 2009, Mr. Finerty emailed Ms. Howser. (RX-19). He expressed concern regarding Complainant's handling of the IPU paperwork; Complainant never told him that he had possession of it even though Complainant requested it. Mr. Finerty also noted that he was concerned that Complainant was spreading distrust of leadership to support personnel and the operators and was not facilitating resolution of issues he becomes involved in. Mr. Finerty felt that Complainant's behavior could not be changed. (RX-19).

Mr. Mott wrote an email to Ms. Howser on October 29, 2009, where he explained how he became involved in the tail cone issue. (RX-18, p. 1). Dave Cecrle, in charge of tail cone silencer Quality Assurance (RX-5, p. 2), told Mr. Mott that he was upset because Complainant had questioned his work and was “not being realistic” about a solution. Mr. Mott also wrote that he felt Mr. Cecrle and Bob Kayser, who also works in Quality Assurance (RX-5, p. 2), are “both intimidated by [Complainant]” and that Complainant was “a cancer” to the work environment. (RX-18, p. 1).

Ms. Howser emailed Bryan Broderick, the Vice President of Human Resources Administration in the Chula Vista office (RX-6), and Mr. Finerty on October 30, 2009. (RX-20). It was determined that Mr. Foster had originally used the correct form IPU for the rework of the tail cone silencer. (RX-20).

D. Report of Business Conduct Case

Mr. Murphy submitted this report of his findings in the investigation of the events surrounding Complainant’s termination. (RX-21). He concluded that Complainant’s allegation that he was retaliated against because of the issues he raised regarding the tail cone silencers was not substantiated. (RX-21, p. 5). Mr. Murphy identified the following actions as inconsistent with the behavior to which he committed himself in the leave letter in April 2009:

- Complainant did not approach the best people to provide answers.
- He undermined the authority of Mr. Foster by telling the mechanics that Mr. Foster acted incorrectly in generating the IPU even though Mr. Foster was not present and Complainant did not have all of the information.
- Complainant had no reason to take possession of the IPU. He did not produce it the next day to Mr. Davis until Mr. Farver came to him, and created a disruption when the paperwork could not be found.
- Complainant’s original suggested disposition for correction of the tail cone issue was perceived as punitive and antagonistic because his recommendation consisted of an unnecessarily time consuming procedure.
- Additionally, Complainant was not truthful with the investigators regarding his level of knowledge of the issue, when he became involved, and his later production of a QN. (RX-21, p. 5).

E. Other documents

Respondent presented a document addressing the company’s policy on “Cameras, Photographic/Recording Equipment”. This policy states that with regard to “audio recording devices, such related recordings will not be made covertly or without the explicit awareness of the one being recorded.” (RX-1).

RX-7 is a copy of EEP number 1006. It requires that “hardware be identified” using Form 2012 or Form TLS0161 when the associated paperwork is separated from hardware for any reason. The employee who removes the paperwork is responsible for returning it to the hardware. (RX-7, p. 2).

A Whistleblower Screening Form was submitted dated February 2, 2010. (RX-2; p. 2).⁸ Complainant stated the reason Respondent gave for adverse action was because he had “‘stuck his nose where it didn’t belong’ and didn’t demonstrate open two way communication.” In response to the question “When/Where did you make your Safety/Health/OSHA complaint?” Complainant answered “None”. The form was forwarded to OSHA on February 2, 2010. (RX-2, p. 3). Handwritten notes from an interview with Complainant indicate that he admitted the tail cone silencer issue would not create-life threatening problems for a flight crew. (RX-2, p. 5). Complainant also compiled a timeline starting in 2004 recording disciplinary actions, complaints made by co-workers against him, and alleged violations of policy and regulations he had reported. (RX-2, pp. 18-23). This was forwarded to Wayne Fayard of OSHA on February 28, 2010. Complainant noted which meetings with Ms. Howser and other company management members he had tape recorded between 2006 and 2009.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employee protection provisions of the Act are set forth at 49 U.S.C. §42121 (passed April 5, 2000). Subsection (a) describes discrimination against airline employees as follows:

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

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

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

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

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

49 U.S.C. § 42121(a).

⁸ RX-2 includes documents Complainant sent to OSHA by certified mail on January 30, 2010.

Under the Act, complainant has an initial burden of proof to make a *prima facie* case by showing (1) the complainant engaged in a protected activity; (2) the complainant was subjected to adverse action; and (3) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. When the complainant reaches the hearing stage, the complainant must demonstrate, by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in the employer's alleged unfavorable personnel decision. Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

I find that Complainant has failed to establish a *prima facie* case as he has not demonstrated that his engaging in protected activity was a contributing factor to his termination. I find Respondent would have taken the same personnel action in the absence of any alleged protected activity on the Complainant's part.

This was not an isolated occurrence of conflict caused by Complainant in this workplace. The record demonstrates several incidents of argumentative and uncooperative manner with colleagues and disruptive behavior as evidenced by several years of performance reviews citing Complainant's need for improvement in his interpersonal and communication skills, verbal and written counseling sessions, the leave letter and decision making leave. The decision to terminate Complainant came after this progression of disciplinary action, and Ms. Howser explained that according to policy, all other alternatives had been exhausted by that point.

From those who testified and the assessments in the performance reviews, it is clear that Complainant was an intelligent and capable engineer. He was diligent in his work, often staying after hours to complete assignments. Complainant was commended in the past for his work. However, he did not excel in the interpersonal aspects of the position which required frequent collaboration and working closely with his colleagues to achieve efficient solutions. Respondent patiently tried to encourage Complainant and develop these skills so that he could reach his full potential in the Foley facility. Nevertheless, after several years there was still frustration expressed by his managers and colleagues due to Complainant's style of interaction and the way he conducted himself.

In the past, Complainant had reported several perceived compliance issues, but investigations of these complaints never revealed any violations. Complainant suggests that Respondent was upset that he brought quality and compliance issues to light again with the tail cone silencer project. However, he has not successfully shown that the complaint in 2010 or any previous complaints are the reason which motivated the company's decision to terminate him. Several witnesses testified that it was not the substance of the issue Complainant raised with regard to the tail cone silencer, but the way he handled the situation that led to his termination. As an MRB, Complainant's involvement was not yet appropriate as a QN had not been issued for the project. He approached the improper employees in reporting his concerns, he undermined the authority of his co-workers in the process, separated the paperwork from the project against policy, and was found to be untruthful in the investigation of the complaint. This is adequately documented by the internal investigations performed surrounding the events leading to Complainant's termination and the testimony of the witnesses at trial. The non-retaliatory

reasoning given by Respondent's personnel for Complainant's termination is corroborated by the history of personnel actions taken against Complainant prior to his termination. While Complainant's termination was the culmination of events surrounding involvement regarding the tail cone silencer assembly, there is no evidence that the nature of Complainant's concern contributed to Respondent's decision to terminate him or, for that matter, that Complainant's expressed concern over the tail cone silencer even involved aircraft safety.⁹

In his brief, Complainant expresses frustration that his compliance concerns reported over the years were not fully investigated or that he was not informed of the outcomes of the related investigations. Complainant argues that if he had been given more feedback in these instances, he may have "re-programmed [his] thinking", which would have helped him to avoid further friction with his colleagues. Furthermore, Complainant explained pressures he felt from the team leaders "shopping for an easy repair". While Complainant gives examples of challenges in his workplace, they do not translate into a successful argument under the Act against Respondent's final termination of Complainant. It does not show that the nature of the complaints he made rather than his personal behavior led to the adverse action. The evidence only shows that any disciplinary action taken against him, including his final termination, was in response to his attitude toward his colleagues and the lack of improvement shown in his communication skills.

Even assuming *arguendo* that Complainant met his burden and established the elements for a *prima facie* case, I find that Respondent would prevail in this matter. It can be shown that Respondent would have taken the same action toward Complainant in the absence of any alleged protected activity. Here, Complainant admitted in his oral testimony and in his own recorded timeline of events that he secretly tape recorded meetings with Ms. Howser and Mr. Finerty. The company's policy on "Cameras, Photographic/Recording Equipment" states that with regard to "audio recording devices, such related recordings will not be made covertly or without the explicit awareness of the one being recorded." (RX-1). Ms. Howser testified that such an action alone would have resulted in Complainant's termination. While these recordings were not discovered until after his termination, an employer can rely upon evidence discovered after an adverse action was taken to show that the complainant was engaged in wrongdoing. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). Therefore, I find that Respondent would have successfully established that the same adverse action would have been taken against Complainant in the absence of any alleged protected activity.

⁹ By Complainant's own admission at trial, the tail cone silencer was "secondary hardware" and played no role in an aircraft maintaining flight.

CONCLUSION

The real issue presented is whether Respondent violated the employee protection provisions of the Act by terminating Complainant for the complaints he raised in October 2009 regarding the tail cone silencer project or any previous complaints made regarding ethics, compliance, or safety. It is my finding that there is no evidence which indicates the action taken against Complainant was based on any safety concerns raised. Therefore, the complaint is **DISMISSED**.

So **ORDERED** this 12th day of September, 2012, at Covington, Louisiana.

C. RICHARD AVERY
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).