

U.S. Department of Labor

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Issue Date: 13 August 2015

In the Matter of:

GARY D'ANGELO,
Complainant,

Case No.: 2012-AIR-00016

v.

JET BLUE AIRWAYS CORPORATION,
Respondent.

Appearances:

For Complainant: Adrienne F. Trent
For Respondent: Thomas C. French

Before: Christine L. Kirby
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS, IN PART

This case arises under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 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, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee participated in a proceeding relating to any violation or alleged violation of any order, regulations, 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) (2) and (4).

Procedural History

Gary D’Angelo (“Complainant”) filed an AIR 21 complaint with the United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) on June 17, 2011, against Jet Blue Airways Corporation (“Respondent”). Complainant alleges Respondent retaliated against him after he filed internal safety reports. On May 10, 2012, the OSHA investigator dismissed Complainant’s complaint, and on July 15, 2012, Complainant requested a hearing before an Administrative Law Judge.

Respondent filed three separate Motions to Dismiss relating to discovery matters.

On January 6, 2014, after considering Respondent's Motion for Summary Judgment and Complainant's Response thereto, I issued an *Order Granting In Part and Denying In Part Respondent's Motion for Summary Decision*. I granted Respondent's Motion as it related to Complainant's refusal to fly with Captain Berry the weekend of February 5-6, 2011, and the alleged adverse action by Respondent failing to credit Complainant for the related missed trip as untimely under the AIR 21 90-day statute of limitations.

This case was scheduled for formal hearing on November 19-21, 2013, in Jacksonville, Florida. Due to the lapse in federal appropriations, i.e., the federal government "shutdown," this matter was continued on October 22, 2013. It was then rescheduled for hearing on August 12-14, 2014, in Orlando, Florida. The parties filed prehearing statements. Both parties filed numerous exhibits – Complainant initially filed twenty-five exhibits and Respondent filed forty-eight exhibits.¹ Complainant filed, and I received, the Deposition of Duby Mauro in lieu of her live testimony (CX 26). In addition, Complainant and Captain Gotsch testified at the formal hearing.

Factual Background

Complainant began working for Respondent in November 2005 (RX 1). During the events that gave rise to this case, he was a First Officer. Tr. 29. Prior to working for Respondent, he had worked for other airlines as a pilot, including Northwest Airlines. Tr. at 29-31. He has been flying airplanes since 1976. *Id.* As a First Officer, Complainant was responsible to the captain of the flight to which he was assigned, and for the safe operation of the aircraft. *Id.* Complainant was familiar with the procedure for submitting a safety report at Jet Blue. Tr. 37-8; CX 3, 4.

In late 2010, Complainant was reassigned as a First Officer to Jet Blue's Orlando, Florida base. Tr. 33. He reported to Chief Pilot, Captain John Gotsch. Tr. 95; 189; CX 2. Complainant lived about an hour away in Melbourne, Florida.

Jet Blue began operations in February 2000. RX 5. In addition to their employment agreement, Jet Blue employees are governed by a crewmember Blue Book (RX 5) as well as the FOM ("Flight Operating Manual")² and FAA regulations. It has adopted a "Jet Blue Way of Being", which promotes presentation of safety and high standards of personal conduct to customers. It also relies on providing on-time service. *Id.* Included within its Progressive Guidance and Performance Expectations is the requirement for no "excessive tardiness and/or absenteeism." *Id.* If a Crewmember receives any Progressive Guidance, he must wait a period of six months from the trigger incident date to be eligible to apply for a transfer. *Id.*

¹ Respondent objected to CX's 6-9 as irrelevant as they concerned Complainant's refusal to fly with Captain Berry, which was the subject of that part of my Order granting summary judgment to Respondent. I ruled these exhibits admissible as background information. Tr. at 9-10.

² Neither party entered the FOM into the record.

Pilots are scheduled to be at the base one hour and 45 minutes before their scheduled domestic flight time. Tr. 97-8. Scheduling is done monthly pursuant to seniority. RX 1 at 0036. Jet Blue Crewmembers are considered tardy if they “fail to report to their assigned work areas at the scheduled time.” RX 5A at 1.G.1.1. The Jet Blue Crew Member Blue Book dated 2011-03-31 notes that Jet Blue is an “on-time airline” with “low tolerance for lateness.” *Id.* at 1.G.1.2. Jet Blue also identifies “Safety” as the first value at Jet Blue. *Id.* at 1.B.4. The Bluebook recognizes that: “Crewmembers are in the best position to identify and evaluate potential hazards” (*Id.* at 1.J.4.1) and pledges:

not to take disciplinary or punitive action for voluntarily reporting a safety issue or concern. Reporting unpremeditated or inadvertent errors will not result in disciplinary or punitive action unless such errors result from reckless activity, criminal activity, substance abuse, or intentional falsification.

Id. at 1.J.4.2/3.

Paid Time Off (“PTO”) refers to an aggregate of vacation, sick leave, and personal days. *Id.* at 31-2. PTO is supposed to be approved by a Crewleader and scheduled in advance. PTO due to illness or emergency may be required to be substantiated with documentation. *Id.* Jet Blue has adopted internet and computer use guidelines which urge Crewmembers to be careful about sharing sensitive or confidential Jet Blue information via the internet. It has also established policies for personal blogging and social network use for Crewmembers.

Complainant and Chief Pilot John Gotsch first met on February 8, 2011, only after a number of relevant events at issue, described below, occurred.

November 19, 2010: Reserve Trip Refusal While On Stand-By

On November 19, 2010, Complainant was a reserve pilot. He was on standby to be called to the airport to fly if needed. Reserve pilots have to be given ten hours to get to the airport for a flight if they are on “long call”, two hours if on “short call.” Tr. 80. Complainant was called for a reserve assignment, but under the two-hour required call time. Tr. 81. He refused the trip. *Id.* Complainant stated that he did not take the trip because he was called less than two hours before the flight (the period required) and he felt he did not have enough time to get to the airport. Tr. at 81.

February 5 - 7, 2011 through May 1, 2011: Complainant’s Refusal to Fly with Captain Berry and Reports on Inadequate Transparency of Open Time Assignments

On February 5, 2011, Complainant was scheduled on a Fort-Lauderdale to Bogota, Colombia trip. The Bogota trip is a two-day trip starting in the afternoon and ending the next afternoon. Tr. at 46. Complainant learned on that day that rather than being paired with the originally scheduled pilot on the Saturday evening flight, he was being paired with a Captain Tyrone Berry. Tr. 39-41; 45. Complainant had previously flown with Captain Berry when they were both based in Fort Lauderdale. Complainant had placed Captain Berry on his “avoid” list at his earlier stint at Fort Lauderdale. Tr. at 43. Complainant considered Berry “toxic”, a Jet

Blue term of art referring to a pilot who has repeated safety issues. Tr. 43-45. He had not realized, however, that Captain Berry had been reassigned from Boston to Orlando in the interim and, accordingly, he had not placed Berry back on his “avoid” list. The particular flight was placed on “open time” meaning that rather than being assigned to a particular captain, any pilot could pick it up. Tr. at 43.³

Complainant stated that he first learned that Captain Berry was the flight’s pilot on his way to the airport. *Id.* at 44. He called the chief pilot on duty, who was located in New York, and requested that Captain Berry be removed from the flight or that he be allowed to switch with another first officer on a different flight. *Id.* at 45. The chief pilot stated that Captain Berry was fully qualified and refused to remove him. *Id.* However, the chief pilot did grant Complainant’s request not to fly with Captain Berry. Complainant offered to fly another trip, but instead, he was removed from flying status for the weekend. Tr. at 46. The chief pilot suggested that Complainant contact his regular chief pilot, Captain Gotsch. *Id.*

Complainant testified that on the same day that he failed to fly, February 5, 2011, he also filed a safety report with Respondent’s Safety Department regarding the matter. Tr. 52; CX 7. D’Angelo prepared a report of events regarding his actions and reasons to give to Gotsch. CX 6. He slipped it under Gotsch’s door on Monday, February 7, 2011, as directed by Gotsch’s assistant. Tr. 47. The report characterized Complainant’s safety concerns as relating to pilots on the “Avoid” list and the relevance of crew “pairing”. CX 6. Complainant was unable to reach Gotsch, although he tried. Tr. at 48. Complainant expressed his concern in these reports with an “open-time” assignment system that undercut the usefulness of “pairing” and the “Avoid List.” CX 6 and 7.

February 8, 2011: Meeting with Complainant and Gotsch and Additional Reporting Regarding the “Avoid List”

On Tuesday, February 8, 2011, Complainant met with Captain Gotsch. Tr. 48-9. This was the first time the two had met. Tr. 49. D’Angelo discussed the reasons for his refusal to fly on February 5, 2011. He refused Gotsch’s request to put his concerns in writing. Tr. 198-200. Complainant explained that he declined to document his refusal to fly with Captain Berry because he was concerned that he would be drawn into Respondent’s ongoing litigation with Captain Berry and be involved in a libel or slander suit by Berry. Tr. 49-50. Nonetheless, at least in part with the understanding that without a written explanation, Gotsch would not arrange for his lost flight time and pay (Gotsch testimony, Tr. at 199), Complainant followed up with a memorandum to Gotsch in which he again explained his concerns and made a number of suggestions regarding the Captain who was “#1 on the F/O AVOID LIST” on the FLICA and

³ Each month Respondent schedules flights by pairing first officers with captains during what it calls the monthly bid process. (R. Motion for Summary Judgement at 11-12). First officers are allowed to identify captains with whom they do not want to fly by placing them on their “avoid list.” *Id.* After the monthly bid process is complete, pilots can request flights that come open through a system known as “open time.” *Id.* If a trip is not assigned through open time, then trips are assigned to reserve pilots. *Id.* Trips that are arranged through open time, or trips that are assigned to reserve pilots, do not take into account avoid lists, and may potentially pair a first officer with a captain he wished to avoid. *Id.*

expressed how Respondent's current assignment practices involving "open time" was a safety issue that Respondent needed to address. RX 8. Included in Complainant's memorandum was his request for credit for the missed trip. RX 8. Subsequently, on February 20, 2011, Complainant also filed a Safety Concern Report with Respondent's Safety Department ,reporting that there existed a systemic undue delay in pairing and posting the Captain who was "#1 on the F/O AVOID LIST" on the FLICA which was a detriment to operational safety. CX 7.

Under Respondent's operating rules, safety concern reports are not sent to chief pilots, but they are sent to the safety department to provide a different set of eyes. Tr. 313-4. The information on the reports is "de-identified", i.e. the pilot's name and identifying report number is eliminated and the reports go to a database. Tr. 314-5. Gotsch could not remember seeing the actual safety report itself, but he did investigate the matter with crew scheduling and learned that Berry had picked up the flight when the designated pilot had dropped it. Tr. at 203-4. As testified to by Gotsch, the February 20, 2011, report contained the essence of the issue as Complainant had expressed it in their February 8, 2011, meeting and had previously provided to him in draft form, subsequent to their meeting. CX 8; CX 7; Tr. 315. Gotsch acknowledged that Berry would have been assigned to the schedule later than the initial pairing. He also acknowledged that other pilots had expressed concern to him about Berry, and he was knowledgeable that Berry, at one point, had been terminated by Respondent. Tr. 204-8.

On May 1, 2011, Complainant posted his concerns, without identifying Captain Berry, about the delayed Fort-Lauderdale posting on a group posting to all 320 Orlando-based officers. Tr. 61-62; 211-2; CX 13. Gotsch posted to the same posting stating that the venue was not an appropriate forum for the discussion and directing that officers should not respond to his e-mail or the subject e-mail, but bring any such concerns to him. *Id.* Complainant posted no further e-mails on the subject although another officer did so and was suspended by Gotsch, as a result. Tr. 213.

March 31, 2011: Fatigue Call on "Ferry" Flight

On March 31, 2011, Respondent added a ferry flight⁴ to Complainant's schedule. The ferry flight was from Orlando to Tampa, and was set to depart after midnight. Tr. 55-56. Complainant had been flying all day on a route originating in Cancun, Mexico to Boston, and then from Boston to Tampa. *Id.* He testified that the weather on his scheduled flight had been bad, involving both thunderstorms and plane de-icing in Boston. *Id.* Complainant felt tired and decided to exercise his option to call in fatigued. *Id.* He discussed this with Captain Hickok, with whom he had been flying on the Boston route, who had likewise been assigned the additional flight. The captain was willing to take the ferry flight. Tr. 56.⁵ Complainant called in

⁴ A ferry flight is a maintenance re-position flight that does not involve the carrying of passengers. Tr. 56. In cross-examination, Complainant testified that such flights are higher risk than passenger flights because, for example, it is not a normal flight, and, if a maintenance flight, something is not working. Tr. 151.

⁵ Respondent encourages pilots who are too tired to safely perform their duties to call in fatigued. (R Motion at 13; D'Angelo Dep. at 90.) If the fatigue was through no fault of the pilot's, Respondent will pay the pilot for the trip. (R Motion at 14; Tr. at 324). The normal procedure for pilots who call in fatigued and want to be paid for the trip must submit a Flight Crew Irregularity Report to their supervisor within seven days of the fatigue call. Tr. 58. Final decision regarding payment of credit for missing a flight because of fatigue is the supervising pilot's call, for Complainant, Chief Pilot Gotsch. Tr. 323-9.

to Crew Services claiming fatigue. Tr. 113. He testified that he got no pushback from Crew Services with regard to his decision not to fly. Dep. At 86; Tr. at 115. Crew Services gave both him and the captain rest and called in a replacement crew. Tr. 57. Another crew moved the plane from Tampa to Fort Lauderdale.

March 31 - April 25, 2011: (Non)Crediting of Hours Relating to Fatigue Call on "Ferry" Flight

Complainant filed a safety report the next day, on April 1, 2011, with the Safety Department involving his calling-in fatigued. CX 12, Tr. 52-3; RX 22, "Safety Concern Report". The report included Complainant's concern that the scheduling of him and his co-pilot did not make operational or safety sense. On the same day, the Flight Safety Department informed him that the report did not seem to be properly classified as a "safety report" but rather should be filed as "an irregularity report" ("FCIR"). Treating it as such would permit the Flight Safety Department to share it with the appropriate operational departments and individuals after "deidentifying" it, i.e., eliminating information identifying the reporter. The Flight Safety Department asked Complainant's permission to treat it as such. *Id.*, e-mail from Colligan to D'Angelo dated April 1; Tr. 58-60. Complainant testified and presented supporting documentation that he agreed, as long as the FCIR was *also* treated as a Safety Report. *Id.*

Normally, under Respondent's procedures, an FCIR, but not a safety report, would have been available to Gotsch as the Chief Pilot. Tr. 118; 216-220. In this instance, the Flight Safety Department, despite its indication to Complainant that it would do so (CX 12, e-mail from Colligan to D'Angelo dated April 1, 2011) took no action to notify Captain Gotsch and did not convert the safety report into an FCIR report. Tr. 220.

Based on the Flight Safety Department's representation, Complainant had expected that the code for "fatigue" would have been entered into his payroll records and that he would be credited for 39 minutes of flight time attributable to the ferry flight and paid for that time. Tr. 59; 116. Through examination of his pay slips, he discovered that had not happened; instead, while he had been credited initially with an "FTG" code resulting in pay, Captain Gotsch, without informing him, had directed a change in the code and directed that time credit be changed into a deduction out of Complainant's own PTO. Captain Gotsch explained that he had not timely received the request and FCIR from D'Angelo in accordance with normal procedure. Tr. at 215.

On April 17, Complainant provided a copy of the Safety/FCIR report directly to Captain Gotsch and asked for the change in code "from FTP to FTG." CX 10/11; Tr. 118. Gotsch refused, stating that he had not seen the FCIR, there was a specific timeline in the FOM⁶ for reporting a fatigue call that D'Angelo had not followed, and the "operational data" did not support any code change. *Id.*; Tr. 59-60; 214-216; 271. Complainant asked for clarification and referred Gotsch to the Safety Department for verification that he had filed a report in a timely manner. Tr. 219. Gotsch did not follow up with safety management to confirm whether it had committed to forwarding the FCIR report. Tr. 220. In response to Complainant's request, in an

⁶ Gotsch referred to the FOM which he relied on as "the pilot's Bible." Tr. at 271. As stated earlier, since the FOM was not made part of the record, I could not directly consider it.

April 25, 2011, responsive e-mail, Gotsch referred to FOM guidance and suggested that the two meet. CX 11.

At the hearing, Complainant testified that Hickok told him that had not been required to provide any substantiation regarding operational data. See RX 29; Gotsch's notes indicate that the "CA" was "not fatigued[d]" and "no compensation for CA" CX RX 22, 10) and a note from him referring to Hickok's records shows "no pay", suggesting that Hickok's PTO was not charged. On June 13, 2011, Gotsch confirmed with Mauro that Captain Hickok did not receive pay credit for the trip. RX 29. Mauro's July 7 "People Resources Investigation Summary Report" also states that Captain Hickok, like Complainant, was not paid for the "ferry" flight not flown. RX 42. Moreover, Captain Gotsch testified that Captain Hickok did not receive fatigue time for the flight. Tr. 221⁷ It appears, however, that Hickok never reported the missed flight under the category of fatigue. RX 29, e-mail from Salz to Complainant dated May 02, 2011.

May 6, 2011: Complainant's No Show For Flight

Complainant was scheduled for a trip to Puerto Rico on May 6, 2011. Tr. 63-5. He had volunteered for the flight (Tr. 154) and was due at the airport three hours prior. Complainant testified that he had gone to sleep early because he was not feeling well and he did not wake up until after the scheduled departure of the flight, as a result missing the flight. When he did wake up, he testified, it was with a fever, and he called crew scheduling to apologize. Tr. 154. Crew scheduling marked him as "sick". Tr. 63-65. Respondent was required to utilize a reserve pilot to make alternate arrangements. Tr. 65. Crew Services informed Gotsch of Complainant's "No Show." RX 12.

May 27, 2011: Complainant and Gotsch's Unsuccessful Attempts To Meet

As a result of his May 6, 2011, "No Show", Captain Gotsch left Complainant a voice message and e-mail on May 6 and 7, 2011, requiring a meeting on May 10, 2011, the following Tuesday. RX 13. Complainant testified that he did not receive the message and wrote an apologetic response telling Gotsch of his unavailability on that day and suggested May 11 instead. Tr. 120. Complainant also made a couple of references to personal issues, including court dates and a mother incapable of recognizing him. RX 13; *Id.* Gotsch rescheduled the meeting for May 16, 2011, when he knew that Complainant had to already be at the airport getting off a flight. *Id.* Tr. 66; 121. The meeting time was scheduled by Gotsch during Complainant's crew rest time. Tr. at 67. Complainant made his necessary arrangements for childcare. Tr. at 67. He received no notification that the meeting had been subsequently cancelled. *Id.* Gotsch was not available when Complainant showed up for the meeting. *Id.*

⁷ Captain Hickok was not a witness at the hearing nor was he deposed. Respondent's records regarding whether Hickok was compensated at all for the flight are unclear. Compare CX 10-12 with RX 29 and 42. Respondent's testimonial evidence involving the payment or credit history for Captain Hickok on that "ferry" flight is not particularly enlightening.

On May 25, 2011, Gotsch rescheduled the meeting for May 27, 2011, Memorial Day weekend, at 3:00 p.m. RX 15. Complainant testified that he never received the notifying e-mail from Gotsch. Tr. 68;123-124. Gotsch called Complainant at 3:15 p.m. on May 27, 2011, while Complainant was in the car on the way to the airport to fly an assignment. *Id.* Complainant had encountered heavy traffic because the highway was being shut down due to Everglade's fires. Tr. 69; 155. Complainant testified that Gotsch was irate and swore at him that he was "tired of this shit" and informed him that they would meet up when Complainant got to the airport. Tr. 125. Gotsch denied using profanity or raising his voice. Tr. at 284-5. Complainant called the security department and left a message for Human Resources that he was being harassed. Tr. 69-70. He also informed his crew that he was running late and gave them an estimated time of arrival. Tr. at 69. Complainant also called the Jet Blue hotline, but received only a recorded message. Tr. at 70. He made a second call to his crew informing them of his ETA again, and parked in valet service to get to his airplane as quickly as possible. Tr. at 71.

Complainant did not arrive until about thirty minutes past his scheduled sign in time. Tr. 98. Captain Gotsch was waiting at airport security to speak with him. Their meeting lasted approximately one minute. Complainant testified that Captain Gotsch yelled at him, publicly humiliated him, and agitated him while he was on his way to perform his duties. Tr. 70-71. Gotsch directed Complainant to be at his office for a mandatory meeting on June 2, 2011. Tr. 128-9; RX 19. Complainant also testified that he thought he heard Gotsch mumble "Stupid WOP". Tr. at 73. Complainant believed that the encounter served to only inform him of a new meeting and "ruffle his feathers."

Complainant filed an internal complaint with People Resources on May 31, 2011, listing his February 5, 2011, safety report, his April 1, 2011 lost pay or credit, and the incident on May 27, 2011, claiming he was harassed by Captain Gotsch and called a "Stupid WOP."⁸ Tr. 73; 156. Gotsch denied using profanity towards D'Angelo, raising his voice to him, calling him a "Stupid WOP", or otherwise abusing or mistreating him. Tr. at 286. Like Complainant, he noted that the two encountered each other in a public area. *Id.*; Tr. at 71.

June 7, 2011: Meeting with Captain Gotsch, Progressive Guidance Report, Suspension

Captain Gotsch rescheduled their meeting for June 2, 2011. RX 20. Complainant acknowledged the meeting in an email. RX 17. Five hours before the scheduled meeting, he emailed Captain Gotsch to tell him that he could not make the meeting due to an urgent family matter. RX 19,20, Tr. 129-31. Gotsch's assistant rescheduled the meeting for June 7, 2011. Tr. 131; RX 21.

Captain Gotsch, Complainant, and Duby Mauro, People Resources Department, met on June 7, 2011. Tr. 75; 133.⁹ Captain Gotsch discussed the missed trip in November 2010, Complainant's no show of May 6, 2011, and his reporting late on May 27, 2011. He informed Complainant that he had a dependability problem. Complainant denied having a dependability

⁸ Ms. Mauro investigated Complainant's complaints but was unable to substantiate his complaint as an EEO violation.

⁹ Mauro took notes of that meeting. RX 23/Mauro Dep., Ex. 1. They made no specific reference to the "fatigue" call, although they do reference an opening comment by Gotsch that he "need[s] you [Gary] to fly trips." *Id.*

problem. Tr. 76; 133 Captain Gotsch testified that he had expected Complainant to present a plan at their meeting to address his dependability problem, but Complainant had no plan. Tr. 134. Complainant testified that he did not believe that he had a dependability problem and had no response to provide Gotsch. Tr. at 76-78. He testified that Gotsch brought up “this trip”, referring to the November 11, 2010, trip, the “no-show”, and the recent May 27, 2011, late arrival. Tr. at 78. He testified that Gotsch did not express concern with either his not wanting to fly with Captain Berry or requesting the replacement crew for the ferry flight. Tr. at 77-78. Gotsch testified that he viewed Complainant’s lack of a plan as a reflection on Complainant’s lack of dependability. Tr. 292-3.

Complainant testified that the meeting involved little dialogue. Tr. at 82. Gotsch requested a written statement from Complainant as to the details of the “no show” on May 5, 2011, by June 16, 2011. CX 30/RX19. Gotsch informed Complainant that he would issue a Crewmember Progressive Guidance Report¹⁰ and suspend him for one trip without pay. When Complainant responded (inappropriately, he testified at hearing) that he could “use a vacation”, i.e. he would enjoy getting time off, Gotsch responded that now he was going to suspend him for multiple trips and for days of Gotsch’s choosing. Tr. 82; 161. Complainant got upset, abruptly stood up, and left the meeting, as did Ms. Mauro. Tr. 159. Complainant testified that he considered Gotsch’s statement harassing. Tr. 160. Complainant, referring to an earlier written statement sent sometime between May 7 and May 9, 2011, to Gotsch testified that he considered that e-mail responsive to Gotsch’s request for a statement by June 16, 2011. Tr. 136-40.

Gotsch made additional attempts to meet with Complainant before actually issuing the suspension and progress review report. RX 31. He scheduled a meeting for June 27, 2011. Tr. 141. On June 26, 2011, Ms. Mauro reminded Complainant of that meeting. Tr. 141; RX 35. Without providing an explanation, Complainant responded to Mauro’s e-mail with a cc to Captain Gotsch stating that he would not be able to attend the meeting on the scheduled meeting date. Tr. 141. That same day, Captain Gotsch sent another e-mail to Complainant telling Complainant to schedule an appointment to receive his paperwork. RX 36; Tr. 142. Instead, Complainant wrote Gotsch that he had checked his V file for the paperwork and had not found it; Complainant asked Gotsch to either put the paperwork in his V file or e-mail it to him. RX 38; Tr. 142-3. Again, Gotsch sent him an e-mail message telling him the paperwork was available for his review and signature and reiterating that Gotsch wanted to speak with him, so he should schedule an appointment. Tr. 144. Gotsch sent a similar e-mail on July 6, 2011. RX 40; Tr. 146.

June 17, 2011: Complainant files his OSHA complaint. CX 21.

July 20, 2011: Second Meeting with Captain Gotsch

Complainant, Gotsch, and Mauro finally met on July 20, 2011. Gotsch provided Complainant with a progressive guidance report at that meeting. RX 45; Tr. 147. Gotsch had, in fact, already suspended Complainant without pay from a 4-day trip in early July 2011 for a maximum number of 30 hours. The progressive guidance report referenced three incidents of

¹⁰ Respondent states that a Crewmember Progressive Guidance Report is a written report used to improve a crewmember’s performance and to motivate the crewmember to correct unacceptable behavior. (Resp. Motion at 8).

undependability – the missed trip on 11/19/10; a no contact/no show on 05/05/11, and a report late on 05/27/11. RX 45. Tr. 82-4; CX 22. Complainant’s transfer eligibility date was also delayed for six months. RX 45.

Issues Presented

1. Whether Complainant proved by a preponderance of the evidence that he engaged in protected activity?
2. Whether Complainant proved by a preponderance of evidence that his protected activity was a contributing factor to Respondent’s issuance of the Progressive Guidance Report, the six month delay in permitting his ability to transfer, allegedly “harassing” conduct by Gotsch, and charging Complainant PTO time for the “fatigue” report?
3. If so, whether Respondent can demonstrate by clear and convincing evidence that it would have taken such actions in the absence of his protected activity?

Applicable Law

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121 et seq., in relevant part, prohibits discipline or other discrimination against any employee “with respect to compensation, terms, conditions or privileges of employment” because an employee” provided ...the employer information relating to any order, regulation of standard of the Federal Aviation Administration or any other provision of law relating to air carrier safety.” To prevail, a complainant under the Act must establish by a preponderance of the evidence that: “(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.” *DeFrancesco v. Union R.R. Co.*, No. 10-114, ALJ No. 2009-FRS-00009, slip op. at 5 (ARB Feb. 29, 2012); *Powers v. Union Pacific R.R. Co.*, No. 13-034, ALJ No. 2010-FRS-00030, slip op. at 10 (ARB Apr. 21, 2015) (*en banc* reissued decision).

If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant’s protected activity. *DeFrancesco*, slip op. at 5; *Powers*, slip op. at 10; 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B) (iii), (iv). In order to qualify as a protected activity, a complainant must show that he had a reasonable belief that the information he was providing related to an FAA order, standard, or other law relating to air carrier safety. A complainant must show that his belief was reasonable under an objective standard and a subjective standard. *See Blount v. Northwest Airlines*, No. 09-120, ALJ No. 2007-AIR-009, slip op. at 5 (Oct. 24, 2011).

Protected Activity

Complainant identifies a number of actions or reports as constituting protected activity. First, he alleges that his report on or around February 5, 2011, his conversation with Captain Gotsch on February 8, 2011, and, again on February 20, 2011 regarding Jet Blue’s “on-time”

assignment practice, its failure to comply with the safety concerns of the “avoid list”,¹¹ and its retention of a “toxic” pilot, constituted protected activity. Second, he alleges that his claim, exercise, and report of “fatigue” rights on April 1, 2011, regarding the Bogota flight constituted protected activity.¹²

a. Allegations of Protected Activity(ies) Involving Captain Berry and Open Assignment Process

As indicated in earlier proceedings, I dismissed as untimely Complainant’s allegations relating to his refusal to fly with Captain Berry on February 5-6, 2011, and any reports involving Berry’s “toxicity” or the “open assignment process” arising from that incident and occurring prior to March 17, 2011, as untimely. *Order* dated January 06, 2014, citing *Sassman v. United Airlines*, ARB No. 05-077, ALJ Nos. 2005-AIR-4 (ARB Sept. 28, 2007) and *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 8-9 (ARB Jan. 31, 2006).

Complainant alleges that his repeated expression of his concerns to Captain Gotsch after March 17, 2011, regarding his not flying with Captain Berry, including his initial refusal to document those safety concerns to Gotsch and his continued expressions of concern to Gotsch and others over the lack of transparency of pairings on Jet Blue’s open assignments listing, including his May 1, 2011, anonymous group posting on May 1, 2011, to all 320 Orlando-based officers, constitute protected activity. Tr. 61-62; 211-2; CX 13. I find that Complainant’s activities subsequent to March 17, 2011, i.e., his reports regarding open assignments and/or Berry, whether made anonymously and broadly and/or directly to Gotsch or others were timely. The 90-day period in the statute is triggered by Respondent’s alleged adverse actions; here, while relating back to Complainant’s concerns about Captain Berry, they also relate to repeat reports by Complainant falling within a later period of time. *Sassman supra and Brune supra*.

Nonetheless, even though employing airlines are prohibited from discriminating against an employee because of his providing information "relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety . . ." 49 U.S.C.A. § 42121(a), not every provision of information relating to air carrier safety is protected. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Env'tl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Leach v. Basin 3 Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003). While some lack of specificity involved in Complainant’s articulation of that provision or the

¹¹I previously dismissed Complainant’s allegations relating to nonreceipt of pay notifications on February 5 and 8 or prior to March 17, 2011 as untimely. *Order* dated January 06, 2014 at 8-9 citing *Sassman v. United Airlines*, ARB No. 05-077, ALJ Nos. 2005-AIR-4 (ARB Sept. 28, 2007) and *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 8-9 (ARB Jan. 31, 2006). I have considered all post-March 17 actions as timely regardless of whether they would be considered under the discrete event doctrine or “continuing violations” doctrine. I correct my January 2014 *Order* to clarify that the “continuing violation” doctrine *does* apply to AIR 21 cases to the extent that the relevant incidents are part of a “hostile working environment” claim. *Id.*

¹² Complainant does not allege that his May 6, 2011, report of being sick and not reporting to work that day as protected activity in either his complaint to OSHA (RX 47) or his post-hearing brief, but rather cites to that event as merely providing a pretext for the employer. Complainant’s Post-hearing Brief at 14, see *Floreck v. Eastern Air Central*, ARB Case No. 07-113, ALJ Case No. 2006-AIR-009 (May 21, 2009) (failure of a party to present argument on an issue or contest an element of a claim waives that argument.)

imminence of a particular governmental rule and debate over it¹³ is permitted in interpreting the statute in order to meet its air safety and remedial objectives, in order to be protected under the statute, the complainant's belief must be related to some such provision relating to air safety.

In *Sievers v. Alaska Airlines*, ARB Case No. 05-109, ALJ Case No. 2004-AIR-028 (Jan. 30, 2008), the ARB distinguished between the ALJ's finding that "[F]or 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" and Complainant's refusal to sign off on an airplane as airworthy as "wrong". The ARB found the latter protected because signing off on an airplane as airworthy when it wasn't would have violated an FAA regulation. *Id.* at 5-6. In contrast, the ARB found that "competently" and "aggressively" carrying out duties to ensure safety, though laudable, does not by itself constitute protected activity stating and rejecting the ALJ's finding that "zealous", "competent", or "aggressive" pursuit of his safety duties constitutes protected activity. *Id.* at 5. The ARB stated:

This record contains no evidence that Sievers provided information to Alaska or to any Federal entity that the incidents concerning wing slat droop, the cracked window cover, the allegedly defective hydraulic reservoirs, or the missing wing placards violated any order, regulation, or standard of the FAA or other Federal law pertaining to airline safety.

Id. at 5-6.

Here, Complainant did make reports involving Berry and Berry's continuing ability to fly despite concerns by Complainant and others and the "open time" system, which avoided the "no forced" pairing requirement, but he never articulated any governmental standard or other provision of law relating to air carrier safety. Accordingly, Complainant's reports relating to a system permitting a licensed pilot whom he considered "toxic" to fly with, are not protected disclosures.

b. Allegations Involving Reporting Fatigue

With regard to Complainant's second set of allegations involving his report of fatigue, the parties did not dispute, but assumed, that this constituted protected activity.¹⁴ In any case, as explained below, I specifically find such reports to be protected activity.

First, the FAA regulations and Jet Blue rules regulate flight crew time expressly for purposes of aircraft safety. *See* 14 CFR Parts 91 and 121. Indeed, the FAA and concerned parties continue to address and update the relevance and applicability of such rules. The FAA publicly announced its *Notice of Proposed Rulemaking* on September 14, 2010. 75 FR 55852; Sept. 14, 2010. Section 117. 5, *Fitness for Duty*, acknowledges the right and obligation of a

¹³ *See Weil v. Planet Airways, Inc.*, 2003-AIR-189 (ALJ Mar. 16, 2004)(imposition of FAA Advanced Passenger Information System (APIS) rule for which Complainant was advocating was imminent.)

¹⁴ Specifically, Respondent did not argue that Complainant's report of fatigue was not protected activity. Failure of a party to present argument on an issue or contest an element of a claim waives that argument. *Floreck v. Eastern Air Central*, ARB Case No. 07-113, ALJ Case No. 2006-AIR-009 (May 21, 2009).

flightcrew member to report if he is too fatigued to continue the assigned flight duty period. The FAA specifically cited to the National Transportation Safety Board's (NTSB) support for enabling flightcrew members to self-report fatigue and noted that the definition of "fatigue" may be subject to change. *Supra* at 341-9. The FAA also specifically cited to concerns that flightcrew members may not recognize fatigue causing them to not self-report.¹⁵ Moreover, in his testimony, Complainant specifically connected his fatigue report to the operation of the scheduling system and FAA regulation:

A So, at the commencement of the flight, they received a time on the ground and time when we get to the gate. Jet Blue should have already made positions [sic] to have someone else to do that ferry flight because we exceeded the flight time we were required by the FAA.

Q I haven't heard that before. You're saying that they exceeded the -- you weren't legal to fly the flight, is that what you're saying?

A Well, technically, we are.

Q Yeah.

A But, under part 91 or part 121, we are not legally allowed to do the flight.

Q So under part 91 --

JUDGE KIRBY: Of what? What are you referring to?

THE WITNESS: Code of Federal Regulations, part 91 is -- other than part 121, 91 has no regulations with regard to rest and time.

JUDGE KIRBY: Okay, carry on. I just wanted to make sure I knew what you were referring to.

BY MR. FRENCH:

Q Under part 91, you were legal to fly?

A Technically legal, yes, sir. Safe, no.

Q Well, you determined you were unsafe and that's why you called in fatigued, correct?

A Uh-huh.

Tr. at 114-115. Accordingly, in this instance, Complainant's concern over safety was not merely generic, but tied to specific FAA regulations.

I find that under the circumstances, Complainant's belief was reasonable. *Blount supra*; *Sievers supra*; *Furland v. American Airlines*, ARB Case Nos. 09-102, 10-130, ALJ Case No. 2008-AIR-011 (slip op. at 5 July 27, 2011). Although Complainant was not scheduled to be the

¹⁵ FAA Final rule, 14 CFR Parts 117, 119 and 121, Flight Member Duty and Rest Requirements, 77 FR Vol. 77, No. 2, Part II 351 (Jan. 4, 2012) at fn 21 citing to NASA report, *Crew Factors in Flight Operations X: Alertness Management in Flight Operations April, 1999*) and fn 2, NIOSH findings and Comment to DOT at 2. *See also supra* at 330 et seq. Fatigue risk management system ("FRMS" requires approval of system and prohibition of exceeding FAA limitations and must include: (1) A fatigue risk management policy; (2) An education and awareness training program; (3) A fatigue reporting system; (4) A system for monitoring flightcrew fatigue; (5) An incident reporting process; and (6) A performance evaluation. [Doc. No. FAA-2009-1093, 77 FR 403, Jan. 4, 2012] The final FAA rule, mandated by the Airline Safety and Federal Aviation Administration Extension Act of 2010 (P.L. 111-216, Sec 212) became effective on January 14, 2014.

chief pilot on that flight, Complainant is an experienced pilot. As First Officer, he was taking on the responsibility for safe operation of the flight. He has identified himself as being concerned about safety, and as documented by his various safety reports on these and other matters, and having observed his demeanor during his testimony, listened to that testimony, and reviewed exhibits documenting his safety concerns, I find that he had a subjective good faith belief that his decision to report himself as fatigued was a protected disclosure. *Furland supra* at 5-6.

I also find his belief with regard to fatigue under these conditions to be a safety issue was objectively reasonable. While the specific time periods spent in flight time on passenger flights may be less than the totals permitted in non-passenger or “ferry” flights, the flight time rules clearly concern themselves with fatigue as a safety issue in all kinds of flights. The FAA and the NTSB have expressed concern over pilot fatigue and ferry flights. *77 FR supra* at 334. Complainant expressly tied his fatigue and decision to opt out of the Bogota flight as related to the need for crew rest. He testified to the difficult labor and weather-intensive two-leg flight from Cancun to Boston and then to Tampa. He testified as to both the thunderstorms from the Gulf of Mexico to east of Florida, the de-icing needed in Boston, the lateness of their flight into Tampa, and that they had exceeded the FAA maximum eight hours of flight time for passenger flight time. Tr. at 55. Jet Blue’s Flight policy has a normal policy of permitting a pilot to call in fatigued with “no questions asked” and they will be automatically removed from the assigned trip. Tr. at 269; 113. Finally, crew scheduling also replaced both Complainant *and* Captain Hickok on the Bogota flight even though the latter did not claim that he was fatigued, and called in a replacement crew. Tr. 57.

Unfavorable Personnel Actions and Their Categorization

1. Introduction - Discrete Economic Actions vs. Hostile Treatment

Complainant asserts that (1) his four day suspension of thirty hours; (2) the progressive guidance report; (3) assignment of payment from his Personal Time Off account for the Bogota trip; (4) six month delay in eligibility for transfer; and (5) harassment by Gotsch all constituted separate adverse actions. The ARB has opined:

Even under *Burlington Northern*, we believe that the supervisor's warning and threatening counseling session in this case constitutes a materially adverse action (more than trivial). Employer warnings about performance issues are manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*. Such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them. We simply doubt that the Court intended to consider a supervisor's written warning or reprimand or threatened discipline as "trivial." To the contrary, we are of the opinion that they are patently not trivial and, therefore, presumptively "material" under *Burlington Northern*.

We recognize that in some previous decisions we have used the terms "materially adverse" and "tangible consequence" interchangeably,

even suggesting that there is no meaningful distinction between the two terms, thus potentially causing the confusion evidenced by the briefing in this case. In Title VII jurisprudence, arguably, these terms are not always universally accepted as interchangeable. In any event, mixing these terms in whistleblower cases may cause unnecessary confusion. To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress.

Given our definition of an "adverse action," we obviously agree with the ALJ's finding that the CR-1s were materially adverse actions when considered in isolation or in the totality of circumstances. On its face, the ETOPS CR-1 recorded that Williams's supervisor, Philip Joshua, "reviewed Rules of Conduct" with Williams and "encouraged [him] to correct his performance as any future performance issues or violations of AA Rules of Conduct can result in corrective action up to and including termination." Even the Revised CR-1 referenced the "Rules of Conduct" and referenced the potential of future "corrective action."

Williams at 15 (internal footnotes omitted).

a. Suspension and Progressive Guidance Report

Respondent disputes whether the first two above-cited actions taken by Respondent, and, specifically, Captain Gotsch, were adverse actions as defined by AIR 21. The Supreme Court has set out in *Burlington Northern v. White*, 548 U.S. 53 (2006) the test for determining an adverse action in Title VII retaliation suits and the ARB has adopted an even broader test, i.e. prohibiting retaliatory action "with respect to compensation, terms, conditions, or privileges of employment". 49 U.S.C. § 42121; see DOL reg. 1979.102(b); *Williams v. American Airlines, Inc*, ARB Nos. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 n. 51, 12-15 (ARB Dec. 2, 2010) (counseling coupled with a reference to discipline falls within list of prohibited retaliatory actions); *Menendez v. Halliburton*, 2011 ARB Nos. 09-002-003, ALJ No. 2007-SOX-005 (Sept. 13, 2011).¹⁶ Actions taken by an employer which might dissuade a reasonable employee from

¹⁶ An adverse action is anything an employer does that could well dissuade a reasonable worker from engaging in protected activity. *Burlington Northern & Santa Fe (BNSF) Railway Co. v. White*, 548 U.S. 53 (2006). Indeed, such

making or supporting a charge of discrimination constitute an adverse action for the purpose of whistleblower retaliation claims like those made under AIR 21. Such actions do include suspensions, reductions in salary, and may include lowered performance evaluations or placement on an improvement plan. Here, the placement on an improvement plan was accompanied by a suspension, and accordingly, I find it to constitute an adverse action.

b. Payment from PTO Account

Relying on both *Burlington* and the ARB, I conclude that an adverse action may also include assignment of payment from a PTO account, i.e. the “personal”, as opposed to “company” time bank.¹⁷ I find that under these circumstances, where such an action does have a clear economic impact on monetary benefit, it should be considered an adverse action. See *Furland v. American Airlines, Inc.*, 2008 AIR 00011, slip op. at 2, 6 (ALJ, May 21, 2009) (Respondent’s decision to convert paid to unpaid leave).

c. Six month delay in eligibility for transfer.

A six month delay in eligibility for transfer and promotion may also be considered an “adverse action” under the statute and relevant regulations. Such a delay could result in short-term and long-term adverse economic and personal consequences, including delayed pay increases, work opportunities, seniority, and retirement impact. During the hearing, Respondent challenged whether either Complainant’s receipt of progressive guidance or an attendance issue prevented Complainant from transferring early; Complainant testified that he did not try to upgrade until the delay time imposed by Gotsch had expired because he believed that it would have been fruitless under the Blue Crew Book. Tr. at 183-187; RX 5A.

A review of relevant provisions of the Crew Book do, in fact, show that the six month delay comes within the definition of an adverse action. As Complainant testified, Section 1.G.1 On-Time Airline of the Blue Book specifically states: “A good attendance record is taken into consideration for performance, evaluations, transfers, and promotions.” RX 5A at p. 32. The Blue Book contains other affirmative statements reflecting how transfers, or delay in a transfer, can affect a Crewmember monetarily. 1.F.9 Transfers Affecting Salaries states in relevant part:

When a Crewmember transfers laterally to a different location, the salary may be adjusted in accordance with the new locality’s pay structure. Crewmembers with employment agreements should refer to those agreements for information regarding pay scales, If a Crewmember transfers to a position that falls within a lower pay-level than his/her previous position, an appropriate pay adjustment may be made after consideration of the specific circumstances for the job change...

warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them. They are not trivial but —material under *Burlington Northern*. Even though a disciplinary letter does not result in a firing or demotion, it is still adverse. See, e.g., *Self v. Carolina Freight Carriers Corp.*, 1989-STA-9, slip op. at 15 (Sec’y Jan. 12, 1990) (warning letters that “served to progress [the c]omplainant toward suspension and discharge” adversely affected him even though the letters did not result in suspension or discharge). *Helmstetter v. Pacific Gas & Electric Co.*, 1986-SWD-2 (Sec’y Sept. 9, 1992).

¹⁷ See Tr. at 214, Testimony of Captain Gotsch, explaining pay bank coding issues.

Id. at 31. Section 1.F.10 Salary Increases states:

A promotional increase is generally granted when a Crewmember moves to a new position within a higher pay range than the previously held position.

Id. The Progressive Guidance given Complainant specifically states:

Failure to implement plan or further issues may result in further action up to and including termination of employment.

and:

Crewmember must wait six months from the date of occurrence/trigger event in order to be eligible to apply for a transfer.

RX 45. Complainant credibly testified regarding the benefits of transferring to JFK airport after the hold on his transfer was lifted. There were additional opportunities to fly (meaning opportunity to earn additional compensation) and a predictable schedule. Tr. at 174. Based on both the testimonial and Blue Crew Book provisions, I find that the delay was part of the adverse action imposed by Respondent and included within the category of discrete economic effects.

d. Hostile Environment – Treatment of Complainant By Gotsch on Telephone and In Person vs. Other Actions with Potential or Actual Economic Impact

Complainant claimed that certain acts by Captain Gotsch were harassing and created an “ongoing” retaliatory treatment or hostile environment. Complainant and Respondent’s inclusion in their respective post-hearing briefs of which events allegedly constituted a hostile environment overlapped and were not exactly the same. Complainant specified these ongoing hostile environment acts as: (1) a May 27, 2011, telephone conversation between the two men following two missed meetings; (2) a later encounter on the same day at an airport security gate in which Gotsch stopped Complainant in public; (3) lost pay credit for the Bogota trip for which he asserted he was too fatigued to fly; and (4) not being given any make up time for the suspended trip. Complainant’s Brief at 8-9. Respondent characterized them as (1) a deduction from PTO rather than company time relating to the Bogota “fatigue” incident; (2) Complainant’s telephonic and in-person treatment at the terminal by Gotsch on May 27, 2011; (3) Complainant’s treatment by Gotsch at the June 7, 2011, meeting; and (4) the Progressive Guidance and pay suspension. Respondent’s Closing Brief at 19.

As indicated above, following the applicable jurisprudence, a hostile work environment or hostile acts toward an employee involving alleged retaliatory acts other than those with tangible economic effects, nonetheless still constitute retaliation under *Burlington* and *Menendez supra*. In *Williams supra*, the ARB clarified its prior interpretation of AIR 21’s anti-retaliation provision in the context of pre-*Burlington* and post-*Burlington* decisions and its own interpretation of its whistleblower protection provisions. The ARB cited, with approval, the ALJ’s language in *Hendrix v. American Airlines*, 2004-SOX-010; 2004-AIR-023 (Dec. 9, 2004). While *Williams* itself was a Sarbanes-Oxley case, the ARB stated:

“[the distinctive language of the Sarbanes-Oxley Act supports a broad reading of the meaning of adverse action for claims arising under this Act. . . . By explicitly prohibiting threats and harassment, the Sarbanes-Oxley Act has included adverse actions which are not necessarily tangible and most certainly are not ultimate employment actions.” Slip op. at 14, n.10. We find the ALJ’s commentary consistent with our analysis under AIR 21.’ *Williams supra* at 11, note 51.

In *Hendrix*, as here, the Complainant alleged a hostile environment and cited to “verbal abuse” by his supervisor as well as assignment to a second shift and difficulty obtaining computer access. *Hendrix* at 17. In analyzing the verbal abuse, the ALJ found that it amounted to a single occasion and was neither physically threatening nor particularly humiliating.

Under the legal analysis applied by the Supreme Court and the ARB, and as indicated by my earlier delineation between discrete adverse economic actions and a hostile environment, the following four actions fall into the former category: (1) the four-day suspension of thirty hours; (2) the progressive guidance report; (3) assignment of payment from his Personal Time Off account for the Bogota trip; and (4); six month delay in eligibility for transfer.

I view the various allegedly hostile telephonic and direct encounters between the Complainant and Gotsch as potentially “hostile treatment” under the “continuing violations” doctrine. These incidents include the May 27, 2011, telephone conversation between the two men (following two missed meetings); (2) a later encounter on the same day at an airport security gate in which Gotsch stopped Complainant in public; and (3) Complainant’s treatment by Gotsch at the June 7, 2011, meeting. Taking the three incidents together, I do not find that these telephonic and personal encounters amount to a hostile work environment. While in all three incidents, Gotsch did not act as a cool and calm supervisor and may have been even confrontational from a human resources and progressive labor-management perspective, the incidents, even taken together were too short and insignificant to arise to the level of hostile treatment or environment. Both Complainant and Gotsch testified as to the public nature of their encounter in public at the gate and their sensitivity to the desire to appear professional in the public airport setting. Tr. at 72; 286. Complainant’s testimony regarding Gotsch’s alleged use of the word “shit” and “WOP” was too unsure for me to credit. Tr. at 127; 156-157. Even assuming that Gotsch raised his voice and used the word “shit” in speaking with Complainant on the phone, I do not find that a reasonable person/pilot would have felt harassed by such language. Accordingly, I find that Gotsch’s actions did not arise to the level of hostile treatment.¹⁸

Contributing Factor of Protected Activities

¹⁸ In any event, even if these encounters did arise to a hostile environment, and under *Powers supra* that the protected activity of the fatigue call was a contributing factor to such treatment, I would ultimately find that Respondent showed by clear and convincing evidence that Gotsch would have treated the Complainant in the same way with respect to the economic adverse action (s) regardless of his protected activity involving his fatigue report. I would find this because (1) Gotsch had dealt with the fatigue issue on and before April 25, 2011, i.e., previously; (2) intervening events, including Complainant’s May 6 lateness, repeated missed meetings with Gotsch, and what Gotsch reasonably perceived as an unreliable, disrespectful and uncooperative employee, (3) all constituted clear and convincing evidence accounting for Gotsch’s treatment of Complainant on May 6 and thereafter.

A contributing factor includes any factor which alone or in connection with other factors, tends to affect in any way the outcome of the decision. *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, slip. op. at 11, 29 (ARB March 20, 2015); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 689-91 (7th Cir. 2009) (discussing *Marano* as applied to analogous whistleblower provision in the ERA); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)). The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext...[and] antagonism or hostility toward a complainant's protected activity. . *DeFrancesco v. Union Railroad Co.*, ARB. No. 10-114 at pp. 6-7 (Feb. 29, 2012). "Contributing factor" or causation in a whistleblower case is not a demanding standard. *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). It does not require Complainant to prove retaliatory motive or animus.

a. *Contributing Factor of Reports on Berry and Transparency of Open Assignment Procedures*

As stated above, I find that Complainant's reports on Captain Berry as they relate to the transparency of the open assignment procedures did not constitute protected activity as a matter of law. Accordingly, they cannot constitute an illegal contributing factor.

b. *Contributing Factor of Fatigue Report(s)*

Under the facts presented, I find that Complainant has proven by a preponderance of evidence that his report of fatigue on March 31/April 1, 2011, i.e., his protected activity, was a contributing factor to at least one of the adverse actions taken here, Captain Gotsch's decision to change Complainant's pay code from FTG to FTP. Changing the code in the pay records from "FTP" to "FTG" resulted in a charging to Complainant's PTO for his reporting and failure to fly the "ferry" flight. I conclude that, as a matter of common sense, Gotsch's action resulted in a docking of pay. *See Furland supra* at 9.

I have considered the following in reaching the conclusion that Complainant established that his protected activity of making a fatigue claim was a contributing factor to the charging of time to his PTO account.¹⁹ First, it required an affirmative act by Gotsch of nullifying the initial claim of Complainant that he was fatigued because of flight-related reasons. Second, Complainant established that Gotsch's decision was unilateral – it was made without consulting any of those involved in the actual events – Complainant, Hickok, or the flight crew. Third, Gotsch relied on a number of various reasons for his decision – lack of providing supportive operational data, untimely submission of the FCIR by Complainant, and failure of the chief pilot

¹⁹ I do not need here to and do not rely on temporal proximity as a factor, because the inherent nature of the relevant acts of Complainant activity, reporting of time, and Respondent response, and docking of time, require them to be connected in time and context. I recognize that temporal proximity alone may be at times sufficient to satisfy the contributing factor test and it is difficult for an employer to provide rebuttal evidence to disprove the contributing factor test. *Powers supra*.

on the flight to seek FTP status for a fatigue-related failure to fly the “ferry” flight. Complainant testified convincingly that he had no knowledge of any need to provide operational data. Tr. at 59-60. Finally, I also rely on my assessment of the credibility of both Complainant and Gotsch from their respective depositions and live testimony. On this issue, I found Complainant’s testimony credible; he testified on this matter both on direct and on cross-examination in a clear and consistent straightforward manner. On direct examination, Complainant testified:

Q And, going back to exhibit CX-11, you have correspondence via e-mail with Mr. Gotsch regarding the code being changed. And did you notify Mr. Gotsch that this was part of the unsafety regarding making the irregularity report?

A Yes. My e-mail to Mr. Gotsch after I discovered the code had been changed was respectful. I asked him to change the code back, and I referenced -- I believe I included a copy of the safety report to give him some background information so that, if there was any concern or any doubt or question, it would be all there in front of him so he could change the code back. He did not change the code back.

Instead, his e-mail was something that the operational data behind the duty day did not support changing it back. To my knowledge, filing a flight crew irregularity report as a condition of being paid is a no-document. There is a procedure that needs to be done, and it was done. There was nothing in any document that I know that precludes payment as a result of the lack of submittal of that particular piece of paper.

Q Okay.

A Furthermore, I'm not clear on what operational data behind the duty day is. I spoke to the captain who was present that day, Brian Hickok. He stated he made no -- he had no discussion or submitted any information to Mr. Gotsch to substantiate anything other than the conclusion that that should have been paid as fatigue.

Q And the date of the fatigue call was March 31st into April 1st?

A Right. It's midnight of -- the transition into the midnight of April 1st.

Q And the date of the safety report, April the 1st?

A Yes. That is the next day.

Q And that's the report that was, your understanding, converted -- or, also being copied as a flight crew irregularity report?

A That is correct.

Q Did you ever get paid for the fatigue call? Was this ever changed back out of -- once the PTO time was deducted from your pay for the fatigue call?

A No. And we're talking about 39 minutes here. The duration of time allotment for them from Tampa to reposition their airplane to Orlando I believe in actuality was about a little more than a half hour, 39 minutes.

Q So you were never credited for 39 minutes of flying time?

A Not only was I not credited, I was docked. Docked it.

Q By having it taken out of your PTO?

A Correct.

Tr. at 58-61. On cross-examination:

Q I want to talk a little bit about your fatigue call.

A Sure.

Q That was March 31, 2011, correct?

A Yes, sir.

Q And you were notified that the company was adding a ferry flight to your trip, correct?

A Correct.

Q And that was -- the ferry flight is what you called in fatigued for, correct?

A Yes, sir.

Q Jet Blue expects a pilot to call in fatigued if he or she is too tired to operate the flight, correct?

A I would hope so.

Q Well, that's their policy, isn't it?

A That's their policy, yes, sir.

Q So you did nothing wrong by calling in fatigued?

A No, I did not.

Q And Jet Blue didn't take any adverse action against you with regard to the fact that you called in fatigued?

A No, no. That's my testimony.

Q You just -- the point is the way you were paid, correct?

A No, no.

Q You're not saying it was about the way you were paid?

A Well, I am, but that's not the whole -- my ultimate claim is not only the pay.

Q What else is there?

A Well, the point was to have them -- I should not have been assigned the ferry flight.

Q Why is that?

A Because Jet Blue is required to do something called flight following, and through the history of the day they knew that we exceeded our eight hours of flight time. They shouldn't have --

Q No, I wasn't --

A Oh, I'm sorry. I was trying to tell you what happened.

Q Fine.

A So, at the commencement of the flight, they received a time on the ground and time when we get to the gate. Jet Blue should have already made positions [sic] to have someone else to do that ferry flight because we exceeded the flight time we were required by the FAA.

Q I haven't heard that before. You're saying that they exceeded the -- you weren't legal to fly the flight, is that what you're saying?

A Well, technically, we are.

Q Yeah.

A But, under part 91 or part 121, we are not legally allowed to do the flight.

Q So under part 91 –

JUDGE KIRBY: Of what? What are you referring to?

THE WITNESS: Code of Federal Regulations, part 91 is -- other than part 121, 91 has no regulations with regard to rest and time.

JUDGE KIRBY: Okay, carry on. I just wanted to make sure I knew what you were referring to.

BY MR. FRENCH:

Q Under part 91, you were legal to fly?

A Technically legal, yes, sir. Safe, no.

Q Well, you determined you were unsafe and that's why you called in fatigued, correct?

A Uh-huh.

Q And Jet Blue took no action with regard to the fact that you called in fatigued?

A Jet Blue was absolutely -- the crew services people were wonderful when I spoke to them.

Q And you did what you were supposed to do?

A Absolutely, sir.

Q Right. With regard to the pay treatment, that's one of the things you dispute with regard to your fatigue call?

A One of them, yes, sir.

Q And what you contend is that you should have been paid by Jet Blue for the trip you called in fatigued for, is that correct?

A Yes, sir. That's the standard.

Q That's your understanding, correct?

A My understanding, that was the policy.

Q You learned subsequently from Captain Gotsch that he changed your pay code, correct?

A He changed a standing procedure without due process.

Q You didn't answer my question. You understood that Mr. Gotsch changed the pay code, correct?

A Yes, sir.

Q And you were compensated for the trip, but it came out of your PTO bank, correct?

A Yes, sir.

Q And that's the rub, so to speak? You think that Jet Blue should pay you for the trip and not come out of PTO bank as it did, correct?

A Well, that's part of the harassment. Correct.

Q Please answer my question.

A What is rub, sir? Explain rub.

Q That's your dispute?

A Yes, sir.

Q Now, when you call in fatigued, you file a safety concern report, right?

A Yes, sir.

Q And you did not file a flight crew irregularity report?

A Correct.

Q Subsequently your testimony was that corporate safety, when you filed a report, asked you if you wanted to convert it to a FCIR?

A Yes, sir.

Q And at some point it was converted?

A Yes.

Q According to you?

A Yes.

Q Mr. Gotsch asked you to submit a report at some point, right?

A Yes.

Q And did you ever submit the report?

A I didn't have to. It was already done for me.

Q So you yourself never submitted –

A No.

Q -- the report?

A No.

Q To Mr. Gotsch?

A Correct. A flight crew irregularity report does not go to Mr. Gotsch.

Q Okay.

A That's not the procedure.

Q It's not the procedure? A flight crew irregularity report?

A Flight crew irregularity report goes to the company via their website. It does not go to the chief pilot.

A That's your understanding?

A Yeah.

Q Do you agree that one of the reasons Mr. Gotsch told you why he denied your request to change your pay code was that you did not file a timely report with regard to your fatigue call?

A That was the second reason.

Q But it was one of the reasons?

A One of the reasons, yes.

Tr. at 113-119, Continuing:

Q -- and with regard to the ferry flight you were assigned, you were legal to fly that trip, correct?

A Yes.

Q In accordance with the Federal Aviation Regulations, there was nothing illegal about assigning that trip to you?

A Under part 91, correct

Q Correct, under part 91.
A Yes.
Q And ferry flights are flown under part 91?
A I agree. You say legal.
Q Legally.
A Not safe.
Q I said legally.
A That's different.
Q Whether or not it's safe is your determination --
A Correct.
Q -- if you're fatigued or not?
A Absolutely.
Q Correct?
A Correct.
Q And, if you're fatigued, you call in fatigued?
A Correct.
Q And that's what you did?
A Exactly.

Tr. at 180-181.

In listening to and reviewing this testimony within the context of all of their testimony as a whole and the documentary evidence, I found Complainant's claim of fatigue detailed and convincing and his request for, and explanation of, why he should not be assessed from his PTO bank rational and respectful. As stated in *Powers supra* slip op. at 22, "it is a [more] difficult case where the adverse action is closely intertwined with the protected activity." As the ARB further opined in *Powers*: "Where the trier of fact determines that the protected activities are closely intertwined with the adverse action taken, the respondent 'bears the risk that the influence of legal and illegal motives cannot be separated.'" *Id.* at 23 citing *Abdar-Rahman*, ARB No. 080003, slip op. at 12, 15 (ARB May 8, 2010). Moreover, at the time that Gotsch made the decision to not credit Complainant from company time, the two did not have a history of missing appointments, telephone calls, or miscommunications. Given the available evidence, and the applicable standard of law, I conclude that Complainant met his contributing factor burden of proof.

Rebuttal by Clear and Convincing Evidence

a. Ferry Flight Fatigue

Having determined that based on the testimony of the parties, and circumstantial evidence, that Complainant has met his burden of proof by a preponderance of evidence that at least, in part, Captain Gotsch relied on Complainant's protected activity with regard to seeking relief for fatigue from the ferry flight, I must still determine "whether or not the respondent can prove by clear and convincing evidence that it would have taken the same personnel action in the absence of Complainant's protected activity." *Keeler v. J.E. Williams Trucking, Inc. et al.*, ARB Case No. 13-070, ALJ Case No. 2012-STA-049 (June 2, 2015) at 5, FN 5 citing *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Mar. 20, 2015) (reissued Apr.

21, 2015) (*en banc*) (reaffirming *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014)). Respondent has a burden to produce by clear and convincing proof that it would have not Changed Complainant's FTP code to FTG and thereby offset his pay from his PTO in the absence of his protected activity. *Clemmons v. Ameristar Airways, Inc.* ARB Nos. 05-048, -096, ALJ No. 2004-AIR-011, slip op. at 10 (ARB June 29, 2007). In *Powers supra*, the ARB cited to *Speegle v. Stone & Webster Const., Inc.*, ARB No. 14-079, ALJ No. 2005-ERA-006, slip op. at 6 (Dec. 15, 2014), ARB No. 13-074, slip op. at 11-12, the ARB explaining with regard to consideration of the "clear and convincing" requirement:

this statutory mandate requires adjudicators of whistleblower cases to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse action; and (3) the facts that would change in the "absence of" the protected activity.

Powers supra at 32.

With regard to Gotsch's explanation of rejecting Complainant's time because of an untimely submission, I find that under the circumstances presented, such reliance amounted to a technical omission caused by a failure of safety management to convert Complainant's safety report to an FCIR which would have come to Gotsch in the normal course of business and in a timely manner. The employer has the burden of proof to show that the normal procedure for receiving an FCIR for purposes of assessing a fatigue call required the following of such specific procedures. Without the FOM in the record, I cannot review the formality of that rule upon which Gotsch stated that he relied. In addition, while stating that this was the first time that he had received a fatigue request that did not follow normal procedures in his thirteen years of employment (Tr. at 217), the circumstances under which the payment was sought was somewhat unusual and Gotsch's explanation appeared very technical. Furthermore, since the change in the code was actually made and communicated to Complainant more than two weeks after the flight was flown, Complainant apparently did not and could not have known that there was an issue until Captain Gotsch or someone else told him or he had the opportunity to review his paystub. *See* RX 7-10. Moreover, in contrast to Complainant's testimony regarding the fatigue issue and how and why it transpired, I found Gotsch's testimony evasive and his explanations unconvincing (*italics added*):

Q There's a string of e-mails in exhibit CX-11, and I'm going to start from the back up. There's Mr. D'Angelo's safety concern report and it's copied at the bottom from April 1st of 2011 regarding a crew fatigue notification. And then there is an e-mail to you from Mr. D'Angelo requesting a change of pay from FTP to FTG. Do you recall getting this e-mail from Mr. D'Angelo?

A Yes, ma'am.

Q And is it correct that the coding he's requesting is -- he's asking to get -- I guess he's concerned that his coding was changed, is that correct?

A Yes, ma'am.

Q And the change had made it so he was paid on PTO time instead of he was paid directly for his fatigue call, fatigue flight?

A He was paid for his fatigue call. It was just out of his bank versus the company bank.

Q And he was asking you to put it back the other way so it was out of the company bank and not his PTO bank, is that correct?

A Yes, for to be paid out of the company bank. *I denied the request.*

Q And why did you deny that request?

A *I never received the information on the fatigue call from Mr. D'Angelo.*

Q Did you receive this -- when he sent you this e-mail, the copy of his safety concern report?

A *That is an edited version.* I don't see safety concern reports. Those don't come to the chief pilot's office.

Q Okay.

A So whatever he copied and put in there was what I was seeing, but it's at his discretion.

Q And did in an e-mail chain he tell you that he was contacted -- I'm actually looking at the April 25th e-mail from Mr. D'Angelo on the first page -- where he said he had been contacted by safety and at their recommendation he agreed to the FCIR being a copy of his safety report. Do you recall getting that e-mail from him?

A Yes, it was changed, yes, ma'am.

Q And was part of the reason that you were denying the pay he had requested because there was not an FCIR report?

A *He failed to follow the operations manual guidelines for reporting FCIR, reporting fatigue events. So I never received -- it was the day after I received an FCIR for that fatigue call.*

Q Okay.

A And, if we don't receive them, it's company policy we don't receive the FCIR.

Q But, when he told you what safety had recommended and he agreed to them to having the FCIR being a copy of the safety report, did you follow up with safety to find out what happened?

A I cc'd the director of safety *if he wanted to follow up, but it's -- safety is beyond the purview of flight operations as far as the department. I don't have any say-so in whatever safety.* I can't mandate what they do or don't do. So I copied the director of safety department, Craig Hoskins. In the first e-mail I said, the FOM has guidelines for reporting these events.

Q But you didn't do any further follow-up other than responding to Mr. D'Angelo and copying Mr. Hoskins?

A I notified safety of what was going on. I responded to Mr. D'Angelo, yes, ma'am.

Q Did Mr. Hoskins respond to you?

A I don't recall if he did.

Q Okay, if you could turn to exhibit CX-12? And I don't know if you can -- because you're not on these e-mails.

A What is the question?

Q I said, I don't know if you saw this e-mail or not, this string of e-mails around the time they were sent back in 2011 or not.

A I don't see -- yes, FCIR reports are not safety reports. They are two different animals, so I won't see this one at all. This is -- it looks like an e-mail chain between Mr. D'Angelo and several people here.

Q And do you see there's an e-mail from Patrick Colligan on the first page dated April 1st, 2011. The fourth paragraph down, it says, with your permission we can convert this report to an irregularity -- we're talking about the safety report that Mr. D'Angelo filed that's attached. It said, with your permission we can convert this report to an irregularity report on your behalf, and no further action will be required. Are you familiar with that procedure?

A No.

Q So you have not experienced that, where safety has converted a safety report to an irregularity report?

A Not in my 13 years. I mean, they are two separate venues, two separate departments, two separate reporting structures.

Q *And do you see where Mr. D'Angelo was given that choice?*

A *I see that. I see that.*

Q *Right.*

A *But you asked me the question have I seen it. This has never happened on my watch as a chief pilot or as a pilot for Jet Blue.*

Q But apparently Mr. D'Angelo was given that option, and if he took them up on it then -- if you didn't get the FCIR report or anything that they didn't follow through with it?

A *I don't have an e-mail that says Gary D'Angelo said it was okay to do it, and I don't know who reflects safety coop -- basically an intern -- who was authorizing this. I can't tell you that, yes, it's an approved procedure.*

Q Okay.

A That response where it says it's okay to convert it, yeah, I see that.

Q Okay.

A But he asks, with your permission. *Whose permission? I mean, you're asking me questions, and I don't see where he approved that.*

Q I think in the e-mail to you Mr. D'Angelo indicates he did give them permission.

A In this one here, I don't see in this evidence where he says you have permission to convert it.

Q Just going back to exhibit CX-11 --

A Yes, ma'am.

Q -- on the second e-mail on top of the page, on the first page, it says -- it's Gary D'Angelo's e-mail to you on April 24th, 2011 where he said, I have been contacted by safety, with their recommendation I agreed that the FCIR is a proper safety report.

A I've got to find that. He agreed to it, yes, ma'am, in that chain.

Q So he agreed to it, but you normally don't gotten an FCIR report that's been converted from a safety report?

A If that's the way they do it, yes. *I don't see any FCIR's posted. They come to my desk. They come to my e-mail. None was posted. There was no FCIR regarding the fatigue event.*

Q But you didn't do any other follow-up, then, other than send the e-mail that you sent back to Mr. D'Angelo with some copy to Craig Hoskins in safety?

A Craig Hoskins was director of flight safety at the time, so he was made aware of this whole e-mail chain.

Q But you never got that?

A I never got that.

Q And you didn't follow up with them any further?

A *It's a management directive to follow up, and it's not my place in the chain to tell the director of safety to do this.* I made him aware of it, and, if there's more concerns filed in the safety report, but I can't tell basically, you know, a person on a higher perch, a boss of mine, to follow up on this.

Q You can't ask for that FCIR report?

A Excuse me?

Q You couldn't have asked Mr. Hoskins for a copy of the FCIR report that was converted from a safety report?

A *I don't need to ask him for it. I'm waiting for a call. According to this should have been done, and it wasn't done.*

Q But you didn't receive a copy?

A If this is an FCIR generated, I will get a copy. There's no ifs, ands or buts. They come out, and I'm on the distribution list. Every chief pilot is on the distribution list for FCIR reports. And they cover a myriad of topics from fatigues to unusual events to all kind of events.

Q If you can you turn to exhibit CX-20? This stream deals with Captain Hickok. Is that the person Mr. D'Angelo was flying with when he filed the fatigue -- when he reported fatigue?

A Yes, ma'am.

Q And did you have some exchange with the payroll again about how Mr. D'Angelo and Mr. Hickok were being paid regarding the ferry flight?

A Yes, ma'am. There's an e-mail exchange between myself and Jessica Salz, who is in the payroll department.

Q And was the captain, Mr. Hickok, did he get his fatigue pay paid by the company for the flight?

A No, ma'am.

Q But he wasn't docked PTO time?

A There was nothing added or subtracted from his pay guarantee. He flew that four-day footprint with nothing added or subtracted to it on the fatigue issue.

Q So he got his regular pay?

A He got the trip credit, yes, ma'am. For that four-day pairing, he would have -- that trip credit would have had nothing added to it and nothing removed from it.

Q Mr. D'Angelo got PTO time deducted towards his trip credit?

A Mr. D'Angelo got extra credit for this trip, yes, ma'am.
Q But out of his own PTO time?
A His compensation was higher than Mr. Hickok's, yes, ma'am.
Q But it was out of his PTO time?
A Yes.

Tr. at 214-221. It is true that safety and on-the-spot operational decisions belonged to management officials, but the ultimate decision with regard to how he would be paid or credited for the flight belonged to Captain Gotsch. I found that his equivocation and confusion of these different decisions reflected poorly on his credibility on the issue.

On redirect by his own counsel, he did not resurrect his credibility on this matter:

Q I'm sorry, for the fatigue. Let's talk about that.
A Okay.
Q The next incident that you recall regarding Mr. D'Angelo, would that have been the fatigue call?
A Yes. We have the missed trip, we had the refusal, and then we had the fatigue call.
Q Do you recall, was that fatigue call on or about March 31st?
A Yes, sir.
Q Of 2011?
A Yes.
Q What do you recall? What is your understanding of Mr. D'Angelo's fatigue call?
A I didn't get direct information because the report was never filed within the seven-day window. I thought I heard something -- or, I heard about it subsequently in deposition testimony, but it was fatigue, well, too tired to the fly the airplane, we got his request, and he was removed fatigued.
Q Is there a fatigue policy at Jet Blue?
A Yes.
Q Was there a fatigue policy in place in March of 2011?
A Absolutely.
Q And what is that policy?
A If at any time you are unable to fly for a rest issue or a mental health issue or you don't feel you can fly an airplane because you're too tired or distracted, whatever the case may be, you can call crew services and say I'm too fatigued to operate this trip.
Q A pilot can call in fatigued, no questions asked, correct?
A Right.
Q And you remove him from the trip, is that right?
A It's automatic trip removal.
Q And that's just the normal policy, is that right?
A Yes, sir.

Q Now, with regard to the trip Mr. D'Angelo called in fatigued for, there was some discussion from him that it was a ferry flight at the end of the day.

A Yes, sir.

Q And is that correct?

A Yes.

Q Is that what you remember?

A Well, Tampa is a maintenance base. We use it to repair a plane and move it out of a repair shop, so it was a plane to fly Tampa to Orlando.

Q Is there anything unusual about adding a ferry flight like that to a pilot's schedule?

A No. We move airplanes from maintenance bases, we ferry them over from paint shops. Planes break down and have to be moved into position. So ferry flights are just flights.

Q Is there anything more dangerous about flying a ferry flight than there is about any other particular flight?

A No, sir.

Q The aircraft that Mr. D'Angelo was asked to fly, was it certified? Was it safe to fly?

A Absolutely.

Q And Mr. D'Angelo alleged that there was some issue regarding his duty day and that he had exceeded his duty day to add that trip. Was that, in fact, correct?

A Under the rules that we operate, part 121, he would not have had to fly. But under the part 91, which are ferry flights, positioning flights, test flights, operate under part 91, he was legal to fly. The rest claim, they all get rest to come back into 121 service, we give you rest after the ferry flight. So we would have given him legal rest after the ferry flight -- that's the part 91 portion -- give you 121 rest and get you back in business.

Q So ultimately with the fatigue call you chose to code Mr. D'Angelo as I believe what's called FTG, is that correct?

A Yes, sir. *The guys -- for the crew services specialists, there's all coding for fatigues are FTP, fatigue with pay. That's what you use to keep their pay. Once the reports are filed within the seven-day window, the FCIR, the flight crew irregularity reports were filed and the chief pilots review it.*

We determine whether that pilot fatigue, was it company-induced or was pilot-induced. And, if it's a request for paid-for leave, if the report is not filed, I don't have it down there, it would revert to an FTG code, fatigue with pay out of your bank, not mine.

Q And is there a specific time period in which the report should be filed?

A Yes, sir. FOM says seven days on a fatigue call you must file a report.

Q We've heard a lot of discussion about FOM, Captain Gotsch. What is an FOM? What does that mean?

A It's a flight operations manual. It's essentially the pilot's Bible. Any airline you go to will have a flight operations manual. It's probably thicker than this book, dictates who, what, when, where and why and policies and procedures for the flying public.

Q And do pilots have access to the FOM?

A They do.

Q And how do they have access to the FOM?

A Currently through their iPads, company-issued. At the time that this occurred, they had them through their company-issued iPhones.

Q Do you recall, did you ever get a proper report from Mr. D'Angelo within that seven-day window with regard to this fatigue call?

A To date, I still have not gotten a fatigue report through the FCIR system from Mr. D'Angelo.

Q And was there any reason that you chose not to change his code from FTG to FTP? Other than he didn't file a report and it wasn't timely filed, were there any other reasons why?

A He submitted, for lack of a better term, an edited version of a report he said he filed through a different venue, and even reading that doesn't justify company-paid non-flying activity. We provided hotel room, we provided legal rest, we met all the legal requirements that they require you to do. And there's nothing there outside of the norm that would dictate the company is obligated to pay you not to fly the airplane.

Q And would you turn to respondent's exhibit RX-8, please?

A Yes, sir.

Q And I'll just ask you, looking at the last couple pages of respondent's RX-8, is that your basis for concluding that Mr. D'Angelo's fatigue had no valid reasons that were caused by the company?

A Yes, sir. This is not the official report to use. This would not suffice to meet the requirements of the flight operations manual. This is what he sent to me. And, even reading that, that report just doesn't justify paying a man that's coming out of the company banks. We met his trip expectation, but he was too tired to fly. He was not made to fly, and he was paid out of his own pocket.

Q Do other pilots call in fatigued?

A We encourage it. If you're not fit to fly, call in fatigue.

Q Have you coded other pilots as FTG?

A Yes, sir.

Q Under what circumstances?

A *My baby cried all night and I couldn't get proper rest and I won't be able to fly the trip, is one example. Neighbors threw a party. Those are typically calls for rest outside of what -- a rest period outside of what the company would pay.*

Q You indicated that the fatigue was due to the pilot's fault, not the company's?

A Yes.

Q Now, there was some testimony with regard to the captain that flew the flight for which Mr. D'Angelo called in fatigued. Do you recall that testimony?

A Yes, sir.

Q And I believe the testimony from -- it was either you or Mr. D'Angelo -- was that the captain was not compensated for that trip, is that correct?

A He was not. He was compensated for the four-day trip that he flew.

Q I've been wanting to ask, can you tell the difference between -- I believe you said Mr. D'Angelo actually received more compensation than the captain?

A He received 39 minutes more compensation for that period of pay than the captain did.

Q And that happened because?

A He opted to call in fatigued for the ferry flight, so he was compensated more credit-wise than the captain was.

Tr. at 268-274. And:

And just back to the fatigue issue, the captain that Mr. D'Angelo flew with, he did not get fatigue pay, is that correct?

A I don't recall him getting fatigue pay.

Q But he did not request fatigue pay, the captain did not?

A Well, you have to call in fatigued to get the fatigue pay.

Q But he didn't call? The captain didn't call in fatigued?

A No, ma'am,

Q Only Mr. D'Angelo called in fatigued?

A Yes, ma'am.

Q So Mr. D'Angelo then got fatigue pay, but then it was taken back through deduction of his PTO time, is that just kind of the correct nutshell of what happened?

A He was paid, so you can't say the pay was taken back. The pay was already there. It's the source from where the pay came from, your sick bank or from the company bank. But the pay was always there.

Q But whether it was initially that pay period or what he was paid and then another pay period where it was then changed to his PTO time?

A The policy you talked about earlier, FTP, where if you call in fatigued it's an FTP code, fatigue with pay. Once you submit the required reports, you're satisfied that it's something that we had provided for you, legal rest, et cetera, then it would be left as FTP. If no report is filed or it's not within the company's control, it's an FTG, fatigue code.

Tr. at 328-29.

Captain Gotsch did not testify that he thought Complainant's assertion of fatigue and decision not to fly was unreasonable under the circumstances. He determined that he did not

think the fatigue call qualified for payment out of the airline's pay bank. Tr. at 272-3. However, in making the assessment that the fatigue call should be allocated to the Complainant's PTO, he distinguished between fatigue for which the company was responsible and should therefore pay for a flight loss and fatigue where the Complainant's nonprofessional life was responsible, providing as an example for the latter that a pilot's child cried all night or a neighbor had a party. Tr. at 273. He referred vaguely to operational data that Complainant should have provided without articulating what kind of operational data would have been helpful in the particular instance. He referenced the FOM's time guidelines for submitting an FCIR but failed to reference its relevant portions. He stressed that he was not in the position to tell the Safety Department how it should treat the fatigue report Complainant filed, rather than responding to counsel's questions as to whether he had the flexibility to treat the Safety report as an FCIR report and why he refused to do so.

I find that with regard to the issue of not crediting Complainant and paying him from the Jet Blue time bank for the ferry flight, Respondent failed to meet its burden of proof by clear and convincing evidence. The record shows that Gotsch had the discretion to credit Complainant as FTP. Instead, without consulting any of those involved in the actual events – Complainant, Hickok, or the flight crew, relying on a rule in the FOM that he did not produce, and relying on a number of reasons for his decision – lack of providing supportive operational data, untimely submission of the FCIR by Complainant, and failure of the chief pilot on the flight to seek FTP status for a fatigue-related failure to fly the ferry flight, none of which went to the substantive relevant issue of whether Complainant's fatigue was based on work-based rather than personal reasons, and without providing any analysis of Complainant's reasons, he changed Complainant's pay record without consulting with him.

In contrast to Gotsch's testimony on this matter, Complainant testified convincingly as to why he had sought fatigue credit, the flight conditions on the earlier flights that he had flown prior to the ferry flight, that he had no knowledge of any need to provide operational data or what operational data Gotsch was looking for, and the safety-related reason for his request. Tr. at 59-60. Accordingly, with regard to the credit for the ferry flight Complainant missed, I find that the Respondent failed to rebut Complainant's claim that such denial was based, at least in part, on his protected activity, failing to fly when fatigued. I find that Respondent failed to carry its burden of proof on that issue by clear and convincing evidence.

b. Other Post-April 25 Adverse Actions – Suspension, Performance Review, and Delay

While applying the same *Powers* analysis to the post April 25 adverse actions as I applied to the earlier actions, I reach a different conclusion finding that Respondent carried its burden of proof that regardless of his fatigue reporting, Gotsch would still have imposed on him the four day suspension, the performance review, and the delay in eligibility for transfer. As the chronology of events reflects, Respondent did not request a meeting with Complainant until the May 6 "No Show" of Complainant and in direct response to that event. Captain Gotsch became increasingly aggravated with Complainant over their inability to connect and meet and with what he perceived, not without cause, as Complainant's tactics to avoid meeting with him. Gotsch was clearly unhappy with Complainant's attitude and his failure to recognize or give any legitimacy to Gotsch's perception that he had any kind of dependability issue as demonstrated by

the three events which Gotsch ultimately raised in their two meetings and documented in the performance report. Gotsch may or may not have acted appropriately in reactively increasing Complainant's suspension from one to four days in reaction to Complainant's attitude toward being suspended at all – but there is no indication that Gotsch's reaction had anything to do with activity in which Complainant engaged which are protected under AIR 21. Accordingly, I do find that Respondent carried its burden of proof by clear and convincing evidence that with regard to each of the remaining discrete adverse actions it imposed on Complainant, it would have taken such action absent the sole protected activity of reporting fatigue and seeking credit for the flight missed because of such fatigue.

Remedy

Complainant seeks various forms of relief to remedy Respondent's violations of the Act. I have found a single violation of the Act arising out of Complainant's requesting relief from flying a flight due to fatigue incurred because of Complainant's conduct and expressed concerns relating to his "fatigue" request and relief from flying a ferry flight.

The applicable regulations on fashioning a remedy prescribe:

- appropriate affirmative action to abate the violation, including, where
- reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and
- compensatory damages, all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

29 C.F.R. § 1979.109(b).

Back Pay, Terms, Conditions, and Privileges of Employment

Complainant's PTO was docked for 39 minutes of time because of Respondent's violation of the Act. Complainant represents that deduction at a rate of \$97.00 per hour for 39 minutes is \$63.05. Complainant's PTO should be properly credited for that time and shall be paid back pay in the amount of \$63.05 for it by the employer with interest at the rate set in 26 U.S.C. §6621(a)(2).

Damages

Complainant requests a nonspecified amount in compensatory damages. Complainant's Post-hearing Brief at p. 15. To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (ARB Sept. 24, 2010)) (affirming ALJ's award of \$50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (ARB Apr. 22, 2013). Reasonable emotional distress damages may be based solely upon the employee's testimony. *Ferguson*, ARB No. 10-075, slip op.

at 7-8. Nonetheless, a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Hobby*, ARB Nos. 98-166, -169, slip op at 32.

Here, Complainant testified that he suffered emotional distress in the form of anxiety and stress on account of Respondent's violations of law. Tr. at 104-110. He testified that he suffered weight change, trouble sleeping, and suffered anxiety every time he went down to the crew office. Tr. at 104-105. He did not claim any monetary damages related to psychological or medical treatment arising from Respondent's act; he never saw a doctor, psychologist, or counselor. Tr. at 106. He testified that he remained fit to fly at all times during the time period and did not report any significant change in his medical or mental health on his pilot certificate forms. Tr. at 108-109. Nor did he take any mediations relating to his stress or anxiety. Tr. at 110. Moreover, having found that Complainant did not prevail with regard to the majority of his claims relating to the period of time in the spring and early summer of 2011, and that the Respondent did not engage in continuous harassing treatment of him, I find that there are no compensatory damages due from the one violation Complainant did prove.

Costs and Expenses Reasonably Incurred

As a prevailing party, Complainant is entitled to recover litigation costs and expenses. An itemization of such costs and expenses, including supporting documentation, must be submitted by Complainant to Respondent within thirty days from the date of this Order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant. The parties shall confer before presenting me with the documents.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED**, that:

1. Respondent shall credit Complainant with pay equating to 39 minutes of time with interest.
2. Complainant shall have 30 days from the date of this Decision to file an attorney fee petition.

SO ORDERED.

CHRISTINE L. KIRBY
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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).