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Issue Date: 12 June 2014

CASE NO.: 2013-AIR-00003

In the Matter of:

BRUCE K. BAILEY,
Complainant,

v.

THE BOEING COMPANY,
Respondent.

Before: Richard M. Clark
Administrative Law Judge

DECISION AND ORDER DENYING RELIEF

This matter arises under the employee protection provisions of subchapter III of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”), and the implementing regulations codified at 29 C.F.R. Part 1979. I held a formal hearing with the parties in Seattle, Washington on February 4 and 5, 2014. Complainant represented himself *pro se* during trial. Mack Schultz, Attorney at Law, represented The Boeing Company (“Respondent” or “Boeing”). At trial Complainant’s Exhibits (“CX”) 1, 3, 5, 8-10, 12-15, and 17-20 were admitted into evidence, as were Employer’s Exhibits (“EX”) A to ZZ.¹ TR² at 13, 155-156.

Complainant asserts that Respondent blacklisted him in 2010 for providing assistance in 2008 to the plaintiffs in the *In re September 11 Litigation*. In sum, Complainant alleges he wrote a letter to Respondent in 1983, maintaining that the cockpit door of the then-new Boeing 767 airplane would not stay closed during test flights. After the September 11, 2001 (“9/11”) terrorist attacks, Complainant eventually remembered his letter and offered his assistance to the plaintiffs who were suing Boeing and a number of other companies on a variety of legal theories,

¹ At hearing, Respondent made a motion to withdraw its Exhibit VV because it was not the maximum RTO test document referenced in the testimony. Complainant objected and wanted it to remain in evidence. I denied the request to withdraw, but am mindful that Exhibit VV does not relate to the RTO testing discussed in this matter. TR at 231-232.

² Transcript of February 2014 hearing.

including negligence, products liability, and other torts. Complainant argues that once Boeing learned he was providing assistance to the plaintiffs, it placed his name on a “do not rehire” list, essentially blacklisting him from further employment at Boeing. At trial, Respondent completely debunked every allegation made by Complainant, and demonstrated that Complainant fabricated the letter allegedly written in 1983; that his one month employment in the 9/11 litigation did not contribute to Respondent’s decision to place him on the do not rehire list; and that Respondent would have taken the same action regardless of his limited involvement in the 9/11 litigation.

For the reasons discussed below, I deny and dismiss the complaint due to Complainant’s failure to prove a case of retaliation under the AIR21 statute and corresponding regulations. Moreover, because I find that the information provided by Complainant in this proceeding was frivolous and brought in bad faith, I order Complainant to pay Respondent \$1,000 for attorney’s fees pursuant to 29 C.F.R. § 1979.109(b).

I. Issues for Hearing

1. (a) Is the *In re September 11 Litigation* a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of federal law relating to air carrier safety?
(b) Was Complainant’s belief that a violation occurred objectively reasonable?
2. Did Complainant engage in protected activity by assisting or participating in the *In re September 11 Litigation*, Case Nos. 21-MC-99 and 21-MC-101 (S.D.N.Y.)?
3. Did Respondent have knowledge that Complainant engaged in protected activity?
4. Was the recoding of Complainant’s employment record as “do not rehire” an adverse employment action?
5. Was the alleged protected activity a contributing factor in Respondent’s decision to recode Complainant’s employment records as “do not rehire”?
6. If so, has Respondent shown by clear and convincing evidence that it would have recoded Complainant’s employment records as “do not rehire” in the absence of the protected activity?

TR at 5-6.

II. Stipulated Facts

The parties stipulated to the following facts: 1) Complainant was employed by The Boeing Company from January 31, 1979, to February 10, 1984, with his position being Senior Engineer for part of that time; 2) During his time at Boeing, Complainant worked on VA001, the first Boeing 767 aircraft; 3) Religious extremists took over two Boeing 767 aircraft on September 11, 2001, killing or otherwise disabling the pilots, and crashed the aircraft into the World Trade Center complex; 4) The copy of the letter dated June 12, 1983, produced in the *In*

re September 11 Litigation, was not, in fact, printed in 1983; 5) Complainant did not testify in the *In re September 11 Litigation*; 6) In July 2010, Vanessa Lee ordered Complainant's employment records at Boeing to be recoded as "do not rehire." CX 19; TR at 156-157.

Having reviewed the record in its entirety, I find the stipulations are supported by the evidence and I accept them for all purposes.

III. Factual Findings

A. Complainant's Employment with Boeing

Complainant maintains a story that appears at first minimally plausible, but completely unraveled at trial. Complainant worked for Boeing from 1979 to 1984, when he left to return to UC Berkeley and complete his engineering degree. EX H. There was a discrepancy with some transfer credit, and he had to go back and take a course at UC Berkeley to earn enough units for his engineering degree. EX YY at 484. Complainant earned his degree from UC Berkeley in August 1984. EX H. His letter of resignation, dated January 4, 1984, says he had a positive experience at Boeing overall, that he was satisfied with the time he spent with the company, and he hoped to possibly work for Respondent in the future. EX G.

While at Boeing, Complainant worked on the first 767 airplane, designated VA001, but maintains that he was in charge of cockpit security during test flights even though evidence established that the pilot on the test flight was in charge of cockpit security. EX YY at 435; TR at 52-54, 102, 241. When Complainant worked on VA001, he said that it had not yet been certified by the FAA, and he testified at trial that he worked on the original FAA certification. EX YY at 433, 435; TR at 103. The FAA certified the 767 on July 30, 1982. TR at 244-46; EX WW. However, internal organization charts from Boeing show that as of April 14, 1983, Complainant was assigned to the Ground Operations for the RA001/747 Production unit – a different role with a different aircraft. EX C. His supervisor was Tom Buce, and his lead was listed as F.B. Quealey. *Id.*; EX D. As of September 1, 1983, he was still assigned to RA001 Ground Operations. EX D. As of October 14, 1983, Complainant was assigned to Flight Test Engineering Project Support, and was listed as a member of the 727, 737, and 757 program. EX E. He had the same assignment in January 1984. EX F.

B. Cockpit Door in 1983

Complainant alleged that he was intimately involved with all the pre-FAA testing of the 767 aircraft, and he claimed to be on the 767 aircraft when the refuse takeoff test ("RTO") was completed. TR at 274. On rebuttal at trial, Complainant said that Thomas Edmonds was only the chief test pilot of the program and did not have the "cross-section sampling" for testing done on the 767 test aircraft the way he did. *Id.* According to Complainant, during the RTO test at Edwards AFB, the cockpit door on the 767 vibrated, fully opened, impacted the wall, and then shut, and opened again. EX YY at 431. At trial, and for the first time, Complainant said that the doors "oscillated at 3 hertz," which was more specific than his previous testimony. TR at 53-54. Complainant said that the cockpit door was always installed during flight tests, though sometimes it would be opened and sometimes it would be closed. EX YY at 430; TR at 104-05.

At his March 2013 deposition, Complainant said the cockpit door would open occasionally during normal flight, but at trial he said it did not open during normal, straight flying. *Compare* EX YY at 431 *with* TR at 108. At the hearing, in response to testimony by Mr. Edmonds, Complainant backed away from his earlier deposition testimony, and said that he could not specifically recall the various plane configurations, and said he was not sure if the cockpit door was installed in all test configurations, but it was installed on VA001. TR at 104-05. Complainant said many people complained about the cockpit door, and claims to have had a conversation with one of the two original test pilots on the 767, who allegedly told him there was a heated debate about the cockpit doors; Complainant insisted that anyone who said the pilots were not having that debate was lying. EX YY at 430, 434; TR at 55, 58, 274. Mr. Edmonds contradicted Complainant on this point, and, as discussed later, I believed Mr. Edmonds' more credible testimony over that of Complainant.

Complainant said that he and another individual, William MacRae, discussed the cockpit door issue routinely in 1983, going so far as to speculate about how hijackers would take over the plane and fly them into historic U.S. landmarks. EX YY at 438; TR at 55. Complainant said that at one point he actually kicked in the 767 cockpit door just to test how strong it was; he did it when no one was around and he told no one except Mr. McCrae. EX YY at 439. Complainant said he called Mr. MacRae on the telephone about a month before trial but was told by Mr. MacRae that he did not remember anything. TR at 66, 132.

Because of these grave concerns about cockpit door safety, Complainant maintains that he wrote a letter in 1983 and gave it to Tom Buce, his supervisor in 1983, describing the problem and claiming that all the test pilots were concerned about the cockpit doors. CX 1; EX YY at 446. The date on the letter is June 12, 1983. CX 1. Complainant maintains that he wrote the letter on a friend's Apple computer, and printed it on what he thinks was dot-matrix printer at his friend's house, and then took it to work and copied it onto Boeing letterhead. CX 11; EX YY at 425-26, 445-46; TR at 76. He made five copies of the letter, and gave one copy to Mr. Buce and put the other four letters in his desk at work. EX YY at 445. He also said that he actually designed a stronger door that would fix the problem, and drew sketches which he allegedly showed to Mr. Quealey and gave to Mr. Buce, though he never reached out to Boeing's cockpit design group to discuss his concerns. EX YY at 441-42; TR at 117.

According to Complainant, after some time passed with no response to the letter, Mr. Quealey came to his desk, demanded to see any copies of the letter and sketches, tore them in half and told him he had to destroy any other copies; Complainant said he complied. EX YY at 425-26, 448; TR at 57. Originally, he said that all four copies were in his desk, but then he clarified that two copies were in one part of the desk and two were in another part, before saying that Mr. Quealey went through his desk and destroyed two copies, and he destroyed the other two. EX YY at 425-26, 448. Within a few days of destroying the copies, Complainant supposedly went to his friend's house again and copied the letter onto a floppy disk, which he put in a file along with Boeing letterhead and kept it for proof later, in case something happened; he did not have a copy of the sketches he allegedly made. EX YY at 450.

Three to four weeks later, Complainant said he was transferred to a different working group at Boeing, where he was tasked with updating maintenance manuals on the 757 and 767, which he maintains were not yet in operation. EX YY at 451, 453. However, Boeing records show he was assigned, as of October 14, 1983, to Flight Test Engineering Project Support, and was listed as a member of the 727, 737, and 757 programs; it does not mention the 767. EX E. According to Complainant, after his transfer to the new group, Mr. Quealey came to his desk with a typewriter, placed it on his desk and dictated to Complainant what he should write in his letter of resignation. EX YY at 455. Mr. Quealey also made him sign forms about his transfer and back date them. *Id.* at 456.

When he left Boeing, his crew and supervisors threw him a going away party, with balloons and cake, and even gave him a signed plaque in appreciation for his work at Boeing. CX 14 at f, c; CX 20; EX AA at 227, 228, 232. Complainant, however, asserts that the party was just a ruse to cover up the punishment he experienced for reporting the cockpit door problem. EX YY at 454; TR at 93. Complainant provided pictures of him while working at Boeing, including one with his co-workers in front of a Boeing 747. CX 14 at f; EX AA at 227. He also provided a photocopy of the picture signed by his co-workers, which says, “Just Cruisin’ Back to School, Good Luck Bruce.” CX 20; EX AA at 228.

Complainant alleges that he had “suppressed memory” apparently regarding the events of his leaving Boeing, even though the evidence clearly established that he left voluntarily and returned to school to complete his education. TR at 130-131. He did not recall that he had written the letter in 1983 until a few years after the 9/11 attacks, and that is when he contacted attorneys involved with suppressed memory cases, and allegedly began to recall the events in 1983 and 1984. TR at 131; EX YY at 468-69.

C. Letter in Evidence is Not Original

The letter in evidence is not the original letter he allegedly gave to Mr. Buce in 1983. CX 1; EX YY at 430; TR at 58. According to Complainant, he printed the letter in 1996 at Kinko’s when he moved to Albuquerque, New Mexico. EX YY at 464-65. He said he kept a copy of Boeing letterhead as memorabilia, and printed the letter on the Boeing letterhead he had saved apparently since 1984. EX YY at 464. When he took the floppy disk to Kinko’s, they had to send it out to process. *Id.* at 465; TR at 57. It cost about \$5, and he got the floppy disk back with his letter printed on the Boeing letterhead. EX YY at 465. During his rebuttal testimony at trial, he recalled that Kinko’s said it was “tough” to print the letter and asked for an extra \$10. TR at 273-74. He then threw out the floppy disk. EX YY at 465. In addition, the letter in evidence is printed with a laser style printer, and not dot-matrix. EX GG at 256.

D. Post-Boeing Employment

Complainant said after completing his engineering degree at UC Berkeley in 1984, he went on to work at a variety of other jobs, and thought nothing more about the letter he allegedly wrote to Boeing. Respondent established that Complainant worked for Big J Enterprises in Albuquerque, New Mexico, and received a letter of recommendation from Big J dated April 17, 1995. EX I. He worked for NexStar in Longmont, Colorado and also received a letter of

reference from NexStar dated February 28, 1997. EX J. He received a Master's degree in Business Administration from University of Colorado in June 1998. EX K. At his deposition, Complainant initially said he left Silicon Valley and went to work at Big J Construction in Albuquerque, New Mexico in approximately 1998, where he worked for two years, and then moved to Boulder, Colorado to enroll in MBA program at University of Colorado. EX YY at 420-21. He later changed his answer and said he lived in Albuquerque from 1994 to 1996 and Boulder from 1996 to 1998. *Id.* He was evasive at trial about the timeline of when he left for Albuquerque and when he got his degree in Colorado. TR at 123-24, 126. He appeared to recognize that Respondent's evidence did not fit his timeline regarding when he claims to have printed the letter. TR at 123-127.

E. Alleged Letter and Email to Boeing in 2006

According to Complainant, in 2006, about two years after he contacted a suppressed memory expert, he wrote a letter to James McEnerney, Jr, the CEO of Boeing, and then followed up with a phone call to Barbara Bond, Mr. McEnerney's executive assistant. CX 12; TR at 131; EX YY at 468-69. He claims that he spoke to Ms. Bond for 15 minutes, and that Ms. Bond verified receiving the letter and that the letter was discussed for a "substantial period," and that he was told if any actions were taken, a vice president would contact him. EX YY at 471. In an email to Ms. Bond dated November 8, 2006, he asserts that Ms. Bond confirmed receipt of his letter dated October 11, 2006, which he also allegedly attached to the email, and said he wanted an answer from Respondent about "what Boeing intends to do with or about the circumstances leading up to the termination of my employment." CX 12 at 1; TR at 78-79. He also wanted an apology and acknowledgment that what he predicted about the cockpit doors was true. EX YY at 472.

He also allegedly wrote a handwritten letter to Mr. Buce in August 1984 discussing his "termination" from Boeing, which was given to Respondent prior to his March 2013 deposition. EX YY at 497, 526-33, 813-20. He wanted to disclose much of the information because he had a "suppressed memory" about the event. *Id.* at 459-463. He never explained why he kept a photocopy of the handwritten letter allegedly sent to Mr. Buce.

F. 9/11 Litigation

In 2008, Complainant sought out the plaintiff's attorneys in the 9/11 litigation and offered his assistance. EX YY at 480. Flemming Zulack LLP, a law firm representing plaintiffs in the *In re September 11 Litigation*, retained Complainant on March 20, 2008, to perform services as an expert witness and or consultant in connection with the litigation, but later canceled the agreement. CX 9; EX YY at 477-78, 481. Complainant never testified at a deposition or in court for the litigation. *Id.* at 481-82; TR at 99-100. On April 28, 2008, Respondent received discovery requests from Fleming Zulack seeking information about Complainant, which was when it first learned of the alleged letter from 1983. EX S, T. Boeing requested reciprocal discovery from Flemming Zulack on June 27, 2008, and sent a subpoena directly to Complainant for information on the same date. EX T, U, V, W.

According to Complainant, he never told the plaintiffs' attorneys in the 9/11 litigation that the 1983 letter about the cockpit doors was not an original until they asked him. TR at 272-73. Complainant acknowledged that he was no longer working as a consultant for the plaintiff's attorneys in a letter he wrote dated May 3, 2008, and the evidence at trial established that he only worked as an expert for plaintiff's attorneys for about a one month period in 2008. CX 3, CX 9; TR at 100.

Once Boeing learned of the alleged letter, it began an exhaustive records search to determine who Complainant was, and locate any record of the letter and email that were allegedly sent. Employer's records show that Complainant's status at Boeing was "TERMINATED," but I find that is an internal code indicating that he was no longer an employee at the company. EX A, B. The same document, dated April 29, 2008, shows that Complainant was eligible to be rehired ("Rehireable Ind: Y"). EX A at 1. Employer's work history dated August 23, 2013, shows that he was no longer eligible to be rehired ("Rehireable Ind: N"). EX B at 1.

G. Fraudulent Email, Letters and the Unraveling of Complainant's Story

After the exhaustive records search, Respondent suspected that the letter was fraudulent and hired Peter Tytell and William Flynn, both forensic document examination experts, to examine the authenticity of the letter. TR at 207-08; EX MM, PP, QQ. Mr. Tytell has an extensive work history and education in documents examination and is well-qualified for his position. EX MM at 283-298. Mr. Flynn is a board-certified forensic documents examiner, has been a documents examiner for over 42 years, and is well-qualified for his position and to render an expert opinion in this matter. EX PP at 329, 334-340; EX NN; EX QQ at 352-355. Mr. Flynn also gave a videotaped deposition on October 1, 2013, which was played during the trial. EX QQ. Mr. Flynn and Mr. Tytell both independently determined that the letter could not have been written in 1983 because it was printed with a version of Microsoft Word 95 that went into production in 1996. EX MM, PP, QQ. Respondent conclusively established that the letter allegedly written by Complainant and presented in the 9/11 litigation was false. EX MM, PP, QQ.

Not only could the letter not have been printed in 1983, but the email supposedly sent in 2006 to Barbara Bond could not possibly have been sent. TR at 208; EX MM, PP, QQ. First, it defies common sense that a personal assistant to the CEO of a major airline would discuss the workload and personal habits of the CEO with a stranger over the phone, or that her personal phone number would be available on the corporate Internet website as Complainant alleged. TR at 131. Vanessa Lee, who was in-house counsel for Boeing from 2005 to 2011, and was assigned to monitor the status of the September 11 litigation, said, in her experience, executive level assistants would not disclose the information Complainant alleged Ms. Bond did to someone outside the company. TR at 166, 169-70, 177. Second, after looking at Ms. Bond's computer, there was no evidence that the email or letter allegedly sent by Complainant were ever received by Ms. Bond, even though Mr. Flynn opined that the October 11, 2006 letter to Mr. McNerney was computer generated and could have been prepared in 2006. TR at 208; EX MM, PP, QQ; *see also* QQ at 357. Third, as explained by Mr. Flynn, the alleged 2006 email from Complainant is also questionable because the margins do not line-up and the font changed

between the subject line of the email and the body of the text; the subject line is written in Times New Roman font and the rest of the email is written in Gothic font. EX QQ at 357. According to Mr. Flynn, the text of the header is one font and the body is in a different font, which is not how email operates. *Id.* He surmised that it could be a cut and paste, with the upper date from a different email and the body appended to it. *Id.* Finally, Mr. Flynn said that a document prepared in 1983 and stored on a five-and-a-quarter-inch floppy disk in 1996 and opened using Microsoft Word 95, would have had to re-keyed (re-typed) to get it to print in the format it was currently in. *Id.* at 359. Respondent established conclusively that the copy of the email that Complainant presented in court had also not been sent.

H. Do Not Rehire

Perkins Coie, the law firm representing Boeing in the 9/11 litigation, laid out its suspicions about Complainant and his alleged letters from 1983 and 2006, in an internal email dated November 20, 2008. EX EE; TR at 169-70. The email recounts the process by which Boeing learned of Complainant's involvement in the litigation, as well as the efforts Boeing made to verify his claims. *Id.* The email reiterates that Boeing had no record of receiving either document, and had also contacted Complainant's co-workers in the 1980s, who did not recall any events related to Complainant being fired or any issues with cockpit doors. *Id.*

In response to a March 8, 2010 voicemail message from Complainant received by Mack Schultz, an attorney at Perkins Coie who represented Boeing in the 9/11 litigation, the internal email was forwarded to Ms. Lee. Ms. Lee, who had been aware of Complainant since November 2008, responded on March 9, 2010 that she would await further developments, and took no further action. EX GG; TR at 173. Ms. Lee continued to monitor the situation until July 2010, when she received an email from Mr. Schultz that Complainant was seeking employment with Boeing. EX II; *see also* JJ, KK, EX LL; TR at 178-184.

On July 18, 2010, Complainant emailed Mr. Schultz and said he could not speak about the 9/11 litigation, but he wanted to continue his efforts to find employment with Boeing. CX 8 at 1. Complainant testified that since 2006, he had applied for a number of jobs through the online application process at Boeing, but never received a request for an interview. TR at 80, 132-33. Mr. Schultz forwarded the email to Ms. Lee, who responded on July 19, 2010, that she had taken steps to have a "do not hire" notification placed on Complainant's records; she inadvertently sent her reply to Respondent as well. *Id.*; CX 5a; CX 13; EX LL; TR at 75, 166, 178-84.

Complainant received the email reply sent by Ms. Lee, who included him in error, and responded to Mr. Schultz and Ms. Lee on July 20, 2010, that he wanted to be rehired at Boeing, harbored no grudges against the company, and asked that they reconsider the coding of his file and allow him to apply for Boeing jobs. CX 13.

In a declaration to OSHA, Ms. Lee stated:

The only reason for my coding [Complainant] as ineligible for rehire was the overwhelming evidence that the 1983 letter [Complainant] claimed to have authored in 1983 was a fake, and I believed [Complainant] attempted to commit fraud upon [Employer], other parties, and the Court in the 9/11 litigation. I did not trust [Complainant], and did not believe he should return to Employer.

CX 8 at 3. She reiterated the same information at trial. TR at 184-85.

In response to questioning by Mr. Schultz during his March 1, 2013 videotaped deposition, Complainant said:

Q: If a company believes that an employee or former employee is committing fraud, is it wrongful of the employer not to rehire that former employee, setting aside the merits of whether fraud was actually committed or not?

A: If – theoretically if fraud was being committed, then that would be a reasonable statement by Boeing.

Q: A reasonable response?

A: Response.

Q Would – and hypothetically if Boeing investigated and obtained the opinion of experts who said that there was a fraud being perpetrated, and based on that information Boeing placed a do-not-rehire tag on a former employee's file, would that be wrongful, or would that be a reasonable and appropriate measure in response to the information available?

A: That would be a reasonable and appropriate response to the information available, even though that information was incorrect.

EX YY at 483.

I. Complainant's Story is False and Not Credible

Respondent exposed Complainant's timelines, recollection, and testimony regarding the testing of the 767 and the letter to be false.

1. Complainant's Testimony and Timeline Are False

The testimony of Peter Tytell and William Flynn, both forensic experts, persuasively established that the letter could not have been printed in the same format in 1996 if it were written in 1983 on an Apple computer, because the change in technology would not have allowed it to print so cleanly from a floppy disk. EX QQ at 355; EX MM. It was the experts' opinion that the document would have had to have been retyped to get it to format appropriately.

EX QQ at 359. At his deposition, Complainant said Kinko's sent the disk out to print what was on it. EX YY at 200. During trial, Complainant said he took the disk to Kinko's, and he doesn't know the process it used to get the information, but he suggested that maybe they had to retype the letter, which that could explain the extra fee. TR at 273-74; EX SS at 369. His explanation was an unsuccessful attempt to make his story appear plausible and conform to the convincing and overwhelming evidence from the experts that the letter was fabricated.

Second, Respondent conclusively established the timeline proposed by Complainant, including the alleged 1996 printing at a Palo Alto Kinko's, was simply false. Respondent proved that, in fact, Complainant had already moved to Albuquerque and worked for Big J prior to 1996. EX I. A copy of a letter of recommendation from Big J about Complainant is dated April 17, 1995. *Id.* Complainant maintained that he had worked for Big J for two years, and it is unlikely that Big J would have written him a letter of recommendation dated 1996 if he had just started working there. Complainant tried to explain at trial, and for the first time, that he had traveled back and forth to Palo Alto after taking the job in Albuquerque, TR at 60, 122, 126, but he never mentioned that at his deposition and it is not supported by any other credible evidence. Complainant's credibility is suspect, and has been throughout this entire trial process. I simply do not believe him. The evidence offered by Boeing is overwhelming in its persuasiveness; Complainant is lying.

Third, not only could Complainant not have printed the letter at Kinko's in California in 1996 because he had already moved to New Mexico, the evidence overwhelmingly established that in 1996, he left his job in New Mexico to move to Colorado and pursue a two-year program leading to his Master's degree in Business, which was awarded in 1998. EX I, J, K. Complainant explained that he took a sabbatical for about one year, which he thought might explain the impossible timeframe, but his testimony lacked any credibility at that point. TR at 123-24, 126. The evidence overwhelmingly established that Complainant lied about the letter, lied about when it was printed, and lied about the circumstances surrounding its production.

2. Contents of 1983 Letter are False

Moreover, the content of what Complainant maintained in the letter was untrue. It was Complainant's contention that he had worked on VA001, the first Boeing 767, and was in charge of cockpit safety during the test flights. EX YY at 435; TR at 52-53, 102. The parties stipulated that Complainant worked on the VA001 aircraft at some point, but the evidence established it was in a much smaller capacity than Complainant claimed. Complainant asserted that the cockpit doors were unsafe and would open during even routine flights. EX YY at 430-31; TR at 54, 104-05, 108. Respondent again soundly refuted that contention. Thomas Edmonds, an impressive and distinguished witness, established that he was the principal pilot on all training flights and oversaw the development of new airplanes for Boeing from 1956 until he retired in 1989. TR at 233-35. Mr. Edmonds established that he flew the test flights, including the very first flight of VA001 and the 767 in September 1981, and he was at all times captain of the airplane when it was airborne. TR at 237-39, 241, 243, 265; EX WW. As captain of the flight, it was his responsibility to maintain cockpit security and safety in flight, and not anyone from ground operations. Not only was Complainant not in charge of anything on a test flight, but also

the cockpit doors were not even installed on the test flights until much later in the process. TR at 241, 247.

Complainant attempted to describe tests that occurred at Edwards AFB in California on the Boeing 767, but Mr. Edmonds established conclusively and without reservation that he was the pilot on those tests, that the cockpit doors were not installed during those tests, and the accusations made by Complainant were simply untrue. TR at 237-40, 256. The cockpit door never opened on its own—it opened only when someone opened it. TR at 258. Because Mr. Edmonds was a pilot, and always the captain of the plane when he flew, if there were any issues with cockpit safety and comfort, or pilot safety and comfort, he would have been intimately involved in addressing any concerns about the cockpit door. TR at 246-47. To the extent that Mr. Edmonds and Complainant conflict in their recollection of the events, I found Mr. Edmonds to have more credibility. His testimony was confirmed by other evidence in the record and his unequivocal recollection of the 767 development was remarkable.

Mr. Edmonds established that there were most likely five or six test planes when the 767 was under development and testing, but that all of the planes would not have cockpit doors during research and development because there were many different engineering groups on the plane and all had to discuss openly and freely with the pilots issues that might have arisen during the training flights. TR at 246-50. Mr. Edmonds knew Mr. Buce, and it was Mr. Edmond's position that the letter allegedly written by Complainant did not exist in the 1980s. TR at 256-57, 265. Complainant did not mention the multiple plane configurations until his rebuttal testimony, and after he heard the compelling testimony from Mr. Edmonds. TR at 274. Further, it was only after all of the research and testing had been completed, and the plane was being flown just prior to release to customers for commercial service, that the cockpit doors were installed and not before. TR at 231-262, 264. Furthermore, the cockpit doors open out towards the passenger cabin, and not into the cockpit, as alleged by Complainant. TR at 248.

3. FAA Certified the 767 Before Complainant Wrote Letter

In addition, Respondent provided two more compelling pieces of evidence that severed any thread of credibility that Complainant might have had left. First, the development of the 767 occurred over many years. TR at 243; EX WW. However, while Complainant contends his observations were made in 1983 before the 767 was FAA certified, the conclusive weight of the evidence showed that the FAA certified the 767 on July 30, 1982, it had been delivered to United Airlines for its first commercial use on August 19, 1982, and the first commercial passenger flight of the 767 occurred from Chicago to Denver on September 8, 1982. TR at 244-46; EX WW. Second, and equally compelling, during the time frame that Complainant maintains he was working on VA001, Boeing's records established that Complainant had been working on the project for the Boeing 747 (RA001) and not the 767. EX C, D, E, F.

4. No Corroboration of Complainant's Claims

Additional evidence that cuts against Complainant's credibility includes the hearsay testimony of Mr. McRae through the testimony of Eric Lent, a former attorney at Perkins Coie, who left the law firm in 2010. TR at 197-200. While investigating the alleged 1983 letter, Mr.

Lent interviewed Mr. McRae by telephone one time regarding the letter and allegations in this matter before Mr. McRae died; the conversation lasted about 20 to 30 minutes. TR at 211, 216. Mr. Lent was one of the attorneys responsible for tracking down information about the alleged letter and interviewed multiple Boeing employees about their knowledge of any letter from Complainant. TR at 175, 207. According to Mr. Lent, McRae did not have a high opinion of Complainant and did not have any recognition of the letter that Complainant says he gave to Boeing in 1983. TR at 211-212. According to Mr. Lent, Mr. McRae became angry when he learned about the allegations by Complainant, and said safety concerns were taken very seriously and any concerns would have been documented, studied and resolved. TR at 213. Mr. McRae thought it was "rubbish" that Complainant was demoted or kicked out of the company over the cockpit door. TR at 219. Complainant himself said he spoke to Mr. McRae by phone just before he died, and Mr. McRae was not cooperative and had no recollection of the letter. TR at 66, 132. Mr. Lent was unable to find any evidence that a letter existed, and very few employees who even remembered Complainant. TR at 175, 204-05, 207, 214.

Mr. Lent also retained the two independent experts who verified the letter could not have been written in 1983, and also found no evidence that Complainant ever sent an email to Barbara Bond. TR at 207-08. Mr. Lent also established that Complainant attempted to work both sides of the 9/11 litigation, and Mr. Lent said that Complainant suggested that maybe he had picked the wrong side, and could easily be an expert for Respondent as well. TR at 206. I am persuaded that the letter was fraudulent and fabricated, even without the hearsay testimony of Mr. McRae through Eric Lent. The testimony from Mr. Lent about Mr. McRae's demeanor towards the letter and towards Complainant is just one additional piece of evidence that destroys Complainant's story and credibility.

5. Criminal Convictions and Financial Motives

Finally, Respondent showed that Complainant had been convicted of crimes involving the presentation of false documents and signing documents under penalty of perjury in Colorado in 2008. EX XX, YY at 494. Generally, the credibility of witness can be attacked by showing he has been convicted of a crime that involved dishonesty or false statement, regardless of the punishment, if less than ten years have elapsed since the date of the conviction or release from confinement. 29 C.F.R. § 18.609(a) & (b). On September 25, 2009, Complainant pled guilty to two counts of theft in Boulder County, Colorado. EX XX at 400. He was sentenced to 30 days in jail and 75 hours of community service. EX XX at 401, 414. The felony conviction was later dropped as part of a deferred prosecution agreement, but the misdemeanor theft remained. EX YY at 494.

Complainant's convictions correspond with the time frame of his seeking out the 9/11 plaintiffs, suggesting financial motivation and an interest in profiting off the litigation. EX YY at 315, 317. Complainant was working as a mortgage lender in 2008 and the economic collapse of the housing market occurred during the time frame he committed the crimes listed above. TR at 147-48. Respondent argued that his work as a mortgage lender and the economic collapse, as well as the theft convictions, are circumstantial evidence that Complainant was desperate for money and support the finding that his letter was fabricated to enhance the likelihood of him benefitting from the 9/11 litigation. TR at 147-148, 301-02. Complainant admitted to the facts

of the theft case, which was going on at the same time he was hired by Flemming Zulack. TR at 145-148.

The overwhelming weight of the evidence is that Complainant fabricated the letter, and fabricated the events surrounding the letter for his own potential financial gain.

6. No Action By Boeing for Two Years

The evidence also established that Respondent did not take any action regarding the fabricated letter and the fraud that Complainant was attempting to perpetrate on the company, until 2010 when he wanted to return to work for Boeing and sought the help of one Boeing's attorneys. EX EE, LL; TR at 174, 178-83. In an internal email dated November 20, 2008, Respondent laid out its suspicions about Complainant and his alleged letters from 1983 and 2006, and the email to Ms. Bond; recounted the process by which Respondent learned of Complainant's involvement in the 9/11 litigation and the efforts made by Respondent made to verify his claims; and concludes that Respondent had no record of receiving either document. EX EE. Respondent also contacted Complainant's co-workers from the 1980s, who did not recall any events related to Complainant being fired or any issues with cockpit doors. *Id.* Ms. Lee learned of the Complainant's involvement in the case in 2008, was made aware of the email and suspicions on March 8, 2010, and acknowledged receiving the information on March 9, 2010. EX GG, LL; TR at 174, 179, 184. Ms. Lee recounted that she was checking the information as of July 6, 2010. EX II; see also JJ, KK. Ms. Lee responded with the "do not rehire" email inadvertently sent to Complainant as well as Mr. Schultz. EX LL.

Ms. Lee, a former attorney for Boeing, conclusively established that Boeing took the action of designating Complainant's file as do not re-hire because it would not want any person who perpetrated a fraud on the company to work there. TR at 180, 182, 184. I believed her testimony over that of Complainant. Ms. Lee was articulate, forthright, had a strong recollection of the events, and persuasively established that her order to change his designation had nothing to do with the 9/11 litigation. TR 184. This is corroborated by the conclusive evidence at trial that Complainant worked only briefly on the 9/11 litigation in 2008 and Respondent knew the letter was fraudulent in 2008, but had no reason to take action until Complainant made overtures that he wanted to return to work at Boeing in 2010. The email chain provided for the period of 2008 to 2010 corroborate Respondent's position and Ms. Lee's account of what occurred. EX GG, LL.

7. Complainant Agreed that Boeing's Actions were Reasonable

Finally, Complainant himself agreed that recoding his file was reasonable under the circumstances. EX YY at 483. Though he maintained that Respondent was mistaken in its belief he had perpetrated fraud against the company, Complainant acknowledged that recoding his file as "do not rehire" was a reasonable response to what Boeing knew at the time. *Id.* Still, in spite of his agreement that the action was reasonable, Complainant pursued his claim.

IV. Legal Conclusions

To prevail under AIR 21, Complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the adverse personnel action. *See* 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); 29 C.F.R. § 1979.109(a); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006). If Complainant proves his case of retaliation under AIR21, then he is entitled to relief unless Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action absent his protected activity. *See* 49 U.S.C.A. §§ 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a); *Luder v. Continental Airlines*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012).

Complainant has not proved his case of retaliation under AIR21. Even if he had, Respondent produced clear and convincing evidence that it would have taken the same action in spite of Complainant's participation in the 9/11 litigation. The overwhelming weight of the evidence demonstrated that Complainant fabricated his story in an attempt to gain financially from the 9/11 tragedy. When the entire record is considered, there is no doubt that Respondent acted appropriately under the circumstances of this case, and did not retaliate, blacklist or otherwise take any action against Complainant because of his limited role in the 9/11 litigation.

Respondent's evidence is overwhelmingly persuasive. I believed the credibility of Boeing's witnesses, particularly since their testimony was corroborated by the great weight of the other evidence at trial, over the testimony of Complainant, whose credibility was suspect and severely undermined by his criminal convictions, his motivation for financial gain, his glorified and inaccurate recollection of his tenure working at Boeing, and his agreement that Boeing acted appropriately by placing his name on the do not rehire list. Complainant's testimony was at times improbable, internally inconsistent, and contradicted by other more compelling evidence in the case. As discussed below, the complaint against Boeing is dismissed.

A. Issue One: Is the *In re September 11 Litigation* a proceeding relating to a violation of the FAA or other provision of federal law relating to air carrier safety?

In 2000, Congress enacted Section 519 of AIR 21, which provides for employee protection from discrimination by air carriers because that employee engaged in protected activity pertaining to a violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. 29 C.F.R. § 1979.100(a). The purpose of the provision was to extend protection to airline employee whistleblowers, consistent with the previous protections afforded in over a dozen other statutes protecting whistleblowers in the nuclear, mining, and trucking fields. H.R. Rep. No. 105-639, at 51 (1998).

AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under . . . [subtitle VII of title 49 of the United States Code] or any other law of the United States; . . . (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(a)-(b). An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

Respondent argued that the 9/11 litigation is not the type of litigation contemplated by the AIR21 statute and regulations. Specifically, Respondent asserts that the actions brought against Boeing in the *In re September 11 Litigation*, while filed in federal court, were based upon state tort causes of action. EX L, M, N, O, P, R, ZZ; TR at 172. The causes of action against Boeing included strict liability for the defective design and manufacture of the cockpit of an aircraft, including the cockpit door and accompanying locks, a claim for negligent design and manufacture of the cockpit environment, including the doors and locks, and breach of warranty. EX L, M, N. Mr. Lent established that the nature of the action and allegations against Boeing did not change over the course of the litigation, which began in approximately 2002. TR at 199-203. The final disposition of all claims related to the *In re September 11 Litigation* occurred on November 6, 2013, when all parties agreed to dismiss with prejudice all claims, cross-claims and counterclaims, against Boeing. EX R, ZZ.

At the trial, Respondent moved to dismiss the matter at the conclusion of Complainant's case because he did not offer any evidence to show that the litigation fell within the AIR21 protections, specifically to any violation or alleged violation of any order, regulation or standard of the FAA, or any other provision of Federal law related to air carrier safety. TR at 158. Respondent argued that Complainant did not produce any evidence of his involvement in a litigation affecting airline safety because the litigation involved only state tort causes of action, and was unconnected to FAA rules or regulations. TR at 158-159. Respondent litigated this contention vigorously on summary decision and at trial.

Generally, remedial statutes such as nondiscrimination provisions in federal labor laws should be given broad construction, and protected activity under AIR21 has been construed broadly by the ARB. *Bechtel Cons. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995); *Mackowiak v. Univ. Nuclear Sys.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-12, slip op. at 9 (Dec. 31, 2007). However, the ARB has held that the protected activity under AIR21 must relate to providing information about a violation of federal air carrier safety laws, and the proceeding must at least relate to

violations of air safety regulations or standards. *Mehen v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-4, slip op. at 5 (ARB Feb. 24, 2005); *Malmanger v. Air Evac. EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8, slip op. at 9 (Jul. 2, 2009).

Here, Complainant did not offer any specific evidence regarding whether his conduct fit within AIR21. Instead, he relied generally upon his one month employment in 2008 helping the plaintiffs in the litigation, and offered that he “demonstrated some important correlations” between his work with Flemming Zulack and Boeing’s decision to code his file do not rehire. TR at 161.

On summary decision, Complainant had the benefit that all inferences from the evidence needed to be drawn in his favor. In addition, because he is not an attorney, I read the pleadings liberally to give him an opportunity to further develop information for trial. However, Complainant did not provide any additional evidence regarding whether his involvement in the 9/11 litigation related to a violation of Federal law or a regulation of the FAA. *See* 49 U.S.C. § 42121(a)(2) & (4). Based upon the pleadings in the *In re September 11 Litigation*, the cases were about state tort causes of action and there were no violations of Federal law or violations of a regulation of the FAA alleged. The Order Denying Summary Decision was issued on May 8, 2013, and the arguments by Boeing were addressed in that ruling. Complainant had notice and ample time to produce evidence and to address this issue.

Based upon the evidence at trial, I find that Complainant did not sustain his burden to establish that his activities fell within the prohibitions of AIR21. Specifically, his one month employment in the *In re September 11 Litigation* related to a lawsuit brought under state tort law, and not any violation of the FAA or any other Federal law. Respondent provided all of the pleadings in the 9/11 litigation in which Complainant provided his tepid assistance, and each of those pleadings demonstrates that the causes of action against Respondent were only for standard state tort claims. While it could be argued that the claims were generally related to air carrier safety, the AIR21 statute covers only violations related to the regulations of FAA or Federal law. Thus, I find that Complainant’s activities do not fall within the whistleblower protections specified in the AIR21 statute and regulations.

Even though I do not believe the *In re September 11 Litigation* is covered by AIR21, and because I was unable to find any authority on whether state tort claims would fall under the protections of AIR21, I will examine the evidence in its entirety as if Complainant had shown AIR21 covered his actions, and will make alternative findings. I am also examining the evidence because I find that Complainant fabricated evidence and should be responsible for paying attorney fees under the regulations.

The remaining evidence overwhelmingly established that Complainant did not prove a case for retaliation, and even if he had, there is clear and convincing evidence that Respondent would have taken the same steps regardless of the protected activity.

B. Issues Two, Three, and Four: Protected activity, Knowledge of the protected activity, Adverse action

Issues Two, Three and Four generally ask whether Complainant engaged in protected activity by assisting or participating in the *In re September 11 Litigation* in 2008, whether Respondent had knowledge of his participation, and whether Respondent took an adverse personnel action against him for doing so.³ Blacklisting is specifically prohibited in the regulations, and Respondent's recoding of Complainant's personnel file to do not rehire is blacklisting, and thus an adverse personnel action. 29 C.F.R. § 1979.102(b); *see* 29 C.F.R. § 1979.104(b)(1)(iii). As discussed previously, it is arguable whether Complainant's conduct fits within the protections of AIR21. Assuming, *arguendo*, that it does, then I would find that Complainant did engage in protected activity by participating in the 9/11 litigation, and Respondent had knowledge of his participation. Complainant was retained for an approximately one month period in 2008 to work on the 9/11 litigation in which Boeing was a named defendant, and Boeing had knowledge of his brief assistance from the plaintiff's attorneys in that litigation. As discussed in the factual findings, Respondent conducted an in-depth examination of Complainant's employment and his alleged letter, and determined that the letter was false and that Complainant was attempting to perpetrate fraud on the company. Respondent took no action until 2010, when Complainant sought employment with the company. Thus, the evidence established that Complainant would have satisfied the first three prongs in the retaliation analysis.

However, Complainant did not establish that the protected activity was a contributing factor in Respondent's decision to recode his file (Issue Five). Even if he had, Respondent established by clear and convincing evidence that it would have taken the same action in the absence of the protected activity (Issue Six).

C. Issues Five and Six: Contributing factor, Clear and convincing evidence

1. Contributing Factor

Complainant must prove, through direct or circumstantial evidence, that the protected activity was a contributing factor in the unfavorable personnel action taken against him. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11 (ARB Nov. 5, 2013) citing *Smith v. Duke*

³ Complainant did not allege as an issue that he engaged in protected activity in 1983, and even if he had, those allegations are time-barred. The employee protections of AIR21 have been construed to reach adverse actions occurring on or after October 1, 1999. *Waters v. Port Authority of N.Y. & N.J.*, 158 F. Supp. 2d 415, 433 (D. N.J. 2001); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 8 (Jan. 31, 2006).

Energy Carolinas, LLC, ARB No. 11-003, ALJ No. 2009-ERA-007, slip op. at 4 (ARB June 20, 2012). A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's "reason, while true, is only one of the reasons for its conduct, another [contributing] factor is the complainant's protected" activity. *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, slip op. at 11 citing *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-00007, slip op. at 4 (ARB Mar. 24, 2011).

Temporal proximity between the protected activity and the adverse action can create an inference that such a causal connection exists. *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6, 11 (Jan. 30, 2004); 29 C.F.R. § 1974.104(b)(2). However, an inference that protected activity contributed to the adverse action is less likely to arise as the time between the adverse action and protected activity increases. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 12 (Nov. 30, 2006). Moreover, inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that independently could have caused the adverse action. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6 (ARB Apr. 28, 2006).

Here, the temporal connection between Complainant's involvement in the 9/11 litigation in 2008, and the adverse action of recoding his personnel file in 2010 is not particularly strong. Thus, I do not find based upon the timing that Complainant is entitled to a temporal proximity inference that his employment contributed to the decision to recode his file. Furthermore, there were two intervening events that demonstrated an independent basis for recoding his file. First, Respondent established that the letter Complainant alleged he wrote in 1983 was fabricated, and the fact that he presented the evidence for purposes of the 9/11 litigation demonstrated he was attempting to perpetrate a fraud on the company. Second, while Respondent knew of Complainant's fraud in 2008, it took no action until Complainant sought employment with the company in 2010.

Complainant offered no persuasive evidence to counter Respondent's evidence, and, in fact, agreed that Boeing's action were not unreasonable under the circumstances in this matter. EX YY at 483. Further, Complainant did not offer any credible evidence that his brief employment in the 9/11 litigation contributed in any way to the decision to mark his file do not rehire. Thus, I find that the overwhelming weight of the evidence was that Respondent took the action of recoding his file based only upon the fabricated letter and Complainant's attempt to seek employment at Boeing, and in no way was affected by Complainant's brief work in the 9/11 litigation. Respondent knew that Complainant was involved in the litigation in 2008, determined that the letter was fabricated in 2008, but took no action until Complainant told Mr. Schultz he was seeking reemployment in 2010. Complainant was only engaged in the 9/11 litigation for approximately one month in 2008 and Respondent was aware of that fact. Thus, there was no persuasive (or even believable) evidence from Complainant that Respondent took any action against him related to his brief involvement with the 9/11 litigation. Therefore, I find that Complainant has not established that his work in the *In re September 11 Litigation* in any manner contributed to Respondent's decision to recode his file.

2. Clear and Convincing Evidence

Furthermore, the same evidence that showed Complainant's work in the 9/11 litigation did not contribute to any adverse action, also showed that Respondent established clearly and convincingly that it took the action of recoding his file only because he was seeking to work for Boeing again. The recoding decision was based upon Respondent's previous investigation concluding that Complainant was perpetrating a fraud on the company, and not because he worked on the 9/11 litigation.

The evidence presented by Respondent to support the rationale behind its decision to recode Complainant's file met the clear and convincing standard. Ms. Lee was a persuasive and credible witness for Respondent and I believed her testimony over Complainant's. She had good recall of the events, and her testimony was corroborated by the documentary evidence in the case. Complainant had a financial incentive to fabricate evidence, and his recollection and testimony regarding the events of his employment ran contrary to the business records supplied by Respondent that showed he did not work in the areas he said he did. Further, Mr. Edmonds' testimony was more persuasive and supported by the other evidence in the case, and contradicted the less-credible testimony from Complainant. Mr. Edmonds' remarkable recollection of events, which was consistent with the documents on file, was more persuasive than Complainant's, whose recollection was questionable given the other evidence in this matter, and his testimony which changed over time as each lie was exposed. Had Complainant proved a case of retaliation under AIR21, Respondent countered with clear and convincing evidence that it would have taken the same action independent of any protected activity.

V. Attorney's Fees

Respondent requested attorney's fees pursuant to 29 C.F.R. § 1979.109(b) in the event it prevailed in this litigation. The AIR21 statute and regulations provide for the payment of attorney's fees not to exceed \$1,000 if the ALJ determines the complaint was frivolous or brought in bad faith. 49 U.S.C. § 42121(b)(3)(C); 29 C.F.R. § 1979.109(b). Here, Respondent has asked for all allowable fees based upon the nature of this case, which, even when exposed as a complete fraud, was pursued by Complainant, and the expense incurred by Respondent is well in excess of the amount that can be awarded. Complainant counters that it is Respondent, not him, that has acted in bad faith. I disagree with Complainant. Because I find that Respondent has prevailed in this litigation, I will consider whether an award of attorney's fees is appropriate.

A. Legal Standard to Award Fees

The AIR21 statute and regulations provide for the payment of attorney's fees not to exceed \$1,000 if the ALJ determines the complaint was frivolous or brought in bad faith. 49 U.S.C. § 42121(b)(3)(C); 29 C.F.R. § 1979.109(b). Attorney's fees should not be assessed for a prevailing defendant unless the court finds the claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so, but a claim is not frivolous merely because the plaintiff did not prevail. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694 (1978)(assessing fees to a prevailing defendant in a Title VII matter). "And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad*

faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.” *Id.* at 422.

“[W]e are reluctant to impose penalties against any litigant, particularly one appearing pro se.” *Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir.1981) (per curiam). The more carefully a court must examine a claim to establish its legal insufficiency, the less likely it is that the claim is frivolous. *Mohammadkhani v Anthony*, No. 11-15938, slip op. at 1 (9th Cir. May 6, 2013)(unpub.) citing *Hughes v. Rowe*, 449 U.S. 5, 15-16, 101 S.Ct. 173, (1980).

In order to obtain fees under AIR21, Respondent must show that the complaint lacked an arguable basis in law or fact. *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, slip op. at 6 (ARB Sept. 30, 2004); see *Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000)(a complaint is frivolous if it lacks an arguable or rational basis in law or fact). The ARB has declined to award attorney fees under AIR21 when a *pro se* complainant had maintained a firm and sincere belief that he had been the victim of retaliatory termination, even though he did not prevail following a hearing on the merits. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). A complaint should be dismissed as frivolous only if it lacks an arguable basis in law or fact, which means that it contains factual allegations that are “fantastic or delusional” or legal theories that are indisputably meritless. *Neitzke v. Williams*, 490 U.S. 319, 325, 327-28 (1989).

B. Discussion

In this matter, I find that Complainant did not have an arguable basis in law or fact to pursue this litigation. The overwhelming evidence established that Complainant’s complaint was based upon fabricated evidence and an alleged suppressed memory that did not comport with the reality of the documents. Complainant pursued this matter even after he agreed that Respondent acted appropriately in recoding his file, and even after Respondent exposed his letter as fabricated and a fraud. Complainant attempted to financially exploit the 9/11 tragedy, while he was suffering through difficult economic times. The evidence from Respondent is convincing and persuasive.

Respondent presented irrefutable evidence that not only could things not have happened the way Complainant contends they did, but they were actually false and he lied during this process and he lied at trial. Boeing provided documents from 1983 and 1984 that showed where Complainant worked and on what projects, and the documents establish that he did not work in the capacity he stated on the 767 aircraft. The documents, including the letter of resignation written by Complainant in 1983, show that he voluntarily left Boeing to complete his engineering degree due to an irregularity with one class. The company gave him a going away party and a plaque signed by his co-workers. There was no corroboration of his claim of any wrongdoing or conspiracy when he left Boeing, and, in fact, the evidence showed that he left Boeing on good terms and for a legitimate reason. He agreed that he needed to complete his degree at UC Berkeley, and that he completed the degree within a few months of leaving Boeing; yet, Complainant inexplicably argued that Boeing fabricated the evidence of his departure even though the documentary evidence corroborated Boeing’s explanation of his reason for leaving. His suppressed memory and distorted recollection notwithstanding, the evidence established that

Complainant worked for Boeing but not in the capacity he stated. During the time frame he alleged to be conducting 767 flight testing, he was, in fact, assigned to a 747 aircraft, and not the 767. Moreover, the 767 was FAA certified and flying commercial passengers when Complainant allegedly wrote his letter exposing issues with the cockpit doors.

I found the testimony of Mr. Edmonds to be much more credible than that of Complainant regarding the flight testing of the 767 aircraft. Mr. Edmonds was the captain on the test flights, and, as such, was responsible for cockpit security. His testimony that the cockpit doors were not installed on the test flights while the aircraft was pending FAA certification was particularly credible. Further, the 767 was in fact certified by the FAA and used in commercial airline passenger travel before the date that Complainant allegedly observed the cockpit doors and allegedly wrote the June 1983 letter about the problem. Further, I accept the testimony and evidence from Respondent that the letter was fabricated and could not possibly have been written by Complainant in 1983. It was only when it appeared he was exposed as a fraud that Complainant admitted the letter was not written in 1983, but was recreated later. Further, Respondent exposed Complainant's timeline for reproduction of the alleged letter as additionally fraudulent. Complainant originally said the letter was printed at a Kinko's in Palo Alto in 1996 when he left the Silicon Valley and took a job in New Mexico, but Respondent established that the timeline was false. Complainant had already lived and worked in New Mexico before 1996. In addition, when he was caught in the lie, he attempted to cover his tracks and offer explanations, such as how he went back and forth to Palo Alto after he moved to New Mexico, but this, too, was not consistent with the chronological timeframe. In light of the record as a whole, I infer that Complainant fabricated evidence to cover his confabulated story.

At times, Complainant's fabrications appeared to border on delusional. There was absolutely no support for his claim that he was in charge of cockpit security on the Boeing 767 test aircraft. Further, the 767 had been certified by the FAA, delivered for commercial use to an airline company, and was actually flying commercial passengers by September 1982, well before Complainant allegedly made his observations and wrote his letter in June 1983. In fact, the evidence showed during the relevant time period here, Complainant was assigned to other areas and other airplanes, not the 767. The parties stipulated that Complainant worked on the 767 at some point, but the evidence showed it was not in the capacity and during the time frames he alleged. Furthermore, his claim to have "kicked in the door" of the 767 to prove it was weak is absurd, and could not have occurred because the cockpit door opens into the passenger cabin and not into the cockpit. Mr. Edmonds established that the cockpit doors were not installed until the very end of the FAA certification process. His complaint had no arguable basis in fact, yet he pursued the claim. When his lies were exposed, he changed his story; he never told anyone the 1983 letter was a reproduction until after he had been retained by the plaintiffs' law firm, and they asked him about it.

There are additional items that I find further establish bad faith by Complainant in this litigation. The evidence established that he was enduring financial hardship during the economic collapse in 2008, which coincides with him seeking employment with the plaintiffs in the 9/11 litigation, and it also coincides with his convictions based upon fraud in Colorado. The evidence showed he had a financial motive in creating the story about the cockpit doors to financially benefit from the 9/11 tragedy. He also insinuated to Mr. Lent that he could easily change sides

in the litigation -- implying that if Boeing paid him, he would serve as an expert for the company. Furthermore, and significantly, when confronted with the information Boeing knew when it placed him on the do not hire list, Complainant agreed that Boeing was within its right to recode his file and not rehire him. Yet, even though he held that opinion, he still pursued this litigation based upon blacklisting. This information, collectively, established a bad faith basis for continuing this litigation, and, for that reason, I am awarding attorney's fees to the maximum extent possible to Boeing.

Because of the gravity of the fabrication here, and the complete lack of legal or factual basis to bring this case, I find that Respondent is entitled to an award of attorney's fees and costs in the amount of \$1,000.00, the maximum allowed under the statute.

ORDER

1. Complainant has failed to prove a case of retaliation under the AIR21 statute and regulations. Accordingly, his request for relief is denied.

2. In the alternative, assuming Complainant had proved his case, Respondent established by clear and convincing evidence that it would have taken the same action regardless of any protected activity. Therefore, Complainant's request for relief is also denied.

3. Because I find that Complainant's case was frivolous and brought in bad faith, I order Complainant to pay attorney's fees in the amount of \$1,000 to The Boeing Company. Complainant shall deliver payment within 30 days of the date of this Order to Mack H. Schultz, Attorney at Law, Perkins Coie, LLP, 1201 Third Avenue, Suite 4900, Seattle, Washington 98101. Mr. Schultz shall arrange delivery of the payment to his client.

RICHARD M. CLARK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). In addition to filing

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

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

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

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

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