

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 05 May 2014**

**In the Matter of**

**ALEX BURDETTE**  
**Complainant**

v.

**CASE NO.: 2013-AIR-00016**

**EXPRESSJET AIRLINES, INC.**  
**FORMERLY ATLANTIC**  
**SOUTHEAST AIRLINES, INC.**  
**Respondent**

**Appearances:**

**Kevin S. Little, Esq.,**  
**James W. Collier, Esq.,**  
**On behalf of Complainant**

**Ellen C. Ham, Esq.**  
**T. Cullen Stafford, Esq.**  
**On behalf of Respondent**

**Before:**

**Clement J. Kennington**  
**Administrative Law Judge**

**DECISION AND ORDER**

This proceeding involves a complaint timely filed by Complainant, Alex Burdette, (Burdette) on July 18, 2011 against Respondent, formerly known as and referred to in this decision as Atlantic Southeast Airlines, Inc. (ASA) and now called ExpressJet Airlines, Inc., alleging that ASA terminated him on April 29, 2011 in retaliation for raising concerns to

management about aircraft safety which was protected by and in violation of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21), 49 U.S.C. §42121. 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 provided to the employer or the 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 related to air carrier safety. (49 U.S.C. § 4212 §4212 (a)(1).

Following an investigation of his complaint the Regional Supervisory Investigator (RSI) for the Occupational Safety and Health Administration, Atlanta Region on April 4, 2013, found no reasonable cause to believe ASA ( an air carrier within the meaning of 49 U.S.C. § 42121 and 49 U.S.C. §40102) violated AIR 21 when it took disciplinary action against Burdette and dismissed his complaint. In so finding the RSI stated that Burdette asserted that the Arming Pilots against Terrorism Act (APATA) Federal Flight Deck Officer (FFDO) program, which authorized certain flight crew members who were deputized federal law enforcement officers to carry and use firearms on an aircraft to defend against acts of criminal violence or air piracy, contained conflicting provisions that affected the command structure and crewmember responsibilities of aircraft operations and that he had a "strong personal apprehension and distraction" when a loaded weapon was in an aircraft cockpit. Because of these concerns Burdette, as a pilot for ASA engaged in the following acts:

- Refused to fly a scheduled flight in June 2005 because an FFDO was scheduled on the flight which allegedly caused Burdette to become unable to focus on his responsibilities because of the presence of a loaded weapon in the cockpit. As a result the flight was cancelled and Burdette received a one week suspension and a warning letter informing Burdette he would be subject to additional discipline if he refused to perform his duties in the future because of the presence of an FFDO on the flight.
- In September 2005 again refused a flight because of the presence of an FFDO wherein Burdette was again suspended and agreed not to refuse additional future assignments because of the FFDO's presence which if he did would subject him to an immediate just-cause suspension.
- In 2006 Burdette sent a letter to Bob Schieffer of CBS Evening News raising concerns with the FFDO program and how it allegedly compromised air carrier safety while providing ASA with a copy of the letter on April 19, 2011.

- In 2010 ASA learned that Burdette was sending emails to First Officers with whom he was scheduled to fly inquiring whether they were FFDOs and if so to leave their weapon at home, and if they would not to let him know so that he could attempt to avoid the flight. Respondent contacted the Department of Homeland Security and confirmed that Burdette's action could constitute interference with an FFDO's duties. On July 28, 2010 ASA issued a final warning to Burdette not to prohibit, harass or question an FFDO's authority or right to carry out their duties and to cease emailing pilots about their participation in the FFDO program or be subject to immediate termination.
- In April 2011 ASA received a complaint from an FFDO who was a First Officer assigned to fly with Burdette stating that Burdette had asked him to take his weapon off while in the aircraft and lock it in his flight bag during the flight. When the FFDO refused the request, Burdette told him he would have to fly all the legs of the trip. The FFDO informed ASA of the incident whereupon ASA ordered Burdette to follow company policy and to alternate legs with the FFDO. Burdette refused and was taken out of service pending an investigation. On April 29, 2011, ASA terminated Burdette for unsatisfactory performance and for violating the terms of his final warning letter of July 28, 2010.

The RSI found that ASA had shown sufficient evidence that it would have taken the same disciplinary action against Burdette despite an alleged protected activity by him and that Burdette's actions showed repeated disregard for Respondent's policies, federal regulations and constituted insubordinate behavior and accordingly dismissed Burdette's complaint.

On May 7, 2013, Burdette timely appealed the RSI dismissal and this matter was referred to the Office of Administrative Law Judges for a formal hearing which was held in Atlanta, Georgia on January 13, 14, 15, and 16, 2013. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post hearing briefs in support of their positions. In support of his case Burdette testified and called on direct, Gabriel Bruno (aviation safety consultant), Michael Ellison,(clinical psychologist). On cross Burdette called Scott Hall (Director of Flight Operation for ASA), Darrin Gruebel (Manager of Line Operations for ASA), Kevin O'Conner (Manager of ASAP's Event Review Committee)(deposition only) and Steve W. (FFDO), Randall Cash (Acting Chief Pilot for ASA) and introduced 62 exhibits. In its defense ASA called on direct supervisors Hall, Gruebel, Cash, O'Conner, Faud Malik (IAD Base Chief Pilot) (deposition only),Douglas Brady (Manager of Aircraft Operations Technology) (deposition only),FFDO Steve W. and two non-employee witnesses, Roy Jansen ( supervisor federal air marshal) and Jerome Ostronic (aviation consultant)\and introduced 83 exhibits which were

admitted.<sup>1</sup> Based upon the evidence introduced, my observation of the witnesses' demeanor and arguments presented, I make the following findings of fact, conclusions of law, and order.

## **I. Background:**

Although the record in this case is lengthy many of the basic facts are straight forward and uncontested. Burdette began his employment as a pilot with ASA in 1987. Two years later in 1989 ASA upgraded Burdette to Captain. (Stip-2). Burdette continued to fly for ASA until his termination on April 29, 2011. Prior to his termination Burdette was in the top 10% of ASA's 1700 pilots in terms of experience, received awards for superior performance including a Five Star Award for customer service and pursuant to ASA's stated policy and had extensive safety training including the FARs, in-flight emergency training, CRM, (CX-7,10,40; Tr. 216-18, 222-24, 236-42, 693, 818, 930, 932).

On January 1, 2012, ASA, which was headquartered in Atlanta, Georgia merged with ExpressJet Airlines, Inc. which was headquartered in Houston, Texas. The combined carrier assumed the name of "ExpressJet Airlines Inc." and is headquartered in Atlanta, Georgia.<sup>2</sup> (Stip.1). Before the merger ASA's flight operations leadership structure consisted of a vice president of flight operations. Reporting directly to the vice president were four directors (flight training, flight operations, operations control and reliability, and crew support.) The director of flight operations was responsible for the management of flight operations department which included maintaining flight crew standardization, quality assurance, management of line check pilots, monitoring compliance with all FAA and company directives and bulletins, upholding the quality of pilot training programs, publications and monitoring of line checks and flight checking events. The director of flight operations served as the system chief pilot and supervised chief pilots who in turn were responsible for the regular and routine supervision of flight crew members including flight crew discipline and recommending personnel actions to the director of flight operations. The flight crew consists of a captain who has full responsibility for the safe operation of the aircraft and is complete command of the aircraft and has authority over all crew members consisting of first officer (FO's ) and flight attendants. In turn the captain must operate

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<sup>1</sup> Before submitting briefs the parties stipulated that the following acronyms appearing in this record refer to these terms:: **AIM** (Aeronautical Information Manual); **ALPA** (Air Line Pilots Association, International); **APATA** (Arming Pilots Against Terrorism Act); **ASA or EJ or Respondent** (Respondent, ExpressJet Airlines, Inc); **ASAP** (Aviation Safety Action Program); **Burdette** (Complainant Alex Burdette); **CRM** (Crew Resource Management); **CBA** (collective bargaining agreement); **ERC** (Event Review Committee); **FAA** (Federal Aviation Administration); **FARs** (Federal Aviation Regulations); **FFDO** (Federal Flight Deck Officer); **FOM** (Flight Operations Manual); **FFDO SOP** (Federal Flight Deck Officer program Standard Operating Procedures); **PIC** (Pilot in Command); **MOU** (Memorandum of Understanding); **SSI** (Sensitive Security Information); **TSA** (Transportation Security Administration). Additional acronyms appear CX-10 (a), pp56-61.

<sup>2</sup>Although the parties did not stipulated to the date or reasons for Burdette's discharge, the record as subsequently developed showed ASA terminated Burdette on April 29, 2011 for misconduct on April 19, 2011 which ASA considered to be a violation of the terms of Burdette's final warning letter, APATA, ASA's FOM and company policy and procedures (Tr. 786-89, (RX, 7, 12 (FOM alternate leg provision) and 17 (handbook provision related to insubordination).

the aircraft in accordance with applicable FAR, FOM.OM, directives, memos of the vice president of flight operations except in emergency situations to the extent necessary to cope with the emergency in the interest of safety. (CX-10 (a)).

Following the terrorist attacks of September 11, 2001 Congress passed APATA which in turn lead to the institution of the Federal Flight Deck Officer (FFDO) program authorizing certain flight crewmembers to carry firearms in the cockpit of commercial airlines during domestic flights. (Stip.3). Pursuant to the FFDO program the Federal Air Marshal Service trained participants in the FFDO program regarding use of force and firearms. As a non FFDO Burdette did not receive nor was he privy to such training. (CX-14; Tr. 231-21,252,267). Program participants paid for their training and had to meet all psychological, medical or physical ability requirements of the Federal Air Marshal Service. The Federal Air Marshal Service made the final determination on which candidates became deputized FFDOs.(Stip.4).

APATA prohibited air carriers from discriminating or retaliating against an FFDO and at 49 U.S.C. § 44921(j) states that ....

An air carrier may not prohibit or prevent anyone from carrying out the FFPO SOP or take action against a flight crewmember for participating in or failing to participate in the FFDO program. An air carrier also may not take any of the following actions against a flight crewmember for volunteering for, participating in, failing to volunteer for, failing to qualify for, or failing to participate in the FFDO program:

- (1) Threaten or take any retaliatory action, including termination; or
- (2) Place any restrictions on FFDO piloting an aircraft operated by the air carrier. (Stip.5).

Shortly after its implementation, Burdette began to criticize the FFDO program because among other reasons, he believed the presence of a loaded firearms in the cockpit constituted a safety hazard.(Stip.6). In support of this belief which ASA, contrary to Burdette, maintained had no objective basis and did not constitute protected activity, Burdette engaged in a series of act including (1) refusing to fly with an FFDO on June 3, 2005 and September 3, 2005,<sup>3</sup> (2) sending

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<sup>3</sup> Regarding the June 3, 2005 incident ASA assigned Burdette on that date was to fly with FFDO (Derek). Burdette refused the assignment allegedly for safety reason telling Derek he (Burdette) was very distracted by having a gun in the cockpit and had no training in CRM issues related to the gun and how to coordinate duties with the FFDO if the FFDO was defending the cockpit door while he was landing the aircraft. In accord with FOM Burdette went in person to his supervisors office and spoke with Chief Pilots (Carl Childree and Chuck Viers telling them of his concern for safety caused by his severe distraction due to not only having a gun in the cockpit but a lack of training on how was to coordinate duties with the FFPO who had to defend the cockpit.(CX-14; Tr-231-36). In addition to verbally reporting the incident, Burdette pursuant to FOM procedures filed out a reportable incident form (RIF) (Tr.245-48, 252-53). Captain Scott Hall, Director of Flight Operations, reviewed Burdette's RIF, considered it to represent a sincere effort by Burdette to present his concerns but viewed the facts as an individual and not a safety issue. (Tr. 700-01, 705-06, 713-14). On June 28, 2005, Hall sent a letter to Burdette informing him that ASA

8 to 10 emails in 2010 to Flight Officers with whom he was scheduled to fly if they were FFDOs and if so to leave their weapon at home or if they decline to do so to let him know so he could attempt to avoid the flight; (3) denying jump seat privileges to FFDOs of other airlines in 2006 and in late June or early July 2010 and (4) on April 19, 2011, (a) asking a First Officer who was an FFDO assigned to fly with him to take his weapon off while in the aircraft and lock it in his flight bag and when the First Officer refused told the First Officer he would have to fly all legs of the multi day trip (b)and refusing to follow instructions from an ASA supervisor when told to cease such activity and follow company policy and alternate legs of the trip with the FFDO.

On November 29,2005, Burdette signed a “Last Chance agreement ”between ASA, ALPA and himself in which Burdette accepted , in lieu of termination for refusing to serve as PIC on two flights on June 3, 2005,and September 3, 2005, because the First Officer assigned to those flights was an FFDO (1) an additional suspension without pay for his September 3, 2005 refusal; (2), an agreement not to refuse future assignments because of the presence of an FFDO or any other person authorized to possess a fire arm, and if terminated by the company for similar conduct to accept immediate termination for just cause and with waiver of his right to file any claim before any court, administrative agency or other judicial forum while acknowledging his right to consult an attorney before signing and his right to revoke the agreement within 7 days of his signing. (Stip.-7, CX-19).

After signing the Last Chance Agreement )(LCA) and before taking an extended medical leave of absence for unrelated reasons in late 2006 to April 2010 Burdette was assigned two flight assignments with FFDO’S which he accepted. However on both flights, unbeknown to ASA, Burdette as the PIC designated the FFDOs as the flying pilot for all flight legs while he assumed the role of monitoring pilot so he could allegedly observe the entire cockpit and be in a better position to “compartmentalize” or control his distraction (Tr.267-275, 298, 301).<sup>4</sup>

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considered his refusal to fly with an FFDO solely because the FFDO was authorized by the Transportation Administration to carry a fire arm aboard company aircraft to be misconduct for which Hall was suspending him without pay for 7 days and warned him that if engaged in similar conduct in refusing to perform assigned duties he would receive additional disciplined. (CX-15).

On September 3, 2005, Burdette again refused to fly with an FFDO for the same reason of being too distracted to fly because of not only the presence of a gun in the cockpit but a lack of training on what to do in the event the FFDO had to defend the cockpit. In turn Burdette filled out an RIF which Captain hall reviewed. (CX-16; Tr. 248-50). In that RIF, Burdette erroneously claimed that other airlines had opt-out policies for non-FFDO’s and that by putting himself in such an uncomfortable position whereby he was distracted or incapacitated in any way, ASA was putting the safety of the flight in question. (CX-16, p.227). On September 27, 2005, ASA’s manager pilot contract administration sent Burdette a letter informing him that pursuant to Section 19 (A) of ASA/ALPA collective bargaining agreement,. ASA was convening a mandatory meeting in Captain Hall’s office to allow him to present information on his behalf. (CX-17). As a result of this meeting, Hall proposed and both Burdette and ALPA accept a “Last Chance Agreement” providing for Burdette’s continued employment rather than termination.(CX-18).

<sup>4</sup> As the pilot in command (PIC) Burdette under the FARs was in command of the aircraft and directly responsible for and the final authority as to the operation of the aircraft. (14 C.F.R. § 91.3; 14 C.F.R.§121.533 (d)(e). Regarding alternate flight legs FOM2-1.8 dated December 21, 2009 provided as follows: “It is customary for the Captain and FO to fly alternate legs. The Captain will consider modifying this sequence based on experience level or authorized minima of the FO; low time restrictions; takeoff and landing currency; variety of departures and approaches during the trip; weather conditions; additional or operational restrictions. On February 15, 2011 ASA

From November 2006 through April 2010 ASA placed Burdette on an approved medical leave for reason unrelated to this case.(Stip. 8;Tr.). In October 2006 Burdette sent a form letter to approximately 60 prominent public figures and politicians in which he expressed his concern about the FFDO program complaining that it forced him to share a cockpit with an armed stranger with minimal need for such a program due to other safety measures in place such as bullet proof doors that were never opened after the plane left the gate. Burdette stated that he felt intimidated when forced to fly with an FFDO with security being turned over to TSA from the FAA allegedly creating a situation making it difficult for pilots to understand the chain of command. For example under FAA regulations before enactment of the FFDO program, the captain was always the pilot in command (PIC). With the enactment of the FFDO program, the FFDO allegedly had the power over the captain in certain situations which were unknown to the captain who was not an FFDO. Burdette claimed that the FFDO made him feel uncomfortable, intimidated and distracted whereby he was focused on things other than passengers thus calling into question flight safety. (Stip.9, CX-20).Thereafter in January, February, March, 2007 Burdette sent out additional letters opposing the FFDO program. (RX-43 to RX-51+).

In 2010 ASA learned that Burdette was sending emails to First Officers with whom he was scheduled to fly inquiring whether they were FFDOs and if so to leave their weapon at home, and if they would not to let him know so that he could attempt to avoid the flight.<sup>5</sup> ASA contacted the Department of Homeland Security and confirmed that Burdette's action could constitute interference with an FFDO's duties. Also ASA learned in July 2010 that Burdette denied customary cockpit jump seat privileges to an FFDO of another airline solely because of his FFDO status .<sup>6</sup> On July 28, 2010 ASA chief pilot, Kenneth Smith issued a final warning to Burdette informing him not to prohibit, harass or question an FFDO's authority or right to carry out their duties and to cease emailing pilots about their participation in the FFDO program or be subject to immediate termination. (Stip-10,CX-26). In that letter Smith told Burdette that ASA could not

... prohibit an FFDO from riding as a jump seater (cockpit or cabin) or as a non-revenue passenger in the cabin again, solely based on their status. Thus, you, as an agent (pilot) of Atlantic

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issued the following revision for alternate flight legs: The Captain and FO will fly alternate legs. The Captain will consider modifying this sequence based on: experience level or authorized minima of the FO; low time restrictions; takeoff and landing currency; variety of departures and approaches during the trip; weather conditions; additional or company or operational restrictions. (emphasis supplied) (CX-10 (b) p.101; EX-12 p.152)

<sup>5</sup> Burdette sent out about 8 to 10 e-mails to flight officers assigned to his flight asking them if they were FFDO's and if so to leave their weapon at home. (CX-21, Tr. 278-280).

<sup>66</sup> On July 15, 2010, Monte Kleman of TSA by e mail informed Faud Malik ,IAD Base Chief Pilot of ASA of the following:

Essentially , Captain Burdette's actions toward First Officers who are FFDOs ( as compared to how he treats those who are not FFDOs place the company at risk. According to APATA, the company may not take sanctions against FFDOs. When a case like this comes to the attention of airline management, it is up tthe airline to fix the problem and to correct the behavior. If it does not, then it could be subject to government action.

Southeast Airlines, cannot prevent or impede FFDO's from carrying out their duties or prohibit them from travel, whether on mission or non-mission status, if you do, this subjects the air carrier as well as yourself to civil penalties.

Please let it be understood, that we at the airline, will not tolerate such behavior. Events such as what we have discussed today along with allegations of similar FFDO conflicts in the past indicate that you have exhibited a pattern of behavior which is inconsistent with Atlantic Southeast Airlines procedures as well as federal laws. As stated above, it is not in your best interest to continue such behavior. You are therefore ordered to immediately cease and desist any action(s) which may be considered as violation(s) of these rules. These actions will include but are not limited to emails, non-standard requirements regarding job activities, jump seat denials, etc. Further actions of this or similar nature will be considered as an act of insubordination by the company.

If you , in the future, are found to be in violation of any of the above mentioned directives and/or recommendations, please be advised that this will subject you to immediate termination from employment with us. (emphasis supplied).

(CX-26)

Burdette signed this letter under protest.

On or about October 29, 2010 Burdette, unbeknownst to ASA, submitted a report to ASAP in which he indicated he was forced by circumstances to be pilot in command (PIC) on October 20,21, and 22, 2010 on multiple flight with an armed FFDO, Eric B, who only 15 minutes before flight departure to Birmingham indicated he was a FFDO which in turn did not give Burdette sufficient time to inform ASA chief pilot, Ken Smith, so that Smith could replace him. As a result Burdette asserted he was forced to fly under uncomfortable or unsafe conditions, i.e., with an armed stranger, in a locked cockpit, under unknown Flight Officer program Standard Operating Procedures FFDO SOP.<sup>7</sup> (Stip.11, CX-29)<sup>8</sup>. On December 1, 2010,

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<sup>7</sup> ASAP is an FAA program designed to enhance aviation safety. Specifically ASAP was created to foster a voluntary and cooperative environment for the open and anonymous reporting of safety and flight concerns. Through this open reporting, ASA, ALPA and the FAA have access to safety information that they may not otherwise be obtainable. (Stip. 12). The ASA program includes an ASAP Program Manager and the three-member Event Review Committee ( ERC) comprised of one ASA representative, one FAA representative and one ALPA representative (Stip. 13). The details of the ASAP program, are governed by a Memorandum of Understanding (MOU) entered into by ASA,ALPA, and the FAA. (RX- 27,28). A principal feature of the ASAP program is the submission of confidential reports by pilots or other employees. ASA management is not aware of these reports unless the person who submits the report informs management of its existence. (Tr.794-796).

ASA program manager, Kevin O'Conner, (O'Conner) notified Burdette that his report had been excluded because it involved matters beyond its jurisdiction which was limited to FAA regulations. O'Conner, who was the only individual besides Burdette aware of the report, testified he did not disclose it to ASA's Director of Flight Operations, Scott Hall or any other individual in ASA flight operations department. (Tr.537,788-89, 845; O'Conner Depo. 37-40, 66-68.). Burdette managers confirmed O'Conner's assertion testifying they did not become aware of Burdette's October ASAP report prior to Burdette's filing of his AIR 21 claim.

On or about January 7, 2011, Burdette submitted a second ASAP report, designated the "January 2011 ASAP Report" relating to his flight assignment with an FFDO(Chris C). (Stip 14). From January 4-6 2011, Burdette was assigned to fly with Chris C. When Chris C identified himself as an FFDO Burdette asked Captain Smith to remove him from the trip. When Captain Smith advised he was unable to remove him, Burdette returned to the cockpit and asked Chris C to store his firearm either in the chief pilots office or in his locked bag. Chris C declined to do as requested whereupon Burdette assigned him to be the flying pilot on every leg of a three day trip totaling 16 takeoffs and landings. Burdette did not report this incident to ASA and ASA did not learn of the incident until the discovery phase of Burdette's AIR litigation. (RX-26;Tr. 309-311; 442-445).

The ERC excluded Burdette's January 2011 report from the ASAP program on the grounds that Burdette's report contained perceived safety concerns over not only FAA regulations which ASAP had jurisdiction but also over the FFDO program beyond ASAP's authority. (Stip. 15; CX-30).

## **II. The Immediate Events leading to Burdette's Discharge:**

In April 2011, ASA assigned Burdette to serve as Pilot in Command (PIC) during a multi-day trip. The first leg of the trip was a flight from Atlanta, Georgia to Gulfport, Mississippi on April 19, 2011. Prior to take off on April 19, 2011, the First Officer (Steve W.) informed Burdette that he was an FFDO. Upon learning that Steve W. was an FFDO Burdette told Steve W. he was extremely apprehensive about flying with an FFDO and asked Steve W. to leave his firearm in Atlanta for the duration of their trip. Steve W. refused to do as requested stating that they were scheduled to fly to Washington, D.C. Burdette then contacted Captain Smith requesting he be removed from the trip. Captain Smith told Burdette he could not remove Burdette as ASA did not have sufficient ready reserve pilots. Burdette did not tell Captain Smith he was unfit to fly with the FFDO.

After talking with Captain Smith, Burdette requested for a second time that Steve W. store his firearm, which Steve W. refused to do, whereupon Burdette designated Steve W. to be the flying pilot for each flight leg of the multiday trip involving about 26 take offs and landings over a three day period (Stips 16, 17, 18, 19; Tr 299-301 ,442-45, RX-10,26 ). Burdette told Steve W., when reassigning him to fly each flight leg, that this reassignment was necessary for Burdette to safely manage the cockpit in his presence. Steve W. replied that Burdette's order

might have to be reevaluated if he became fatigued. Burdette replied there would be no reevaluation (RX-24 at 163, Tr. 876-78.) After the cockpit closed and the aircraft was ready for push back, the Steve W. holstered his weapon whereupon Burdette requested Steve W to leave his firearm in his locked bag. Steve W. declined because to do so would defeat the purpose of the FFDO program.

Upon completing the first leg of the April 19, 2011 trip, Burdette asked the gate agent at the Gulfport, Mississippi airport to delay boarding so he could hold a crew briefing. During this crew briefing Burdette informed the two flight attendants in the presence of Steve W. who had already identified himself to the flight attendants as an FFDO that he (1) was distracted by Steve W.'s presence which affected the safety of the flight; (2) had offered several compromises to Steve W. which Steve W. rejected; and (3) invited the flight crew to read his January 2011 ASAP report as well as a copy of one of his Whistleblower letters. (RX-24; Tr. 882-84).

When Burdette completed the second leg of his flight and landed in Atlanta, he went to Captain Smith's office in terminal C of the Atlanta Airport and slid a copy of his January 2011 ASAP report and Whistleblower letter under Captain Smith's door to give Captain Smith a good idea of his position on the FFDO program. Captain Smith, however did not review, discuss or disseminate Burdette's ASAP report with anyone including Captain Hall or Burdette's other managers until Burdette filed his AIR 21 complaint.( RX-22; Tr. 321, 533-35). Meanwhile Steve W. reported Burdette's conduct to the ALPA representative, Ken Armstrong who in turn contacted Captain Randall Cash, the on-call Chief Pilot, and advised him of Burdette's action.<sup>9</sup> Cash contacted Steve E., confirmed Burdette's conduct in ordering Steve W. to fly all legs of their multi day trip. (RX-25; Tr.884-85).

Cash instructed Steve W. to provide an account of what transpired with Burdette which Steve W. did so by email dated April 19, 2011 ( Stip. 30, RX-24). Following the chain of command, on April, 20, 2011, Cash forwarded Steve W's April 19, email to his supervisor for review and investigation. (Stip. 31). While waiting in Atlanta for his next flight, Steve W., acting on Cash's directive, instructed Burdette to contact Cash. Burdette telephone Cash and informed Cash that he had designated Steve W to be the flying pilot for all legs of the trip.(Stips. 20, 21, 22).

Cash responded by telling Burdette he "could not continue to do this" and had to treat the FFDO as a regular pilot. Further he told Burdette to cease his harassment of Steve W. and to alternate legs in accordance with the Flight Operations Manual (FOM). Burdette said that he would comply with the FOM but when Cash told him that the FOM required him to alternate flight legs with the First Officer. Burdette replied it was his "discretion". In reply Cash told Burdette that if he continued in that course of action and refused to alternate flight legs with Steve W., his First Officer, Cash would consider it insubordination and recommend termination. Cash then ordered Burdette to alternate flight legs with Steve W. and asked Burdette if he would comply. Burdette replied "No" whereupon Cash suspended Burdette pending an investigation. (RX-25 ;Tr. 955-958.).

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<sup>9</sup> Cash was already aware of Burdette's position on the FFDO program based on meeting with Burdette in July 2010 and Burdette's final warning letter of July 28, 2010 (RX-25; Tr. 282, 434-436, 5410, 781-784, 981-986.).

On or about April 21, 2011 Burdette submitted his third ASAP report related to the April 21, 2011 incident which the ERC excluded from its ASAP program (Stips. 23, 24, RX-57). In this document which was not provided to ASA Burdette cited what he perceived to be conflicts between the FFDO program, the Federal Aviation Regulations (FARs), the Aeronautical Information Manual (AIM) and the Crew Resource Management (CRM) program citing FAR 121.542 (b) for the proposition that no crew member may engage in any activity during a critical phase of flight which could detract from the performance of any flight crew member performance of their duties; AIM chapter 8, Section 1, 8-1-1 for the proposition that stress from everyday living could impair pilot performance with a pilot advised to delay a flight when the pilot experienced unusual difficulty; FARs 91.3 (a), 121.533 (d) and (e) for the proposition that the PIC is responsible for the safety of the aircraft crew, passengers, cargo and plane while the FFDO program permits another pilot to be armed while in the cockpit with him thereby causing him to be distracted and to interfere with his ability to concentrate on his duties.(RX-57).

In this report Burdette also stated the following:

The presence of a lethal firearm in a cockpit on which I am assigned as a crewmember is a distraction to me. I see it as a possible threat and it makes me uncomfortable. I become apprehensive and it interferes with my ability to properly concentrate on the duties of my job. If I am aware of this and continue to fly under the circumstances, I have clearly violated the FARs and the AIM.

.... I did the best I could under the circumstances to fulfill the obligations of my airmen's certificate. However the following flights were not in compliance with the FARs and AIM, and the safety of flight was not always assured: 4-19-2011 (flights redacted).

(RX-57)

Following the events of April 19, 2011 FFDO, Steve W. and Captain Cash sent emails to ASA flight operations management describing their interactions with Burdette on April 19, 2011. Atlanta Chief Pilot, Captain Greubel also spoke to Steve W. and Captain Cash about the events of April 10, 2011 (RX 24,25. Tr. 829,830). In turn the Director of Flight Operations, Captain Hall, who was already familiar with Burdette's "concerns" about the FFDO program from June 2005 to April 2011, reviewed Steve W. and Captain Cash statements, met with Captain Cash and Captain Greubel, and decided to terminate Burdette pending the outcome of a 19-B disciplinary meeting between ASA, Burdette, and ALPA (Burdette's union). (Tr. 720-25, 797-99, 828-829 846-847). On April 29, 2011 the 19-B discipline meeting was held. Burdette, several ALPA representatives, Captain Greubel and IAD Base chief pilot, Captain Fuad Malik were present. During the meeting Burdette and his ALPA representative were given the opportunity to present any information they deemed pertinent to show that disciplinary action was not warranted. Neither Burdette or his representatives provided any new information except

what Burdette had already stated of being apprehensive about safety concerns over the FFDO program. (Tr. 234-36, 846,847)<sup>10</sup>.

Accordingly on April 29, 2011, ASA's manager, Captain Hall terminated Burdette because of his conduct on April 19, 2011 in violation of the terms of Burdette's final warning and ASA handbook provision related to insubordination Tr. 786-89).

### **III. Witness Testimony**

In support of Burdette's case he called aviation consultant Gabriel Bruno and psychologist, Dr. Michael Ellison. Bruno was a former FAA employee and manager who worked in various field and headquarter offices and was responsible for helping to write the FARs which in turn designated the PIC as the ultimate person responsible during flight time for the safe operation of the air craft. FARs takes precedence over FOM which has to be approved by the FAA. In this case Bruno identified FOM 1-3.2 to 1-3.6 as setting forth the captain's responsibilities and which provided in relevant part as follows:

The Captain is the final authority for the operation of the aircraft, unless sooner relieved of responsibility by the Vice President-Flight Operations or a chief pilot, and is charged with the ultimate responsibility for the safety of passengers, crewmembers, cargo, and aircraft for the designated period duty. The Captain must operate the aircraft in accordance with applicable FAR, FOM, OM, directives, memos, letters or other means the Vice President-Flight Operations deems necessary to convey information. (CX-10(a), p. 65)

Regarding alternating legs, Bruno testified that company policy governed because the FARs did not deal it. In reviewing FOM 2-1.8 Rev 14 and Rev. 16, both operations manual provisions in Bruno's opinion allow flexibility to the PIC although Rev 16 provides that the Captain and FO will fly alternate legs while the former Rev 14 states that it is customary for the Captain to fly alternate legs with both versions providing 6 reasons the captain can choose to modify the alternating leg provision namely:

1. Experience level or authorized minima of the FO.
2. Low time restrictions.
3. Takeoff and landing currency.
4. Variety of departures and approaches during the trip
5. Weather conditions.
6. Additional company or operational restrictions.

Bruno testified that APATA contained no provision dealing with alternating legs and that Burdette was within FARs with he directed his co-pilot who was a FFDO to fly all flight legs and

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<sup>9</sup> After signing the last chance agreement Burdette never refused a flight assignment with an FFDO until April 19, 2011 (CX-13, 14,15, 16, 17, 18, 19 ; Tr 234- 262).

that it was a common practice for piloting duties to be swapped around all the time. Further in directing the his flight officer to fly all legs was a reasonable request for Burdette to make so as to be able to fly the aircraft safely as opposed to following Cash's directive to alternate legs.(Tr. 135-40).

Upon cross Bruno admitted that none of the 6 reasons applied to Burdette and further Burdette had the authority as PIC to not follow the alternating provision if he perceived a conflict between the FARs and FOM (Tr. 164-67). Further under APATA a carrier or PIC cannot discriminate or retaliate against FFDO's and cannot tell him what to do with his weapon (Tr. 168). Bruno testified that Burdette had to follow FAR's except in emergency situation and when signing off on dispatch release, Burdette was saying he and plane were fit to go (Tr. 197-98).Further the FARs do not allow pilot to fly if he feels unfit to fly. (Tr 212).

Dr. Michael Ellison, psychologist, counselor and former professional pilot testified he began seeing Burdette on February 28, 2012, on a two week basis to the present, to discuss his work related problems at ASA and the distraction caused by the FFDO in the cockpit. During these sessions Dr. Ellison helped Burdette to realize that he could choose not to be distracted by the presence of a gun in the cockpit and that by early May, 2012, Burdette's perceptions about the gun issue had resolved so that he was no longer distracted by the gun. (Tr. 622-32).

Testifying for ASA were : Scott Hall, Director of Flight Operations: Darrin Greubel Base Chief Pilot from April 2010 to the end of April 2011; Randall Cash, Assistant Base Chief Pilot; Steve W, FFDO assigned to work with Burdette on the April 19,2011 flight; Fuad Malik Roy Jansen, Federal Air Marshal employed by TSA and aviation expert, Jerome Ostronic.<sup>11</sup> Hall as the Director of Flight Operation was responsible for ASA FOM and monitoring with FAA and company directives. (Tr. 692-93). Hall was very familiar with Burdette actions in response to the FFDO program from his initial refusals to fly with FFDO's on June 3, 2005 and September 3, 2005 to his subsequent e-mails to FFDO's to identify themselves followed by his actions on April 19, 2011 in refusing supervisor's Cash's directive to cease discriminating against FFDO Steve W by ordering him to fly all legs of multiday trip in contravention of FOM policies. Hall had numerous talks with Burdette trying to assist him in overcoming his opposition to guns in the cockpit but to no avail. (Tr. 702-03; 717-18). In fact Hall believed he had settled the issue with Burdette otherwise he would not have allowed him to come back to work after a lengthy absence for medical reasons unrelated to the FFDO issue. Indeed Hall admitted that Burdette was required to remove himself from the cockpit prior to take off if he honestly felt it was unsafe to fly because of the FFDO distraction.(Tr. 705-06)

Concerning Burdette discharge, Hall before making any decision of Burdette's employment talked to Captain Cash, reviewed Steve W. e-mail and considered Burdette's refusal to fly alternate legs to be insubordination and non-compliance with the terms of Burdette final warning.(Tr.725-27) Indeed Hall testified that if Burdette considered his refusal to alternate legs to be a safety issue, he should have raised it before leaving for Gulfport and removed himself from the trip. (Tr. 731-33). Hall testified that if Burdette or PIC, that he could not do as flying

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<sup>11</sup> Although the depositions of Faud Malik and Douglas Brady were submitted by ASA, I find after reading both depositions that neither person's testimony provides additional information in resolving the issues before me and thus I need not discuss the contents of their testimony.

pilot he should never have gotten into the cockpit because as monitoring pilot he could be required to take the controls at any time for the flying pilot (Tr.791-94, 811-12). Hall testified that Captain Smith never provided him with Burdette's ASAP submissions. (Tr.494, 810).

Captain Greubel was in charge of the investigation that led to Burdette's termination. (Tr.817). Like Captain Hall Gruebel testified Burdette should have declined or removed himself from the flight if he felt too distracted to fly. (Tr. 819,837) Also like Captain Hall, Gruebel had no knowledge of Burdette's ASAP reports.(Tr. 845). Steve W. and Cash testified regarding the incidents of April 19, 2011 as previously described and Burdette's refusal to allow Steve W. to fly alternating legs once he found out Steve W. status as an FFDO who would not "store" his weapon as Burdette requested.(Tr.857-86, 929-983).

Steve W. further testified he had never been ordered either before or after to fly all legs of a multiday flight.(Tr. 878, 879). Steve W. testified about Burdette crew briefing in Gulfport as a means of convincing Steve W. to change his position and "store" his weapon (Tr, 861-64). Steve W. also testified regarding his duty to defend the cockpit in the event of a breach. (Tr. 888).

Roy Jansen testified about the FFDO program and its purpose to prevent unauthorized access to the flight deck so that an airplane could be used as a weapon of mass destruction. Further a captain could not order a FFDO not to holster his weapon (Tr. 898-905). Also contrary to what Burdette stated, ASA or any other similarly situated air carrier could not "opt" out of the program or restrict FFDO's use of a gun in the cockpit. (Tr. 906-07). Jansen described the FFDO's program wherein the FFDO pays for his lodging and travel while undergoing initial and recurrent training several times annually (Tr. 908-23).

ASA's final witness, Jerome Ostronic, an aviation expert and former FAA employee and supervisor testified about FAA's policies and procedures for 121 air carriers such as ASA and the development of the ASAP program to enhance safety by encouraging voluntary reporting of potential safety incidents with sole source reports (a report that no one would have knowledge of were it not for the report) resulting in no action taken against reporting individuals. Excluded from such reports were reports of intentional violations.(Tr. 1008-1023).

According to Ostronic, Burdette should have removed himself from the cockpit and not flown in any capacity if he believed he could not safely perform his duties regardless of whether he was a flying or monitoring pilot because the regulations make no distinction between being able in either position. Further in this case the PIC or Burdette had no authority to deviate from alternating legs, absent emergency conditions which were not present. Further if he did fly two legs while believing he could not perform either flying or monitoring pilot safely, he violated the regulations (Tr. 1037-1048).

#### **IV. Complainant and Respondent's Arguments:**

Burdette's argument centers around his decision as a pilot in command not to fly with an unsafe distraction. Simply put Burdette contends ASA terminated him 10 days after he made a

decision not to follow Assistant Base Chief Pilot Randall Cash's order to conduct a flight under circumstances he believed were unsafe. This belief was eminently reasonable according to ASA's expert who testified that under the circumstances Burdette should have refused to follow Cash's order. In support of that argument Burdette points to these underlying facts:

1. Burdette told his supervisors when required to operate an aircraft as a flying pilot and paired with an FFDO who carried a holstered firearm, he was distracted by the gun.
2. ASA did not question his sincerity in stating he was distracted by the gun.
3. On April 19, 2011, Burdette refused the direct order of Assistant Chief Pilot, Randall Cash to alternate flight legs with an FFDO.
4. On April 19, 2011 the FFDO informed Captain Burdette's supervisors that moments before a passenger flight he was "noticeably uncomfortable", told the FFDO that he was "extremely apprehensive" and "didn't feel he could safely operate the airplane, and designated the FFDO as the flying pilot while he would serve as the monitoring pilot for each flight leg because "he felt he could not safely manage if he was the flying pilot."
5. According to ASA witnesses Burdette should have refused to alternate legs on April 19, 2011 if he knew he was too distracted to safely operate the aircraft as flying pilot.
6. ASA fired him ten days later for refusing Captain's Cash's order to alternate legs on April 19, 2011.
7. ASA knew of but disregarded Burdette's safety concern of flying with FFDO categorizing it as an individual and not a safety issue.
8. All of ASA's reasons for terminating Burdette stemmed from his protected activities with Burdette never violating FARs or flying under unsafe conditions by either declining flights or safely compartmentalizing his distraction by serving as monitoring pilot.
9. When Burdette refused to follow Cash's order to alternate flights, he did what he should have done to ensure flight safety as required under FARS 14.C.F.R. §91.3 §121.533.

Contrary to Burdette's argument, ASA contends Burdette (1) cannot show by a preponderance of evidence two essential elements of a cognizable AIR 21 claim, namely a sincere belief that he was incapable of safely operating an aircraft in the presence of an FFDO which belief he conveyed to ASA and which belief was objectively reasonable; (2) cannot connect his alleged protected activity to his discharge; (3)and cannot rebut ASA would have terminated in any event for Burdette's violations of his supervisor's direct orders, the terms of his final warning letter, ASA approved FOM, Company policy and federal anti-terrorism regulations and (4) cannot rebut his admission that he intentionally and knowingly violated federal safety regulations at the time of his protected activities which is a total defense to his AIR 21 claim.

#### IV. Legal Analysis:

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 owby substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case I was not impressed with Claimant's testimony that he consistently informed management he was unfit to fly in the presence of an armed FFDO. For example in the Last Chance Agreement which he signed on November 29, 2005, Burdette told ASA that he had reconsidered his position on working with armed FFDO's and in the future would not refuse to work with them only to repudiate this statement at trial saying his position had not changed but never apprised ASA management about it.(CX-19, Tr. 491-95). In fact Burdette never gave his managers any reason to believe he was still unfit to fly with armed FFDO after signing the Last Chance Agreement. (Tr. 492-98, 531,542,545, 575-77, 645, 669-70, 846-47, 959.). I credit Captain Hall that had Burdette claimed he was unfit to fly Hall would never have allowed Burdette to return after his lengthy leave of absence. (Tr. 771). Further I credit Hall that the Final Letter of July 28, 2010 included not only e-mails to pilots regarding their FFDO status and non-standard requirements of having FFDO's not alternating legs. (RX-5, Tr, 783-784).

Further I was not impressed by Burdette's line that he was either "confused" or did not understand (a) the meaning of the term non-standard job activities as contained in the Final Warning Letter; (b) how his admitted actions in his ASAP reports violated FARs; (c) how his actions on April 19, 2011 violated his final warning letter ;(d) how his directive to Steve W. to fly every leg of the flight constituted a non standard activity or (e) how refusing to permit FFDO's to use the cockpit jump seat violated APATA: (Tr. 273,516-17, 288, 302-03, 309, 312, 325, 330, 386, 552). In dealing with Burdette I find that Cash was correct when he testified that Burdette had a tendency to deliberately misunderstand directives he did not agree with which in turn required Cash to spell out in detail what he was telling him.

In like manner I was not impressed by Bruno's "expert's" opinion that Burdette had the discretion to ignore Cash's directive and order FFDO's to fly every leg of a trip. Admittedly neither FARs or APATA specifically address the issue. Rather the issue is governed by FOM which as noted before requires alternating legs except for 6 conditions, none of which apply. Bruno would apparently allow Burdette to ignore Cash's directive to alternate flights despite the fact that in doing so Burdette made such an assignment based upon the FFDO's right to carry a firearm and not upon any evidence of any objective safety concern. Bruno ignored the fact that

if Burdette was as distracted as he claims he should have never begun the flight from Atlanta in the first place and that in so doing he jeopardized flight safety because of the potential to be called upon to perform flying as opposed to monitoring duties at any time and especially in the event of a cockpit breach.

In this case I find that the testimony of ASA supervisors Hall, Greubel, Cash, as well as Steve W. and Jerome Ostronic were far more straightforward and credible than what Burdette presented. In fact Burdette spoke on the purpose and safety of the FFDO program which Burdette refused to accept. I agree with ASA witnesses that Burdette, rather than fly should have removed himself from the cockpit if he was as disturbed as he claimed and sought the counseling he eventually received from Dr. Ellison before, rather than after, his termination.

The employee protective provisions of AIR21 as set forth at 49 U.S.C. § 42121 (a) provide as follows:

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

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

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

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

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

To establish a case of discrimination under AIR21, a complainant must show by a preponderance of the evidence that:

1. The employer is subject to the act and the employee is covered under the act;
2. The complainant engaged in protected activity as defined by the act;
3. The employer took adverse action against the employee;
4. The employer knew or had knowledge that the employee was engaging in protected activity; and

5. The adverse action against the employee was motivated at least in part by the fact that the employee engaged in protected activity. *See Peck v. Safe Air Int'l., Inc.*, ARB 02-028 (January 30, 2004) slip op at 8-9; *Svendson v. Air Methods, Inc.*, ARB 03-074 (August 26, 2004) slip op at 7; *Taylor*, 2001-AIR-2, slip op at 33.

Preponderance of evidence means the greater weight of evidence or superior evidence weight though not sufficient to free the mind wholly from all reasonable doubt is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Brune v. Horizon Air Industries, Inc.* ARB Case No. 04-037, slip. op. at 13 (ARB Jan. 31, 2006).

After a complainant establishes these elements an employer to escape liability must then demonstrate by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior or employer had a legitimate purpose or motive for the personnel action. 49 U.S.C. § 42121(b)(2)(b); 29 C.F.R. § 1979.104(c); *Taylor v. Express One International, Inc.*, 2001-AIR- 00002 (ALJ February 15, 2002); *see also Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-00007 (ALJ Feb. 9, 2004) If employer meets this burden, the inference of discrimination is rebutted and complainant then assumes the burden of proving by a preponderance of the evidence that Respondent's proffered reasons are "incredible and constitute pretext for discrimination." *Id.*

Regarding the first and third elements of a discriminatory case (coverage under the Act and adverse action ) there is no dispute that those elements are present in this case. However there is substantial dispute over the existence of elements two (protected activity ) element four (knowledge of protected activity by ASA), and element five (motivating factor) Protected activity under AIR 21 must involve a complaint that (a) involves a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of Federal law relating to air carrier safety; or, at least "touch on" air carrier safety; (b) the complainant's belief about the purported violation must be objectively reasonable.(c) the complaint must be made either to the complainant's employer or the Federal Government. *Svendson*, 2002-AIR-16 (ALJ Mar. 3, 2003), slip op. at 48. *See also Weil v. Planet Airways, Inc.*, 2003-AIR-18 (ALJ Mar. 16, 2004)(finding the FAA's announced intention to implement a rule is sufficient to establish protected activity) and ; (d) a complainant must reasonably believe in the existence of a violation." *Peck*, ARB No.02-028, slip op at 13, *citing Clean Harbors Env'tl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Leach v. Basin 3Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).<sup>12</sup>

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<sup>12</sup> In his brief Burdette's counsel notes there is no dispute that (1) a pilot distraction can constitute a safety issue (Tr. 710, 718, 818, 941, 1047);(2) the cause of the distraction can be anything and may be personal to an individual pilot; (3) whether a pilot's distraction is a safety issue depends upon whether the pilot can departmentalize the distraction and safely perform his duties (Tr. 173-74, 177-78; 714-16, 941); (4) only the pilot in question can determine the level of distraction and whether he can safely perform his duties (Tr. 707r-08; 870; (5) if a pilot cannot compartmentalize his distraction and safely perform his duties he should remove himself from the flight. (Tr. 701-02, 705-06, 819; (5) a pilot in command is in the best position to determine whether a flight can be conducted safely. (Tr. 745-46 843); (6) if a chief pilot gives a PIC a direct order that would result in an unsafe flight situation, the PIC should not obey it. (7) a pilot's belief that he should not operate the airplane if he thinks doing so would be unsafe is a reasonable belief.(Tr. 820).

Regarding the fourth element, Burdette is required to establish, by a preponderance of evidence, that the Respondent had knowledge of his protected activity. *Jeter v. Avior Technologies Operations, Inc.*, ARB Case No. 06-035 (ARB: Feb. 29, 2008), slip op. at 8-9; *Rooks v. Planet Airways, Inc.*, ARB Case No. 04-092 (ARB: June 29, 2006), slip op. at 6-8. In general, it is not enough for a complainant to show that the employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision makers who subjected him to the alleged adverse actions or hostile work environment were aware of his protected activity. *Peck v. Safe Air Int'l, Inc.*, ARB Case No. 02-028 (ARB: Jan. 30, 2004), slip op. at 11. The ARB has stated that “[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment “because” the employee has engaged in protected activity.” *Peck*, ARB No. 02-028 at 14, *citing Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec’y Apr. 7, 1993), *aff’d*, 73 F.3d 100 (6th Cir. 1996).

Alternatively, a complainant may establish this element by showing that, although the manager who ultimately took adverse action was unaware of the protected activity, another individual who had substantial input into the alleged adverse action knew of the protected activity. *Kester*, slip op. at 4.

In this case Burdette, contrary to ASA, asserts he engaged in the following protected activity by refusing to follow Cash’s directive of following company policy of alternating flight legs because to do so in Claimant’s mind would be to fly with an unsafe distraction just as it was for him to fly in a cockpit with an armed FFDO officer. ASA knew of this refusal to follow Cash’s order because Burdette told Cash he had done so, because he could not safely operate the airplane if he was the flying pilot while the other flight officer was an FFDO. In fact ASA management officer, Captain Hall, who made the decision to terminate Burdette was thoroughly familiar with all of Burdette’s past reactions to the FFDO program with the exception of the letter writing incident and Burdette’s ASAP reports, and knew despite ASA position that it was unaware of Burdette assertion the FFDO’s presence caused him to be unfit or unable to fly, clearly knew despite the absence of “unfit” or “unable” from Burdette’s refusal that Burdette had refused to fly with an FFDO, as ordered by Cash because to do so would create too great a distraction for safe plane operation.

I do not credit Burdette with a good faith subjective belief that to fly with an FFDO as instructed by Cash would constitute too great a distraction for Burdette to safely fly an aircraft. Moreover such a belief even if held in good faith by Burdette is unsupported by any credible objective evidence and thus does not constitute protected activity. For a subjective belief to be objectively reasonable, Burdette must show that a pilot with similar training and experience would reach the same conclusion under similar circumstances. *Blount v. Northwest Airlines*, ARB No.09-120 at 6 (ARB Oct. 24, 2011).Burdette presented no such evidence. Moreover Burdette’s belief that a condition is unsafe does not establish a cognizable AIR 21 claim where the condition at issue complies with or is not addressed by federal air safety regulations *Mehen v. Delta Air Lines*, ARB No.03-070 at 8 (Feb.24, 2005). The fact that Burdette’s apprehension of

flying with FFDO's was resolved by psychological counseling by a person with no knowledge of the FFDO program despite efforts by ASA, ALPA, TSA, and the FAA to do so further demonstrates that Burdette concerns were based on his own unfounded fear rather than an objectively safe condition. While Burdette had a right and obligation to refuse a flight if he subjectively believed he could not safely perform his duties, this right does not confer upon Burdette the additional privilege to refuse a flight and retain his job if his refusal is based upon an unreasonable safety concern. Assuming however that Burdette had initially objective and reasonable concerns about the FFDO program, Burdette's subsequent refusal to accept explanations from managers and others about the safety of the program make his continued refusal to accept such explanations unprotected. *See e.g. Blount*, ARB No. 09-120 at 6. (Tr.282, 378-79, 434-36 514-15; 519, 714-17, 752, 772-74, 781-84, 981-86.

Under 49 U.S.C. § 42121(b) and 29 C.F.R. § 1979.109, to establish that a respondent has committed a violation of the employee protection provisions of AIR21, a complainant must prove by a preponderance of the evidence that an activity protected under AIR21 was a contributing factor in the unfavorable personnel action alleged in the complaint. *Taylor*, slip op at 33; *Hirst*, slip op. at 7. A complainant need not establish that the employer's adverse action was "due to" or "because" of the protected activity. *Clark v. Airborne, Inc.*, ARB Case No. 06-082 (ARB: Mar. 31, 2008), slip op. at 2. The Board has emphasized that a "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109 (ARB: Jan. 30, 2008), slip op. at 4, quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); see also *Clark*, slip op. at 2. the adverse employment action that he suffered. *See, e.g., Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam). In this case I find no evidence to show any protected activity by Burdette affected his termination. Further assuming that Claimant's letter writing campaign to prominent national and government officials against the FFDO program to be protected activity along with Claimant's participation in ASA's ASAP program I credit ASA supervisors and management officials that the decision makers in Burdette discipline and termination had no knowledge of such until after his termination. Thus I find ASA, in disciplining and terminating Burdette did not violate AIR 21 in so doing. *See e.g. Gary v. Chautauqua Airlines*, ARB Case No 04-112 (Jan.31, 2006).

If a complainant proves by a preponderance of the evidence that the employer has violated the statute, the complainant is entitled to relief unless the employer establishes, by clear and convincing evidence, that the same adverse action would have been taken in the absence of the protected activity. 29 C.F.R. § 1979.109(a); see also *Barker*, slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4. In asserting this affirmative defense, the burden of proof at the clear and convincing level rests with the respondent. Although there is no precise definition of clear and convincing, that evidentiary standard falls above preponderance of the evidence and below a reasonable doubt. *See Yule v. Burns Int'l Security Serv.*, 93-ERA-12 (Sec'y May 24, 1995). In this case ASA showed it had no choice but to terminate Burdette when he refused Cash's direct order, violated the terms of his final warning letter(which expressly prohibited Burdette from interfering with an FFDO's duties and required him to perform "non standard" duties, including flying every leg of a multiday trip,) and ASA's FAA -approved FOM.(Section 2-1.8 where captains and first officers are required to alternate legs when flying.) Burdette produced no evidence to show any other employee received more

favorable treatment. Indeed I find, contrary to what Burdette alleged that it was non standard procedure for Burdette to order Steve W. to fly every leg of a trip, as explained by ASA supervisors, including Cash. By refusing to follow Cash's lawful directive, Burdette provided ASA with more than sufficient reason to terminate him.

Accordingly I find no merit in Burdette's whistle blower claim and dismiss it as unsupported by the weight of credible testimony.

**So ordered this 5th day of May, 2014.**

**CLEMENT J. KENNINGTON  
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).

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