

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 11 September 2013 CASE NO. 2013-AIR-9**

**IN THE MATTER OF**

**DAWN SEWADE,  
Complainant**

**v.**

**HALO-FLIGHT, INC.,  
Respondent**

**APPEARANCES:**

Jayne Byrne, Esq.  
Christine Neill, Esq.  
Neill & Byrne  
On behalf of Complainant

Lamar Clemons, Esq.  
English & Clemons, LLP  
On behalf of Respondent

**BEFORE:**

**Clement J. Kennington  
Administrative Law Judge**

**DECISION AND ORDER**

This proceeding involves a complaint filed by Ms. Dawn Sewade (Complainant) against Halo-Flight, Inc. (Respondent) on August 15, 2012, under the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21), 949 U.S. C. §42121, alleging a “constructive discharge” by Respondent on May 23, 2012 in retaliation for Complainant raising aircraft safety issues which activities were protected by AIR 21. <sup>1</sup>

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<sup>1</sup> 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 (FAA) or any other provision of federal law related to air carrier safety. (49 U.S.C. §4212 (a)(1)).

Following an investigation of her complaint the Regional Administrator for the Occupational Safety and Health Administration, Region VI on January 9, 2013, found no reasonable cause to believe Respondent violated AIR 21 and dismissed her complaint. In so finding the Regional Administrator stated: (1) Respondent was an air carrier within the meaning of 49 U.S.C § 42121 and 49 U.S.C§ 40102 (a)(2); (2) Complainant was an employee within the meaning of U.S.C.§ 42121 and (3) Complainant engaged in protected activity. In this case Respondent did not contest Complainant's or its coverage under AIR 21 but asserted Complainant's activity was unprotected and that it took no adverse employment action against her because of her alleged protected activities.

On February 8, 2013, Complainant timely appealed the Regional Administrator's dismissal and this matter was referred to the Office of Administrative Law Judges for a formal hearing which was held in Dallas, Texas on June 12, 2013. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post hearing briefs in support of their positions. Complainant and her husband (Christopher Sewade) testified and offered 22 exhibits which were admitted. Respondent called Thomas Klassen and introduced 17 exhibits. Both parties filed post hearing briefs and 13 joint exhibits.

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. Issues**

1. Whether Complainant engaged in protected activity as described in 49 U.S.C.§ 42121.
2. If so, whether Respondent took adverse or unfavorable personnel action against her.
3. If so, whether Complainant protected activity was a contributing factor in any adverse personal action taken against her by Respondent.
4. If so, whether Respondent established by clear and convincing evidence that it would have taken adverse action her absent her protected activity.

For Complainant to prevail under AIR 21, she, as a covered employee, must prove by a preponderance of the evidence that: (1) she engaged in protected activity which Respondent was aware of; (2) she suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the adverse personnel action. If Complainant proves that her protected activity was a contributing factor in the adverse personnel action Respondent can escape liability by demonstrating clear and convincing evidence "that it would have taken the same unfavorable action absent her protected activity." *Peck v. Safe Air Int'l Inc.*, ARB 02-028 (January 30, 2004); *Svendsen v. Air Methods, Inc.*, ARB 03-074 (August 26, 2004).

## II. Background

Respondent is a non-profit, air and ground ambulance service with its main base of operations located in Corpus Christi, Texas and a second base about 60 miles west in Alice, Texas. During Complainant's employment with Respondent, Tom Klassen (Klassen) served as Respondent's Executive Director and Director of Operations and was responsible for the safe operation of all aircraft. Reporting directly to Klassen was Chief Pilot, Curt Snodgrass (Snodgrass) who supervised all pilots and worked with Klassen to ensure all operations were compliant with Federal Aviation regulations and Respondent's general operations manual (GOM).

Also reporting directly to Klassen was Ben Yelle (Yelle), Director of Maintenance (DOM) who was responsible for ensuring adequate maintenance, inspection, and repair of all aircraft. (CX-3; Tr, 24, 274-75). Pilots reported to Snodgrass and were directly responsible and had the final authority for the safe operation of their aircraft. (CX-3, GOM sections 3.5; 5.1; 5.2).

Complainant was a former U.S. Coast Guard helicopter pilot with a B.S. degree from the University of Denver and an MBA from Nova Southeastern University with commercial fixed wing and motor craft certifications from the U.S. Navy's flight school, and helicopter training on a HH60 Jayhawk from the U.S. Coast Guard where she served as an aircraft commander on this aircraft conducting search and rescue, marine and environmental patrol, and law enforcement missions. (Tr. 12-24).

In December 2011, Respondent hired Complainant and her husband, Chris Sewade, (C.S.), who was a U.S. Navy trained helicopter pilot, for helicopter pilot positions at its newly opened base in Alice, Texas. Initially from January 12 or 13, 2012 to about the second week of February 2012, Respondent stationed Complainant and C.S. at its main base located in Corpus Christi about 60 miles east of Alice. There they underwent training on a Bell 407 helicopter followed by actual flights in February 2012 from the Alice base where they worked with two other newly hired pilots (Jeff Martin and Mark Brennan) on 12 hour shifts, one pilot per shift, 7 days on and 7 days off. Accompanying the pilots on their flights was a flight crew consisting of a paramedic and flight nurse. (Tr. 20, 22, 222). Like other pilots Complainant was responsible and the final authority for the safe operations of their aircraft and was paid a salary with overtime for work between the 12th and 14th hour of each shift. Respondent also employed mechanics that were stationed at its Corpus base and worked closely with the pilots on a daily basis to ensure safe aircraft operation.<sup>2</sup>

In late February, 2012, Respondent assigned mechanic Bryan Bowen, to work with Complainant. From late February to late April 2012, Respondent provided hospital rooms in Alice, Texas for the pilots and medical crew when on duty until accommodations were available on base. (Tr.14-26).

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<sup>2</sup> FAA regulations ( 14. C.F.R. § 91.3) as well as Respondent's flight and general operations manuals (CX-3,4,5; RX-10, 12) provide that the pilot in command of an aircraft is directly responsible for, and is the final authority for the safe operation of their aircraft.

### III. Alleged Protected Activity

According to Complainant the first alleged incident of protected activity occurred in either late February or early March 2012 on which day Complainant noted problems with the aircraft fuel system left and right transfer lights. This system which consisted of 4 lights that were designed to be briefly illuminated when the aircraft was powered up indicating fuel could be transferred from the forward to the aft tanks. (Tr. 99, 100). On the day in question Complainant testified that when she powered up her aircraft the lights did not initially go on but on a second try they did. On a third try the lights did not come on indicating a malfunctioning fuel signal that in Complainant's estimation could potentially lead to fuel starvation and an engine flame out requiring a forced landing.<sup>3</sup> At this point Complainant called mechanic Bowen to trouble shoot. After 5 to 10 tries the light came on but Bowen was not able to determine what was wrong and stated he was going back to Corpus Christi to get some tools and return.

Before departing for Corpus, Bowen asked Complainant if she felt comfortable flying the helicopter back to Corpus. Complainant indicated she was not comfortable doing that and contacted Klassen in Corpus and explained the problem whereupon Klassen told Complainant, "We need you to fly the aircraft back to Corpus." Complainant was shocked by Klassen's suggestion because to do so in her estimation would require her to either fly an unworthy aircraft and put her certificate at risk or defy Klassen. Complainant declined to fly the aircraft back to Corpus whereupon Klassen told Complainant to go back to the aircraft and turn the battery and boost pumps on until she could get the other set of set of fuel transfer lights to go on. After about 3 hours with Bowen's assistance the lights came on and Complainant flew the aircraft back to Corpus. (Tr. 28-35, 102-04).<sup>4</sup> When assisting Complainant Bowen encouraged her to fly the aircraft back to Corpus telling her that any other pilot would do so. (Tr. 33, 104).

During her conversation with Klassen, Complainant testified that Klassen told her he would write up the incident on a Safety Management System (SMS) report indicating he had pressured her to fly her aircraft back to the Corpus base and in a subsequent March 2012 operations meeting with employees admitted pressuring Complainant. (CX-7, 22; Tr.36, 37, 281-83). Klassen never indicated to Complainant that she should have completed an SMS report on the incident (Tr. 284-85).

The second instance of alleged protected activity also occurred in March 2012 when pilot Mark Ritter, after taking a maintenance test flight on an Alice aircraft, approached Complainant

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<sup>3</sup> C. S. testified that malfunctioning fuel system caution lights rendered an aircraft unsafe to fly and could lead to a flame out. (Tr. 139-40). C.S. testified that Klassen admitted pressuring Complainant to fly. (Tr. 142). On cross C.S. admitted he did not understand how a malfunctioning fuel conditioner which was later found to be the cause of the problem could lead to a flame out when flying from Alice to Corpus bases. (187).

<sup>4</sup> In an SRM process report of May 17, 2012 Complainant documented her interaction with Bowen under the event title 'BRIAN/DAWN impaired communications saying that the FAA prohibited the flying of her aircraft with inoperable lights and to do so would jeopardize her certificate (CX-21). According to Complainant 14 CFR § 97.1 provided that a pilot cannot operate an air craft in an unworthy condition and it is the pilot who is responsible for making that determination. 14 CFR§ 97.1 however did not deal with operation of unworthy aircraft but rather standard instrument approaches, weather minimums and obstacle departures.

and told her he had noticed a pitching of the aircraft. He asked her to check to see if she observed the same problem. Complainant, with Ritter onboard, took off and observed the aircraft to pitch up when forward pressure was release from the cyclic. Complainant returned to the Alice base where Bowen attempted but was unsuccessful in repairing the aircraft. In turn Bowen asked Complainant if she would fly the aircraft to Corpus which she declined whereupon Ritter flew the aircraft to Corpus. (Tr. 38, 39).

Later that day after the aircraft was allegedly repaired Complainant attempted to fly the aircraft only to encounter again the same violent pitching. Complainant informed Bowen of the problem only to be told the pitching she described was impossible as he had not touched the flight controls in doing maintenance and he (Bowen) would have Ritter verify if what Complainant said was true. Complainant informed Ritter and chief pilot Snodgrass what had occurred whereupon Snodgrass took off in the aircraft and verified extreme pitching. (Tr. 106-07). At no time up to Snodgrass' test flight did Bowen leave Complainant's view or make any telephone calls. Klassen on the other hand testified that after Complainant informed Bowen of the reoccurrence Bowen called him and asked if Snodgrass could do a test flight to which Klassen replied it was a good idea. (CX-21; Tr. 39, 40, 234-35).

Complainant testified after the second incident Bowen began to withhold information from her, delaying in coming to check out her aircraft and intentionally forcing her and the rest of her crew into overtime. The forced overtime occurred on two occasions within a span of 3 days. The first instance occurred because Bowen wanted to "watch" her aircraft. The second instance involved an aircraft inspection both of which could have been done at other times. Both instances took place after Complainant had flown most of the night and like her crew were extremely tired. (Tr. 42). Complainant complained to Klassen who told Complainant he thought Complainant had a communications problem with Bowen and should try to talk to him. (Tr. 43). About 10 minutes after talking with Klassen, Complainant received a call from Bowen which lasted about 30 minutes in which Bowen repeatedly said he was extremely angry with her because she had gone to Klassen about the overtime situation and was not to communicate with Klassen about any concerns she had with him. (Tr. 44, 45).

On a 4<sup>th</sup> occasion in March 2012 Complainant received a call from the airport manager that in the event of inclement weather she needed to move her aircraft from the unprotected hospital pad to the Alice Airport hangar next door. To accomplish this task Complainant needed to use ground handling wheels that could be attached to the aircraft skids. However before using the wheels Complainant had to unlock the wheels which she could not do since she did not have a key or combination. In her search to unlock the wheels Complainant called Snodgrass and dispatch neither of whom knew who or how to unlock the wheels. About three hours later Bowen called and provided Complainant with the lock combination but gave no explanation for the delay. (Tr. 46, 47).

On a 5<sup>th</sup> occasion in April 2012 Complainant's crew told her during her pre-flight that an external door handle on the left side of the passenger area would not unlatch the door when lifted up. However the door could be opened from the inside by lifting up on inside latch or from the outside by reaching through a sliding window and then lifting up on the latch. Complainant apparently landed her aircraft in Corpus and one of Complainant's crew reported the problem to

Bowen who replied he would have to order parts for the latch. Complainant asked her crew (paramedic and nurse) if they wanted to fly with the unrepaired door latch. When they indicated they had no problems flying with the unrepaired door latch since the door was operational Complainant flew the aircraft back to Alice. On the next day Complainant had a new crew who wanted the latch repaired so Complainant flew back to Corpus and waited until Bowen fixed the latch. During this waiting time Complainant reported to Snodgrass that Bowen withheld information from her and delayed in fixing her aircraft to which Snodgrass replied that Bowen was a good worker and he never had a problem with him. (Tr. 48-50).

On a 6<sup>th</sup> occasion in late April, 2012, Complainant after shutting down a flight and Bowen took her log book and told her a maintenance tracker would be put in her log book that week.<sup>5</sup> When Bowen returned he said the tail rotor spline on her aircraft was due for periodic maintenance and he was going to extend the inspection<sup>6</sup>. According to Complainant, pilot Brennan looked at the maintenance tracker and saw the maintenance items had been overflowed on the log book close out by pilot Martin 0.2 hours and another hour by Complainant before Bowen indicated he had granted a maintenance inspection extension which was against FAA regulation. (CX-5, 21; Tr. 52-54, 149,150, 191-95, 453).

The 7<sup>th</sup> example of protected activity involved fuel sampling. According to Complainant while she worked for Respondent the general operations manual (GOM) provided that mechanics were to do and in fact were doing the fuel sampling. (Tr. 56). Complainant testified that on May 15, 2012, during an all personnel meeting, Klassen asked if Alice pilots were doing fuel sampling. Complainant, who was listening over a speaker phone with Jeff Martin, replied "No." Klassen asked why whereupon Martin responded: "It's because we don't have the necessary equipment in order to conduct the fuel sample." In turn Klassen sent Bowen with the sampling equipment and supplies with apparent instructions to train the Alice pilots. When Bowen attempted to train Complainant she disagreed with Bowen's instructions telling him he had to take the fuel sample from the bottom of the fuel pump underneath the aircraft after the battery, fuel valve and boost pumps were turned on in order to retrieve fuel out of the filter. Bowen replied that all that needed to be done was to go to the fuel valve or fuel filter and open a valve

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<sup>5</sup> Maintenance is recorded in the log book. According to Complainant FAA regulations require inspections to be performed on different aircraft parts at stated time intervals. Further, it is a violation of FAA regulations to overfly an inspection without an extension being granted before the overflight. If a pilot knowingly conducts an overflight they can lose their FAA license. (Tr. 150). Generally extensions are recorded in the log book regarding the time of the extension. C.S. testified that a pilot is required to keep a flight and maintenance book in his aircraft. In the case of Complainant's aircraft (N34HF), the 100 hour tail rotor drive shaft spline lubrication was completed on May 1, 2012 but was due on April 28, 2012 with an extension granted 3 days late on May 1, 2012 against FAA regulations. (Tr. 142-50). If a pilot knowingly flies an aircraft overflight of the maintenance item, his/her certification can be lost. On cross C.S. admitted not knowing whether Respondent was required to document the extension before the overflight was taken. (Tr. 188). An overflight refers to flying an aircraft after an inspection or maintenance action should have but did not occur. (Tr. 188-93). In this case C.S admitted that the industry or Bell standard automatically gave its customers a 10% overflight within which the maintenance was performed (Tr. 196 - 98).

<sup>6</sup> Klassen indicated in his FAA report of the overflying incident that an extension had been noted on the printed aircraft tracking sheet but was not properly documented in the log book and that he confirmed the required service was performed in the 10% extension period allowed under Respondent's policy (Jt. Exh. 11).

which Complainant argued would allow air into a pressurized system and result in a possible flame out. Complainant further objected when Bowen tried to put additional maintenance oil in a pilot's bedroom closet. (Tr. 56-58).<sup>7</sup>

Following the argument with Bowen Complainant called the Director of Maintenance, Yelle and expressed her concern about a possible flame out. Shortly thereafter Bowen called Complainant and spoke with her for 34 minutes during which he said he was angry with her for calling Yelle and telling him that he did not know how to do an uncomplicated fuel sampling. Further, Complainant testified Bowen threatened her by stating Klassen was on his side and repeating that "things were not going to be good for me" and "I was not in a good place." (Tr. 59, 61). Following Bowen's call, Complainant told other employees including her husband she was concerned about her safety. (Tr. 62).<sup>8</sup>

On the next morning Complainant called Yelle and told him about Bowen's call. Yelle replied that Bowen's call was against his instructions not to do so. <sup>9</sup> Complainant then called Klassen who initially dismissed Bowen's conduct as not important only to take a different attitude 10 to 15 minutes later when he called her back and told her to write up the incident in an SMS report which she did on May 17, 2012. (Jt. Exh. 10, Tr. 63-64). Included within that report were Complainant's previous complaints about inoperable fuel transfer caution lights, aircraft pitching, locked ground handling wheels, inoperable aircraft door latch, forced overtime, improper maintenance extensions, Bowen's calls and complaints about Complainant going over his head supervision. (CX-21; Tr. 65).

On May 23, 2012, Complainant had a meeting with Klassen. Present was HR manager, Ann Clements, Yelle and Bowen. Before the meeting Complainant learned from her husband that Bowen had allegedly been involved in an altercation with another mechanic, Robert Monahan in which Bowen allegedly admitted not taking anti-psychotic medication.<sup>10</sup> This information increased Complainant's concerns about her personal safety in Bowen's presence. (Tr. 66, 67). Klassen opened the meeting by stating the purpose of it was to discuss Complainant's concerns for her job and personal safety due to Bowen's conduct. Bowen admitted being angry with Complainant. Complainant stated she felt that Bowen was trying to isolate her after which Bowen and Yelle left the meeting and then Klassen went over Complainant's individual

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<sup>7</sup> C.S. testified the Alice pilots did not have the training or equipment to take fuel samples. After receiving the supplies the pilots still had a problem with not having a safe place to store the waste fuel. C.S. complained to mechanic Robert Monahan, and the pilots were provided a flammable storage locker. (Tr. 153-56). C.S. also admitted flying aircraft knowing the fuel sample had not been taken although the fuel used could be contaminated and cause a crash. (Tr. 202).

<sup>8</sup> C.S. testified he was concerned for his wife's safety yet he never called Klassen or the police or even spoke with Bowen about his alleged threats; nor did he ask to be present during her wife's meeting with Klassen, Clements, Yelle and Bowen. (Tr. 200, 204)

<sup>9</sup> According to Klassen, Bowen received a verbal warning for not following Yelle's instruction not to call Complainant.

<sup>10</sup> The medication in question was Wellbutrin which is not an antipsychotic medication but an antidepressant which mechanics can take. (Tr. 205-06).

complains and asked she wanted done to which Complainant replied she would like a shift change with Bowen (Tr. 68-71). As it turned out Klassen changed her shift and not Bowen's which allowed Bowen access to her aircraft and resulted in her losing a week of work because she had allegedly already taken her week off and by changing shifts she would lose the next week also. (Tr. 72, 73). Regarding discipline Complainant learned that Bowen suffered no discipline as opposed to her although Klassen indicated he would be disciplined.

#### **IV. Complainant's Constructive Discharge**

Following the meeting Complainant received a written warning from Klassen dated May 23, 2012, in which he criticized Complainant for (1) a poor attitude where Klassen indicated that coworkers had come to him and complained about her consistent negative and complaining attitude; (2) inconsistent behavior toward regulatory items not accepting a discrepancy on one day and disregarding a discrepancy on a different day; (3) not following instructions dealing with intermittent problems by contacting Bowen and informing him of her communication expectations; and (4) failure to meet some important core EMS PIC competencies by not meeting the 10 minute lift off time for 911 flights and not accomplishing fuel samples allegedly because she did not have a bucket or fuel container with Respondent issuing corrective action to other Alice based pilots for the same infraction. (Jt. Exh. 1, Tr. 74).<sup>11</sup>

Complainant testified on item #1 (poor attitude) that Klassen never told her who the coworkers were that had complained about her negative attitude and that the only person she had in fact complained about was Bowen who had threatened her. (Tr. 74, 75). On item #2, Klassen admitted pressuring her to accept the aircraft without proper transfer fuel lights and then writing her up for not accepting the aircraft until the transfer light problem was resolved. On item #3, Complainant took Klassen's instructions as recommendations rather than an order and Bowen called her before she had a chance to call him. On item #4 the late liftoffs Complainant's room was located on the hospital's third floor which took her 6 minutes just to go from her room to where her aircraft was located and denied she had more extended late lift offs.(Tr. 76-79). Also on item#4, fuel sample, Complainant was not the only pilot in Alice to take fuel samples but was the only one to raise that issue because of a lack of equipment and the only one to be counseled with other Alice pilots being given a warning that was subsequently rescinded when Klassen admittedly said it was a management failure. (Jt. 2, 3, 4; Tr. 80, 81).

By May 23, 2012 Complainant did not feel any of her concerns about Bowen had been resolved especially since neither Klassen nor Clements indicated during their meeting with Complainant that they did not consider what Bowen told Complainant to jeopardize her safety. On May 23, 2012 Complainant sent the following e-mail to Klassen:

I can no longer continue to work for Halo Flight under these conditions. In my opinion, the verbal reprimand I received today was discriminatory and retaliatory. I am being singled out and I am the only one being made accountable for the

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<sup>11</sup> C. S. testified he , and pilots Brennan and Martin also received a warnings on May 24, 2012 concerning not taking fuel samples but unlike Complainant their warnings were oral as opposed to being written with C.S. warning being retracted by Klassen who admitted management was responsible for training failures (Jt. Ex. 2, 3, and 4).

items listed. As a point of fact, all of the infractions that were listed in my warning are attributable to all other pilots at the Alice base as well.

Jt. Exh. 5.

In Complainant's mind none of her concerns were addressed by Klassen because even with a schedule or shift change Bowen would still have access to her aircraft and the other pilots were guilty of the same things as she. (Tr. 83). In sending the letter Complainant thought Klassen would reconsider his position and even see to it that Bowen would not work on her aircraft. (Tr. 84).<sup>12</sup> On May 24, 2012 after talking to pilot Brennan Complainant e-mailed the Board of Directors telling them of her pending litigation against Respondent for creating a hostile work environment in which Klassen discriminated and retaliated against her in essence forcing her to quit. (Ex. 6; Tr. 85).

On May 24, 2012, Brennan according to Complainant sent to Respondent's Board of Directors, (Jt. Ex. 7), an e-mail which appears to be sent from Klassen to the Board, concerning Bowen whom Klassen allegedly allow to work while on an anti-psychotic medication (Wellbutrin) and had a verbal fight with another mechanic when he failed to take his medication. (Jt. Ex. 7). Complainant also accuses Klassen of (1) not hiring another pilot so as to allow current pilots of making overtime; (2) allowing a maintenance item (tail rotor spline lube) to be overflowed by 7 hours before required maintenance was done and then allowing Bowen two weeks later to write in an extension against FAA regulations; (3) pressuring pilots to fly unworthy(broken) aircraft; (4) pressuring pilots to fly aircraft in marginal weather condition; (5) giving written warnings to pilots for not doing fuel sampling when it is not their job but the mechanics and if the pilots are responsible not supplying the necessary equipment to do so; (6) allowing the mechanics to look at aircraft once or twice a week instead of daily and engaging in improper conduct at a bar with another employee while wearing a Respondent shirt on plus other morale lowering issues. (Tr. 87, 88).

On cross Complainant admitted filing the same safety related complaints with the FAA but not knowing the FAA's findings. (Tr. 94, 95). When questioned about the fuel pump issue Complainant was not able to explain how fuel transfer light illumination was a safety issue when her aircraft was fully loaded with fuel for a 15 minute light to Corpus except to say that a flame out could occur if the system was not working properly. (Tr. 99-104). In the end Complainant admitted the problem was not Klassen's for which she received no negative repercussions but with Bowen who simply said other pilots fly would have flown her aircraft. (Tr. 104-05; 129-30).

Indeed many of Complainant's issues dealt with personal conflicts she had working with Bowen. When she suggested a change of schedule Responded accommodated her only to be told that that a shift change was not the solution because Bowen would still have access to her

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<sup>12</sup> C.S. testified that in sending the e-mail to Klassen she was hoping he would take a more appropriate response to her complaints, retract her disciplinary warning and then she would continue to work for Respondent. In fact C.S. suggested to Snodgrass that he finish his wife's shift and she take his shift the following week to which he received no answer. (Tr. 163-65).

aircraft.<sup>13</sup> Moreover, Complainant was not able to cite any FAA or federal regulation in support of her complaint. Even in her amended pre-trial statement Complaint incorrectly cited 14 C.F.R. § 97.1 dealing standard instrument approaches, obstacle departure procedures and weather minimums.

## V. Respondent's Defense

Klassen, Respondent's Executive Director and Director of Operations for the past 3 years is an airline transport qualified pilot with commercial rotor craft ratings, commercial glider ratings with 11,000 hours of flight time. Respondent provides all of its pilots including Complainant with Bell Helicopter ground and flight training on the Bell 407.

Klassen testified initially about the fuel transfer system in the Bell 407 which consists of a large aft tank and a forward tank with a bulk head and a stand pipe between them. Klassen testified that the 407 was equipped with two sets of pumps: fuel boost and fuel transfer. When a pilot powers up the Bell 407 (s)he flipped a switch which turned on the fuel boost pump it automatically transferring 154 pounds of fuel from forward to aft tanks to the engine and briefly light up 2 lights. The pilot then flipped a second switch that turned on the fuel transfer pump and briefly illuminates 2 additional lights when operational. In this case Complainant was not able to consistently get the second set of transfer lights to go on. (Tr. 228).

Klassen described the incident as an intermittent problem and admitted working with (pressuring) Complainant over a period of time trying to get her to fly the aircraft back to Corpus for repairs by repeatedly asking if the aircraft was air worthy and finally convincing her to fly the aircraft back to Corpus when the transfer lights went operational going on and off as expected which she did. After the incident was Klassen apologized for pressuring her. However, Klassen stated there was no safety issue since the flight to Corpus from Alice was 15 minutes and it would take an hour and a half of flying before the issue of fuel transfer became a concern. (Tr. 229-31).<sup>14</sup> Klassen testified he never told Complainant to do anything but felt it was bad manners and created pressure on Complainant to repeatedly ask her if the aircraft was air worthy. (Tr. 233). Further, according to Klassen there was no violations of FAA rules or regulations for Complainant to fly her aircraft from the Alice to Corpus base once the fuel transfer lights when on and off as expected (Tr. 234).

Regarding Complainant's aircraft pitching up once the forward pressure was released from the cycle or when she took her hand off the throttle, Klassen testified that he received a phone call from Bowen asking if it would be "ok" if Snodgrass, a maintenance test pilot, took Complainant's aircraft to see if he experienced the same pitching problem to which Klassen agreed since Snodgrass was a maintenance test pilot with much more experience (5 years) in flying the aircraft than Complainant. (Tr. 234-35). Klassen did not consider this a safety issue

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<sup>13</sup> In fact Klassen stated it was apparent to him Complainant wanted Bowen fired because there was no away Bowen would not have access to Complainant's aircraft because of the small number of aircraft Respondent flew.

<sup>14</sup> In this case the fuel transfer lights did not go on and off consistently which was caused by a defective fuel signal conditioner. The fuel signal conditioner is a transistor that senses fuel flow and will turn off transfer lights when fuel began to flow. (Tr. 232).

for which there was no retaliation but later regarded it as part of Complaint's sensitivity to criticism and her communication problems with Bowen which Klassen was trying to fix. (Tr. 236).

Regarding the fuel sampling procedures Klassen asked at a pilot meeting how the pilots were disposing of waste fuel to which Complainant replied they were not taking samples. Klassen asked why the pilots were not taking samples to which Martin replied they had asked the mechanics for over a month for a bucket and had not been supplied with one. In turn Bowen bought a fuel container and brought it to the Alice base. Klassen acknowledged that Respondent's SOP provided that the mechanics would do the fuel sampling but the pilot was responsible for doing a pre-flight check which involved checking the fuel on the aircraft according to FAA regulations. In order to address this problem Klassen revised Respondent's SOP making the pilot responsible, developed procedures for fuel sampling, and trained pilots in these procedures. All Alice pilots received verbal warnings and retraining including Complainant because they knew the fuel sampling was not being done since the mechanics were not stationed at Alice. (Tr. 237-242). On the issue of overtime Klassen acknowledged that Bowen was making Complainant stay overtime just to wash her aircraft and agreed it was unreasonable for him to do so. Klassen subsequently told Bowen his actions were not reasonable. He agreed and the problem was corrected. (Tr. 243-45).

Regarding Complainant's communication with Bowen Klassen testified that he spoke to both Bowen and Complainant about their lack of communication telling her she needed to tell Bowen what her concerns and expectations were and telling Bowen he needed to take the higher ground. Klassen eventually scheduled a meeting with Bowen and Complainant for May 23, 2012 for the purpose of finding out if Bowen had threatened Complainant. (Tr. 255). When questioned about what Bowen told Complainant he admitted telling her he was angry and frustrated with her but never admitted any other "threatening speech". (Tr. 257). Ann Clements, Respondent's HR manager who was in attendance was asked if she would consider what Bowen said to be threatening, and she responded "No." Complainant moreover could not come up with examples of how she considered threatened. (Tr. 257).

Concerning the overflight issues Bowen reported to the FAA that Respondent may have overflowed an inspection but upon further investigation found the overflight had not occurred because of the Bell maintenance manual automatically provided a 10 percent increase which allowed Bowen to do timely inspection which he did by May 1, 2012 (Tr. 260,261). At the May 23, 2012 meeting Klassen addressed with Complainant the fact that her lift off times were greater than any other Alice pilot as previously reported to him by chief medical officer, Randy Ensley. (Tr. 262). Ensley also reported Complainant had negative attitude problems which Klassen addressed plus not following his instruction of having Complainant talk to Bowen about communication issues. (Tr. 263). At this meeting Klassen said he would allow her to switch schedules with C.S. so as to make the transition as easy as possible. Later that evening, Klassen was shocked to learn Complainant had quit and told him if Complainant wanted to rescind her resignation he would consider it but never heard from her.

Klassen further testified that the verbal reprimand was put in her file because she threatened to get a lawyer and bring a claim against Respondent. (Tr. 269). Concerning Bowen

use of Wellbuterin, Bowen told Klassen he was authorized to take the drug which Klassen researched and found to be true (Tr. 270, 321). Upon cross Klassen denied telling Complainant initially she had to fly her aircraft back to Corpus for repairs but did tell her if the lights came on she could take off because at that point the fuel transfer pumps would be operational even if Complainant's estimation operational and in compliance with FAA regulations. (Tr. 279). Regarding Bowen's call to Complainant which Bowen did against Yelle's order, Klassen issued Bowen a verbal warning. (Tr. 310).

## V. Discussion

No employer, subject to the provisions of the AIR21 Act "may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions or privileges of employment because the employee . . . engaged in any [protected activity]." 29 C.F.R. § 1979.102(a) (2004). Accordingly, to establish a case of discrimination under AIR21, the 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; *Svendsen v. Air Methods, Inc.*, ARB 03-074 (August 26, 2004) slip op at 7; *Taylor*, 2001-AIR-2, slip op at 33.

### A. Protected Activity

A protected activity under AIR 21 has three elements. First, the complaint must either: a) involve 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, b) at least "touch on" air carrier safety. Second, the complainant's belief about the purported violation must be objectively reasonable. Third, the complaint must be made either to the complainant's employer or the Federal Government. *Svendsen*, 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). Additionally, protected activity under AIR21 must raise safety definitively and specifically. *Kinser v. Mesaba Aviation, Inc.*, 2003-AIR-7 (ALJ Feb. 9, 2004), slip op at 22; *Fader v. Transportation Security Administration*, 2004-AIR-27 (ALJ June 17, 2004)(violations of the Privacy Act, abuses of the junior workforce, nepotism and fraud did not involve safety and did not constitute protected activity under the Act). "While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation." *Peck*, ARB No. 02-028, slip op at 13, *citing Clean*

*Harbors Envtl. 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).

In this case Complainant, contrary to Respondent, asserts she engaged in the following protected activity:

1. Refusing to fly aircraft with malfunctioning transfer lights which showed whether aircraft fuel systems were operating properly.
2. Returning a violently pitching aircraft to base and reporting the aircraft as not airworthy.
3. Providing information to Respondent regarding overflying.
4. Reporting information relating to fuel sampling and Bowen's outburst of extreme anger and threats to Complainant.
5. Filing an SMS report relating to items #1-4, above.

Regarding the issue of malfunctioning transfer lights Complainant maintains she raised a legitimate safety issue of flying her aircraft with malfunctioning transfer pumps subjecting her aircraft to possible fuel starvation (flame outs) and crashing but also interference in her final authority to determine the airworthiness of her aircraft pursuant to Respondent's general operations manual and FAA regulations. FAA regulations at 14 C.F.R. § 91.3(a) provide that the pilot in command of an aircraft is directly responsible for and is the final authority as to the operation of the aircraft.

Respondent argues there was no safety violation involved for there is no violation for Complainant to fly her aircraft once the transfer lights became operational and even then there was no safety issue involved for fuel transfer did not come to play because of the short distance involved from Alice to Corpus Christi and the automatic transfer of fuel by the boost pump.

In reviewing the entire record I find that Complainant because of her limited knowledge of her aircraft's fuel pumps operation was concerned about its operation but that Klassen who had more knowledge about its operation, knew the aircraft's safe operation was not at issue, attempted to explain the condition to her and in so doing admitted he used bad manners. However, in so admitting and apologizing he cured any alleged improper conduct. Complainant's underlying concern was not with Klassen but with Bowen with whom she had problems working with and led to her resignation when Klassen would not support her allegations against Bowen.

Regarding issue #2 involving a mechanical problem with her aircraft pitching up once forward pressure was released from the cyclic, this did not involve FAA violation but rather a reported problem with her aircraft which she reported to her mechanic, Bowen, who did not believe what she told him and said he was going to have another pilot verify it which Snodgrass did. After this incident Complainant alleged, but did not prove that Bowen began to withhold

information from her<sup>15</sup>, delayed responses to her request for air craft maintenance<sup>16</sup>, forced her and her crew into overtime<sup>17</sup>, and eventually threatened her physical safety. The record does not support her allegations except for the overtime issues which involved minimal time during the 12<sup>th</sup> and 14<sup>th</sup> hours of her shift.

Regarding the overflying issue Complainant alleged that on one occasion Bowen failed to perform maintenance inspection on Complainant's aircraft tail rotor spline lube at the state time interval resulting in an overflying condition against FAA regulations which could cause Complainant to possibly lose her certification. When Bowen told Complainant he was going to extend the maintenance inspection the time for the maintenance inspection had already passed and Bowen indicated an incorrect date on the maintenance log which Complainant reported in her SMS report of May 17, 2012. In fact Respondent had already been extended a 10 percent automatic overtime by manufacture Bell.

On the issue of fuel sampling, Complainant told Klassen Alice pilots were not taking fuel sample in violation of FAA regulations because Respondent's manuals provided mechanics were to do it. When Klassen asked the pilots at Alice were not taking fuel samples, pilot Martin indicated they did not have the necessary equipment (bucket and funnel). When Bowen brought the equipment to Alice he got into an argument with Complainant about the proper way to take a fuel sample after which she reported the incident to Yelle. Yelle reported to Bowen Complainant's call. In response Bowen called Complainant again alleged threatened her by telling her how upset he was with her by calling Yelle and telling her Klassen was on his side, things are not going to be good for her and she was not in a good place. On May 17, 2012 Complainant in an SMS reported the transfer light, pitching, overflying, fuel sampling, and alleged threat issues to Klassen.

When seen in their full context I find that none of those issues raised involve protected activity. Even the fuel transfer light malfunctioning did not objectively any safety issue despite Complainant's concern which was resolved by Klassen suggestion and subsequent admission of bad manners in encouraging her to fly. My review of the above issues showed the real problem was Complainant's inability to get along and communicate civilly with mechanic Bowen and did not involve Respondent's condoning safety issues in violations of FAA rules or regulations

## **B. Adverse Personal Action**

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<sup>15</sup> Bowen allegedly took 3 hours to provide Complainant with the combination to a lock on ground handling wheels.

<sup>16</sup> Bowen told Complainant's nurse and paramedic he could not immediately repair a door latch because he would have to order parts. Complainant and Klassen both agreed her aircraft could be safely operated without fixing the door latch.

<sup>17</sup> According to Complainant Bowen forced her to remain at base on needless overtime between the 12<sup>th</sup> and 14<sup>th</sup> hours of her shift when she was very tired. When Complainant complained to Klassen he told her to work the problem out with Bowen and then called Bowen telling him that Complainant had a negative attitude about him. After this call Bowen called Complainant and allegedly repeatedly told her for 30 minutes how upset he was with her for going over his head and reporting him to Klassen. Complainant alleged but did not show safety issues by having her remain at the base.

In *Powers v. Paper Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)* ARB No. 04-111 (ARB August 3, 2007) the Board defined adverse personal action as action that was “material adverse”, i.e., “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination” in accord with *Burlington Northern & Santa Fe Ry. CO. V. White*, 548 U.S. 53 (2006). In other words whether the employer action could dissuade a reasonable worker (reasonable in plaintiff’s position) from engaging in protected activity by adversely affecting the terms, conditions or privileges of employment

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052 (ARB Sept 30, 2008), the Board stated:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. The employee protections that the Labor Department administers are not “general civility codes.” Nor do they make ordinary tribulations of the workplace actionable. Actions that cause the employee temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment....

In Complainant’s case where she received an oral warning, this warning did not affect the terms, condition or privileges of employment and contrary to her assertion were not accompanied by words which would lead her to believe that this conduct was part of progressive discipline that would lead to her discharge. Contrary to Complaint’s assertion a review of the transcript of the May 23, 2012 meeting showed Claimant’s warning was not part of progressive discipline that would lead to her discharge but counseling designed to improve her performance. (Jt. Ex. 13).

### **C. Constructive Discharge**

Complainant asserts that contrary to her May 23, 2012 e-mail to Klassen (Jt. Ex-5) and her subsequent May 24, 2012 e-mail to the Board of Directors (Jt. Ex-6) in which she described allegedly intolerable working conditions which forced her to quit, nevertheless she did not quit but tried to work out a change of schedule with Snodgrass. However I find that neither Complainant nor C.S. responded to Klassen’s offer to let Complainant rescind her resignation indicating that in fact she quit.

In the alternative Complainant argues she was constructively discharged. In order to establish constructive discharge it is incumbent to show by a preponderance of evidence not only a hostile work environment but an abusive environment so intolerant that her resignation qualified as a fitting response. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 93 Fair Empl. Prac. Cas. (BNA) 1473 (June 14., 2004); *Williams v. Administrative Review Board, U.S. DOL*, 376 F.3d 471 (5th Cir. July 15, 2004). Or, as Complainant argues a reduction in pay or badgering, harassment or humiliation by Respondent calculated to encourage her resignation or working conditions so intolerable that she is forced into involuntary resignation.

*Brown v. Bunge Corporation*, 207 F.3d. 776, 782 (5th Cir. 2000); *Young v. Southwestern Sav. and Loan Ass'n*, 509 F.2d 140,144 (5th Cir. 1975).

In the present case there is no evidence of abusive treatment, a reduction in pay, badgering, harassment or humiliation. While Klassen did not support Complainant's assertions of misconduct by Bowen, he had every reason to discount her unsupported allegations of misconduct by Bowen realizing they stemmed from a dislike of Bowen and attempt by her to have him fired.

Accordingly I find no merit to Complainant's AIR 21 allegations and **DISMISS** them as unfounded.

**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).