

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 03 December 2015**

Case No.: 2014-AIR-00015

In the Matter of:

ROBERT GAULT,

Complainant,

v.

KOURY AVIATION, INC.,

Respondent.

APPEARANCES: Nancy Quinn, Esq.  
For the Complainant

Jeffrey Southerland, Esq.  
Richard Andrews, Esq.  
For the Respondent

Before: DANA ROSEN  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR21”), as implemented by 29 C.F.R. 1979 (2008). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

The Complainant filed a complaint on January 17, 2014, alleging the Respondent Koury Aviation retaliated against him in violation of AIR21 by constructively discharging him when he resigned as Director of Operations on December 3, 2013, and then as a contract pilot on January

11, 2014. The complaint was investigated, and on April 14, 2014, the Regional Supervisory Investigator for OSHA, Atlanta Regional Office, dismissed the complaint. He issued the Secretary's Findings that "Complainant voluntarily resigned both positions and no adverse action occurred. Therefore Complainant has not established a *prima facie* case." On May 13, 2014, the Complainant filed his objection to the Secretary's decision and requested a hearing before an Administrative Law Judge.

A formal hearing took place on November 5, 2014, with an open court in Greensboro, North Carolina, at which time all parties were afforded a full and fair opportunity to present evidence and testimony under AIR21. At the hearing Administrative Law Judge Exhibits 1 and 2, Joint Exhibit 1, Hearing Exhibit 1, Complainant's Exhibits 1-14, and Respondent's Exhibits 1-15 were admitted into the record. Each party also submitted post-hearing briefs.<sup>1</sup>

### **STIPULATIONS**

The parties have stipulated and this Administrative Law Judge finds the following as fact:

1. Respondent is an air carrier within the meaning of 49 U.S.C. §42121 and 49 U.S.C. §40102(a)(2).
2. Complainant was formerly employed by Respondent Koury Aviation, Inc. as Director of Operations.
3. On December 3, 2013, Complainant notified Respondent by email that effective December 16, 2013, Complainant was resigning as Director of Operations but would be willing to serve as a contract pilot for Respondent.
4. Respondent paid Complainant \$300.00 for contract pilot work he performed on December 26, 2013.
5. Complainant resigned as a contract pilot on January 11, 2014.  
(JX 1, TR 8)

### **ISSUES**

1. Whether the Complainant engaged in protected activity or conduct under AIR21?
2. Whether the Complainant was constructively discharged?
3. If the Complainant was constructively discharged, whether protected activity or conduct was a contributing factor?  
(ALJX 2, TR 9)

### **FINDINGS OF FACT**

#### **Testimony of Robert Gault**

Complainant testified at the hearing on November 5, 2014. (TR 49). Complainant testified that for most of 2013 he worked as the Director of Operations for the Respondent, Koury Aviation in Greensboro, North Carolina.. He had "approximately 15 years between airlines and corporate aviation, 10 years military service, a Bachelor's degree in Aeronautics as well as thousands of

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<sup>1</sup> The following abbreviations will be used as citations to the record: ALJX – Administrative Law Judge Exhibit; JX – Joint Exhibit; TR – Transcript of hearing; CX – Complainant's exhibit; RX – Respondent's exhibit.

hours of turbo jet time, international experience.” (TR 49). He testified that when he joined Koury Aviation he knew it was a growing operation that needed to acquire specific licenses. The Complainant testified:

[I]t could take days and even weeks. The process of certification is extremely complex. The FAA is very paperwork driven so volumes of paperwork, bundles to be submitted, certifications as far as aircraft equipment, personnel, programs. It’s a ton of work. (TR 50)

The Complainant testified that during his employment with Respondent, he worked to the best of his abilities to keep staff and passengers safe. (TR 50). The Complainant identified a document (CX 1) sent to the Respondent from the Federal Aviation Administration (FAA).

The document deals with the subject exclusive use of aircraft and operational control. They’re cornerstones. They’re the foundation of any charter certificate. In essence, Koury Aviation in this case must maintain airtight operational control at all times of all their assets on their certificate, but most importantly, this deals with one aircraft in specific called the exclusive use aircraft and it deals fundamentally with [what] it sounds [like]. There has to be one aircraft at all times exclusively for the use of Koury Aviation, not for third parties. It’s called part 91 flying, non-revenue, non-charter business basically. There has to be one airplane at all times completely dedicated to the certificate. (TR 51)

The Complainant testified that the document was brought to all of the charter operations in the area as a ruling from the FAA dated July 2013. (TR 52)

The Complainant testified that he discussed the significance of the letter with Mr. Brad Koury, founder and owner of Koury Aviation, Inc.:

Mr. Koury saw the need to fly all of his aircraft on the same day under Part 91. I was away. I was at school in Wichita. We were conversing on the phone via text, via emails. This time, I believe also the FAA had been shut down by the sequester of 2013 and when I say shut down, they were completely shut down. The office was not staffed. There was no protocols to go. Effectively, I was told to shut up and they’re going to do it anyways. I’m paraphrasing. I’m certain it’s documented. I know for a fact. I think I was called a disparaging name and they opted to fly all the aircraft the same day under Part 91. After I had professionally promised the FAA that until the leases were drafted for Koury Aviation, we would dedicate the airplane as exclusive use and would not operate it under Part 91 or for non-charter purposes. (TR 53, TR 126)

The Complainant testified that as the Director of Operations, he would be held responsible by the FAA “for losing complete operational control of the certificate.” (TR 53)

The Complainant testified that CX 2 showed a flight log for September 19, 2013, a flight from Canada to Greensboro, North Carolina. Complainant stated, “Koury Aviation, the charter

company at this point, did not have international operations.” The Complainant stated that prior to the flight he told Mr. Koury, via text message, that was not a proper use of Koury Aviation’s aircraft. (TR 54-55, CX 3).

I told them that they’re flying them all under Part 91 on the same day is illegal per Roy and that references to Roy Henry, the FAA inspector, assigned to Koury at that time. It had just been handed down several weeks ago in writing. (TR 57)

The Complainant testified that he expressed his concerns about having all of the planes out on dry lease<sup>2</sup>. Mr. Koury responded via text message. “Would u quite (sic) being a bitch, if someone wants to by a aircraft, and they want to fly it then it will happen. Study ur books.” (CX 3-7, TR 57).

The Complainant testified that the King Air aircraft was put on certificate at the beginning of November 2013. (TR 60). He stated that there were mechanical issues with the aircraft.

[T]here were anomalies with the engine on that flight where it shut itself down uncommanded. When the aircraft came back, it was immediately grounded. Everybody at Koury was notified that it was down, had major issues both with the engine and a handful of other issues with the airplane other than the engine shutting down and the airplane literally languished for the remainder of November.... Mr. Crowder<sup>3</sup> was contacted by [a] local pilot on the field and Mr. Koury had contacted that pilot and asked if he would be willing to fly the airplane for him. Again, the airplane is down, grounded with squawks. Mr. Koury certainly didn’t notify me that he was looking for pilots. I know by Mr. Crowder’s reaction he hadn’t been notified, but nonetheless, Mr. Koury was going to find someone to fly that King Air. (TR 61-62)

The Complainant testified that standard procedure would have been for him to be involved with any new pilots who would fly under the Koury Aviation certificate. (TR 62)

The Complainant testified that he and David Crowder met with Mr. Koury to discuss the mechanical issues with the King Air aircraft. The Complainant testified that Mr. Koury told him “he would take care of getting the maintenance arranged and basically that was the end of it.” (TR 62)

Q: Did he indicate whether he thought you were being negative about that particular aircraft?

A: Not specifically. There was a different issue during that conversation. He had threatened to fire me just slightly before that for another issue, a training request that he had.

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<sup>2</sup> The Complainant explained: “Dry lease is complex. The simplicity is he can lease the use of the airplane for an hour and he cannot charge for the pilots. If it includes pilots, it’s considered wet leasing and it takes specific FAA authorization and approval from the FAA to do so.” (TR 56)

<sup>3</sup> Koury Aviation’s Director of Maintenance.

When I challenged him on that, he just smirked. He was amused.

Q: Okay. Tell us about the training issue you just referenced.

A: Some of the people that he was dry leasing the airplane to wanted to get trained to fly the airplane. One of them was aptly qualified to do so under Koury's 135 training program. One of them did not qualify. From what I understand, it was a personal friend of Mr. Koury's and he was demanding that they be trained together as a crew which was completely and directly contrary to Koury's training manuals which I advised him prior to that. He said he wanted them both trained under Part 135 which is the charter training program. I explained. I think my exact quote was, mixing 6158 which is a non-charter training and 135 is like oil and water. They don't mix and we can't do that as Koury and he told me to either do it or he'd replace me, his quote. (TR 63; CX 9-11).

The Complainant testified that the King Air was not in use. "It was just sitting. Nothing was happening with the airplane." (TR 63). He stated, "The first maintenance flight was December 3<sup>rd</sup>. That was with Mr. Koury, Mr. Ernst and in the back of the airplane were the three people we talked to this morning, Chad Rhodes, David Crowder and Teri Crowder."<sup>4</sup> The Complainant stated that he was working on December 3, 2013, but he was out-of-town on December 4, 2013. (TR 64)

The Complainant testified that he never flew on the King Air. He did not think that it was ready for revenue flying.

A: Mr. Crowder had sent Mr. Koury an email clearly stating that the issues with the King Air were beyond the scope of Mr. Crowder's expertise. I know Mr. Crowder personally and professionally. He's a skilled mechanic and a good man and if he says that, he means that and he asked for Mr. Koury's permission to send it to a third party for maintenance. That did not happen.

Q: Did you ever talk to Mr. Ernst about the need for the repairs on the King Air?

A: No, I was directed by Mr. Koury not to so I honored that.

Q: Moving further into early December, did you come to the conclusion that you needed to resign your position with Koury Aviation?

A: Yeah, I had to.

Q: Can you tell us what brought you to that decision?

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<sup>4</sup> The King Air is owned by Greg Biffle Racing. Mr. Ernst is Mr. Biffle's personal pilot. Chad Rhodes was a pilot. David Crowder was the Director of Maintenance for Koury Aviation. Teri Crowder was a pilot for Koury Aviation. (TR 138, 140)

A: Yes. On December 3<sup>rd</sup>, Mr. Koury and Mr. Ernst came off the King Air after the test flight. I asked Mr. Koury if I could have a few minutes of his time and went into an office in the hallway, closed the door behind us. We had a one-on-one conversation and I very clearly told him that what was going on was unsafe. That airplane was unsafe. They had dodged a bullet and having it on the schedule to fly a revenue trip the following day was crazy and that I couldn't be a part of it. If he was going to do that, he was going to have to do it without me. I was leaving and that I couldn't be a part of what was about to take place there in any way, shape or form and wouldn't be party to it.

Q: What was Mr. Koury's response to you at that time?

A: Initially, muted. I don't recall him really saying anything. He just left.

Q: Later that afternoon, did you do a formal resignation?

A: I did a couple hours later. I sent which is entered somewhere in here the first page of an email basically very cordial to the management team and schedulers at Koury announcing my resignation. (TR 64-67)

Complainant testified further regarding his resignation as Director of Operations.

Q: Okay. I want to make sure that I understand the reason that you're saying that you resigned from Koury, okay? You agree with me that you resigned?

A: I was forced to, yes.

Q: I understand your characterization, but you resigned?

A: Yes.

Q: And the reason you resigned is what?

A: To prevent the situation Mr. Koury was forcing with the King Air from going forward.

Q: So, you resigned to prevent a King Air from proceeding forward?

A: That's correct, on a revenue flight.

Q: And in fact, we heard from Mr. and Mrs. Crowder this morning that the King Air revenue flight did not proceed, correct?

A: That's correct.

Q: And we heard from them this morning that on December 4<sup>th</sup>, the very day after you resigned, Mrs. Crowder and Mr. Rhodes took the flight out and didn't even get off the ground, correct?

A: That's correct, the engine failed.

Q: Right and so the revenue flight did not go forward, correct?

A: Thankfully, no.

Q: And it didn't go forward because the engine failed, correct?  
A: That's correct.  
Q: Which had nothing to do with your resignation, did it?  
A: No, I had resigned the day before because I knew that engine was going to fail.  
Q: You knew the engine would fail?  
A: That's correct.  
Q: And it would have failed whether you had resigned or not, correct?  
A: Yeah, I would agree with that.  
Q: And you heard Mr. Crowder say that when he called Mr. Koury and said, "Brad, we've got to take this plane off the certificate," Mr. Koury said, "Okay," right?  
A: I did.  
Q: That's what Mr. Crowder said?  
A: That's correct.  
Q: And you believe Mr. Crowder is a good, honest, decent man. That's what you told the court a few minutes ago?  
A: Absolutely.  
Q: So, there's no reason to disbelieve that Mr. Koury in fact told Mr. Crowder, "That's okay, David, take it off the certificate," correct?  
A: No, I don't doubt that for a moment. (TR 88-91)

The Complainant testified:

December 3<sup>rd</sup>, Mr. Koury and Mr. Ernst test flew the aircraft and said it was good, ordered it into service and were going to have it flying passengers and I resigned. Of course, the morning of December 4<sup>th</sup> when I'm on the road, Mr. Crowder, Mrs. Crowder and Mr. Rhodes are on the airplane and the engine fails. Initially, I found out about the engine failure from Fran Bassett<sup>5</sup> via text and I responded back to her rather sarcastically, "Tell Brad he's the one that said the plane was good" and then I gathered myself and said, "No, get a hold of Dave Crowder because he is the Director of Maintenance and obviously an engine shutting down is something that the Director of Maintenance needs to be involved in." I had no idea at that time Mr. Crowder was actually on board the airplane and party to that. (TR 68)

The Complainant testified that he never flew the King Air. He testified that Mr. Crowder, as the Director of Maintenance, exclusively had the authority to determine the airworthiness of Koury Aviation airplanes. (TR 91-92)

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<sup>5</sup> Ms. Bassett worked in scheduling and sales for Koury Aviation.

A: Exclusively, yes.  
Q: Exclusively and if Mr. Crowder said, "This plane is not flying," that's his fault, correct?  
A: That's correct.  
Q: And in fact, we saw the email from December the 10<sup>th</sup> [CX 11-8] from Mr. Koury who is in the courtroom. Mr. Koury said, "I wish you guys would reconsider. I'd really like for the King Air to fly." You were here when that was talked about, correct?  
A: That's correct.  
Q: And you also heard the testimony that King Air didn't do any revenue flights after December 3<sup>rd</sup>, did it?  
A: No, it did not. (TR 92)

The Claimant testified that when he expressed his concerns about the King Air to Mr. Koury, Mr. Koury ignored him. (TR 114)

Q: And he ignored the concerns of other people as well?  
A: Yes.  
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Q: Okay and is it your testimony that he ignored your concerns in order to induce you to quit?  
A: No, I can't tell you what was going through his mind. I thought we had that --- (TR 114-115)

The Complainant testified he resigned in a closed-door meeting with Mr. Koury.

Q: And you told him you were resigning because he wanted to fly the King Air plane? Is that right?  
A: That's correct.  
Q: And I believe you characterized his response as muted, correct?  
A: Yes.  
Q: He wasn't excited that you were resigning, was he, as best you observed?  
A: No.  
Q: Okay. In fact, he wrote you later that day [CX 4-3] and said he was "disappointed" that you had resigned. Do you remember that?  
A: That's not how I would characterize his response, but I believe that word is in there. I'd have to look at it.  
Q: Any reason to believe he wasn't legitimately disappointed that you resigned?  
A: I think he was angry.  
Q: He was angry that you resigned?  
A: Absolutely.

Q: He didn't want you to resign, did he?  
A: Oh, no, I think he did. He threatened to fire me the month before.  
Q: Well, if he wanted you to resign, why would he be angry that you resigned?  
A: Because I put him in a pickle. He wanted to fly the King Air.  
Q: He didn't need you to fly the King Air, did he? It wasn't your decision?  
A: No, but when the Director of Ops resigns, it causes notice.  
Q: Do you think Mr. Koury deliberately chose to have the King Air fly so that you would quit?  
A: I can't tell you what was going on in Mr. Koury's mind.  
(TR 95-97)

The Complainant testified that after his meeting with Mr. Koury, the Complainant sent a resignation email. The Complainant wrote, "It has been my distinct pleasure to serve as Koury Aviation's Director of Operations." (TR 99, CX 4-4). The Complainant testified that he wrote that because the email was for "public consumption," and he did not want to "slander anyone or call names and certainly not to burn bridges." (TR 99) The Complainant further testified that he wrote that he did not want to impede Mr. Koury's goals and ambitions. (TR 100)

Q: Was that true, you were concerned you were impeding Mr. Koury's business goals?  
A: No.  
Q: You weren't concerned about that?  
A: No.  
Q: Is there anything in this resignation email that's true?  
A: As far as --- no, not really. (TR 100)

The Complainant testified about the email he received from Mr. Koury in response to resigning. (CX 4-3) The Complainant stated the tone of Mr. Koury's email was demeaning.

Q: Okay. Is there any indication anywhere in this email that Mr. Koury was pleased that you had resigned?  
A: No.  
Q: In fact, in the first sentence, he used the word, "I am very disappointed," correct?  
A: Yeah, the word, I, is littered throughout the whole document.

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Q: Let's go towards the end of that email and I'm down at the sentence that begins, "So, if you have made your final decision."  
A: Okay, yeah.

- Q: Had you left the matter open during your meeting with Mr. Koury that you might not necessarily be resigning?
- A: Not at all. (TR 102-104)

The Complainant testified that he responded to Mr. Koury's email on December 4, 2013. (TR 106, CX 4-1). The Complainant's email stated, in part:

When your Chief Pilot, Director of Maintenance, King Air Captain, King Air F-O, Jerry Snyder, the FAA and the only paying passengers to set foot on [the King Air] told you that the aircraft was not safe, you "laughed" at us all and chose to ignore each and every member of the Koury Aviation team. (CX 4-1)

- Q: So, Mr. Koury didn't single you out about the King Air, he was laughing at everybody if what you're writing here is accurate?
- A: Yeah, it's not like we all were together. He was systematically ignoring everyone. This wasn't a big group thing where we got the FAA, the passengers. This is a separate, several different instances probably over a month's time or several months really where people were telling him, "This is not tenable. This is not a safe airplane. We can't do this."
- Q: I understand and he ignored all of those people.
- A: That's correct.
- Q: He didn't single you out as the only person he ignored, did he? You were just one of several?
- A: Yeah, I would agree with that. (TR 107)

The Complainant testified that at the time he resigned, he did not have employment with another company. The Complainant testified that no one at Koury Aviation asked him to reconsider his resignation. He stated his last date as Director of Operations was December 16, 2013.

The Complainant testified regarding his working environment during the fall of 2013.

- Q: How would you describe your interactions with [Mr. Koury] as the end of 2013 progressed?
- A: Basically it was either do as he says or you're fired. Didn't matter whether it was safe, legal or anything. That was the general relationship.
- Q: Would you characterize that as just a personality conflict between you and Mr. Koury?
- A: No.
- Q: Did you consider your resignation in December 2013 voluntary?
- A: No.

Q: Why not?

A: If I hadn't resigned that day, if I hadn't told him that I wasn't going to sit back and let that plane fly with passengers, he would have done it. If I would have sat there and just turned a blind eye and let it happen, he would have done it and again the results could have been catastrophic. I had to quit. That's my opinion. Started a string of events which ultimately led to that airplane being pulled off Koury's certificate which was a great thing. It had no business being out for public use. (TR 81-82)

The Complainant testified though he resigned as Director of Operations, he was willing to serve as a contract pilot for Koury Aviation.

I'm a sole provider for my family and while I couldn't personally or professionally be responsible for the actions of Mr. Koury, when it comes to being a pilot on an airplane, literally I'm the final authority. I can choose whether or not I want to fly that airplane and most certainly don't have to have somebody direct me what to do once in the air. (TR 67)

In early December 2013, Complainant verbally contacted the FAA about safety breaches for Koury Aviation. (CX 11-1) "I had contacted the FAA and made it known that I was contacting the FAA about what I felt was egregious breaches of safety protocol at Koury." (TR 76)

Complainant testified further regarding the FAA contact:

A: No, I went a month prior to that.

Q: You went a month ---

A: Talked to them on the phone.

Q: Talked to them on the phone in December?

A: That's correct.

Q: And you were concerned I think you told them about the safety of Koury Aviation, right?

A: The personnel and the paying public, absolutely.

Q: You wanted to protect the public, you wanted to protect the personnel?

A: Absolutely. (TR 92)

The Complainant testified that he reported the Respondent to the FAA while he was still working for the Respondent.

Q: Okay. When did you do that?

A: Again, I'll tell you approximately December 10<sup>th</sup> when I finally got the ability to speak to Inspector Roy Henry of the Greensboro Flight Center's District Office and I

informed him directly that Mr. Koury was trying to compel us as an organization to do things that were unsafe, illegal or combination thereof.

Q: Okay and those conversations were sometime around December 10<sup>th</sup>, correct?

A: That's correct.

Q: You met with Mr. Koury and resigned on December 3<sup>rd</sup>?

A: That's correct.

Q: You agree that December 10<sup>th</sup> is a week after December 3<sup>rd</sup>?

A: Yeah, but I worked until the 16<sup>th</sup>.

Q: And were paid through the 16<sup>th</sup>?

A: Yes. (TR 112-113)

He stated his grandfather in law passed away before Christmas "but I had drafted my complaint written to the FAA...." (TR 76) He filed the written complaint with the FAA on January 13, 2014 or January 14, 2014.

After the verbal FAA complaint and before the written FAA complaint, Complainant worked as a contract pilot for Respondent Koury Aviation. The Complainant stated that he was asked to handle a last-minute contract pilot assignment for Koury Aviation on December 26, 2013 because the initial pilot was sick and no other pilot was available due to the Christmas holiday. (TR 70-71, CX 7-2)

Q: And during that correspondence with Ms. Terry<sup>6</sup>, was a fee set for that flight?

A: Yes, it was.

Q: And how much was that?

A: \$600 per day.

Q: Who was scheduled to fly with you that day?

A: Mr. Pat Bidom (ph).

Q: Would he have been paid the same rate as you for the same flight?

A: No, Pat Bidom (ph) though a contract pilot, was a contract first officer and he was paid \$200.00 a day for his service.

Q: Did the aircraft actually fly on December 26, 2013?

A: Yes, it did.

Q: What happened?

A: The landing gear malfunctioned on the aircraft shortly after takeoff. The goal was to fly down to Florida and after ATC delays and then the obvious in-flight issue with the landing gear, made the decision as pilot in command (1) that we couldn't fly to Florida. With the landing gear extended, the fuel consumption would be too high and we didn't have enough fuel to do it. Furthermore, we had too much fuel on

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<sup>6</sup> Ms. Terry worked in scheduling and sales for Koury Aviation

board to immediately land so we had to circle around Greensboro for about 20 minutes to get the aircraft within the landing weight limits, burn off the fuel. We came back and made a safe landing. It was after hours so I coordinated with David Crowder via phone the on-field contract maintenance provider as well as the customers to make sure they were taken care of, that their ground transportation arrived, that the contract maintenance provider on field took the airplane and began repairs per David's direction, Mr. Crowder's direction and finished all the required paperwork to close out the trip sheet, the flight logs if you will, wrote the aircraft discrepancy logs and finally went home.

Q: Did you receive payment for that flight?

A: No.

Q: Did you receive partial payment for that flight?

A: Eventually, yes.

(TR 72-73)

The Complainant testified he was initially told he was not going to be paid because he did not complete the trip. "Then I was told Mr. Koury was going to give me half pay and because that was Koury Aviation's policy that if you don't complete to the planned destination, then you only get half your pay agreed to, but I also found out that the other pilot was paid in full...." (TR 74)

He stated that he had never seen a Koury Aviation policy indicating pay was reduced if a trip was not completed. He stated such a policy "would be completely contrary to safety." (TR 74)

I was told literally after the fact when I asked where my paycheck was, first that I was getting no pay and then when they were going to offer me \$300.00 which was half pay, I was told that was Koury Aviation's policy to only pay 50 percent of the day rate unless you make it to your planned destination which I obviously failed to do. (TR 74)

After Respondent Koury Aviation refused to pay him for the contract pilot flight, Complainant sent an email to the Koury Aviation schedulers explaining the reasons he was resigning as a contract pilot. (TR 75, CX 7-2).

Due to Koury Aviation's 'after the fact' decision to not pay me for the pilot services I performed on December 26, 2013...I will no longer be available to fly any further contract trips for Koury Aviation.... [T]he new management policy encourages a pilot to disregard the safety of his passengers and crew, and instead fly through whatever hazards are presented so as to get paid. That is not what I agreed to.... From start to finish, my day at Koury was 8 hours long, I dealt with a landing gear malfunction in flight, and

handled the maintenance and passengers without the assistance of any other Koury personnel on site. Koury's response to my effort is to deny my pay, and force me to seek other remedies. There could not be a more egregious breach of contract and safety protocol. (CX 7-2)

The Complainant testified that CX 11 was an undated letter he sent to the Greensboro FAA inspector. He stated the letter was sent either January 13 or 14, 2014. The Complainant testified:

I had set up a meeting with the FAA and had this drafted and wanted to make sure that I met with them [the FAA] before mailing my submission to OSHA. Knowing how the process works, I knew that through the AIR-21 complaint process, a regional if not national level of the FAA would get involved and review the complaint and I didn't want the local office, the people that I had worked with for the past several years both with Mr. Koury's company and another company in the area, I didn't want them to be blind-sighted (sic) by an investigation they didn't know was coming for their actions. (TR 79)

On January 15, 2014, Complainant filed his complaint with the U. S. Department of Labor. The Complainant identified CX 8-1 as his complaint letter to the Department of Labor. The letter was dated January 15, 2014. The Complainant testified the complaint was necessary.

A: Because AIR-21 is posted in the office. It clearly describes basically some of the actions that are prohibited by employers. I had contacted the FAA and made it known that I was contacting the FAA about what I felt was egregious breaches of safety protocol at Koury. I had contacted them verbally in December.... [W]hen Mr. Koury withheld my pay and paid the other pilot in full, it was apparent and clear to me that he was reacting to my notifying the FAA of the issues going on at Koury and it was his way of enacting further vengeance against me. (TR 76)

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Q: Was this complaint about \$300.00 in pay as a contract pilot?

A: There's no way I would sacrifice what I've had to sacrifice over the last 12 months for \$300.00 or \$600.00. This goes about to a much bigger issue and that was the King Air's and the pressure that Mr. Koury was putting on top with that aircraft and what was obviously not a safe condition. I wouldn't have endured what I have endured for \$300.00 or \$600.00 or \$6,000 or \$6,000,000. It's not that. Those

people at Koury Aviation are both friends and co-workers, colleagues and the paying public has a right to expect safety and I take that to heart. I don't have any doubts that had Mr. Crowder, Mrs. Crowder and Mr. Rhodes on December 4<sup>th</sup> not gone out and run that airplane, the next time that airplane ran would have been with a plane full of paying passengers ... and the results of that engine failing as it did could have and likely would have been catastrophic. (TR 76-77)

The Complainant testified that CX 9 was a January 27, 2014, letter to Koury Aviation from the Greensboro, North Carolina FAA inspector. (TR 77). The letter identified four items to be corrected. Each item was related to incomplete flight log information. (*See* CX 9). The Complainant testified that CX 10 was a February 27, 2014, letter from the FAA to Koury Aviation regarding Koury Aviation's proposed corrective measures and a follow-up inspection. (TR 78, *See* CX 10)

The Complainant testified that CX 12 was the FAA Washington, D.C. findings dated March 14, 2014, following its investigation of his complaints. He stated the FAA did not review its report with him. The letter was all that was provided. (TR 80). The March 14, 2014, letter stated:

The investigation substantiated that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred. Accordingly, the FAA is taking appropriate corrective and/or enforcement action.... Please note the FAA's disposition of safety issues outlined in your complaint is independent of any investigation the Department of Labor may be conducting into your allegations of discrimination. (CX 12)

The Complainant identified CX 13 as a letter from the FAA local district dated April 4, 2014 regarding its inspection of Koury Aviation. (TR 80) The April 4, 2014, letter identified three issues that were corrected during the inspection: proper logging of mandatory rest periods, proof of observed checkrides, and a log entry with an incorrect date. (CX 13)

The Complainant testified that after December 16, 2013, he used his best efforts to find work with another employer. He stated he started a new position on Monday February 24, 2014 with Solarius Aviation in Petaluma, California. The Complainant testified that he did not have any earnings between December 26, 2013 and February 24, 2014. He did not accept the reduced \$300.00 payment from Koury Aviation for his contract pilot work on December 26, 2013. (TR 82)

The Complainant testified that he did not know the dollar amount he was seeking for damages. He stated he claims back-pay from December 16, 2013 until February 23, 2014, when he started his current position. (TR 83) He testified that he now works for Solairus Aviation in Petaluma, California. (TR 86) Complainant estimated the amount for back pay was about \$13,100. He also seeks reimbursement for his insurance costs of \$870.00 per month. (TR 85) The Complainant

testified, "My professional reputation has been destroyed. I have no ability to work in Greensboro." He testified that he did not know the dollar figure for the reputation damage. "I couldn't even begin to guess."

Complainant testified regarding the release of medical and drug records and his claim that it was an adverse action.

- Q: I want you to explain what Exhibit 2 [RX 2] is.
- A: It's a protected document. It's governed under the Pilot Record Information Act of 1996. Much like medical records, it's not to be distributed in any way, shape or form and yet here it is on public display and it's a drug test, drug and alcohol testing for Chautauqua Airlines.
- Q: Pardon me?
- A: For Chautauqua Airlines.
- Q: Okay and it says, "Applicant employee signature, Robert A. Gault"?
- A: That's correct.
- Q: Is there any particular reason why Robert A. Gault and that's you correct?
- A: It is.
- Q: -- was dealing with a drug test for some other airline on November 2<sup>nd</sup>?
- A: Yeah, because I was talking to them about potential employment.
- Q: When did you start looking for employment at other places, Mr. Gault?
- A: Immediately after Mr. Koury said he was going to fire me if I didn't break the regs.
- JUDGE ROSEN: After what?
- WITNESS: If I --- immediately after Mr. Koury started telling me verbally and in writing that if I didn't violate the regulations, he was going to fire me. So, I immediately started seeking other employment.
- Q: And can you as you sit here today pin that down at all? Do you have any idea when that was within a day, a week, a month?
- A: October, mid-October when I started making phone calls.
- Q: You started looking for another job in October?
- A: I can't give you a date, but probably mid to late October. I'd have to look at the email from Mr. Koury where he specifically said he was going to fire me if I didn't break the regs. (TR 107-109)

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- Q: Okay. This document that we're looking at, Exhibit 2, Respondent's Exhibit 2, that document would have come out of Koury Aviation's file?
- A: It obviously did.
- Q: Did anyone at Koury take any adverse action against you after November 2, 2013?
- A: The distribution of this [RX 2] is an adverse action. (TR 109)

### **Testimony of Bradford Koury**

Bradford Koury testified that he is President of Koury Aviation. He started "Koury Aviation and started flying 135 charter in 1991." (TR 126) Mr. Koury testified about his role at Koury Aviation.

I'm not very active. I know that I am the president. I love to see the company grow. I depend on my Director of Operations, my chief pilot and Director of Maintenance for the company to survive. It's on their hands and I may talk to them once a week, once every two or three weeks. I'm not active on a regular basis. (TR 127-128)

He testified about the responsibilities of other positions at Koury Aviation.

Director of Operations is to maintain compliance with the Federal regulations, make sure all of the forms are filled in correctly to advance the certificate, apply for new airplanes or send in training manuals. As far as Director of Maintenance, Director of Maintenance's main focus is on the safety and the maintenance of the airplane. He determines whether an airplane is safe to fly or not. (TR 128)

Mr. Koury testified that the Complainant was hired to be Assistant Director of Operations. He stated that once Koury Aviation received its 135 certificate, the Director of Operations resigned and recommended the Complainant as his replacement.

- Q: Do you know whether Mr. Gault had ever served as Director of Operations for any other airline?
- A: He had not. . . .
- Q: What type of money and time, if any, did Koury invest in training Mr. Gault?
- A: Time on the airplane, the operation of costs of airplanes is approximately \$2,800 an hour. We did extensive flying to get him comfortable in the airplane and qualified because you have to do that as an SIC [second-in-command]. Once that was done, he flew SIC for a period. We sent him to

school. The school itself was \$15,000. His room and board, it was probably close to \$20,000. (TR 129)

Mr. Koury testified that Koury Aviation currently had six employees. “We have had to terminate with the loss of one airplane, well, two airplanes, we’ve terminated two employees. Terri Crowder was one and [the Complainant] was the other, but he left willingly.” (TR 127)

Mr. Koury testified about Part 91 and Part 135 use regulations. “The difference between 91 and 135, 91 you can only share the cost. Part 135, you can charter the airplane, charge people for the aircraft.” (TR 127)

Mr. Koury identified CX 3 as text messages from September 2013.

A: They’re referring to a trip. Todd Porterfield was planning on purchasing one of the Citation 7s. He spent approximately \$20,000 to send a pilot to school before he bought the plane. I had two of them. He wanted to fly one of them as a demo before he purchased to see which one he preferred. (TR 151)

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Q: Do you have any understanding as to whether or not allowing Mr. Porterfield to demo that flight was legal?

A: I guess the question was never brought up. [The Complainant] says it was illegal. I wouldn’t think. I would think if somebody is going to spend like I said earlier, \$2,000,000, they could fly that airplane. The owner can fly the airplane. I was not on it. I had other things to do, but the pilot who Todd sent to school, he was on the airplane and Todd was on the airplane. (TR 152)

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Q: Tell me, what were you referring to in that text message [CX 3-7]<sup>7</sup>, Mr. Koury?

A: [The Complainant] was in school and I asked him, “Just quit worrying about it. I mean study your books, get your certificate in school.” (TR 152-153)

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Q: Why [was the Complainant] contending that this flight with Mr. Porterfield was illegal?

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<sup>7</sup> The text message states, “Would u quite (sic) being a bitch, if someone wants to by a aircraft, and they want to fly it then it will happen. Study ur books.” CX 7

- A: Because it was a part 91 flight. Of course, an owner flight is a part 91. Because the owner was not in there and he felt like it was illegal for Todd to be flying that airplane.
- Q: Did you believe that it was illegal?
- A: No, I didn't. I wouldn't have done it. (TR 153)

Mr. Koury testified that the series of text messages was the end of the discussion. “[W]hat I said right there was about the end of it, ‘study your books.’ ” (TR 154)

Mr. Koury testified about his disagreement with the Complainant regarding pilot training. “[T]he schools have never had an issue with putting a 135 pilot in with a part 91 pilot for the training. They’ve done it for me for years every year.” (TR 154-155)

- A: [The Complainant] said, “It can’t be done.” I said, “Rob, I know it can be done. I’ve done it.” “It can’t be done.” I said, “Yes, it can be done” and he said, “It won’t be done. They won’t do it.” I said, “Rob, I’ve done it for so many years.” I said, “Either you could do it or I’ll find somebody else to do it, but it can be done.”

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- A: Oh, it [CX 11-9] says “Rob, if this request causes an issue, I’ll replace you in the training center. The only difference between 135 and 91 rides are minimums for standards. Quit being such a drama queen.” (TR 155)

Mr. Koury reviewed CX 11-9, an email chain from October 8, 2013.

- Q: Aren’t you threatening [the Complainant’s] job at that point?
- A: Well, basically stating, you know, I said, “Rob, if this request is causing an issue, I’ll replace you in the training center.” So, it’s not, I mean, again as I explained earlier, when you’re in these cockpits together and there’s conversations going on with each other that probably not real proper in some of the things you talk about. So, some of these things you take with a grain of salt because that was back in October and I write him a letter of disappointment in December. So, it goes back. Somebody evidently explained it because we followed the procedures the [Complainant] was going to do anyway. (TR 166-167)

Mr. Koury testified:

[M]e and [Complainant] have always had discussions of some one kind or another and I mean, when you're in a cockpit together for hours and hours, conversations, you talk about different things and you may tell the other one, "Shut up so and so" or back and forth. I mean, it's just you do that because you're in the close quarters. As far as doing consequences or anything, I had no interest whatsoever because we had a good team going and we were moving forward. (TR 158)

Mr. Koury testified that the training he wanted done was not illegal. He stated that he did not have further discussions with the Complainant about the training, and that he did not take any action against the Complainant because of the disagreement. (TR 157) Mr. Koury testified that he had no interest in flying unsafe airplanes and he never threatened to take action against the Complainant over the King Air aircraft. (TR 158)

Mr. Koury testified that he did not interact frequently with the Complainant. He stated, "[s]ometimes we may talk once a week, once every two or three weeks." (TR 130)

Q: Was it your expectation that Mr. Gault was in charge of maintenance and flight safety issues?

A: No. He was --- that was not part of his position. His position was compliance on the manuals. (TR 130)

Mr. Koury testified the Complainant resigned from Koury Aviation in December 2013.

Q: Were you --- what was your reaction to him telling you that he was going to resign?

A: I was surprised. I really was. He mentioned it to me in the office. I didn't know what to say and so I didn't say anything and the more I thought about it, the more upset I became because he's leaving us.

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Q: Were you pleased that he was resigning?

A: No.

Q: Was it ever your goal to force Mr. Gault to resign?

A: Absolutely not. We had too far to go. (TR 131-132)

Mr. Koury testified that he wanted to expand the business and wanted the Complainant to be a part of the process.

Q: Did you ask him to resign?

A: No, I did not ask him to resign.

- Q: At any point, did you demand that he resign?  
A: No, I did not demand he resign.  
Q: At any point, did you demote Mr. Gault for his time at Koury?  
A: No. As a matter of fact if I'm not mistaken in July, we gave him a raise and sat down and was happy with the job he was doing and increased his salary. (TR 133)

Mr. Koury testified that he wrote an email response to the Complainant's resignation email. (TR 134, CX 4-2) Mr. Koury stated he was disappointed the Complainant was resigning. "[W]e had just gotten certificate, I think, maybe eight months we had been working on the international and so we were moving forward." (TR 134) Mr. Koury testified that he was upset when he wrote the email. He wrote that the Complainant was a "coward." (TR 134)

Mr. Koury testified that the last time he spoke with the Complainant was the day the Complainant resigned, December 3, 2014. He stated the Director of Operations position was filled by someone else after the Complainant resigned.

Mr. Koury testified:

[T]he King Air is an older airplane. It had some issues. In a conversation with [Mr. Crowder], what he couldn't work on or fix, we did send it to Atlantic Arrow across the field two or three times to have them to work on the airplane. Like mentioned before, the airplane was older, it was in bad shape, but before the FAA would approve this airplane to be on your certificate, they have to go through the books, manuals, it has to be signed off, they have to take test flight in it, everything has to work properly on the 299 test flight before the FAA will accept airplane and put it on your certificate. (TR 136-137)

Mr. Koury testified that the FAA accompanied the King Air pilots on a test flight of the aircraft. "They had one minor squawk. I told [Mr. Crowder] to fix it and signed it on and approved it to be on the certificate." Mr. Koury stated the King Air did end up on Koury Aviation's certificate. (TR 137)

Mr. Koury testified that he had seen the email Mr. Crowder, the Director of Maintenance, sent to him about the King Air. (TR 138, CX 11-5) "He had some squawks on the airplane.... I tried to find another pilot who was qualified to fly the airplane on a test flight." (TR 138) Mr. Koury stated that he went on a test flight to see the King Air's issues. "We took off, we flew it, we flew the autopilot, made some instrument approaches and [it] was overcast weather so it was bad weather that day, but yes we still had a good flight." Mr. Koury reviewed CX 11-6 and stated the date of the test flight was December 3, 2014. (TR 139, CX 11-6)

Mr. Koury testified that Mr. Ernst flew the King Air as pilot in command and Mr. Koury was second in command on the December 3rd test flight.

- Q: What assessment, if any, did you make in your mind about the King Air after that flight?
- A: When we got in the airplane, one of the first things [Mr. Ernst] noticed on the auto pilot, the turn indicator was in the incorrect position. So, he placed that in the correct position and the normal takeoff, normal departure. We did an instrument approach in Burlington, North Carolina, GPS approach and came back to Greensboro and everything seemed normal which I was aware of. I know when he put the flaps down, the airplane gained about 100, 200 feet, but with an airplane with flaps that size that is a normal situation. That airplane will gain altitude. [Ms. Crowder] at that time said, "See, it's not holding altitude." Gary said, "Wait a minute" and we just sat for a minute. It took its [raise] from the flaps being dropped, then it came back to normal altitude. (TR 140-141)

Mr. Koury testified that he could not recall if his meeting with the Complainant, when Complainant resigned, occurred before or after the test flight. (TR 143)

- Q: Was there another test flight or any other flight for the King Air with anybody associated with Koury Aviation after your December 3<sup>rd</sup> flight?
- A: Yeah, they had a charter revenue flight in two days and I told [Mr. Crowder] --- me and [Mr. Crowder] spoke and I said, "Let's make sure the airplane is safe. Let [Mr. Rhodes] and [Ms. Crowder] go out and do a test flight and make sure everything is in order." (TR 144-145)

Mr. Koury testified that Koury Aviation did not use the King Air for any revenue flights after the December 3<sup>rd</sup> test flight.

- Q: Did there come a time where someone at Koury made the decision to take the King Air [out] of the certificate?
- A: I mean, it went through with discussion. [Mr. Crowder] said, "[Mr. Koury], you had this engine failure on taxi. I think it needs to come off." I said, "Okay, [Mr. Crowder], take it off." I mean, [Mr. Crowder] is in charge of the safety of these airplanes. He's in charge of whether these airplanes are going to be flying or they're going to end up balled up on the sidewalk. (TR 145-146)

Mr. Koury identified CX 11-8 as a December 10, 2013, email he sent asking Matt Schiebel, David Crowder, Gary Ernst, and Teri Crowder affiliated with the Koury Aviation certificate, for their opinions of the King Air aircraft. (TR 146) "If the majority says, 'It's got to go,' it's got to go off certificate. We will not push the issue." (TR 147)

Q: Who at Koury Aviation ultimately had the final say on whether or not the King Air was going to make a flight?

A: David Crowder. He is the one and I guess there's different. If it's a maintenance issue, it would be David Crowder. If it's a compliance paperwork issue, it'll be [the Complainant] or it would have been the chief pilot.

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Q: Did [Complainant] tell you at any point that there was a paperwork issue with the King Air?

A: Not that I can recall.

Q: When Mr. Crowder told you that the King Air needed to come off the certificate, did you take any action against him?

A: I don't take action. I just tell them to take it off. [Mr. Crowder] is the one that puts it on. [Mr. Crowder] is the one that takes it off. Him and [the Complainant], they put it on, they take it off.

Q: Was Mr. Crowder demoted or have his pay docked or anything when he ---

A: No, by no means whatsoever. I have to follow their recommendations. They're the one dealing with the FAA, not me. I can tell them what I wish and what I'd like to see done, but the ultimate decision is up to these people.

(TR 147-148)

Mr. Koury testified that he paid the Complainant 50 percent of the rate agreed to on the Complainant's December 26, 2013, contract flight.

I recall the flight and they had a mechanical, they had to call another airplane and Chastity [a scheduler for Koury Aviation], she called and said, "What do we pay Rob" and I said, "We've never done this before." I said, "I don't know. Pay him what's fair" was my exact words to her. She said, "Well, Caus (ph) Aviation, when they have that issue, they pay 50 percent of the rate" and I said, "Well, then pay him 50 percent." (TR 158)

Respondent Koury testified that there was a Koury policy for payment when a flight was not completed but he did not memorize the handbook.

Q: Just to help kind of clarify my notes, Mr. Koury. When we were talking about the contract pilot work that Mr. Gault did on December 26, 2013, you were asked about how the decision was made to pay him and I think you had testified that you were searching around to find out what was fair in the industry. Is that correct?

A: Correct.

- Q: We heard testimony earlier today that there was actually a Koury policy that if you didn't complete a flight to its destination, you only received half your pay. Are you aware of such a policy?
- A: I understand that there is a policy in the handbook, but I do not memorize my handbook on what is written in there.
- Q: So, if you had a policy and handbook, why did you feel the need to do this industry investigation about what was fair?
- A: I just asked Chastity what was a fair price to pay him. Whether she wanted to pay him full price or half-price or whatever, he was out of work. I mean, that was a question I related it to her. I didn't say, "pay him per policy." I said, "what's a fair price." (TR 161-162)

No written exhibit was submitted at the hearing providing the Handbook and the Koury policy regarding a flight that was not completed and the pay for the pilot. (TR 161-162)

Respondent Koury testified that the Copilot, Mr. Bidom, was paid his full rate of \$200 for the flight (TR 159).<sup>8</sup>

Mr. Koury testified that he did not force the Complainant to resign. He stated the FAA inspected Koury Aviation three times between December 2013 and January 2014. The investigations occurred after the Complainant's resignation. (TR 148-149) He testified:

The only issues that the FAA found was paperwork issues, logging of pilots' names, not logging takeoffs, only minor paper, adding numbers up which goes back to the chief pilot and Director of Operations who's supposed to flow up with logging this data in. (TR 149)

Mr. Koury identified RX 12 as an April 4, 2014, letter from the FAA. He stated: "It was minor paper issues that the Director of Operations or the chief pilot did not put entries in properly and overlooked some pertinent information, but not a safety issue." (TR 149-150) Mr. Koury testified that he did not take any action against the Complainant for any safety concerns expressed by the Complainant. (TR 150)

### **Testimony of David Crowder**

Mr. Crowder testified that he served as the Director of Maintenance at Koury Aviation for approximately five years. His last day with Koury Aviation was August 1, 2014. (TR 25) Mr. Crowder testified that he had concerns about the King Air.

The airplane was older. It had 16,000 hours on it and I have to do a thing called conforming with the FAA. There were a lot of things I had to go through to get that done. It was very time consuming. It had a lot of issues, the airplane, just because it was older. It had a lot of hours on it. So, it took a little longer to get it

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<sup>8</sup> Complainant also testified Mr. Bidom was paid his full rate of \$200. (TR 72)

on certificate than normally it would have taken us on an airplane that probably was a little newer and in better shape. (TR 26)

Mr. Crowder testified that he worked with the Complainant and Mr. Koury to resolve some the issues with the King Air.

Q: How would you characterize Mr. Koury's concerns about the maintenance issues you brought to his attention on that aircraft?

A: A lot of his --- well, me being Director of Maintenance, he leaves a lot of that up to me in my expertise. So, I would keep him on the loop of what we'd be doing, what I was doing, what we were with trying to get some of the issues fixed. A lot of them were recurring and it was frustrating because it was --- that becomes a part of that when you're in a position like mine.

Q: Did Mr. Koury authorize all the repairs you were requesting for that aircraft?

A: Yes and they had --- yes, yes. (TR 27)

Mr. Crowder testified that after a test flight of the King Air, the pilots, Ms. Crowder and Mr. Rhodes, thought the plane flew fairly well. Mr. Crowder, however, sent Mr. Koury an email informing him there were issues with the King Air aircraft. (TR 28, RX 13)

They didn't see that it had any issues. Well, I had --- so I talked to [Mr. Koury] after the fact that same day and I said, 'I know it has an issue with the engine' and he said, 'Then fly the thing tomorrow and if they're not comfortable flying it, then we'll take it off certificate' and I said, 'Good, that's what I want to do.' So, the next day, we flew it. We didn't fly it. We taxied out. We got short of the taxi way and the number 2 engine shut down.... So, that's all I need to see. So, I called [Mr. Koury] and I said, 'We're done' and when I say me saying that to the owner of my company, my boss, that meant that I have a certain responsibility to tell him if something isn't right and I was adamant that this is not right and we need to take it off. So, we immediately took it off. I had [the Complainant] immediately take the airplane off. (TR 29)

Mr. Crowder testified that the King Air never came back on certificate while he worked for Koury Aviation. He stated his job was not in jeopardy by expressing his concerns about the King Air to Mr. Koury. (TR 30)

Mr. Crowder testified that he wrote an email on November 27, 2013, to Mr. Koury. He recommended that Mr. Koury and Mr. Crowder fly in the King Air with the pilots, Ms. Crowder and Mr. Rhodes, so the pilots could demonstrate the aircraft's pending issues. (TR 34, RX 1) Mr. Crowder stated he was aware that Mr. Koury and Mr. Ernst flew the King Air on December 3,

2013, and determined the issues had been addressed. Mr. Crowder testified that the next day, December 4, 2013, Ms. Crowder, Mr. Rhodes, and Mr. Crowder attempted to fly the plane but never got off the ground.

Q: Okay and when you said that after that happened, you called Mr. Koury and said, "This plane is done. It's not going to go up"?

A: To some effect, yes. I mean, basically that's what I told him, yes.

Q: Do you remember what his response to that at all?

A: "Okay, then just take it off" and so I got with [the Complainant] immediate --- I think [the Complainant] was on a trip. As soon as he got back, I took it off immediately. (TR 35)

### **Testimony of Teri Crowder**

Ms. Crowder testified at the hearing that she worked as a pilot for Koury Aviation and worked with the Complainant for approximately six months. Ms. Crowder no longer works for Koury Aviation. "I was let go in April of this year [2014]." (TR 38)

Ms. Crowder testified that she is familiar with the King Air and some of its issues that were discussed by others at the hearing. "[I]t was constantly in maintenance.... [I]t wasn't flown very much because it was usually in maintenance." (TR 39)

Ms. Crowder identified CX 11-6 as the log sheet for a test flight on December 3, 2013.

Q: Were there any issues that day with the aircraft?

A: Yes. Well, I thought there were.

Q: Which ones did you think showed up that day?

A: Well, once again, the auto pilot, although it was not tested correctly on the ground, there was the generators were not parallel....

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Q: During that 12-3-13 date, did Mr. Koury express any thoughts to you about those issues with the plane?

A: The only thing I remember is he thought it went well. (TR 39-40)

Ms. Crowder identified CX 11-7 as a flight log from December 4, 2013.

Q: What do you recall happening at that time?

A: That's the flight that [Mr. Rhodes] and I were told to take the airplane back out to see what we thought, if the airplane

was okay and [Mr. Crowder], Director of Maintenance, was riding in the back as well and that's the flight that started it up there on the ramp, we were taxing out. We were doing some run-ups on the airplane and the right engine shut down on its own.

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- Q: Okay. Prior to doing this maintenance flight on December 4<sup>th</sup>, had Mr. Koury expressed any opinions to you about whether the plane was ready for revenue flight or not?
- A: Not to me personally.
- Q: Had you heard him express that to someone else?
- A: I mean, I can't really say. It would be just hearsay. I know he was anxious to get it on certificate and get it on a revenue flight.
- Q: Okay. Do you know if it had ever been placed on any revenue flights prior to December 2013?
- A: I think so. I can't remember the exact date.
- Q: Do you recall if it was on any revenue flights after December 4, 2013?
- A: I don't believe so.
- Q: Did you express your findings on the issues with the aircraft to [the Complainant]?
- A: Yes.
- Q: And what was his response?
- A: His response was that he knew it should not be on the certificate and that it had issues. (TR 41-42)

Ms. Crowder testified that the Complainant told her he resigned because he felt there were safety issues that he did not want to be a part of anymore. (TR 42) She testified that she never discussed the King Air with Mr. Koury, and she was not aware of the King Air being used for any revenue flights after December 3, 2013. (TR 44)

Ms. Crowder identified CX 11-8 as a December 10, 2013 email from Mr. Koury to her and several others. "Well, the way it reads to me is he still wants the airplane to be put on the certificate." (TR 45)

- Q: Why would he be asking Mr. Scheibel and Mr. Crowder and you and Mr. Ernst to evaluate the possibilities of putting the King Air on the certificate while he could have just done it himself?
- A: Well, I mean, he's not qualified to do it himself.
- Q: What do you mean by that?

A: You have to have a Director of Maintenance and a chief pilot. There's proper FAA paperwork to be done and those are the people that are qualified to do that.

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Q: If David Crowder thought, is telling Mr. Koury, "Don't put it on certificate," is it Mr. Crowder's decision to make as the Director of Maintenance and not Mr. Koury's?

A: Yes. (TR 46-47)

### **Testimony of Chad Rhodes**

Mr. Rhodes testified at the hearing that he is a licensed pilot who met the Complainant when the Complainant was the Director of Operations for Koury Aviation. (TR 18) He stated that he was able to observe the Complainant's performance. Mr. Rhodes testified that he saw "[the Complainant's] frustration sometimes when we were trying to do 299 check rides and they were scheduled and the plane was down for maintenance. We'd have to reschedule a check ride." (TR 18-19) He stated the "check ride" was a pilot proficiency check for the King Air aircraft.

Q: Ever take that aircraft on a revenue flight?

A: One flight.

Q: What do you recall about that flight?

A: The passengers got on. We done our pre-flight and pre-flight briefing. [Ms. Crowder] started the right engine first and before she got to the left engine, the right engine shut down.

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Q: Did that flight get rescheduled or did it continue later on that day?

A: We continued on that day.

Q: With the same aircraft?

A: Same aircraft.

Q: Was that a wise decision given that you just had an uncommanded engine failure?

A: Well, it was just a shutdown. It wasn't engine failure.

Q: Okay.

A: There could be multiple causes. (TR 21-22)

Mr. Rhodes testified that it is not unusual for a flight to be cancelled because of maintenance issues. (TR 23)

### **Testimony of Frances Bassett**

Ms. Bassett testified at the hearing that she was an assistant manager / charter sales executive with Koury Aviation. She worked there for more than four years. She knew the Complainant

from his time at Koury Aviation. Ms. Bassett stated she was not involved with payroll or accounting but sold charters.

### **Text Message Screen Shot (CX 3)**

September 9, 2013 - Complainant wrote to Mr. Koury and Mr. Schiebel, "You should both be aware that flying both planes under part 91 on the same day is illegal...." (CX 3-2)

September 9, 2013- Mr. Koury wrote "[w]ould you quite (sic) being a bitch, if someone wants to by a aircraft, and they want to fly it then it will happen. Study ur books."

### **Email Chain Regarding Pilot Training (CX 11-9)**

October 8, 2013

10:22 A.M. From the Complainant to Mr. Koury. "I am not sure how you want them trained... do you want them on the 135 training program, or do you want to send them through under 61.58? If it is on the 135 program, we will have to set up and train them in the basic indoc before they go to Wichita."

10:39 A.M. From Mr. Koury to the Complainant. "Keith 135, Todd 91."

10:57 A.M. From Complainant to Mr. Koury. "I will work on it. I have to check to be sure, but it will likely create a problem for their check rides if they are going through under different parts. The training part won't be a problem, but 61.58 and 135 are like oil and water when it comes to the check rides. I will let you know for sure."

11:06 A.M. From Mr. Koury to the Complainant. "[I]f this is causing an issue I will replace u and the training center. The only difference between 135 and 91 check rides are min. For standards quite (sic) being such a drama queen."

### **Email From David Crowder to Brad Koury (RX 1)**

November 27, 2013 – Mr. Crowder wrote:

I am not comfortable with putting this aircraft in service until these issues, that have persistently shown up, have been addressed and deemed fixed. I would recommend that you and I fly with Terri and Chad, not someone else, so they can effectively show us the pending issues.... I am directly responsible for the safety and well being of all our company aircraft and the people that fly on them....

### **Email Chain Between Complainant and Mr. Koury (CX 4)**

December 3, 2013 - Complainant wrote, "I am unable to continue moving forward as Koury Aviation's Director of Operations and I am tendering two weeks' notice of resignation.... I am still willing to serve as a contract pilot for Koury...." (CX 4-4)

December 3, 2013 - Mr. Koury wrote:

I am very disappointed.... I hired you with a vision of forming a team to grow.... So if you have made your final decision, I will not wish you good luck, [c]owards need to be wished happy hunting on your hiding place. (CX 4-3)

December 4, 2013 - the Complainant wrote:

[Y]our e-mail only serves to re-enforce my long-standing fear that you are totally unaware of the conundrum I face daily in carrying out my duties as your DO. As your employee and DO.

I am not only responsible to you, the owner, to assist in achieving your business goals, but I am also responsible to the FAA to assure regulatory compliance and the overall safety of the operation.... It is the confluence of those business goals and FAA legality/safety where the two of us have come into conflict, and my professional counsel has been disregarded....

When your Chief Pilot, Director of Ops, Director of Maintenance, King Air Captain, King Air F-O, Jerry Snyder, the FAA and the only paying passengers to set foot on [the King Air] told you that the aircraft was not safe, you "laughed" at us all and chose to ignore each and every member of the Koury Aviation team.... Ultimately, you spit in the face of all your employees.... by flying the aircraft on Tuesday with Gary.... You were very lucky that that engine did not quit while you were all in the plane.... This is where your opinions of "safety" are fundamentally opposing in nature. Although this was not the first incident, I ultimately made the decision that it would indeed be my last as your DO. [T]otal responsibility with only limited authority is untenable in any situation. The two must be equal in breadth and depth. So, when choices were made that put my DO certification and pilot's license in jeopardy, I had to take action to protect them.... I made the decision to resign as Koury Aviation's DO in order to preserve those hard-earned, personal assets as well as hopefully lead people away from making pressure induced decisions to fly aircraft that are fundamentally unsafe.

Believe and respect that my decision to resign was as difficult for me to make as all the daily decisions you make as the owner of the business.... (CX 4-1 – 4-2)

**Email From Mr. Koury Regarding The King Air (CX 11-8)**

December 10, 2013 – Mr. Koury wrote:

One more time I ask everyone to evaluate the possibilities of allowing the King Air to continue as an aircraft for Koury Aviation Charter.... I know the aircraft has thousands of hours, and was built in the 70's, and you think it is not safe.... Everyone take time to consider the King Air, and respond to this email.

**Text Message Regarding Contract Pilot Fees (CX 5)**

December 26, 2013 – “\$600 confirmed daily rate” sent at 9:21 a.m. for a 4 p.m. departure.

**Email Regarding Termination of Contract-Pilot Services (CX 7)**

January 11, 2014 – Complainant wrote to Koury Aviation informing “Fran/Chas” that he was no longer available to fly contract flights for Koury Aviation. The Complainant cited the “decision to not pay me for the pilot services I performed on December 26<sup>th</sup>.... There could not be a more egregious breach of contract and safety protocol.” (CX 7-2)

**Contract Pilot Paycheck (CX 6)**

January 14, 2014- \$300 check to Complainant from Koury Aviation for December 26, 2013 contract flight.

**Complaint to Federal Aviation Administration (FAA) (CX 11)**

January 13, 2014 or January 14, 2014 - Complainant wrote to Inspector Roy Henry, Greensboro, North Carolina FAA, regarding Koury Aviation and safety. (TR 78-79) Complainant advised “I verbally informed you when I resigned that Brad was trying to coerce his employees to perform unsafe and illegal actions... I [did] not provide any supporting evidence of this claim. I am now going to do so.” (CX 11-1)

**Complaint to U.S. Department of Labor (CX 8)**

January 15, 2014 – Complainant wrote to OSHA stating Koury Aviation took action against him for his “refusal to comply with unsafe and illegal directives....” Complainant alleged he was blacklisted, threatened with termination, denied pay, intimidated, ridiculed, slandered, and forced to resign.

**Authorization for Release of Records Under PRIA (RX 2)**

November 2, 2013 – Signed by the Complainant authorizing Koury Aviation to release drug and alcohol testing records to Chautauqua Airlines.

**Koury Aviation Maintenance Records (RX 13)**

Discrepancy	Maintenance Clearing Action
11-11-13 – Teri Crowder At cruise with prop sync on if you move power levers – RT prop will move with it and surge	12-3-13 – David Crowder Accomplished ground run IAW BE90 MM <sup>9</sup> , Could not duplicate issue on the ground. No Issue Found. OK for service.
11-11-13 – Teri Crowder On T.O. full power A/C wants to runoff runway to the left. Have to add brake and differential power to stay straight.	12-3-13 – David Crowder Adjusted steering link IAW BE 90 MM
11-11-13 – Teri Crowder Autopilot will not hold altitude. Will not always track GPS course. Autopilot intermittent buttons will not always engage. Does not test on ground. Will not hold heading (flies left).	12-2-13 – David Crowder Removed control head and checked all connections, button sticking on controller cleaned with contact cleaner and works ok.
Teri Crowder Left generator below operating limits and not parallel.	12-2-13 – David Crowder Parallel left and right generators IAW BE90 MM
Teri Crowder #2 copilot HSI [horizontal situation indicator] intermittent	12-3-13 – David Crowder Removed #2 HIS and found cannon plug dirty. Cleaned pig tail and reinstated. Provide feedback after next flight.

**CONCLUSIONS OF LAW**

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121. Subsection (a) prohibits discrimination against airline employees 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

<sup>9</sup> IAW = in agreement with; BE 90 = Beechcraft King Air aircraft; MM = middle marker

violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

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

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

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

49 U.S.C. § 42121(a); *see also* 29 C.F.R. § 1979.102(b)(1)-(4).

An employee's safety violation complaint may be oral or in writing, but must be specific in relation to a given practice, condition, directive, or event. Peck v. Safe Air International Inc., ARB Case No. 02-028, ALJ Case No. 2001-AIR-00003 (ARB January 30, 2004). The Complainant must have a reasonable belief that his complaint is valid. *Id.*

Once a case reaches the adjudicatory stage a Complainant is required to prove the four *prima facie* elements by a preponderance of the evidence. Fordham v. Fannie Mae, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014); Brune v. Horizon Air Indus., Inc., ARB Case No. 04-037, ALJ Case No. 2002-AIR-00008 (ARB Jan. 31, 2006); Dysert v. Sec'y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). The Complainant must prove (i) he engaged in a protected activity or conduct; (ii) the Respondent knew or suspected, actually or constructively, that the Complainant engaged in protected activity; (iii) the Complainant suffered an unfavorable personnel action; and (iv) the protected activity was a contributing cause in the unfavorable action. *See Fordham*.

A determination that a violation has occurred may only be made if the Complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the Respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. § 1979.09(a).

#### Protected Activity

Complainant engaged in protected activity. On September 9, 2013, the Complainant's text message expressed concern regarding flights he considered to be inconsistent with exclusive use aircraft requirements (CX 3). On October 8, 2013, the Complainant's email raised objections to training pilots together under Part 91 and Part 135. Though a date was not given, the

Complainant testified he and David Crowder met with Mr. Koury to discuss mechanical issues with the King Air. The Complainant testified that Mr. Koury told him “[H]e would take care of getting the maintenance arranged and basically that was the end of it.” (TR 62). The evidence in the record shows the Complainant had a legitimate belief that safety regulations were being violated.

### Knowledge

The aforementioned occurrences involved direct communication between the Complainant and the Respondent. The Respondent had knowledge Complainant filed a complaint with the FAA. The Respondent had knowledge of the Complainant’s protected activity.

### Adverse Action

Complainant alleges that he was subjected to adverse action in the form of (1) constructive discharge from his position as Director of Operations, (2) reduced pay as a contract pilot, and (3) distribution of protected information to a prospective employer.

#### 1. *Constructive Discharge*

“[I]n order to demonstrate constructive discharge, a plaintiff must allege and prove two elements: (1) deliberateness of the employer's actions and (2) intolerability of the working conditions.” Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir.1995) (internal quotation marks omitted) citing Paroline v. Unisys Corp., *infra*. The court in Martin held that “to recover under a theory of constructive discharge, a plaintiff must show that his or her ‘*employer deliberately ma[de] an employee’s working conditions intolerable and thereby force[d] him to quit his job.*’” *Id.* at 1350, quoting Bristow v. Daily Press, Inc., *supra* (emphasis in original Martin). With respect to an employer's deliberateness, the Fourth Circuit requires the plaintiff prove that “the actions complained of were intended by the employer as an effort to force the employee to quit.” *Id.* (citing Paroline v. Unisys Corp., 879 F.2d 100, 114 (4th Cir.1989) (Wilkinson, J., dissenting), vacated in part, 900 F.2d 27 (1990) (en banc ) (adopting panel dissenting opinion)). Evidence of this intent can be proven by inference, and it may be shown by evidence that the employee's resignation was the “reasonably foreseeable consequence” of the employer's conduct. *Id.* at 1354, 1356. The intolerability of working conditions “is assessed by the objective standard of whether a ‘reasonable person’ in the employee's position would have felt compelled to resign.” Bristow v. Daily 770 F.2d 1251, 1255 (4th Cir.1985). “[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge.... An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress.” *Id.*

The evidence in the record does not support finding the working conditions were so intolerable that a reasonable person in the Complainant’s position would feel compelled to resign. The evidence does not show the Respondent’s actions were intended to force the Complainant to quit his position. The Complainant presented three occurrences that he alleges forced him to resign: exclusive use aircraft, pilot training, and the King Air aircraft. While the Respondent disagreed

with the Complainant's input and called him derogatory names, the evidence does not show the Respondent's actions created an abusive working environment so intolerable that Complainant's resignation qualified as a fitting response.

a. Exclusive Use Aircraft

On September 8, 2013, the Complainant sent a text message to Mr. Koury, "You should both be aware that flying both planes under Part 91 on the same day is illegal...." (CX 3-2) The Respondent did not agree with the Complainant's assessment of the regulation. After back-and-forth text messages, Mr. Koury wrote, "Would you quite (sic) being a bitch, if someone wants to by a aircraft, and they want to fly it then it will happen. Study ur books." Mr. Koury disregarded the Complainant's input and called him a derogatory term. Following this exchange there was no further discussion on the matter between Mr. Koury and the Complainant. Although Mr. Koury's behavior in the exchange was demeaning, it does not show intent to compel the Complainant to resign. Rather, Mr. Koury told the Complainant to drop the matter and focus on studying. At the time of the dispute, the Complainant was in training paid for by the Respondent. Based on the evidence and the testimony, Mr. Koury's intent in the exchange was not to create an intolerable work environment. Further, a reasonable person in the Complainant's position would find Mr. Koury's behavior objectionable but would not be forced to resign. Mr. Koury testified that abrasive language between pilots was typical. (*See* TR 158) While whistleblower protection statutes do not require the Complainant to be correct when he alleges safety violations, the FAA investigations (*see* CX 9, CX 13) did not find any violation of the exclusive use aircraft requirement.

b. Pilot Training

On October 8, 2013, the Complainant and Mr. Koury disagreed about pilot training requirements. (CX 11-9 – 11-15) The Complainant emailed Mr. Koury, "The training part won't be a problem, but 61.58 and 135 are like oil and water when it comes to the check rides. I will let you know for sure." (CX 11-9) Mr. Koury responded, "[I]f this request [is] causing an issue I will replace u and the training center. The only difference between 135 and 91 check rides are min. For standards quite (sic) being such a drama queen." (CX 11-9) Mr. Koury's response to the Complainant's concerns do not demonstrate intent to force the Complainant to resign. Mr. Koury testified that the training he wanted the Complainant to schedule was not illegal. "I said, 'You can do it' and that was it." (TR 156). The evidence shows Mr. Koury's intent in threatening to replace the Complainant was to get the Complainant to schedule the pilot training not to encourage the Complainant to resign. Following their exchange, the Complainant communicated with a flight school to coordinate enrolling pilots for training under the Respondent's training manual and FAA requirements. (CX 11-14) Mr. Koury and the Complainant disagreed on the application of the regulations. The FAA investigation did not find any safety violations regarding this issue. Though Mr. Koury's approach lacks diplomacy, Mr. Koury's testimony supports he intended to persuade the Complainant to schedule pilot training and not to resign. This disagreement, when considered with the dispute one month earlier, falls short of creating a work environment so hostile that a reasonable person would feel he had no choice but to resign.

c. The King Air

The Complainant alleges he was constructively discharged by the Respondent's insistence on using the King Air, despite the Complainant's safety concerns. The evidence does not support finding the Complainant's working conditions were intentionally made so intolerable that a reasonable person in the Complainant's position would resign. Rather, the evidence shows the Respondent was reluctant to ground the King Air until pursuing all options to remedy the aircraft issues.

The Complainant testified that he and Mr. Crowder expressed concerns about the King Air to Mr. Koury in November 2013. The Complainant stated that Mr. Koury told him "[h]e would take care of getting the maintenance arranged and basically that was the end of it." (TR 62) There is no evidence in the record the Complainant and Mr. Koury discussed the King Air again until the Complainant resigned on December 3, 2013. In the interim, Mr. Koury and Mr. Crowder were attempting to resolve the plane's issues.

On November 27, 2013, Mr. Crowder wrote Mr. Koury regarding the King Air's pending issues. Mr. Crowder wrote:

I do not feel comfortable with signing these issues off until they have been addressed. I think it is in the best interest of our company, to have them addressed at Atlantic aero if that's ok with you. I am not comfortable with putting this aircraft in service until these issues, that have persistently shown up, have been addressed and deemed fixed. I would recommend that you and I fly the plane with [pilots Ms. Crowder and Mr. Rhodes], not someone else, so they can effectively show us the pending issues. I can get a maint test flight approved.... (CX 11-5)

Mr. Crowder testified that Mr. Koury authorized all of his requests for King Air repairs. (TR 27) The King Air maintenance records showed Mr. Crowder took corrective action on several issues on December 2<sup>nd</sup> and 3<sup>rd</sup>, 2013. (RX 13) The Complainant testified that Mr. Ernst and Mr. Koury test flew the King Air on December 3, 2013, with Mr. Crowder, Ms. Crowder, and Mr. Rhodes on board. The Complainant alleges this action is what forced him to resign.

Complainant testified further regarding his resignation as Director of Operations.

Q: Okay. I want to make sure that I understand the reason that you're saying that you resigned from Koury, okay? You agree with me that you resigned?

A: I was forced to, yes.

Q: I understand your characterization, but you resigned?

A: Yes.

Q: And the reason you resigned is what?

A: To prevent the situation Mr. Koury was forcing with the King Air from going forward.

Q: So, you resigned to prevent a King Air from proceeding forward?

A: That's correct, on a revenue flight. (TR 89)

The Complainant may sincerely believe he had to resign to prevent a catastrophe, but that is not sufficient proof of constructive discharge. An objective evaluation of the circumstances shows the Respondent was working on addressing the safety issues and relied on the Director of Maintenance to determine whether the King Air was safe. The Complainant testified that he never flew the King Air. He testified that Mr. Crowder, as the Director of Maintenance, had the authority to determine the airworthiness of Koury Aviation aircraft. (TR 91-92)

The evidence does not show, as the Complainant must prove, that the Respondent was determined to fly the King Air in order to force the Complainant to resign. Mr. Crowder testified about the December 3, 2013, test flight that preceded the Complainant's resignation. Mr. Crowder stated that after the test flight, the King Air pilots, Ms. Crowder and Mr. Rhodes, thought the plane "flew pretty good." (TR 29)

They didn't see that it had any issues. Well, I had --- so I talked to [Mr. Koury] after the fact that same day and I said, 'I know it has an issue with the engine' and he said, 'Then fly the thing tomorrow and if they're not comfortable flying it, then we'll take it off certificate' and I said, 'Good, that's what I want to do.' So, the next day, we flew it. We didn't fly it. We taxied out. We got short of the taxi way and the number 2 engine shut down.... So, that's all I need to see. So, I called [Mr. Koury] and I said, 'We're done' and when I say me saying that to the owner of my company, my boss, that meant that I have a certain responsibility to tell him if something isn't right and I was adamant that this is not right and we need to take it off. So, we immediately took it off. I had [the Complainant] immediately take the airplane off. (TR 29)

An objective evaluation of the evidence shows the Complainant had other options available to him rather than resigning. The Complainant could have expressed his concerns to Mr. Crowder or Ms. Crowder, both of whom, as Director of Maintenance and Pilot-in-Command, had the authority to ground the plane. Through his resignation, the Complainant effectively preempted any possible adverse action related to his safety concerns. The evidence and testimony in the record does not show Mr. Koury had any intent to compel the Complainant's resignation through his desire to use the King Air aircraft.

The Complainant testified about the day he resigned in a closed-door meeting with Mr. Koury.

Q: And you told him you were resigning because he wanted to fly the King Air plane? Is that right?

A: That's correct.

Q: And I believe you characterized his response as muted, correct?

A: Yes.

Q: He wasn't excited that you were resigning, was he, as best you observed?  
A: No.  
Q: Okay. In fact, he wrote you later that day [CX 4-3] and said he was "disappointed" that you had resigned. Do you remember that?  
A: That's not how I would characterize his response, but I believe that word is in there. I'd have to look at it.  
Q: Any reason to believe he wasn't legitimately disappointed that you resigned?  
A: I think he was angry.  
Q: He was angry that you resigned?  
A: Absolutely.  
Q: He didn't want you to resign, did he?  
A: Oh, no, I think he did. He threatened to fire me the month before.  
Q: Well, if he wanted you to resign, why would he be angry that you resigned?  
A: Because I put him in a pickle. He wanted to fly the King Air.  
Q: He didn't need you to fly the King Air, did he? It wasn't your decision?  
A: No, but when the Director of Ops resigns, it causes notice.  
Q: Do you think Mr. Koury deliberately chose to have the King Air fly so that you would quit?  
A: I can't tell you what was going on in Mr. Koury's mind.  
(TR 95-97)

Mr. Koury testified that he did not want the Complainant to resign.

Q: Were you --- what was your reaction to him telling you that he was going to resign?  
A: I was surprised. I really was. He mentioned it to me in the office. I didn't know what to say and so I didn't say anything and the more I thought about it, the more upset I became because he's leaving us.  
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Q: Were you pleased that he was resigning?  
A: No.  
Q: Was it ever your goal to force Mr. Gault to resign?  
A: Absolutely not. We had too far to go. (TR 132)  
\* \* \*  
Q: Did you ask him to resign?  
A: No, I did not ask him to resign. (TR 133)

The Complainant cited three incidents that prompted him to resign. The Respondent and the Complainant disagreed about the regulations regarding exclusive use aircraft on September 9, 2013 (CX 3-2), and pilot training regulations on October 8, 2013 (CX 11-9). These two instances were a month apart. In each the Complainant was called a derogatory name. In the second instance, the Complainant was told to do what the Respondent asked or, "I will replace u and the training center." The Complainant complied and was not replaced. In the third instance, the Complainant and Mr. Crowder met with Mr. Koury in November 2013 to discuss the mechanical issues with the King Air. The Complainant stated that Mr. Koury told him, "[h]e would take care of getting the maintenance arranged and basically that was the end of it." (TR 62) On December 3, 2013, the Complainant resigned following the test flight of the King Air.

Based on the case law, these three instances did not amount to an intolerable work environment such that a reasonable person would feel compelled to resign constituting constructive discharge. The Respondent's decision to use the King Air, despite the Complainant's misgivings, did not amount to an adverse employment action such that a reasonable person would be compelled to resign. Mr. Koury testified that he talked with the Complainant "once a week, once every two or three weeks." (TR 127) The Respondent's management style may have been harsh, but the instances the Complainant cited as adverse employment actions did not meet the high standard for constructive discharge. Rather, the exclusive aircraft and pilot training disputes cited were demonstrative of the differing opinions and priorities of a company president and its Director of Operations. The evidence in the record shows the Complainant told the Respondent in late November 2013 that he did not believe the King Air was safe. The Respondent was in communication with the Director of Maintenance, Mr. Crowder, and King Air pilots in an effort to use the plane for revenue flights. The Complainant testified that he did not have the authority to determine whether the plane was safe. (TR 92) The fact that the Respondent did not include the Complainant in the efforts to have the King Air ready for revenue is not evidence of objectively unendurable working conditions resulting in constructive discharge. There is no evidence the Complainant discussed the King Air again with the Respondent until after his resignation.

Assuming arguendo the evidence in the record demonstrates the working conditions were such that a reasonable person would have no choice but to resign, in order to prevail in a whistleblower case, to prove constructive discharge the Complainant must also demonstrate the "the actions complained of were intended by the employer as an effort to force the employee to quit." Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir.1995).

The evidence in the record shows the Respondent's intent was to further his business interests. The Respondent imposed the same treatment to Koury Aviation's other employees. The Complainant wrote that the Respondent "chose to ignore each and every member of the Koury Aviation team." (CX 4-1)

Q: So, Mr. Koury didn't single you out about the King Air, he was laughing at everybody if what you're writing here is accurate?

A: Yeah, it's not like we all were together. He was systematically ignoring everyone. This wasn't a big group

thing where we got the FAA, the passengers. This is a separate, several different instances probably over a month's time or several months really where people were telling him, "This is not tenable. This is not a safe airplane. We can't do this."

Q: I understand and he ignored all of those people.

A: That's correct.

Q: He didn't single you out as the only person he ignored, did he? You were just one of several?

A: Yeah, I would agree with that. (TR 107)

"[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge.... An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress." Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir.1985).

The Complainant has not demonstrated by a preponderance of the evidence that a reasonable person in his position would find the working conditions so intolerable as to have no option but to resign. The evidence in the record does not show the Respondent deliberately intended his actions to compel the Complainant to resign, nor does it show the Respondent's actions were motivated by the Complainant's protected activity. Accordingly, the Complainant is not entitled to recovery under the AIR-21 whistleblower statute on the basis of constructive discharge.

## 2. *Reduced pay*

The Air 21 statute prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a). (Emphasis added) Specifically, 49 U.S.C. § 42121(a) states:

### **§42121. Protection of Employees Providing Air Safety Information**

(a) Discrimination Against Airline Employees.-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.

(b) Department of Labor Complaint Procedure.-

(2) Investigation; preliminary order.-

(B) Requirements.-

(i) Required showing by Complainant.-The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the Complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) Showing by employer.-Notwithstanding a finding by the Secretary that the Complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) Criteria for determination by secretary.-The Secretary may determine that a violation of subsection (a) has occurred only if the Complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) Prohibition.-Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

### Contributing Factor

Complainant alleges that he was discriminated against and retaliated against in violation of Air 21 when the Respondent first refused to pay the \$600 contracted rate for a December 26, 2013 flight, when Respondent then reduced the contracted rate pay by half, and when the copilot was paid his contracted rate in full. Complainant alleges this was due to his protected activity and filing earlier complaints with the FAA.

In regard to the interpretation of the “contributing factor” requirement in section 42121 (b) (2) (B) (i), in Taylor v. Express One International, 2001-AIR-2 (Feb. 2002), the administrative law judge adopted the definition in Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1):

The words “contributing factor”...mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing caselaw, which requires a whistleblower to prove that his protected activity was a “significant,”

“motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action.

Once the Complainant establishes his prima facie case, the burden shifts to the Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant’s protected behavior or conduct.

49 CFR §42121 (b) (2) (B) (ii)

If the Respondent meets its burden to produce legitimate, non-discriminatory, reasons for its employment decision, the inference of discrimination is rebutted, and the Complainant must then assume the burden of proving by a preponderance of the evidence that Respondent’s proffered reasons are “incredible and constitute a pretext for discrimination.” Taylor v. Express One International, 2001-AIR-2 (Feb. 2002), slip op. at 37, quoting Overall v. Tennessee Valley Authority, Case No. 1997-ERA-53, at 13 (ARB Apr. 2001).

In this case, the Complainant resigned from his position as Director of Operations in an email dated December 3, 2013, effective December 16, 2013. (Stipulation 3) However, he agreed to continue serving as a contract pilot for Respondent Koury Aviation. The Complainant agreed to pilot a flight on December 26, 2013 because the original pilot was sick, it was the Christmas holiday, and no other pilot was available. (CX 7-2). Respondent texted and contracted with the Complainant to pay him a “\$600 confirmed daily rate.” (CX 5-1). After there were mechanical problems with the aircraft, Complainant flew for 20 minutes to use up excess fuel, returned the aircraft to the airport, and worked a total of 8 hours, Respondent initially refused to pay the Complainant the contracted \$600 rate for the flight. Respondent then sent Complainant a check for half, \$300, for the same flight. Conversely, the copilot was paid his contract rate in full. (TR 72, 159)

Complainant testified regarding the December 26, 2013 flight. The Complainant testified that shortly after take-off, the landing gear malfunctioned, the flight could not continue on its destination to Florida, and he had to return. “We had too much fuel on a board to immediately land so we had to circle around Greensboro for about 20 minutes to get the aircraft within the landing weight limits, burn off the fuel... and made a safe landing.” (TR 72-73) Complainant testified that since it was after hours, he also coordinated on-field contract maintenance, completed required paperwork for the trip sheet, flight logs, discrepancy logs, cared for the passengers until their ground transportation arrived and went home. (TR 73) Complainant worked a total of 8 hours. (CX 7-2)

Complainant testified he was initially told he “wasn’t going to be paid [\$600] because he didn’t complete the trip.” He testified he was then told he would be paid half pay [\$300] because that was Koury policy.

Complainant testified he was not aware of any Koury Aviation policy regarding incomplete flights.

Q. Had you ever seen a Koury Aviation policy that said you didn't get full pay if a trip wasn't completed?

A. No, that would be completely contrary to safety. (TR 74)

Respondent Koury testified that there was a policy in the employee handbook regarding pay for an incomplete flight. (Emphasis added) Even though he was President and owner of Koury Aviation since 1991, he testified that he did not know what it was because he did not "memorize my handbook on what is written in there." (TR 126), 161-162) Respondent did not submit the employee handbook into evidence. Instead, Respondent Koury testified that Ms. Terry asked him what to pay the Complainant for the December 26, 2013 flight. Mr. Koury testified:

I said, "We've never done this before." I said, "I don't know. Pay him what's fair" was my exact words to her. She said, "Well, Caus (ph) Aviation, when they have that issue, they pay 50 percent of the rate" and I said, "Well, then pay him 50 percent." (TR 158)

However, Respondent Koury testified that the copilot, Mr. Bidom, had "his full daily rate ... \$200 a day. That was his pay scale as an unexperienced pilot." (TR 159) Based on the evidence in the record, Mr. Bidom was paid his full daily rate on December 26, 2013. Nonetheless, the Respondent testified he paid the Complainant \$300 [half] stating that amount was fair and consistent with how cancelled flights were handled by others. (TR 158)

Following the unexpected reduction in pay, the Complainant did not accept the \$300. He informed Koury Aviation he would no longer work as a contract pilot. The Complainant alleged he was discriminated against and the reduction was retaliation from the Respondent. The Complainant testified his pay was reduced because he reported the Respondent to the FAA. The

Complainant testified:

I had contacted the FAA and made it known that I was contacting the FAA about what I felt was egregious breaches of safety protocol at Koury. I had contacted them verbally in December.... [W]hen Mr. Koury withheld my pay and paid the other pilot in full, it was apparent and clear to me that he was reacting to my notifying the FAA of the issues going on at Koury and it was his way of enacting further vengeance against me. (TR 76)

The timeline based on the evidence in the record is as follows:

In December 2013, Complainant filed a verbal complaint with the FAA before the December 26, 2013 contract flight. Complainant testified that Respondent was well aware of the FAA complaint. (TR 76, CX 11) On December 26, 2013, Complainant agreed to pilot and did fly a contract flight for \$600. On December 26, 2013, Koury Aviation sent Complainant a text early in the morning "4:00 PM departure today. Will send a trip sheet shortly. \$600 confirmed daily

rate.” (CX 5,TR 72). Respondent initially refused to pay the Complainant the contracted \$600 rate for the flight. On January 11, 2014, Complainant’s contract pilot pay was unilaterally reduced by Respondent Koury from \$600 to \$300. On January 11, 2014, Complainant was advised via email that Respondent Koury “told her to pay you half your normal daily rate which would be \$300.” (CX 7-1) Complainant informed Respondent Koury Aviation he would no longer work as a contract pilot. On January 14, 2014, a check for \$300 was issued by Koury Aviation to Complainant. (RX 7 , CX 6 ) Complainant did not accept the \$300 check. On either January 13, 2014 or January 14, 2014, Complainant submitted a written complaint letter to Inspector Henry with the Federal Aviation Administration. (FAA) (CX 11-1, TR 79)

Once a claim has reached the hearing stage, and the case is before an Administrative Law Judge (and the Administrative Review Board on review), the Complainant’s burden is to prove by a preponderance of the evidence, that protected activity was a “contributing factor” that motivated the Respondent to take adverse action against him. 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). Cf. Dysert v. United States Sec’y of Labor, 105 F.3d 607, 609-610 (11th Cir. 1997) (“demonstrate” means to prove by a preponderance of the evidence). The Complainant has the burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in his reduced pay. Fordham v. Fannie Mae, ARB No. 12-061, ALJ No. 2010-SOX-051, (ARB October 9, 2014).

Based on the evidence in the record, the preponderance of the evidence supports a finding that protected activity contributed to the Respondent’s initial denial of the contracted rate of pay, and the subsequent reduced rate from \$600 to \$300. The Complainant presented 3 instances of protected activity that occurred prior to his reduced pay: one each in September, October, and December 2013. (TR 76, CX 11) The Complainant’s email dated December 4, 2013, is the protected activity in closest temporal proximity to the reduced rate. The email was sent after the Complainant resigned as Director of Operations. The Complainant informed Respondent Koury that he believed the King Air “would have lost directional control and balled up off the side of the runway. This is where your and my opinions of “Safety” are fundamentally opposing in nature.” (CX 4-2) Complainant also made a verbal complaint to the FAA in December 2013 and the Respondent received written notice from the FAA regarding the Complainant’s complaints.

The preponderance of the evidence supports that Complainant’s protected activity was a contributing factor that motivated the Respondent to discriminate against the Complainant, retaliate against the Complainant and cut Complainant’s pay when he paid the other pilot in full for the same flight. Complainant testified regarding the post-flight tasks on the field since it was after hours and there was no other Koury employee present.

Respondent must demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action [refusing to pay Complainant \$600 contracted pilot rate and then unilaterally cutting it by half to \$300] in the absence of that behavior. Based on the evidence in the record, Respondent has failed to submit the necessary evidence.

Respondent’s evidence on this issue is not persuasive and lacks credibility. The most compelling factor is that Respondent Koury Aviation paid the other contract pilot, who was also flying with the Complainant and had to return to the Greensboro airport, his full contracted pay. Respondent

Koury cut Complainant's pay by half stating it was their policy based on what other aviation companies did.

There is no written evidence in the record regarding Koury Aviation's employee handbook and its cancelled flight protocol and policy. Respondent Koury testified he was unaware of his own company's policy because he did not "memorize" his company's policies but he testified there was an employee handbook addressing this issue. Complainant testified he was unaware of and never saw such a policy; it would be completely contrary to aviation safety. Moreover, while testifying that his company did have such a policy, Respondent Koury nonetheless followed what other companies allegedly paid which is illogical.

Respondent Koury has been in the charter aviation business for 23 years and is the owner of the company. Respondent Koury testified he "picked up Aviation in 1981" and got his pilot's license. Respondent Koury testified he started Koury Aviation in 1991 and "started flying 135 charter in 1991." (TR 126) Respondent Koury testified that he was personally giving up piloting the charter though he would continue operating the charter. (TR 126) Considering Respondent Koury operated a charter aviation business from 1991 to the present, for over 23 years, it is highly unlikely he has never experienced a flight that was not completed and has not addressed the issue of what to pay the pilot when he had to return to the airport for mechanical failure. It is highly unlikely that Koury Aviation has no policy regarding pilot pay. Respondent Koury testified there was a handbook, but he did not know what was in it, he did not "memorize it." Is also highly unlikely that aviation companies would have a policy of half pay to pilots because it would encourage some pilots to take unsafe risks and complete an otherwise unsafe flight. Accordingly, Respondent Koury's testimony lacks credibility and is given little weight.

Respondent has failed to submit clear and convincing evidence that it would have taken the same personnel action of not paying Complainant the full \$600 contract rate, then reducing to \$300 or half, when it paid the co-pilot in full, in the absence of any protected activity. Little weight is given to the Respondent's testimony regarding the handbook, the company policy, and how and why he unilaterally reduced Complainant's contracted rate of pay. Based on the facts of this case and the evidence in the record, Complainant's testimony and evidence is given significant weight.

By a preponderance of the evidence, Complainant has shown that his protected activity was a contributing factor in his reduced contract pay as a pilot with Respondent Koury Aviation on December 26, 2013. Respondent Koury Aviation has failed to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the Complainant's protected behavior or conduct. Accordingly, Complainant is entitled to remedies under Air 21.

## 2. *Distribution of Protected Activity*

The Complainant alleges the Respondent distributed protected, sensitive personnel information in retaliation to his protected activity. Regarding the distributed material (RX 2), the Complainant testified:

It's a protected document. It's governed under the Pilot Record Information Act of 1996. Much like medical records, it's not to be distributed in any way, shape or form and yet here it is on public display and it's a drug test, drug and alcohol testing for Chautauqua Airlines. (TR 107-108)

This claim is not supported by the evidence. The Complainant testified that he signed the authorization for release of his drug and alcohol testing records. The release shows the Complainant signed the authorization on November 2, 2013.

Q: Okay and it says, "Applicant employee signature, Robert A. Gault?"

A: That's correct.

Q: Is there any particular reason why Robert A. Gault and that's you correct?

A: It is.

Q: -- was dealing with a drug test for some other airline on November 2nd?

A: Yeah, because I was talking to them about potential employment. (TR 112)

The Complainant testified, "The distribution of this is an adverse action." (TR 109) The release of these records upon the Complainant's request is not an adverse action. There is no evidence the information was distributed anywhere other than to the party designated by the Complainant and for use as an exhibit in the present claim. Accordingly, the Complainant is not entitled to remedies under the Act.

### **CONCLUSION**

Based on the evidence in the record, the Complainant engaged in protected activity regarding safety violations. The Complainant did not demonstrate that his protected activity was a contributing cause to support finding constructive discharge, but rather the Complainant resigned. A reasonable person in the Complainant's situation would not have felt compelled to resign on the basis of Respondent's actions in relation to the Complainant's protected activity. The evidence in the record does not show a nexus between the Respondent's actions and the Complainant's protected activity such that the Respondent had the intent to compel the Complainant's resignation.

The evidence in the record does not support that there was any nexus between the protected activity and the release of his records to another airline.

However, the evidence supports, by a preponderance of the evidence that Respondent discriminated and retaliated against Complainant with respect to his contract pilot pay and

compensation on December 26, 2013. The employee provided to the employer and the FAA alleged safety violations in violation of 49 U.S.C. 42121.

The evidence demonstrates that protected activity contributed to the reduced contract pilot pay. Complainant set forth sufficient evidence that he engaged in protected activity under Air 21; the employer knew of the protected activity; Complainant suffered an adverse employment action; and the Complainant's protected activity was a contributing factor in the adverse employment action being taken. Florek v. Eastern Air Central, Inc., ARB case no.07-113, 2009 WL 1542296 (May 21, 2009). "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, 2008 WL316012,\* 3 (January 30, 2008) citing Marano v. Dep't of Justice, 2 F. 3d 1137 (Fed Cir. 1993). In this case, Complainant filed his safety complaint with the FAA and Respondent knew about it. Complainant suffered an adverse employment action when he was denied his contract pilot pay. The evidence in the record supports that the protected activity was a contributing factor in this adverse employment action being taken by Respondent. The other pilot was paid in full for the same flight. The Respondent has not submitted clear and convincing evidence to rebut the Complainant's evidence. There is unpersuasive testimony and unpersuasive evidence regarding an alleged company policy and why Respondent Koury unilaterally reduced the Complainant's compensation. The evidence supports by a preponderance of the evidence that Respondent Koury Aviation discriminated and retaliated against Complainant when it denied his contracted pay, and then reduced his contracted pay after his protected activity. Complainant has established his *prima facie* case.

### **ORDER**

For the reasons set forth above, it is hereby **ORDERED** that:

1. Complainant's complaint for constructive discharge is **DENIED**.
2. Complainant's complaint regarding the release of his records to another airline is **DENIED**.
3. Complainant's complaint that he was discriminated and retaliated against after his protected activity, when he was initially denied wages as a contract pilot, when the wages were subsequently reduced to half, when his copilot was paid in full, is **GRANTED**.
4. Complainant is entitled to lost wages in the amount of \$600 as compensatory damages pursuant to 49 U.S.C. § 42121 ("AIR21"), (b) (3) (B) (iii).
5. Complainant is entitled to reasonable attorney's fees and costs pursuant to 49 U.S.C. § 42121 ("AIR21"), (6) (B).
6. Within twenty (21) days of the receipt of this Decision and Order, Complainant's attorney shall file with the court a fully itemized and supported fee petition, including each task, the date, the amount of time billed for the task, with total hours, the hourly rate, and

itemized costs. Complainant's attorney shall send a copy of same to opposing counsel who shall then have fifteen (15) days to respond with objections thereto. If the parties negotiate and agree to the attorney's fee, the parties are to so advise the court. Complainant's counsel must still submit the above itemized attorney fee petition for approval by the court.

DANA ROSEN  
Administrative Law Judge

DR/JDP/ard  
Newport News, Virginia

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions

or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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