

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 07 June 2017

Case Nos.: **2014-AIR-21**
2016-AIR-11

In the Matter of:

JOHN SWINT,
Complainant,

v.

NETJETS AVIATION, INC.,
Respondent.

Appearances:

John Swint
Complainant

Joseph C. Devine, Esq.
Ryan A. Cates, Esq.
Baker & Hostetler, LLP
Columbus, Ohio
For Respondent

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER

These consolidated proceedings arise under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR-21”), 49 U.S.C. § 42121, and the implementing regulations found at 29 CFR Part 1979 (2013). John Swint (“Complainant”) is a pilot employed by NetJets Aviation, Inc. (“Respondent”). Complainant alleges that Respondent retaliated against him in violation of AIR-21 after Complainant had engaged in activities protected by the statute. In this case, Complainant seeks the award of back pay, front pay, compensatory damages, non-monetary relief and attorney fees.

Procedural History

Complaint Number 5-1800-13-067 was filed by Complainant with the Occupational Safety and Health Administration (“OSHA”) of the United States Department of Labor on August 24, 2013. This complaint was amended on March 21, 2014 to add additional claims of adverse action. Following an investigation by OSHA, Complainant’s complaint was dismissed on July 22, 2014. On July 31, 2014, Complainant sought a hearing before the Department of Labor’s Office of Administrative Law Judges (“OALJ”). This case was assigned OALJ case number 2014-AIR-21.

Complaint Number 5-1800-15-004 was filed by Complainant on October 22, 2014. Following an investigation by OSHA, it was determined that a one-day suspension issued to Complainant on October 17, 2014 was retaliation for Complainant reporting safety violations, and thus a violation of the whistleblower protection provisions of AIR-21. OSHA ordered that Complainant receive the pay lost during his one-day suspension, awarded him attorney fees, and awarded him other incidental relief. On February 19, 2016, NetJets Aviation, Inc. (“Respondent”) requested a hearing before OALJ. This case was assigned OALJ case number 2016-AIR -11.

On October 24, 2016, I issued an order consolidating cases 2014-AIR-21 and 2016-AIR-11 for prehearing preparation and for hearing. I set a hearing date of December 12, 2016, in Cleveland, Ohio. Due to concerns about a possible government shutdown, the hearing was continued until December 13, 2016.

On November 29, 2016, I issued an Order granting in part, and denying in part, Respondent’s Motion for Summary Decision. Under my Summary Decision Order, the issues remaining for me to decide are whether Respondent violated AIR-21 when it suspended Complainant for one day on October 18, 2014, and/or whether Respondent violated AIR-21 when Complainant was initially denied the opportunity to interview for a promotion.

I conducted the formal hearing at the Carl Stokes United States Courthouse in Cleveland, Ohio on December 13 and 14, 2016. I heard testimony from 10 witnesses:

John Swint, Complainant

Brent Owens, Director of Current Day Operations, NetJets

Eric Lampert, former Director of Flight Operations, NetJets

Erica Leighton, Manager, Labor & Employment, NetJets

Christopher Eastman, Assistant Director of Training, NetJets

Dave Hyman, former Chief Pilot, Citation Excel fleet, NetJets

Robert Burney, Maintenance Air Boss, NetJets

Anthony Mosso, former Manager of Labor Relations, NetJets

Mark Okey, Vice President of Labor Contract Compliance, NetJets

Dr. Ethan Singer, Compass Lexicon (economics expert)

At the hearing, Joint Exhibits 1, 2 and 3 were admitted. Complainant's exhibits 1, 3-31, 35-38, 59-63, 65-73, 77, 82-84, 86-88, 90, 92-94, 101-109, 111-113, 115-123, 125, 127, 131-134, 137-139, 134-144, 147-151 were admitted. Respondent's exhibits A-SS were admitted.

Stipulated Facts

The parties have stipulated,¹ and I so find:

1. Respondent, Net Jets Aviation, Inc. is an "air carrier" as defined in 29 CFR §1979.101;
2. Complainant, John Swint, is an "employee" of Respondent as defined in 29 CFR §1979.101.
3. Complainant suffered an adverse employment action when, on October 17, 2014, Respondent issued Complainant a letter of warning assessing a one-day unpaid suspension to be served on October 18, 2014.
4. Complainant sent an email on February 18, 2014.
5. The email said "Fcuk y."
6. The February 18 email was sent to "CrewActivityReports."
7. Complainant was on vacation when he sent the February 18 email.
8. Complainant's first duty day after vacation following February 18, 2014 was March 1, 2014.
9. The notice of Pilot Review Board covering the February 18 email was sent out on March 18, 2014.
10. Complainant received the notice of the Pilot Review Board on March 19, 2014.
11. The Pilot Review Board meeting was held on March 31, 2014.

¹ Hearing transcript ("Tr.") 5-8.

12. Complainant was initially refused the opportunity to interview for the Challenger 650 Training Captain position as a result of the October 17, 2014, letter being in his record.

In addition to the foregoing stipulations, Joint Exhibit 3 was admitted at the hearing.² This exhibit contains a list of approximately 50 acts performed by C in 2013 and 2014. The parties have stipulated, and I find, that each of the acts described in Joint Exhibit 3 constitute activities protected by AIR-21.

Issues Presented

The parties have stipulated that Complainant engaged in numerous activities protected by AIR-21 in the years 2013 and 2014. The parties have further stipulated that Complainant suffered an adverse employment action when he served a one-day suspension on October 18, 2014. The parties have stipulated that as a consequence of the one-day suspension being in his file, Complainant was initially denied the opportunity to interview for a Challenger 650³ Training Captain position, which would have been a promotion.

Respondent denies that it violated AIR-21 by suspending Complainant, or by initially refusing to allow him to interview for the Challenger 650 promotion. Respondent argues that the one-day suspension was levied only to punish Complainant for sending an inappropriate email from his company-issued iPhone, and that Respondent's discipline of Complainant was consistent with Respondent's policy allowing for discipline for the sending of offensive emails.

Complainant bears the burden to demonstrate that his suspension (and any other adverse employment action) was related to Complainant engaging in protected activity. Respondent asserts that Complainant has not satisfied his burden of proof. Respondent also argues that it proved by clear and convincing evidence that it would have imposed the same discipline absent any protected activity on the part of Complainant.

Statement of Facts

The central issues in this case involve an email sent by Complainant on February 18, 2014. A copy of this email was admitted into the record as Respondent's Exhibit B. There is no text in the body of this email. In the subject line is the following text: "Fcuk y." As noted above, the parties have stipulated:

1. Complainant sent an email on February 18, 2014.
2. The email said "Fcuk y."
3. The February 18 email was sent to "CrewActivityReports."⁴

² Tr. 8.

³ The Challenger 650 is a type of jet aircraft flown by some of Respondent's pilots.

⁴ The actual email address is "crewactivityreports@netjets.com."

Complainant testified about the creation of the “Fuck y” email as follows:

Q. Okay. So you then put it in your pocket and the e-mail sent, correct?

A. Yes.

Q. And we even have a stipulation that it was sent from your device, correct?

A. If that's what you say. I'm pretty sure that's correct.

Q. Okay. So while in your pocket, you then picked it out and saw that e-mail, the February 18 e-mail, in front of you, because that's what you testified, correct?

A. Yes.

Q. All right. So you would have had to have had that change from the inbox to the sent items, correct?

A. No.

Q. But you did send it, correct?

A. Yes.

Tr. 140-141.

I had this colloquy with Complainant during the hearing:

JUDGE BELL: So let me ask you directly. Did you send on purpose an e-mail to anyone at NetJets, including this, what appears to be an unattended mailbox? Did you intend to send an e-mail using the letters that are in the February 18 e-mail?

MR. SWINT: No, I did not.

JUDGE BELL: Do you admit that that e-mail was, in fact, sent from your phone?

MR. SWINT: If you eliminate extreme crazy possibilities of somebody hacking into my system and sending it, I probably sent it.

JUDGE BELL: Okay. You're on vacation with your wife, correct?

MR. SWINT: Yes.

JUDGE BELL: Any kids with you?

MR. SWINT: No.

JUDGE BELL: Okay. No reason to think -- you're not claiming that somebody at the hotel came in and went through your pants and found the phone in your pants and sent this e-mail?

MR. SWINT: It was in my possession the entire time, Your Honor. From when I first looked at the e-mail or looked at the e-mail from Crew Activity until I saw the e-mail that was sent out, that February 18 e-mail, it was in my possession the entire time Your Honor. From when I first looked at the e-mail or looked at the e-mail from Crew Activity until I saw the e-mail that was sent out, that February 18 e-mail, it was in my possession the entire time.

Tr. 92-93.

On and prior to February 18, 2014, Respondent maintained an “Information Security and Electronic Use Policy.”⁵ This policy applied to Complainant’s use of the iPhone issued to him by Respondent.⁶ Various provisions of the policy prohibit the sending of “abusive,” “intimidating,” “obscene” or “inappropriate” emails.⁷ In its disciplinary letter to Complainant, Respondent characterized the “Fcuk y” email as being “inappropriate.”⁸

Respondent convened a meeting of a panel known as the Pilot Review Board to consider whether Complainant should be disciplined for sending the February 18, 2014 email. Complainant was given more than 10 days’ notice of the meeting, and was told in advance that the Pilot Review Board would be considering the February 18 email.⁹ Complainant was allowed to have a union representative at the Pilot Review Board.

Anthony Mosso¹⁰ and Brent Owens¹¹ were the members of the Pilot Review Board assigned to consider Respondent’s February 18, 2014 email. Mr. Mosso’s contemporaneous

⁵ Respondent’s Exhibit C.

⁶ See Exhibit C at 5: “This policy . . . applies to mobile devices . . . that access the Company network. . . .”

⁷ See, e.g. Exhibit C at Section 5.9. Respondent’s “Report of Investigation” (Exhibit K) and the disciplinary notification given to Complainant on October 17, 2014 (Exhibit Y) assert that Complainant violated “#510” of the Information Security and Electronic Use Policy. I do not find a paragraph specifically denoted as “#510” in the Information Security and Electronic Use Policy admitted as Exhibit C.

⁸ Exhibit Y.

⁹ Exhibit J.

¹⁰ Formerly employed as Respondent’s Labor Relations Manager.

notes of the March 31, 2014 Pilot Review Board meeting are in the record as Exhibit L.¹² The final Report of the Pilot Review Board is in the record as Exhibit K.¹³

Mosso and Owens both testified during the formal AIR-21 hearing. Owens testified that he thought Complainant had lied during the Pilot Review Board when Complainant denied intentionally sending the February 18, 2014 email.¹⁴ Owens testified that he believed Complainant had intentionally created and sent the email.¹⁵ Mosso didn't think Complainant's description of the sending of the email "could be possible."¹⁶ Mosso testified: "I personally did not believe that there was any likelihood that this series of characters could be typed without fingers on an iPhone."¹⁷

The Pilot Review Board concluded that "Captain Swint composed and sent the e-mail intentionally and then misrepresented the facts when given the opportunity to explain it."¹⁸ The pilot Review Board recommended that Complainant receive a Letter of Warning and that he be suspended for one day.¹⁹

The one-day suspension was not actually imposed until October 17, 2014 – six and one half months after the Pilot Review Board considered the matter. This delay was of concern to me when I denied Respondent's Motion for Summary Decision on November 29, 2016. I wrote at that time:

Complainant was notified on October 17, 2014 that he would serve a one-day suspension for the inappropriate email. That suspension was served on October 18, 2014 with a consequent loss of pay.

I have carefully reviewed Respondent's papers with respect to Claims 13 and 14. At this point, I find no credible explanation for why Respondent waited from March 31, 2014 to October 18, 2014 to discipline Complainant for the email which Complainant admits writing, and which is inarguably inappropriate.

There is ample evidence in the record is that during the period between March 2014 and October 2014, Complainant participated in protected activities, including reporting safety issues to a Member of Congress. In the week immediately preceding the imposition of the one-day suspension, Complainant

¹¹ Respondent's Assistant Director of Operations.

¹² Tr. 445.

¹³ Several versions of this Exhibit appear in the record. I do not find the minor differences between these versions of Exhibit K to be of importance when reaching my decision.

¹⁴ Tr. 238-9.

¹⁵ *Id.* 240.

¹⁶ *Id.* 446.

¹⁷ *Id.* 447.

¹⁸ Exhibit K.

¹⁹ At Complainant's rate of pay, the one day suspension cost him \$836.28. Exhibit Y.

was responsible for the grounding of 3 different aircraft for a variety of safety issues.

I am aware of the various arguments made by Respondent which attempt to persuade me that the protected activities in which Complainant participated have no causal relationship to the one-day suspension levied against Complainant on October 18, 2014. I believe I would be required to impermissibly weigh the evidence in order to grant summary decision to Respondent as to Claims 13 and 14. At this summary decision stage, I decline to perform such an assessment of competing facts and inferences.

Decision and Order Granting In Part, and Denying In Part, Respondent's Motion for Summary Decision at 12.

A significant amount of evidence was presented at the hearing which served to explain why Respondent took so long to discipline Complainant for sending the "Fcuik y" email. The following factors contributed to the long delay: (1) Respondent's IT department was asked to perform an "independent analysis"²⁰ of the possibility of an email being inadvertently created and sent from an iPhone. This inquiry took "months."²¹ (2) Research was performed on the types of discipline imposed on "comparables" – those who had committed offenses similar to that of Complainant.²² (3) The decision to impose discipline needed to be reviewed and approved by Respondent's Labor Relations Department. This "vetting" process "could easily take a month or two."²³ (4) There were vacation and training schedules which interfered with scheduling the meeting where the disciplinary letter would be provided to Complainant.²⁴ (5) Anthony Mosso, Respondent's Labor Relations Manager in the summer of 2014, was interviewing for jobs outside NetJets. He accepted a position at another company, and was transitioning out of Respondent's Labor Relations Department in the late Summer and Fall of 2014.²⁵ The tentative plan to present Complainant with his disciplinary letter on August 1, 2014 fell through due to Mosso's distractions:

Q. So August 1 was a Friday, and that was [Complainant's] last day [of work before scheduled vacation and training tours] . Is that the day that you committed to schedule him for this in-person discipline?

A. Yes.

Q. And, again, the level of the discipline that you were supposed to schedule?

²⁰ Tr. 261.

²¹ *Id.*

²² *Id.* 262.

²³ *Id.*

²⁴ *Id.* 262-3.

²⁵ *Id.* 298.

A. It was a one-day suspension and letter of warning.

Q. Okay. Did that, in fact, happen on August 1?

A. It didn't.

Q. Why?

A. I dropped the ball.

Q. I'm sorry?

A. I dropped the ball.

Q. All right.

A. I forgot to do it.

Q. And what was going on with you in July? And I hate to put you on the spot, but the Judge needs to know.

A. I was interviewing for another position, for the position that I currently have with Canadian Pacific, which required one trip to Minnesota and two trips to Canada for interviews and such. So I had personally checked out on that, Judge.

JUDGE BELL: When you say you dropped the ball, what exactly was it that you didn't accomplish?

THE WITNESS: I would have had to contact crew scheduling and tell crew scheduling to ensure and to actually brief Mr. Swint to show up and appear, much like the notice that said here, you have to come for this hearing. There's a separate piece to that which happen -- what it is is crew scheduling then takes that information and they actually push a brief through the electronic device that says, instead of going and picking up passengers at point A, you have to now come to Columbus to go do -- to have this meeting with Eric or whoever it happened to be. And I didn't do that. I did not coordinate that effort.

JUDGE BELL: So that's the specific task that did not get performed?

THE WITNESS: That's correct.

Tr. 452-3.

This testimony explained the long delay in Complainant's discipline being imposed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicable Standards

To prevail on his whistleblower complaint under AIR-21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in protected activity; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014)(citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). In the case before me, C must also prove by a preponderance of the evidence that Respondent had "any knowledge" of C's protected activity before the adverse employment action.²⁶ If Complainant establishes this *prima facie* case, the burden then shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable employment action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013)(citing 49 U.S.C. § 42121(b)(2)(B)(iv)). If Respondent proves it would have taken the adverse employment action in the absence of protected activity, then the Respondent has prevailed.

Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discipline or otherwise discriminate against an employee because the employee:

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

²⁶ 49 U.S.C. §42121(a)(1) and (2).

The ARB has explained, “[a]s a matter of law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee’s belief of a violation is subjectively and objectively reasonable.” *Sewadev Halo-Flight, Inc.*, ARB No.13-098, slip op. at 7-8 (Feb. 13, 2015)(citing 49 U.S.C § 42121(a))(emphasizing, “an employee need not prove an *actual* FAA violation to satisfy the protected activity provided that the employee’s report concerns a federal law related to air carrier safety and the employee’s belief that the violation occurred is subjectively and objectively reasonable”). The “complainant must prove that he reasonably believed in the existence of a violation,” and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Regarding the former, “To prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* Regarding the latter, the Board explained, “To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (internal quotation marks omitted).

The ARB has observed that “mere words do not create an FAA violation when the parties “actual conduct does not violate FAA regulations.” *Hindsman v. Delta Air Lines, Inc.*, ARB No.09-023, slip op. at 6 (June 30, 2010). Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air EvacEMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). Similarly, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.” *Id.* at 8 (internal quotation marks omitted)(holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and “did not reasonably believe that safety violations existed at the time he made his complaint”).

Complainant Engaged in Protected Activity

As noted above, the parties have stipulated that Complainant engaged in those protected activities described in Joint Exhibit 3. By virtue of the stipulation of the parties, Complainant has satisfied his burden to prove that he engaged in activity protected by AIR-21.

Respondent’s Knowledge of Complainant’s Protected Activity

Complainant serves as the pilot in command of high performance, passenger-carrying, multi-engine jet aircraft. Complainant inspects his aircraft before and after flight,²⁷ and makes notations of any mechanical discrepancies (“squawks”) he encounters with the aircraft.²⁸ Much of what Complainant does on a daily basis as pilot in command is activity protected by AIR-21 –

²⁷ Tr. 55.

²⁸ Tr. 284.

the pilot in command is tasked at every working minute to zealously enforce “any . . . provision of Federal law relating to air carrier safety.”²⁹

A number of persons who participated in Respondent’s decision making in this case are themselves pilots.³⁰ These persons would undoubtedly understand that Complainant was likely engaging in activities protected by AIR-21 on any occasion when Complainant was serving as pilot in command of one of Respondent’s aircraft. In this general sense,³¹ Complainant has demonstrated that Respondent had “any knowledge” that Complainant had engaged, and was engaging, in protected activity.

Brent Owens was one of the members of the Pilot Review Board which made the recommendation in March 2014 that Complainant be suspended for sending the “Fcuk y” email. It is clear that when the Pilot Review Board met in March 2014, Owens was aware of the OSHA AIR-21 complaint that had been filed by Complainant on August 23, 2013.³² Complainant has thus demonstrated that those involved in making disciplinary decisions about him were aware that he had participated in protected activity by filing an AIR-21 complaint with OSHA.

Many of the protected activities to which the parties stipulated are maintenance issues reported through a safety system known as “ASAP.” Safety reports submitted through the ASAP system go to the Federal Aviation Administration, the pilot union safety committee and to Respondent’s management.³³ The reporting system was designed to be confidential,³⁴ meaning that the operations department at NetJets was not aware of the ASAP complaints. There is no evidence in the testimony or in the exhibits which demonstrates by a preponderance of the evidence that those involved in imposing the one-day suspension on Complainant were aware of the ASAP reports made by Complainant.

Adverse Employment Action

AIR-21 prohibits retaliation by employers against employees who have engaged in protected activity, stating that “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 of the employee’s protected activity.” These provisions are the statutory foundation for the requirement that a complainant must show an adverse employment action. The implementing regulations specify that it is a violation of the act for an employer “to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee for engaging in protected activity.” 29 C.F.R. § 1979.102(b).

²⁹ See generally, Tr. 38.

³⁰ Erica Leighton (Tr. 196), Brent Owens (Tr. 221), Eric Lampert (Tr. 387) and Mark Okey (Tr. 473) are among those who are pilots.

³¹ 49 U.S.C. §42121(a)(1) uses the phrase “with any knowledge of the employer” to define a Complainant’s burden of proof of the knowledge element.

³² Owens was interviewed by an OSHA investigator about Complainant’s complaint on February 12, 2014 – just a few days before the “Fcuk y” email was sent. Tr. 241.

³³ Tr. 44.

³⁴ *Id.* 144.

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB adopted the “materially adverse” deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The majority for the ARB wrote: “*Burlington Northern* held that for the employer action to be deemed ‘materially adverse,’ it must be such that it ‘could well dissuade a reasonable worker from making or supporting a charge of discrimination.’” The majority further stated that the purpose of the employee protections that the Labor Department administers “is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes.” *Melton*, slip op. at 20. Moreover, the majority believed that both ARB and federal case law demonstrated that the terms “tangible consequences” and “materially adverse” are “used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action. *Id.* The majority summarized:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action....Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of “materially adverse” rather than “tangible consequence,” or “significant change,” or “materially disadvantaged,” or the like, is of no consequence. Applying this test would not deviate from past precedent.

Id. at 23.

Consequently, the finding of an adverse action in an AIR-21 statute will be based on the standards set forth in *Burlington Northern. Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, 04-160, ALJ No. 2003-AIR-0004, slip op. at 7 (ARB January 31, 2007). Suspensions and transfers have been found to constitute an adverse employment action under the *Burlington Northern* standard. See, e.g., *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021 slip op. at 6-7 (ARB December 30, 2004). The ARB has held that a warning letter issued to an employee does not constitute adverse action. *Simpson v. United Parcel Service*, ARB No. 06-065 (ARB: Mar. 14, 2008).

Complainant’s One-day Suspension Was An Adverse Employment Action

The parties stipulated that Complainant’s one-day suspension was an adverse employment action. By virtue of the stipulation of the parties, Complainant has satisfied his burden to prove that he suffered an adverse employment action.

Complainant's Exclusion From the Interview List for the Challenger 650 Training Captain Promotional Opportunity Was Not an Adverse Employment Action

Complainant's one-day suspension was imposed on October 17, 2014. Pursuant to Respondent's personnel policies, Complainant was not eligible for any promotional opportunity for a one-year period after the imposition of this discipline.³⁵

A job posting for Challenger 650 Training Captains was posted on February 12, 2015, with an application deadline of February 26, 2015.³⁶ This job posting was made within one year of Complainant's letter of warning and suspension, and he was initially not given an interview for the position.³⁷ Complainant understood he would not be interviewed for the position when he applied.³⁸

While interviews for the Challenger 650 Training Captain positions were ongoing, Complainant was given the chance to interview for the promotion, notwithstanding Respondent's policy that he was ineligible for the promotion. Mark Okey, Respondent's Vice President for Labor Contract Compliance described the reasons for his decision to allow Complainant to interview:

I've worked with John a long time, probably over a decade, on system board. John often sits on the union side of system board. And I like the guy. And he was new to the airplane. He, you know -- I think John has a fair amount of talent. So I thought, well, I talked with the training folks. I said, would you guys be okay if we let John interview? They said sure. And I said, well, then, I'm going to as a grievance -- in other words, to try to resolve the matter for him, I'm going to let him interview. And they said, that's fine with us. So that's what I did.

Tr. 481.

Complainant did not accept Respondent's offer to interview for the Challenger 650 Training Captain promotional opportunity.³⁹

At the hearing, and in his post-hearing brief, Complainant refers to the offer to interview for the Challenger 650 Training Captain position as being conditioned upon him releasing other claims he alleges he had against Respondent. No evidence concerning Complainant's other claims or of Respondent's demand that he release those claims appears in the hearing testimony

³⁵ Exhibit DD contains somewhat of a description of the steps in the promotion process. Page 6 of the Exhibit contains the following: "a disciplinary action in the previous 12 months the applicant is marked as disqualified for the bid."

³⁶ See Exhibit BB.

³⁷ Tr. 97.

³⁸ *Id.* at 96.

³⁹ *Id.* at 167.

or in any exhibit identified by the parties. Complainant gives the following cryptic description in his Post-hearing Brief:

One of those claims [that would allegedly have been released] was the delay in issuing the discipline which effectively subverted the 12 month drop out of discipline clause in Respondent and [the NetJets pilot union]’s CBA. This would allow Respondent to delay issuing discipline indefinitely bypassing the drop out clause. Complainant was concerned with this issue as the [System Boards of Adjustment] Chairman.

Complainant’s *Post-Hearing Brief* at 80, footnote 101. I do not fully understand what Complainant is discussing in this footnote.⁴⁰ However, the second sentence of the footnote indicates to me that Complainant was concerned that agreeing to interview for the Challenger 650 Training Captain vacancy might have had some precedential impact on the rights of persons other than Complainant who are members of the pilot’s union. I am only to examine the claims of Complainant – not any other hypothetical person(s) who might be hypothetically exposed to some hypothetical harm if Complainant were to accept Respondent’s very concrete offer to interview for the Challenger 650 Training Captain promotion.

I am not persuaded by the evidence in the case that there were any “strings” attached to the offer made to Complainant to allow him to interview for the Challenger 650 Training Captain position. In light of Respondent’s offer to allow Complainant to interview for the promotion, I find there was no materially adverse consequence to Complainant during the period between the announcement of the promotional opportunity and the date on which Complainant was offered the opportunity to interview for the position. There was no adverse employment action created by Respondent’s initial, temporary, and rescinded position that Complainant was not eligible to interview for the Challenger 650 Training Captain position. Complainant effectively withdrew from the process to select the Challenger 650 Training Captains by refusing the offer to interview. This does not constitute an adverse employment action.

Complainant’s Arguments Regarding the February 18, 2014 Email

Complainant was equivocal at the hearing about whether he had actually sent the “Fcuk y” email.⁴¹ Complainant’s ability to deny that he created the email is overwhelmed by his stipulations and his testimonial admissions that the “Fcuk y” email was sent from his company-provided iPhone, and that he was in possession of the iPhone at the time the email was sent.⁴²

⁴⁰ If Complainant means to argue that the delay in imposing his one-day suspension rolled forward the one-year period in which he was not eligible for promotional opportunities, I would note that the application deadline for the Challenger 650 Training Captain promotion was February 26, 2015. The “Fcuk y” email was sent on February 18, 2014. In order for Complainant to have been disciplined for sending the “Fcuk y” email and still be eligible to apply for the Challenger 650 Training Captain job, he would have needed to have his discipline imposed within 8 days of the “Fcuk y” email being sent.

⁴¹ Tr. 141.

⁴² *Id.* 92-3.

Complainant argues that he did not *intend* to send the February 18 email. His *Post-Hearing Brief* recounts a history of other “inadvertent messages” being sent from his iPhone prior to February 18, 2014,⁴³ and states: “The problem of inadvertent messages continued and on February 18, 2014 Complainant inadvertently sent an email to what he believed was an unattended mail alias called ‘Crew Activity Reports’ with the subject line of ‘Fcuk y.’”⁴⁴ Complainant offered testimony about these other inadvertent messages at the hearing.⁴⁵

At the time of his Pilot Review Board hearing regarding the February 18, 2014 email, Complainant was allowed an opportunity to offer an explanation for the email. He was allowed unlimited time at the formal hearing in this case to demonstrate that there was an innocent explanation for how the “Fcuk y” email had been created and sent. He has submitted an 82 page post-hearing brief in which he has had the opportunity to argue that he is not responsible for the “Fcuk y” email.

I am unaware of any motivation Complainant may have had to send the “Fcuk y” email to anyone at NetJets while he was on vacation on February 18, 2014. I am unaware of any motivation for Complainant to have sent a nasty email to what he assumed was an unattended e-mailbox.⁴⁶ I have read hundreds of pages of workmanlike legal arguments created by Complainant (who is unrepresented in this proceeding), and I am certain he could have articulated a more coherent message than “Fcuk y” had he wished to convey his displeasure with the contents of the Crew Activity Reports email sent to him earlier on February 18. Although my time with him has been brief, my impression is that Complainant is not a person who would ordinarily send emails with four-letter words to others in his workplace – nearly all of the co-workers and supervisors who testified at the hearing -- even including those involved in levying the suspension for the February 18 email incident -- seemed to enjoy amiable relationships with Complainant.⁴⁷ All that said, Complainant has not persuaded me that his one-day suspension was imposed for any reason other than what has been stated by Respondent: “Captain Swint composed and sent the e-mail intentionally and then misrepresented the facts when given the opportunity to explain it.”

Complainant Has Not Proven A Causal Relationship Between His Protected Activity and His Adverse Employment Action

The recent decision of the Administrative Review Board in *Palmer v. Canadian National Railway*, No. 16-035, 2016 WL 5868560 (September 30, 2016) makes clear that Complainant bears the burden to prove that his involvement in protected activity was a contributing factor to the adverse employment action he suffered. Protected activity is a contributing factor if “the

⁴³ Tr. 78. See also Complainant’s *Post-Hearing Brief* at 5.

⁴⁴ Tr. 92-3.

⁴⁵ *Id.* 78. See also Complainant’s Exhibits 103 and 105.

⁴⁶ Respondent suggests that the “Fcuk y” email sent from C’s iPhone at 2:52 pm⁴⁶ on February 18, 2014 was Complainant’s angry reply to an email sent to him several hours earlier on the same day.⁴⁶ However, the 2:52 pm email does not seem to be a “reply” to the 12:01 pm email in the sense that it was created by someone opening the 12:01 pm email, and then pressing “Reply,” and then entering text – if that were the case, then the 2:52 pm email would have the same information in the “Subject” field as the 12:01 email.⁴⁶ It does not. I am not persuaded that Complainant sent the 2:52 pm “Fcuk y” email as an angry reply to the 12:01 email.

⁴⁷ See, e.g. Tr. 481.

protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." *Benjamin v. Citationshares Management, LLC*, No. 12-029, 2013 WL 6385831 (ARB Nov. 5, 2013).

Complainant has not articulated an argument which "connects the dots" between the stipulated acts of protected activity and the stipulated (or any other) adverse employment actions. I note the following deficiencies in Complainant's proof:

First, I believe the decision to impose a one-day suspension on Complainant for sending the "Fcuk y" email was essentially made on March 31, 2014, immediately after the meeting of the Pilot Review Board. While the decision to impose this discipline remained subject to review and modification for many months thereafter, the essential terms of the discipline were determined on that date. This is important because approximately one-half of the protected activities to which the parties stipulated occurred after March 31, 2014. Complainant has not proven by a preponderance of the evidence that the stipulated protected activities which occurred after the Pilot Review Board meeting had any impact on the discipline imposed by Respondent.

Second, about one-third of the stipulated protected activities which occurred before March 31, 2014 involve safety issues submitted through the ASAP reporting system. Complainant has not proven by a preponderance of the evidence that those involved in imposing discipline on him were aware of these ASAP reports.

Third, Complainant argues there have been "shifting explanations and false arguments"⁴⁸ put forth by Respondent. Complainant describes what he calls "inconsistent testimony"⁴⁹ on the part of witnesses, and points to what he claims are other inconsistencies in the litigation position of Respondent. Complainant apparently wants me to conclude that because of these "inconsistencies," I should find that Respondent is not being truthful about the real reason why Complainant was disciplined, and that I should then conclude that he was really disciplined for engaging in protected activity. Those inferences are not supported by the evidence in the record.

Fourth, I have carefully considered all of the testimony and all of the documentary evidence. I have carefully read Complainant's Post-Hearing Brief, and have diligently tried to identify any evidence which could be construed in a light which shows that any protected act of Complainant, alone or in combination with any other act or fact, contributed to his one-day suspension. After a thorough analysis of the record, I am unable to identify any such connection. I conclude that Complainant has failed to satisfy his burden to prove a causal connection between his protected activity and the adverse employment action he suffered.

Fifth, the "inconsistencies" in testimony to which Complainant refers in his Post-Hearing Brief are insubstantial. Considering the record as a whole, I do not find that Respondent offered "shifting explanations" for the discipline imposed on Complainant. The disciplinary letter given to Complainant finds that "Captain Swint composed and sent the e-mail intentionally and then misrepresented the facts when given the opportunity to explain it." I find this statement to

⁴⁸ Complainant's *Post-hearing Brief* at 32-37.

⁴⁹ *Id.* at 40-41.

essentially mean that Respondent had concluded that Complainant sent the “Fcuk y” email, and that he lacked contrition and that he should be disciplined for those things.

Sixth, I also find significant the nature of the discipline itself. I asked Complainant the following questions at the hearing:

JUDGE BELL: Okay. At the time you left the pilot review board meeting, walking out the door in March of 2014, did you think you were going to be disciplined for sending the February 18 e-mail?

MR. SWINT: Yes.

JUDGE BELL: What kind of discipline did you think -- what was the range of discipline you thought was out there?

MR. SWINT: I thought I might be terminated.

Tr. 105-106.

I do not mean to diminish the importance or the consequences of the one-day suspension imposed on Complainant. However, in comparison to the termination Complainant believed might be a consequence of sending the “Fcuk y” email, a one-day suspension is far less severe, and much more proportional to sending an offensive email. It seems to me that if Respondent had decided to retaliate against Complainant for speaking with a Member of Congress, or for engaging in more than 50 acts protected under AIR-21, or for filing an AIR-21 complaint with OSHA, that something more severe than a one-day suspension would have been imposed by Respondent.

It also seems to me that if Respondent had made the decision to retaliate against Complainant for engaging in protected activity, and if Respondent truly wanted to put a chill on Complainant (or any other NetJets pilot) engaging in protected activity, then Respondent would not have allowed Complainant to participate in the competition for promotion to the Challenger 650 Training Captain position (discussed above).

I find that Complainant satisfied his burden to prove that he engaged in protected activity. I find that Complainant proved that Respondent was aware that Complainant engaged in protected activity. Complainant proved that he suffered an adverse employment action. However, Complainant has failed to prove by a preponderance of the evidence that Complainant’s protected activity contributed in any way to the adverse employment action imposed by Respondent.

Respondent Has Proven By Clear and Convincing Evidence That It Would Have Taken the Same Disciplinary Action In the Absence of Complainant’s Protected Activity.

Alternatively, I find that Respondent has proven by clear and convincing evidence that it would have taken the same disciplinary action in the absence of Complainant engaging in protected activity. Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Coryell v. Arkansas Energy Services, LLC.*, No. 12-033, 2013 WL 1934004, *3 (ARB Apr. 25, 2013) quoting *Warren v. Custom Organics*, No. 10-092, 2012 WL 759335, *5 (ARB Feb. 29, 2012); *Klosterman v. E.J. Davies, Inc.*, No. 12-035, 2013 WL 143761 (ARB Jan. 9, 2013). As the ARB explained in *Palmer*:

The AIR-21 burden-of-proof provision requires the factfinder—here, the ALJ—to make two determinations. The first involves answering a question about what happened: did the employee's protected activity play a role, any role, in the adverse action? On that question, the complainant has the burden of proof, and the standard of proof is by a preponderance. For the ALJ to rule for the employee at step one, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is more likely than not that the employee's protected activity was a contributing factor in the employer's adverse action.

The second determination involves a hypothetical question about what would have happened if the employee had not engaged in the protected activity: in the absence of the protected activity, would the employer nonetheless have taken the same adverse action anyway? On that question, the employer has the burden of proof, and the standard of proof is by clear and convincing evidence. For the ALJ to rule for the employer at step two, the ALJ must be persuaded, based on a review of all the relevant, admissible evidence, that it is highly probable that the employer would have taken the same adverse action in the absence of the protected activity.

Slip opinion at 32.

Complainant admits that the “Fcuk y” email came from his company-owned iPhone. Respondent has a policy which can reasonably be construed as prohibiting the sending of such an email. I find that Respondent has proven by clear and convincing evidence that it imposed a one-day suspension on Complainant because Complainant sent the “Fcuk y” email from his company-owned iPhone, and that there was no other reason for this suspension. I find that none of the protected activities to which the parties have stipulated (or any other) played any role whatsoever in Respondent’s decision to discipline Complainant for sending the “Fcuk y” email. I find it is highly probable that Respondent would have imposed the one-day suspension even

had Complainant not engaged in any of the protected activity to which the parties have stipulated.

For the foregoing reasons, Complainant's claim is **DENIED**, and the within matter is hereby **DISMISSED**.

Steven D. Bell
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).