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Issue Date: 04 May 2018

CASE NO: 2015-AIR-3

In the Matter of:

SHEIDA HUKMAN

Complainant

v.

U.S. AIRWAYS, INC.

Respondent

**ORDER ON REMAND GRANTING RESPONDENT'S MOTION FOR SUMMARY
DECISION AND DENYING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT**

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 ("AIR 21" or "the Act"). This statutory provision, in part, prohibits 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 to the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a). This claim was brought by the Complainant, Sheida Hukman, against the Respondent, U.S. Airways, Inc., alleging that she was discharged in violation of the Act.¹

¹ In the instant case, Complainant, a pro se party, is unrepresented by counsel, and thus deference is given to her filings. Young v. Schlumberger Oil Field Serv., ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 8-10 (ARB Feb. 28, 2003). Nevertheless, Complainant has been advised to seek legal representation on several occasions. The Administrative Review Board has held that while a pro se party is entitled to "fair and equal treatment . . . a pro se litigant cannot generally be permitted to **shift the burden of**

I. PROCEDURAL HISTORY & CONTENTIONS OF THE PARTIES

Complainant filed a complaint on or around February 20, 2013,² with OSHA under the whistleblower provisions of AIR 21. On October 6, 2014, OSHA completed its investigation of Complainant's complaint, which alleged Respondent suspended her on December 10, 2012, for reporting illegal activities in violation of AIR 21. Following an investigation of the matter, OSHA found there was no reasonable cause to believe Respondent violated the Act because Complainant had not engaged in any protected activity. OSHA determined that Complainant's 2010 and 2011 reports that employees were "smuggling" other employees and relatives on flights without being on a flight manifest or having a passport did not constitute a violation of FAA orders, regulations, or standards, and thus, Complainant did not engage in protected activity when she reported such alleged misconduct. However, OSHA found the complaint was timely as it was filed within 90 days of the alleged adverse action, pursuant to 49 U.S.C. § 42121(b).

On April 23, 2015, the undersigned issued a Decision and Order Denying Motion For Leave To File Amended Complaint and Granting Motion To Dismiss (herein "Order Granting Motion to Dismiss"). In doing so, the undersigned found that although Complainant alleged she suffered various forms of adverse action from 2009 through 2014, the only timely claims occurred between November 22, 2012 and February 20, 2013, pursuant to her OSHA

litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." Pik v. Credit Suisse AG, ARB No. 11-034, ALJ No. 2011-SOX-6, slip op. at 4-5 (ARB May 31, 2012) (citing Rays Lawn & Cleaning SVCS., ARB No. 06-112, ALJ No. ALJ No. 2005-SCA-7, slip op. at 7-8 (ARB Aug. 29, 2008) (emphasis added). Consequently, pro se complainants have the same burdens of production and persuasion as complainants represented by counsel. Cf. Canterbury v. Admin., ARB No. 03-135, ALJ No. 02-SCA-011, slip op. at 3-4 (ARB Dec. 29, 2004). Notwithstanding the foregoing, Complainant has failed to cite to any supportive exhibits in each motion she has filed with the undersigned. However, because Complainant is pro se the undersigned has accorded deference on Complainant's behalf despite her failure to comply with 29 C.F.R. § 18.72(c), which requires Complainant to cite to materials in the record in order to show a fact cannot be or is genuinely disputed, and as a result, I have examined her **admissible** evidence in support of her motions discussed herein.

² As will be discussed below, due to a discrepancy in filing dates the Administrative Review Board directed the undersigned to make an "explanatory determination" as to when Complainant filed her complaint with OSHA. Hukman v. U.S. Airways, Inc., ARB No. 15-054, ALJ No. 2015-AIR-003, slip op. at 8 (ARB July 13, 2017). Accordingly, in the discussion that follows the undersigned will determine whether Complainant filed her OSHA complaint prior to, on, or after **February 20, 2013**.

complaint filed on February 20, 2013. In addition, I found that Complainant failed to state a claim upon which relief could be granted because Complainant's claims of protected activity such as reporting "smuggling" of passengers on planes, Complainant's subjection to "airport rage" on November 15, 2012, and reporting Nicole Blanchard's expired nursing license failed to state a claim under the whistleblower provisions of 49 U.S.C. § 42121. Furthermore, I found Complainant failed to meet her burden in showing that she objectively and reasonably perceived violations of federal laws touching on or relating to air carrier safety because she did not allege enough facts to state a claim for relief that is plausible on its face in order to determine whether her perception was reasonable.

Notably, the undersigned also found Complainant's allegations of protected activities and adverse actions regarding Complainant's national origin, race, or sexual harassment allegations were not within the jurisdiction of the U.S. Department of Labor, and as such, were not addressed. The undersigned further found any alleged discrimination Complainant encountered, and the retaliation she incurred regarding the same did not in any way relate to a violation of FAA orders, regulations, or standards, and thus did not fall within the whistleblower protections of 49 U.S.C. § 42121. Accordingly, the undersigned granted Respondent's Motion to Dismiss.

Thereafter, on May 6, 2015, Complainant appealed the Order Granting Motion to Dismiss to the Administrative Review Board (herein "the Board") contending that I erred in denying her request to amend her complaint. Likewise, Complainant asserted she did engage in protected activity in 2010 and 2011, when she reported that her co-workers at U.S. Airways were "smuggling" other employees or relatives onto flights without being listed on the flight manifest, which in turn created a safety issue due to weight and balance limitations. Additionally, Complainant stated she engaged in protected activity on November 15, 2012, when she had a dispute with a co-worker about boarding priority that Complainant also viewed as an assault, as well as when she reported a nurse was practicing with an expired license and that the nurse was retaliating against her and threatening her employment. Complainant also contended she engaged in protected activity when she reported a co-worker's brother ("Modika") was placed on a plane without a passport and became a fugitive from the law.

Complainant further alleged that because of her protected activity, Respondent took adverse action against her including:

1) the November 15, 2012 airport rage incident; 2) harassment in the form of unpleasant work assignments, disciplinary action, hostile work environment, being underpaid, promotion denial, and unfair subjection to an independent medical examination; 3) retaliation on November 20, 2012, when Complainant was assigned to work with individuals who had harassed and humiliated her; 4) her December 2, 2012 coaching session; 5) December 10, 2012 disability and retaliation discrimination when Respondent's representative was unavailable to her, she was suspended, and asked to submit to an independent medical examination ("IME"); and 6) February 20, 2013 disability discrimination and retaliation resulting from the IME examining physician concluding Complainant could not perform her job, and Respondent removing Complainant from service.

Consequently, on July 13, 2017, the Board issued a Decision and Order of Remand affirming in part and reversing in part my Decision, and remanded the case to the undersigned for further consideration consistent with its opinion. Hukman, supra, slip op. at 1-8. Specifically, the Board held that I did not abuse my discretion in denying Complainant leave to amend her complaint. Nevertheless, the Board reversed my Decision granting Respondent's Motion to Dismiss on the basis of Complainant's pleadings being sufficient to survive a 12(b)(6) motion to dismiss. However, the Board affirmed my conclusion that Complainant's November 15, 2012 "airport rage incident" and the report about a nurse's expired license do not state claims of protected activity that involve violations of FAA orders, regulations, or standards. On the other hand, the Board reversed my conclusion that Complainant did not state a claim with respect to her allegation that co-workers were "smuggling" other co-workers onto planes without listing them on the flight manifest, which may have created weight and balance issues.³

The Board also held that the undersigned should have considered Complainant's materials that were submitted outside of her pleadings, including materials attached to her request for hearing and her response to the Order to Show Cause, and in doing so, the Board held the undersigned should have considered Respondent's Motion to Dismiss as a motion for summary decision.⁴

³ The Board also noted Complainant alleged that "a passenger was allowed on a flight without any identification which posed a security risk." The Board stated that although Complainant did not appeal the undersigned's failure to discuss her allegation, this alleged protected activity could be more fully fleshed out at a formal hearing. See Hukman, supra, slip op. at 6 n. 24.

⁴ Specifically, the Board noted that the undersigned **considered** Complainant's February 20, 2013 OSHA Complaint, Complainant's February 20, 2013 Case Activity Worksheet, Complainant's February 7, 2014 Request for Hearing,

The Board noted that Federal Rule of Civil Procedure 12(d) states that if on a motion for failure to state a claim upon which relief can be granted under 12(b)(6), "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." In determining whether there was a genuine issue of material fact such that Complainant's claims survive a motion for summary decision on the issue of protected activity, the Board considered all of Complainant's "pleadings and submissions," which included her allegation that co-workers were smuggling people onto aircraft, not counting "jumpseaters," and counting adults as children. In particular, the Board noted it considered Complainant's submissions attached to her Response to Order to Show Cause dated March 9, 2015, her submissions attached to her request for hearing (reports dated "August 13," November 24, 2010, March 2, 2012, and July 25, 2012),⁵ an accident description of an airplane crash in January 8, 2003, and a CBS news article about American Eagle being fined \$2.5 million by the FAA for failing to calculate baggage weight. Thereafter, the Board summarily concluded that Complainant's pleadings and submissions show there is genuine issue of material fact as to whether Complainant **held a reasonable belief** that the circumstances she were reporting as weight and balance issues were violations of the FAA regulations.⁶ Thus, the Board concluded Complainant's claim should not be dismissed and reversed my Decision dismissing her claim.

Lastly, the Board directed the undersigned to make an explanatory determination as to the date when Complainant filed her complaint with OSHA in the present matter.

Complainant's January 22, 2015 Pre-Hearing Statement, and her March 9, 2015 Response to the Order to Show Cause. Conversely, the Board noted that while the undersigned stated Complainant's April 13, 2015 Sur-Reply Brief was beyond the scope of what is allowed in briefs, repetitive, and did not bolster her arguments or clarify issues, I did not consider Complainant's Sur-Reply Brief. Similarly, the Board noted the undersigned did not consider Complainant's second Pre-Hearing submission dated March 12, 2015, including 62 exhibits, because I found Complainant had already filed a Pre-Hearing statement and the deadline for pre-hearing statements had passed. Nonetheless, the Board noted that I should have considered the submissions outside of her pleadings, including materials attached to her request for hearing and her response to the Order to Show Cause, in determining whether to dismiss Complainant's claim. Hukman, supra, slip op. at 5-6, n. 23.

⁵ The Board noted that in at least one of these reports dated July 25, 2012, which is entitled "PHL Station Employee Statement," Complainant mentioned weight restrictions. Hukman, supra, slip op. at 7.

⁶ Notably, the Board did not determine or explain whether there was a genuine issue of material fact concerning Respondent's knowledge of Complainant's alleged reports of "weight and balance" issues on aircraft. See Hukman, supra, slip op. at 6-7; see also 29 C.F.R. § 1979.102(a), (b).

On March 5, 2018, Respondent filed "U.S. Airways, Inc.'s Memorandum In Support Of Motion For Summary Decision (herein "Respondent's Motion")," along with 27 supportive exhibits.⁷ By way of factual background, Respondent avers Complainant began working for U.S. Airways in May 2007, as a Customer Service Agent (CSA), and as such, Complainant was at all times a member of the bargaining unit represented by the Airline Customer Service Employee Association - Communications Workers of America and International Brotherhood of Teamsters. Respondent further avers that a collective bargaining agreement (herein "CBA") governs the terms and conditions of employment for union members, including Complainant. On this basis, Respondent states Article 16 of the CBA allows U.S. Airways to require an employee to submit to an IME if it "believes an employee's physical or mental health condition may impair the performance of the employee's duties or poses a safety hazard to his or herself, other employees, or customers." Respondent's Motion, Exhibit 2.

Respondent asserts the events leading up to Complainant's IME pursuant to Article 16 of the CBA, and her suspension for failure to comply with the IME's return-to-work requirements arose directly from Complainant's "repeated customer service failures and highly inappropriate, erratic and disturbing behavior on the job, including complaints from her co-workers fearing for their safety and well-being due to Complainant's threats and outburst, not air carrier safety issues." In particular, Respondent avers that on November 15, 2012, while working a departing flight for Republic Airways, Complainant refused to board a Republic Airways' flight attendant who had boarding priority under U.S. Airways' policy after the Republic

⁷ Likewise, on February 26, 2018, Respondent filed "U.S. Airways, Inc.'s Motion to Continue Hearing." Respondent sought to continue the formal hearing scheduled in the present matter beginning on April 9, 2018, in Las Vegas, Nevada, based upon Respondent's intention to file a Motion for Summary Decision no later than the March 2, 2018 deadline. Further, Respondent noted that in accordance with the September 11, 2017 Pre-Hearing Order Complainant, if she elected to do so, could respond to the Motion for Summary Decision no later than March 14, 2018. Thus, in light of the timeframe, Respondent stated it was unlikely the undersigned would have an opportunity to rule on the Motion prior to the formal hearing, rendering the hearing premature. Respondent's Motion to Continue Hearing, p. 1. Consequently, on March 26, 2018, the undersigned issued an Order Continuing Hearing Sine Die and **granting** Respondent's request to cancel the formal hearing set for April 9, 2018, noting that on March 2, 2018, Complainant filed a Motion for Summary Judgment, and on March 5, 2018, Respondent filed a Motion for Summary Decision, as well as on March 9, 2018, Respondent filed a Response to Complainant's Motion for Summary Judgment.

Airways' flight attendant and a pilot reminded Complainant about the policy. As a result, Complainant began to scream at the Republic Airways' pilot in front of passengers, and called the control tower and police. According to Respondent, Manager Eric Staples investigated the November 15, 2012 altercation with witnesses present, and he determined that both Complainant and the pilot had acted unprofessionally and unnecessarily escalated the situation. Respondent's Motion, Exhibit 6. However, Mr. Staples also noted that during his investigation Complainant exhibited troubling behavior such as repeatedly -raising her voice, and becoming agitated and disrespectful when asked straightforward questions like "when was your shift today?" Respondent's Motion, Exhibit 7.

Likewise, on December 2, 2012, when Mr. Staples, along with a duty manager and shift manager, met with Complainant to issue her a "Performance Level 1" written discipline for the November 15, 2012 altercation, Complainant entered the meeting screaming, and continued to yell, interrupt, and berate Mr. Staples during the meeting. Complainant also accused Mr. Staples of trying to turn the "entire station" against her, and threatened Mr. Staples, as well as stating the Republic Airways' pilot would "never fly again" and the flight attendant would "not have a job when I am done." Respondent's Motion, Exhibits 8-9. Following his December 2, 2010 meeting with Complainant, Mr. Staples had serious concerns about Complainant's mental stability. Respondent's Motion, Exhibit 10. Respondent also avers it had concerns about Complainant's behavior and demeanor prior to and after the November 15, 2012 altercation due to Complainant's reports that U.S. Airways' breakrooms were bugged, she was being stalked by a co-worker who was going to murder her, that U.S. Airways' employees had their own "witch language (i.e., reverse language)" they were using to make up allegations against Complainant, and that someone was accessing Complainant's work computer and changing the language preference from English to Spanish.⁸ Respondent's Motion, Exhibits 11-12. Lastly, Respondent avers that after the November 15, 2012 altercation, U.S. Airways received complaints about Complainant's behavior on its "Global Compliance hotline," stating Complainant was acting irrationally, that Complainant accused a co-worker of tapping

⁸ Complainant alleged the U.S. Airways' employees that utilize the "witch language" all "represent the witch" and that Complainant's relatives were informed by employees about the "witch." Respondent's Motion, p. 5, Exhibit 11. Complainant also alleged international and domestic gate terminals were being "monitored," and that a "CSA" was stalking her and was in cahoots with the CIA, who tapped Complainant's phone to gather information on her. Respondent's Motion, Exhibits 12-13.

her cell phone at the behest of the FBI, and another co-worker expressed concern about what Complainant was capable of doing and may suffer from a mental disorder. Respondent's Motion, Exhibits 14-15.

On December 10, 2012, one of Respondent's Human Resources representatives and a union representative met with Complainant to inform her that she would need to complete an IME pursuant to the CBA. Respondent's Motion, Exhibit 16. Although Complainant initially refused to participate in the IME, she eventually underwent an IME with Dr. Karen Cruey on February 12, 2013. On February 20, 2013, Respondent's Human Resources Director, Mr. O'Donnell, informed Complainant that Dr. Cruey determined Complainant "currently cannot safely and effectively perform the functions of a CSA" and advised that Complainant attend regular psychotherapy sessions for at least four to six weeks. Mr. O'Donnell also informed Complainant she was removed from service on unpaid leave; they requested she comply with Dr. Cruey's return-to-work conditions, and that pursuant to Article 16 of the CBA, she could seek a second medical opinion within 14 days.⁹ Respondent's Motion, Exhibits 17-18. Nevertheless, Respondent avers Complainant did not seek a second medical opinion, nor did she complete the return-to-work conditions imposed by Dr. Cruey, and as a result, Respondent terminated Complainant's employment on December 10, 2015.

Turning to its Motion for Summary Decision, Respondent asserts that only two of Complainant's alleged protected activities giving rise to Complainant's claims of whistleblower retaliation under AIR 21 remain, which include Complainant's alleged report in April 2011, about co-workers "smuggling" other employees onto aircraft without listing them on the flight manifest (creating a weight and balance issue), and Complainant's alleged December 25, 2011 report that a passenger, "fugitive Modika," brother of pilot Modika boarded a flight without a passport.¹⁰ Respondent contends that Complainant must present sufficient evidence that a trier of fact could find in

⁹ Respondent explained that Mr. O'Donnell's letter to Complainant regarding her compliance with return-to-work conditions was erroneously dated February 20, 2012, and was actually prepared and sent to Complainant on February 20, 2013, as evidenced by Mr. O'Donnell's email to Complainant. Respondent's Motion, p. 7 n. 5, Exhibit 18.

¹⁰ Pursuant to the Board's July 13, 2017 Decision in the instant case, Respondent avers these are the only alleged protected activities at issue because the Board affirmed the undersigned's finding that Complainant's November 15, 2012 "airport rage" incident and Complainant's complaint about a nurse's expired license do not state claims with respect to protected activity under the Act. Respondent's Motion, p. 10 n. 8.

her favor, and absent such evidence summary decision is proper. Wallis v. J.R. Simplot, Co., 26 F.3d 885, 892 (9th Cir. 1994); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). However, Respondent argues Complainant has failed to produce probative evidence supporting her "absurd and fantastical claims" that she suffered adverse action for reporting "smuggling" of airline employees and a fugitive. Thus, Respondent asserts summary decision is proper in the instant case. See Wilson v. N.Y. Police Dep't, 2013 WL 878585, at *19-20 (S.D.N.Y. Feb. 6, 2013) (the court found that the plaintiff, who suffered from psychosis, made "delusional" allegations and summary judgment was appropriate regarding her claim of hostile work environment).

Similarly, Respondent argues Complainant cannot prove a **prima facie** case because Respondent did not take any adverse employment actions against Complainant. First and foremost, Respondent contends its requirement that Complainant submit to an IME and comply with return-to-work conditions cannot be an adverse action as it is dictated in the CBA.¹¹ As discussed above, Respondent avers a company official determined Complainant's "mental condition may impair the performance of her duties and pose a safety hazard to herself, other employees and customers." Respondent's Motion, p. 14, Exhibit 2. Thus, Respondent argues, since this requirement is dictated by the CBA, it cannot be an adverse action. See Cherkaoui v. City of Quincy, 877 F.3d 14, 29 (1st Cir. 2017) (the court held it was not an adverse employment action for the employer to require the plaintiff to undergo an IME allowable under union contract); see also Wetzel v. Town of Orangetown, 2015 U.S. Dist. LEXIS 21355, at *15-16, 21 (S.D.N.Y. Feb. 9, 2015) (requiring an employee to undergo IME pursuant to department policy was not an adverse employment action). In addition, Respondent contends Complainant's decision not to seek a second opinion, as permitted by the CBA, and to not comply with the return-to-work conditions set by the IME provider eliminates any contention by Complainant that her suspension or termination were adverse employment actions. Second, Respondent asserts Complainant's

¹¹ Respondent states employees, like Complainant, are contractually bound to undergo an IME under Article 16 of the CBA which states the following:

Employees may be required to submit to a Company paid medical examination at the time of employment and at such time as a Company official determines that an employee's physical or mental condition may impair the performance of his duties or poses a safety hazard to himself, other employees, or customers.

Complainant's Motion, p. 14, Exhibit 2.

allegation that she was subjected to a "frivolous coaching session" on December 2, 2012, does not rise to the level of an adverse action. See Evans v. Fed. Express Corp., 468 F. App'x 746, 747 (9th Cir. 2012) (corrective actions are not adverse employment actions). Third, Respondent contends Complainant's allegation that she was subjected to an adverse action of additional assignments is time-barred, but even if timely, additional assignments also do not rise to the level of adverse actions. See Hargrow v. Fed. Express Corp., 2009 WL 226039, at *1 (9th Cir. 2009) (finding that the denial of schedule change is not an adverse employment action).

Further, Respondent argues Complainant cannot prove her **prima facie** case because U.S. Airways did not have knowledge of Complainant's alleged protected activity at the time of its December 10, 2012 decision to submit Complainant for an IME under the CBA. Respondent avers that at the time it decided to have Complainant complete an IME and comply with return-to-work conditions, it knew nothing of Complainant's April 2011 complaint about a weight and balance issue due to "smuggling" employees on aircraft, nor did Respondent have knowledge of Complainant's December 2011 complaint about a passenger being on a flight without proper identification. Similarly, Respondent avers that on December 2, 2012, when its decision makers issued Complainant a Performance Level 1 written discipline, and thereafter on December 10, 2012, placed Complainant on leave pending the completion of an IME, the decision makers had no knowledge of Complainant's complaints about "smuggling" passengers on aircraft. Indeed, Respondent contends that on December 10, 2012, when Complainant was placed on leave pending the completion of an IME, it was the **first** time Complainant made any allegations known to U.S. Airways about an unknown passenger allegedly being "smuggled" onto a flight. Furthermore, Respondent argues that Complainant has not produced (and cannot produce) any evidence showing Respondent, as well as the decision makers knew of her protected activity. On this basis, Respondent avers it had no knowledge of other alleged protected activity such as allowing a passenger ("Modika") on a flight without proper identification prior to any other alleged adverse actions. Although Complainant states that on December 25, 2011, she spoke with the FBI about the "Modika" incident at an unnamed time, Respondent avers it had no knowledge of such events, and in fact, Complainant's only mention of "Modika" is found in an undated, handwritten note stating "other employees got corrupted and created a serious issue for U.S. Airways back in December (the Modika case)." Respondent's Motion, p. 17, Exhibit 19. However, Respondent argues that Complainant's bizarre and vague

reference does not meet the requisite notice required under the Act.

Additionally, Respondent asserts Complainant cannot prove by a preponderance of the evidence that her alleged protected activity was a contributing factor in any alleged adverse employment action. Respondent contends Complainant was suspended and subjected to an IME for "disturbing and alarming" behavior she engaged in while on the job, not for any protected activity. Moreover, Respondent argues that over one year went by between Complainant's alleged April 2011 and December 2011 protected activity, and her December 10, 2012 referral to the IME. See Evans v. Wash. Pub. Power Supply Sys., ARB No. 96-065, ALJ No. 1995-ERA-052, slip op. at 4 (ARB July 30, 1996) (finding that a lapse of approximately one year was too much to justify an inference that protected activity caused the adverse action); Clark v. Pace Airlines, Inc., ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006) (dismissing claims related to complaints more than one year prior to the adverse action). Thus, Respondent concludes the temporal proximity between Complainant's alleged protected activity and adverse actions is too remote to create any inference of retaliation.

Similarly, Respondent asserts Complainant's erratic behavior during the November 15, 2012 altercation, and thereafter, is an intervening cause and breaks any causal connection between Complainant's alleged 2011 protected activity and alleged adverse actions. On this basis, Respondent contends it had legitimate reasons for requiring Complainant to submit to the IME, and suspend, as well as terminate Complainant's employment when she did not comply with the IME recommendations. Respondent avers that AIR 21 does not protect an employee's rude, negative, and destructive behavior even if a safety issue is intermingled with the misconduct. See, e.g., Herchak v. American West Airlines, Inc., ALJ No. 2012-AIR-012, slip op. at 1 (ALJ Jan. 27, 2002) (stating an "employer is not required to overlook the intemperate manner in which an employee makes a complaint simply because the nature of the complaint involves safety concerns."). Therefore, Respondent asserts Complainant has failed to demonstrate that her alleged protected activity was a contributing factor in her suspension or termination, and thus summary decision should be granted. See Zurcher v. S. Air, Inc., ARB No. 11-002, ALJ No. 2009-AIR-007, slip op. at 4 (ARB June 27, 2012) (affirming the ALJ's dismissal because the protected activity was not a contributing factor in the airline's decision to terminate the pilot's employment); Powers v. Pinnacle Airlines, Inc., ALJ No. 2003-AIR-012, slip op. at 8-9 (ALJ Dec. 10, 2003) (granting summary decision for the airline

because, under AIR 21's standard, the complainant had not alleged facts that her termination was pretextual).¹²

Respondent further contends that even if Complainant could establish a **prima facie** case, Complainant's claims should be dismissed because it is clear Respondent would have taken the same personnel action in the absence of protected activity. Respondent avers it had an obligation to investigate the November 15, 2012 altercation between Complainant and the Republic Airways' pilot. Likewise, based upon Respondent's investigation of the November 2012 altercation, Complainant's reaction to the issuance of a Performance Level 1 written discipline, and employees' complaints and concerns for their safety due to Complainant's behavior, Respondent asserts it exercised a contractual right to submit Complainant for an IME. Moreover, once Respondent received Dr. Cruey's IME recommendations, Respondent avers it had no other choice but to advise Complainant of her right to a second opinion and suspend her employment until she completed the IME recommendations.

Finally, Respondent contends that this Court lacks subject matter jurisdiction because all of Complainant's claims require interpretation of the CBA, and thus are preempted by the Railway Labor Act ("RLA"). See 54 U.S.C. §§ 151-188; see e.g., Bhd. Of Locomotive Eng'rs v. Louisville & Nashville R.R. Co., 373 U.S. 33, 36-38 (1963); Tice v. Am. Airlines, Inc., 288 F.3d 313, 318 (7th Cir. 2002). More specifically, Respondent argues that pursuant to the CBA, Article 16, it had authorization to require Complainant "to submit to a Company paid medical examination at the time of employment at such time as a Company officer determines that an employee's physical or mental condition may impair the performance of his duties or poses a safety hazard to himself, other employees, or customers." Further, Respondent avers Complainant's right to seek a second opinion within 14 days of removal from service, her ability to grieve the outcome of the exam, and Respondent's right to remove Complainant are

¹² Although Complainant alleges in her complaint that she was denied promotions, Respondent avers any adverse action based on the denials of promotions is time-barred. However, even if timely, Respondent argues the denial of promotions does not fall under the purview of the Act because Complainant alleged she was denied promotion based upon her race and/or national origin, and as such, she did not allege any violations of FAA orders, regulations, or standards. Nevertheless, Respondent avers the decision not to promote Complainant to a CSS position was solely due to Complainant's interview scores and a clear withdrawal of her application. Therefore, Respondent argues the denial of promotions to a CSS position, even if timely, are not based on her protected activity under AIR 21. Respondent's Motion, pp. 20-22.

exclusively governed by the CBA.¹³ In the same way, Respondent contends Complainant's claims regarding her denied promotions are governed by Articles 8 and 9 of the CBA, which address seniority and filling vacancies for Custom Service Supervisors and "E-Temporary." Consequently, Respondent asserts any of Complainant's claims relating to the IME and her failure to be promoted are preempted by the RLA and must be dismissed due to lack of subject matter jurisdiction.

Based on the foregoing, Respondent argues that there are no genuine issues of material fact as to Complainant's AIR 21 claim, and as a matter of law Respondent's summary decision should be granted.

On March 13, 2018, the undersigned issued an Order to Show Cause, advising Complainant, as a pro se party, that she was entitled to file a response opposing Respondent's Motion by March 26, 2018. Complainant was also advised that the Court could dismiss the action on the basis of the moving party's papers if she did not file a response. Furthermore, Complainant was advised that her response must identify all the facts stated by the moving party to which she disagreed and must set forth **her version of the facts** by offering **affidavits** or by **filing sworn statements**. Finally, Complainant was advised that she was entitled to file a legal brief in opposition to Respondent's brief.

On March 16, 2018, Complainant filed her "Memorandum in Support of Plaintiff's Opposition to Motion for Summary Judgment (herein "Complainant's Opposition")," along with sixteen supportive exhibits.¹⁴ Complainant avers she was hired by

¹³ In its Motion, Respondent avers that under the RLA a "minor dispute" is one that involves the interpretation or application of a collectively-bargained agreement. See, e.g., Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 722-23 (1945). As a result, Respondent argues that Complainant's claims constitute a "minor dispute" for purposes of the RLA because they all involve interpretation and application of the CBA, that is, promotions and all processes surrounding IMEs are governed by the CBA. Respondent's Motion, p. 23.

¹⁴ In her Opposition, Complainant provides 16 supportive exhibits, but she does not cite to any of the exhibits in support of factual allegations as required by 29 C.F.R. § 18.72(c). Furthermore, none of Complainant's exhibits are **affidavits** or **sworn statements** of her version of the facts in the instant case. Complainant also objects to Respondent's supportive exhibits that were submitted as part of its Motion for Summary Decision. More specifically, she objects to 25 out of the 27 exhibits Respondent relies upon for various reasons including the exhibits are invalid, submitted in breach of the CBA, forged, is a false statement, based on false information, or Complainant simply "objects" to the exhibit with no further explication or

Respondent on May 22, 2007, as a full time Customer Service Agent ("CSA") in Las Vegas, Nevada. Complainant claims that in her first week of employment with Respondent, CSA Laura Anderson began harassing Complainant by spreading rumors about her. Complainant also claims that in 2008, Ms. Anderson and Ms. Edwards¹⁵ placed Complainant's personal information on Myspace and Facebook, but that Respondent did not address the incident despite having knowledge of the same. Complainant avers she "was laid off in 2010," and that Ms. Anderson and Ms. Edwards followed Complainant to Philadelphia, rented an apartment in the same complex where Complainant resided, and continued to harass Complainant. In January 2011, according to Complainant, "Homeland Security" conducted an investigation, and as a result, Ms. Edwards transferred to Florida and Ms. Anderson resigned from her employment with Respondent. Complainant avers that Ms. Anderson and several other U.S. Airways' employees "learned invisibility," which was taught by Respondent's employees and was used to intimidate Complainant, and cause serious damage to Complainant's business, her reputation, finances and family.¹⁶ Complainant further avers Ms. Anderson and other employees were "paying cash money in order for her [Ms. Anderson] to be accommodated to be smuggled inside the aircraft without listing her [Ms. Anderson] on the manifest."

In opposition, Complainant avers she filed her complaint with OSHA on February 14, 2013, and that she is entitled to a "new trial to submit new factual allegations and submit documentation according to her termination on December 10, 2015." Pursuant to AIR 21, Complainant asserts she engaged in protected activity, that Respondent had knowledge of her protected activity, that she suffered adverse actions, and her protected activity contributed to Respondent's adverse employment actions. Specifically, Complainant contends she engaged in protected activity¹⁷ when she reported to Respondent about the "modification of adults" by listing them as children

evidence in support of her allegations. Complainant's Opposition, pp. 26-30, Exhibits 1-16.

¹⁵ Complainant did not state whether Ms. Edwards was also employed by Respondent or what position Ms. Edwards held, if any. Complainant's Opposition, pp. 3-4.

¹⁶ In opposition, Complainant states Ms. Anderson learned "invisibility" from an Iranian, who taught other U.S. Airways' employees how to become "invisible." Complainant states she conducted a serious investigation about "invisibility" and spoke with "Arab Officials" who confirmed that "terrorist commit most of [their] crimes invisibly." Complainant's Opposition, p. 4.

¹⁷ Complainant did not provide any dates with respect to her alleged protected activity or adverse employment actions unless otherwise noted. Complainant's Opposition pp. 1-26.

on a "weight and balance" restricted flight; accommodating crew members (flight attendants and pilots) in a "jumpseat" without listing them on the flight manifest; "smuggling" employees inside aircrafts without listing them on the flight manifest; accommodating a unidentified "passenger" on a flight to Europe without obtaining a passport, boarding pass, and without listing the passenger on the flight manifest; and on December 25, 2011, permitting "fugitive Modika"¹⁸ on an aircraft without a passport.¹⁹

Complainant also contends that Respondent has retaliated against her when they denied her promotion and benefits, allotted written discipline to her, required her to submit to an IME, and suspended and terminated her employment.²⁰ In particular, Complainant argues that the November 15, 2012 altercation between her and Republic Airways' pilot Harken (about allowing flight attendant Handel on the aircraft) was a "set up" by Republic Airways to retaliate against Complainant for complaining about FAA violations on July 25, 2012, and on August 11, 2012, as well as for her second EEOC complaint. Moreover, Complainant alleges all the documentation relating to the November 15, 2012 incident was forged by "Nicole Blanchard and Human Resources." Complainant contends that on November 15, 2012, she performed her CSA duties according to Respondent's policies and procedures. With respect to promotions, Complainant avers she was denied a promotion on three different occasions, as well as being denied overtime pay. Further, Complainant avers in June 2012, Respondent promoted 15 agents, but that Ms. Nina Benevenga refused to process her interview application at the Philadelphia International Airport. Moreover, Complainant states she never withdrew her application to be a customer service supervisor. Therefore, Complainant contends her "application and promotion is not time-barred."

¹⁸ Complainant avers that "fugitive Modika" traveled on one of Respondent's airplanes without a passport when "manager John" allowed him to do so. She further avers the Federal Bureau of Investigation conducted a "serious investigation" and determined Respondent transported Modika, a fugitive, without a passport to London, Heathrow. Complainant also avers Respondent was fined by the FAA. Complainant's Opposition, p. 23.

¹⁹ Complainant also claims she filed a grievance with the "CWA Union," and she filed two EEOC complaints, but that Respondent has refused to resolve the disputes. Complainant's Opposition, p. 5.

²⁰ Complainant also argues she suffered adverse action when she had to work in a hostile work environment, she was intimidated by other employees who falsely accused Complainant of delivering drugs, and had derogatory remarks made about her national origin. Complainant's Opposition, p. 25.

Similarly, Complainant contends Respondent retaliated against her on December 2, 2012, when she received "another frivolous coaching" by Mr. Staples who gave Complainant a Performance Level 1 written discipline due to the November 15, 2012 altercation with a Republic Airways pilot. On this basis, Complainant argues her Performance Level 1 discipline is not valid because she did not sign the document, nor did she agree with the discipline. Complainant also argues she was retaliated against from November 15, 2012 through December 10, 2012, because she was harassed by other U.S. Airways employees, and she was assigned to work with employees who had harassed her. Complainant also contends she was retaliated against due to "perceived disability discrimination" when Respondent requested she undergo an IME and suspended her employment. Complainant asserts Dr. Cruvey, the IME examining psychiatrist, negligently rendered her medical opinion, and that Complainant could not find a psychiatrist within the 14 days allotted for a second medical opinion. Lastly, Complainant contends she was retaliated against when she was not called for an interview for a Custom Service Supervisor position at the Philadelphia International Airport, and when she was denied being paid overtime.²¹

In addition, Complainant contends that Respondent had knowledge of the "weight and balance" issue because she informed Manager Christine Thompson, Ms. Harmony Cleary and Manager Eric Staples (on unknown dates) about the safety issue.

Complainant argues her alleged protected activity was a contributing factor in Respondent's adverse employment actions because Complainant filed several complaints alleging FAA violations in 2010, 2011, and in 2012 (in writing), she contacted the FAA about "smuggling" employees on aircrafts, and she filed two EEOC complaints and a union grievance while employed with Respondent. Consequently, Complainant contends Respondent retaliated against her when they "set up" her termination with the assistance of Republic Airways, required her to submit to an IME, suspended her employment, and terminated her employment on December 10, 2015.

²¹ Complainant also contends she suffered adverse action when Jane Galina, who was hired by Laura Williams-Anderson to commit "illegal activities," called Respondent's Global Compliance hotline and made "false accusations" about Complainant. Complainant further contends that Ms. Galina and "her boyfriend" colluded together to "set up" Complainant's suspension following Complainant's November 15, 2012 altercation with the Republic Airways pilot. Notwithstanding the foregoing, Complainant offered no **affirmative evidence, affidavits, or sworn statements** regarding the same. Complainant's Opposition, p. 21.

Given the foregoing, Complainant asserts the undersigned "was wrong about his conclusion on [sic] April 23, 2015 Order and Complainant did not receive a fair decision for a New Trial or Amendment." Therefore, Complainant contends she is entitled to a new trial to submit new factual allegations, adverse actions, retaliation, and documentation "according to her termination on December 10, 2015."²²

On March 29, 2018, Respondent filed "U.S. Airways, Inc.'s Reply in Support of Its Motion for Summary Decision (herein "Respondent's Reply")," asserting Complainant's Opposition to Respondent's Motion for Summary Decision neither addresses the substance of Respondent's Motion nor provides facts supported by evidence as required to avoid summary decision.²³ On this basis, Respondent argues Complainant's Opposition is full of unsupported allegations that are outside the realm of reality such as Complainant asserting an U.S. Airways' employee made

²² Complainant also states that Respondent obtained her personnel file and it was forged. She asserts Respondent cannot discuss "Dr. Cruvey's [IME] Treatment Decision per Article 16 [of the CBA]," because she did not give Respondent written permission to do so. Complainant's Opposition, pp. 22, 24.

²³ On March 29, 2018, Respondent contemporaneously filed "U.S. Airways, Inc.'s Motion To File Reply In Support Of Its Motion For Summary Decision," and the undersigned granted Respondent's Reply on the same day. Thereafter, on **April 4, 2018**, by facsimile, Complainant filed a "Motion For Not Receiving Respondent's Motion For Leave to File Reply Brief by US Mail or Email," asserting she did not receive Respondent's Reply and contacted Counsel for Respondent requesting a copy of the Reply via email. On April 9, 2018, the undersigned issued an Order directing the parties to confer about the issue, and if Complainant had yet received Respondent's Reply, Respondent was directed to serve the Motion upon Complainant. On April 18, 2018, by facsimile, Respondent filed "U.S. Airways, Inc.'s Response to Complainant's Motion For Not Receiving Respondent's Motion For Leave to File Reply Brief by US Mail or Email," along with eight exhibits. Respondent avers that it mailed its Reply to Complainant's last known address via USPS certified mail, return receipt requested. Respondent's Reply, Exhibit A. However, on **April 2, 2018**, Complainant emailed Respondent's counsel stating she never received Respondent's Reply. Respondent's Reply, Exhibit B. On the same day, Respondent's Counsel replied to Complainant via email, informing Complainant that the Reply was sent to her via certified mail. Respondent's Reply, Exhibit C. Indeed, on April 9, 2018, Respondent's counsel received the USPS certified mail receipt signed and dated by Complainant showing she received Respondent's Reply on **April 2, 2018**. Respondent's Reply, Exhibit D. Later that day, Respondent's Counsel received Complainant's instant Motion, which is dated **April 3, 2018, the day after Complainant signed and dated the USPS certified mail receipt** for Respondent's Reply, claiming she never received Respondent's Reply. Notwithstanding the foregoing, pursuant to the undersigned's April 9, 2018 Order, Respondent sent correspondence to Complainant via email and certified mail on April 13, 2018, explaining they sent the Reply to her via certified mail and **that Complainant signed the receipt dated April 2, 2018**. Respondent's Reply, Exhibit E.

herself "invisible," and learned how to become "invisible" from the "Iranian." Likewise, Respondent notes Complainant's allegation that she spoke with "Arab Officials" about "invisibility" and they confirmed that "Terrorist" commit most crimes "invisibly." Respondent contends that allegations such as these are not supported by the evidence and in no way are related to the substance of Respondent's Motion.

Further, Respondent asserts its Motion should be granted because Complainant provides no evidence that Respondent took adverse action against her or that the alleged adverse actions were causally connected to her two alleged protected activities, and many of Complainant's alleged adverse actions have already been time-barred.²⁴ Moreover, Respondent contends Complainant's alleged adverse actions are all governed exclusively by the CBA between Complainant's union and Respondent, thus rendering all of her claims preempted by the RLA, 45 U.S.C. §§ 151-188.²⁵

Likewise, Respondent contends that Complainant relies upon new, yet wholly unsupported allegations and unfounded accusations that should not be (and cannot be) considered by the undersigned, and Complainant offers no evidence in support of her allegations that the documents upon which Respondent relies are forged or otherwise inadmissible. Respondent argues that, in responding to its Motion, Complainant is required to refute Respondent's factual allegations by "[c]iting to particular parts of materials in the records, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory

²⁴ Respondent avers that the Board determined Complainant engaged in two protected activities, that being, she complained about potential weight and balance issues, and when she complained about "fugitive Modika" boarding an aircraft without a valid passport. Respondent's Reply, p. 8; Respondent's Motion, p. 10. As will be more fully discussed below, the Board did not explicitly find Complainant engaged in **two** protected activities, but instead the Board noted that Complainant "sufficiently alleged at least one instance of protected activity when she alleged the flights were taking off with incorrect numbers and types of people listed on the manifest because the incorrect information touched on the safety of flights and because weight on a flight could reasonably be perceived to be a safety issue to one such as Hukman, a customer service representative." Hukman, supra, slip op. at 6. In addition, the Board noted Complainant alleged another instance of protected activity regarding a passenger who was allowed on a flight without any identification which posed a security risk. In doing so, the Board suggested that the alleged protected activity be "more fully fleshed out at trial." Hukman, supra, slip op. at 6 n. 24.

²⁵ Respondent avers Complainant did not address Respondent's contention that her claims relating to adverse actions such as undergoing an IME and completing IME return-to-work conditions are governed by the CBA, and are preempted by the RLA. Respondent's Reply, p. 2 n. 2.

answers, or other materials.” 29 C.F.R. § 18.72(c)(1). However, Respondent asserts Complainant has failed to cite to any **admissible** evidence in the record, thus Respondent’s Motion is undisputed.

In addition, Respondent contends Complainant’s allegations that she suffered adverse action when she was subjected to a “frivolous coaching” on December 2, 2012, that on December 10, 2012, she was required to undergo an IME, and she was eventually terminated on December 10, 2015, do not constitute adverse actions.²⁶ See Evans, supra at 747 (corrective actions are not adverse employment actions). Respondent further contends U.S. Airways’ requirement that Complainant undergo an IME when it determined Complainant’s “mental condition may impair the performance of her duties and pose a safety hazard to herself, other employees and customers” is dictated by the CBA (Article 16), and therefore cannot be an adverse action. Similarly, Respondent argues Complainant’s termination is also not an adverse action because it is simply a contractual consequence provided for in the CBA in the event an employee fails to comply with the return-to-work conditions following an IME. See Cherkaoui, supra at 29. Indeed, Respondent avers Complainant admitted she did not comply with the IME return-to-work requirements, nor did she seek a second medical opinion which ultimately led to her termination. Consequently, Respondent asserts Complainant suffered no adverse action.²⁷

Respondent also contends Complainant is unable to provide any causal connection between her claimed protected activity and her alleged adverse actions. Specifically, Respondent argues Complainant’s contention that she filed several complaints in 2010, 2011, and 2012, which caused Respondent to “set her up for termination and With [sic] Republic Airways help and requested to submit an [sic] Independent Medical Examination and instructed Dr. Cruvey to remove Complainant from job duty,” is not supported by evidence in the record and is speculative in

²⁶ Significantly, as will be discussed below, Complainant filed her OSHA complaint on **February 20, 2013**. However, Complainant was not terminated from her employment with Respondent until **December 10, 2015**, and the record is devoid of any evidence demonstrating that Complainant filed a second OSHA complaint alleging her **December 10, 2015** termination was in retaliation due to her alleged protected activity.

²⁷ Respondent also argues Complainant’s contention that she suffered other adverse actions such as failing to receive promotions, overtime pay, and discriminating against her, are all time-barred on the basis of the Board not disturbing the undersigned’s finding that the only timely claims are for alleged adverse actions occurring between **November 22, 2012** and **February 20, 2013**. Respondent’s Reply, p. 5.

nature. Respondent avers that its decision to require Complainant to undergo an IME had no relation to Complainant's alleged protected activity, and Complainant has offered no evidence of collusion between U.S. Airways' employees and Republic Airways' employees to "set her up" other than her rank speculation.

In contrast to Complainant's assertion that her IME was unjustified because she has no mental health problems, Respondent argues Complainant's statements about various individuals intimidating her while being "invisible" demonstrates Respondent had a legitimate reason for referring Complainant for a mental health examination pursuant to the CBA. Moreover, Respondent contends Complainant's "wild accusations of an elaborate conspiracy" to terminate her have no factual support, and thus the undersigned is not required to entertain such allegations in the absence of any evidence. Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987) ("when the non-moving party's claims are factually implausible, the non-moving party must present more persuasive evidence than is otherwise [required] . . ."); see Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (fantastical allegations and "**uncorroborated and self-serving testimony**" are insufficient to create a triable issue of fact). Therefore, Respondent asserts Complainant has offered no evidence that U.S. Airways' decision to require her to undergo an IME and her subsequent termination for failure to comply with Dr. Cruey's recommendation were causally connected to her alleged protected activity.

Respondent argues Complainant has failed to present evidence that her alleged protected activities, that is, reporting weight and balance issues and complaining about "fugitive Modika" boarding a aircraft without a valid passport, were causally related to any alleged adverse action, or that relevant decision makers who required Complainant to submit to an IME knew of her alleged complaints at the time Complainant was asked to submit to an IME. Respondent also asserts Complainant has also made **new** allegations that are **unsupported** by any evidence in the record. For example, Complainant now alleges Respondent could not discharge her, so it asked Republic Airways to "set up" Complainant's termination by way of the November 15, 2012 incident when Complainant had an altercation with a Republic Airways' pilot. In the same way, Complainant now alleges Ms. Anderson could become "invisible" in order to intimidate her while "invisible," but Complainant's claim lacks any factual support whatsoever. Additionally, Complainant makes

a claim for "perceived disability discrimination retaliation," which Respondent avers is not only a new claim, but AIR 21 provides no relief for perceived disability discrimination. See 29 C.F.R. § 1980.102. Respondent also avers many of Complainant's new claims are time-barred because Complainant alleges harassment and adverse action beginning in May 2007, and taking place in 2010, and 2011. In sum, Respondent argues the aforementioned claims are not only **new** allegations, but they are not supported by **admissible** evidence in the record.

Finally, Respondent asserts Complainant's allegations that Respondent has relied upon forged, invalid evidence in support of its Motion for Summary Decision, is without merit because she offers no evidence to the contrary. See Complainant's Opposition, pp. 9, 13, 15, 17, 20, 22, 27-30. Specifically, Complainant stated Respondent's Exhibit 11 is "forged. It's not valid," and statements from Respondent's employees Irene Morris and Eric Staples are "not valid," but Complainant offers no evidence to support her statements. Complainant also alleged her deposition transcript is "not valid due to breach of the Collective Bargaining Agreement," that Respondent provided documentation for her panel interview that was forged, and that Respondent provided information relating to her IME without permission. Respondent asserts all of Complainant's allegations concerning the validity of its evidence lacks any factual or legal support, and therefore the undersigned should not consider her objections to Respondent's exhibits in support of its Motion for Summary Decision.

On March 29, 2018, Complainant filed a "Legal Brief" in response to Defendant's Motion for Summary Decision "per Court Order on March 13, 2018."²⁸ Complainant asserts she engaged in

²⁸ On April 16, 2018, Respondent filed "U.S. Airways, Inc.'s Motion to Strike 'Complainant [sic] Motion to Show Cause and Complainant [sic] Opposition to Respondent [sic] Motion for Summary Judgment and Complainant [sic] Legal Brief," asserting both of Complainant's filings should be struck from the record because the applicable rules and the Pre-Hearing Order in this matter do not permit these supplemental filings. Respondent argues that by Complainant submitting the aforementioned filings she is getting "second and third bites at the apple," which seek to further sway the Court and simply reiterate the same arguments over and over. Respondent asserts Complainant had an opportunity to respond to its Motion for Summary Decision and should not be allowed to provide endless responses. While the undersigned does not disagree with Respondent, I do recognize Complainant is pro se, and as such, I have provided deference to her filings. See Young, supra, slip op. at 8-10. Indeed, on March 16, 2018, Complainant filed her "Opposition to Respondent's Motion for Summary Decision" with the undersigned on March 5, 2018. However, just three days before on March 13, 2018, the undersigned issued an Order to Show Cause, advising Complainant that she was entitled to

protected activity, Respondent had knowledge of her protected activity, she suffered adverse action, and her protected activity was a contributing factor in Respondent's decision to take adverse action. Complainant averred she never had issues with her co-workers or passengers while employed by Respondent, nor did her personnel file have a discussion of any kind about her mental stability during her employment with Respondent.

In brief, Complainant provides "Facts About Federal Aviation Administration Violation," and in doing so, stated that:

1. In April 2011, she complained to Senior Manager Eric Staples that employees were accommodating other employees and their relatives during weight and balance flights without listing them on the flight manifest, that Ms. Laura Williams-Anderson asked employees to accommodate her without listing her on the flight manifest, that U.S. Airways was "advised about the smuggling issue," and that on "November 24, 2011, [sic]" Complainant advised U.S. Airways (in writing) about the "smuggling" issue.
2. During her employment at the Philadelphia International Airport, Complainant observed employees accommodating non-revenue crew during weight and balance flights without listing them on the flight manifest.²⁹
3. In July 2012, Complainant advised Shift Manager Nicole Blanchard (in writing) about "accommodating Jump Sweaters [sic] without listing them in the manifest during Weight and Balance Flight and modifying adult [sic] and listing them as children."
4. In December 2011, Complainant refused to accommodate "fugitive Modika" on an aircraft from Philadelphia International Airport to London Heathrow Airport, but he

file a response opposing Respondent's Motion by March 26, 2018. Complainant was also advised, among other things, that she was entitled to file a legal brief in opposition to Respondent's brief. See March 13, 2018 Order to Show Cause. In light of the foregoing, it appears Complainant was under the impression that she must respond to the Order to Show Cause and provide a legal brief, despite her already filing her Opposition to Respondent's Motion for Summary Decision. Accordingly, while I do not disagree with Respondent, the undersigned does not find it necessary to strike Complainant's Motion to Show Cause and her Legal Brief from the record. Therefore, Respondent's Motion to Strike is hereby **DENIED**.

²⁹ Complainant did not provide observation dates, or record of to whom she may have reported her observations. Complainant's Legal Brief, p. 5.

was allowed on the aircraft by "manager John" (last name unknown) and was not issued a boarding pass because he did not have a passport. According to Complainant, the FBI investigated the matter and Respondent was fined.

5. In 2012, Homeland Security investigated the "smuggling issue" and interviewed Complainant.
6. From 2010 to 2012, Complainant filed several complaints (in writing) to U.S. Airways' management. She avers Respondent's management "had knowledge and at times were instructed by management and supervisor [sic] to accommodate extra bodies inside the aircraft," but management never resolved the issue.
7. On November 15, 2012, Complainant observed Republic Airways' pilot Harken leaving the gate without an accurate passenger count and without showing the "jumpseaters" on the flight manifest. Complainant contacted the FAA about the incident.

In addition, Complainant noted the "U.S. Airways flight 5481 Crash, January 2003, at Charlotte Douglas International Airport," stating weight and balance was a factor in the crash, and that Complainant's "complaint" is similar to Flight 5481. She further notes the FAA proposed \$2.5 million civil penalty against American Eagle Airline for not complying with weight and balance procedures.³⁰

Complainant avers she complained to "management" at the Philadelphia International Airport about the weight and balance of restricted flights. Specifically, Complainant alleges she spoke with Manager Christine Thompson and Ms. Harmony Cleary. Complainant further states management was aware of the weight and balance issues, but Mr. Eric Staples did not stop weight and balance violations.³¹

Complainant further asserts she suffered adverse action in the form of: 1) harassment; 2) unpleasant work assignments with employees who harassed Complainant; 3) hostile work environment; 4) denied promotion; 5) unpaid upgrade "overtime;" 6) December 2, 2012 coaching session; 7) "December 10th" retaliation,

³⁰ Complainant also provides a list of various FAA regulations. Complainant's Legal Brief, pp. 7-9.

³¹ Complainant did not provide any dates on which she informed Manager Eric Staples, Manager Christine Thompson, or Ms. Harmony Cleary about weight and balance issues. Complainant's Legal Brief, p. 10.

disability discrimination and suspension; 8) placing Complainant on medical leave and forcing her to submit to a medical examination; 9) February 20, 2013 discrimination and retaliation to remove Complainant from her job duties; and 10) December 10, 2015 wrongful termination.

Complainant also states she filed EEOC charges against Respondent for discrimination, retaliation, harassment, and a hostile work environment, but that Respondent retaliated against her by disciplining her and "setting her up" for suspension and termination. She further claims Respondent breached the CBA because Complainant never gave Respondent permission to discuss her IME medical evaluation, that Respondent did not comply with federal and state laws when it allowed discrimination, harassment and retaliation against Complainant, that Complainant was discriminated against when Respondent did not call her for a "panel interview," and that Respondent never discussed with her the condition of her mental health.³² Lastly, Complainant claims Respondent, along with its employees, instructed Dr. Cruet to remove Complainant from her job duties and ordered her to submit to psychotherapy when "she could not submit."³³

³² Complainant did not provide any citation to supportive evidence, nor did she provide dates as to any occurrence. Complainant's Legal Brief, pp. 11-12. On the other hand, with respect to violating Article 16 of the CBA, Respondent asserts no violation occurred when it discussed Complainant's IME without first obtaining Complainant's permission. First, Respondent argues interpretation of the CBA and its requirements is not properly before the undersigned because the RLA preempts consideration of the same. Second, Respondent contends Complainant waived any potential cause of action against U.S. Airways for purportedly discussing her IME without her permission by putting her IME directly at issue since the very beginning of the instant dispute. On this basis, Respondent avers courts have consistently held that when a party puts her medical condition at issue, she waives any right to privacy in her medical condition or records. See, e.g., Stephens v. Chairman of Penn. Bd. of Prob. And Parole, 173 F. App'x 963, 965 (3d Cir. 2006) (holding that because plaintiff "put his medical condition at issue in the resolution of his disciplinary charge . . . appellees did not violate his right to privacy in his medical records."); Stogner v. Sturdivant, No. 10-125-JJB-CN, 2011 WL 4435254, at *5 (M.D. La. Sept. 22, 2011); Thomas v. Carrasco, No. 1:04-cv-05793-MJS (PC), 2010 WL 4024930, at *3 (E.D. Cal. Oct. 13, 2010). Thus, Respondent argues that because Complainant contends the IME was a "means" to terminate her employment, Complainant's IME is at issue in the present matter. Respondent's April 18, 2018 Reply, Exhibits F-H. Given the foregoing, the undersigned agrees with Respondent that Complainant has put her IME at issue in the instant case because in her OSHA complaint, Complainant alleges on December 10, 2012, she was "set up" and retaliated against when she was asked to submit to an IME. Accordingly, the undersigned finds Respondent's disclosure of Complainant's IME is permissible with respect to Complainant's AIR 21 claim. See Stephens, supra at 965.

³³ Complainant alleges that Respondent forced her to take medical leave to "cover for various Federal Aviation Administration Violations and Ms.

In conclusion, Complainant asserts she has "sufficient evidence to support her AIR 21 claim" and that she should be granted summary judgment on all factual counts.

On March 29, 2018, Complainant also filed a "Motion to Show Cause and Complainant Opposition to Respondent [sic] Motion for Summary Decision." As discussed above, Complainant already filed her Opposition to Respondent's Motion for Summary Decision. See Complainant's Opposition, pp. 1-26. Complainant raises nothing new in opposition to Respondent's Motion but a 37-page rambling diatribe of her alleged complaints and "version of the facts," as well as various allegations that U.S. Airways' employees learned how to be "invisible," and were "stalking" Complainant.³⁴ Furthermore, Complainant again raises conspiratorial allegations without any support which have nothing to do with her alleged protected activity or adverse action pursuant to AIR 21.

Notably, in her Motion to Show Cause, Complainant submitted a notarized "Declaration in Support of Opposition to Motion for Summary Judgment [sic] to Show Cause." Complainant swore she is competent to be a witness in the instant case and would testify under oath and penalty of perjury. She also swore that she has personal knowledge "of all the facts and Respondent [sic] disputed facts and the Federal Aviation Administration Violations and all Exhibits submitted to the court set forth above." Complainant's Motion to Show Cause, p. 37.

On March 2, 2018, Complainant also filed a "Motion for Summary Judgment (herein "Complainant's Motion")," asserting that she is entitled to summary judgment on counts "three, four,

Williams-Anderson [sic] to cover for her involvement with the Iranian and for her invisibility . . ." Complainant states she observed Dr. Cruet assisting Respondent and Ms. Williams-Anderson committing violations. Complainant's Legal Brief, p. 13. Complainant again alleges U.S. Airways' employees learned "invisibility" from the "Iranian." Complainant stated she was unaware human beings could be "invisible" and so she conducted a serious investigation about invisibility and even contacted Arab Officials who confirmed invisibility existed. Complainant again alleges U.S. Airways' employees brought the "Iranian" onboard aircraft, and that employees were "smuggling" other employees on weight and balance restricted flights. Complainant's Legal Brief, p. 29.

³⁴ In her Motion to Show Cause, Complainant provides a list of exhibits at the end of her Motion, but she does not cite to any of the exhibits. Further, Complainant provides a list of exhibits she avers was submitted to the undersigned on March 14, 2018, with her Opposition to Summary Judgment, but with very limited descriptions. Complainant's Motion to Show Cause, pp. 33-34.

five, six, seven, and eight" of her complaint because there is no genuine issue of material fact and she is entitled to a judgment as a matter of law.³⁵ Complainant contends that pursuant to the Act, she engaged in protected activity, Respondent had knowledge of her protected activity, she suffered adverse employment actions, and that her protected activity was a contributing factor in the alleged unfavorable personnel action.

Complainant avers she engaged in protected activity, including the following: 1) in April 2011, when she complained to Manager Eric Staples about a "weight and balance" issue due to employees "smuggling" other employees and their relatives on aircrafts without listing them on the flight manifest; 2) on an unknown date, while working at the Philadelphia International Airport Complainant observed employees accommodating non-revenue crew during a weight and balance flight without listing them on the flight manifest; 3) in July 2012, Complainant informed manager Nicole Blanchard that other employees were "modifying adults" and listing them as children on the flight manifest during weight and balance flights; 4) in December 2011, Complainant alleges "fugitive Modika" was allowed on an aircraft without a valid passport, no boarding pass, and was not listed on the flight manifest; and 5) on November 15, 2012, Complainant observed Republic Airways' Captain Harken allowing a disruptive flight attendant on an aircraft, removing a "jumpseater," and leaving the gate without an accurate passenger count.³⁶

With respect to adverse action, Complainant alleges she was harassed, given unpleasant work assignments with employees who harassed her, that she had to work in a hostile work environment, was denied promotion, was not paid "upgrade" overtime, and received a "coaching" on December 2, 2012. Complainant also alleges she suffered adverse action on December 10, 2012, when she was discriminated against for a disability,

³⁵ Complainant did not proffer any supportive exhibits with her Motion for Summary Judgment, rather Complainant stated "Complainant rely [sic] on all evidence and exhibits that was [sic] submitted to the court on the Pre-Hearing Submissions Section 1 through Section 10," dated February 14, 2018. In her Motion, Complainant also states "Complainant would like to use all exhibits," but she does not refer to any specific exhibit in her Motion to support her factual allegations. Complainant's Motion, p. 1.

³⁶ Complainant also refers to the captain, as "Captain Dewitt," thus it was unclear whether the November 15, 2012 incident involved "Captain Harkins" or "Captain Dewitt." Complainant's Motion, p. 5. However, in its Motion, Respondent submitted the captain's statement recalling the November 15, 2012 incident, which demonstrates the captain's name is "Dwight C. Harken," and not "Harkins" or "Dewitt." Respondent's Motion, Exhibit 4. Accordingly, the undersigned will refer to the captain by his proper name.

required to submit to an IME, and suspended from work on medical leave. Likewise, on February 20, 2013, Complainant alleges she suffered adverse action when she was removed from her job following Dr. Cruvey's IME findings, and on December 10, 2015, when she was terminated from employment with Respondent.³⁷

On March 9, 2018, Respondent filed "U.S. Airways, Inc.'s Response to Complainant's Motion for Summary Judgment (herein "Respondent's Response")," asserting Complainant's Motion should be denied and summary decision should be granted in favor of Respondent.

Pursuant to the Board's July 13, 2017 Decision, Respondent asserts the only two alleged protected activities giving rise to Complainant's claims under the Act consist of an alleged April 2011 report Complainant made about co-workers "smuggling" other employees onto aircraft without listing them on the flight manifest, thus creating a weight and balance issue. In addition, on December 25, 2011, Complainant alleged that a passenger identified as a fugitive brother of pilot "Modika" boarded a flight without a passport.³⁸

Significantly, Respondent argues this Court lacks subject matter jurisdiction and must enter summary decision as to all of Complainant's claims because they require interpretation of the CBA, and are **preempted by the RLA**. 54 U.S.C. §§ 151-188; see e.g., Bhd. Of Locomotive Eng'rs, supra at 36-38. In particular, Respondent contends Complainant's claims she was improperly required to undergo an IME under Article 16 of the CBA, she was unjustly suspended from duty upon the IME provider imposing return-to-work conditions, that on December 10, 2015, Complainant's employment was terminated, that Complainant failed to receive upgrade pay or overtime, and she allegedly was denied promotions, are all claims arising out of the interpretation of an airline CBA, and thus only boards of adjustment established

³⁷ In her Motion, Complainant does not address whether Respondent had knowledge of her protected activity nor does she address whether the circumstances were sufficient to raise an inference that her alleged protected activity was a contributing factor in an unfavorable employment action. On the other hand, Complainant vaguely and incoherently discusses that she filed two EEOC complaints against Respondent, that Respondent breached the CBA, and Respondent did not comply with applicable federal and state laws or its own policies and procedures. Complainant's Motion, pp. 1-21.

³⁸ Respondent asserts Complainant conceded in her Motion for Summary Judgment that the aforementioned protected activities are the only protected activities following the Board's July 13, 2017 Decision in the instant case. Respondent's Response, p. 4; Complainant's Motion, p. 3.

under the RLA have "mandatory, exclusive, and comprehensive" jurisdiction. Bhd. Of Locomotive Eng'rs, supra at 36-38; Tice, supra at 318 ("only the arbitral boards convened under the aegis of the Railway Labor Act have authority to determine the rights conferred by a collective bargaining agreement in the airline industry.").

Moreover, Respondent asserts Complainant failed to cite to relevant parts of the record in support of her factual allegations. Pursuant to 29 C.F.R. § 18.72(c)(1), Respondent avers Complainant, who asserts a fact cannot be or is genuinely disputed, must support the assertion by . . . [c]iting to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. See Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001)(the court "may determine whether there is a genuine issue of fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in the motion papers," but the court is not required to consider other materials). Respondent argues that rather than citing to any specific portion of the record in support of Complainant's factual allegations, Complainant merely stated, "Complainant rely [sic] on all Evidence [sic] and exhibits that was [sic] submitted to the court on the Pre-Hearing Submissions Section 1 through Section 10." See Complainant's Motion, p. 1. Complainant further stated "Complainant would like to use all exhibits," but without referencing which documents support each factual allegation. See Complainant's Motion, pp. 1, 15. However, Respondent contends that by Complainant failing to cite to relevant portions of the record in support of her Motion, Complainant has failed to demonstrate that she is entitled to a decision in her favor as a matter of law. In the same way, Respondent argues Complainant relies entirely on her "bare assertions and rank speculation," rather than on **admissible** evidence and fails to meet the stringent standard required for a complainant to prevail on summary decision. Consequently, Respondent asserts Complainant's Motion should be denied for failure to cite to the record in support of her factual assertions.

Likewise, Respondent argues Complainant has not submitted **admissible** evidence in support of her factual assertions in her Motion as required by 29 C.F.R. § 1872(c). See Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 988 (9th Cir. 2006)("only

admissible evidence may be considered in deciding a motion for summary judgment."). Thus, Respondent avers that even if the undersigned were to examine all of Complainant's exhibits, the majority of the exhibits would be inadmissible at the formal hearing and should not be considered on a motion for summary decision.³⁹ Therefore, Respondent contends Complainant's Motion should be denied due to lack of **admissible** supporting evidence.

In addition, assuming Complainant filed her OSHA Complaint on February 20, 2013, Respondent asserts that many of Complainant's alleged adverse actions are time-barred.⁴⁰ Under 29 C.F.R. § 1979.103, Respondent avers any claim filed by Complainant that is outside the 90-day window of the date of adverse action is untimely. Thus, in the instant case, Respondent asserts the only alleged adverse actions that are timely claims are those that occurred between November 22, 2010 and February 20, 2013, and any other alleged adverse actions that occurred before November 22, 2012, or after February 20, 2013, must be dismissed. Consequently, Respondent contends Complainant's adverse actions that are time-barred include: 1) alleged denied promotions; 2) the November 15, 2012 altercation; 3) the November 20, 2012 assignment; 4) her alleged additional assignments; and 5) her December 10, 2015 termination. On this basis, Respondent argues it is entitled to summary decision regarding the aforementioned alleged adverse actions.

In the alternative, Respondent argues that even if the documents Complainant relies upon are admissible at the formal hearing and her claims are not time-barred, Complainant's exhibits do not prove Respondent took any adverse action against Complainant. First, Respondent contends that although

³⁹ On March 5, 2018, Respondent filed "U.S. Airways, Inc.'s Objections to Complainant Sheida Hukman's Pre-Hearing Submission," objecting to the majority of Complainant's February 14, 2018 Pre-Hearing Submission and exhibits. See Respondent's Objection to Complainant Sheida Hukman's Pre-Hearing Submission. As will be discussed below, the majority of Complainant's February 14, 2018 Pre-Hearing Submissions and exhibits, on which she now relies, are not **admissible** evidence.

⁴⁰ Respondent notes that Complainant's Motion alleges it took the following adverse actions against her: 1) Harassment, unpleasant work assignment with U.S. Airways' employees who harassed her, humiliated her and ignored her complaint; 2) Hostile work environment; 3) Denied promotion; 4) Unpaid upgrade "overtime"; 5) A December 2, 2012 coaching session; 6) December 10, 2012 Retaliation, disability discrimination and suspension; 7) Placing Complainant on medical leave and forced her to submit to a medical examination; 8) February 20, 2013 discrimination and retaliation to remove Complainant from her job duties with Respondent; 9) Complainant's termination from employment with Respondent on December 10, 2015. Respondent's Response, p. 8; Complainant's Motion, pp. 10-12.

Complainant alleges U.S. Airways took adverse action against her by denying her a promotion, Complainant has presented no evidence tending to show she was actually denied a promotion or that such a denial was based upon protected activity. Rather, Complainant presents documents relating to her alleged applications for promotions dated April 22, 2011, June 7, 2011, and May 27, 2012. See Complainant's Pre-Hearing Submission, Section 4, Exhibit 3. Furthermore, Respondent asserts the allegation with respect to any promotion is both untimely and preempted by the RLA. Similarly, Respondent contends Complainant's allegation that she was denied a transfer, relying only on her March 18, 2011, April 27, 2011, and November 20, 2011 applications for transfer, fail to demonstrate she was denied a transfer or that the reason for denial was because she engaged in protected activity. Just as with her alleged denial of promotion, Respondent asserts Complainant's denial of transfer claims are untimely and are preempted by the RLA.

Second, Respondent argues Complainant has failed to present any evidence demonstrating that Respondent took adverse action against her by not paying her overtime or providing salary "upgrades." Respondent avers that in support of Complainant's claim she was not paid overtime, Complainant simply provided a preliminary time sheet from November 26, 2010, with a handwritten note at the top stating, "U.S. Airways' Supervisor Sam denied Complainant Overtime." See Complainant's Pre-Hearing Submission, Section 8, Exhibit 1. Notwithstanding the foregoing, Respondent is not sure as to whether Complainant is alleging U.S. Airways denied her overtime hours or that it failed to pay her for overtime compensation for hours worked. Nonetheless, Respondent argues Complainant presented no evidence that U.S. Airways denied or failed to pay Complainant overtime, and such claims are also untimely. Further, Complainant provided no timesheets or pay records to demonstrate she was not paid overtime, nor did she present evidence that any denial of overtime was related to her alleged protected activity.

With respect to Complainant's claim that she was denied "benefits," Respondent also disagrees. Respondent avers that in support of her contention Complainant provided a one-page document about Respondent's "Language Premium Policy" which states Respondent "will establish a language premium of \$0.30 per hour to be added to the base rate of pay for employees occupying language premium positions." See Complainant's Pre-Hearing Submission, Section 7, Exhibit 1. However, Respondent also avers Complainant provided no evidence showing she occupied a "language premium" position, that she was paid for such a

position, when (i.e., timeframe) she was denied such pay, or that Respondent's alleged failure to pay the "language premium" was the result of Complainant's alleged protected activity. Moreover, Respondent asserts that Claimant's claims regarding overtime and the "language premium" pay are exclusively governed by the CBA and therefore preempted by the RLA. As a result, Respondent asserts Complainant's claims regarding the same must be denied.

Third, Respondent asserts Complainant has failed to produce any evidence that demonstrates U.S. Airways subjected Complainant to discrimination or retaliation due to her alleged protected activities. Instead, Respondent avers Complainant makes only cursory and confusing allegations about discrimination, stating she "was never called for a Panel interview at Philadelphia International Airport." However, Respondent contends Complainant did not describe how she was discriminated or retaliated against in violation of AIR 21, but rather she insists she was a good employee. See Complainant's Motion, p. 14. Respondent avers the only exhibits Complainant provided seemingly in support of her discrimination claims are an April 9, 2013 letter from her attorney and four charges of discrimination filed with the Pennsylvania Human Relations Commission on August 31, 2011, June 7, 2012, December 11, 2012, and June 2, 2016, all of which allege Respondent discriminated against Complainant based on her national origin and retaliated against her for filing EEOC charges. Nevertheless, Respondent asserts Complainant did not mention any discrimination or retaliation resulting from her alleged protected activity under AIR 21. Indeed, Respondent argues that rather than supporting her claims in the instant case, her proposed exhibits refute Complainant's allegations that she was discriminated and retaliated against for engaging in protected activity pursuant to AIR 21.

In light of the foregoing, Respondent asserts it took no adverse action against Complainant. To the contrary, Respondent argues that requiring Complainant to submit to an IME and comply with return-to-work conditions cannot be an adverse action as it is expressly permitted and dictated by the CBA. Respondent avers it only required Complainant to submit to an IME after she displayed erratic, unpredictable and unprofessional behavior, none of which Complainant can or has denied. Additionally, Respondent avers that after the IME was conducted Complainant had an opportunity to seek a second medical opinion, but she failed to do so within the 14-day allotted window of time. Likewise, Complainant did not comply with Dr. Cruey's return-to-

work requirements which led to Complainant's termination on December 10, 2015. Respondent also asserts that Complainant's December 2, 2012 coaching session, as well as Complainant's alleged "additional" work assignments do not constitute adverse action. Therefore, Respondent contends Complainant's Motion must be denied due to a lack of adverse action being taken against Complainant.

Respondent also argues there is no evidence that Complainant's alleged adverse actions were causally connected to Complainant's alleged protected activity. On this basis, Respondent avers it had no knowledge about Complainant's alleged protected activity. Respondent concedes that Complainant alleges she complained about weight and balance issues on July 25, 2012 and August 13, "2012," to Manager Christine Thompson and Ms. Harmony Cleary, but Complainant provides no **sworn statement** or **documentary evidence** showing the same.⁴¹ See Complainant's Motion, p. 12. Moreover, Respondent avers that Manager Eric Staples investigated the November 15, 2012 altercation (between Complainant and a Republic Airways' pilot) and on December 2, 2012, issued Complainant a Performance Level 1 written discipline, but Complainant failed to present any evidence that Mr. Staples (or any other decision maker) involved in Complainant's discipline (and her December 10, 2012 suspension pending completion of an IME) had any knowledge about weight and balance complaints at that time.

In the same way, Complainant alleged that on December 25, 2011, she complained about "fugitive Modika" boarding a flight without proper identification, which took place approximately one year before Complainant received her December 2, 2012 Performance Level 1 written discipline. As with the weight and balance issue, Respondent argues there is no evidence showing Mr. Staples (or any other decision maker) had knowledge of this complaint when he issued Complainant a Performance Level 1 discipline and required her to submit to an IME with Dr. Cruey.

Lastly, Respondent asserts Complainant's erratic behavior was an intervening cause and breaks any causal connection between her alleged protected activity and adverse actions. Respondent avers AIR 21 does not protect an employee's rude,

⁴¹ Respondent avers Complainant failed to provide a "year" for the August 13th statement, but instead "2012" is handwritten at the top of the statement, which calls into question the actual date of the complaint. Furthermore, in her Complaint, Complainant states she complained about weight and balance issues in April 2011. See Complainant's Pre-Hearing Submission, Section 1, Exhibits 2 and 3.

negative, or disruptive behavior even if a potential safety issue is intermingled with misconduct. Therefore, Respondent contends that because Complainant has failed to demonstrate her alleged protected activity was a contributing factor in her suspension or termination, summary decision should be granted in favor of Respondent, and Complainant's Motion for Summary Judgment should be denied. See Zurich v. S. Air, Inc., ARB No. 11-002, ALJ No. 2009-AIR-007, slip op. at 4 (ARB June 27, 2012) (affirming the ALJ's dismissal because the protected activity was not a contributing factor in the airline's decision to terminate the pilot's employment).

II. DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.72(a) (2015). See, e.g., Stauffer v. Wal-Mart Stores, Inc., ARB No. 00-062, ALJ No. 1999-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. Part 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Rollins v. Am. Airlines, Inc., ARB Case No. 04-140, ALJ No. 2004-AIR-9 (ARB April 3, 2007); Webb v. Carolina Power & Light Co., Case No. 1993-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.72(a). Thus, in order for the moving party's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party, and the moving party must be entitled to prevail as a matter of law. Gillilan v. Tenn. Valley Auth., Case Nos. 1991-ERA-31 and 1991-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). **Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial.** Id. at 587.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247

(1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Hasan v. Enercon Servs., ARB No. 10-061, ALJ No. 2004-ERA-022, slip op. at 5 (ARB July 28, 2011). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. Affidavits must be made on personal knowledge, **set forth such facts** as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Fed. R. Civ. P. 56(e). While the judge may consider other materials in the record, the judge **need only consider the cited materials** when ruling on a motion for summary decision. 29 C.F.R. § 18.72(c)(3); see Carmen v. S.F. United Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001)(on summary judgment, the court may determine whether there is a genuine issue of fact based on papers submitted on the motion and other papers on file that are specifically referred to in the motion. However, the court need not examine "the entire file for evidence establishing a genuine issue of fact, **where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.**").

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v. U.S. Dep't of Energy, Case No. 1998-CAA-10 (Sept. 28, 1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 1995-WPC-6 (Dec. 13, 1995)(emphasis added); Latigo v. ENI Trading & Shipping, ARB No. 16-076, ALJ No. 2015-SOX-031, slip. op. at 3 (Mar. 8, 2018)(the Board affirmed the administrative law judge's finding that summary decision was proper where the complainant did **not provide any affidavits, sworn statements, or other admissible evidence** to rebut the evidence the respondent presented in support of its affirmative defense). Consequently, the non-moving party may not oppose the moving party's motion for summary decision on **mere allegations**. Such responses must set forth **specific facts** showing that there is a genuine issue of fact for a hearing. 29 C.F.R. § 18.72(c); Anderson, supra at 248; Alexander v. Atlas Air, Inc., ARB No. 12-030, ALJ No. 2011-AIR-003, slip op. at 5 (Sept. 27, 2012). A "scintilla of evidence, or evidence that is **merely colorable** or not **significantly probative** is not sufficient to present a genuine issue as to a material fact." United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989)(internal quotations omitted). Likewise, if the non-moving party's claim is factually **implausible**, the non-moving party

must present "more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987); see Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) ("uncorroborated and self-serving testimony" are insufficient to create a triable issue of fact).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to the non-moving party. Trieber v. Tenn. Valley Auth., Case No. 1987-ERA-25 (Sec'y Sept. 9, 1993).

The U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Pollar v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962) (emphasis added).

In the instant case, in order to withstand Respondent's Motion, it is not necessary for Complainant to prove her allegations. Instead, she must only allege the material elements of her **prima facie** case. Bassett v. Niagara Mohawk Power Co., Case No. 1986-ERA-2 @ 4 (Sec'y July 9, 1986). Whether the alleged acts actually occurred or whether they were motivated by the requisite animus are matters which cannot be resolved conclusively until after the parties have presented their evidence at a formal hearing.

Accordingly, to prevail in an AIR 21 "whistleblower" case, Complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity **was likely a contributing factor in the unfavorable employment action.** See Occhione v. PSA Airlines, Inc., ARB No. 13-061, ALJ No. 2011-AIR-012, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 49 U.S.C. § 42121(b); 29 C.F.R. § 1980.104(e)(1), (2)); see also Macktal v. U. S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Zinn v. Univ. of Missouri, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); Overall v. Tenn. Valley Auth., Case No. 1997-ERA-53 at 12 (ARB Apr. 30, 2001). The foregoing creates an

inference of unlawful discrimination. Id. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 262-63 (5th Cir. 2014) (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468 (5th Cir. 2008)); accord Ameristar Airways, Inc. v. Admin. Rev. Bd., 650 F.3d 563, 567 (5th Cir. 2011); Coates v. Grand Trunk W. R.R. Co., ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015).

If, however, Complainant makes a **prima facie** showing, the burden shifts to Respondent to demonstrate **by clear and convincing evidence** that it would have taken the same adverse action in the absence of the complainant's protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii); Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010); Mizusawa v. United Parcel Serv., ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 4 (ARB June 15, 2012). Notwithstanding the foregoing, "[whistleblower provisions] are not intended to be used by employees to **shield themselves from the consequences of their own misconduct or failures.**" Trimmer v. U.S. Dep't of Labor, 174 F.3d 1098, 1104 (10th Cir. 1999) (citing Kahn v. U.S. Sec'y of Labor, 64 F.3d 271, 279 (7th Cir. 1995); see also Johnson v. Stein Mart, Inc., 440 F. App'x 795, 803 (11th Cir. Sept. 9, 2011).

Prefatory to discussing Respondent and Complainant's Motions for Summary Decision and/or Summary Judgment, there are three issues that must be addressed: 1) the date on which Complainant filed her OSHA complaint; 2) whether Complainant may raise new allegations of protected activity and adverse action that were not raised in her initial OSHA complaint; and 3) Complainant's admissible evidence in support of her motions.

A. Filing of Complainant's OSHA Complaint

The Board directed the undersigned to make an explanatory determination as to when Complainant filed her complaint with OSHA, and in doing so, stated the following:

It is not clear when Hukman filed her complaint and a fact-finding is necessary to establish the filing date for purposes of the record. The complaint itself lists the date it was created as "February" and in handwriting "14, 13." It is printed on paper with a date at the bottom of "1/29/13." The "Discrimination Intake Worksheet," attached to the Assistant Secretary's Findings, has a date of "03/21/13" in

handwriting at the top, and states, also in handwriting, "sent letter in February 2012 Rec 02/20/2013." The Assistant Secretary's Findings state that Hukman filed her complaint on February 20, 2013, but does not indicate how it came to this conclusion. As we are already remanding to the ALJ, and because a disputed event occurred on November 15, 2012, that would be a timely adverse action if the complaint was filed (as Hukman claims) on February 14, 2013, but would be untimely if filed (as US Airways claims) on February 20, 2013, we hold that on remand, the ALJ must make an explanatory determination regarding Hukman's filing date.

Hukman v. U.S. Airways, Inc., ARB No. 15-054, ALJ No. 2015-AIR-003, slip op. at 7-8 (ARB July 13, 2017).

In accordance with AIR 21, "[t]he date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt." 29 C.F.R. § 1979.103(d). As discussed by the Board, there are several dates noted in relation to the filing of Complainant's OSHA complaint. It appears that Complainant printed a typed letter from an "aol" mail account on January 29, 2013, as indicated at the bottom of each page of her letter/complaint to OSHA. However, on the first page of Complainant's letter to OSHA, appears "February," and below, in handwriting "14, 13." Nevertheless, on its "Case Activity Worksheet," OSHA lists Complainant's filing date as February 20, 2013. Moreover, although the "Discrimination Intake Worksheet" attached to the Assistant Secretary's Findings lists "03/21/13" in handwriting at the top, it also states (in handwriting) "sent letter in February 2012 Rec 02/20/2013," which appears to indicate Complainant's OSHA complaint was received on February 20, 2013.

Upon considering the foregoing, I find that Complainant did not mail, fax, or email her letter on January 29, 2013, because of the handwriting on the letter indicating the date of February 14, 2013, which is also the date Complainant stated she filed her complaint. However, there is no evidence in the record showing she faxed, emailed or mailed (i.e., no postmark date) her complaint on February 14, 2013, as claimed by Complainant. On the other hand, OSHA noted on its "Case Activity Worksheet" and on the "Discrimination Intake Worksheet" that Complainant's claim was filed and/or received on February 20, 2013.

Therefore, because it is unclear as to the exact date Complainant sent her letter/complaint to OSHA the undersigned finds Complainant filed her OSHA complaint on **February 20, 2013**, the date OSHA stated her complaint was filed and/or received.

A whistleblower claim must be filed timely in order to be considered before the OALJ. The Code of Federal Regulations establishes the timeframe within which Complainant has to file her claim to be considered timely and, in part, states the following:

(d) Time for filing. Within **90 days after an alleged violation** of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

29 C.F.R. § 1979.103(d) (emphasis added). Thus, a claim filed **outside of the 90-day window** of the date of the adverse action is rendered untimely. Sullivan v. Pinnacle Airlines, Inc., 2010 WL 3119787, at *4 (D. Minn. May 28, 2010) (dismissing an AIR 21 complaint as untimely because the claim was not filed within 90 days after the purported adverse action occurred).

In the present matter, Complainant alleged several adverse actions were taken against her, spanning from 2010 through 2015, for engaging in protected activity pursuant to AIR 21. Nevertheless, as I have found that Complainant filed her OSHA complaint on **February 20, 2013**, the only claims that will be timely are claims that occurred between November 22, 2012, and February 20, 2013. Therefore, I find and conclude all of Complainant's alleged adverse actions **before** November 22, 2012, and **after** February 20, 2013, are untimely and are **DISMISSED** and will not be further considered.

B. New Allegations Outside Complainant's OSHA Complaint

Complainant asserts she is entitled to a "new trial to submit **new factual allegations** and **submit documentation according to her termination on December 10, 2015.**" Conversely, Respondent asserts Complainant has also made **new** allegations that are not permissible, and are **unsupported** by any evidence in the record. For example, Complainant now alleges Respondent could not discharge her, so it asked Republic Airways to "set

up" Complainant's termination by way of the November 15, 2012 incident when Complainant had an altercation with a Republic Airways' pilot. In the same way, Complainant now alleges Ms. Anderson, one of Respondent's employees, became "invisible" in order to intimidate her, but Complainant's claim lacks any factual support whatsoever. Additionally, Complainant makes a claim for "perceived disability discrimination retaliation," which Respondent avers is not only a new claim, but AIR 21 provides no relief for perceived disability discrimination. See 29 C.F.R. § 1980.103. In sum, Respondent argues the aforementioned claims are not only new allegations, but they are not supported by **admissible** evidence in the record.

While a formal de novo hearing in this matter scheduled for April 9, 2018, was continued sine die by an Order issued on March 26, 2018, Complainant is not entitled to assert **new factual allegations** regarding her **December 10, 2015 termination** because she filed her OSHA complaint on **February 20, 2013**, and as such, any alleged adverse actions **before** November 22, 2012, and **after** February 20, 2013, are untimely and will not be considered. See 29 C.F.R. § 1979.103(d). Furthermore, I am aware the implementing regulation states that proceedings before an administrative law judge are de novo. 29 C.F.R. 1980.107(b). Nevertheless, in the instant case, de novo is properly characterized as a "review that prevents deference to OSHA's findings and conclusions if an employee subsequently sues, but it is not a complete redaction of the administrative proceeding." Wallace v. Tesoro Corp., 796 F.3d 468, 475 (5th Cir. 2015).

The Board has held that the OSHA investigation is an absolute prerequisite, and stated that where a complainant fails to file a complaint with OSHA, the administrative law judge has no power to adjudicate such a complaint. Coates v. Southeast Milk Inc., ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 8 n. 3 (ARB July 31, 2007); Parker v. Tenn. Valley Auth., ARB No. 99-143, ALJ No. 1999-ERA-013, slip op. at 4 (ARB June 27, 2002) (declining to address allegations of post-layoff retaliation because the complaints were not investigated by OSHA). Moreover, various United States Circuit Courts of Appeals have held **only those alleged acts asserted in Complainant's OSHA complaint will be subject to judicial review.** Wallace, supra at 476; see also Jones v. Southpeak Interactive Corp. of Del., 777 F.3d 658, 669 (4th Cir. 2015) (finding that in a SOX whistleblower case "litigation may encompass claims reasonably related to the original complaint, and those developed by reasonable investigation of the original

complaint.") (internal quotations omitted). The undersigned acknowledges that the Wallace and Jones cases involved claims brought under the Sarbanes-Oxley Act of 2002 ("SOX"), and not AIR 21. See Wallace, *supra* at 476; see also Jones, *supra* at 669. Nonetheless, pursuant to 18 U.S.C. § 1514A(b)(2)(C), procedure for SOX cases, that is, rules and procedure, burdens of proof, statute of limitations, and entitlement to a jury trial are governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). As discussed above, AIR 21 is applicable to the present matter, and like SOX claims, AIR 21 claims mandate the similar requirement common to whistleblower claims falling within the purview of the U.S. Department of Labor's authority, that being, the initial complaint (and subsequent investigation) must first be considered by OSHA.

In Wallace, the Fifth Circuit Court of Appeals held "[t]he **scope of a judicial complaint is limited to the sweep of the OSHA investigation that can reasonably be expected to ensue from the administrative complaint.**" The Court further noted "[i]t would thwart the administrative scheme to allow plaintiffs to sue on claims that the [OSHA] agency never had the chance to investigate and attempt to resolve." Id. In support of its holding, the Wallace Court noted that the Title VII "exhaustion requirement" is consistent with SOX's administrative enforcement mechanisms because "an administrative charge is not filed as a preliminary to a lawsuit." Id. (internal citations omitted). Rather, the purpose of an administrative charge is to prompt OSHA's "defined investigation and conciliation procedures." Id. Thus, an OSHA complaint must "allege the existence of facts and evidence to make a **prima facie** showing, including facts and evidence showing that the employee engaged in protected activity." Id.; 29 C.F.R. § 1980.104(e).

In light of the foregoing, the undersigned finds that, not unlike Wallace, AIR 21 dictates procedure for the instant case, and as such, it is proper that the "**scope of [Complainant's] judicial complaint is limited to the sweep of the OSHA investigation that can reasonably be expected to ensue from the administrative complaint.**" Id. at 476. Indeed, under the governing regulation, OSHA has been designated to receive such complaints. 49 U.S.C. § 42121; 29 C.F.R. § 1979.103(c). Accordingly, I find that the governing regulations require submission of complaints to OSHA as a prerequisite to further action by the U.S. Department of Labor, which includes action by an administrative law judge. Furthermore, because SOX and AIR 21 claims have similar administrative enforcement mechanisms, it

follows that an AIR 21 complainant, like a SOX complainant, must exhaust his or her administrative remedies before OSHA, and "litigation that follows may encompass only those claims reasonably related to the original complaint." Jones, supra at 669. Consequently, I find and conclude any allegations that were not first submitted to OSHA for investigation are not properly before me, and I cannot consider them as it would thwart the administrative scheme. See Wallace, supra at 476.

In sum, Complainant's present allegations that were not identified in Complainant's February 20, 2013 OSHA complaint and are not reasonably related to her OSHA complaint include: 1) alleged denial of benefits; 2) alleged denial of promotion; 3) alleged denial of overtime pay or salary upgrade; 4) alleged unpleasant work assignments with people who allegedly harassed Complainant; 5) alleged harassment by "invisible" employees; 6) allegations of "perceived disability discrimination;" 7) alleged denial of transfer to other airports serviced by Respondent; and 8) Complainant's December 10, 2015 termination from employment with Respondent. See Complainant's OSHA Complaint, pp. 1-6.

Thus, given my findings that Complainant filed her OSHA Complaint on February 20, 2013, and that Complainant's allegations of protected activity and adverse action are limited to the OSHA complaint and investigation, the following are not properly before me, and I am unable to consider them:⁴²

1. Any allegations (protected activity and adverse action) concerning the November 15, 2012 airport rage incident between Complainant and a Republic Airways' pilot, from which Complainant alleges she was "set up" and terminated on December 10, 2015. Such allegations are time-barred.
2. Any allegations regarding Complainant being denied promotions because Complainant failed to raise this issue in her OSHA complaint, and therefore she did not exhaust her administrative remedies before OSHA.⁴³

⁴² With respect to Complainant's allegations regarding denial of promotions, overtime pay, harassment by "invisible" employees and perceived disability discrimination, Complainant did not offer definitive dates on which these alleged actions took place. See Complainant's Opposition; Complainant's Motion; Complainant's Legal Brief; Complainant's Motion to Show Cause.

⁴³ Notably, Complainant did not provide dates as to when her applications for promotion were denied. However, in her February 14, 2018 Pre-Hearing Submission, Complainant submitted applications dated **April 22, 2011, June 7, 2011, and May 27, 2012.** Thus, considering the dates of her applications, any denial of promotion would be considered untimely as well. See Complainant's February 14, 2018 Pre-Hearing Submission, Section 4, Exhibit 3. Lastly,

3. Likewise, any allegation made by Complainant about her alleged denial of overtime pay or salary "upgrades" because Complainant failed to allege these issues in her OSHA complaint, and therefore she did not exhaust her administrative remedies before OSHA.⁴⁴
4. Complainant alleges she suffered adverse action when she was denied "benefits," but she offers no date or further explication. In addition, Complainant failed to exhaust her administrative remedies before OSHA with respect to any denial of "benefits."⁴⁵
5. Complainant alleges on November 20, 2012, she was retaliated against when she was assigned to work with individuals who harassed and humiliated her. However, this allegation is time-barred and Complainant failed to exhaust her administrative remedies before OSHA.
6. Her December 10, 2015 termination from employment with Respondent because Complainant failed to file a complaint alleging her termination to exhaust her administrative remedies before OSHA and it is also untimely.
7. Any allegations pertaining to harassment by employees who are "invisible," "perceived disability discrimination" and work assignments with employees who allegedly harassed Complainant because Complainant failed to

Complainant did not present any **admissible** evidence, **affidavit**, or **sworn statement** demonstrating she was denied promotion, or that any denial was due to her alleged protected activity.

⁴⁴ Assuming **arguendo** Complainant had mentioned in her OSHA complaint that she was denied overtime pay, she failed to present any **admissible** evidence demonstrating she was denied overtime or overtime wages. In particular, Complainant submitted a document (which is not admissible evidence) dated **November 26, 2016**, which appears to be a preliminary shift sheet. However, Complainant handwrote on the top of the sheet "US Airways Supervisor Sam denied Complainant Overtime." Even if admissible and taken as true, the document fails to show Complainant was denied overtime, and her claim would also be untimely. See Complainant's February 14, 2018 Pre-Hearing Submission, Section 8, Exhibit 1.

⁴⁵ Complainant provided a one-page document about Respondent's "Language Premium Policy" which states Respondent "will establish a language premium of \$0.30 per hour to be added to the base rate of pay for employees occupying language premium positions." See Complainant's February 14, 2018 Pre-Hearing Submission, Section 7, Exhibit 1. However, Complainant provided no evidence showing she occupied a "language premium" position, that she was paid for such a position, when (i.e., timeframe) she was denied such pay, or that Respondent's alleged failure to pay the "language premium" was the result of Complainant's alleged protected activity. See Complainant's Opposition.

exhaust her administrative remedies before OSHA by not listing such issues in her OSHA complaint.⁴⁶

C. Complainant's Admissible Evidence⁴⁷

As directed by the Board, I note that I have considered Complainant's February 20, 2013 OSHA Complaint, her February 20, 2013 Case Activity Worksheet, her January 22, 2015 Pre-Hearing Statement, Complainant's March 9, 2015 Response to the Order to Show Cause, her March 12, 2015 Pre-Hearing Submission, her April 13, 2015 Sur-Reply Brief, and all her submissions discussed herein. In doing so, I note that Complainant did not provide any **affidavits** or **sworn statements** except in her March 29, 2018 Motion to Show Cause, swearing she has personal knowledge "of all the facts and Respondent [sic] disputed facts and the Federal Aviation Administration Violations and all Exhibits submitted to the court set forth above."⁴⁸ Complainant's Motion

⁴⁶ Likewise, Complainant did not allege she was harassed by "invisible" employees or assigned work assignments with threatening employees due to any action taken in connection with reporting a safety issue falling under AIR 21, nor did she provide any **admissible evidence, affidavit, or sworn statement** in support of her allegations. See Complainant's Opposition; Complainant's Legal Brief; Complainant's Motion to Show Cause.

⁴⁷ Pursuant to the Rules of Practice and Procedure For Administrative Hearings Before The Offices Of Administrative Law Judges:

(c) Procedures -

(1) Supporting factual positions. A party asserting that a fact cannot be or is genuinely disputed **must support the assertion by:**

(i) **Citing to particular parts of materials in the record**, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(ii) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection that a fact is not supported by admissible evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials not cited. The **judge need consider only the cited materials**, but the judge **may** consider other materials in the record.

(4) Affidavits or declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, **set out facts that would be admissible in evidence**, and show that the affiant or declarant is competent to testify on the matters stated.

²⁹ C.F.R. § 18.72(c) (emphasis added).

⁴⁸ On March 13, 2018, Complainant was advised that her response to Respondent's Motion for Summary Decision must identify all the facts stated by the moving party to which she disagreed and **must set forth her version of the facts by offering affidavits** or by filing **sworn statements**. See Order to Show Cause. As discussed above, the undersigned recognizes Complainant is

to Show Cause, p. 37. Moreover, in Complainant's March 9, 2015 Response to the Order to Show Cause, her April 13, 2015 Sur-Reply Brief, her March 2, 2018 Motion for Summary Judgment, her March 16, 2018 Opposition to Respondent's Motion for Summary Decision, and March 29, 2018 Legal Brief and Motion to Show Cause, Complainant did not reference or cite to any **affirmative evidence, affidavit, or sworn statement** in support of her factual allegations as required by 29 C.F.R. § 18.72(c).⁴⁹ See Carmen, supra at 1031.

In addition, by Order dated **April 5, 2018**, the undersigned granted Respondent's objections to Complainant's **February 14, 2018** Pre-Hearing Submission, which contained numerous exhibits, most of which Respondent objected to as irrelevant and immaterial pursuant to the Federal Rules of Evidence, Rules 401 and 402; lacking authenticity under Federal Rule of Evidence 901; unfairly prejudicial, confusing, or misleading under Federal Rule of Evidence 403; inadmissible hearsay under Federal Rules of Evidence 801, 803, and 805; protected communication about settlement/compromise pursuant to Federal Rule of Evidence 408; and/or that, in major part, Complainant failed to produce such documentation in response to Respondent's request for production of documents. Accordingly, as set forth in the April 5, 2018 Order, many of the exhibits upon which Complainant ambiguously relies are **excluded** from the record, and would not be admitted into evidence at the formal hearing.⁵⁰ See Order Granting Respondent's Objections to Complainant's Pre-Hearing

pro se, and in doing so, I have overlooked Complainant's failure to comply with 29 C.F.R. § 18.72(c), by specifically citing to her exhibits in support of factual allegations in her motions. Nonetheless, the undersigned provided clear directive to Complainant regarding **affidavits** and **sworn statements**, and thus, I do not find her sweeping and vague statement, in which she swore she has knowledge of "all facts," to sufficiently describe her version of the facts by **affidavit** or **sworn statement**. To do anything to the contrary would permit Complainant to "**shift the burden of litigating [her] case to the courts.**" Pik, supra, slip op. at 4-5. Accordingly, the undersigned will not consider Complainant's sworn statement to be supportive of specific facts alleged by Complainant.

⁴⁹ See supra, notes 1 and 35.

⁵⁰ Many of Complainant's exhibits that were excluded by the April 5, 2018 Order Granting Respondent's Objections to Complainant's Pre-Hearing Submission and Denying Complainant's Motion to Supplement Complainant's Pre-Hearing Exchange correspond to exhibits she submitted in prior Motions, including her Opposition to Respondent's Motion for Summary Decision, as well as her March 12, 2015 Pre-Hearing Submission. In addition, Complainant wholly relied upon her exhibits filed with her February 14, 2018 Pre-Hearing Submission, most of which are excluded from the record as discussed above. The only exhibits from her February 18, 2014 Pre-Hearing Submission that are **not excluded** are as follows: Section 1, CX-2, pp. 1-2; Section 3, CX-3 through CX-5; Section 4, CX-2; Section 6, CX-4 and CX-5.

Submission and Denying Complainant's Motion to Supplement Complainant's Pre-Hearing Exchange, pp. 1-12.

On the other hand, in Opposition, Complainant summarily objected to many of Respondent's exhibits in support of its Motion for Summary Decision on the basis of the exhibits being "invalid," submitted in breach of the CBA, "forged," setting forth "false statements," based on "false information," or Complainant simply "objected" to the exhibit with no further explication and no evidence in support of her allegations. Consequently, the undersigned did not exclude any of Respondent's exhibits in support of its Motion for Summary Decision.

Here, both Complainant and Respondent filed Motions for Summary Decision and/or Summary Judgment. Accordingly, the undersigned will first address Respondent's Motion for Summary Decision, followed by Complainant's Motion for Summary Judgment.

D. Complainant's Prima Facie Case⁵¹

1. Protected Activity

The Code of Federal Regulations prohibits any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:

(1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other

⁵¹ Any alleged protected activities and adverse actions regarding Complainant's national origin, race, or sexual harassment allegations are not within the jurisdiction of the U.S. Department of Labor, and they will not be discussed as a result. The alleged discrimination Complainant encountered, and the retaliation she incurred as a result of her complaints about such discrimination in no way relate to a violation of FAA orders, regulations, or standards, and thus do not fall within the whistleblower protections of 49 U.S.C. § 42121. Additionally, in accordance with the Board's July 13, 2017 Decision and Order of Remand, the undersigned will not again consider Complainant's November 15, 2012 "airport rage" incident or Complainant's report of a nurse practicing without a license with respect to any allegation of protected activity. See Hukman, supra, slip op. at 5.

provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;

(2) 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 subtitle VII of title 49 of the United States Code, or under 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); 29 C.F.R. § 1979.102(a), (b) (emphasis added).

According to the Board, “[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.**” Sewade v. Halo-Flight, Inc., ARB No.13-098, ALJ No. 2013-AIR-009, slip op. at 7-8 (ARB 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.”). As a result, 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, AJJ No. 2013-AIR-016, slip op. at 5 (ARB Jan. 21, 2016). To prove subjective belief, “a complainant must prove that he held the belief in good faith.” Id. On the other hand, the Board explained, “[t]o 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 omitted). However,

while 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, ALJ No. 2007-AIR-008, slip op. at 9 (ARB July 2, 2009).

Here, pursuant to Complainant's February 20, 2013 OSHA complaint, Complainant alleges she engaged in protected activity "[e]arly in 2011,"⁵² when she advised Manager Eric Staples that CSA Laura Williams-Anderson was asking other employees to "smuggle" her onto aircraft without being listed on the flight manifest, as well as other employees "smuggling" fellow employees, friends and family members on aircraft without being listed on the flight manifest (creating a weight and balance issue). Complainant also alleges she engaged in protected activity on **December 25, 2011**, when a passenger, "fugitive Modika," boarded an aircraft from Philadelphia International Airport to London Heathrow Airport without a boarding pass and passport. Complainant avers she told Modika he could not board the aircraft, but "manager John" was "misinformed" by Modika and permitted him to board the aircraft without a boarding pass and passport, which created a "security" risk. Complainant avers the FBI questioned "all the employees who worked the gate" and that U.S. Airways was fined over the incident. Complainant also alleged that in **February 2012**, she "had to go to the Internal Affairs to verify some information. [She] had to inform them about the illegal activities."⁵³ In **May 2012**, she also spoke with a detective from Homeland Security "about the situation."⁵⁴

As discussed above, the Board found that at least one of Complainant's submissions (i.e. her July 25, 2012 PHL Station Employee Statement) mentioned "weight restrictions" in regard to Complainant's allegations of co-workers smuggling people onto aircraft, not counting "jumpseaters," and counting adults as children.⁵⁵ In addition, the Board considered Complainant's

⁵² In her January 22, 2015 Pre-Hearing Statement, Complainant states that in **April 2011** she informed Manager Eric Staples about employees smuggling other employees onto aircraft. See January 22, 2015 Pre-Hearing Statement, p. 1.

⁵³ Complainant did not expound on what "illegal activities" she discussed with "Internal Affairs." Complainant's OSHA Complaint, p. 2.

⁵⁴ In her March 29, 2018 Legal Brief, Complainant states that in 2012, she talked to Homeland Security about the "smuggling issue." Complainant's Legal Brief, p. 6.

⁵⁵ The Board also considered other submissions made by Complainant that allegedly discuss weight restriction issues dated "August 13," November 24, 2010, and March 2, 2012. Hukman, supra, slip op. at 7 n. 30. Notably, the "August 13" PHL Station Employee Statement was excluded from the record

submission of an article from the Flight Safety Foundation about a description of an U.S. Airways' airplane crash on January 8, 2003, and a CBS news article about American Eagle Airlines being fined \$2.5 million by the FAA for failing to calculate baggage weight in January and October 2008. Thereafter, the Board summarily concluded that Complainant's pleadings and submissions show there is a genuine issue of material fact as to whether Complainant **held a reasonable belief** that the circumstances she was reporting as weight and balance issues are violations of FAA regulations. Thus, **arguably**, the Board concluded there is a genuine issue of material fact as to whether Complainant engaged in protected activity when she reported weight and balance issues.

In its Motion, Respondent does not dispute Complainant engaged in protected activity, stating "[t]he issue for determination, here, however, is not whether Complainant engaged in protected activity (as those have already been narrowed and defined by the ALJ and ARB), but whether U.S. Airways took adverse action against Complainant and, if so, whether such adverse action is causally related to her alleged protected activity."⁵⁶ Respondent's Reply, p. 2 n. 1; Respondent's Motion,

evidence because Complainant failed to produce the document during discovery. See Order Granting Respondent's Objections to Complainant's Pre-Hearing Submission and Denying Complainant's Motion to Supplement Complainant's Pre-Hearing Exchange, pp. 1-12. On the other hand, upon examining Complainant's March 2, 2012 handwritten letter, it makes no mention of "weight and balance issues" relating to safety, but instead Complainant alleges two co-workers were rude to her and would not place passengers on the aircraft. Complainant stated, according to DOT on a weight restricted and oversold flight, the passengers who did not board the aircraft should have been compensated. Complainant's March 12, 2015 Pre-Hearing Submission, Exhibit 20. That being said, Complainant's November 24, 2010, and July 25, 2012 PHL Station Employee Statements do mention "smuggling" and a weight and balance issue relating to safety, respectively. Complainant's March 12, 2015 Pre-Hearing Submission, Exhibits 1 and 2. However, there is no **affirmative evidence, affidavit, or sworn statement** showing that in April 2011, Complainant informed Manager Eric Staples about employees "smuggling" other employees onto aircraft, or that she provided her November 24, 2010, and July 25, 2012 PHL Station Employee Statements about "smuggling" to Mr. Staples or to any other employee or Respondent official. Likewise, there is no **affidavit, sworn statement or admissible evidence** showing Complainant engaged in protected activity on December 25, 2011, with respect to the "fugitive Modika" incident.

⁵⁶ In its Motion, Respondent stated the two alleged protected activities giving rise to Complainant's claims of whistleblower retaliation under AIR 21 remain: 1) a report Complainant claims to have made in April 2011 about co-workers smuggling other employees onto aircraft without listing them on the flight manifest, allegedly creating a weight and balance issue; and 2) her alleged report on December 25, 2011, that a passenger identified only as fugitive brother of pilot Modika boarded a flight without a passport. Respondent's Motion, p. 10.

p. 10. Contrary to Respondent's assertion, the Board did not conclude Complainant engaged in protected activity on December 25, 2011, when she alleged she was questioned by the FBI about "fugitive Modika" boarding an aircraft without a passport or boarding pass, or that a genuine issue of material fact existed regarding the same. See Hukman, supra, slip op. at 6 n. 24. Rather, the Board simply suggested Complainant's allegation be "more fully fleshed out at trial." Id. Upon careful examination of the record, there is no **admissible** evidence, **affidavit**, or **sworn statement** demonstrating Complainant reported to Respondent or any government agency that "fugitive Modika" was boarded on aircraft without a passport or boarding pass. Indeed, the only **admissible** evidence that mentions "fugitive Modika" is an undated, handwritten note from Complainant to Mr. Yori stating, "other employees got corrupted & created a serious issue for US Airways back in December (the Modika case)."⁵⁷ Respondent's Motion, p. 17, Exhibit 19. Thus, Complainant's allegation that on December 25, 2011, she engaged in protected activity is not supported by competent evidence, but rather she relies on **mere allegations** that carry no probative weight in summary decision proceedings. Anderson, supra at 248; Alexander, slip op. at 5. Accordingly, the undersigned does not find there is a genuine dispute as to any material fact that Complainant did **not** engage in protected activity on December 25, 2011, when she allegedly reported "fugitive Modika" boarded a plane without proper credentials.

Nevertheless, because Respondent **arguably** concedes that Complainant has engaged in protected activity in **April 2011**, when she allegedly reported to Manager Eric Staples that employees were "smuggling" other employees on aircraft, and does not offer any argument or evidence to the contrary, I find

⁵⁷ Assuming **arguendo** on December 25, 2011, "fugitive Modika" boarded an U.S. Airways' aircraft without proper credentials, Respondent avers the only mention of "Modika" that exists is an undated, handwritten note from Complainant to Mr. Yori stating, "other employees got corrupted & created a serious issue for US Airways back in December (the Modika case)." Respondent's Motion, p. 17, Exhibit 19. Thus, Respondent contends Complainant's bizarre and vague reference to Modika does not meet the requisite notice under AIR 21, and therefore no evidence exists demonstrating that Respondent or any decision maker had notice of the "Modika" incident. See, e.g., Simpson v. United Parcel Serv., ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008) (holding that complainant's complaint did not relate to a regulation or order, and that she was not sufficiently specific in her complaint). I agree. Based on the foregoing, I find Complainant's vague, undated letter to Mr. Yori about the "serious issue" regarding the "Modika case," is insufficient to demonstrate that she informed Respondent or any government agency about a safety or security issue relating to and within the scope of AIR 21.

there is no genuine dispute as to any material fact that Complainant engaged in protected activity in April 2011 when she allegedly reported "smuggling" issues to Manager Staples.⁵⁸

2. Respondent's Knowledge of Protected Activity

The Board has held "knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint." Peck v. Safe Air Int'l, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 14 (ARB Jan. 30, 2004); Bartlik v. TVA, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), aff'd, 73 F.3d 100 (6th Cir. 1996).

In particular, Complainant alleges that in **April 2011**, she reported to Manager Eric Staples that U.S. Airways' employees were "smuggling" other employees onto aircraft without listing them on flight manifest. Likewise, Complainant alleges she complained (on an unknown date) about weight and balance issues to Manager Christine Thompson and Ms. Harmony Cleary.

On the other hand, Respondent avers the decision makers possessed no knowledge of Complainant's concern about "smuggling" passenger(s) when they issued Complainant a Performance Level 1 written discipline on December 2, 2012, and on December 10, 2012, placed Complainant on leave pending her completion of an IME.⁵⁹ In fact, Respondent avers that December

⁵⁸ With respect to Complainant's allegation that in February 2012, she went to "Internal Affairs" to inform them about "illegal activities," and in May 2012, she also spoke with Homeland Security about "smuggling" issues, I do not find her **mere allegations** create a genuine issue as to material fact in regard to this alleged protected activity because they are vague, lacking any factual detail of the activities/issues, unsupported by **admissible** evidence, and she did not provide **affidavits** or **sworn statements** regarding the same. See Complainant's Opposition; see also Anderson, supra at 248; Hansen, supra at 138. Also, contrary to Respondent's concession, Manager Eric Staples memorialized a meeting he had with Complainant in an August 4, 2011 email to Mr. Cory Cooper. Mr. Staples mentioned a litany of issues raised by Complainant, none of which related to "smuggling" employees or passengers. Respondent's Motion, Exhibit 13; see infra, note 60.

⁵⁹ With respect to the November 15, 2012 altercation between Complainant and a Republic Airways' pilot, it appears that PHL Duty Manager Michael Lofton provided a summary of the altercation, and that Mr. Lofton, Shift Manager Nicole Blanchard, and Senior Manager Eric Staples were all present during the company investigation with Complainant on November 15, 2012, and on December 2, 2012, when Complainant was issued a Performance Level 1 written discipline. However, it appears that on December 2, 2012, Manager Eric Staples issued the written discipline to Complainant. Respondent's Motion, Exhibits 6-7, 10. That notwithstanding, it is unclear if Mr. Staples was the sole decision maker in meting out discipline, or if Mr. Lofton and Ms. Blanchard assisted in the decision. Nonetheless, Complainant has not

10, 2012, when Complainant was placed on leave pending the completion of an IME, was the **first** time Complainant made any allegations known to U.S. Airways about an unknown passenger allegedly being "smuggled" onto a flight.⁶⁰ Thus, Respondent argues Complainant's alleged protected activity could not have contributed to her December 2, 2012 Performance Level 1 written discipline, or to her December 10, 2012 placement on leave pending completion of an IME.

Accordingly, viewing all evidence and factual inferences in the light most favorable to Complainant, I find there are no genuine issues of material fact as to whether Respondent did **not** have knowledge of Complainant's alleged protected activity at the time Complainant received her December 2, 2012 written discipline, or on December 10, 2012, when requested she undergo an IME. A non-moving party, such as Complainant, who relies on **conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot create an issue of material fact.**⁶¹

demonstrated by **affirmative evidence, affidavit, or sworn statement** that Manager Eric Staples, Duty Manager Michael Lofton, or Shift Manager Nicole Blanchard had any knowledge of the "smuggling" issue or the "Modika" passenger boarding an aircraft without a passport or boarding pass.

⁶⁰ On **August 4, 2011**, Manager Eric Staples emailed Mr. Cory Cooper (whose position is otherwise unknown) stating Complainant had come to speak with him a couple of months ago (arguably in April 2011) when he was working as "interim Director," about several issues, and that he, along with Mr. Robert Yori, met with Complainant to address her specific complaints. The complaints included the following: 1) CSA Laura Anderson was stalking her, Anderson was in contact with the CIA, and had tapped Complainant's family's phones to gather information on Complainant; 2) Ms. Anderson requested to be transferred to LAX Airport to further harass Complainant; 3) Ms. Anderson was spreading rumors about Complainant; 4) PHL Duty Manager Madeline McCune worked to sabotage Complainant by conspiring to change Shift Manager Shepherd's perfect scoring of Complainant's job performance; 5) Ms. McCune held meetings with Shift Managers instructing them to complete paperwork showing Complainant had low scores to ensure she would not receive a "panel interview;" 6) Ms. McCune through Shift Manager Jackie Edwards spread non-specific rumors about Complainant; 7) CSS Kevin Bailey, Shift Manager Joe Wilson, and numerous unidentified Customer Service Agents devised a petition to force Complainant to be transferred from the PHL Airport; and 8) CSS Kevin Bailey, CSS Steven Moustafa, and "others" were sexually harassing Complainant for one year. Respondent's Motion, Exhibit 13. Significantly, absent from this account from Manager Eric Staples is any mention that Complainant reported employees "smuggling" other employees onto aircraft without listing them on the flight manifest, or any mention of safety issues due to weight and balance concerns. Respondent's Motion, Exhibit 13.

⁶¹ The undersigned recognizes Complainant provided two PHL Station Employee Statements dated **November 24, 2010**, and **July 25, 2012**, alleging Laura Anderson was smuggled onto an aircraft without a flight reservation, that "jumpseaters" were allowed on aircraft without being listed on the flight manifest, and that some "agents" list adults as children on weight restricted flights, but there is no **competent evidence, affidavit, or sworn statement**

See Hansen, supra at 138; Rockefeller, supra; Latigo, supra, slip op. at 3. Further, Complainant may not oppose the Respondent's motion for summary decision on **mere allegations**. See Anderson, supra at 248; Alexander, supra slip op. at 5. On this basis, Complainant provides no **affidavit, sworn statement** or **affirmative evidence** showing that in April 2011, she communicated any weight and balance or "smuggling" issues to Manager Eric Staples. In the same way, Complainant provided no **affirmative evidence, affidavit** or **sworn statement** showing she notified Manager Thompson or Ms. Cleary about similar issues. Indeed, Complainant has not even provided a date as to when she notified Manager Thompson or Ms. Cleary about such issues. See Complainant's Opposition, pp. 13-14; Complainant's Legal Brief, p. 10.

3. Complainant's Alleged Adverse Action

Assuming **arguendo** that genuine issues of material fact exist regarding Respondent's alleged knowledge of Complainant's protected activity, I will address whether a genuine issue of material fact exists concerning Complainant's alleged adverse actions. While Complainant alleged she suffered from numerous forms of adverse action, the only three allegations of adverse action that remain are: 1) the December 2, 2012 Performance Level 1 written discipline; 2) the December 10, 2012 requirement to undergo an IME; and 3) the February 20, 2013 suspension pending her fulfillment of IME return-to-work conditions.

a. December 2, 2012 Performance Level 1 Discipline

In her OSHA complaint, Complainant contends Respondent retaliated against her on December 2, 2012, when she received "another frivolous coaching" by Manager Eric Staples who gave Complainant a Performance Level 1 written discipline due to the November 15, 2012 altercation with a Republic Airways' pilot.⁶²

demonstrating Complainant provided these statements to Manager Eric Staples, Manager Thompson, or Ms. Cleary, or any other of Respondent's employees or decision makers. Rather, the November 24, 2010 and July 25, 2012 Statements are allegedly handwritten statements from Complainant, and signed only by Complainant, thus there is no evidence that Respondent or any of its other employees or government agencies received the statements. See Complainant's March 12, 2015 Pre-Hearing Submission, Exhibits 1 and 2.

⁶² On December 2, 2012, Manager Eric Staples emailed Mr. Robert Yori to inform Mr. Yori that he issued the Performance Level 1 written discipline to Complainant, but that "once again, she refused Union representation." Thereafter, on December 3, 2012, Mr. Staples emailed Mr. Yori again and stated "[p]lease advise when we will be meeting with Ms. Hukman. My two managers and I had some serious concerns regarding her mental stability during the meetings last night." Respondent's Motion, Exhibit 10.

On this basis, Complainant argues her "Performance Level 1" written discipline is not valid because she did not sign the document, nor did she agree with the discipline. In addition, Complainant argues she received the discipline "for doing nothing [wrong]" and she was blamed for the problems that arose out of the November 15, 2012 altercation, despite the pilot yelling and screaming.⁶³ Complainant's OSHA Complaint, p. 3.

Respondent does not dispute that on December 2, 2012, Complainant received a Performance Level 1 written discipline. However, contrary to Complainant's assertion, Respondent argues that, as a matter of law, Complainant's December 2, 2012 discipline does not constitute adverse action because corrective actions are not properly characterized as adverse actions. See Evans, supra at 747. I agree. The Board has held that employment actions such as "warning letters" must show the letter affected an employee's terms, conditions, or privileges of employment in order to be considered adverse in nature. Simpson, supra, slip op. at 7. Here, Complainant has not provided **affirmative evidence, affidavit, or sworn statement** demonstrating her Performance Level 1 written discipline had a tangible effect on her employment, that is, it did not change her salary, employment status, or benefits.⁶⁴ See id. Accordingly, I find and conclude there is no genuine dispute as to any material fact, and that as a matter of law Complainant's December 2, 2012 Performance Level 1 written discipline is **not** an adverse action.

b. December 10, 2012 Request to Undergo IME & Suspension

In her OSHA complaint, Complainant alleges on December 10, 2012, she was "set up" and retaliated against when she was asked to submit to an IME and suspended. Complainant's OSHA Complaint, p. 4. In Opposition, Complainant alleges Respondent

⁶³ On December 7, 2012, an "Official Passenger Service Grievance Form" was completed on behalf of Complainant, stating that Complainant received a "Performance ECR" on December 2, 2012, from Manager Eric Staples for failing to comply with the "Republic Non Rev aircraft policy." Per article 3:H of the CBA, the union stated it disagreed with Complainant's discipline and wanted to discuss the issue. The union suggested as a possible remedy, removing the ECR discipline from Complainant's personnel file. Complainant's February 14, 2018 Pre-Hearing Submission, Section 6, CX-5. Significantly, the record is devoid of any other union statements objecting to or disagreeing with Respondent's request that Complainant undergo an IME or that she submit to the IME return-to-work conditions set forth by Dr. Cruey.

⁶⁴ Complainant also failed to provide any case law demonstrating that corrective actions may be properly characterized as adverse action. See Complainant's Opposition, pp. 1-32; Complainant's Legal Brief, pp. 1-15.

reported to her that it was their belief Complainant was having difficulty interacting with other co-workers and managers, and asked her to submit to an IME. Nonetheless, Complainant avers she has no mental or physical impairment that would make her "unstable," and that she was required to undergo an IME due to her trying to rectify "discriminatory and illegal [b]ehavior (i.e., due to "perceived disability discrimination")." Complainant's Opposition, pp. 11-12.

Respondent contends Complainant's allegations that the November 15, 2012 Republic Airways incident, the IME, and her subsequent termination on December 10, 2015, were all part of some elaborate "set up" in retaliation for her alleged protected activity are nothing more than "rank speculation" because she has failed to present any evidence of collusion between Respondent and Republic Airways, nor has she provided any **admissible evidence** in support of the same. In contrast, Respondent asserts the events leading up to the December 10, 2012 meeting, during which it requested Complainant undergo an IME (pursuant to Article 16 of the CBA), arose from "repeated customer service failures and highly inappropriate, erratic and disturbing behavior on the job, including complaints from her co-workers fearing for their safety and well-being due to Complainant's threats and outburst, not air carrier safety issues." Respondent's Motion, Exhibit 16. For example, Respondent notes that on November 15, 2012, Complainant had an altercation with a Republic Airways' pilot and began to scream at a Republic Airways' pilot in front of passengers, and called the police and control tower. Respondent's Motion, Exhibits 4, 6-10. According to Respondent, Manager Eric Staples investigated the November 15, 2012 altercation with witnesses present, and he determined that both Complainant and the pilot had acted unprofessionally and unnecessarily escalated the situation. Respondent's Motion, Exhibit 6. However, Mr. Staples also noted that during his investigation Complainant exhibited troubling behavior such as raising her voice repeatedly, and becoming agitated and disrespectful when asked straightforward questions like "when was your shift today?" Respondent's Motion, Exhibit 7.

Likewise, on December 2, 2012, when Mr. Staples along with a duty manager and shift manager met with Complainant to issue her a Performance Level 1 written discipline for the November 15, 2012 altercation, Complainant entered the meeting screaming, and continued to yell, interrupt, and berate Mr. Staples during the meeting. Complainant also accused Mr. Staples of trying to turn the "entire station" against her. Complainant threatened

Mr. Staples, and also stated the Republic Airways' pilot would "never fly again" and the flight attendant would "not have a job when I am done." Respondent's Motion, Exhibits 8-9. Nevertheless, although Complainant alleged the November 15, 2012 altercation with the Republic Airways' pilot was a "set up" she refused to have union representation at the December 2, 2012 disciplinary meeting. See Respondent's Motion, Exhibit 10 (on December 2, 2012, Manager Staples emailed Robert Yori letting Mr. Yori know Complainant refused union representation). Following his December 2, 2010 meeting with Complainant, Mr. Staples, along with two other managers, had "serious concerns" about Complainant's mental stability. Respondent's Motion, Exhibit 10. Respondent also avers it had concerns about Complainant's behavior and demeanor prior to and after the November 15, 2012 altercation due to Complainant's reports that U.S. Airways' breakrooms were bugged, she was being stalked by a co-worker who was going to murder her, that U.S. Airways' employees had their own "witch language (i.e., reverse language)" they were using to make up allegations against Complainant, and that someone was accessing Complainant's work computer and changing the language preference from English to Spanish. Respondent's Motion, Exhibits 11-12. Lastly, Respondent avers that after the November 15, 2012 altercation, U.S. Airways received complaints about Complainant's behavior on its "Global Compliance hotline," stating Complainant was acting irrationally, that Complainant accused a co-worker of tapping her cell phone at the behest of the FBI, and another co-worker expressed concern about what Complainant "was capable of doing" and that Complainant may suffer from a mental disorder. Respondent's Motion, Exhibits 14-15.

Given the foregoing incidents, Respondent avers on December 10, 2012, it required Complainant to undergo the IME pursuant to the CBA because it determined that her "mental condition may impair the performance of her duties and pose a safety hazard to herself, other employees and customers."⁶⁵ Respondent's Motion,

⁶⁵ In brief, Respondent avers that during the December 10, 2012 meeting with Complainant, one of U.S. Airways' Human Resources representative and a union representative met with Complainant. Respondent's Motion, p. 6. However, Respondent does not identify the names of the representatives. Nevertheless, in its December 10, 2012 letter to Complainant regarding submission to the IME, Mr. Staples signed the letter and it was copied to Theresa Vevea, Director of Customer Service, Jody Manuele, Manager of Labor Relations, and Barbara Tobin, President, Local 13301. Notably, while the union objected to Complainant's December 2, 2012 Performance Level 1 discipline, the record is devoid of any union response or objections concerning Respondent's requirement that she submit to an IME or fulfill the IME return-to-work

Exhibit 2 (CBA, Article 16) and Exhibit 16. On this basis, Respondent argues that any requirement for an employee to undergo an IME is dictated by the CBA, and as such, it cannot be adverse action. See Cherkaout, supra at 29 (the court found that requiring the plaintiff to undergo an IME allowable under union contract was not an adverse action); see also Wetzels, supra at *15-16, 21 (requiring an employee to undergo an IME pursuant to department policy was not an adverse employment action).

In Cherkaout, the Court considered Complainant's claim that her employer retaliated against her when she filed EEOC charges of religious and disability discrimination, and as a result, the employer requested that she submit to an IME. Cherkaout, supra at 30. However, the Court found the union contract demonstrated the employer could request an IME to produce evidence of disability, and that her employer provided enough evidence to show it required the IME for legitimate non-retaliatory reasons. Id. at 29. The Cherkaout Court further noted the plaintiff failed to provide evidence showing her employer retaliated against her in requiring the IME, and granted the employer's motion for summary decision on plaintiff's retaliation claim. Id. at 30. Just as with Cherkaout, here, as discussed above, Respondent has provided competent evidence showing that pursuant to Article 16 of the CBA it had reason to believe Complainant's mental condition may impair her work performance or pose a safety hazard to herself and others, and therefore requested Complainant undergo an IME. See Respondent's Motion, Exhibit 2. Moreover, Complainant has provided no **affirmative evidence, affidavits or sworn statements** to the contrary, nor did she dispute that Respondent could require an IME pursuant to the CBA.⁶⁶ Instead, Complainant simply rests upon her **mere allegation** that she was "set up" and retaliated against when she was required to undergo an IME. Complainant fails to provide any affirmative evidence, affidavit, or sworn statement to

conditions set forth by Dr. Cruey. See Complainant's February 14, 2018 Pre-Hearing Submission, Section 6, CX-5.

⁶⁶ In fact, Complainant stated she is a member of the Airline Customer Service Employee Association - Communications Workers of America and International Brotherhood of Teamsters union and she complied with U.S. Airways' "obsured [sic] request to submit to an IME." However, Complainant does not argue Respondent did not have a right (per the CBA) to request she undergo an IME, but instead she argues the terms of the CBA prevent Respondent from discussing the results of her IME unless she provided written permission. See Complainant's Opposition, pp. 13, 17. Furthermore, Respondent avers a member of the union was present at the December 10, 2012 meeting when Complainant was asked to submit to an IME. In addition, the record is devoid of any evidence from the union objecting to Complainant having to undergo an IME. See Respondent's Motion, Exhibit 16; see also supra, note 63.

support her allegation that she was required to undergo an IME due to her trying to rectify "discriminatory and illegal [b]ehavior." Complainant's **mere allegations** do not show there is a genuine issue of fact for a hearing, and are insufficient when opposing Respondent's Motion for Summary Decision. Anderson, supra at 248; see United Steelworkers of Am., supra at 1542; see also Villiarimo, supra at 1061 ("**uncorroborated and self-serving testimony**" are insufficient to create a triable issue of fact).

Accordingly, the undersigned finds and concludes there is no genuine issue as to any material fact that Respondent required Complainant to submit to an IME, according to the CBA, because Respondent determined Complainant's mental condition may impair her work performance or pose a safety hazard to others. Moreover, I find and conclude that, as a matter of law, requesting Complainant to undergo an IME pursuant to the terms of the CBA is not properly characterized as an adverse action. See Cherkaout, supra at 29-30.

**c. February 20, 2013 Suspension Pending Fulfillment of
IME Return-To-Work Requirements**

In her OSHA complaint, Complainant alleges Respondent also took adverse action against her when it suspended her pending her fulfillment of Dr. Cruey's IME return-to-work requirements. Complainant also asserts Dr. Cruey, the IME examining psychiatrist, negligently rendered her medical opinion, and that Complainant could not find a psychiatrist within the 14 days allotted for a second medical opinion. Complainant claims Respondent, along with its "employees," instructed Dr. Cruey to remove Complainant from her job duties and ordered her to submit to psychotherapy when "she could not submit." Complainant also alleges that Respondent forced her to take medical leave to "cover for various Federal Aviation Administration Violations and Ms. Williams-Anderson [sic] to cover for her involvement with the Iranian and for her invisibility . . ." ⁶⁷ Complainant states she observed Dr. Cruey assisting Respondent and Ms. Williams-Anderson committing "violations." ⁶⁸ Complainant's Legal Brief, p. 13.

⁶⁷ See supra, note 16.

⁶⁸ Complainant did not provide any further explanation or affirmative evidence in regard to her alleged observation of Dr. Cruey assisting Respondent and Ms. Williams-Anderson committing "violations." Complainant's Legal Brief, p. 13. Nor did Complainant provide any evidence showing Respondent forced her to take medical leave so that Respondent could conceal FAA violations, or that Ms. Williams-Anderson was involved with an Iranian and her

Respondent again contends its requirement that Complainant submit to an IME and comply with return-to-work conditions cannot be adverse actions because it is dictated in the CBA. Respondent's Motion, Exhibit 2. See Cherkaout, supra at 29; see also Wetzel, supra at *15-16, 21. According to Respondent, Complainant initially refused to participate in the IME, but she eventually underwent an IME with Dr. Karen Cruey on February 12, 2013. On February 20, 2013, Respondent's Human Resources Director, Mr. O'Donnell, informed Complainant that Dr. Cruey determined Complainant "currently cannot safely and effectively perform the functions of a CSA" and advised that Complainant attend regular psychotherapy sessions for at least four to six weeks. Respondent's Motion, p. 7, Exhibit 17. Consequently, Mr. O'Donnell informed Complainant that she was removed from service on unpaid leave, and in order for her to safely return to her CSA position Respondent requested she comply with Dr. Cruey's return-to-work conditions. Mr. O'Donnell also informed Complainant that pursuant to Article 16 of the CBA, she could appeal her removal from work by seeking a second medical opinion within 14 days. Respondent's Motion, Exhibits 17-18. Nevertheless, Respondent avers Complainant did not seek a second medical opinion, nor did she complete the return-to-work conditions imposed by Dr. Cruey, and as a result, Respondent terminated Complainant's employment on December 10, 2015.⁶⁹

Just as with the December 10, 2012 request that Complainant undergo an IME, I find that as a matter of a law Respondent's February 20, 2013 request that Complainant comply with return-to-work conditions set forth by Dr. Cruey is **not** an adverse action because it is dictated by the CBA. See Cherkaout, supra at 29; see also Wetzel, supra at *15-16, 21. Moreover, Complainant sets forth no case law to the contrary, nor did she dispute that Respondent could require her to fulfill IME return-to-work conditions pursuant to the CBA.

Additionally, assuming **arguendo** Respondent's suspension of Complainant's employment pending completion of the IME return-to-work conditions could be an adverse action, Complainant alleges that Dr. Cruey was ordered by Respondent and its employees to remove Complainant from her job duties, and that Complainant was forced to take medical leave so that Respondent

"invisibility," and how this pertains to her AIR 21 claim. Complainant's Legal Brief, pp. 1-15.

⁶⁹ Complainant does not dispute that she did not comply with the IME return-to-work conditions set forth by Dr. Cruey, nor does she dispute that she did not seek a second medical opinion. Complainant's Motion, pp. 14-15.

could cover up FAA violations with the help of Dr. Cruey. Nevertheless, Complainant simply rests upon her **mere allegations** that she was "set up" and required to undergo an IME and comply with IME return-to-work conditions because Dr. Cruey and Respondent conspired together to commit "violations," but her **uncorroborated allegations** are insufficient to overcome Respondent's Motion for Summary Decision. Anderson, supra at 248; see United Steelworkers of Am., supra at 1542; see also Villiarimo, supra at 1061 ("**uncorroborated and self-serving testimony**") are insufficient to create a triable issue of fact). Thus, assuming **arguendo** that suspension of Complainant's employment pending completion of the IME return-to-work conditions could be an adverse action, the undersigned finds that there is no genuine dispute as to any material fact, that Respondent's request that Complainant undergo such conditions was not an adverse action.

4. Whether Complainant's Alleged Protected Activity Was A Contributing Factor In Any Unfavorable Employment Action

Assuming **arguendo** Respondent had knowledge of Complainant's protected activity and that she suffered adverse action, the undersigned will address whether there is any genuine issue of material fact regarding Complainant's alleged protected activity being a contributing factor to any unfavorable employment action.

Complainant contends she has proven that her alleged protected activity was a contributing factor in Respondent's unfavorable employment action, stating the following:

Complaint [sic] filed several complaint [sic] in writing due to US Airways Federal Aviation Administration Violation [sic] in 2010, 2011, 2012 in writing, contacted Federal Aviation Administration for Republic Airways Violation and the smuggling Employees inside the aircraft without listing them in the manifest, complainant filed two EEOC Complaint [sic] while [sic] was working for US Airways, filed Union Grievance.

Respondent retaliated against complainant and set her up for termination and with Republic Airways help and requested to submit an Independent Medical Examination and instructed Dr. Cruey to remove complainant from her job duty and claimed that complainant had a Guardian 'Laura Williams-Anderson' and requested to submit to psychotherapy, [sic] complainant did not have any

medical history or record and no psychiatrist in the state of Nevada accepted that, [sic] complainant seek psychotherapy session because she did not obtain any Medical Record. Therefore, Respondent terminated complainant on December 10, 2015 [sic] and gave her 3 days notice [sic] to provide the psychotherapy session, that was another form of Respondent [sic] retaliation.⁷⁰

Complainant's Opposition, pp. 25-26.

Respondent contends that even if Complainant could demonstrate her complaints were protected activity and that she suffered an adverse employment action, she cannot establish that her alleged protected activity was a contributing factor in any alleged adverse employment action because Complainant has provided no evidence in support of her claim. Respondent contends Complainant was suspended and subjected to an IME for her "disturbing and alarming behavior" while on the job, but not for any protected activity.⁷¹ See Respondent's Motion, Exhibits 6-10, 14-15.

Furthermore, Respondent asserts the temporal gap between Complainant's alleged protected activity in April 2011, and Respondent's request that Complainant undergo an IME (on December 10, 2012), is over one and one-half years from the

⁷⁰ Complainant provided no **affirmative evidence, affidavit, or sworn statement** in support of her claim that her alleged protected activity contributed to any alleged adverse employment action. See Complainant's Opposition, and attached Exhibits.

⁷¹ More specifically, on December 2, 2012, when Manager Eric Staples, along with two other managers issued Complainant a Performance Level 1 written discipline, Manager Staples recalled that she came into the room "screaming," was disrespectful to him, and accused him of turning the "whole station against her." Manager Staples also described Complainant as being "fidgety, would not look anyone in the eye for more than a couple of seconds and could not stay on-topic with anything she was discussing." Respondent's Motion, Exhibit 10. Manager Michael Lofton was also at the December 2, 2010 disciplinary meeting with Manager Staples and Complainant, and he described her behavior as "quit [sic] disturbing," "combative," and that she "pointed blame to the parties seated at the table with no respect to Management or the Company." Respondent's Motion, Exhibit 9. Lastly, on November 21, 2011, and December 3, 2012, U.S. Airways received complaints about Complainant's behavior on its "Global Compliance hotline," stating Complainant was acting irrationally, that Complainant accused a co-worker of tapping her cell phone at the behest of the FBI, and another co-worker expressed concern about what Complainant was capable of doing and may suffer from a mental disorder. It was also reported that since 2010, Complainant behaved negatively toward all employees, yelled at them, and spoke negatively about other employees, while also making up "situations in her head." Respondent's Motion, Exhibits 14-15.

alleged April 2011 protected activity. Respondent argues that while temporal proximity between protected activity and an adverse action can create an inference of a causal connection, that inference is less likely to arise as time between the protected activity and adverse action increases. See Evans, supra, slip op. at 4 (finding that a lapse of approximately one year was too much to justify an inference that protected activity caused the adverse action); see also Clark, supra, slip op. at 12 (dismissing claims related to complaints more than one year prior to the adverse action). In light of the foregoing, Respondent asserts the lack of temporal proximity in the instant case does not support a finding that Complainant's alleged protected activity was a contributing factor to any unfavorable employment action.

Likewise, Respondent contends Complainant's erratic behavior in the November 15, 2012 altercation where she yelled at a Republic Airways' pilot, then refused to take responsibility for her actions, and also engaged in similarly disturbing behavior with other co-workers acts as an intervening cause and breaks any causal connection between her alleged protected activities and adverse employment actions.⁷² Respondent's Motion, Exhibits 3-15. Respondent asserts AIR 21 does not protect an employee's rude, negative, and destructive behavior even if a potential safety issue is intermingled with misconduct. See Herchak, supra, slip op. at 1 (an "employer is not required to overlook the intemperate manner in which an employee makes a complaint simply because the nature of the complaint involves safety concerns."). Respondent avers legitimate reasons existed to require Complainant to undergo an IME, and suspend and terminate her employment for failing to comply with the recommendations of the IME, namely, Complainant's role in the November 15, 2012 altercation where she yelled at a pilot at the gate, then refused to take responsibility for her actions and engaged in similarly disturbing behavior with others. Respondent's Motion, Exhibits 3-15. Therefore, Respondent asserts that since Complainant has failed to demonstrate that her alleged protected activity was a contributing factor in her suspension or termination, Respondent's summary decision should be granted. See Zurcher, supra, slip op. at 4 (affirming the ALJ's dismissal because the protected activity was not a contributing factor in the airline's decision to terminate the pilot's employment).

⁷² See supra, note 71.

Given the foregoing, I find that even if Complainant suffered adverse action, no genuine issues of material fact exist regarding whether Complainant's alleged protected activity is **not** a contributing factor in any adverse employment action.⁷³ Again, Complainant has relied upon **conclusory allegations which are unsupported by affirmative evidence, sworn statements, or affidavits** setting forth facts that would be admissible at a hearing. Fed. R. Civ. P. 56(e); Hansen, supra at 138; Latigo, supra at 3. Indeed, Complainant sets forth vague and confusing allegations that are **uncorroborated** and **self-serving**, and she has failed to set forth specific facts showing there is a genuine issue of fact regarding her alleged protected activity being a contributing factor in any adverse employment action. See Anderson, supra at 248; see also Alexander, supra, slip op. at 5; Villiarimo, supra at 1061. Complainant bears the burden of demonstrating, by a preponderance of the evidence, that her alleged protected activity was a contributing factor in the unfavorable employment action. Occhione, supra, slip op. at 6. However, Complainant has set forth no specific facts demonstrating that there was any contributing factor which, alone or in connection with other factors, tended to affect in any way Respondent's decision concerning any alleged adverse action. Halliburton, supra at 262-63. Finally, it is **undisputed** that the temporal proximity between Complainant's alleged April 2011 protected activity and her alleged adverse action beginning on December 10, 2012, when Respondent requested Complainant submit to an IME, demonstrates a lapse in time of at least one year. As such, the temporal proximity between her alleged protected activity and adverse action, as a matter of law, is too remote to justify an inference that her protected activity caused the alleged adverse action. See Evans, supra, slip op. at 4. Further, Complainant has set forth no specific facts by **affidavit** or **sworn statement** demonstrating her behavior during the November 15, 2012 altercation was not inappropriate, or that she did not refuse to take responsibility for her actions, or that she did not engage in similarly "disturbing and alarming behavior" with other co-workers which created concern among Respondent's employees.⁷⁴ See Hansen, supra at 138; Respondent's Motion, Exhibits 6, 8-9, 14-15.

⁷³ Any alleged adverse action is limited to only the three actions considered above, which are: 1) the December 2, 2012 Performance Level 1 written discipline; 2) the December 10, 2012 request for Complainant to submit to an IME; and 3) the February 20, 2013 suspension of Complainant's employment pending her fulfillment of IME return-to-work conditions.

⁷⁴ See supra, note 71.

E. Respondent's Same Action Defense

Respondent further contends that even if Complainant could establish a **prima facie** case, Complainant's claims should be dismissed because it is clear Respondent would have taken the same personnel action in the absence of any alleged protected activity. Respondent avers it had an obligation to investigate the November 15, 2012 altercation between Complainant and the Republic Airways' pilot. Likewise, based upon Respondent's investigation of the November 2012 altercation, Complainant's reaction to the issuance of a Performance Level 1 written discipline, and employees' complaints and concerns for their safety due to Complainant's behavior, Respondent asserts it exercised a contractual right to submit Complainant for an IME pursuant to Article 16 of the CBA. Respondent's Motion, Exhibits 2, 6-15. Moreover, once Respondent received Dr. Cruey's IME recommendations,⁷⁵ Respondent avers it had no other choice but to advise Complainant of her right to a second opinion and suspend her employment until she completed the IME return-to-work recommendations.

In Opposition, Complainant did not set forth any argument or **affirmative evidence**, or specific facts in an **affidavit** demonstrating there is any genuine issue of material fact as to whether Respondent provided clear and convincing evidence that it would have issued the December 2, 2012 Performance Level 1 written discipline, requested she undergo an IME on December 10, 2012, and on February 20, 2013, suspend her pending her fulfillment of Dr. Cruey's return-to-work IME requirements even in the absence of Complainant's alleged protected activity. See Anderson, supra at 247. Instead, Complainant simply stated the November 12, 2015 altercation between her and the Republic Airways' pilot was a "set up" by Respondent (with the assistance of Republic Airways) due to her complaining about FAA violations on July 25, 2012, and on August 11, 2012, as well as for her second EEOC complaint. Thus, Complainant asserts Respondent retaliated against her when Respondent requested she submit to an IME, suspended her employment pending the fulfillment of the IME return-to-work conditions, and terminated her employment on December 10, 2015. However, Complainant has produced no **affidavit**, **sworn statement**, or any other **affirmative evidence**

⁷⁵ Dr. Cruey determined Complainant "currently cannot safely and effectively perform the functions of a CSA" and advised that Complainant attend regular psychotherapy sessions for at least four to six weeks. Respondent's Motion, Exhibits 17-18.

beyond her own unsupported allegations which would substantiate her claims. Accordingly, the undersigned finds and concludes there is no genuine issue of material fact that Respondent has provided clear and convincing evidence U.S. Airways would have taken the same personnel action in the absence of Complainant's alleged protected activity.

F. Complainant's Claims Preempted by the RLA

Significantly, Respondent avers that claims arising out of interpreting an airline CBA are preempted by the RLA and must be submitted to final and binding arbitration before a System Board of Arbitration. Additionally, Respondent avers courts do not have jurisdiction to decide even **minor disputes** arising out of the CBA, that is, any dispute that involves the interpretation or application of a collectively-bargained agreement.⁷⁶ See, e.g., Bhd. of Locomotive Eng'rs, supra at 36-38; see also Elgin, supra at 722-23. Therefore, Respondent contends the boards of adjustment established pursuant to the RLA have "mandatory, exclusive and comprehensive" jurisdiction for resolving grievance disputes. Id. at 38; Tice, supra at 318 ("only the arbitral boards convened under the aegis of the Railway Labor Act have authority to determine the rights conferred by a collective bargaining agreement in the airline industry.").

Here, Respondent asserts Complainant's claims, that is her failure to be promoted and any claims arising from her termination after failing to comply with Dr. Cruey's return-to-work conditions, constitute a "minor dispute" for purposes of the RLA because they all involve interpretation and application of the CBA.⁷⁷ In particular, Respondent argues that pursuant to the CBA, Article 16, it had authorization to require Complainant "to submit to a Company paid medical examination at the time of employment or at such time as a Company officer determines that an employee's physical or mental condition may impair the performance of his duties or poses a safety hazard to himself,

⁷⁶ See supra, note 13.

⁷⁷ Respondent contends Complainant's claims regarding her denied promotions are governed by Articles 8 and 9 of the CBA, which address seniority and filling vacancies for Custom Service Supervisors and "E-Temporary." Thus, Respondent asserts any of Complainant's claims relating to Complainant's failure to be promoted are preempted by the RLA and must also be dismissed due to lack of subject matter jurisdiction. Respondent's Motion, pp. 22-23. However, as discussed above, I found any claims relating to Complainant's failure to be promoted were not properly investigated by OSHA, nor are they timely. Accordingly, the undersigned will not address whether such claims require interpretation of the CBA and whether the undersigned lacks subject matter jurisdiction.

other employees, or customers." Respondent's Motion, Exhibit 2. As a result, Respondent contends the authority to request an IME, Complainant's right to seek a second medical opinion within 14 days of removal from service, any challenge to examination (i.e., IME), Complainant's ability to grieve the outcome of the exam, and Respondent's right to remove Complainant are **exclusively** governed by the CBA. Therefore, Respondent asserts any challenge to the IME, removal and grievance procedures requires an interpretation of the CBA provisions, and thus are preempted by the RLA. See Bhd. of Locomotive Eng'rs, supra at 36-38; see also Tice, supra at 318. Consequently, Respondent contends that the undersigned lacks subject matter jurisdiction because all of Complainant's claims require interpretation of the CBA, and are preempted by the Railway Labor Act ("RLA"), which provides a mandatory, exclusive, and comprehensive statutory grievance procedure for such disputes. See 54 U.S.C. §§ 151-188; see also Bhd. Of Locomotive Eng'rs, supra at 36-38; Tice, supra at 318.

Complainant did not address Respondent's contention that her claims relating to adverse actions such as undergoing an IME, completing IME return-to-work conditions, or whether her December 10, 2015 termination are all governed by the CBA, and are preempted by the RLA. See Complainant's Opposition; Complainant's Legal Brief.

As noted by Respondent, in Brotherhood of Locomotive Engineers v. Louisville N.R., 373 U.S. 33, 38, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), the Supreme Court found that the RLA provides a "mandatory, exclusive, and comprehensive system for resolving grievance disputes." However, several years later, in Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d. 203 (1994), the Supreme Court addressed whether the RLA preempted a plaintiff's state law claim, in which the plaintiff alleged he was wrongfully terminated in violation of public policy. The Court noted that "the RLA's mechanism for resolving minor disputes does not preempt causes of action to enforce rights that are **independent of the CBA**." Id. at 256. The Court found that the plaintiff's obligation to pursue a grievance under the RLA did not relieve the employer from its duty of complying with state law, that is, the employer could not terminate plaintiff in violation of public-policy. Id. at 259. Consequently, the Court held the RLA did not preempt the plaintiff's claim "even though the CBA might be

consulted in the course of the state-law litigation.”⁷⁸ Id. at 261 (internal quotations omitted).

The Ninth Circuit Court of Appeals, under whose jurisdiction this case arises, established a two-part test to determine whether a claim is preempted under the RLA: **1)** Does the cause of action involve a right conferred upon the employee by state law, not by a CBA? **2)** If the right exists independently of the CBA, is it nevertheless “substantially dependent on analysis of a collective bargaining agreement?” Gilmore v. Union Pac. R.R. Co., 857 F. Supp. 2d 985, 990 (9th Cir. 2012) (citing Burnside v. Kiewitt Pac. Corp., 491 F.3d 1053, 1060 (9th Cir. 2007)).

Although the instant case does not involve a state law claim, I find the reasoning set forth in the Norris case applies in the present matter. Norris, supra at 261. Indeed, pursuant to 49 U.S.C. § 42121, Complainant may bring a claim against Respondent for discharging or otherwise discriminating against her with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or to the federal government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (“FAA”) or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a). Furthermore, while Complainant’s whistleblower claim may touch on employment issues and require consultation of the CBA, the RLA does not preempt her claim under AIR 21 as it involves a wholly separate cause of action, and it does not obviate Respondent’s obligation to not discriminate or retaliate against Complainant for reporting a violation of FAA orders, regulations, or standards. Norris, supra at 261; Gilmore, supra at 990. Complainant has not argued that Respondent did not have a contractual right to request that she undergo an IME, but rather she asserts she was retaliated against by Respondent for reporting FAA violations, and in turn, was asked to undergo an IME, was suspended pending fulfillment

⁷⁸ In Allis-Chalmers Corporation v. Lueck, 471 U.S. 202, 209, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), the Supreme Court recognized that “not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement is pre-empted” when considering whether a state law claim was preempted under the Labor Management Relations Act (“LMRA”). Thereafter, the Ninth Circuit Court of Appeals, under whose jurisdiction this case arises, held that “LMRA preemption principles inform resolution of RLA preemption questions.” Espinal v. Northwest Airlines, 90 F.3d 1452 (9th Cir. 1996).

of the IME return-to-work conditions, and later terminated on December 10, 2015, among other things.

Accordingly, the undersigned finds and concludes, as a matter of law, that Complainant's claims concerning her alleged protected activity and adverse actions, as well as Respondent's alleged retaliation for engaging in protected activity are not preempted by the RLA because it involves a separate cause of action under AIR 21, and is not substantially dependent upon analysis of the CBA, rather it requires consultation of the CBA. That notwithstanding, the undersigned also finds and concludes that this court does lack subject matter jurisdiction with respect to any challenge to the IME findings, and removal and grievance procedures that require interpretation of the CBA provisions.

Therefore, in light of the foregoing discussion and viewing all evidence and factual inferences in the light most favorable to Complainant, I conclude there is no genuine issue of fact that requires a formal hearing. See Matsushita, supra at 587. Although Complainant contends there is evidence that her employment was adversely affected for engaging in protected activity, she has failed to provide any evidence, beyond sheer speculation, in a sufficient manner to convince me that there is a legitimate dispute regarding the factual circumstances involved herein such that summary disposition of this matter would be inappropriate. Accordingly, I find and conclude Respondent's Motion for Summary Decision is appropriate and it is hereby **GRANTED**.⁷⁹

⁷⁹ The undersigned notes that even if all of Complainant's pre-hearing submissions and evidence were admissible in the record, the evidence would still fail to demonstrate there were any genuine issues of material fact concerning numerous allegations of protected activity, Respondent's knowledge of the alleged protected activity, whether Complainant suffered any adverse action, and whether her protected activity was a contributing factor in any unfavorable employment actions.

G. Complainant's Motion for Summary Judgment⁸⁰

Like Respondent, Complainant also filed a Motion for Summary Judgment. In her Motion, Complainant asserts she is entitled to a summary judgment on counts "three, four, five, six, seven, and eight" of her complaint because there is no genuine issue of material fact and she is entitled to a judgment as a matter of law.⁸¹

Complainant avers she engaged in protected activity, including the following: Count 1) in April 2011, when she complained to manager Eric Staples about a "weight and balance" issue due to employees "smuggling" other employees and their relatives on aircrafts without listing them on the flight manifest; Count 2) on an unknown date, while working at the Philadelphia International Airport Complainant observed employees accommodating non-revenue crew during a weight and balance flight without listing them on the flight manifest; Count 3) in July 2012, Complainant informed manager Nicole Blanchard that other employees were "modifying adults" and listing them as children on the flight manifest during weight and balance flights; Count 4) in December 2011, Complainant alleges "fugitive Modika" was allowed on an aircraft without a valid passport, no boarding pass, and was not listed on the flight manifest; and Count 5) on November 15, 2012, Complainant observed Republic Airways' Captain Harken allowing a disruptive

⁸⁰ In her Motion, Complainant seeks to rely on Sections 1 through 10 of her February 14, 2018 Pre-Hearing Submission. However, as discussed above, by Order dated **April 5, 2018**, many of Complainant's exhibits found in Sections 1 through 10 were excluded pursuant to the Federal Rules of Evidence and Procedure. See Order Granting Respondent's Objections to Complainant's Pre-Hearing Submission and Denying Complainant's Motion to Supplement Complainant's Pre-Hearing Exchange, pp. 1-12. Nevertheless, as directed by the Board, the undersigned will consider the remainder of Complainant's **admissible** evidence submitted with all of her motions discussed herein. See Hukman, supra, slip op. at 5-7.

⁸¹ Complainant states she is entitled to summary judgment on counts "three, four, five, six, seven, and eight" of her complaint, but upon careful examination of all submitted documents it is unclear as to what "counts" she is referencing. For example, in her Motion for Summary Judgment, Complainant designates "Count One" through "Count Five," but there are no further designations. Complainant's Motion, pp. 4-5. However, also in her Motion, Complainant designates by only numbers 1 through 11 various complaints and allegations. Complainant's Motion, pp. 12-15. Other documents, including her February 20, 2013 OSHA complaint, her January 22, 2015 Pre-Hearing Statement, and March 12, 2015 and February 14, 2018 Pre-Hearing Submissions, do not comport with the "count" numbers provided. Accordingly, the undersigned will address "Count One" through "Count Five" of Complainant's Motion for Summary Decision.

flight attendant on an aircraft, removing a "jumpseater," and leaving the gate without an accurate passenger count.⁸²

As discussed above, in accordance with Complainant's February 20, 2013 OSHA Complaint and the Board's July 13, 2017 Decision, Complainant's protected activity occurred in **April 2011**, when she allegedly reported to Manager Eric Staples that employees were "smuggling" other employees on aircraft (i.e., Count 1). Respondent did not offer any **affirmative evidence, affidavits, or sworn statements** to the contrary.⁸³ Anderson, supra at 247. Accordingly, I find there is no genuine dispute as to any material fact that Complainant engaged in protected activity with respect to Count 1.

However, with respect to Count 2, Complainant did not provide the date on which this alleged protected activity occurred, nor does simply "observing" employees accommodating non-revenue crew during a weight and balance flight without listing them on the flight manifest qualify as protected activity, pursuant to AIR 21, without Respondent's knowledge of the same. 49 U.S.C § 42121(a). Therefore, I find and conclude Complainant did not provide enough information or any supportive documentation to establish a genuine issue of material fact concerning Count 2. On the other hand, I find Complainant's Count 3 is not properly before the undersigned because she did not make this allegation of protected activity in her OSHA complaint, and thus I am unable to consider it. In regard to Count 4, as discussed above, Complainant simply relied on **mere allegations** that "fugitive Modika" boarded an aircraft without a passport and boarding pass, and she offered no **admissible evidence, affidavit, or sworn statement** to demonstrate she engaged in protected activity. Therefore, I find and conclude Complainant did not provide enough information or any supportive documentation to establish a genuine issue of material fact concerning Count 4. Conversely, the Board affirmed my finding that the November 15, 2012 "airport rage incident" was not protected activity. Accordingly, I will not again consider Complainant's Count 5.

⁸² Notably, in her Motion, Complainant attempts to portray the November 15, 2012 "airport rage incident" as protected activity. However, in her February 20, 2013 OSHA complaint, Complainant simply states the "company set me up. There was another safety issue with one of [sic] Pilot and a flight attendant. She was very disruptive. Pilot was off, [sic] yelling and screaming very loud. He was very unstable to fly the aircraft." Nevertheless, as discussed above, the November 15, 2012 "airport rage incident" is untimely.

⁸³ See supra, note 58.

Complainant also asserts she suffered adverse action, alleging she was harassed, given unpleasant work assignments with employees who harassed her, that she had to work in a hostile work environment, was denied promotion, was not paid "upgrade" overtime, and received a "coaching" on December 2, 2012. Complainant also alleges she suffered adverse action on December 10, 2012, when she was discriminated against for a disability, required to submit to an IME, and suspended from work on medical leave. Likewise, on February 20, 2013, Complainant alleges she suffered adverse action when she was removed from her job following Dr. Cruvey's IME findings, and on December 10, 2015, when she was terminated from employment with Respondent. Nevertheless, in her Motion, Complainant did not provide any facts, case law, or argument in support of her allegations, rather she simply listed the aforementioned actions. See Complainant's Motion, pp. 11-12. Likewise, Complainant has no **admissible** evidence to support her assertion she suffered adverse action. That notwithstanding, for the same reasons set forth above, I find Complainant's alleged adverse action was limited to: 1) the December 2, 2012 Performance Level 1 written discipline; 2) the December 10, 2012 requirement to undergo an IME; and 3) the February 20, 2013 suspension pending her fulfillment of IME return-to-work conditions. Moreover, as I previously found, Respondent does not dispute the occurrence of these events, however, as a matter of law, the aforementioned events are not adverse actions. Accordingly, I find there is no genuine dispute of material fact that Complainant did not suffer any adverse action.

In the remainder of her Motion, Complainant does not address any other element of her **prima facie** claim, that is, she failed to address Respondent's knowledge of her protected activity and whether circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable employment action.⁸⁴ See Occhione, supra, slip op. at 6. Quite frankly, the remainder of Complainant's Motion is disjointed, vague, and does nothing to affirmatively support her argument that she is entitled to a Motion for Summary Judgment pursuant to her AIR 21 claim. The

⁸⁴ In her Motion, Complainant also addresses issues that are either unrelated to her AIR claim, were not timely complaints, or never alleged in her OSHA complaint such as Respondent violated the CBA, she filed EEOC complaints against Respondent, Respondent does not comply with their own procedures and policies, Respondent provided a "blank exhibit," Respondent did not call her for a panel review, Respondent did not provide the panel interview paperwork to Complainant, Respondent provided documentation that was never discussed with Complainant, and Respondent denied paying her overtime. Complainant's Motion, pp. 12-15.

undersigned recognizes Complainant is pro se, and has accorded her great deference, but she **may not shift the burden of litigating her case to the courts.**" Pik, supra, slip op. at 4-5.

In light of the foregoing discussion and viewing all evidence and factual inferences in the light most favorable to Respondent, I conclude there is no genuine issue of fact that requires a formal hearing. See Matsushita, supra at 587. Accordingly, I find and conclude Complainant's Motion for Summary Judgment is hereby **DENIED**.

I also note that Respondent's March 12, 2018 "Motion to Allow Witnesses to Appear Telephonically" and "Motion to Exclude Complainant's Submitted Expert Statement and Testimony," as well as Respondent's March 27, 2018 Reply are **moot** in light of the dismissal of Complainant's claim. In the same way, Complainant's March 2, 2018 "Objections to Defendant's Witness and Exhibit List" and her March 8, 2018 "Response to Respondent Motion to Disallow Witnesses to Appear Telephonically" are also **moot**, and as such will not be considered by the undersigned.

Likewise, on April 19, 2018, Complainant filed "Motion to Strike Respondent [sic] Motion For Objecting to Pre-Hearing Order Granting Respondent [sic] Objections to Complainant [sic] Pre-Hearing Submission And Denying Complainant [sic] Motion to Supplement Complainant [sic] Pre-Hearing Exchange." Thereafter, on May 2, 2018, Respondent filed "U.S. Airways, Inc.'s Response to 'Complainant [sic] Motion to Strike Respondent [sic] Motion For Objecting to Pre-Hearing Order Granting Respondent [sic] Objections to Complainant [sic] Pre-Hearing Submission And Denying Complainant [sic] Motion to Supplement Complainant [sic] Pre-Hearing Exchange." On May 3, 2018, Complainant filed an "Opposition to Motion to Strike Respondent [sic] Motion to Show Cause, Complainant [sic] Summary Judgement [sic] and Complainant [sic] Legal Brief." Notwithstanding the parties' filings, given the foregoing discussion and findings, I find the aforementioned filings are **moot** as well.

Considering the foregoing,

IT IS HEREBY ORDERED that Respondent's Motion for Summary Decision be, and it is **GRANTED**, and that Complainant's Complaint is hereby **DISMISSED** with prejudice.

IT IS FURTHER HEREBY ORDERED that Complainant's Motion for Summary Decision be, and it is **DENIED**.

IT IS FURTHER ORDERED that the prospective formal hearing in this matter previously scheduled for April 9, 2018, and subsequently postponed Sine Die, is hereby **CANCELLED**.

ORDERED this 4th day of May, 2018, at Covington, Louisiana.

LEE J. ROMERO, JR.
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. § 1982.110(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. § 1982.110(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, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).