



Issue Date: 21 April 2016

Case No.: 2016-AIR-00001

In the Matter of

DOUGLAS GREENE

Complainant

v.

UNITED PARCEL SERVICE

Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a U.S. Department of Labor ("DOL") complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979.

I. PROCEDURAL BACKGROUND

Complainant filed an AIR 21 complaint on December 18, 2013. Subsequently, on October 13, 2015, the Occupational Safety and Health Administration ("OSHA") issued the Secretary's Findings. OSHA determined that although Complainant's complaint was timely filed and the parties were covered under the Act, Respondent demonstrated that it would have taken the same action in the absence of protected activity. By letter dated October 20, 2015, Complainant's former counsel contested OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). By letter dated October 27, 2015, Complainant, without the assistance of counsel, filed an additional "Notice of Objections to DOL/OSHA Findings and Order with Request for Hearing Before an Administrative Law Judge," noting that his attorney's letter contained incorrect addresses.

By Order dated November 20, 2015, this Tribunal issued the Notice of Assignment and Conference Call in this matter, and scheduled a teleconference for December 17, 2015. By letter dated November 23, 2015, Complainant's original counsel requested to withdraw from representing Complainant in this matter, and also requested that Complainant be accorded

leeway on timelines in light of his *pro se* status.¹ By letter dated December 2, 2015, Respondent submitted its response to the Notice of Assignment. By Order issued December 7, 2015, I deferred ruling on Complainant's counsel's Motion to Withdraw, but granted an extension of time to respond to the Notice of Assignment. By letter dated December 14, 2015, Complainant, proceeding *pro se*, submitted his response to the Notice of Assignment. By Order issued December 18, 2015, I granted Complainant's original counsel's Motion to Withdraw.

On December 31, 2015, I issued the Notice of Hearing and Pre-Hearing Order, setting the hearing in this matter in Seattle, Washington on May 2, 2016. By letter dated January 14, 2016, Complainant's current counsel entered his appearance. By letter dated January 6, 2016, Complainant submitted his initial disclosures. By facsimile submitted January 27, 2016, Complainant submitted the parties' Joint Motion to Transfer the Location of the Hearing to Louisville, Kentucky. By Order issued January 28, 2016, I granted the parties' joint request and transferred the hearing location to Louisville, Kentucky.

On March 16, 2016, Respondent submitted a Motion for Summary Decision and Memorandum in Support with accompanying exhibits. By facsimile dated March 17, 2016, Complainant submitted an Emergency Motion for Extension of Time to Respond to Respondent's Motion for Summary Judgment. Complainant requested that I extend his deadline to respond to April 14, 2016, and represented that Respondent did not object, provided that the "prehearing statement date, the date for labeling exhibits, and the hearing date were also extended."

By Order issued March 18, 2016, I directed Respondent to submit an expedited response to Complainant's Emergency Motion for Extension of Time. By letter dated March 22, 2016 and also by facsimile on March 23, 2016, Respondent submitted its Response, opposing Complainant's request. By Order issued March 28, 2016, I granted in part and denied in part Complainant's Emergency Motion for Extension of Time. I afforded Complainant twenty-one days from the service of Respondent's Motion for Summary Decision to submit a response, and also extended the deadline for the submission of Pre-Hearing Statements and the exchange of exhibits to April 18, 2016. On April 5, 2016, Complainant responded to Respondent's Motion for Summary Decision.

On April 11, 2016, Respondent filed a Motion for Leave to File Attached Reply to Complainant's Response to Motion for Summary Decision. By Order issued April 12, 2016, this Tribunal denied Respondent's Motion for Leave to File Reply, and advised that the Reply would not be considered in adjudicating the Motion for Summary Decision.

By email on April 13, 2016, and without the assistance of his counsel, Complainant filed an Urgent Addendum for Response to Respondent's Motion for Summary Decision. Complainant petitioned this Tribunal to consider newly-discovered evidence consisting of an audio recording of a July 31, 2013 conversation. By Order issued April 14, 2016, I granted Complainant's request to submit newly-discovered evidence and directed Respondent to file an

¹ Pending my ruling on the Motion to Withdraw, Complainant's original counsel, filed a letter dated December 4, 2015 to request that this Tribunal issue extensions of time regarding the deadlines set forth in the November 20, 2015 Notice.

expedited response. By facsimile dated April 15, 2016, Respondent filed a Response to Complainant's Urgent Addendum.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Factual Background

1. Because of the large number witnesses involved in this case, below is a list of individuals involved. Hereafter they will be identified by their last names only.

- Atherton, Kelli: IPA Legal Secretary (*see* Foster Aff., Ex 15);
- Bergman, David: Assistant Chief Pilot (“ACP”) (*see* CX 21);
- Cason, Bill: International Pilots Association (“IPA”) Treasurer (*see* CX 15);
- Cline, Cathy: Occupational Health Manager (*see* Foster Aff., Ex. 7);
- Coleman, Tony: counsel who represented Respondent in matters relating to Complainant (CX 36);
- Cook, Peyton: Captain²;
- Creamer, Don: ACP, Anchorage/Asia Flight Operations (*see* CX 23);
- Cutler, Irwin: counsel for IPA;
- Driskell, Marty: employee of Respondent³;
- Faith, Edward: Asia Pacific Region Chief Pilot or Anchorage Chief Pilot⁴;
- Feldman, Arnold: counsel for Complainant in arbitration (*see* Foster Aff., Ex. 17);
- Ferguson, David: Captain (*see* CX 11);
- Foster, Kevin: Flight Operations Manager and District Labor Manager⁵
- Guinn, Rob: District Security Manager (*see* CX 4);
- Harper, Chris: IPA Jumpseat Chairman (*see* CX 15);
- Illig, M.D., Petra: Aviation Medical Services of Alaska (*see* Foster Aff., Ex. 8);
- Jennings, William: employee of Respondent.⁶
- Kilmer, Jeff: FedEx Captain, Senior Manager (*see* CX 9);
- McDermont, Marc: First Officer (CX D at 7);
- Murray, Ken: Security Supervisor⁷;

² During his March 4, 2016 deposition, Cook stated that he has been a captain for nine years, and that he has been domiciled in Anchorage, Alaska for seven years. RX 8 at 7-8.

³ Based on the evidence of record, Driskell's position and title are unclear.

⁴ During his March 1, 2016 deposition, Faith testified that he is currently the Ontario West Region Chief Pilot, a position he held since June 2015; previously, and during the time period relevant to this matter, Faith was the Asia Pacific Region Chief Pilot in Anchorage, Alaska for approximately eight years. CX C at 7. He referred to his position as “Anchorage Chief Pilot” in his sworn affidavit. *See* Faith Aff. at 1.

⁵ Foster has held this position since 2006, and it is based out of Louisville, Kentucky. Foster Aff. at 1.

⁶ Based on the evidence of record, Jennings position and title are unclear.

- Mustacci, Brian: Federal Express (“FedEx”) Regional Manager, Aviation, Regulatory & International Security (*see* CX 5);
- Psiones, James (“Jim”): Assistant Chief Pilot (“ACP”)⁸;
- Quinn, Roger: System Chief Pilot⁹;
- Robbins, Jennifer: Flight District Security Manager¹⁰;
- Starnes, Michael: Captain (CX H at 6);
- Trent, William (“Bill”): IPA General Counsel (*see* CX 32 at 1);

2. Brief Statement of Facts

Respondent is a party to a collective bargaining agreement (“CBA”) under the Railway Labor Act. The CBA contains various policies governing employment with Respondent, in addition to grievance procedures, and Complainant was a member of the Independent Pilot Association (“IPA”). Resp’t Mot. at 7-10; Complainant Resp. at 3. Respondent shares a reciprocal agreement with other air carriers for “jump seating,” which allows Respondent’s pilots to travel free of charge on another airline, and the pilots are subject to the other carriers’ jump seat rules. Resp’t Mot. at 10. Respondent maintains an electronic file called the Exception History Report (“EHR”) to document information involving its pilots, including, *inter alia*, discipline or absences, and pilots periodically review their own reports. Resp’t Mot. at 13; Complainant Resp. at 10-11.

Complainant was employed as a captain and pilot for Respondent. Complainant Resp. at 1. Complainant began working for Respondent in 1994. Resp’t Mot. at 7; Complainant Resp. at 3. Complainant flew jump seat on a FedEx flight on March 19, 2013, and a pair of scissors was confiscated from him, as an allegedly prohibited item, during his exit screening by a FedEx security agent. Resp’t Mot. at 10-13; Complainant Resp. at 6-8. On March 27, 2013, Captain Jim Psiones confronted Complainant about the scissors incident in a crew room and in front of other crewmembers, and allegedly mentioned the existence of a TSA¹¹ report. Resp’t Mot. at 11; Complainant Resp. at 8.

⁷ Murray held this position in Anchorage, Alaska for approximately twelve years, and in January 2015 became Gateway Supervisor in Las Vegas, Nevada. Murray Aff. at 1.

⁸ During his February 29, 2016 deposition, Psiones testified that he currently performs “flight operations tech and safety on the 747,” and that he has held this position for eighteen or nineteen months; previously, and during the time period relevant to this matter, Psiones was an assistant chief pilot in Anchorage, Alaska for approximately nine years. CX E at 7.

⁹ Quinn has held this position since April 1, 2013. Quinn Aff. at 1.

¹⁰ Robbins held this position since 2010; subsequently, she became the Security Manager of the international shipment resolution group in August 2015. CX G at 7.

¹¹ TSA stands for Transportation Security Administration. The TSA is an administration of the federal government within the Department of Homeland Security, established in November 2001 as part of the Aviation and Transportation Security Act. *See* P.L. 107-71, 115 Stat. 597 (Nov. 19, 2001). *See also* <https://www.dhs.gov/operational-and-support-components>. The mission of TSA is to “Protect the nation's transportation systems to ensure freedom of movement for people and commerce.” *See* www.tsa.gov/about/tsa-mission.

Also on March 27, 2013, after his interactions with Psiones, Complainant spoke to Ken Murray regarding the purported TSA report, at which time Complainant was informed that to Murray's knowledge, there was no TSA report. Resp't Mot. at 13; Complainant Resp. at 9.

On May 21, 2013, Respondent's Chief Pilot Edward Faith made an entry in the EHR regarding the events at FedEx. Resp't Mot at 13-14; Complainant Resp. at 10-11.

Complainant also spoke to Murray on June 18, 2013. Resp't Mot. at 26.

In August 1, 2013, Respondent's Captain and System Chief Pilot Roger Quinn updated Complainant's EHR after receiving a letter favorable to Complainant from FedEx Chief Pilot Jeff Kilmer regarding the incident with the scissors. Resp't Mot at 13, 18-19; Complainant Resp. at 12-15.

On August 13, 2013, Complainant contacted the TSA "to ask if there was an incident report for the FedEx scissor incident. [Complainant] was informed that there was not. [Complainant] then complained about ACP Psiones. He explained how ACP Psiones had created safety issues by distracting [Complainant] from flight safety by making false statements and lying on his exception history and then refusing to fix it." Complainant Resp. at 15. Complainant alleges that the "TSA agent directed [Complainant] to file an incident report against ACP Psiones." *Id.*

Complainant met with Faith on August 22, 2013. Resp't Mot. at 20; Complainant Resp. at 15. Complainant was withheld from service with pay following the August 22, 2013 meeting. Resp't Mot. at 22; Complainant Resp. at 19.

A disciplinary hearing was held on September 11, 2013. Resp't Mot. at 22; Complainant Resp. at 26. Another disciplinary hearing was held on October 16, 2013. Resp't Mot. at 32; Complainant Resp. at 28.

After the second disciplinary hearing, Respondent instructed Complainant to submit to a medical examination. Resp't Mot. at 36; Complainant Resp. at 29. Complainant did not attend the November 2, 2013 scheduled examination, and Respondent alleges that he appeared for the rescheduled November 7, 2013 examination, but did not submit to the examination. Resp't Mot. at 38-39; Complainant Resp. at 31-32. Complainant also refused to submit to an examination on November 18, 2013, and also waived his right to a disciplinary hearing regarding insubordination. Resp't Mot. at 41-42; Complainant Resp. at 33.

System Chief Pilot Roger Quinn discharged Complainant by letter dated November 22, 2013 (Resp't Mot. at 42; Complainant Resp. at 33).

3. Detailed Summary of the Factual Background

The factual background of this matter is summarized below, and is based primarily on the documentary evidence submitted, particularly the numerous emails and letters of record.

On March 19, 2013, the FedEx scissors incident occurred. Mustacci, the FedEx local security manager involved in the incident (*see* CX 5), emailed Murray, explaining that a pair of scissors was confiscated from Complainant, and that he was trying to make arrangements to return the item to Complainant. Murray Aff., Ex. 1.

Via email on March 27, 2013, Psiones and Creamer discussed a schedule change, and Psiones mentioned that he “[h]ad a real conflict on a face to face with [Complainant] this AM.” CX 3.

On March 28, 2013, Murray emailed Guinn to advise that he received an email from Mustacci, who explained that Complainant carried a pair of scissors, a prohibited item, in his baggage on a FedEx flight; Murray also advised that he discussed the matter with Complainant, and that he “understood the matter to have been resolved at that point.” CX 5. On March 29, 2013, Guinn emailed Jennings, Quinn, and Robbins, writing, “I just want to ensure this situation with [Complainant] is addressed properly and documented in his exception file”; Quinn forwarded this email to Foster and Driskell on March 30, 2013. CX 5. On April 1, 2013, Driskell emailed Quinn and Foster, writing that Psiones reviewed the jump seat incident issue with Complainant and that Driskell asked Psiones to document it in Complainant’s exception report history since “this is the third instance in the last few months in ANC with one of our guys taking something prohibited through FedEx.” CX 5.

On May 21, 2013, Faith, Guinn, Psiones, and Quinn, among others, emailed among themselves regarding the FedEx jump seat incident; Quinn questioned why an exception had not been filed, to which Faith replied that he entered the exception report into Complainant’s record using Psiones’ emails. CX 5. Quinn remarked, “Documentation is so important, especially with some of our more ‘special’ performers.” CX 5.

On June 14, 2013, Psiones emailed Guinn to advise that Complainant stopped by to review his exception report history, and that Psiones declined to give him a hard copy of the report; Complainant “questioned his right to a copy,” but “[t]hings were professional we shook hands and he left.” CX 7. Via email on June 15, 2013, Guinn wrote to Bill Cason that he heard Complainant requested a copy of his exception report history, and Guinn “[d]idn’t know if something new was happening or more of the same.” Cason replied, “I think he has got a little paranoid schizophrenia going based on his comments that everyone is ‘out to get him’ (including IPA...)...very disturbing pathology there. I must admit I am worried about this guy.” CX 8.

On June 18, 2013 Complainant spoke with Murray and recorded their conversation. Foster Aff., Ex. 5; Quinn Aff., Ex. 7; Quinn Aff., Ex. 15; Murray Aff., Ex. 2. Complainant called Murray, and he thanked him “for helping clearing up that whole inference that there was a TSA report over the – over the scissors that were in my checked bag when I flew on FedEx.” Complainant noted that after Psiones recovered the scissors, Murray returned the scissors to Complainant. Complainant told Murray that what he saw in his exception history report about this incident “was clearly inappropriate. And it was basically an exaggeration of the truth.” Complainant then discussed how “the union, I’ve found, doesn’t support me,” and that he thinks “this is really about another issue . . . about an attack on our pilot group by the state of Kentucky and [Complainant] trying to help our pilots to know how to defend themselves against rights

violations.” Complainant also wanted Murray to know that the exception history report entry “referenced [Murray] inappropriately,” and that the scissors that were confiscated were not a TSA-prohibited item. In addition, Complainant explained that on March 27, 2013, Psiones “embarrassed [him] in front of the crewmembers in the crew room when he blusterly spoke that I had a TSA incident and that there was a report on me because of my scissors. I was compromising UPS jump seat for other FedEx pilots.” Complainant also explained that by writing that he acted in a confrontational manner in the exception history report, Faith’s entry was “fraud.” Complainant also stated, “I didn’t ask for this fight, but they’re giving it to me and I have no choice but to defend myself . . . perfect airline career until the state of Kentucky started threatening me and about 300 other pilots over tax issues. . . . So that’s what this is really about,” and “somebody is trying to exaggerate and sensationalize this story to make it a deal at UPS. We know who it is,” referring to Psiones. He further explained, “I told him that you disputed the fact that there was this purported TSA incident, which was a blatant lie by Jim Psiones. And he said it in front of several crewmembers,” that Complainant “had a TSA incident and a TSA report was out on me, . . . well, he was lying.”

Via email on June 19, 2013, Foster wrote to Jennings that they needed to talk to Complainant. CX 20.

On July 1, 2013, Complainant, Faith and Harper, *inter alia*, communicated via email. Complainant forwarded the email to Creamer that FedEx pilot Kilmer originally sent to Complainant and Faith regarding the scissors incident (*see* Quinn Aff., Ex. 4), and Faith acknowledged that “it appears [Complainant] unknowingly violated a rule with regard to prohibited items,” and that Complainant “acted in a professional manner.” In his email to Creamer, Complainant wrote that the scissors incident was “taken out of context and inflated,” as evidenced by Kilmer’s email, and he also requested that the incident be removed from his exception history report. CX 10.

On July 13, 2013, Complainant spoke with Cook and recorded their conversation without Cook’s knowledge. This conversation took place prior to their departure to Louisville, at which time Complainant discussed Psiones, using an expletive to describe him, how “the company [is] harassing me,” and “the lie in [Complainant’s] exception history.”

Via email on August 1 through 2, 2013, Psiones advised Faith, Quinn, Robbins, Guinn, Foster, and Driskell that he has been contacted by “numerous crewmembers regarding unsolicited calls from [Complainant],” and that Complainant approached one crewmember and “rendered an expletive opinion regarding Jim Psiones.” He also wrote that Complainant “remains deeply offended by my confronting him regarding the security report early this spring,” and that “longstanding IPA crewmembers and newer copilots have contacted me directly, unsolicited to inform, or for lack of a better description warn me about [Complainant’s] comments and allegations directed at me.” Guinn acknowledged Psiones’ email on August 2, 2013, and solicited Faith and Psiones’ opinions as to whether they should inform Complainant that his exception history was amended. CX 9.

On August 6, 2013, Complainant had his FAA First Class Medical Certificate renewed. CX 29.

On August 12, 2013, Complainant, Quinn, Cason, and Harper, *inter alia*, sent various emails. Complainant wrote to Quinn to share his concern that he unsuccessfully tried to address the removal of the inclusion of the scissors incident in his exception history report with Creamer. The record also contains a more detailed account written by Complainant regarding the scissors incident and also his interactions with Psiones. *See* Quinn Aff., Ex. 4. Subsequently, Quinn wrote to Guinn, copying Psiones and Faith, forwarding Complainant's email and asking them to explain the situation since the pair of scissors was apparently not a TSA-prohibited item. Guinn responded by explaining that FedEx may prohibit additional items beyond the TSA's prohibited items list. He also explained that that after this issue was reported and addressed with Complainant, Complainant "acted inappropriately when his management team discussed it with him," and "that discussion was documented in his exception history." Once Respondent received Kilmer's email, the exception history report was amended to include that email. Guinn also expressed willingness to "make a compromise with [Complainant]" regarding the exception history report. Quinn Aff., Ex. 4; CX 15.

Complainant spoke with Creamer, and recorded their conversation without Creamer's knowledge, on August 13, 2013. Foster Aff., Ex. 5; Quinn Aff., Ex. 5; Quinn Aff., Ex. 15. Complainant asked to see his exception report history and referenced the two emails he sent Creamer, and Creamer apologized regarding his failure to respond, saying that it slipped his mind. Creamer showed Complainant his exception report history, and Complainant saw that there was an entry showing that FedEx Pilot Kilmer wrote Respondent a letter regarding the scissors incident. Complainant stated that the event was misconstrued and inflated, and he explained that Psiones made this an incident, approximately two months after the fact, when he "publicly humiliated" Complainant. Complainant advised that if the entry were not removed, he would "have to get a labor attorney involved and have it removed because it's clearly defamatory and inappropriate," and that Psiones "knows it's a lie. And that it was put in there for a reason." Complainant also stated, "It would probably be easier if we just remove that so we can put this little – this whole event to rest, because it's going to get expensive, I think."

Also on August 13, 2013, as detailed in his complaint and affidavit, Complainant asserts that he contacted the TSA and reported a verbal complaint.

On August 22, 2013, Faith met with Complainant, and Complainant recorded the majority of this conversation without Faith's knowledge, until his recording device sounded unexpectedly, at which time Complainant admitted that he recorded the conversation. Resp't Mot. at 18; Foster Aff., Ex. 5; Quinn Aff., Ex. 8; Quinn Aff., Ex. 15; Faith Aff., Ex. 2. Faith explained that he wanted to go over Complainant's questions regarding his exception history report, and also to let him know that there was an amendment to the entry to reflect FedEx Pilot Kilmer's letter. Faith stated, "please understand that an exception is anything that's out of the ordinary. So some exceptions are good exceptions, some exceptions are poor exceptions or bad exceptions, and some exceptions are just neutral exceptions to give detail to an individual's activities along the way." Faith explained that his understanding of this particular entry was that it was "just an explanation of what happened . . . an event that happened and it was documented." Faith also explained the reason that he entered the event in the exception history, despite not having met Complainant prior to this meeting, was that Psiones called him and asked

him to enter it into the computer, as Psiones did not have computer access. Faith further explained that the reason this was documented is because a lot of crewmembers use FedEx, and “in this case, we were told that it was a prohibited item. And so that – that’s the reason that it was documented.” Complainant advised that he was “not going to rest until it’s removed,” referring to the scissors incident entry, and he also explained the circumstances surrounding the scissors incident at the FedEx facility. In addition Complainant recounted his interaction with Psiones when Psiones said to Complainant that he needed “to talk to you about your TSA incident. . . . There’s a TSA report on you about you and your scissors.” Complainant explained, “There was no TSA report and he knows it.” Complainant then stated, “We have a problem in our pilot group, okay. It’s a completely unrelated issue, but I think it’s directly related, becoming directly related,” referring to the Kentucky state tax issue, which he also discussed in more detail. Complainant also expressed his opinion that the entry in his exception history report was for purposes of harassment. Faith explained that “the exception history will stay with the letter as part of the exception, basically supporting your side of the story with the exception history.” Subsequently, Faith advised Complainant that Respondent had received complaints from four people, suggesting that Complainant “intimidated them by asking questions directly related to this and posed towards an individual as though you are searching for some type of information on that individual and they feel like that – they feel very uncomfortable in the way you approached it and also the questions that were being asked, that these questions were not normal questions that a person should be asking.” Faith advised Complainant that “it needs to stop and not go any further.” Complainant directed the conversation towards Psiones, repeating that he could prove “his behavior,” specifically regarding the way Psiones publically confronted him; Complainant also made reference to an issue where pilots felt that they could not come forward to report fatigue due to intimidation, but did not discuss this in detail. Faith reiterated, “I’m passing on to you is that there have been individuals that come to us and that have said that they feel uncomfortable and that they feel intimidated by a conversation that was had between you and them,” and also “that that’s not acceptable per UPS’ harassment and workplace violence issues or policies.” He also advised Complainant, “if there is any more of these conversations and somebody does feel intimidated and they do come forward, then we – we are going to be required to act on something.” Complainant stated his opinion that he believes the intent of the exception report entry “was harassment. This was intimidation. . . . I feel like my career has been threatened.” Faith stated that “there was nothing in that one exception that’s going to harm your career.” Faith promised that he would go back and look into the issue for Complainant. Complainant stated that he is just “trying to defend inappropriate behavior,” and that “there should not be reprisal against me. I feel like that’s what’s happening here.” Faith disagreed, stating, “It’s basically an informative meeting.”

On August 23, 2013, there were emails between, *inter alia*, Faith, Quinn, Foster, Coleman, and Guinn regarding Faith’s August 22, 2013 meeting with Complainant. CX 17. Faith advised that Complainant has been recording all of his conversations with both UPS and IPA representatives without their knowledge. CX 17. On August 26, 2013, Faith emailed Quinn, Foster and Guinn, and forwarded a summary of his August 22, 2013 meeting with Complainant. CX 16. According to Faith, the purposes of the meeting with Complainant were to address the scissors incident, Complainant’s “subsequent reaction to the documentation of this incident,” Complainant’s “alleged obsession with gathering information on ACP Jim Psiones,” and “a number of IPA/UPS Crewmember complaints regarding [Complainant’s] questioning of

their knowledge of ACP Jim Psiones,” in addition to advising Complainant that “further pursuit of either having the documentation regarding his FEDEX event removed or questioning of crewmembers in an attempt to gain some information on ACP Jim Psiones would result in possible disciplinary action.” CX 16.

On September 7 through 9, 2013, Starnes and Robbins communicated via email. Foster Aff., Ex. 5; Quinn Aff., Ex. 2; Quinn Aff., Ex. 2 and Ex. 15. Starnes advised Robbins that he believes that Complainant’s “attitude toward Jim [Psiones] is not justified and disabling to Jim from a standpoint that his authority and position as an ACP is being disregarded,” and that Complainant has engaged in “vocal tearing down of Jim in conversation to his crewmembers and as in my case jump seaters.” *Id.* He further advised that Complainant’s “paranoia has extends [sic] to him carrying a recording device onto UPS property and keeping files of paper with him in order to document anything that Jim says or does. This to me sounds like someone who is more interested in revenge than coming to work to fly airplanes.” *Id.* On September 11, 2013, Starnes emailed Robbins to describe his interaction with Complainant during a jump seat flight in the preceding weeks. He wrote that Complainant discussed Respondent and the IPA’s involvement with the Kentucky State Department of Revenue, and also that Psiones “publically humiliated [Complainant] over something that has now escalated into an all out attack on Jim. The conversation was both normal for [Complainant] in that he is always ranting about something.” Foster Aff., Ex. 6; Quinn Aff., Ex. 2 and Ex. 16.

On September 15, 2013, Robbins, Ferguson and Psiones communicated via email. Robbins asked Ferguson to provide an account, in his own words, concerning his phone call with Complainant, specifically regarding Complainant’s discussion of Psiones. Ferguson wrote that Complainant called him to ask about his relationship with Psiones, but explained, “At no point did [Complainant] make any threatening comments about Jim,” as “the conversation was more about [Complainant] and how the company was out to get him, Jim being the catalyst.” CX 11.

On September 16, 2013, Cutler emailed Robbins, Coleman, Trent, and Guinn, forwarding the copy of Complainant’s exception history, printed on June 13, 2013, in Complainant’s possession to Robbins; Guinn noted that the Exception History could not have been given to Complainant on June 4, 2013, contrary to his assertion, in light of the June 13, 2013 print date. CX 4. Quinn asked Faith to inquire whether Complainant was given a copy of his exception report history. CX 6.

On September 23, 2013, Robbins emailed Guinn and forwarded the September 23, 2013 email from Peyton Cook to Robbins and Psiones. CX 18; Foster Aff., Ex. 5; Quinn Aff., Ex. 1; Quinn Aff., Ex. 15. In his email, Cook wrote that Complainant had a “hostile and volatile personality towards fellow crewmembers and UPS management,” which “jeopardizes the conduct of safe flight operations,” and that Complainant “expressed his anger and aggression towards Captain Psiones specifically.” Cook further wrote that he was “concerned for Captain Psiones’ wellbeing and safe working environment for fellow crewmembers.” He also wrote that he had been contacted by other crewmembers concerning Complainant.

In emails dated September 25, 2013, Robbins wrote to Guinn, “Roger [Quinn] and I are on the same page that we should bring [Complainant] back in to ask a few more questions and

then determinate [sic] him due to; creating a hostile work environment, dishonesty and retaliation.” CX 25. Guinn replied that he agreed with Robbins. *Id.*

In an email dated September 30, 2013, from Faith to Robbins, Faith forwarded the September 24, 2013 email from Bergman to Faith, in which Bergman provided an account of an interaction with Complainant “this past summer.” CX 21. During a dinner in Hong Kong where other crewmembers were present, Complainant “discussed his tax issues . . . and he wanted to ensure we all understood that UPS and the IPA are ‘not our friends!’” but that Complainant did not “mention any disparaging or slandering remarks about any specific person during this discussion.” *Id.*

In an email to Robbins dated October 3, 2013, Driskell forwarded his notes from the September 11, 2013 hearing. CX 22. In what appears to be a transcript of this hearing, as contained in the notes, Complainant explained that he reached out to other crewmembers for advice on how to get an entry removed from the exception history report. Complainant was questioned as to why he recorded conversations with UPS and IPA personnel and was asked to provide copies of the recordings. Complainant stated that Psiones lied to him, and that he did talk to coworkers. Robbins and Foster asked Complainant if he is aware that he is creating an atmosphere of hostility among his coworkers. Complainant was afforded an opportunity to correct any statements he made during this hearing.

A second disciplinary hearing was held on October 16, 2013. Foster Aff., Ex. 5; Quinn Aff., Ex. 10; Quinn Aff., Ex. 15. In an email dated October 19, 2013, McDermont sent Robbins his “statement regarding personal interaction with [Complainant],” whom he had not met prior to the dinner in Hong Kong. During this dinner, Complainant “spoke quite vociferously and at great length about his interactions with the Company and the Kentucky Department of Revenue. He stated that there was a conspiracy between UPS and the Kentucky Department of Revenue to harm him financially and to impeach his character as well as every other UPS crewmember.” McDermont also wrote that Complainant discussed a UPS plot to assassinate him, but that “he had developed so much evidence of their plot to kill him that it had made it impossible for UPS to carry through with the assassination.” Quinn Aff., Ex. 11.

By letter dated October 25, 2013, Quinn advised Complainant that Respondent concluded its investigation into Complainant’s conduct, which “uncovered various acts of misconduct that has provided a legitimate basis for discipline.” He further advised, “the investigation has also uncovered ‘objective evidence indicating that you may have a medical problem which could interfere with your ability to safely function as a crewmember.’ [UPS/IPA CBA Article 5, Section D.1.a.]” He concluded that Respondent needed to require an examination, and directed Complainant to contact Cathy Cline for instructions. Quinn Aff., Ex. 12; CX 26.

By letter dated October 29, 2013 to Coleman,¹² Irwin Cutler, counsel for the IPA, requested that Respondent provide the objective evidence uncovered by the investigation, which formed the basis for Respondent’s decision to require Complainant to submit to a medical examination. Foster Aff., Ex. 2; Quinn Aff., Ex. 13. In emails on October 30, 2013 between Coleman and Cutler, copying Foster and Bill Trent, Coleman forwarded documents reviewed by

¹² This letter was courtesy copied to Trent, Complainant and Feldman.

Respondent regarding decision to conduct medical examination; Cutler also requested that the instruction for Complainant to contact Cathy Cline be delayed pending Cutler's review of the objective evidence. Coleman advised Cutler that the November 2, 2013 appointment would remain as scheduled since Cutler would have several days to review the evidence. Foster Aff., Ex. 4; Quinn Aff., Ex. 14.

On October 31, 2013, Coleman emailed Cutler and forwarded Starnes' September 11, 2013 email regarding his interaction with Complainant. Foster Aff., Ex. 6; Quinn Aff., Ex. 16. In addition, Cline emailed Dr. Illig, advising that Complainant had an appointment for an independent medical examination ("IME") on November 2, 2013, and that "further evaluation tools are at [Dr. Illig's] discretion to make an appropriate medical decision." Cline also requested that Dr. Illig send her the results of the evaluation along with the fee for service. Foster Aff., Ex. 7; CX 34. Also on October 31, 2013, Faith, Foster, Quinn, and Complainant, communicated via email regarding Complainant's scheduled appointment with Dr. Illig. Foster Aff., Ex. 8; Quinn Aff., Ex. 17; Faith Aff., Ex. 3. Finally, on October 31, 2013, Quinn sent Complainant a letter directing Complainant to attend the evaluation with Dr. Illig. Foster Aff., Ex. 9; Quinn Aff., Ex. 18.

On November 2, 2013, Complainant emailed Faith, Feldman and Cutler, advising that he "respectfully decline[d] to attend the medical exam scheduled for today, as I do not believe the company has the right to direct me to do so." Quinn Aff., Ex. 19; Faith Aff., Ex. 4. In addition, Dr. Illig advised Cline that Complainant did not attend the November 2, 2013 IME. CX 34. On November 4, 2013, Quinn emailed Complainant, Foster, Coleman, and Faith regarding the medical examination. Quinn noted that Complainant "respectfully decline[d] to attend the examination," originally scheduled for November 2, 2013. Quinn instructed Complainant to attend the examination with Dr. Illig scheduled for November 7, 2013, and advised him that "failure to appear will result in the immediate termination of your employment with United Parcel Service," as refusal to obey this instruction "constitutes insubordination which will result in your termination." Foster Aff., Ex. 10; Quinn Aff., Ex. 20.

On November 5, 2013, Quinn sent Complainant a letter instructing Complainant to attend the November 7, 2015 examination, or face immediate termination, and emphasizing that Complainant does not have the ability to disobey or ignore this instruction, as that would constitute insubordination. Quinn Aff., Ex. 21. By letter dated November 7, 2013, Annamaria McCoy, M.D., advised that Complainant had been a patient since May 2012 and that at the time of his September 9, 2013 appointment, he had "a normal complete physical exam. He is in good health at this time." CX 30.

In emails dated November 8 through 11, 2013, Cutler, Coleman, Foster, Feldman, and Complainant communicated. Foster Aff., Ex. 11; Foster Aff., Ex. 12; Quinn Aff., Ex. 22. Cutler advised that Complainant attended the November 7, 2013 examination, but that it was not completed; he proposed that Complainant, the IPA and Respondent agree to the circumstance surrounding an examination prior to Complainant submitting to one, specifically that the examination would be "for the sole purpose of determining if he is qualified to hold a first class medical," and noting that he already had a current first class medical certificate. Citing Article 7 of the CBA, Coleman responded that there is no requirement that they reach a mutual agreement

prior to the examination, and advised that Complainant should exercise his right to a hearing on the issue since he has demonstrated “clear refusal to comply with what is clearly a reasonable request.”

In emails dated November 10, 2013 between Creamer and Faith, Creamer requested that he not be assigned Complainant as a crewmember so that he would not “have an issue with the recording of conversation he initiated between us w/o my knowledge.” CX 23. Faith replied that the recordings are not illegal in Alaska, but that it broke a UPS rule.

In emails dated November 11 through 14, 2013 between Cline and Dr. Illig, Dr. Illig wrote that she declined to perform the rescheduled IME and requested that Dr. David Bryman, Respondent’s aeromedical advisor, perform the examination. CX 34.

In emails dated November 14 through 15, 2013 between, *inter alia*, Cutler, Foster and Coleman, they discussed Complainant’s options of either submitting to a medical examination, or exercising his right to a hearing on the issue. Foster Aff., Ex. 13; Quinn Aff., Ex. 23.

On November 19, 2013, Cline advised Dr. Illig that Complainant would not be evaluated by Dr. Illig. CX 34.

Via emails dated November 19 through 20, 2013 between, *inter alia*, Cutler, Complainant and Coleman, Cutler advised Coleman that Complainant did not wish to have a hearing on the medical examination issue. Foster Aff., Ex. 14; Quinn Aff., Ex. 24.

By letter dated November 22, 2013, Quinn notified Complainant that his “refusal to comply with the Company’s directive to attend an evaluation by an AME is insubordinate and will not be tolerated. You were given multiple opportunities to comply and informed that the failure to do so would result in termination,” and that “the Company even waived its right to obtain any personal or medical information from the examining doctor in order to address your concern about who would have access to this information.” For these reasons, Respondent terminated his employment. Quinn Aff., Ex. 25.

On November 27, 2013, Kelli Atherton emailed, *inter alia*, Driskell and Cutler regarding Complainant’s filing of a grievance. Foster Aff., Ex. 15. The arbitration for Complainant’s grievance was held on September 15 through 17, 2014. Foster Aff., Ex. 16; RX 11; CX A. On March 20, 2015, the panel issued the Arbitration Opinion and Award, dismissing the union grievance. Foster Aff., Ex. 17.

On January 8, 2014, Complainant had his FAA First Class Medical Certificate renewed. CX 31.

4. Complainant’s OSHA Complaint (RX 2) and Affidavit (CX 1)

In his original complaint, Complainant averred that Respondent terminated his employment after Complainant notified Faith of his August 13, 2013 TSA verbal complaint. RX 2 at 1. Complainant “reported Mr. Psiones for dishonesty because he believed it is a matter of

safety in aviation that FFDOs, who are certified by TSA and permitted to travel with firearms, are held to the highest standards of honesty and integrity.”¹³ *Id.* On March 27, 2013, Psiones “falsely accuse[d] [Complainant] of intentionally violating TSA regulations and FedEx company procedures while traveling from Florida to Anchorage,” and Psiones “stated that he had in his possession a TSA report of the incident.” *Id.* at 2. Complainant was unable to obtain a copy of this TSA report and “became convinced that the TSA report did not exist and that Mr. Psiones had lied about a sensitive safety and security matter. *Id.* at 3. Complainant “verbally reported the false statement to a TSA official” on August 13, 2013. *Id.* Complainant also reported to Faith during their August 22, 2013 meeting that Psiones “had made false statements regarding a safety/security issue, specifically the false statement that there was a TSA report on the FedEx jump seat matter.” *Id.* Complainant alleged, “Upon learning of [Complainant’s] complaint to the TSA the company began looking for a pretext upon which to justify terminating [Complainant’s] employment.” *Id.* at 4. Respondent’s “search for a pretext included approximately 7 hours of hostile examination by Company officials on September 11, 2013 and October 16, 2013.” *Id.* “Rather than impose discipline the company chose to demand that [Complainant] submit to a physical exam.” *Id.* at 5. Complainant attended the November 7, 2013 examination, but Complainant terminated this examination with the advice of his counsel since “it was both a transparent attempt to uncover or manufacture grounds for discharge and an outrageous invasion of [Complainant’s] privacy.” *Id.* at 5-6. Complainant attempted to negotiate a compromise with Respondent regarding the medical examination from November 7, 2013 through November 22, 2013, but “[d]ue to the circumstances [Complainant] declined to go forward with the medical examination.” *Id.* at 6-7. Complainant was terminated by letter dated November 22, 2013 for his failure to attend the November 7, 2013 medical examination. *Id.* at 7. Complainant “believes he was discharged due to his report to the TSA of dishonesty on the part of Jim Psiones,” and that Respondent “did discriminate against [Complainant] as a direct and punitive response to this report to the TSA stating that Jim Psiones in his capacity as a UPS manager and FFDO did make false statements regarding a safety sensitive matter.” *Id.* at 7.

In his sworn affidavit, Complainant wrote that he began working for Respondent in 1994, and prior to his employment with Respondent, Complainant served in the Air Force for twenty-two years. CX 1 at 1-2. Complainant described his litigation against the Kentucky Department of Revenue, and expressed his concern with how IPA and Respondent handled the issue. *Id.* at 2. Complainant alleged that the FedEx jump seat incident with the scissors occurred on March 19, 2013. *Id.* at 7. On March 27, 2013, Psiones confronted Complainant about the scissors in front of other crewmembers in a “loud, admonishing tone,” and told him that there was a TSA

¹³ The Federal Flight Deck Officer (FFDO) program was established by the Arming Pilots Against Terrorism Act (APATA) as Title XIV of the Homeland Security Act (Pub. L. 107-296, Nov. 25, 2003, 116 Stat. 2300), codified at 49 U.S.C. § 44921. Under this program, TSA deputizes qualified volunteer pilots and flight crewmembers of passenger and cargo aircraft as law enforcement officers to defend the flight deck of aircraft against acts of criminal violence or air piracy. Participants in the program, known as Federal Flight Deck Officers (FFDOs), are trained and authorized to transport and carry a firearm and to use force, including deadly force. Part of the FFDO program includes psychological screening during the application process. See Dept of Homeland Security Report, Privacy Impact Assessment for the Federal Flight Deck Offer Program (Jan. 10, 2008), *available at* https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_ffdo.pdf

report on Complainant for the scissors. *Id.* at 8. Complainant then met with Murray and asked him about the TSA report; Murray “then told me that there was no TSA report and he had simply received an email from his FedEx counterpart, Brian Mustacci.” *Id.* at 9. Complainant alleged, “As a result of the confrontation with ACP Psiones and being a Federal Flight Deck Officer (“FFDO”), however, I was quite concerned about the allegations of having done something wrong,” to the point that it “was very distracting and I could not help but think about the allegations It clearly affected the safety and security of conducting my duties” of acting as the Pilot in Command flying from Anchorage to Hong Kong 1.5 hours after the confrontation. *Id.* at 10. After continued harassment and because Respondent’s chain of command did not resolve the issue, Complainant called Federal Air Marshall (“FAM”) Julian Ross on August 13, 2013 “to ascertain if in fact a TSA incident report and investigation about me actually existed. After FAM Ross . . . verified that no such incident or report ever existed,” Complainant “then told him about my safety and security concerns pertaining to ACP Psiones fabricating a fraudulent story of me being in trouble for creating a TSA incident that generated a TSA report.” *Id.* at 14. Complainant “further explained to FAM Ross, how I was extremely concerned about how this lie caused me to be distracted by creating a sense of being in trouble for something alleged that was not true.” *Id.* Complainant alleged that FAM Ross “directed me to file a TSA Dashboard Incident report. I explained to him I was afraid of retaliation.” *Id.* Complainant also alleged that there were issues with pilots feel too intimidated to call in when they are fatigued or sick. *Id.* at 16-17.

B. Evidence Submitted by the Parties

In support of its Motion for Summary Decision, Respondent submits the following evidence:

- OSHA’s Findings (RX 1)¹⁴;
- Complainant’s AIR 21 Complaint (RX 2);
- Transcript from a proceeding in Complainant’s federal district court case (RX 3)¹⁵;

¹⁴ The following abbreviations are used in this Order: “RX” refers to Respondent’s Exhibits; and “CX” refers to Complainant’s Exhibits.

¹⁵ Under the applicable procedural regulation, this Tribunal may take official notice of adjudicative facts. 29 C.F.R. § 18.84. Similar to the analogous provisions of the Federal Rules of Evidence and of Civil Procedure regarding judicial notice, Part 18.84 provides, “On motion of a party or on the judge’s own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice.” However, it is well-established that a court may take judicial notice of a document filed in another court “not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2d Cir. 1992); *see also Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A.*, 146 F.3d 66, 69-70 (2d Cir. 1998) (explaining, “Facts adjudicated in a prior case do not meet either test of indisputability contained in [Federal Rule of Evidence] 201(b) [Judicial Notice of Adjudicative Facts]: they are not usually common knowledge, nor are they derived from an unimpeachable source”); *United States v. Wilson*, 631 F.2d 118 (9th Cir. 1980) (holding that judicial notice may be taken of court records in another case); *Romo v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 9814, at *7-8 (N.D. Cal. Jan. 27, 2016) (citing *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)) (explaining, “Notice can be taken, however, only for the limited purpose of recognizing the judicial act that the order represents on the subject matter of the litigation) (internal quotation marks omitted); *General Electric Capital Corp. v. Lease Resolution Corp.*,

- Excerpts from deposition of Roger Quinn and deposition exhibits (RX 4);
- Excerpts from deposition of Jim Psiones and deposition exhibits (RX 5);
- Excerpts from deposition of Edward Faith and deposition exhibits (RX 6);
- Excerpts from deposition of Jennifer Robbins and deposition exhibits (RX 7);
- Excerpts from deposition of Peyton Cook and deposition exhibits (RX 8);
- Excerpts from deposition of Michael Starnes and deposition exhibits (RX 9);
- Excerpts from deposition of Marc McDermont and deposition exhibits (RX 10);
- Transcript of September 2014 arbitration (RX 11);
- Curriculum vitae of Dr. Joseph Tordella (RX 12);
- Expert opinion report notes by Dr. Tordella (RX 13);
- Affidavit of Dr. Tordella (RX 14);

- Affidavit of Kevin Foster;
- “Agreement between United Parcel Service and the Flight Crewmembers in the service of United Parcel Service Co. as represented by the Independent Pilots Association (“IPA”),” effective August 31, 2006 – December 31, 2011 (Foster Aff., Ex. 1);
- Letter dated October 29, 2013 from Irwin Cutler, counsel for the IPA, to Tony Coleman, copying Bill Trent, Complainant and Arnold Feldman (Foster Aff., Ex. 2);
- Emails dated October 29 and 30, 2013 between Irwin Cutler and Kim Demers (Foster Aff., Ex. 3);
- Email dated October 30, 2013 from Tony Coleman to Irwin Cutler, forwarding documents reviewed by Respondent regarding decision to conduct medical examination (Foster Aff., Ex. 4);
- Transcript of recorded conversation between Complainant and Ken Murray, June 18, 2013 at 3:24 p.m.; transcript of recorded conversation between Complainant and Don Creamer, Aug. 13, 2013, 8:10 a.m.; transcript of recorded conversation between Complainant and Edward Faith, August 22, 2013, 3:15 p.m.; email dated September 7, 2013 from Michael Starnes to Jennifer Robbins; email dated September 23, 2013 from Peyton Cook to Jim Psiones and accompanying written statement; and transcript of October 16, 2013 disciplinary hearing (Foster Aff., Ex. 5);
- Email dated October 31, 2013 from Tony Coleman to Irwin Cutler and email dated September 11, 2013 between Michael Starnes and Jennifer Robbins (Foster Aff., Ex. 6);
- Emails dated October 31, 2013 between Cathy Cline and Dr. Petra Illig (Foster Aff., Ex. 7);
- Emails dated October 31, 2013 between Edward Faith, Kevin Foster and Roger Quinn (Foster Aff., Ex. 8);
- Letter dated October 31, 2013 from Roger Quinn to Complainant regarding medical evaluation (Foster Aff., Ex. 9);

128 F.3d 1074, 1082, n.6 (7th Cir. 1997) (“We agree that courts generally cannot take notice of findings of fact from other proceedings for the truth [of the matter] asserted therein because these findings are disputable and usually are disputed”). Thus, this Tribunal merely takes official notice of this transcript as a document filed in another court, but does not take official notice of any part of this document for the truth of the matters asserted in this other litigation.

- Email dated November 4, 2013 from Roger Quinn to Complainant, Kevin Foster, Tony Coleman, and Edward Faith regarding medical examination (Foster Aff., Ex. 10);
- Email dated November 8, 2013 from Irwin Cutler to Tony Coleman regarding medical examination (Foster Aff., Ex. 11);
- Emails dated November 8 and 11, 2013 between Irwin Cutler, Tony Coleman and Kevin Foster (Foster Aff., Ex. 12);
- Emails dated November 14 and 15, 2013 between, *inter alia*, Irwin Cutler, Kevin Foster and Tony Coleman (Foster Aff., Ex. 13);
- Emails dated November 19 and 20, 2013 between Irwin Cutler and Tony Coleman (Foster Aff., Ex. 14);
- Email dated November 27, 2013 from Kelli Atherton to, *inter alia*, Marty Driskell and Irwin Cutler (Foster Aff., Ex. 15);
- Transcript of the September 15 through 17, 2014 arbitration of Complainant's grievance (Foster Aff., Ex. 16);
- Arbitration Opinion and Award, dated March 20, 2015, dismissing the union grievance (Foster Aff., Ex. 17);
- List of pilots who were withheld from service with pay from 2012 through mid-October 2013 (Foster Aff., Ex. 18);

- Affidavit of Roger Quinn;
- Email dated September 23, 2013 from Peyton Cook to Jim Psiones (Quinn Aff., Ex. 1);
- Emails dated September 7 through 9, and 11, 2013 between Jennifer Robbins and Michael Starnes (Quinn Aff., Ex. 2);
- Complainant's Crewmember Exception/LOA History (Quinn Aff., Ex. 3);
- Email, with attachments, dated August 12, 2013 from Complainant to Roger Quinn, and Bill Cason and Chris Harper of IPA (Quinn Aff., Ex. 4);
- Transcript of recorded conversation between Complainant and Don Creamer, August 13, 2013, 8:10 a.m. (Quinn Aff., Ex. 5);
- List of pilots withheld from service with pay from 2012 through mid-October 2013 (Quinn Aff., Ex. 6);
- Transcript of recorded conversation between Complainant and Ken Murray, June 18, 2013 at 3:24 p.m. (Quinn Aff., Ex. 7);
- Transcript of recorded conversation between Complainant and Edward Faith, August 22, 2013, 3:15 p.m. (Quinn Aff., Ex. 8);
- Audio recording (Quinn Aff., Ex. 9);
- Excerpts from the transcript of the October 16, 2013 disciplinary hearing (Quinn Aff., Ex. 10);
- Email, and attached statement, dated October 19, 2013 from Marc McDermont to Jennifer Robbins (Quinn Aff., Ex. 11);
- Letter dated October 25, 2013 from Roger Quinn to Complainant (Quinn Aff., Ex. 12);
- Letter dated October 29, 2013 from Irwin Cutler to Tony Coleman (Quinn Aff., Ex. 13);

- Email dated October 30, 2013 from Tony Coleman to Irwin Cutler, Kevin Foster and Bill Trent (Quinn Aff., Ex. 14);
- Transcript of recorded conversation between Complainant and Ken Murray, June 18, 2013 at 3:24 p.m.; transcript of recorded conversation between Complainant and Don Creamer, Aug. 13, 2013, 8:10 a.m.; transcript of recorded conversation between Complainant and Edward Faith, August 22, 2013, 3:15 p.m.; email dated September 7, 2013 from Michael Starnes to Jennifer Robbins; email dated September 23, 2013 from Peyton Cook to Jim Psiones and accompanying written statement; and transcript of October 16, 2013 disciplinary hearing (Quinn Aff., Ex. 15);
- Email dated October 31, 2013 from Tony Coleman to Irwin Cutler and Kevin Foster; and email dated September 11, 2013 from Michael Starnes to Jennifer Robbins (Quinn Aff., Ex. 16);
- Emails dated October 31, 2013 between Kevin Foster, Edward Faith, Roger Quinn and Marty Driskell (Quinn Aff., Ex. 17);
- Letter dated October 31, 2013 from Roger Quinn to Complainant (Quinn Aff., Ex. 18);
- Email dated November 2, 2013 from Complainant to Edward Faith, Arnold Feldman and Irwin Cutler (Quinn Aff., Ex. 19);
- Email dated November 4, 2013 from Roger Quinn to Complainant, Kevin Foster, Edward Faith, and Tony Coleman (Quinn Aff., Ex. 20);
- Letter dated November 5, 2013 from Roger Quinn to Complainant (Quinn Aff., Ex. 21);
- Email dated November 8, 2013 from Irwin Cutler to Tony Coleman, Kevin Foster and Arnold Feldman (Quinn Aff., Ex. 22);
- Emails dated November 14 and 15, 2013 between Irwin Cutler, Kevin Foster, Tony Coleman, Arnold Feldman, Complainant, and Bill Trent (Quinn Aff., Ex. 23);
- Emails dated November 19 and 20, 2013 between Irwin Cutler, Tony Coleman, Bill Trent, Arnold Feldman, and Complainant (Quinn Aff., Ex. 24);
- Letter dated November 22, 2013 from Roger Quinn to Complainant (Quinn Aff., Ex. 25);

- Affidavit of Edward Faith;
- Crewmember Exception/LOA History of Complainant (Faith Aff., Ex. 1);
- Transcript of recorded conversation between Complainant and Edward Faith, August 22, 2013, 3:15 p.m. (Faith Aff., Ex. 2);
- Emails dated October 31, 2013 between Kevin Foster, Edward Faith, Roger Quinn, Marty Driskell, and Complainant (Faith Aff., Ex. 3);
- Email dated November 2, 2013 from Complainant to Edward Faith, Arnold Feldman, Irwin Cutler, and Roger Quinn (Faith Aff., Ex. 4);

- Affidavit of Ken Murray;
- Email dated March 19, 2013 from Brian Mustacci to Ken Murray (Murray Aff., Ex. 1);
- Transcript of recorded conversation between Complainant and Ken Murray, June 18, 2013 at 3:24 p.m. (Murray Aff., Ex. 2).

In opposition to Respondent's Motion for Summary Decision, Complainant submits the following evidence:

- Affidavit of Complainant (CX 1);
- Subpoena request form, Jefferson County Grand Jury (CX 2);
- Emails dated March 27, 2013 between Jim Psiones and Don Creamer (CX 3);
- Emails, with attached Crewmember Exception/LOA History of Complainant, dated September 16, 2013 between Irwin Cutler, Jennifer Robbins, Tony Coleman, Bill Trent, and Rob Guinn (CX 4);
- Emails dated March 19 and 28 through 30, April 1, and May 21, 2013 between, *inter alia*, Brian Mustacci, Ken Murray, Rob Guinn, Roger Quinn, Jennifer Robbins, Edward Faith, Marty Driskell, Kevin Foster, and Jim Psiones (CX 5);
- Email dated September 16, 2013 from Roger Quinn to Edward Faith (CX 6);
- Email dated June 14, 2013 from Jim Psiones to Rob Guinn (CX 7);
- Email dated June 15, 2013 from Rob Guinn to Bill Cason (CX 8);
- Emails dated March 19, 28, and 30, April 1, May 21, June 14 and 19, August 1, 2 and 5, 2013 between, *inter alia*, Brian Mustacci, Ken Murray, Rob Guinn, Roger Quinn, Kevin Foster, Edward Faith, Jim Psiones, Jeffrey Kilmer, and Jennifer Robbins (CX 9);
- Email dated July 1, 2013 between, *inter alia*, Complainant, Edward Faith and Chris Harper (CX 10);
- Email dated September 9 and 15, 2013 between Jennifer Robbins, David Ferguson and Jim Psiones (CX 11);
- IPA "Safety Survey Executive Summary," April 8, 2014 (CX 12);
- Affidavit of Sean Baber (CX 13);
- Affidavit of Alexander Eskin (CX 14);
- Email dated August 12, 2013 between, *inter alia*, Complainant, Roger Quinn, Chris Harper, Rob Guinn, Edward Faith, and Jim Psiones (CX 15);
- Email dated August 26, 2013, with attached summary of August 22, 2013 meeting with Complainant, from Edward Faith to Roger Quinn, Kevin Foster and Rob Guinn (CX 16);
- Email dated August 23, 2013 from Edward Faith to Quinn Roger, Kevin Foster and Rob Guinn (CX 17);
- Email dated September 23, 2013 from Jennifer Robbins to Rob Guinn, forwarding September 23, 2013 email from Peyton Cook to Jennifer Robbins (CX 18);
- Affidavit of James Crowley (CX 19);
- Email dated June 19, 2013 from Kevin Foster to Steve Jennings (CX 20);
- Email dated September 30, 2013 from Edward Faith to Jennifer Robbins, forwarding September 24, 2013 email from David Bergman to Edward Faith (CX 21);
- Email dated October 3, 2013 from Marty Driskell to Jennifer Robbins regarding notes from the September 11, 2013 hearing (CX 22);
- Emails dated November 10, 2013 between Don Creamer and Edward Faith (CX 23);
- "UPS Corporate Security Investigation Detail Report" (CX 24);
- Emails dated September 25, 2013 between Jennifer Robbins and Rob Guinn (CX 25);
- Letter dated October 25, 2013 from Roger Quinn to Complainant (CX 26);
- "Article 7: Grievance Procedure" (CX 27);

- “Article 5: General” (CX 28);
- “Medical Certificate First Class” dated August 6, 2013 for Complainant (CX 29);
- Letter dated November 7, 2013 from Annamaria McCoy, M.D. (CX 30);
- “Medical Certificate First Class” dated January 8, 2014 for Complainant (CX 31);
- Arbitration Opinion and Award dated September 29, 1993 regarding an unrelated female UPS employee (CX 32);
- Text message from Dr. Bryman to Cathy Cline (CX 33);
- Emails dated October 31, November 2, 11, 14, and 19, 2013 between Cathy Cline and Petra Illig (CX 34);
- Email dated August 23, 2013 from Roger Quinn to, *inter alia*, Tony Coleman, Rob Guinn, Kevin Foster, Edward Faith, Fran Folino, and Cathy Cline, forwarding Complainant’s August 12, 2013 email to Roger Quinn (CX 35);
- Affidavit of Tony Coleman (CX 36);
- Affidavit of Bruce Chien (CX 37);
- Letter from Bruce Chien (CX 38)¹⁶;
- August 12, 2014 letter from David Bryman, D.O. to Cathy Cline, with accompanying emails, notes and letters from the “Heard File” (CX 39);
- Copy of Equal Employment Opportunity Commission (“EEOC”) decision in unrelated matter, *EEOC v. Shinseki, Dep’t of Veterans Affairs* (CX 40);
- Copy of decision in unrelated matter, *Shaltry v. City of Saginaw*, 2011 WL 252518 (E.D. Mich. Jan. 20, 2011) (CX 41);
- Excerpts from the transcript of the September 17, 2014 arbitration of Complainant’s grievance (CX A);
- Excerpts from the March 4, 2016 deposition of Peyton Cook (CX B);
- Excerpts from the March 1, 2016 deposition of Edward Faith (CX C);
- Transcript of the March 4, 2016 deposition of Marc McDermont (CX D);
- Excerpts from the February 29, 2016 deposition of Jim Psiones (CX E);
- Excerpts from the February 29, 2016 deposition of Roger Quinn (CX F);
- Excerpts from the March 1, 2016 deposition of Jennifer Robbins (CX G);
- Excerpts from the March 4, 2016 deposition of Michael Starnes (CX H).
- Audio recording of July 13, 2013 conversation between Complainant and Peyton Cook.

III. THE PARTIES’ POSITIONS

A. Respondent’s Argument

Respondent asserts that Complainant cannot demonstrate that he engaged in protected activity, or that a causal nexus exists between the alleged protected activity and the adverse action. Specifically, with regard to protected activity and citing Complainant’s AIR 21 complaint, Respondent emphasizes that Complainant’s AIR 21 complaint focuses on his allegation that “he was terminated for reporting ACP Jim Psiones to the TSA for misrepresenting that there was a TSA report from his March 2013 FedEx security incident.” Resp’t Mot. at 48. Respondent argues that Complainant’s verbal complaint to the TSA does not involve a violation

¹⁶ Despite marking CX 38 as a letter from Bruce Chien, Complainant’s counsel did not include this letter in his submission.

of any regulation, order, or standard relating to air carrier safety, and that he did not have an objectively and subjectively reasonable belief that a violation was occurring. *Id.* at 49-50. Respondent observes that Complainant waited five months from his initial confrontation with Psiones in March 2013 to report him to the TSA in August 2013. *Id.* at 50. Moreover, Complainant's explanation for reporting Psiones is not reasonable because on the same day that Psiones allegedly said there was a TSA report, Complainant learned from Murray that there was no TSA report. *Id.* at 51.

Regarding causal nexus, Respondent argues that "where the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action," citing the secret recordings Complainant made of various conversations with Respondent's employees, the statements Respondent received from other pilots commenting on Complainant's conduct, and Complainant's refusal to attend the medical examinations. *Id.* at 55-56.

Respondent also argues that its "actions were motivated by one thing and one thing only: safety," and also ensuring that its pilots were fit for duty; for those reasons, after Respondent determined "there was objective evidence of a medical problem which could interfere with his ability to function as a crewmember," Complainant was terminated for insubordination due to his refusal to attend the examinations. *Id.* at 57-58. Respondent's objective evidence consisted of Complainant's audio recordings of conversations and the statements from other pilots who expressed concern regarding Complainant's behavior. *Id.* at 69-71. Accordingly, Respondent had a "legitimate business reason for discharging [Complainant]," and that it would have discharged Complainant in the absence of any protected activity. *Id.* at 60, 84. Respondent reiterates that "there is simply no margin for error when one's insubordination (like [Complainant's] refusal on multiple occasions to submit to the medical examination) jeopardizes airline safety." *Id.* at 85.

Finally, Respondent argues that its Motion for Summary Decision should be granted on the grounds of *res judicata* and collateral estoppel, in light of the arbitration decision. *Id.* at 83.

B. Complainant's Argument

Complainant argues that he engaged in protected activity "numerous times." Complainant' Resp. at 37. Specifically, Complainant alleges that he engaged in protected activity during the August 22, 2013 meeting when "he made multiple complaints of harassment against him from ACP Psiones and also pointed out that pilot fatigue was an issue because pilots were afraid they would be disciplined if they called off for fatigue." *Id.* Complainant "also made these concerns known to CP Quinn," "to the TSA and notified UPS management that he did so." *Id.* Moreover, Complainant "also recorded select conversations to better preserve the truth of his fact-finding mission." *Id.* He further argues that Respondent "acknowledges that flying under stress can be a safety issue," and that his complaints were subjectively and objectively reasonable "in that he felt his safety was at risk when flying under the stress caused by ACP Psiones and the false exception history." *Id.* at 37-38.

Regarding causal nexus, Complainant notes that Respondent did not begin its investigation, or insist on “a highly irregular medical examination, until after Complainant “discussed his beliefs regarding the safety concerns created by UPS management tactics at the August 22, 2013 meeting.” *Id.* at 38-40. Complainant also cites the letters and emails regarding the false exception history report entry on August 12, 2013 and August 23, 2013 as evidence of “a preconceived plan to terminate him either for trumped up disciplinary reasons or through a fixed medical evaluation.” *Id.* at 39-40. In addition, Respondent demonstrated “disdain for [Complainant’s] protected activity. *Id.* at 40. “Therefore, [Complainant’s] protected activity was a contributing factor that led to UPS requiring [Complainant] to submit to an illegal medical exam and eventually his termination.” *Id.*

Regarding Respondent’s “same decision defense,” Complainant argues that Respondent had no objective evidence that Complainant “was a danger to himself or others or that he had displayed any behavior that would make it reasonable for UPS to believe he could no longer do the essential functions of his job.” *Id.* at 43. Respondent “merely found [Complainant’s] behavior annoying. That behavior, however, was protected activity under AIR 21.” *Id.* Moreover, Complainant argues that he was treated differently than other similarly situated employees regarding fitness for duty exams. *Id.* at 44.

Finally, Complainant argues that the arbitration decision has no preclusive effect on this case, noting that “the standard is different when [Complainant] is asserting his statutory rights.” *Id.* at 45. Furthermore, “the CBA does not cover [Complainant’s] statutory rights under AIR 21, nor was the arbitration litigated on the same standards that apply in AIR 21 cases,” such that the arbitration cannot have preclusive effect. *Id.* at 46.

IV. STIPULATIONS AND ISSUES

Respondent stipulates to the coverage issue, and acknowledges that Respondent is an air carrier within the meaning of the Act, Complainant was a covered employee under the Act, and the DOL has jurisdiction over this matter. Resp’t Mot. at 6-7. Complainant concedes “that any adverse employment action he suffered, except for his termination on November 22, 2013 would be barred by the statute of limitations.” Complainant Resp. at 38. The parties also do not dispute that Complainant’s November 2013 termination constitutes an adverse action. Resp’t Mot. at 53-54; Complainant Resp. at 38. Accordingly, the parties contest whether Complainant engaged in protected activity that was a contributing factor in the adverse action and whether Respondent has demonstrated, by clear and convincing evidence, that it would have taken the same action absent the protected activity.

V. LEGAL STANDARD

An administrative law judge may grant summary decision in favor of a party where there is no genuine dispute as to any material fact.¹⁷ 29 C.F.R. § 18.72(a).¹⁸ No genuine issue of

¹⁷ Summary decision in proceedings before the office of administrative law judges is derived from Rule 56 of the Federal Rules of Civil Procedure. *Lee v. Parker-Hannifin Corp., Advanced Prod. Business Unit*, ARB No. 10-021, slip op. at 5 n.8 (Feb. 29, 2012).

material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Administrative Review Board (the “Board”) has explained, “Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.” *Lee*, ARB No. 10-021 at 4. Thus, the factfinder “must not judge witness credibility or weigh evidence.” *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 627 (10th Cir. 2012).

The Board has directed, “The first step is to determine whether there is any genuine issue of a material fact,” but that “[d]etermining whether there is an issue of material fact requires several steps.” *Lee*, ARB No. 10-021 at 4 (citing *Anderson*, 477 U.S. at 248). After examining the elements of the complainant’s claims, the factfinder must “sift the material facts from the immaterial.” *Id.* After assessing materiality, the factfinder examines the parties’ arguments and evidence to determine whether a genuine dispute exists as to the material facts. *Id.* The parties may submit evidence (such as documents or affidavits) in support of their positions. See 29 C.F.R. § 18.72(c)(4). The procedural regulations provide that the factfinder “need consider only the cited materials, but the judge may also consider other materials in the record.” 29 C.F.R. § 18.72(c)(3).

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by “an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The movant must support its assertions that a fact cannot be genuinely disputed by: citing to particular parts of materials in the record, including, *inter alia*, depositions, documents, affidavits or declarations, admissions, interrogatory answers, or other materials; or, showing that the materials cited do not establish the presence of a genuine dispute. 29 C.F.R. § 18.72(c)(1). “The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant’s claim.” *Lee*, ARB No. 10-021 at 5 (citing *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 07-013, slip op. at 1 (Oct. 31, 2008)). In opposing summary decision, the non-moving party must similarly follow the procedure set forth at § 18.72(c)(1) to support its assertions that a fact is genuinely disputed. The non-moving party may also show, by affidavit or declaration, that, for specified reasons, it cannot present facts essential to justify its opposition. 29 C.F.R. § 18.72(d).

In adjudicating a motion for summary decision, the factfinder must view all facts and inferences in the light most favorable to the non-moving party. See *Celotex Corp.*, 477 U.S. at 323; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (1986); *Jaramillo v. Colo. Judicial Dep’t.*, 427 F.3d 1303, 1307 (10th Cir. 2005) (*en banc*) (*per curiam*). All ambiguities are resolved, and all reasonable inferences are drawn, in favor of the nonmovant. *Nationwide Life Ins. Co. v. Bankers Leasing Ass’n*, 182 F.3d 157, 160 (2d Cir. 1999). If a party fails to properly support an assertion of fact or address another party’s assertion of fact as required by § 18.72(c), the factfinder may grant an opportunity to properly address the fact, consider the fact undisputed

¹⁸ The parties should be aware that the Rules of Practice and Procedure before OALJ were amended, effective June 18, 2015. Since Respondent filed its Motion for Summary Decision after the effective date, the amended rules apply; accordingly, Section 18.72, not Section 18.40, governs summary decision.

for purposes of the motion, grant summary decision if the movant is entitled to it, or issue any other appropriate order. 29 C.F.R. § 18.72(e).

VI. DISCUSSION

Since Respondent raised a res judicata and collateral estoppel argument, this Order first addresses that threshold issue. This Order then addresses whether any genuine disputes as to material fact exist with regard to Complainant's *prima facie* case. This Order will determine if any genuine disputes as to material fact exist regarding whether Respondent would have taken the same unfavorable action in the absence of protected activity if Respondent fails to demonstrate that it is entitled to judgment as a matter of law with regard to Complainant's *prima facie* showing.

A. The Effect of the Arbitration Decision

In the context of the Surface Air Transportation Act ("STAA"), the Administrative Review Board ("the Board") has held, "Under judicial and administrative precedent, this Board defers to the outcome of another proceeding only if the tribunal has given full consideration to the parties' claims and rights under the STAA." *Germann v. Calmat Co.*, 2002 DOL Ad. Rev. Bd. LEXIS 38, at 9-10 (Aug. 1, 2002) (quoting *Scott v. Roadway Express, Inc.*, ARB No. 99-013, slip op. at 9 (Jul. 28, 1999)). In *Lachica, Jr. v. Trans-Bridge Lines*, the Board vacated the administrative law judge's dismissal of the STAA complainant's complaint. ARB No. 10-088 at 8-9 (Feb. 1, 2012). The Board reasoned:

The record of the arbitration clearly indicates that neither the subject matter of the hearing nor the decision of the arbitrator addressed the whistleblower protections the STAA provides. . . . The arbitrator did not determine whether these complaints constituted activity the STAA protects or whether such activity contributed to [complainant's] February lay-off and eventual discharge. Further, the arbitrator denied [complainant's] grievance by finding that [respondent] had just cause to fire him but did not address whether the company would have fired him regardless of whether he engaged in STAA-protected activity.

Id. Accordingly, the Board held that "because the arbitrator's decision did not deal adequately with the factual issues in this case, the arbitration failed to consider fully the parties' claims and rights under the STAA." *Id.*

Here, the central issue decided by the arbitration panel in its March 20, 2015 decision, after its September 15 through 17, 2014 hearing, was whether "the grievant [was] dismissed with just cause." Foster Aff., Ex. 17 at 3; *see also* RX 11; Foster Aff., Ex. 16. Although the panel provided a detailed account of the factual background involved in this matter, and a similarly detailed discussion of the circumstances surrounding Complainant's termination, the focus of the arbitration proceeding was whether Complainant was dismissed with just cause. While the facts and discussion surrounding this issue may overlap with those of the AIR 21 claim, the ultimate inquiry is entirely distinguishable. The arbitration panel did not fully consider Complainant's claims and rights under AIR 21, and it neither addressed Complainant's burden to demonstrate a

prima facie case, nor Respondent's burden of showing that it would have taken the same unfavorable action by clear and convincing evidence. After reviewing the findings of the arbitration panel, this Tribunal finds that it did not fully consider Complainant's rights under the Act; consequently, it merits no preclusive effect.

B. Complainant's *Prima Facie* Case

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

1. Protected Activity

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

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, "As 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, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C.A. § 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")

(emphasis in original)).¹⁹ Thus, the “complainant must prove that he reasonably believed in the existence of a violation,” and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Regarding the former, “To prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* Regarding the latter, the Board explained, “To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (evaluating the reasonableness of belief of the *Burdette* complainant, a pilot, against that of a pilot with similar training and experience) (internal quotation marks omitted).²⁰

However, the Board observed, “mere words do not create an FAA violation when the parties’ actual conduct does not violate FAA regulations.” *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, slip op. at 6 (June 30, 2010). Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). Similarly, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.” *Id.* at 8 (internal quotation marks omitted) (holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and “did not reasonably believe that safety violations existed at the time he made his complaint”).²¹

Regarding a complainant’s recordings of conversations, the Board has consistently “held that under the proper circumstances, the lawful taping of conversations to obtain information about safety-related conversations is protected activity.” *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, slip op. at 7 (Nov. 5, 2013). However, the Board cautioned, “None of

¹⁹ Moreover, that “management agrees with an employee’s assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee’s disclosure was objectively reasonable.” *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, slip op. at 5-6 (Nov. 5, 2013); *see also Sewade*, ARB No. 13-098 at 8 (“When an employee makes a protected complaint, the employer’s response (positive or negative) does not change that AIR 21 protected activity has occurred”).

²⁰ In *Burdette*, the pilot complainant alleged that his refusal to serve as the pilot on a multi-let trip, on which a Federal Flight Deck Officer (“FFDO”) would also be present, was protected activity because he claimed that flying with an FFDO would distract him such that he could not fly safely. *Id.* at 2, 4-6. In affirming the dismissal of the complaint, the Board noted, “while Burdette opposed the FFDO program and thought it unsafe, he believed that he could safely fly but professed (or feigned) fear, in bad faith, to get the result that he wanted – not to fly with FFDOs.” *Id.* at 6. Regarding the subjective component, the Board affirmed the administrative law judge’s findings on the grounds that the complainant “put forth no evidence that people with his training and experience would share his belief that safety would have been at risk,” such that “if there had been a subjective belief, that it would have been Burdette’s uniquely.” *Id.* at 6-7.

²¹ *See also Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, slip op. at 9 (June 30, 2008); *Williams v. U.S. Dep’t of Labor*, 157 Fed. App’x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, slip op. at 1 (Nov. 12, 1996).

this is meant to convey that we condone the surreptitious audio recording of coworkers.” *Id.* at 7 n.6. In so holding, the Board identified several guiding factors to consider when determining whether the recordings constitute protected activity, *inter alia*: whether the complainant held a reasonable belief of retaliation at the time the recording was made (*id.* at 8); whether the recording was intended to preserve evidence of a safety issue (*id.*); whether the company had a policy restricting employees from recording conversations with coworkers (*id.* at 7 n.6); and whether the substance of the recorded conversations related to air safety, as opposed to “indiscriminate and excessive recordings of topics unrelated to air safety” (*Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, slip op. at 9 (Mar. 24, 2011)). However, the Board has made clear that “the number of recordings is not by itself a concern.” *Id.* at 8.

Here, Complainant has alleged that he engaged in protected activity multiple times. The alleged instances of protected activity can be categorized as follows: Complainant’s August 12, 2013 communication to Quinn, describing his concerns regarding the removal of the exception report history entry and detailing his March 27, 2013 interaction with Psiones (*see* CX 35; Quinn Aff., Ex. 4); Complainant’s August 13, 2013 verbal complaint to the TSA regarding pilot fatigue or illness; Complainant’s August 22, 2013 statements to Faith regarding pilot fatigue or illness; Complainant’s August 13, 2013 verbal complaint to the TSA regarding Psiones; Complainant’s August 22, 2013 statements to Faith regarding Psiones; Complainant’s surreptitious recording of several conversations, including the June 18, 2013 conversation with Murray, the July 13, 2013 conversation with Cook, the August 13, 2013 conversation with Creamer, and the August 22, 2013 conversation with Faith; and any time Complainant “would engage pilots about his struggles with ACP Psiones in an effort to resolve the situation and make it safer for him and others to fly.” Complainant Resp. at 37. This Tribunal will address each instance and/or type of alleged protected activity. As a threshold matter, the parties do not dispute that the TSA is part of the Federal Government, or that communications made to employees of Respondent, including, *inter alia*, Faith and Quinn, would constitute communications to the employer sufficient to satisfy the narrow “to the employer or Federal Government” condition of 49 U.S.C. § 42121(a)(1).

Regarding pilot fatigue or illness, in his sworn affidavit, Complainant alleged that he communicated to TSA FAM Ross his belief that there were issues with pilots who felt too intimidated to call in when they are fatigued or sick. *Id.* at 16-17. However, and notably, Complainant failed to reference any pilot fatigue concerns in his original, and detailed, AIR 21 complaint. Similarly, the transcript of the August 22, 2013 conversation with Faith shows that Complainant briefly discussed his generalized concerns with pilot fatigue, but he did not voice an individual, or more specific, concern; the transcript also demonstrates that throughout the course of this discussion, Complainant focused on a number of other topics in greater detail, including his theories on the Kentucky State Department of Revenue, inadequacies of IPA counsel, and his theories on Respondent’s collusion with the Department of Revenue, in addition to Psiones’ conduct. *See* Foster Aff., Ex. 5; Quinn Aff., Ex. 8; Quinn Aff., Ex. 15; Faith Aff., Ex. 2. Thus, even when viewing the facts and inferences in a light most favorable to the Complainant, the foregoing demonstrates that the central focus of Complainant’s complaints was Psiones’ conduct. His conclusory mention of pilot fatigue issues constitute unsupported speculation and an attempt to bootstrap seemingly-cognizable protected activity onto the real focus of his complaint: the effect that Psiones’ conduct had on him. The sum total of the

evidence that supports Complainant's assertions regarding pilot fatigue is merely his own conclusory and tangential statements, for which he provides no support or further detail; accordingly, even when viewing the facts and inferences in a light most favorable to the Complainant, he cannot show that his belief was objectively or subjectively reasonable.²² The Board has held that this type of speculation is "insufficient as a matter of law to constitute protected activity." *High Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, slip op. at 4 (Mar. 13, 2001) (upholding the administrative law judge's decision to dismiss the portion of the complaint based on speculation for failure to state a claim). Thus, Respondent is entitled to judgment as a matter of law that Complainant did not engage in protected activity when made any of these generalized reports of pilot fatigue.

With regard to the remaining instances of alleged protected activity, Complainant cannot show that he reasonably believed that safety violations existed at the time he made his complaints, even when all facts and reasonable inferences are viewed in the light most favorable to him, as will be discussed below. The remaining instances of alleged protected activity can be further divided into two distinct categories: complaints regarding Psiones' dishonesty in stating that there was a TSA report on Complainant, and complaints regarding the effect of Psiones' conduct on Complainant. In order to properly consider the remaining instances and/or topics of alleged protected activity, it is necessary to examine Complainant's specific complaints.

With regard to the first category, in his OSHA complaint, Complainant specifically alleged that Respondent "did discriminate against [Complainant] as a direct and punitive response to this report to the TSA stating that *Jim Psiones in his capacity as a UPS manager and FFDO did make false statements regarding a safety sensitive matter.*" RX 2 at 7 (emphasis added). He also alleged that he believed Psiones' dishonesty was a matter of safety in aviation. RX 2 at 1. In his June 18, 2013 recorded conversation with Murray, the earliest of the recorded conversations of record, Complainant similarly stated that Psiones told Complainant, in front of other crewmembers, a "blatant lie" that "a TSA report was out on me." Foster Aff., Ex. 5; Quinn Aff., Ex. 7; Quinn Aff., Ex. 15; Murray Aff., Ex. 2. During his August 13, 2013 recorded conversation with Creamer, Complainant similarly referred to Psiones' statements as "a lie." Foster Aff., Ex. 5; Quinn Aff., Ex. 5; Quinn Aff., Ex. 15. Complainant further alleged that he engaged in protected activity when he communicated to Faith that Psiones made the false statement that there was a TSA report regarding the FedEx jump seat matter. RX 2 at 3.

Concerning the latter category, Complainant alleged that on March 27, 2013, Psiones "embarrassed [him] in front of the crewmembers in the crew room when he blusterly spoke that I had a TSA incident and that there was a report on me because of my scissors." Foster Aff., Ex.

²² This determination is based on this Tribunal's careful review of all evidence of record, specifically: the many letters and emails, as summarized above; the transcripts of the recorded conversations between Complainant and Murray, Cook, Creamer and Faith; the depositions of Cook (RX 8; CX B), Faith (RX 6; CX C), McDermont (RX 10; CX D), Psiones (RX 5; CX E), Quinn (RX 4; CX F), Robbins (RX 7; CX G), and Starnes (RX 9; CX H); and the affidavits of Foster, Quinn, Faith, Murray, Baber (CX 13), Eskin (CX 14), Crowley (CX 19), Coleman (CX 36), and Chien (CX 37). After this careful review, when viewing the facts and reasonable inferences in the light most favorable to the Complainant, the record contains nothing more than Complainant's own vague, generalized and conclusory statements regarding issues of pilot fatigue and/or illness, which are not supported by any other evidence of record.

5; Quinn Aff., Ex. 7; Quinn Aff., Ex. 15; Murray Aff., Ex. 2. In his August 12, 2013 communication to Quinn, Complainant described his concerns regarding the removal of the exception report history entry and his interactions with Psiones. See CX 35; Quinn Aff., Ex. 4. In his sworn affidavit, Complainant specifically alleged, “As a result of the confrontation with ACP Psiones and being a Federal Flight Deck Officer (“FFDO”), however, I was quite concerned about the allegations of having done something wrong,” to the point that it “*was very distracting* and I could not help but think about the allegations *It clearly affected the safety and security of conducting my duties*” of acting as the Pilot in Command flying from Anchorage to Hong Kong 1.5 hours after the confrontation. CX 1 at 10 (emphasis added). Regarding his August 13, 2013 verbal complaint to the TSA, Complainant averred that he “further explained to FAM Ross, how I was extremely concerned about *how this lie caused me to be distracted* by creating a sense of being in trouble for something alleged that was not true.” CX 1 at 14 (emphasis added). During his August 13, 2013 recorded conversation with Creamer, Complainant discussed how Psiones “publicly humiliated” Complainant (see Foster Aff., Ex. 5; Quinn Aff., Ex. 5; Quinn Aff., Ex. 15), and Complainant similarly recounted his May 2013 interaction with Psiones to Faith on August 22, 2013, alleging that Psiones said to Complainant that he needed “to talk to you about your TSA incident. . . . There’s a TSA report on you about you and your scissors” (see Foster Aff., Ex. 5; Quinn Aff., Ex. 8; Quinn Aff., Ex. 15; Faith Aff., Ex. 2).

Based on the foregoing accounts of Complainant’s alleged protected activity, Respondent has demonstrated that there exist no disputes of material fact that Complainant did not have a reasonable belief that a violation of law related to air carrier safety occurred, or was occurring, with regards to Psiones’ “lie,” or its effect on Complainant. As in *Burdette, supra*, Complainant has put forth no evidence, nor raised any reasonable inference, that a pilot with his training and experience would share his belief that safety would have been at risk as a result of another pilot’s alleged statement that a TSA report existed, especially when Complainant’s own statements suggest that he confirmed, to his own satisfaction, that no TSA report existed on the same day as Psiones allegedly publically-declared the “lie.” There is no dispute that after Complainant’s March 27, 2013 confrontation with Psiones, Complainant spoke to Murray that same day, at which time Murray told him that to his knowledge, there was no TSA report. See Complainant Resp. at 9. By Complainant’s own statements, made during his June 18, 2013 recorded conversation with Murray, Complainant acknowledged that a TSA report did not exist on him when he thanked Murray “for helping clearing up that whole inference that there was a TSA report over the – over the scissors,” referring to it as a “purported TSA incident.” Murray Aff., Ex. 2. From this statement, it can be inferred that the “clearing up” occurred prior to their June 18, 2013 conversation, namely during their March 27, 2013 discussion.^{23, 24} Moreover, in his August 12, 2013 email to Quinn, after describing his March 27, 2013 interaction with Psiones,

²³ Moreover, Complainant’s allegation that he did not have definitive knowledge that a TSA report did not exist until his August 13, 2013 call with FAM Ross does not alter this analysis; he specifically alleged that he called the TSA “to ascertain if in fact a TSA incident report and investigation about me actually existed.” See CX 1 at 14. This portion of Complainant’s alleged verbal complaint is nothing more than a mere inquiry, which, in and of itself, cannot be construed as reporting a violation related to air carrier safety.

²⁴ Since no TSA report existed on Complainant, I separately observe that Complainant cannot imply that Psiones made a misrepresentation or a false communication to the TSA.

Complainant wrote, “In turn I met with Ken Murray, of my own volition, and asked about the purported TSA report,” and “Ken told me that there was no TSA report.” CX 35; Quinn Aff., Ex. 4. Since Complainant called Murray on June 18, 2013, the reasonable inference is that Complainant is referring to his March 27, 2013 meeting with Murray in this email to Quinn. Thus, when viewing all evidence and reasonable inferences in the light most favorable to Complainant, there is no genuine dispute of material fact that Complainant learned that there was no TSA report on March 27, 2013. For this reason, all of Complainant’s remaining alleged protected activity that occurred after March 27, 2013 postdates his knowledge that the subject matter of his complaint was resolved, such that his belief that a violation occurred was neither objectively nor subjectively reasonable. *See Malmanger, supra*.

Furthermore, any complaints regarding the effect of Psiones’ conduct on Complainant are neither objectively nor subjectively reasonable, even when all facts and reasonable inferences are viewed in the light most favorable to Complainant. Complainant’s allegations with regard to how Psiones’ March 27, 2013 comments adversely impacted his ability to safely serve as the Pilot in Command flying from Anchorage to Hong Kong 1.5 hours after the confrontation (*see* CX 1 at 10) do not amount to a violation of federal law related to air carrier safety committed by Respondent. In fact, when viewing all facts and inferences in the light most favorable to the Complainant, these allegations suggest that Complainant, not Psiones, or any other employee of Respondent, may have violated a federal law relating to air carrier safety if he flew the plane while distracted to such an extent that “[i]t clearly affected the safety and security of conducting [his] duties.” CX 1 at 10.²⁵ Furthermore, in alleging that Psiones’ March 27, 2013 comments alone, based solely on that one interaction, caused him to feel distracted, such that his ability to safely conduct his duties as a pilot was adversely affected, the possibility that Complainant’s complaints are merely those of a “hypersensitive employee,” a term well-established in Title VII hostile work environment litigation, can be reasonably inferred, even when the facts and inferences are viewed in a light most favorable to him. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) (explaining, “The objective standard protects the employer from the “hypersensitive” employee”).²⁶

²⁵ Pursuant to 14 C.F.R. § 121.533(e), the FAA affords the pilot in command “full control and authority in the operation of the aircraft, without limitation, over other crewmembers and their duties,” while 14 C.F.R. § 61.53(a)(1) makes clear that “no person who holds a medical certificate issued under part 67 of this chapter may act as pilot in command . . . while that person [k]nows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation.” Citing these provisions, among others, the Board has explained, “A pilot’s broad regulatory authority for ensuring the safety of air travel includes a pilot’s obligation to refrain from flying when the pilot himself is unfit.” *Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, slip op. at 7 (July 27, 2011); *see also Douglas v. SkyWest Airlines*, ARB Nos. 08-070, 08-074, slip op. at 8-10 (Sept. 30, 2009).

²⁶ In adjudicating whistleblower complaints, the Board expressly permits incorporation of, and reliance on, applicable Title VII case law precedent. *See, e.g., Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 9 (Jan. 31, 2006) (explaining that the Title VII hostile work environment case of *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), applies to the environmental whistleblower statutes and AIR 21, and also incorporating related precedent including, *inter alia*: *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); and *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

Accordingly, Respondent is entitled to judgment as a matter of law that Complainant did not engage in any protected activity, as he did not have an objectively or subjectively reasonable belief that a violation of federal law relating to air carrier safety occurred.

VII. CONCLUSION

Respondent has demonstrated the absence of genuine disputes as to material facts regarding whether Complainant engaged in protected activity. Respondent has pointed to the absence of evidence for protected activity, the first, and an essential, element of Complainant's *prima facie* case. Accordingly, Respondent is entitled to judgment as a matter of law, and it is unnecessary to address the remaining elements of Complainant's *prima facie* case and Respondent's burden to show that it would have taken the same unfavorable action in the absence of the protected activity. Complainant's claim is hereby DISMISSED.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey