



Issue Date: 06 March 2018

Case No.: 2016-AIR-00029

In the Matter of

ANTHONY D. SHELTON
Complainant

v.

THE BOEING COMPANY
Respondent

DECISION AND ORDER DENYING RELIEF

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. The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and the applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration (“OSHA”) on September 3, 2013. In its July 26, 2016 letter, OSHA made the following determinations: Complainant timely filed his complaint; Respondent is a contractor of an air carrier within the meaning of the Act, Complainant is a covered employee, but that his concerns about the accountability of airplane parts was not a contributing factor to his discipline or discharge.¹ Accordingly, OSHA dismissed the complaint. On August 16, 2016, Complainant objected to OSHA’s findings and requested a formal hearing before the Office of Administrative Law Judges (“OALJ”).

Subsequently, on September 14, 2016, this matter was assigned to the undersigned. On September 16, 2016, the Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by an undated letter. Respondent submitted its initial pre-hearing statement on October 10, 2016. Complainant did not submit a prehearing statement. Following the teleconference, this Tribunal issued a Notice of Hearing and Pre-

¹ Complainant’s appeal concerns the discipline that occurred on July 1, 2013 for an incident that occurred on April 29, 2012, not his termination that occurred on September 3, 2013. As explained below, Complainant explicitly narrowed the scope of his complaint during the May 24, 2017 teleconference.

Hearing Order on October 12, 2016, and set the hearing for May 4, 2017 in the Seattle, Washington area.

On November 18, 2016, Respondent filed a Motion to Compel Complainant to Submit to Initial Disclosures. On November 21, 2016, the Tribunal issued a Discovery Order directing Complainant to comply with his initial discovery obligations by December 7, 2016.

On November 30, 2016, the Tribunal received a United States Postal Service box from Complainant that contained various items. On December 2, 2016, the Tribunal issued an Order Directing the Return of Certain Items to Complainant and cautioned him about communicating with the Tribunal without providing the same information to Respondent.

On December 14, 2016, Respondent filed a Notice regarding Complainant's Initial Disclosures seeking sanctions against Complainant for his failure to comply with discovery. On December 15, 2016, the Tribunal issued a Second Discovery Order giving Complainant until January 6, 2017 to provide specific information about his claimed damages.

On January 3, 2017, the Tribunal received a copy of Complainant's discovery responses and on January 6, 2017, the Tribunal received a copy of Complaint's calculations for claimed damages.

On January 25, 2017, the Tribunal issued an Order Rescheduling Hearing, moving the hearing date set to begin May 4, 2017 to June 5, 2017.

On February 10, 2017, the Tribunal received a document from Complainant entitled "Complainant's Motion to Compel Tribunal to bring Respondent's Focus back to Original Complaint." On February 13, 2017 the Tribunal responded in writing to this document addressing Complainant's concerns.

On February 13, 2017, the Tribunal received from Complainant a document entitled "Application to Quash Subpoena Jeanne R. Bybee to Appear and Testify at a Deposition." On February 14, 2017, the Tribunal issued an Order Denying Complainant's Request to Quash Subpoena.

On February 18, 2017, Complainant submitted his Motion for Summary Decision. As part of his motion, Complainant provided 14 exhibits. In his motion Complainant asserted that the disciplinary taken against him on July 1, 2013 was retaliatory and followed his refusal to accept an offer of settlement by Respondent, and to return to work. On April 7, 2017, Respondent submitted its response. Attached to the response were 13 exhibits. Respondent argued that Complainant's motion was untimely, that the corrective action did not contribute to Complainant's termination, and Complainant's action of stopping another employee on April 29, 2012 was not a protected activity. On May 11, 2017, the Tribunal issued an Order Denying Complainant's Motion for Summary Decision.

On February 22, 2017, Respondent filed a Motion for Summary Decision. On February 27 and March 13, 2017, Complainant filed documents apparently in response to this motion. On April 3, 2017, the Tribunal issued an Order Granting in Part and Denying in Part Respondent's

Motion for Summary Decision. The Tribunal found that matters concerning an alleged assault upon Complainant in April 30, 2012 were in no way related to an air safety issue and were not subject to adjudication by this Tribunal. However, the Tribunal would hear the remaining allegations that were not otherwise time barred.

On February 27, 2017, the Tribunal provided Respondent's counsel with a Copy of Documents Filed Ex Parte by Complainant.

On March 21, 2017, the Tribunal issued a Protective Order at the request of Respondent.

On April 14, 2017, Respondent filed a Motion for Clarification as to the Order Denying Respondent's Motion for Summary Decision. On May 10, 2017, the Tribunal issued an Order Addressing Motion for Clarification providing further explanation of its earlier ruling.

On or about May 16, 2017, the parties submitted their pre-hearing statements.

On May 24, 2017, the Tribunal held a final pre-hearing teleconference with the parties. During this teleconference, Complainant was specifically asked about the scope of his allegations or claim. Complainant stated that the sole issue for the Tribunal to resolve was the one-day suspension that occurred on July 1, 2013. The Tribunal specifically asked Complainant if he was challenging his termination of employment and that if he was not, the Tribunal was going to limit testimony at the hearing to facts surrounding that one-day suspension. He clearly expressed that the July 1, 2013 personnel action constituted the totality of his appeal. According the Tribunal ruled "that the Tribunal will only hear testimony concerning and relating to the July 1, 2013 issues." May 24, 2017 Transcript, at 7-12.

The Tribunal held a hearing in this matter in Tacoma, Washington from June 5 to June 6, 2017.² Complainant, who appeared *pro se*, and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Respondent's Exhibits ("RX") 1 – 49,³ Complainant's Exhibits ("CX") 1, 3, 4, 6-8, 12-1 only, 13, and 15.⁴ Post-hearing, the Tribunal admitted CX 16 and CX 17.⁵ In its opening statement, Respondent explained the case involved Complainant's one-day suspension on July 1, 2013, and its progressive disciplinary process. Further, and even if Complainant was to prevail, damages were limited to \$272 for the loss of one day wages. Tr. at 75-78, and 134.⁶ In Complainant's opening, he represented that the case was about traceability and trackability of parts going on to an aircraft. Both at the end

² The Transcript of the June 5 and 6, 2017 proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 27-47.

³ Tr. at 10. RX 50 were slides referenced during Respondent's opening and were for demonstrative purposes only.

⁴ Tr. at 138, 141, 146-148, 153, 154, and 157.

⁵ On September 25, 2017, Complainant filed a Motion to Supplement Record. Complainant wished to add two exhibits to his evidence. As Respondent did not respond to Complainant's motion, on October 17, 2017, the Tribunal issued an Order Granting Complainant's Motion to Supplement the Record, and admitted CX 16 and CX 17.

⁶ Complainant seeks no damages for his termination from employment. Tr. at 134. However, if he was to prevail, at the hearing he also asked for emotional distress and other appropriate remedies. *Id.* at 74. But again, he provided no evidence of damages except his loss of one day of wages.

of Complainant's case-in-chief and following the presentation of its evidence, Respondent moved for a directed verdict. In both instances the Tribunal denied Employer's request.

On August 22, 2017, Complainant filed a Motion for Extension of August 25, 2017 briefing date. On August 24, 2017, the Tribunal granted the requested extension, and extended the due dates for Respondent's brief and Complainant's reply brief. Complainant submitted its closing brief on September 23, 2017.

On October 16, 2017, Respondent filed a Motion to Extend Post-hearing Briefing Deadlines. On October 17, 2017, the Tribunal granted Respondent's motion and also extended Complainant's reply brief deadline. Respondent submitted its closing brief on December 14, 2017. Complainant submitted his reply brief on January 6, 2018.

This decision is based on the evidence of record, the testimony of the witnesses at this hearing, and the arguments by the parties.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Testimonial Evidence

The sworn testimony of the witnesses who appeared at the hearing is summarized below.

Jon Holden Tr. at 47-94

Mr. Holden is the President of the Machinists Union District 751 and has been since March 2014. During the period of April 2012 to July 2013, he was the business representative covering a portion of the Union members at Complainant's Everett facility. Complainant was one of his members during that period. Mr. Holden expects his union members to follow the Respondent's rules, including the requirement that members wear their ID badges. Mr. Holden denied that a Respondent representative told him "that they were going to find something on [Complainant] to get [him] on." Mr. Holden felt that it was just a matter of time, if Complainant did not accept an offer to leave its employ, before Respondent would subject Complainant to other disciplinary action, which could lead to his termination of employment. Respondent had taken a number of disciplinary actions against Complainant in the few years prior to that timeframe and Mr. Holden had a general concern that the interaction Complainant had with his coworkers or management could potentially lead to more disciplinary action. When an employee is placed on administrative leave, he is on paid leave and not in an active status. Complainant was not on an active work status during his paid leave of absence. During Complainant's paid leave, he was receiving full pay and benefits. Mr. Holden knew that at some point Respondent cleared Complainant to return to work, but does not recall when.

On cross-examination, Mr. Holden agreed that no one made any representations to the Complainant that his prior disciplinary issues would be "zeroed out." The only promise Respondent made to Complainant was that he would be transferred outside of the area where he had previously worked, but Respondent did not promise Complainant that it would remove the potential for progressive discipline on outstanding disciplinary events.

Respondent has policies mandating that co-workers must treat each other with respect in the workplace. Yelling “are you stupid?” at a co-worker would be a violation of this policy, and could potentially be a violation of the Employee Corrective Action Process Requirements (“ECAPR”).⁷ As the union representative, Mr. Holden has seen many people disciplined for the type of conduct Complainant allegedly committed.

Mr. Holden is aware of the incident between Mr. Johnson—another union member—and Complainant. He reviewed the investigative file of that incident, but was not in the warehouse when the incident occurred. He reviewed the file for purposes of determining whether to grieve the discipline under the Collective Bargaining Agreement. The union did not challenge the discipline because the union felt that Respondent acted appropriately in issuing that discipline and Respondent followed its procedures. A one-day suspension was not inappropriate for a second infraction in the same category.

Respondent utilizes a progressive discipline system on most occasions. The first infraction usually merits a written warning. If the employee commits a second offense, Respondent typically imposes an unpaid suspension, often only for a single day. For a third offense, an employee’s employment may be terminated. An employee needs to have correction action within the same behavioral category under the ECAPR for progressive discipline to occur. Tr. at 72-73. In Mr. Holden’s experience, Respondent follows its disciplinary procedures by the book, and did so in Complainant’s case. Respondent’s discipline of Complainant was consistent with how they treated numerous other employees. Under Respondent’s progressive disciplinary policies, a corrective action is extended by whatever length an employee is out on leave and not on active status. So when Complainant returned to work in July 2013, he had a variety of active correction actions which had been extended because of his leave of absence; that period of absence did not count towards the 12-month expiration period. Again, this is consistent with Respondent’s disciplinary policy.

Mr. Holden is familiar with Complainant’s disciplinary record in 2012 and 2013. He had two corrective actions under Category 3, for failing to report to his manager. These offenses had nothing to do with Complainant’s April 2012 Category 1 discipline; the Category 3 offenses are an entirely separate matter.⁸

When Respondent transferred Complainant to a new work area following his returned to work, there was no agreement that prior corrective actions would be wiped away. He was given a clean slate in the sense that he was given a new manager, but his corrective actions were still active and remained in his file.

Respondent did have concerns about Complainant returning to work, but they had nothing to do with aviation safety.

⁷ See Tr. at 34; RX 44.

⁸ For a pictorial summary of how this worked within the company, see Resp. Br at 13.

Anthony D. Shelton (Complainant) Tr. at 91-139, 163-75 (direct)

Complainant does not hold any FAA certificates. He started working when he was 15 years old for the General Services Administration. Complainant then went to work for the Navy Exchange until he was 21 years old. He next worked at a machine shop where he learned about traceability and trackability of a part. Complainant joined Respondent in 1988 at the Everett facilities, but had to work at Renton for 18 months during a turndown.⁹ At the time of the April 29, 2012 incident, Complainant worked for Respondent in Everett in the 40-55 building rail-house. He described his position as “team lead,” and was working under a repair station certificate or another manufacturer’s authorization for performance of inventory and parts.

Complainant testified that he had volunteered to come in to work on Sunday, April 29, 2012. He was sitting at his desk and out of the corner of his eye he saw a flash down the warehouse. This warehouse—building 40-54—is huge. He spotted a person near Respondent’s nut storage area, so Complainant logged out of his computer and walked over to investigate. He met a person whom he did not recognize and who was not wearing an identification badge. When Complainant asked him to identify himself, this person responded “Where’s Janet Phillips-Peterson?” Complainant responded that she is the supervisor during the week and was not on duty. Complainant asked this person again to identify himself and he said “It’s none of your business.” Complainant informed this person that he needed to go talk to the duty supervisor, Wendy Curry. According to Complainant, Ms. Curry determined this person’s identity and asked Complainant to “cut the paperwork” for the parts, which this person should have done himself. This supervisor then asked Complainant to give this person 9047 CD nuts, which is a 60-day supply and would weigh about 90 pounds. Due to the size of the nuts, and the fact that they have been stolen in the past, they were located in another part of the warehouse on a pallet rack.

At Ms. Curry’s direction, Complainant began pulling the order for this unknown person. This person—who Complainant later learns is Darin Johnson—“disappears” into the propulsion area where the engines valued at \$7 million to \$14 million are located, which was empty and dark at the time. Complainant could not understand why Mr. Johnson was still “randomly” walking around the building after having been told he was in violation.

Mr. Johnson later reappeared, came to the counter, and asked if Complainant had a chance to pull his parts. Complainant was at his work station, which was about 40 feet from the counter and had parts stacked on it for other requests. Additionally, the area has 12-14 pneumatic tubes—like at the bank—for sending parts across the warehouse. The air from these tubes blows constantly; so Complainant had to speak loudly for an individual at the counter to hear him. Complainant responded by saying: “reach out and touch them, they’re right in front of you, stacked.” Mr. Johnson then asked Complainant if he was having a hard day, and Complainant stood up and said “no, I’m trying to work . . . what’s your problem now?”

⁹ The Tribunal takes official notice that Boeing has an aircraft facility in Renton, Washington where it manufactures the 737. The Everett plant assembles the Boeing 747, 767, 777 and 787. The Renton plant is approximately 40 miles south of Everett, Washington. See generally www.boeing.com and https://en.wikipedia.org/wiki/Boeing_Everett_Factory.

From Complainant's perspective, Mr. Johnson had arrived with no ID badge in a secure area and had been combative from the very beginning. Complainant alleged that Mr. Johnson should have checked in before coming into the warehouse, and that management had told employees in the warehouse—such as himself—that they needed to act as security guards. Complainant had stopped other individuals before, and would try to get their names or badge numbers—neither of which he received from Mr. Johnson. Mr. Johnson proceeded to load the parts, but Complainant did not know how Mr. Johnson got them back to his job because it may have been a quarter mile away, though Complainant did not know the exact location of Mr. Johnson's work.

Complainant testified that he first learned that there was a problem with this interaction with Mr. Johnson on July 1, 2013.¹⁰ This was his first day back to work after being on administrative leave from July 2012 to July 2013,¹¹ and Respondent told Complainant that he would be suspended for the April 29, 2012 incident because he did not treat Mr. Johnson with dignity and respect. Complainant felt that Mr. Johnson did not treat him with dignity and respect; it was Complainant's work area and Mr. Johnson arrived without identification or authorization. Complainant believes his protected activity was preventing parts from leaving the warehouse without being accounted for. He asserted that theft was prevalent at Respondent. He also stated that he has learned that CK nuts are similar in appearance to CD nuts but different in function. According to Complainant, installation of the CK nut requires use of a sealant so the nuts are not exposed to fuel or air. Complainant expressed concern that a mechanic mistakenly installing CK nut onto an aircraft could lead to corrosion in the wing, which could precipitate a crash. Complainant recognized that an employee using the proper process for ordering a part would eliminate any potential for error, but intimated that a new employee acquiring a part for a new mechanic could result in improper selection of parts for installation. Complainant also recognized that Mr. Johnson was not seeking these 9000 CD nuts—a "60-day supply"—for a particular plane.¹²

Complainant alleges that Respondent retaliated against him for this protected activity by imposing a one-day suspension on July 1, 2013. However, from Complainant's perspective, he was merely trying to follow management's directions to stop unauthorized individuals in the warehouse from stealing nuts. Mr. Johnson did not identify himself and disrupted Complainant's work, so he turned the matter over to his duty supervisor, Ms. Curry.

On cross-examination, Complainant reviewed the statement he provided to investigators during their investigation into the April 29, 2012 incident. *See* RX 33. The report does not

¹⁰ Complainant seems to have forgotten that he was interviewed about this very incident by an HR investigator on June 13, 2012. *See* RX 33, page 1.

¹¹ Respondent placed Complainant on administrative leave during this time period for behavioral issues. *See* RX 34; Tr. at 209.

¹² Complainant also stated that Respondent only brings in employees on Sunday to do specific jobs, even though the number of CD nuts that Mr. Johnson sought far exceeded the number required to complete a specific expedited job. Complainant did not explain his suspicions regarding the discrepancy between Respondent's usual practice and Mr. Johnson's request, though it seems theft would have been the logical concern.

contain Complainant's mention of the 9,000 bolts ordered by Mr. Johnson, because, according to Complainant at the hearing, the investigator did not ask him about it.¹³ Complainant again asserted that he raised his voice at Mr. Johnson only because of the noise from the pneumatic tubes nearby. Complainant admitted that he never reported the incident or that he had concerns about Mr. Johnson to his supervisor, Ms. Phillips-Peterson, or his next supervisor Mr. Burkenpas. In fact, he agreed that he did not report the incident to anyone at Respondent. Complainant filed his complaint with the FAA the same day he was terminated from employment; September 3, 2013.

Complainant attested that CX 3 is a diagram of building 40-54, the warehouse where the April 29, 2012 incident occurred. It shows eight entrances to the building and contains about \$200 million worth of inventory. Complainant alleged that CX 12-1 indicates an inventory loss at the warehouse of approximately \$20 million.

On re-cross, Complainant stated that he wants the Tribunal to issue a ruling stating the Respondent should, in some way, secure the 40-54 building, which would make the employees feel safer. He also alleged that this was part of his original complaint, as he felt the incident with Mr. Johnson would not have happened if the 40-54 warehouse had been secured.

Janet Phillips-Petersen Tr. at 180-201

Ms. Petersen works at Respondent's Everett facility and has worked there ten years. In 2012-2013 she was a first line manager in building 40-54. This is the standards warehouse and standards are nuts, bolts, washers, shims, and fillers; like a wholesale nuts and bolt depot for the plant. There are two sides to the warehouse. One is receiving, which has loading docks and receives parts from all over the world. The other side is distribution, where they fill parts requests. A parts request is called a "CID." Complainant worked on the distribution side of the warehouse. Employees must have special access to order a standard at the Everett site. Mr. Johnson did not work in the warehouse; he worked in one of the standards kitting cribs, which is an adjacent building. To access building 40-54 to pick up an order, Mr. Johnson would have had to have been precleared in the computer. Persons of Mr. Johnson's position are allowed into building 40-54 to pick up standards, and Respondent uses procedures to prevent unauthorized employees from receiving them. If an individual did not have an ID badge, the person manning the counter would not fill his order. Respondent expects individuals to show their ID badges when picking up standards orders. Respondent has only ever disciplined one employee—Complainant—for asking to see an ID badge, and that was due to the manner in which he asked. Respondent does not consider it acceptable behavior for an employee to ask someone to identify themselves by yelling at them or saying "are you stupid."

CX 12-1 is titled "Inventory Record Accuracy Yearly Counts." The April 2012 entry is "green", showing 88 percent, which means it is within the acceptable guidelines and parameters for the Inventory Record Accuracy. The 88 percent accuracy does not mean that 12 percent of

¹³ The report is composed in first-person language, though Complainant apparently wrote "I refuse to sign" on the signature line. See RX 33. Nevertheless, Claimant affirmed at the hearing that this was his statement. Tr. at 114.

the parts were simply no longer there; it could indicate an overage or an undercount. This form does not reflect thefts of parts, only clerical errors in the computer system.

According to Ms. Petersen, the noise level in Building 40-54 is very low. There is no heavy machinery operating and no planes are being built there. She did not consider it common for employees to shout or raise their voices to communicate in the warehouse. While there are pneumatic tubes like you see in at a drive-through at a bank, they do not make noise all the time, only when it swishes parts through the tube. The noise level is similar to the pneumatic tubes at a bank. Ms. Petersen did not believe it would be necessary to raise your voice to be heard above that swishing noise even if persons were 40 to 60 feet apart from one another.

Yvonne Marx Tr. at 195-240.

Ms. Marx testified that she has worked for Respondent for 26 years. During her first 15 years, she worked in Human Resources as a generalist and then transferred to Employee relations. Throughout her career, she has been involved in making disciplinary decisions and delivering corrective actions to employees, and is familiar with Respondent's progressive discipline policies. RX 43 is the document that governs the administration of Respondent's progressive employee corrective action. RX 43, page 3 explains when progressive employee corrective action occurs. Pages 5 and 6 delineate that progression, starting with a written warning, then time off from work, and finally discharge. RX 44, which is the ECAPR, sets forth Respondent's expected employee behaviors in seven major categories. The first expected behavior is "Treat others and expect to be treated with respect, dignity, and trust." Within RX 44 is a matrix that identifies the types of violations that correspond to certain types of specific behaviors or actions. A progression of discipline occurs for repeated offenses within each of the main categories, which is explained at RX 43, page 3.

In Complainant's case, he had two Category 3 violations and one Category 1 violation at the time he was issued a one day suspension on July 1, 2013 for the April 29, 2012 incident. A corrective action memo expires after twelve months following its date of issue of the employee's active time in the workplace. *See* RX 43 at 6. When an employee is on a leave of absence from the work place, then their time away would extend the expiration period, regardless of the nature of the leave of absence. *See* RX 43 at 7. Complainant received a Category 1 corrective action in November 2011 (RX 41), and was placed on administrative leave for eleven months in July 2012. Due to this extended administrative leave, his November 2011 corrective action would not have expired in November 2012, but would have been extended for the eleven months. Thus, when Complainant returned from his leave of absence on July 1, 2013, the November 2011 corrective action was still active.

Ms. Marx knows of Complainant through Respondent's Threat Management Team. She first became aware of Complainant in 2006 and has personal knowledge of Complainant's disciplinary history. Complainant's Category 1 written warning (RX 41) would be the foundation for progression to occur for the April 2012 incident. Ms. Marx learned about the incident between Complainant and Mr. Johnson from her presence on the Threat Management Team. Respondent conducted an investigation into this incident, and compiled an HR

investigative report dated July 29, 2012. *See* RX 30. At the time this report was produced, Respondent had already placed Complainant on administrative leave.

On cross-examination, Ms. Marx's acknowledged that Complainant wanted to get out of the standards building because he did not like working there. Specifically, he did not like the type of work he was assigned, and was very uncomfortable working for leaders there. Once an employee reports some sort of violation, the average investigation time period would be around 30 to 45 days, depending on the egregiousness of the complaint. Ms. Marx's did not know why the investigation into the April 29, 2012 incident took so long to complete. Respondent placed Complainant on administrative leave on July 25, 2012.

On re-direct, Ms. Marx identified RX 33 as Complainant's statement to the investigator dated June 13, 2012, which was part of the investigation into the April 29, 2012 incident. She agreed that the investigator would not have started writing his report until he had a chance to talk to the Complainant, and that it takes a while to write a report. Ms. Marx's agreed that many investigations take longer than 30 to 45 days for a variety of reasons.

Darin Johnson Tr. at 246-301.

Mr. Johnson has worked for Respondent for six years at the Everett plant. He is currently a materials procedure requirements facilitator ("MPRF"), and held this same position in April 2012. He does not work in building 40-54, but is familiar with it because he worked there temporarily for about a week and one-half. Mr. Johnson testified that the noise level in that building at times is the same as in the courtroom. The building does not have load machines or serve as a site for plane assembly, but there are occasional forklifts being operated. Employees only need to yell to communicate if one is yelling across the entire facility, which is quite large. There are pneumatic tubes in the building and these tubes go all over the factory to send parts up to five pounds. An employee would not have to yell to be heard over the sound from these pneumatic tubes. The sound of a canister dropping into the bin is the only thing you would hear when receiving a part via the pneumatic tubes. The canister that goes in the tube is clear and bullet-shaped—like an ATM transaction tube.

Mr. Johnson recalled the incident with Complainant on April 29, 2012. The pneumatic tube in his area was down, so he could not use it to receive parts. He believed that the parts he needed weighed less than 5 pounds because that is the maximum weight the pneumatic tube can carry without getting stuck. Prior to April 29, 2012, he had never met Complainant. According to Mr. Johnson, when he first came to the counter at the 40-54 building, there was a young lady that asked for his parts order. She walked him to the bin where his parts were stored, but the bin was empty or too low to fill his order, so he returned to the front counter with her. She then went to retrieve Complainant, and Mr. Johnson sat down in a waiting area near the counter. Complainant approached him in a very loud voice and asked him what he thought he was doing there. Complainant used a bit of profane language and asked him to get out of the area. Mr. Johnson apologized because he did not want a confrontation and went outside to the counter area. Once at the counter, Complainant said that he was busy and it would probably be 20-plus minutes before he could get the parts. At some point he left the counter area, maybe to use the bathroom, and returned probably 20 to 25 minutes later. When he came back, Complainant sat

in a chair and Mr. Johnson asked Complainant, "Where are my parts?" In response, Complainant came towards him and asked him "Are you stupid? Your parts are right there on the counter." Complainant's voice was irate and hostile. Then he walked away and flipped Mr. Johnson the finger.

At that point Mr. Johnson said, "excuse me," and asked for Complainant's name and BIMS number, which is an identification number that Respondent assigns to its employees. Mr. Johnson asked for this information because it was totally out of character for one of Respondent's employees to be that hostile, angry, and loud towards another employee. Mr. Johnson did not believe he had done anything to provoke Complainant that day. He alleged that he was wearing his ID badge that day, as Respondent's employees are required to wear identification at all times on the property. Mr. Johnson testified that he always wears his Boeing ID badge on a lanyard around his neck.¹⁴

When asking for Complainant's name and BIMS number, Mr. Johnson informed Complainant that he worked for Ms. Phillips-Petersen, who was Complainant's boss at the time. He also told Complainant that he had worked in this facility on several occasions, and that he worked at the same grade and position as Complainant. Complainant did not care, telling Mr. Johnson: "if you don't like how you're being treated, you may go upstairs and talk to the duty manager." So Mr. Johnson went upstairs and explained the situation to the duty manager and his first line supervisor. Mr. Johnson asserted that a supervisor informed him that they had seen this kind of behavior from Complainant before. At the supervisor's request, Mr. Johnson wrote an incident report of what happened and emailed it to her on April 29, 2012. *See* RX 31 at 3. After sending this email, he later talked to an investigator about the incident and provided him with a written statement on June 5, 2012. *See* RX 31 at 2.

Respondent's policy states that parts should not be given out in the standards warehouse to anyone not wearing an ID badge. Despite alleging that Mr. Johnson did not have a badge, Complainant ultimately gave Mr. Johnson the parts on April 29, 2012. Mr. Johnson alleges that neither supervisor he spoke with that day commented about his lack of a badge, which supports his assertion that he was wearing his ID badge at the time. During his time at Respondent, Mr. Johnson has not experienced anything like the interaction he had with Complainant on April 29, 2012. This interaction shook him up as he had never been addressed by a fellow employee in such an unprofessional and intimidating manner.

On cross-examination, Mr. Johnson does not know who the young lady was that he talked to at the counter that day. At the time he approached the counter, he did not see Complainant at a work station. He sat down to await his parts next to a row of computers with probably 10 to 12 chairs. When he worked in the 40-54 building for six to eight months, Mr. Johnson worked upstairs on the second floor. Mr. Johnson has no knowledge of a supervisor instructing Complainant to cut the paperwork for his CD nuts; he merely reported the incident upstairs and then left with his parts. Mr. Johnson stated that his work on the weekend involved filling standard kits. Mr. Johnson did not know the difference between a CD and a CK nut off the top of his head, but he stated that he is not a mechanic and does not determine which parts are

¹⁴ The Tribunal noted on the record that the ID card had his picture on it, a chip in it, and was similar to the DOD CAT card. Tr. at 257.

installed. As an MPRF, Mr. Johnson stated that he is able to look up and identify parts through Respondent's inventory system, and that he regularly pulls orders for mechanics. He agreed that it is important to have the proper paperwork and the proper parts pulled. Mr. Johnson could not recall the number of nuts that he pulled that day, since it occurred five years prior and the number of parts he pulls varies for every mechanic's order. Mr. Johnson denied going to the propulsion area while in the warehouse that day; he only sat at a chair about 20 to 25 feet from the counter and then he went upstairs to report the incident. He stated that he had Respondent's permission as an MPRF to be in that area while he waited for his parts. Mr. Johnson vehemently denied ever hiding from security. It was Mr. Johnson's understanding that the investigator substantiated his allegations.

Lewis Dukes Tr. at 302-20

Mr. Dukes has worked for Respondent for over five years. He holds the position of an MPRF and also a safety coordinator. In April 2012, he worked in building 40-54, which is a warehouse that stores nuts, bolts, screws, and other plane parts. The industrial machines that operate in the building are battery powered so there is a very low noise level and it is easy to hear people. In general, employees do not need to yell to be heard, so yelling is atypical. There are a series of pneumatic tubes in the building.

Mr. Dukes knows Complainant and saw the incident between Complainant and Mr. Johnson in April 2012. According to Mr. Dukes, he was picking kits, Complainant was sitting at a desk, and there was another man (Mr. Johnson) at the counter. Mr. Johnson was asking about his parts, and at some point Complainant jumped up and ran over and started yelling at him. Complainant was loud, looked upset, and was intimidating; there was just the counter between them. The confrontation ended when Mr. Johnson left. Mr. Dukes could not recall if Mr. Johnson went upstairs or out the door, but he left. The incident lasted a minute or two, but seemed like a lot longer because it was very uncomfortable. He did not see Mr. Johnson do anything to provoke Complainant. Mr. Dukes could not hear all of the conversation; however, he did hear Complainant did say "Your parts are on the counter" and then yell "Are you stupid?" Mr. Dukes had never seen any other co-worker act that way. Initially, he did nothing, but he later decided to email his manager about the incident because he thought that it was unusual; he had never seen that happen before and he wanted to make sure that somebody knew about the incident. *See* RX 32. This email references "April 9," but Mr. Dukes explained that this is a typographical error. In addition to his email, Mr. Dukes provided a statement to an investigator. *See* RX 32 at 2.

On cross-examination, Mr. Dukes acknowledged that he did not see Mr. Johnson sitting in the seats near the counter. Mr. Dukes saw what happened at the counter; Complainant on one side of the counter and Mr. Johnson on the other side. From his position, he could easily see an individual at the counter through the parts that were on it, though he could not tell if Mr. Johnson was wearing his ID badge. He did not see Complainant walk Mr. Johnson to the elevator. During this incident, Mr. Dukes was wearing ear buds listening to audio books. Mr. Dukes learned of Mr. Johnson's name just recently, but did not know his name prior to that.

In response to the Tribunal's question, Mr. Dukes acknowledged that he knew Complainant's name prior to the incident.

On re-direct, Mr. Dukes said he was wearing ear buds, but he could hear Complainant through the ear buds from a distance.

Anthony D. Shelton (Complainant) Tr. at 322-48 (rebuttal)

In rebuttal, Complainant testified as follows. The person Mr. Johnson referenced in his testimony was not an employee from the standards department. Complainant believes that she was from Propulsion Systems Development or Design. Complainant stated that he was sitting at his work station when Mr. Johnson came to the counter. The first time he approached Mr. Johnson, Complainant asked him to identify himself as he did not see a badge. Mr. Johnson answered his question with the question "Where is Janet Phillips-Petersen?" The second time he asked Mr. Johnson to identify himself, Mr. Johnson said "It's none of [your] business, where's Janet Phillips-Petersen?" Complainant escorted Mr. Johnson to the elevator and told him to go see the duty supervisor. Later the duty supervisor came down and told him to do a job. Complainant was confused because the part Mr. Johnson was requesting would not even fit in the pneumatic tubes—and he did not even have an order in.

After the disputes with Mr. Johnson, he was so far behind in his work and he explained to the duty supervisor that Mr. Johnson wanted his parts ahead of all the other people, but that had followed the proper policy and procedure for requesting parts. Complainant maintained that there was a lot of noise coming from the pneumatic tubes, in addition to the noise from heavy equipment in the warehouse. As for things getting heated, after the third time talking to Mr. Johnson, Complainant felt that he was a little frustrated but not out of line. Mr. Johnson was in the area for 20 to 30 minutes, so Mr. Dukes saying he did not see Mr. Johnson sitting means he did not see the whole episode nor could he see anything other than our heads. Complainant denied flipping off Mr. Johnson. The following day, Complainant alleged that he tried to report this incident, but another incident occurred that thwarted his attempt.

B. Stipulated Facts

The parties stipulated at the hearing that the Respondent was subject to the Act and the Complainant is a person protected under the Act. Tr. at 13. Further, the parties agreed that the only matter before the Tribunal concerned a corrective action memorandum from July 1, 2013. Complainant was not challenging his eventual termination of employment in September 2013.

C. Facts in Dispute

1. Respondent's Statement of Facts

Respondent is the world's largest aerospace company and leading manufacturer of commercial jetliners. It has written policies and procedures governing employee conduct and maintains a progressive disciplinary procedure. Its disciplinary policy has seven broad

categories of expected behaviors that it expects all of its employees to follow. Within these seven categories, its Employee Corrective Action Process Requirements (“ECAPR”) policy further narrows each of these seven categories in to sub-categories that identify discrete behaviors it expects of its employees. If an employee violates one of these behaviors, the Respondent may administer discipline in a progressive manner. If an employee has a prior similar behavior on file, within the same category and within a twelve month period, then the subsequent discipline is enhanced. As a general rule, an employee’s corrective action remains “active” for twelve months after it is issued. However, if an employee is on a leave of absence and not actively working, that period is essentially tolled; the expiration date for the corrective action is extended by the amount of time the employee is away from work on leave. Resp. Br. at 4-6.

Complainant had a disciplinary history with Respondent back in November 2011 which was a Category 1 violation, for using obscene and offensive language with a co-worker and demonstrating hostility towards his managers. RX 41; RX 42. For this Complainant received a written warning. Thus, this corrective action would normally be on file until November 2012. On April 29, 2012, Complainant had an incident with Mr. Johnson. Mr. Johnson had gone to building 40-54 to pick up parts that a mechanic needed because the pneumatic tube in his work area was inoperable. When he arrived, he asked a woman to fulfill his order for parts. She could not fill the order so she took Mr. Johnson to Complainant. While he waited he sat down at a row of computers while the parts were retrieved. While there, Complainant approached Mr. Johnson and in an “irate and hostile” tone and in a loud voice told him that he was not allowed to sit there. Mr. Johnson apologized and move to the front counter to wait for his parts. After waiting twenty to twenty-five minutes, Mr. Johnson asked Complainant is his parts were ready. Without provocation, Complainant charged at Mr. Johnson and yelled “are you stupid, your parts are right there on the counter.” Mr. Dukes observed the events at the counter and testified that Complainant was upset and intimidating and yelled so loudly the volume was “an 8 or 9” out of 10, even though he was wearing ear buds and listening to an audiobook. Both Mr. Johnson and Mr. Dukes were concerned that Complainant’s behavior might turn violent.

As a result of Complainant’s conduct, Mr. Johnson asked for Complainant’s identification number. Complainant told Mr. Johnson that if he did not like how he was treated he could go upstairs and talk to the duty manager; Mr. Johnson did just that. Following the confrontation both Mr. Johnson and Mr. Dukes emailed their respective manager recounting what had occurred because neither had witnessed such behavior previously at Respondent’s facilities. After receiving these reports, Respondent initiated an investigation and the investigator issued a report which concluded that Complainant had committed a Category 1 violation of Respondent’s expected behaviors—to treat others and expect to be treated with respect, dignity, and trust. The investigator found that Complainant used unacceptable verbal and non-verbal communication towards Mr. Johnson. In light of this report, Respondent opted to issue Complainant a corrective action for his conduct.

By the time that the investigator had generated his report, Complainant was not actively working, for Respondent had placed him on administrative leave on July 25, 2012 due to concerns that Complainant represented a threat to himself and others. As Complainant was not actively at work, Respondent could not issue corrective action for his April 29, 2012

confrontation. Instead, Respondent had to wait until Complainant returned to work to issue the discipline. Respondent returned to work on July 1, 2013.

On July 1, 2013, Respondent issued Complainant a corrective action based on its determination that Complainant had violated company policy. Since Complainant had a prior active correction on file, this was considered a second violation, the correction action warranted an increase in sanction. His prior active corrective action for a Category 1 violation was issued November 2011, and would normally have expired in November 2012, but because he was on administrative leave from July 2012 to July 1, 2013, that period did not count towards the expiration of the prior corrective action.

Respondent terminated Complainant's employment on September 3, 2013 for matters unrelated to the April 12, 2013 incident, a Category 1 incident, and his April 29, 2013 and resulting discipline was not even considered in that action. He was terminated when he accrued a third Category 3 incident.

It was only after Respondent terminated Complainant's employment that he filed a report concerning Respondent's parts tracking practices.

2. Complainant's Statement of Facts¹⁵

On April 29, 2012, Complainant refused to provide inventory to an unidentified person, later identified as Darren Johnson, who was in a restricted area of the 40-54 warehouse. When Complainant asked Mr. Johnson to identify himself for he had no identification badge visible, Mr. Johnson became combative and kept asking to see Janet Phillips Peterson, a supervisor who was not working that day. Mr. Johnson refused to provide his name after two or three requests by Complainant. Complainant reported Mr. Johnson's conduct to the duty supervisor for the building that same morning. The following day Complainant attempted to verbally report what had occurred with Mr. Johnson but a separate incident precluded that from occurring. Complainant alleges that retaliation began to occur the very next day during his exchange with Ms. Peterson.¹⁶ And these retaliatory acts continued on July 10, 2012 and July 25, 2012 when

¹⁵ To the extent that his brief contains facts not in evidence, this Tribunal gives no weight to those statements. For example, despite agreeing that his termination of employment was not at issue before this Tribunal and despite receiving no testimony about the reasons for the termination, Complainant argues that the failure of Respondent to call the person that actually terminated his employment is fatal to Respondent's case. He argues that Respondent cannot prove that Complainant was actually terminated for a legitimate, non-discriminatory reason. Compl. Br. at 9. He further argues that Respondent cannot establish by clear and convincing evidence that it would have terminated Complainant for the corrective action. There are several problems with this assertion beginning with he agreed that his termination of employment was not before the Tribunal. Furthermore, no evidence was offered at the hearing about the reasons for his termination or that any of those grounds related to a protected activity. Finally, the burden only shifts to the Respondent if, and only if, Complainant first establishes his *prima facie* case.

¹⁶ Complainant alleges that Ms. Peterson assaulted him. This separate allegation will not be considered by this Tribunal as explained in its Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision.

Ms. Peterson issued a written warning and a suspension for not calling his manager prior to the shift.¹⁷

In early 2013, Mr. Holden called Complainant and offered him \$100,000 as a severance package.

Complainant was disciplined on the first day that he returned from Administrative Leave, July 1, 2013 and terminated on September 3, 2013.

D. Summary of the Documentary Evidence

In support of his case, Complainant presents the following evidence, as summarized below:

Exhibit	Description
1	Unsworn but signed statement by Jeanne Bybee
3	Hand-drawn diagram of Building 40-54
4	Handwritten statement by Tina Allen concerning a severance package
6	Redacted email, dated July 12, 2012, containing one line where a Tanya Irby was purported told by Respondent’s investigator on 6/23/2012 that the investigation involving Complainant and Mr. Johnson was not substantiated
7	FAA letter dated Oct 25, 2013 substantiating a violation of an FAA regulation from case #EWB13647.
8	A hand draw diagram of the area around Building 40-54
12, page 1 only	A spreadsheet entitled “Inventory Record Accuracy Yearly Count”
13	Complainant’s complaint to OSHA, dated Sept 3, 2013
15	A document entitled “Request for Attendance/Shift Deviation,” dated 7-11-2013
16	Email, dated 7/18/2012 from Janet Phillips-Peterson
17	FAA Press Release – Boeing Agrees to Pay \$12 Million and Enhance its Compliance Systems to Settle Enforcement Cases, dated December 22, 2015 FAA Press Release – FAA Proposes \$.275 Million Civil Penalty Against Boeing Co. for Quality Control Violations, dated July 26, 2013

In support of its position, Respondent presents the following evidence,¹⁸ as summarized below:

¹⁷ The Tribunal notes that little, if any, information about these incidents is contained in the record. Further, the parties specifically limited the issue before this Tribunal to the April 29, 2012 incident. Complainant’s Brief also raises an issue with a Category 4 incident from April 30, 2012. Compl. Br. at 7. Again, there is little or no evidence before this Tribunal concerning this allegation.

¹⁸ Although the Tribunal admitted these exhibits in mass at the beginning of the hearing, without Complainant’s objection, the weight this Tribunal gives these exhibits varies greatly. Many of Respondent’s exhibits relate to conduct prior to April 29, 2012 or after July 1, 2013, and merit little to no weight given the issue before this Tribunal. In particular, the Tribunal will not consider those exhibits that reference Complainant’s prior discipline except for those that directly concern the April 29, 2012 incident and the explanation for a one-day suspension.

The Tribunal finds the following RX the most probative in reaching this decision: RX 1, 19, 23, 24, 29-34, 41, and 43-45.

Exhibit	Description
1	Employee Corrective Action Memo to Complainant, dated 9/3/2013
2	HR Investigation Report, dated 8/28/2013
3	Email from D. Burkenpas to T. Irby et al.: "Update Incident: Employee Corrective Action Collection – 101952," dated 8/7/2013
4	Email from A. Myllykangas to D. Burkenpas: "refused to help out," dated 7/25/2013
5	Email from D. Syson to D. Burkenpas: "Tony Shelton 8/9/2013 7:53 am"
6	Email form M. Bracamonte to D. Burkenpas: "Tony...," dated 8/22/2013
7	Email from d. Bukenpas to T. Irby: "FW; Tony...," dated 8/22/2013
8	Respondent's case chronology log
9	Respondent's Human Resource Generalis (HRG) Investigation Request Intake, dated 8/5/2013
10	Statement from Daniel Burkenpas to HR, dated 8/13/2013
11	Statement from Mark Bracamonte to HR, dated 8/13/2013
12	Statement by Complainant to HR, dated 8/15/2013
13	Statement by Sambath Yong to HR, dated 8/9/2013
14	Statement by Anderson Myllykangas to HR, dated 8/9/2013
15	Statement by Timothy Harbeck to HR, dated 8/9/2013
16	Statement by John Cole to HR, dated 8/9/2013
17	Statement by David Syson to HR, dated 8/9/2013
18	A. Shelton tool Check-Out record, dated 8/16/2013
19	Email from T. Irby to D. Burkenpas: "Revised CAM Expiration Dates," dated 7/15/2013
20	Employee Corrective Action Memo to Complainant, dated 7/10/2012
21	Notes on Meetings with Complainant, June/July 2012; July 2013
22	Emails between J. Phillips-Peterson and Complainant: "Reminders," dated 5/15/2012 – 5/16/2012
23	Email from J. Phillips-Peterson to T. Irby: "chat with Shelton, Anthony...," dated 6/5/2012
24	Emails between J. Phillips-Peterson and T. Irby: "Shelton, Anthony...," dated 6/13/2013
25	Emails between J. Phillips-Peterson and T. Irby: "Tony Shelton," dated 6/21/2012 – 6/25/2012
26	Email from t. Irby to J. Holden: "Potential Job Abandonment," dated 6/26/2012
27	Employee Corrective Action Memo issued to Complainant, dated 7/25/2012
28	Email from J. Phillips-Peterson to T. Irby: "Shelton, Anthony...," dated 7/20/2012
29	Employee Corrective Action Memo to Complainant, dated 7/1/2013
30	HR Investigation Report, dated 7/29/2012
31	Statement by D. Johnson to HR, dated 6/5/2012
32	Statement by L. Dukes to HR, dated 6/1/2012
33	Statement by Complainant to HR, dated 6/13/2012
34	Time off from Work Notice issued to Complainant, dated 7/25/2012
35	Email from J. Pugsley to B. Atkinson: "Safety Concern," dated 6/18/2012
36	Email form M. Patrick to M. Turley et al: "E1 Meeting Behavior," dated 6/18/2012
37	Employee Corrective Action Memo issued to Complainant, dated 10/31/2001
38	Employee Corrective Action Memo issued to Complainant, dated 2/5/2002
39	Employee Corrective Action Memo issued to Complainant, dated 4/11/2003
40	Employee Corrective Action Memo issued to Complainant, dated 9/4/2007

Exhibit	Description
41	Employee Corrective Action Memo issued to Complainant, dated 11/21/2001
42	Emails from A. Shelton to A. Remo, dated 11/16/2011
43	Administration of Employee Corrective Action, dated 4/20/2012
44	Employee Corrective Action Process Requirements (ECAPR), dated December 2011
45	Puget Sound Attendance Guidelines
46	Memorandum: Case Review – Anthony Shelton, dated 3/26/2007
47	Report of Investigation, dated 5/2/2007
48	Email from B. Whaley, FAA: “RE: Background info,” dated 6/15/2016
49	FAA Letter of Investigation, Re: 2013NM410033, dated 7/31/2015

III. ISSUES TO BE RESOLVED

- Did the Complainant engage in protected activity?
- Did the Respondent take an unfavorable personnel action against Complainant?
- Was the protected activity a contributing factor in the unfavorable personnel action?
- In the absence of the protected activity, would the Respondent have taken the same adverse action?

A. Complainant’s Position

In his brief, Complainant asserts that he engaged in protected activity during his employment when he expressed concern about inventory counts and security issues in the building 40-54 warehouse. He repeatedly raised this issue with his supervisor Ms. Peterson. On April 29, 2012 he refused to provide inventory to an unidentified person—Mr. Johnson—who was in a restricted area, and when he asked Mr. Johnson to identify himself, he person became combative. Complainant believes he acted in conformance with Respondent’s policy as well as FAA regulations by prohibiting unauthorized personnel access to airplane parts. He alleges that his protected activity was a contributing factor in Respondent’s decision to progressively discipline and terminate him. He also asserts that Respondent’s retaliation against him commenced the very next day, when Ms. Peterson assaulted him.¹⁹

Complainant submits that Mr. Johnson’s testimony was inherently contradictory. He noted that Respondent failed to call the investigator that conducted Respondent’s investigation of the incident and that the investigation took from April 29 until July 30, 2012, even though investigations normally take about 30 days to complete.

Complainant was disciplined on the first day that he returned from Administrative Leave, July 1, 2013, and he alleges that this discipline was untimely and directly related to his protected activity.

For damages, Complainant asks for reinstatement, back wages of \$87,900 per year, precluded overtime pay of \$2,366.56 per month, reimbursement of vacation and sick leave, front

¹⁹ This Tribunal has already granted Respondent’s motion for summary decision concerning this allegation.

pay until 2028, reimbursement for health and dental care insurance and costs, damages for deprivation of character and associated pain and suffering, reimbursement for lost 401K contributions, and other costs.²⁰

In Complainant's reply brief, he asserts that he was wrongfully discharged due to his action to ensuring Mr. Johnson had a visible badge when attempting to obtain airlines parts on April 29, 2012. He denies that he stipulated to only challenging a one-day suspension. He maintains the Respondent ignores that Mr. Johnson was not where he was supposed to be and was not wearing an identification badge. Complainant alleges the July 1, 2013 suspension for the April 29, 2012 incident was "bogus." Compl. Rep. Br. at 3. He noted that Mr. Johnson remained unidentified until the duty supervisor came back down with Mr. Johnson and identified him. He argues that Respondent further retaliated against him for allegedly improperly following Respondent's procedure for medical leave. Compl. Rep. Br. at 5. And Respondent has never provided "admissible" evidence why Complainant was placed on administrative leave for 11 months. He maintains that "all 3 CAMS including the July 1, 2013, were retaliation for stopping Darren Johnson."²¹ He points out that Respondent failed to call as a witness the investigator of the incident as a witness. He argues that his actions constitute protected activity because Mr. Johnson, among other reasons, wandered four buildings away from his work area, refused to identify himself, was not wearing an ID badge, lied about the pneumatic tubes, was in a restricted warehouse, and disappeared for 15 minutes wandering through the warehouse. Compl. Reply Br. at 8-9. He also notes that Mr. Dukes did not hear or see Complainant approach Mr. Johnson in the middle of the warehouse, or see Mr. Johnson sitting at the work station. He points out that Mr. Dukes was wearing ear buds and listening to an audiobook yet could supposedly hear a conversation from 60 feet away. Compl. Repl. Br. at 10. Complainant asserts that his prior voicing of his concerns about inventory not being traceable after it leaves building 40-54 was the reason for Respondent's retaliation. Compl. Repl. Br. at 11-13.

B. Respondent's Position

In its brief, Respondent asks the Tribunal to disregard Complainant's improper attempt to inject his termination of employment into this case after expressly stipulating that his claims were limited to his July 1, 2013 suspension.

Respondent argues that Complainant's claim, which is limited to the one-day suspension issued July 1, 2013 for his April 29, 2012 misconduct, fails for several reasons. First, Complainant's has not proven that his confrontation with Mr. Johnson was a protective activity. Second, he cannot prove that the alleged protected activity contributed to any adverse action. Finally, Respondent has demonstrated by clear and convincing evidence that Respondent would have suspended Complainant for his April 29, 2012 misconduct even in the absence of any alleged protected activity.

²⁰ As Complainant provided no evidence of any of these damages at the hearing, even if Complainant would prevail, his damages would be limited by this Tribunal to possible reinstatement and one day of lost wages. Again, Complainant has the burden to prove damages and entitlement to the remedies he seeks, and that damages must be causally related to the unlawful conduct and cannot be presumed. *See Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9 (Jan. 31, 2012).

²¹ The Tribunal infers that "CAMS" refers to corrective action memos.

To be protected activity, Complainant must have provided information about an alleged violation of federal law related to air carrier safety. Since actions that do not involve reporting concerns about air carrier safety do not constitute protected activity, Respondent argues that Complainant's hostile outburst toward Mr. Johnson was not protected activity. Complainant alleges that he acted because Mr. Johnson was not wearing an identification badge; however, Mr. Johnson testified otherwise and Mr. Dukes—a neutral witness—contradicted Complainant's attestation. Complainant's credibility is further undermined by inconsistencies with his own prior statements about what occurred that day. It defies credulity that he would not mention that an unidentified individual was wandering around a restricted area and not report that as the reason in his earlier statements.

Furthermore, even if this Tribunal were to accept Complainant's explanation for stopping Mr. Johnson, Respondent argues that his behavior still would not amount to protected activity. Respondent points out that Complainant never reported his interaction with Mr. Johnson to Respondent, and thus he did not engage in protected activity. Respondent also argues that Complainant stopping Mr. Johnson was motivated by Respondent's management instructions and as such there is no nexus to federal air carrier safety rules; thus, no protected activity.

Respondent also addressed other matters raised in Complainant's brief, including activities back in 2011 and 2012. As these events occurred well before the events resulting in the one-day suspension in July 2013, Respondent argues that they fall outside the stipulated narrow scope of Complainant's claims. Respondent asks that the Tribunal disregard Complainant's comments in his reports about parts inventories in 2011 and 2012 as well as his claims against Ms. Phillips-Peterson because they exceed the stipulated scope of the hearing and do not show that they contributed to any adverse action. Further, a discrepancy in an inventory counts does not indicate that the wrong part was issued to a mechanic, much less installed on an aircraft. Accordingly, Respondent urges the Tribunal to find that Complainant's activities do not constitute protected activities.

Even if the undersigned determines that Complainant's actions on April 29, 2012 were protected activities, Respondent maintains that it did not discipline him because he asked Mr. Johnson to identify himself. To the contrary, Respondent expects its employees to courteously ask for a person's identification if it is in issue. Complainant failed this standard: he was loud, hostile, menacing, and insulted Mr. Johnson by yelling "are you stupid" at him. Accordingly, Respondent argues that its discipline of Complainant responded to his mistreatment of Mr. Johnson, not any protected activity.

Respondent further argues that even if the Tribunal determined that Complainant could establish a *prima facie* case that protected activity contributed to his July 1, 2013 suspension, Complainant's claim still fails because Respondent proved by clear and convincing evidence that it would have suspended Complainant in the absence of any alleged protected activity. Complainant's behavior on April 29, 2012 clearly violated its policy that co-workers treat each other with respect and courtesy. Both Mr. Johnson and Mr. Dukes testified and had provided prior statements that they had never seen anyone act the way Complainant did that day and that Complainant's behavior was atypical and inappropriate.

Respondent also asserts that the level of discipline Complainant received from the April 29, 2012 incident is consistent with its policy, a position which Complainant's union representative corroborated. Mr. Holden testified not only did the union not challenge the discipline imposed on July 1, 2013, but that the union felt that Respondent had acted appropriately in issuing Complainant the one-day suspension. Accordingly, Respondent maintains that the evidence shows it followed its disciplinary policies and treated Complainant like any other employee.

Finally, Respondent maintains that, even if Complainant were to prevail, his damages are limited to \$276 in back pay for his July 1, 2013 for his one-day suspension. Complainant has failed to present evidence regarding any other damages he seeks, and is therefore barred from any additional recovery.

IV. CONCLUSIONS OF LAW

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. § 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)).

A. Complainant's Prima Facie Case

1. Subject to the Act

The parties have stipulated that Complainant and Respondent are subject to the Act, so Complainant has established this element.

2. Scope of Complainant's Complaint

As an initial matter, Complainant has raised in his briefs a plethora of allegations that are either specifically waived, tangential to the complaint, or not addressed at the hearing. On May 24, 2017, during a pre-hearing teleconference, the issue of the scope of his complaint was specifically raised by Respondent and inquired into by the Tribunal. The Complainant unequivocally stated that he was not seeking damages for his termination of employment, and that the facts at issue concerned his one-day suspension that occurred on July 1, 2013 for an incident that occurred back on April 29, 2012. *See* May 24, 2017 Transcript, at 7-12. Based on these assertions, the Tribunal finds that Complainant knowingly and willingly limited the scope of his complaint to this April 29, 2012 incident.

Given the specific inquiry made during this teleconference and the focus of the testimony at the hearing itself, this Tribunal disregards any statements or assertions made by Complainant that do not related to the one-day suspension imposed on July 1, 2013 for the April 29, 2012 incident. Complainant has chosen to proceed *pro se* and this Tribunal has afforded him leeway in these proceedings, but his attempt to litigate beyond the bounds of his self-imposed limits is problematic. After specifically telling the Tribunal and the Respondent his allegations concerned the July 1, 2013 suspension, it prejudices the Respondent to then even consider such allegations when Respondent has been denied the opportunity to present evidence to defend itself. Even *pro se* litigants are not entitled to trial by ambush. Accordingly, this Decision and Order will address only whether Complainant has demonstrated that the facts and circumstances surrounding the July 1, 2013 one-day suspension for an April 29, 2012 incident entitle him to whistleblower relief under the Act.

3. 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. § 42121(a)(1)) (emphasizing that “an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement”). 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). “To prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* “To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”

Id. (internal quotation marks omitted) (evaluating the reasonableness of belief of the *Burdette* complainant, a pilot, against that of a pilot with similar training and experience).

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). To be protected, Complainant need not have to have actually communicated with the FAA prior to sending the email. The Act extends protection to those that are *about to provide* information relating to any violation of the FAA. *See* 49 U.S.C. 42121(a)(1). To succeed in a whistleblower action, a complainant must also show that the employer had knowledge of the protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). This requirement stems from the statutory language prohibiting employers from taking adverse action against an employee “because” the employee has engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(a)). Accordingly, a complainant bears the burden of showing that the person making the adverse employment decision knew about the employee’s past or imminent protected activity. *Id.*

Discussion of Protected Activity

Complainant alleges that he engaged in protected activity on April 29, 2012 by confronting an employee that was requesting aviation parts who was not wearing an ID badge. His theory of protected activity is twofold. First, he maintains that Mr. Johnson was in an unauthorized area and Complainant was attempting to protect Respondent’s inventory. While this in and of itself is a commendable aspiration that any employer would embrace, theft prevention—at least in the context of stopping theft from a parts inventory—does not reasonably relate to air carrier safety.²² Accordingly, Complainant’s attempt to secure Respondent’s inventory does not constitute protected activity. Second, Complainant explained at the hearing that he stopped Mr. Johnson in part because he was concerned about CK nuts being mistaken for CD nuts, the improper installation of which could cause corrosion, leading to an airline accident. However, as explained below, Complainant’s confrontation of Mr. Johnson does not constitute protected activity because—even accepting Claimant’s alleged concern as genuine—his concern was not objectively reasonable. For these reasons, this Tribunal finds that Complainant is not entitled to relief under the Act.

As an initial matter, this Tribunal finds abundant reason to doubt the veracity of Complainant’s account of the April 29, 2012 incident. Complainant denies that he was hostile towards or yelled at Mr. Johnson, and also denies referring to Mr. Johnson as stupid. However, the preponderance of the evidence shows otherwise. The Tribunal found Respondent’s witnesses generally to be more credible than Complainant, but two of its witnesses deserve specific mention. Mr. Johnson’s explanation of events was generally measured, reasoned, and consistent, which increases his credibility in the eyes of this Tribunal. In addition, his version of the key events that are the heart of this claim are in large measure corroborated by a second person, Mr. Dukes, who this Tribunal found very credible. Specifically, the undersigned finds the contemporaneous nature of Mr. Johnson’s and Mr. Dukes’ reporting to buttress their accounts at

²² This Tribunal also notes that FAA regulations mandate that air carriers maintain documentation of the trail of parts used in an aircraft, no regulation prohibits general theft from a parts storage facility.

the hearing. Both Mr. Johnson's and Mr. Dukes' contemporaneous and independent emails establish that the confrontation between Complainant and Mr. Johnson in April 2012 was a startling event to each of them, and was of such an unusual nature that they felt the need to report the incident to their respective supervisors. Other than this confrontation, there is no evidence of prior animus by Mr. Johnson towards Complainant. The same can be said of Mr. Dukes. And there is no evidence that Mr. Johnson and Mr. Dukes had any reason to misrepresent what happened. Further, the fact that their recollection of events differs slightly enhances their credibility. It shows this Tribunal that they provided independent recollections of events which are bound to differ slightly. It also shows that, notwithstanding the slight inconsistencies between the two statements, that Complainant yelled at Mr. Johnson, approached him in an aggressive manner, and asked him "are you stupid" in a hostile manner.

By contrast, Complainant's diverging and inconsistent accounts of the confrontation lessen his credibility. At the hearing, Complainant testified that he stopped Mr. Johnson in the warehouse because he did not have an ID badge, and that he escorted Mr. Johnson to the elevator for him to go to the duty supervisor. However, in Mr. Dukes' April 29, 2012 email, he records that Complainant "pointed upstairs with his left hand and pointed towards the door with his right hand." Even Complainant mentions in his June 13, 2012 statement that he told Mr. Johnson that Ms. Peterson was not working that day and "pointed in to the direction of [the duty supervisor's] office where she was located." He makes no mention of escorting this person to the elevator until the hearing. It is also noteworthy that there is no evidence that he reported the fact that Mr. Johnson was not wearing an ID badge until he was interviewed six weeks later by the HR investigator. At the hearing, Complainant asserted that he raised this issue with the duty supervisor when she came back down with Mr. Johnson, but the supervisor still instructed that Mr. Johnson's parts request be filled. Tr. at 326-27. However, there is no statement or testimony to corroborate Complainant's assertion. This Tribunal simply finds it implausible that a supervisor would direct Complainant to pull over 9,000 nuts for an unfamiliar person, who was in the warehouse on a Sunday, and who was not wearing an ID badge. Respondent's HR investigative report indicates that the duty supervisor was interviewed as part of the investigation. See RX 30, page 4. Surely, had there been an issue with an employee not having a proper ID badge while picking up parts, it would have been raised at that time. The report is silent on this issue. Finally, Mr. Johnson testified at the hearing that on April 29, 2012 he was wearing his ID badge because it is affixed to a lanyard which he wears at all times while at the facility and he only removes the lanyard from his neck when he is off the property. Tr. at 256-58. Put simply, the evidence better supports Mr. Johnson's version of events.

Complainant also admitted that he raised his voice at Mr. Johnson because of the noise from the pneumatic tubes in his area. Tr. at 115. However, Mr. Johnson,²³ Mr. Dukes²⁴ and Ms. Peterson²⁵ all testified essentially that the noise from those pneumatic tubes was not so loud to necessitate yelling for communication. All three testified that the noise in the building was quiet or very quiet. For this reason, and those reasons cited above, the Tribunal accords little credibility to Complainant's version of the April 29, 2012 incident. Accordingly, the undersigned seriously questions Complainant's assertion of a good faith belief that fulfillment of

²³ Tr. at 248

²⁴ Tr. at 303.

²⁵ Tr. at 189-91.

Mr. Johnson's 9,047 CD nuts order would result in improper installation. Even taking Complainant's version of events as true, he did not discuss his safety concerns with Mr. Johnson at the time of the incident, nor did he subsequently report those concerns to anyone at Respondent. Such a failure to communicate these purported safety-related concerns strikes this Tribunal as inconsistent with a good faith belief that improper installation would ensue from fulfillment of Mr. Johnson's order.

But even if this Tribunal did find that Complainant had a good faith subjective belief that confronting Mr. Johnson would prevent a violation of FAA regulations related to air carrier safety, such a belief was not objectively reasonable in light of the facts known to Complainant at the time. Complainant essentially asserts that he was concerned that Mr. Johnson was obtaining the wrong parts for use on an aircraft, which could have led to corrosion of an aircraft wing and a subsequent crash. According to Complainant, there are subtle differences between a CD nut and a CK nut that a new employee might overlook. He intimated that if a new employee was obtaining these parts for a new mechanic, the mechanic might mistakenly install a CK nut where a CD nut should have been used. Such a mistaken installation, without contemporaneous application of a proper sealant, could result in corrosion and an eventual airplane crash. This Tribunal recognizes that it would be proper to raise any concern he might have had to management about the proper utilization of hardware because type certificate aircraft being manufactured under a production certificate must conform to their type design or properly altered condition.²⁶ And only properly qualified persons can install a part on an aircraft during production²⁷ of transport category type certificated aircraft. Complainant supports his allegation of a reasonable concern by noting that it took him years working for Respondent to learn the difference between a CK nut and CD nut.

Nevertheless, Complainant's alleged concern was not objectively reasonable for a number of reasons. First, Complainant testified on direct that Mr. Johnson's order was for 9,047 CD nuts—not CK nuts. Granting that Complainant's explanation of the differences between these nuts is correct, only the CK nuts are those for which additional sealant is needed when installed in certain locations on an airplane. Thus, Mr. Johnson's order of CD nuts would not have alarmed a reasonable person in Complainant's position. Second, Mr. Johnson was not a

²⁶ See generally, 14 C.F.R. Parts 21 and 25. Conformity to type design is obtained when the aircraft configuration and the installed components are consistent with the drawings, specifications, dimensions, materials, and processes and airworthiness limitations that are part of the type certificate. 14 C.F.R. § 21.31. See FAA Order 8110.4C thru CHG 6, Type Certification (Mar. 6, 2017). The Tribunal is aware, and it is common knowledge in the commercial aviation community, that Boeing has held for more than 50 years a production certificate for numerous type certificated aircraft. See generally, <http://boeing.mediaroom.com/1999-06-10-Boeing-Production-Certificate-50-Years-Old>; http://www.boeing.com/news/frontiers/archive/2007/october/i_ca01.pdf.

²⁷ Regulation of who can place parts on aircraft depends on when it occurs during the aircraft's life. Persons authorized to assemble an aircraft under production are regulated by the production certificate holder's quality system program under 14 C.F.R. Part 21, subpart G, especially 14 C.F.R. § 21.137. Once the aircraft is certificated and approved for service, the only persons authorized to perform maintenance on the aircraft are those qualified under 14 C.F.R. Parts 43, 135, 121 and 145.

mechanic, and was merely obtaining the parts for a mechanic.²⁸ Thus, Complainant's concern relied upon the assumption that the mechanic had either mistakenly ordered the wrong nut or would have inevitably installed a CD nut in an improper location. Such an assumption is speculative at best. Complainant admitted at the hearing that using the proper processes to obtain the part would eliminate any error. Tr. at 102. For all Complainant knew, the CD nuts were appropriate nuts for the mechanic's order, and he provided this Tribunal with no credible indication that Mr. Johnson's order did not follow proper procedure.²⁹ Finally, Complainant testified that Mr. Johnson was seeking 9,047 CD nuts—in his words, a “60-day supply.” Thus, according to Complainant's line of thought, this specific order of nuts was not even bound for a specific plane, and would be used as needed by a mechanic. Again, this provided no legitimate basis for concern other than speculation that a trained and licensed mechanic would select the wrong parts for a job. Accordingly, Complainant's alleged concerns, even if genuine, appear to be based on speculation rather than any reasonable apprehension of danger. Properly trained mechanics can mistakenly install incorrect parts, but Complainant has failed to provide the Tribunal with any information demonstrating that his speculation about improper installation of the parts was objectively reasonable.

In sum, this Tribunal finds that Complainant did not hold a subjective, good faith concern that provision of these parts would result in a violation of FAA regulations related to air carrier safety, and even if he did genuinely hold such a concern, it was not objectively reasonable in light of the facts known to Complainant. For these reasons, Complainant has not established that his actions on April 29, 2012 constituted protected activity.

3. Conclusion

As Complainant has not established that his actions on April 29, 2012 were protected activities and this was the only event at issue before this Tribunal, Complainant cannot establish a violation of the Act. Therefore, there is no need to address the other issues that remain in this case.³⁰

²⁸ The same can be said for Complainant. He holds no FAA certifications or authority to act as a mechanic (Tr. at 91), and he presented no evidence that he was authorized or even qualified to install parts on an aircraft. He supplies parts; he does not put whatever part he supplies on to the aircraft.

²⁹ As explained above, this Tribunal finds Mr. Johnson's and Mr. Dukes' testimonies to be more credible than Complainant's on the issue of what happened on April 29, 2012. Mr. Johnson's testimony in particular explains and substantiates his allegation that he was following company protocol in obtaining the parts for his order.

³⁰ Notwithstanding the above statement, the Tribunal finds that Complainant's one-day suspension on July 1, 2013 was an adverse action. The ARB regards “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline.” *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9, slip op. at 10 (ARB Feb. 13, 2015).

This Tribunal notes that even if Complainant could prove that his actions constituted protected activity, his claim would fail because there is no evidence that Respondent knew of his motivations in attempting to stop Mr. Johnson from filling his order. An employer is not omnipotent. To succeed in a whistleblower complaint, a complainant must show that the employer had knowledge of the complainant's protected activity. See *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No.

V. ORDER

Complainant is unable to make out his *prima facie* case. Accordingly, his complaint is hereby **DISMISSED**.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

2001-AIR-3 (ARB Jan. 30, 2004). Complainant never reported his concerns about air carrier safety to anyone as far as the Tribunal can tell, at least as it relates to the April 29, 2012 incident. If anything, the evidence shows that Respondent initiated an investigation in response to complaints from co-workers, and Complainant made no mention of having concerns about any FAA violation when interviewed by the HR investigator. There is some evidence from Complainant that he attempted to communicate with a different supervisor, Ms. Peterson, the next day about the incident with Mr. Johnson, but Complainant stated that he was ultimately unsuccessful. He may well have raised aviation safety related matters at some earlier time, but that is beyond the scope of the alleged protected activity in this case.

There is evidence that in September 2013, after Complainant's employment was terminated for different issues, that Complainant filed a complaint with the FAA "for raising an air safety concern about the tracking of aircraft parts . . ." CX 9; CX 13. However, this reporting occurs twenty months after the April 29, 2012 incident and at least two months after Respondent had suspended him for one day on July 1, 2013. Thus, even if he had reported the April 29, 2012 incident to the FAA in September 2013, Respondent would not have considered this report when it suspended Complainant at least two months earlier.

Finally, even if what Complainant was communicating was protected, that does not give him license to communicate to a fellow employee in an unprofessional manner. The evidence is overwhelming that the discipline concerned the manner Complainant conducted himself that day rather than anything he communicated to management, and had nothing to do with federal aviation related regulation or aviation safety in general. The Act is not meant to shield employees of the aviation community from disciplinary actions stemming from their own inappropriate conduct.

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

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

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party’s legal brief of points and authorities in opposition to the

petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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