



Issue Date: 05 November 2018

Case No.: 2017-AIR-00018

In the Matter of

NICHOLAS GUY POHL
Complainant

v.

AERO MICRONESIA, INC. d/b/a/ ASIA
PACIFIC AIRLINES
Respondents

DECISION AND ORDER DENYING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), which was signed into law on April 5, 2000. *See* 49 U.S.C. § 42121. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 67 Fed. Reg. 15,453 (Apr. 1, 2002). 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 January 3, 2017. In its May 4, 2017 letter, OSHA made the following determinations: Complainant timely filed his complaint; Respondent is an air carrier, and Complainant is a covered employee. However, OSHA found that Complainant did not provide evidence to substantiate his allegations of Respondent’s failure to hire him because of his protected activities. Accordingly, OSHA dismissed the complaint. On May 21, 2017, Complainant objected to OSHA’s findings and requested a formal hearing before the Office of Administrative Law Judges (“OALJ”).

Subsequently, on June 12, 2017, this matter was assigned to the undersigned. On June 15, 2017, this Tribunal issued the Notice of Assignment and Conference Call. On June 22, 2017, Respondent’s counsel filed an entry of appearance. On June 23, 2017, in response to an e-mail from Respondent’s counsel requesting an extension of time to submit a written statement, the Tribunal issued an Order Rescheduling Telephonic Conference and Granting Respondent’s

Request for Extension to File Initial Submission. Also, on June 23, 2017, due to the distance between the parties and the Tribunal, the undersigned issued an Order Establishing E-Mail Guidelines. On July 2, 2017, Respondent filed its position statement. Respondent submitted Initial Disclosures pursuant to 29 C.F.R. § 18.50(c)(1)(i) with the Tribunal on July 6, 2017.

On July 7, 2017, the Tribunal held an initial pre-hearing conference in this matter. The undersigned issued a Notice of Hearing and Pre-Hearing Order on July 10, 2017, and set the hearing for February 27 – March 1, 2018 in Honolulu, Hawaii.¹

On February 15, 2018, the Tribunal held its final pre-hearing conference where Complainant indicated that he may not show up at the scheduled hearing. On February 16, 2018, the Tribunal issued an Order to Show Cause and Order for Complainant to Inform the Tribunal of Whether He will be Attending His Hearing Set to Begin in Honolulu on February 27, 2018. Complainant responded to this Order via email on February 20, 2018 stating that he would not attend the February 27, 2018 scheduled hearing, but the following day he submitted numerous e-mails.

Respondent submitted its prehearing statement and proposed exhibit list on February 16, 2018. Complainant did not submit any prehearing materials.

On February 19, 2018, Complainant filed a document entitled “Demand for Trial De Novo and Disqualification of Judge Morris.” On February 20, 2018, the Tribunal issued an Order Directing Respondent to Reply to Claimant’s [sic] February 19, 2018 “Demand for Trial De Novo and Disqualification of the Judge Morris.” Respondent complied with this Order on February 22, 2018 opposing the undersigned’s disqualification.

On February 20, 2018, Respondent filed a Motion in Limine to Exclude Exhibits Not Timely Disclosed by Complainant in Violation of Pre-hearing Order. On February 21, 2018, the Tribunal issued an Order Deferring Ruling on Respondent’s Motion in Limine, Denying Complainant’s Motion to Disqualify the ALJ and Converting [the Hearing] to a Telephonic Hearing with Instructions.²

¹ On July 14, 2017, the Tribunal issued a Supplement to Pre-Hearing Order memorializing the date any Motions were due. The Tribunal provided these dates to the parties during its July 7, 2017 teleconference but were omitted in its original pre-hearing order. On July 24, 2017, the Tribunal issued another Supplement to Pre-hearing Order addressing the call-in information necessary for the final pre-hearing teleconference set for February 20, 2018. On December 20, 2017, the Tribunal issued an Amended Order Rescheduling Pre-hearing Telephone Conference resetting the teleconference for February 15, 2018. On January 30, 2018, the Tribunal issued a Notice of Hearing Location, providing the parties the exact location for hearing to be held in Honolulu, Hawaii.

² The details and reasons for converting this hearing from an in-person hearing to a telephonic hearing are set forth in detail in the Tribunal’s February 21, 2018 Order and need not be rehashed. *See also* Order to Show Cause and Order for Complainant to Inform the Tribunal of Whether He Will Be Attending His Hearing Set to Begin in Honolulu on February 27, 2018, dated February 16, 2018.

This Tribunal held a telephonic hearing in this matter on February 27, 2018.³ 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 – 2⁴ and Complainant's Exhibit ("CX") 1.⁵ Following its opening statement, Respondent conceded that both it and the Complainant are subject to the Act. Tr. at 56. After Complainant completed the presentation of his case-in-chief and rested, Respondent moved that the case be dismissed. The Tribunal denied that request. Tr. at 56.

On May 3, 2018, a counsel for Complainant filed a Notice of Appearance.

Complainant submitted his closing brief on May 7, 2018. Respondent submitted its closing brief on June 22, 2018. Complainant submitted his reply brief on July 2, 2018.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Overview of the Events leading to the dispute before the Tribunal

In essence, Complainant alleges that Respondent did not hire him as a pilot because of his whistleblowing activities when he worked for another air carrier. Complainant has never been an employee of Respondent, but maintains that Respondent's decision not to hire him constitutes an unfavorable personnel action.

B. Stipulated Facts

There are no stipulated facts in this matter.

C. Summary of Testimony

Respondent is an air carrier headquartered in the Territory of Guam that conducts its operations under 14 C.F.R. Part 121 using Boeing 727 and 757 aircraft. It is a relatively small air carrier, and its pilots and crewmembers typically fly eight-hour legs in close quarters. In 2015 there existed a severe pilot shortage—especially for jets—and Respondent was looking for a pilot with Complainant's qualifications.⁶ Complainant wanted to work for the Respondent because he resides in Saipan, and Respondent knew that.⁷

³ The Transcript of the February 27, 2018 proceedings will hereafter be identified as "Tr." Both parties provided brief opening statements. Tr. at 25-29.

⁴ RX 1 is copy of a complaint e-filed Apr. 17, 2015 by Pacific Oriental, Inc. v. Dynamic Airway LLC, in the Superior Court of the Commonwealth of the Northern Mariana Islands, NMI Superior Court Civil Case No. 15-0072-CV, including complaint exhibits 1 and 2 (13 pages). RX 2 contains Transcripts of the four audiotapes identified as track 1 to track 4 on CX 1 (18 pages including cover page). The Tribunal has listened to and considered these audio-recordings when arriving at this decision.

⁵ Tr. at 7, 17 and 30. CX 1 is a CD that contains four records/track identified as LS-101800, LS-101801, LS-101802 and LS-101803. Tr. at 7. RX 2 is a transcript of those audio-recordings.

⁶ Tr. at 89 (Ferguson); Tr. at 140 (Brown).

⁷ Tr. at 83 (Ferguson); Tr. at 140, 159 (Brown).

Complainant holds an airline transport pilot certificate (“ATP”) with type ratings in the Boeing 757, 767, Embraer 170 and 190 series aircraft. He also holds a certificate flight instructor - instrument rating (“CFII”)⁸ and is a multiengine instructor (“MEI”).⁹ He has about 14,200 hours total flight time, with about 8,277 hours of that being in jets.¹⁰ Tr. at 33-34. At the time of the hearing Complainant held a second-class medical certificate, but held a first-class medical certificate back in December 2016.¹¹ Tr. at 49.

According to Adam Ferguson, Respondent’s President,¹² Respondent is a small airline and has a collaborative approach to hiring. Respondent’s flights typically are very long in length¹³ for a Boeing 757, so there is no place for the crew to rest besides the cockpit. Consequently, for a confined two or three crewmember environment, the personalities of each applicant are important and play a “heavy role” in hiring decisions. The hiring process normally involves someone from flight operations, himself (from upper management), someone from safety, and might even include someone from the ground side or maintenance. No one person at Respondent has the executive authority to hire, not even Mr. Ferguson. Tr. at 83-84, 90.

March 12, 2015 Interview

On or about March 12, 2015, Complainant had a face-to-face interview on the Island of Guam with Respondent’s Director of Flight Operations Ralph Freeman¹⁴ and Interim Chief Pilot

⁸ Complainant also holds a certified flight instructor certificate (“CFI”) and is an advanced ground instructor. Tr. at 33.

⁹ Complainant later testified that his flight instructor certificates were no longer current. Tr. at 65-66.

¹⁰ Complainant started his aviation career flying turboprops in Las Vegas, Nevada, and since then has worked for various airlines flying the MD-80, 757, and 767. Complainant currently works for United Express, flying the Embraer 170. Tr. at 34-37.

¹¹ The Tribunal took official notice that obtaining an Airman First Class Medical Certificate is a process in which an aviation medical examiner examines a pilot every six months. And the pilot is required, on the FAA’s Medical Evaluation Form in Section 18 or Item 18, to identify any particular impairments. Part of the medical certification includes a mental health component. *See* 14 C.F.R. § 67.107; *see generally*, Guide for Aviation Medical Examiners (July 25, 2018) available at https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/.

¹² Mr. Ferguson testified that he has spent 22 years in the aviation industry, sixteen of those with Continental/United Airlines. After leaving United Airlines, he has worked with various companies within the PAN Holdings umbrella. For Respondent, from July 2015 until January 2017, he was its vice president, and in January 2017 became Respondent’s president. He does not hold any FAA certificates. Tr. at 77-78.

¹³ Mr. Ferguson later testified that if the flight is over eight hours, they have to have three crewmembers inside the cockpit. Their “milk run” is a flight between Honolulu and Guam which typically runs over eight hours. Tr. at 100.

¹⁴ Mr. Freeman has flown jets for 31 years with Part 121 carriers until retiring as a commercial pilot. At one point he was the director of flight operations for the Continental Air Micronesia Division of Continental Airlines. He has served in FAA required management positions. *See* 14 C.F.R. § 119.65. He joined Respondent in the September-October 2014 time frame, and he became Respondent’s Director of Flight Operations in late 2015 / early 2016, and has remained such until present. Tr. at 103-04. Mr. Freeman holds an ATP certificate, is type rated in the Boeing 727, 737 and Airbus 300. He has about

Patrick Bartos.¹⁵ This meeting occurred outside the security area in the airport terminal in Guam. Tr. at 107.

The facts surrounding this meeting are in dispute. According to Complainant, during this interview, Mr. Freeman stated that Complainant was the “kind of guy we never want to hire” because he is a whistleblower.¹⁶ Mr. Bartos also said “you don’t hire a whistleblower,” and that was the end of that interview. Tr. at 38. Complainant maintained that, although Mr. Freeman allegedly chastised him for being a former whistleblower during the March 2015 interview, he did not believe that meant Respondent was never going to hire him. Tr. at 60.

Mr. Freeman agreed that around March 2015, he and Mr. Bartos meet with Complainant. He did not know Complainant prior to that time, nor did he know anyone from Dynamic International Airways (“DIA”). He had no idea that Complainant had an ongoing whistleblower complaint against DIA. Tr. at 105-07. After the interview, Mr. Bartos and Mr. Freeman discussed the interview. Mr. Bartos felt more strongly about it than he, but they both agreed that the interview was negative. Mr. Freeman thought Complainant displayed a little bit of arrogance. Tr. at 108. They had concerns that Complainant would not fit into the pilot group that they already had, and there were concerns about his Crew Resource Management skills. Tr. at 109. Complainant appeared qualified, but they had no way of confirming his qualifications. Mr. Freeman wondered why Complainant was not flying for a major airline. Tr. at 108. Mr. Freeman adamantly denied that he ever referred to Complainant as an “f’ing whistleblower.” While he admitted that he might curse a little bit on the racquetball courts, he maintained that he does not curse in a professional environment such as an interview. Tr. at 109. He did not recall discussing benefits during this interview, but stated that it would not be unreasonable for such a discussion to occur. Tr. at 110.

Complainant testified that he later received a tentative mail offer from Mr. Bartos and the salary was for the captain’s position in the airline, \$67,000 per year plus a cost of living allowance of \$1,250 per month, \$42.50 per day per diem, and free medical and dental.¹⁷ After several weeks of not receiving a formal job offer from Respondent, Complainant asked a friend, Steven Pixley, Respondent’s Chief Counsel,¹⁸ if he could assist him in finding out what was going on.

23,000 hours total flight time, and also served as a check airman on the Airbus and on the Boeing 737 NG 800s. Tr. at 128-29.

¹⁵ Neither party called Mr. Bartos as a witness for these proceedings.

¹⁶ Complainant also said that at one point he had recordings of Mr. Freeman talking about “Dynamic Air’s whistle-blowing activities” (the person who purportedly blew the whistle at Dynamic Air was never specified at the hearing), but those recordings were on a memory stick that was either stolen or misplaced. Tr. at 67-68. Complainant also asserted that after this interview he talked with a Department of Labor investigator, but never filed a complaint. He admitted he has no evidence of any contacts with OSHA investigators prior to his October 26, 2015 complaint. Tr. at 59, 61-62.

¹⁷ Complainant did not provide the Tribunal with a copy of this correspondence.

¹⁸ Mr. Pixley served as the chief counsel for Respondent and its parent company PAN Holdings. Tr. at 26, 40, 42, 47.

Mr. Pixley subsequently reached out to Mr. Ferguson and asked him to give Complainant an interview. Mr. Ferguson told Mr. Pixley that he was uncomfortable with Complainant, but would go ahead and have his Director of Operations and Chief Pilot have a look at him to see if they felt otherwise. Mr. Ferguson stated that he did so to give Complainant a fair opportunity to display what he could about himself. Mr. Ferguson testified that even though Complainant was a friend of Mr. Pixley, that was not relevant to a hiring decision; he would direct all applicants through Respondent's flight operations personnel. Tr. at 83-85.

August 2015 Phone Interview

In August 2015, Complainant contacted Mr. Ferguson on numerous occasions to request an opportunity to work for Respondent.¹⁹ Complainant introduced himself as a friend of Mr. Pixley, and let Mr. Ferguson know that Complainant was a friend of one of Respondent's owners.²⁰ According to Complainant, during a telephonic interview for a position with Respondent, Mr. Ferguson asked Complainant if he had a lot of past baggage and if Complainant was a whistleblower. Tr. at 40-41. Complainant admitted to Mr. Ferguson that he had given the FAA truthful information about unsafe aircraft and unsafe flying operations at DIA.²¹ *Id.* Complainant testified that, at the conclusion of this interview, Mr. Ferguson told him he would hear back from Mr. Freeman. Tr. at 41.

Mr. Ferguson recalled his telephonic interview of Complainant differently. He alleged that he talked to Complainant multiple times on the phone. During the third phone call, he informed Complainant that Respondent's Director of Safety, Richard Brown,²² had worked with Complainant on a different occasion and had said that he would not recommend Complainant for the job. Tr. at 83. Since Mr. Ferguson took the recommendations of Respondent's directors

¹⁹ At some point, Mr. Ferguson was involved in Respondent's attempt to establish a new air carrier in Saipan, Saipan Air. Complainant also applied for an advertised pilot's position with this potential airline, but the airline never came to fruition and Complainant was never given an interview. Tr. at 81-82.

²⁰ Mr. Ferguson was familiar with DIA because he worked with their owners to bring that company out to Saipan to fly charters for PAN Holdings. DIA ran into financial problems, so PAN Holdings withdrew from its partnership with DIA. It was not an amicable split, and a lawsuit resulted. RX 1 is a copy of the complaint to that suit filed April 17, 2015. Tr. at 78-81. Mr. Ferguson stated that by August 2015, his relationship with the folks over at DIA was non-existent. Tr. at 87.

²¹ Despite the negative indications he received from Mr. Freeman and Mr. Bartos at his March 2015 interview, according to Complainant, Mr. Pixley was the reason Respondent was still considering hiring him at that point. Tr. at 42-43, 63.

²² Mr. Brown started his aviation career in the Navy where he accumulated about 2,000 flight hours. After the Navy, he joined TWA. After being furloughed in the 1970s by TWA, he instructed at a college aviation program. From there, he worked at a regional airline, flew for a law firm out of Austin, and then went to fly in Saudi Arabia followed by becoming the chief pilot at Templehof Airways that operated out of West Berlin. He then worked for airlines just off the West Coast of Africa and New Hampshire before coming over to Pacific Island Aviation in Saipan. He next worked for Freedom Air, before coming to work for Respondent and worked there until he retired from flying at age 60. After retiring from flying he went back to Freedom Air as the Director of Operations and in 2013 went back to Respondent to be the Director of Safety. Tr. at 132-34. Mr. Brown holds an ATP certificate and has about 23,000 hours total flight time, with 2,000 – 2,500 hours being in jets. Tr. at 162-63.

seriously, that weighed heavily on him. Tr. at 83, 85-86. Accordingly, he informed Complainant that Respondent was not going to hire him. Tr. at 83. Mr. Ferguson also stated that Complainant was “extremely emotional” on the phone, and that Complainant’s personality struck him as imbalanced, which led him to a “resounding rejection” of Complainant for the position. Tr. at 86, 89.

Mr. Ferguson agreed that during the August 2015 telephone call with Complainant they discussed DIA, but denied that during this call Complainant told him that he was a federal whistleblower against DIA. Tr. at 95. Mr. Ferguson testified that he first learned about Complainant’s whistleblower complaint against DIA on May 17, 2017, after an investigative report came back from the FAA that a whistleblower complaint had been denied. Tr. at 86. The earliest he had contact with the Complainant was August 2015. Tr. at 87.

Mr. Brown’s recollection of his “recommendation” to Mr. Ferguson differs only slightly from Mr. Ferguson’s testimony. Mr. Brown first heard about Complainant’s application for a position with Respondent when Mr. Ferguson asked Mr. Brown if he had any information on Complainant. Tr. at 139. Mr. Brown relayed to Mr. Ferguson that, while he was working for Freedom Air, he had recommended to his boss that they “exercise caution” when considering hiring Complainant due to some character issues that had been reported to him.²³ Tr. at 139-40. Freedom Air ultimately did not hire Complainant, and Complainant filed an EEOC complaint against Freedom Air alleging age discrimination, but it was determined that age had nothing to do with the hiring decision. Complainant also filed a suit in federal court and that case was dismissed. Tr. at 139-40. and Mr. Brown recalled telling this story to Mr. Ferguson. Tr. at 139-40. Mr. Brown later learned that Complainant had interviewed with Mr. Bartos and Mr. Freeman, and, having given his relevant input to Mr. Ferguson, told them that if they felt like Complainant would work out, he had no problem with it. Tr. at 140.

Following his interview with Mr. Ferguson, Complainant did not hear back from Respondent. Complainant asked Mr. Pixley to assist him in getting Mr. Freeman’s number for him. Tr. at 41. However, Complainant continued to pursue a position with Respondent because he needed a job. He stated that he did not raise the whistleblower complaint until later because he wanted to keep a dialogue open with Respondent for a job. Tr. at 59-61.

²³ Mr. Brown first worked with Complainant at Pacific Island Aviation in 1996, when he hired him as a pilot/dispatcher. During Complainant’s time with Pacific Island Aviation, Mr. Brown had concerns about Complainant’s character both during work and conduct outside of work. However, on cross-examination, Mr. Brown was unable to provide details of Complainant’s alleged off-duty conduct, the details of which this Tribunal need not elaborate upon. Tr. at 145-50. The Tribunal need not determine the truth of these allegations in this decision, and considers them only for the limited purpose of understanding any actions taken by the parties in response to these assertions.

As an aside, Complainant was fired from Pacific Island Aviation as a result of an accident that required him to ditch an aircraft in the ocean. See NTSB accident number LAX98LA046, available at <https://app.nts.gov/pdfgenerator/ReportGeneratorFile.ashx?EventID=20001208X09210&AKey=1&RTYPE=Summary&IType=LA>. Complainant asked that this Tribunal take official notice of this report and Respondent did not object. Tr. at 152-56.

November 2016

Around November 1, 2016,²⁴ Complainant noticed that Respondent listed a pilot position located on the Island of Guam. Complainant applied for that position.²⁵ Tr. at 42. Complainant called Mr. Freeman twice and recorded the conversations without Mr. Freeman being aware that it was being recorded.²⁶ Tr. at 70-71. He alleged that he recorded these conversations to have a record “proving that [he] called [Mr. Freeman]” about the job. Tr. at 71.

During the first conversation, Mr. Freeman used the word “baggage.” Mr. Freeman explained that what he was referring to were Complainant’s alleged civil problems on the Island of Saipan that he had heard about; it had nothing to do with the interview itself. Tr. at 114-15.

On the second recorded conversation between Mr. Freeman and Complainant, Mr. Freeman makes the statement “So, I’m not blocking you, but I’m not getting enough support to bring you on.”²⁷ Mr. Freeman testified that at that time, he was trying to bring Complainant in for a second or third interview. Mr. Freeman had no ill-will against Complainant. Tr. at 115-17. Complainant admitted that in neither recorded conversation was the word “whistleblower” used; all Mr. Freeman mentioned was “baggage.” Tr. at 70-72.

Around the first week of December 2016, Complainant made an appointment to see Mr. Pixley in Saipan. According to Complainant, Mr. Pixley seemed sympathetic towards Complainant’s situation and said that he would do his best to ask Respondent’s management to consider hiring Complainant. Tr. at 42-43.

December 2016 Pre-Interview Luncheon

On December 15, 2016, Complainant received a call from Mr. Brown, who asked Complainant to come to Guam for a pilot interview. Tr. at 43. When Complainant arrived, his interview was delayed, so he offered to take Mr. Freeman and Mr. Brown out for a complimentary lunch. Tr. at 43.

According to Complainant, during this lunch the parties discussed what happened to him when he worked at DIA. Tr. at 43. Mr. Freeman told him that he never understood why

²⁴ Between August 2015 and November 2016, Complainant explained that he made various phone calls to Respondent about a job, but with no results. Tr. at 42.

²⁵ The job advertised had a salary of \$67,000 per year, plus a cost of living allowance of \$1,250 per month, plus \$42.50 per diem for each day of flight duty, and free medical and dental insurance. Mr. Yoder told Complainant that they flew around 70 hours in the air per month. If the Tribunal ruled in Complainant’s favor, he asked for instatement as he never worked for Respondent. Tr. at 51-53.

²⁶ Complainant recorded several conversations between himself and Mr. Freeman without Mr. Freeman’s consent. *See* CX1; RX 2.

²⁷ Complainant agreed that in the two recorded conversations he had with Mr. Freeman in November 2016, Mr. Freeman did not know that Complainant was recording the conversations. CX 1 at LS-801 and LS-802; RX 2 at Track 2.

Complainant had to tell the FAA about the numerous safety maintenance concerns there, although both Mr. Freeman and Mr. Brown seemed to agree with Complainant that he did the right thing by telling the FAA about them. Tr. at 43-44. During the luncheon, Mr. Freeman warned Complainant that the only opponent to him getting hired at Respondent was the acting CEO, Mr. Ferguson, as he hated pilots—such as Respondent’s interim Chief Pilot Mr. Bartos—that reported matters to the FAA. Tr. at 44. Complainant alleges that he was shocked to hear that Mr. Bartos was also a whistleblower, and that Mr. Freeman and Mr. Brown declined to discuss the details of Mr. Bartos’ whistleblowing when he asked. Tr. at 44.

Mr. Freeman recalled going to lunch with Complainant and Mr. Brown, but denied that the parties had any discussion about Complainant being a whistleblower. He maintained that the first he heard of Complainant as a whistleblower was in relation to this case; he did not hear anything about him being a whistleblower during the time Complainant was interviewing for a pilot’s position with Respondent.²⁸ Tr. at 111-113.

Mr. Brown agreed that he Mr. Freeman and Complainant had gone to lunch prior to Complainant’s December 2015 interview, but he did not recall any discussion about Complainant’s federal whistleblower activities against DIA. However, Mr. Brown stated that he would not have found such comments remarkable because he had heard complaints from several other DIA pilots about that company’s operations. Tr. at 154-57.

December 15, 2016 Interview

After this lunch, Complainant had his interview with Mr. Robert Walker (Respondent’s CEO²⁹), Mr. Ferguson, Mr. Freeman, and Mr. Brown. Tr. at 44-45. The interview lasted about 1 hour and 50 minutes, and Complainant explained why Respondent should hire him and described his qualifications. Tr. at 45.

The accounts of this interview diverge. According to Complainant, Mr. Ferguson started screaming at him, saying: “Why should we hire an f’ing whistleblower like you, a guy that turns [sic] Dynamic International Airways into a horrible financial mess?” Tr. at 45. Mr. Ferguson then began to ask Complainant if he know the harm that he caused DIA by giving testimony to the FAA. Complainant stated that he was in shock and told Mr. Ferguson that he felt “really bad” and “very belittled,” but that “the safety was so bad over there that I had to step up to the plate or people were going to get killed.” Tr. at 45-46. Mr. Ferguson responded: “You’re exactly the guy we don’t want to hire, an f’ing whistleblower.” Tr. at 46. He also said “I don’t even know why you brought him here today,” and continued to yell at Complainant. Tr. at 46. Complainant stated that it was the most traumatic interview he had had in his life. Tr. at 46.

²⁸ Mr. Brown acknowledged meeting with Complainant and Mr. Freeman in Mr. Brown’s office and to mentioning Mr. Bartos, but Mr. Brown did not recall exactly what was said. However, Mr. Brown denied that he mentioned during this meeting that Mr. Bartos was no longer with Respondent because he had filed a whistleblower complaint. Mr. Brown did acknowledge that Mr. Bartos had gotten into trouble with the FAA, but it was not because of a whistleblower complaint. Tr. at 153-54.

²⁹ Mr. Ferguson later testified that Mr. Walker was then in this last few weeks of serving as Respondent’s president. Tr. at 96.

After Mr. Ferguson's outbursts, Complainant asserts that Mr. Freeman and Mr. Brown attempted to defend him by discussing with Mr. Ferguson that they had talked to Complainant over lunch about his whistleblower activity at DIA. Tr. at 46-47. Mr. Ferguson yelled back at them stating "We have enough problems dealing with our previous employee who was a whistleblower, Mr. Patrick Bartos, who we fired." Tr. at 46-47. Mr. Walker chimed in and agreed that the company "did not need another whistleblower," and that whistleblowers "waste precious hours of our time and Asia Pacific Airlines." Tr. at 47. Complainant was shocked and dismayed and told them that if they just gave him a chance, he would not be a whistleblower ever again because the AIR 21 program does not work. Tr. at 47. Complainant maintained that they did not want to hear it and that was the end of the interview, and they said that Complainant would be hearing from them. Tr. at 46-48.

By contrast, Mr. Ferguson denied that Mr. Walker talked to Complainant about being a federal whistleblower, that the word "whistleblower" ever came up, or that he ever called Complainant an "f'ing whistleblower." Tr. at 87, 96-97. During interactions with Complainant, the subject of DIA did come up because they wanted to know how things were at DIA in terms of flying in Saipan, but not once was the word "whistleblower" used. Tr. at 91. Mr. Freeman also testified that the topic of whistleblower complaints against DIA never came up. Tr. at 112. Mr. Ferguson maintained that Complainant's allegations are a fabrication. Mr. Ferguson stated that he could not imagine anybody being stupid enough to say something like "you don't hire any whistleblowers" in the first place. Tr. at 87-88. According to Mr. Ferguson, at the end of their meeting, the Respondent's participants concluded that Complainant's personality was not a very good fit for their company. Tr. at 89-90.

Mr. Brown recalled going to Respondent's offices in Guam after lunch and waiting to meet Mr. Ferguson around 3 p.m. Mr. Brown denied that he ever called Complainant a rat or that he accused or berated Complainant for being a whistleblower against DIA. Tr. at 140-45. He also denied that Mr. Ferguson called Complainant an "f'ing whistleblower" and a rat, or that Mr. Ferguson stated he would never hire a whistleblower like Complainant. Tr. at 157. Mr. Brown similarly could not recall Mr. Walker stating that Complainant's whistleblower activities had costed him many wasted hours. Tr. at 157-58. Though he acknowledged that Mr. Bartos had been mentioned in passing with regard to where he was currently flying and an action taken against him by the FAA, Mr. Brown stated that Mr. Bartos never filed a whistleblower complaint against Respondent. Tr. at 153-54. Mr. Brown agreed that during the 45-60 minute interview, Complainant brought up some issues that he had had while working for DIA.³⁰ However, Mr.

³⁰ Mr. Brown stated unequivocally that he did not have personal knowledge of Complainant's whistleblower complaint against DIA even through the time that Complainant interviewed with Mr. Yoder on December 23 (Tr. at 141-42). He also testified numerous times that he did not recall Complainant saying anything about his time at DIA specifically related to whistleblowing. Tr. at 154, 158, 161. Following a complex question from Complainant's cross examination, in which Complainant asked Mr. Brown if he recalled Complainant stating at the interview that he would never be a federal whistleblower for any airline because AIR 21 "doesn't work for pilots," Mr. Brown stated that he did "remember you bringing that up." Tr. at 159. While in isolation this response could be interpreted as an admission that Complainant *did* discuss his whistleblower activities at DIA, Complainant did not further

Brown did not think that was particularly relevant information to the question of whether to hire Complainant, because he knew that there had been a lot of other complaints from pilots working at DIA. Tr. at 157-59.

December 23, 2016 Interview

On December 22, 2016, Complainant received another telephone call from Mr. Brown, who stated that Respondent wanted to give him another interview, this time with their Chief Pilot Scott Yoder. Tr. at 48. Complainant testified that he was shocked because he was expecting to receive a rejection letter, but agreed to take the interview. The next day, Complainant again flew from Saipan to Guam to meet with Mr. Yoder. Tr. at 48.

According to Complainant, the interview went well, with Mr. Yoder asking general questions about aviation. Tr. at 49. However, Complaint alleged that Mr. Yoder unexpectedly asked Complainant if he had any mental issues. According to Complainant, Mr. Yoder claimed the previous Chief Pilot (Mr. Bartos) had Asperger's Syndrome and was a whistleblower, and was asked to leave the company. Tr. at 49. Complainant denied suffering from any mental health impairment. At the end of the interview, Mr. Yoder said that they had a captain's position open on a Boeing 757 and 727, and that he would get back to Complainant in a week or so. Tr. at 50. On January 4, 2017, Mr. Yoder called Complainant and told him that, as a result of his past, Respondent had decided to hire other pilots. Mr. Yoder did not elaborate on what he meant by Complainant's "past," though Complainant took this to be a reference to his whistleblower activities because Mr. Yoder had mentioned it in his interview. Tr. at 50-51.

In contrast, Mr. Brown recalled that, even though Complainant's interview did not go well, he still set up an interview with Mr. Yoder -- and did not tell the Chief Pilot anything negative whatsoever.³¹ Tr. at 140-41. According to Mr. Brown, at that interview, Mr. Yoder did not feel like Complainant would be a good addition to Respondent's pilot group, and noted that Complainant would not work well with others in the cockpit. Tr. at 141. To Mr. Brown's knowledge, at no time did anyone at Respondent—including Mr. Yoder, who interviewed Complainant independently—mention that Complainant had been a whistleblower while at DIA. Tr. at 140-45.

Mr. Ferguson also testified that he referred Complainant to Respondent's Chief Pilot, Captain Scott Yoder, who had been flying at the time of the December 2016 interview, for one final discussion. Tr. at 92. Following this interview, Mr. Yoder also told Mr. Ferguson that he felt that Complainant would not be a good fit for Respondent or "any airline" based on his CRM and personality. Tr. at 93. Mr. Freeman similarly testified that Chief Pilot Yoder was not present during the initial December 2016 interview, but separately interviewed Complainant

develop Mr. Brown's testimony to clarify this point. And in fact, just a few questions later, on redirect, Mr. Brown stated that Complainant's alleged whistleblowing activities at DIA did not come up at the interview "either amongst us or even in the talk after." Tr. at 161.

³¹ Mr. Yoder did not testify in these proceedings.

afterwards. Following Mr. Yoder's interview, Mr. Freeman alleged that Mr. Yoder had stated that he had no interest in hiring Complainant.³² Tr. at 111-13.

Stated Reason for Not Hiring Complainant

Complainant was specifically asked if he had any other evidence that would substantiate his claim that Respondent knew of his whistleblowing activities at DIA and that Respondent acted adversely to his job application because of it. He stated: "All I have is what I remember and what I heard. I don't have any other recordings." Tr. at 75.

Mr. Ferguson testified that he had concerns about hiring Complainant, the biggest factor being information shared by Mr. Brown about Complainant's previous work history.³³ "If one of our directors within our company says that this person is not a good fit for our company, I take that to heart, as simple as that." Tr. at 86. However, more importantly, the personality of the person he was speaking to on the phone was a "resounding" rejection to him. Tr. at 85-86.

Mr. Freeman explained that, based on Complainant's background and the way he presented himself, he did not think that Complainant would be a good fit with Respondent's core pilot group. After 17 or 18 years in management with a crew base of between 150 and 300 pilots, he thought that he had a good handle on crew resource management, and he just did not think that Complainant was the right candidate. Mr. Freeman assumed that during the March 2015 interview he reviewed Complainant's resume and anything else he presented. Mr. Freeman recalled that Complainant had bounced around a lot and he wondered why, based on Complainant's extensive flying experience, he was not flying for one of the legacy carriers. Tr. at 120-22.

III. ISSUES³⁴

- 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?

³² According to Complainant, on January 4, 2017, Mr. Yoder called Complainant and told him that, as a result of his past, Respondent had decided to hire other pilots. Mr. Yoder did not elaborate on what he meant by Complainant's "past". Tr. at 48-51.

³³ Mr. Ferguson later testified that Mr. Brown, who was a captain, worked with Complainant at two different airlines. Tr. at 99.

³⁴ Respondent did not challenge the timeliness of Complainant's complaint so the Tribunal need not address this element. However, even if Respondent had raised this issue, the Tribunal finds that Complainant's complaints and appeal of the OSHA dismissal were timely.

A. Summary of Complainant's Position³⁵

Complainant argues that he engaged in protected activity involving Respondent's close partner, DIA, and that protected activity included the filing of an AIR 21 complaint before this Tribunal.³⁶ Complainant claims Respondent's defense here rests on two elements: the decisionmakers had no knowledge of Complainant's protected activity and that its decision to reject Complainant's job action was due to "the conveniently intangible concept of Crew Resource Management (CRM)." He argues that the pretended ignorance of Complainant's protected activity is implausible because of the contemporaneous litigation between Respondent and DIA and the insular island environment on Guam and Saipan, and notes that in Respondent's pre-hearing statement that Respondent's president considered Complainant's "litigious" nature to be objectionable. Further, Complainant testified that his AIR21 litigation came up repeatedly in his three job interviews. Complainant notes that it is undisputed that he possessed the qualifications for the position. He also notes that the decision not to hire him was supposedly based on a deficiency of his CRM skills. However, the decision involved the non-pilot president, a pilot manager that did not testify, and a second pilot manager that testified that he supported Complainant's job position. When these events are placed in the temporal proximity of his protected activities, the credibility with respect to what transpired during the job interviews must be resolved in favor of Complainant. Compl. Br. at 1-3.

Complainant asserts that he engaged in protected activity by bringing to the attention of his prior employer, DIA, operational issues so severe that he believed people would be killed. Tr. at 45-46. He maintains that Respondent has never disputed the fact that Complainant's AIR 21 complaint against DIA was a protected activity; rather Respondent contends that it was not aware of Complainant's protected activity during the period at issue. Complainant further asserts that it is undisputed that Complainant suffered an adverse action by not being hired. Compl. Br. at 8-10.

Complainant contends that there is both direct and circumstantial evidence that Respondent had knowledge of Complainant's protected activity. He asserts that Mr. Ferguson's objection for employment due to Complainant's "litigious" nature,³⁷ Mr. Freeman's identifying

³⁵ Complainant's brief cites on several occasions to Respondent's pre-hearing statement. *See, e.g.*, Compl. Br. at 3 and 13. However, pre-hearing statements as well as opening statements are not evidence and the Tribunal gives no weight to assertions contained therein, unless a party is conceding to a particular element that must be established in this litigation.

³⁶ *See Pohl v. Dynamic Int'l Airways*, Case No. 2017-AIR-00011. The Tribunal is aware of this separate action but has not considered the contents of that case in deciding this matter. Only evidence presented at this hearing has been considered by the Tribunal. Further, the Tribunal notes that case no. 2017-AIR-00011 is currently stayed due to the automatic stay provisions of 11 U.S.C. § 362(a), due to the pending bankruptcy proceedings involving DIA. *See Pohl v. Dynamic Int'l Airways, et al*, Order Staying Proceedings in this Matter, dated July 27, 2017.

³⁷ Complainant cites Respondent's pre-hearing statement for this contention. However, nowhere in record that is considered evidence does such a statement exist. Accordingly, and as stated previously above, this Tribunal gives no weight to a pre-hearing statement submitted to the Tribunal, but was never admitted in to the record as substantive evidence. But moreover, it was undisputed that Complainant had

of Complainant's "baggage," and Mr. Brown's direct admission that Complainant's protected activity was discussed with Respondent's representatives demonstrates this.³⁸ Additionally, the temporal proximity of Complainant's protected activity warrants an inference of Respondent's knowledge. Complainant also noted the geographic proximity of Respondent to the protected activity and Respondent's prior business relationship with DIA as factors to consider in the plausibility of Respondent's contentions about its ignorance of Complainant's protected activity. Compl. Br. at 11-16.

Complainant maintains that he has established his *prima facie* case and that Respondent cannot establish a legitimate business reason for rejecting his application for employment. He notes that Respondent's management representatives were "desperate" to hire the Complainant because he unquestionably possessed the qualifications for a pilot they needed. Complainant points to the Respondent's Chief Pilot's tentative job offer—which included specific wage and benefit figures—as support for his qualifications and Respondent's need. Yet, Respondent relies on the intangible element of Crew Resource Management for its refusal to hire Complainant. Complainant observes that neither Mr. Yoder nor Mr. Bartos were produced to explain their reasoning about why Complainant was not hired;³⁹ yet Respondent did produce Mr. Freeman who testified that he advocated for Respondent to hire Complainant. Further, Complainant notes that Mr. Ferguson says he relied heavily on the recommendation from Mr. Brown, but Mr. Brown actually testified that he was supporting Complainant being hired. The combination of these inconsistencies causes any claim of a legitimate business reason for not hiring Complainant to fail. Compl. Br. at 18-22.

Complainant asserts that he is entitled to \$50,000 compensatory damages and attorney's fees reasonable incurred.⁴⁰ In addition, Complainant seeks an Order directing Respondent to hire Complainant as a Boeing 757 captain and to make him whole for any difference in pay and benefits retroactive to March 2015. He also seeks an Order directing Respondent to cease and desist from all discriminatory conduct toward Complainant; an Order granting such additional relief as the Tribunal deems proper and just; and an Order directing Respondent to post for ten years the OSHA Fact Sheet "Whistleblower Protection for Employees in the Aviation Industry" in a visible location in every employee break room throughout its system, accompanied with some monetary penalty in the event Respondent fails to comply with that Order. Compl. Br. at 22-24.

previously filed an EEOC complaint against Freedom Air, due to age discrimination, and Mr. Brown relayed this information to Mr. Ferguson when asked about Complainant. *See* Tr. at 139-40. Thus, Mr. Ferguson could have considered Complainant to be "litigious" even without knowledge of his whistleblowing activities against DIA.

³⁸ As explained above, the undersigned does not interpret Mr. Brown's testimony as supportive of this assertion.

³⁹ However, Respondent is under no obligation to call any witness until the Complainant first established his *prima facie* case, because Complainant—not Respondent—bears the initial burden to establish his case.

⁴⁰ The brief references attorney's fees and costs in the amount of \$9,000. Compl. Br. at 23.

In Complainant's reply brief⁴¹ he notes that Respondent's brief did not even attempt to explain away the admissions of its own witnesses. He reiterates that he has established a *prima facie* case. In particular, he notes that Mr. Brown admitted that during a 2016 job interview, Complainant's protected activity had been directly discussed between the parties. Tr. at 159; Compl. Reply Br. at 3.

Complainant maintained that Respondent failed to establish a legitimate business reason and directly addressed three contentions contained in Respondent's Brief: the alleged Section 121.599 violation back in 1997; CRM issues; and the EEOC charge. Complainant notes the lack of any detail to this allegation in the record other than a passing comment by Mr. Brown. And even Mr. Brown characterized Complainant's prior job deficiencies as "mostly relatively minor" (Tr. at 137). Respondent's contentions about CRM are inconsistent with Mr. Freeman's testimony and his efforts to support Complainant's attempts at employment with Respondent. As for the EEOC charge, there is nothing in the evidentiary record to support this; it was first raised in Respondent's brief. Moreover, the Respondent witness that mentioned this, Mr. Brown, supported Complainant's hiring. Compl. Reply Br. at 6-9.

Finally, Complainant recounted his request for damages but noted that his request for attorney's fee and costs were now \$14,000.00. Compl. Reply Br. at 10

B. Summary of Respondent's Position

Respondent argues that Complainant has failed to meet his burden of proof. It contends that Complainant's assertion that Mr. Ferguson, Mr. Freeman, and Mr. Brown repeatedly accused him of being a whistleblower is simply incredible. Respondent posits that with the years of experience Mr. Ferguson has in particular, why would he make such an inflammatory allegation towards Complainant in the presence of others. Resp. Br. at 13-14. Respondent notes that Complainant's surreptitious nonconsensual recording of his conversations with Mr. Freeman and Mr. Quinn demonstrate that Complainant was trying to set up the company for litigation. And when asked about other recordings referenced in an email to a DOL investigator, Complainant alleged that they were on a memory stick which he lost. *Id.* at 15-16. Respondent also notes that Complainant refers to a separate pending whistleblower complaint against another air carrier, DIA, but provided little information about it, other than asserting that because of his whistleblower complaint against DIA was supposedly the reason the Respondent did not hire him. And Complainant has provided no evidence to link the matter involving DIA to Respondent's decision not to hire Complainant. Complainant asserts the linkage is due to a business relationship that existed between DIA and Respondent, but in fact that relationship soured in 2014, prior to any the actions alleged in this case. *Id.* at 16-17; *see also* Tr. at 81.

⁴¹ As part of Complainant's reply brief, he attaches a FAA Report on Whistleblower Complaint EWB15677. The report references an investigation that occurred by FAA Eastern Region Aviation Safety Investigators; however, this is an investigative report of a complaint, not the compilations of records referred to in the cases Complainant cites. Such reports are merely the first step in an adversarial process, should the FAA desire to take enforcement action against the air carrier and the air carrier decides to appeal the investigator's findings. *See* 14 C.F.R. Part 13; *see also* 49 U.S.C. §46101 and FAA Order 2150.3B. Thus, the Tribunal finds this report of no probative value to the issues before it.

Respondent also maintains that it would have made the same decision to not hire Complainant even in the absence of any alleged protected activity. It maintains that during all times relevant to Complainant's complaint, it did not have knowledge of Complainant's AIR 21 case against DIA. However, it does acknowledge that it was aware that in one of Complainant's previous jobs he left his post as a dispatcher prior to aircraft landing.⁴² Respondent asserts that this is a violation of 14 C.F.R. § 121.599(B). Respondent also had concerns about Complainant's Crew Resource Management skills. It is a small airline which engages in long flights that requires crewmembers to be in cramped cockpits for long periods of time, so the personalities of applicants are important to its hiring decisions. During its meetings with Complainant, Respondent's managers had concerns about Complainant's skills in this area and found him somewhat arrogant.⁴³ Respondent also said that Complainant previously had filed a baseless age discrimination complaint against Freedom Air in Saipan and that Mr. Ferguson had "large concerns" about Complainant based upon the information provided to him by Mr. Brown during Respondent's hiring process. Moreover, Respondent's hiring process was a collaborative one and the crew resource management issue was the key to their hiring decisions. In short, it had legitimate, nondiscriminatory and non-retaliatory reasons for not hiring Complainant. Resp. Br. at 18-21.

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)).

Complainant appeared before the Tribunal during the hearing *pro se*, but since the hearing he has retained counsel. However, equity demanded this Tribunal to construe liberally the complaints and papers filed by Complainant while he was a *pro se* litigant. *See Jenkins v. CSX Transp., Inc.*, ARB No. 13-029, slip op. at 10-11 (May 15, 2014) (internal quotation marks omitted). Thus, this Tribunal has charitably interpreted Complainant's *pro se* filings with the Office. Nevertheless, the Tribunal has not extended such deference to the evidence the parties have submitted. In accordance with the Tribunal's statements at the hearing,⁴⁴ the undersigned will determine the appropriate weight to assign the parties' evidence based on the value of the contents therein, without deference to Complainant's *pro se* status.

⁴² *See* Tr. at 135-37.

⁴³ Tr. at 108.

⁴⁴ *See, e.g.*, Tr. at 23, 147, 150.

A. Credibility

In deciding the issues presented, this Tribunal has considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has considered all relevant, probative, and available evidence, and has assessed its cumulative impact on the parties' contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

This Tribunal finds that Respondent's witnesses were credible and presented a generally consistent theme regarding its decision-making process. While at times Mr. Ferguson sounded irritated at Complainant's questioning, his expression of frustration was consistent with the level of effort and time expended in dealing with Complainant's claims. The Tribunal found all of the Respondent's witnesses credible and finds no reason, except as described below, to accord their testimony less than normal weight. By contrast, the Tribunal found Complainant's version of events less credible and lacking any independent support.

B. Complainant's Prima Facie Case

1. Covered Employer and Employee

During the hearing the Respondent conceded that both it and Complainant are covered under the Act. Accordingly, Complainant has established this element of his case.⁴⁵

⁴⁵ Even if Respondent had not made this concession, after hearing all of the evidence in this matter, this Tribunal would have concluded that the Employer and Employee are covered by the Act. It is undisputed that Respondent was a corporation that provided interstate transport of passengers and cargo under the authority of 14 C.F.R. Part 121. Tr. at 24; Resp. Br. at 1. *See also* 49 U.S.C. §§ 42121(a), 40102(a)(2), and 40102(a)(15)(C). And Complainant was an "employee" under the regulations as "an individual applying to work for an air carrier." *See* 29 C.F.R. § 1979.101.

2. 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 in reference to providing information under subsection (a)(1) that: “As a matter 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)) (noting 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,” which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016).⁴⁶ To prove subjective belief, a complainant must show that he “held the belief in good faith.” *Id.* To determine whether a complainant’s subjective belief is

⁴⁶ Interestingly, though no such “good faith” or “objectively reasonable” requirements appear in subsection (a)(1), the Board has imported such requirements into AIR 21 from “case law under analogous whistleblower statutes governing transportation and the environment.” *See Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 6 (ARB June 29, 2006); *Furland v. American Airlines, Inc.*, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-11, slip op. at 5 (ARB July 27, 2011). Such a holding appears to be a matter of (not unreasonable) policy judgment rather than statutory interpretation, as various whistleblower statutes explicitly contain either requirement. *See, e.g.*, 18 U.S.C. § 1514A(a)(1) (securities employees must “reasonably believe” that reported conduct violates federal law for whistleblower protection to apply); 49 U.S.C. § 20109(a)(1), (b) (same requirement for railroad employee whistleblowers, and adding a “good faith” requirement for employees who report hazardous conditions); 6 U.S.C. § 1142(a)(1) (public transportation employees). *But see, e.g.*, 42 U.S.C. § 5851(a)(1) (imposing no good faith or reasonableness requirement on whistleblowers in the nuclear industry); 49 U.S.C. § 60129(a)(1)(A) (same for pipeline employees).

objectively reasonable, an ALJ must assess his 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 a pilot’s belief in light of his training and experience).

Though under subsection (a)(1) a 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). However, an employer’s “mere words do not create an FAA violation when the parties’ actual conduct does not violate FAA regulations.” *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, slip op. at 6 (June 30, 2010).

In contrast to subsection (a)(1), neither the Board nor any circuit court has provided interpretive guidance regarding subsection (a)(2). Accordingly, determining what “proceedings” fall within the scope of subsection (a)(2) arises before this Tribunal as a matter of first impression. The undersigned notes that this subsection creates a broad ambit of protected activity: an employee need only have “filed, cause to be filed, or [been] about to file” any “proceeding relating to any violation or alleged violation” of federal aviation law. 49 U.S.C. § 42121(a)(2). Accordingly, the plain language of subsection (a)(2) compels the conclusion that a complainant’s filing of a prior federal whistleblower claim is protected activity under the Act.⁴⁷ Subsection (a)(3) and (a)(4) also provide that testimony or assistance in such AIR 21 whistleblower proceedings is also protected activity. 49 U.S.C. § 42121(a)(3)-(4).

Discussion of Protected Activity

Complainant asserts that his actions constituted protected activity separately under subsections (a)(1) and (a)(2)-(4). Compl. Br. at 8-9. The undersigned disagrees that Complainant has shown protected activity under subsection (a)(1), but accepts that protected activity has been shown under subsections (a)(2)-(4).

⁴⁷ Importing a requirement that a complainant prove he filed a prior proceeding in “good faith” and on “objectively reasonable bases” would prove impracticable in litigation and, more importantly, render (a)(2) superfluous. Such an adjudication would essentially require proof of two allegations; one concerning the validity and merits of the prior suit (whether it constituted protected activity), and another concerning whether the present employer knew of the prior suit and discriminated against the employee on that basis. Requiring Complainant to prove the merits of his other claim in this forum would require discovery of materials and witnesses from an employer unconnected to this case (DIA). Such a result could hardly have been the intention of Congress in drafting subsection (a)(2).

It is far simpler to interpret subsection (a)(2) according to its plain language. That is, in drafting subsection (a)(2), Congress intended to protect former whistleblowers from future discrimination on the basis of their prior suits—full stop. Accordingly, a complainant need not prove the merits of a prior “proceeding” to establish the element of protected activity in a future whistleblowing complaint. That the former “proceeding” filed by a complainant was “relat[ed] to any violation or alleged violation” of federal aviation law—such as a federal whistleblower complaint—will suffice.

For these reasons, the undersigned finds that the requirements of “good faith” and “objective reasonableness” do not apply to alleged protected activity under subsection (a)(2).

The central problem Complainant faces in establishing the element of protected activity under subsection (a)(1) is that he has offered no evidence to establish whether he held a good faith, objectively reasonable belief that the information he provided to the FAA related to any violation or alleged violation of an FAA law relating to air carrier safety at DIA when he reported them. All the record establishes is that he reported to the FAA “numerous safety maintenance concerns.”⁴⁸ Tr. at 43-44. What those concerns were and whether they reflected a good faith, objectively reasonable belief in the existence of FAA violations is unknown. The mere fact that an employee has provided information about alleged violations of federal aviation law is insufficient to cloak that employee in the protections of the Act. When only information is provided, the complainant must further establish that he held a good faith, objectively reasonable belief that the facts related to air carrier safety law violation. It is this second component that is lacking under the facts as presented in the matter. Accordingly, the Tribunal finds that Complainant’s reporting of safety concerns to the FAA while working for DIA has not been shown to constitute protected activity.

Nevertheless, as explained above, a Complainant need not demonstrate good faith and objective reasonableness in connection with a previously *filed* federal whistleblower claim under (a)(2)-(4). The fact that he filed a “proceeding” is sufficient to constitute protected activity. Here, there is evidence that Complainant did more than merely provide *information*; there is testimony and other evidence to establish that he actually *filed* a proceeding relating to an air carrier safety violation. It is this additional step that distinguishes (a)(1) protections from (a)(2)-(4) protections. Respondent does not dispute that Complainant has filed an AIR 21 whistleblower claim against DIA in 2015, and thus, this filing constitutes protected activity under subsection (a)(2).

3. Adverse Action

The Act provides, “No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, “An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis.” ARB No. 09-118, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, slip op. at 14 (Sept. 13, 2011) (explaining that use of the “tangible consequences standard,” rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error).

Discussion of Adverse Action

Here, it is undisputed that Respondent did not hire Complainant as a pilot after he had applied and interviewed for the position. The regulations include within its sphere of protections persons that are applying for employment. *See* 29 C.F.R. § 1979.101. There can be little

⁴⁸ Complainant also testified that “Mr. Ferguson that “safety was so bad over there that I had to step up to the plate or people were going to get killed.” Tr. at 46.

question—and Respondent does not contest—that a failure to hire an applicant is an adverse action. Accordingly, Complainant has established the element of adverse action.

4. Contributing Factor Analysis

The Tribunal must determine whether Complainant’s protected activity was a contributing factor in Respondent’s unfavorable personnel action. See 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

The Board holds that a contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The Board has observed that “the level of causation that a complainant needs to show is extremely low” and that an ALJ “should not engage in any comparison of the relative importance of the protected activity and the employer’s nonretaliatory reasons.” *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant “need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected activity.” *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: “did the protected activity play a role, *any* role whatsoever, in the adverse action?” *Palmer*, ARB No. 16-035, slip op. at 52 (emphasis in the original).

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Though “[t]emporal proximity between protected activity and adverse personnel action ‘normally’ will satisfy the burden of making a *prima facie* showing of knowledge and causation,” and “may support an inference of retaliation, the inference is not necessarily dispositive.” *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); see also *Powers*, ARB No. 13-034, slip op. at 23 (explaining that, at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). “Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.” *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). “The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity.” *Palmer*, ARB No. 16-035, slip op. at 56.

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 to show that the person making the adverse employment decision knew about the employee's past or imminent protected activity. *Id.*

Discussion of Contributing Factor Analysis

Other than Complainant's testimony, the record contains no direct evidence that Respondent retaliated against Complainant when it opted not to hire him. After hearing witness testimony concerning Complainant's interactions with Respondent's employees, the undersigned finds Respondent's employees' versions of events to be more credible. For the reasons explained below, the Tribunal also finds that none of Respondent's employees knew of Complainant's protected activity (his whistleblower claim against DIA) at the time they made their decision not to hire him. Accordingly, the Tribunal also finds that Complainant's protected activity was not a contributing factor to his non-hire.

a. Credibility

Most of the evidence in this case was testimonial. Put simply, the undersigned found Respondent's witnesses to present a more credible version of their interactions with Complainant.

Complainant alleged that a number of Respondent's interviewing employees commented about his whistleblowing activities at DIA. According to Complainant, at his first interview Respondent's Director of Flight Operations Mr. Freeman said "this is the kind of guy we never want to hire, because he's a fucking whistle-blower." Tr. at 38. Respondent's interim Chief Pilot Mr. Bartos similarly commented: "I don't know what to do here, you know, you don't hire a whistle-blower, that's the kind of guy you never hire." Tr. at 38, 60. Complainant asserted that following this interview, Mr. Bartos emailed him a tentative offer for a 757 captain's position with Respondent.⁴⁹ Tr. at 39.

Complainant also testified that Respondent's Vice President Mr. Ferguson asked about his past "baggage" and if he was an FAA whistleblower. Tr. at 40-41. While at that time Mr. Ferguson only said "oh, I see" in response to hearing about Complainant's whistleblowing at DIA, Complainant asserted that at a later interview with Mr. Brown, Mr. Freeman, Mr. Ferguson, and Mr. Walker, Mr. Ferguson screamed at him: "Why should we hire an f'ing whistle-blower like you, a guy that turns Dynamic International Airways into a horrible financial mess?" Tr. at 41, 45. Mr. Ferguson allegedly continued, saying "You're exactly the guy we don't want to hire, an f'ing whistle-blower." Tr. at 46. Similarly, Respondent's President Mr. Walker chimed in and said: "We don't need another whistle-blower. You kind of guys are causing me so many problems." Tr. at 47.

By contrast, all of Respondent's witnesses disclaimed these versions of Complainant's interviews. The Tribunal finds the counter narratives from Mr. Ferguson, Mr. Brown, and Mr. Freeman as credible. Each of these witnesses testified that Complainant's whistleblower claim

⁴⁹ Complainant did not produce this email.

against DIA never came up during his interviews, much less that Mr. Ferguson or Mr. Freeman berated him for it. And the Tribunal tends to agree with Mr. Ferguson's observations that it would have been quite foolish for him (or Mr. Walker or Mr. Freeman) to have made such inflammatory statements claimed by Complainant in front of witnesses. It strains credulity that a senior manager of an airline would flatly state to a supposedly litigious applicant that "you're exactly the guy we don't want to hire, an f'ing whistleblower," and explain how a former whistleblower caused problems at Respondent and was fired. *See* Tr. at 46-47. Similarly, to have the president of an airline during the same interview affirm that "we don't need another whistleblower" and explain to an applicant how "whistleblowers waste precious hours of our time" seems incredulous. *See* Tr. at 47.

As the only evidence before this Tribunal about these incidents is testimonial, the Tribunal finds Respondent's witnesses more credible than Complainant. Specifically, the Tribunal is not persuaded that Mr. Ferguson or Mr. Freeman ever called Complainant an "f'ing whistleblower" or berated him for his whistleblowing activities.⁵⁰

b. Whether Respondent Had Knowledge of Complainant's Whistleblower Proceeding Against DIA

Having accepted Respondent's witnesses as more credible than Complainant, the undersigned also credits their assertions that they did not know of Complainant's whistleblower claim against DIA at the time they decided not to hire Complainant.

In the absence of admissions or direct evidence, Complainant offers six arguments—besides reliance on his own testimony—as to why this Tribunal should infer that Respondent knew of his whistleblower activities at DIA. He notes (1) the temporal proximity between his DIA whistleblower complaint and Respondent's decision not to hire him, (2) the "rumor mill" inherent in the "insular nature of the Pacific island communities, (3) the business relationship between Respondent and DIA, (4) Mr. Ferguson's admitted hostility to Complainant's legal actions,⁵¹ (5) Mr. Freeman's tacit admission of knowledge, and (6) Mr. Brown's direct admission of knowledge. Compl. Br. at 11-17. None of these arguments are compelling.

Complainant is correct that temporal proximity between the protected activity and the adverse action *can* satisfy the prima facie burden of showing knowledge and causation; however, here the close temporal proximity supports the opposite inference. In most AIR 21 cases, a

⁵⁰ Other portions of Complainant's testimony seemed, at worst, fabricated, or at best, uncorroborated. For instance, despite testifying that Respondent's employees affirmed that Mr. Bartos was fired for whistleblowing and mental problems (Tr. at 46-47, 49), Respondent's employees all agreed that Mr. Bartos was not a whistleblower and left Respondent of his own accord to find a pilot position with a different schedule. Tr. at 88, 110-11, 126, 153-54. Furthermore, Complainant's testimony concerning Mr. Bartos has Mr. Bartos both being fired for being a whistleblower himself *and*, while Mr. Bartos was still employed with Respondent, telling Complainant during his interview that Respondent would not hire Complainant because he was a former whistleblower. *Compare* Tr. at 38 *with* Tr. at 46-47. Such seeming contradictions further eroded Complainant's credibility as a witness.

⁵¹ Complainant bases this argument from "concessions" in Respondent's Pre-Hearing Statement. Such a statement is not evidence, and Complainant's argument therefore need not be addressed.

whistleblower-employee brings a suit against his current or former employer, alleging that it took adverse action against him due to some recent protected activity that involved the employer itself. Thus, temporal proximity supplies an inference of knowledge and causation because the employer is intimately connected to its own business and would likely know of safety issues that a whistleblower-employee had raised either internally or with the FAA. Here, however, Complainant's protected activity is a "contemporaneous" whistleblowing claim against another air carrier—not Respondent. Compl. Br. at 11. As the subject of the whistleblower action against DIA was external to Respondent, its employees would not have known about it unless informed by some outside source. Such a transfer of information takes time, if it occurs at all. Therefore, a shorter time period between Complainant's protected activity and Respondent's adverse action *increases* the likelihood that Respondent would be ignorant of Complainant's whistleblower claims against DIA. For this reason, contemporaneous temporal proximity tends to disprove an inference that Respondent's employees knew of Complainant's whistleblowing activity at DIA.

The Tribunal finds Complainant's assertion that the "rumor mill" inherent in the "insular nature of the Pacific island communities" justifies an inference of Respondent's knowledge to be long on speculation and short on facts. *See* Compl. Br. at 12. Complainant maintains that it is implausible that Respondent would not know of the Complainant's whistleblower litigation in such an environment, but has provided no such evidence to support this contention. At best, he notes that Mr. Freeman acknowledged the small aviation community in Guam and Saipan and had heard rumors of some civil law issues concerning Complainant in the past. *See* Tr. at 114. But again, information takes time to flow, and Complainant has not shown that rumors of Complainant's contemporaneous whistleblower claim would have inevitably reached Respondent's decision-making employees by the time they opted not to hire Complainant. It is certainly plausible, but Complainant has failed to show by a preponderance of the evidence that the "rumor mill" in the Pacific island aviation community provided Respondent's decision-making employees with knowledge of his stayed whistleblower claim against a bankrupt carrier (DIA).

Complainant next argues that Respondent's knowledge of his whistleblower claim against DIA should be inferred from the business relationship between Respondent and DIA. This argument is unavailing. While the evidence suggests some sort of business relationship did exist between these two companies, the evidence is also clear that relationship soured by the end of 2014. *See* Tr. at 81. Complainant asserts that Respondent's lack of awareness of Complainant's protected activity at DIA is implausible because of the contemporaneous litigation between Respondent and DIA. This argument is also unpersuasive. The evidence concerning that litigation shows that Respondent and DIA had a contract dispute. *See* Tr. at 78-81; RX 1. There is no evidence that this contract litigation had anything to do with the allegations Complainant made against DIA concerning an aviation safety issue.⁵² Thus, there is

⁵² This is despite Complainant's speculation otherwise. *See* Tr. at 65. At the very most, there is reference to DIA "having mechanical problems with the aircraft and not flying the aircraft between Saipan and Hong Kong or China...." Tr. at 79. However, it is not an aviation safety violation to have mechanical problems on an aircraft. In fact, given this sentence, one could equally infer that DIA actually

no reason to conclude that the business relationship between DIA and Respondent, or their contract dispute, would have apprised Respondent's decision-making employees of Complainant's whistleblower claim.

Complainant also seizes upon Mr. Freeman's use of the term "baggage" in relation to Complainant's past. He argues that such language—and Mr. Freeman's failure to definitively explain what he meant when he used that term—indicates a reference to Complainant's protected activity against DIA. Compl. Br. at 15. The undersigned disagrees. Mr. Freeman credibly explained that his comments referred to some rumored civil problems that Complainant had on Saipan.⁵³ Tr. at 114-15, 117. He further stated that he brought this to Complainant's attention as a "head's up" to apprise Complainant of something he needed to address. Tr. at 124. Complainant has provided no good reason to discount Mr. Freeman's testimony, and thus, this Tribunal accepts Mr. Freeman's assertion that he did not have knowledge of Complainant's whistleblower complaint against DIA at the time Respondent declined to hire Complainant.

Finally, Complainant asserts in his brief that Mr. Brown "corroborated" Complainant's version of events—that Complainant disclosed his whistleblowing activities at DIA to Respondent's interviewers on December 16, 2016. Compl. Br. at 6, 16. As explained in footnote 30, *supra*, the undersigned disagrees. Mr. Brown consistently denied that Complainant's specific whistleblowing activities at DIA came up during the interview, or that he ever had knowledge of Complainant's whistleblower claim at the time Respondent was evaluating Complainant's application. Tr. at 141-42, 154, 158, 161. Only in response to a long, complex, and somewhat confusing question from Complainant on cross-examination did Mr. Brown agree that Complainant "[brought] that up" at the interview. Tr. at 159. The byzantine nature of the question posed makes it difficult, if not impossible, to discern what assertions were affirmed by Mr. Brown's nonspecific response. And in fact, just a few questions later on redirect, Mr. Brown explicitly stated that Complainant's whistleblowing activities at did not come up at the interview, "either amongst us or even in the talk after." Tr. at 161. Accordingly, Mr. Brown's testimony furnishes no ground upon which this Tribunal could conclude that Respondent's decision makers knew of Complainant's protected activity when they opted not to hire him.

For all these reasons, the Tribunal finds that Complainant has not shown, by a preponderance of the evidence, that Respondent's decisionmakers knew of his whistleblower case against DIA at the time they declined to hire him.

was complying with FAA regulations by not flying its aircraft because of mechanical problems. *See* 14 C.F.R. §§ 121.153(a)(2) and 91.7(a).

⁵³ Mr. Brown had similarly testified to (and informed Mr. Ferguson about) Complainant's other aviation incidents and reputed "character issues." Tr. at 139-40.

c. Whether Protected Activity Contributed to Respondent's Adverse Action

As Complainant has failed to establish Respondent's knowledge of his protected activity, his claim must fail. Nevertheless, the undersigned notes that Respondent's employees provided credible explanations for their decision not to hire Complainant.

After Complainant's first interview, Mr. Bartos and Mr. Freeman both agreed that the interview was negative. They had concerns about Complainant's Crew Resource Management skills and that he would not fit into Respondent's pilot group. Mr. Freeman thought Complainant displayed a little bit of arrogance and wondered why he was not flying for a major airline with his credentials. Tr. at 108-09.

Similarly, Mr. Ferguson testified that Complainant's phone interview did not go well. Complainant seemed "extremely emotional" on the phone, and Complainant's personality struck Mr. Ferguson as imbalanced, which led him to a "resounding rejection" of Complainant for the position. Tr. at 86, 89. According to Mr. Ferguson, at the end of Complainant's December 15, 2016 interview, the Respondent's participants all concluded that Complainant's personality was not a very good fit for their company. Tr. at 89-90.

Mr. Brown also recalled that Complainant's December 15, 2016 interview did not go well. Tr. at 140-41. He testified that Respondent's Chief Pilot, Mr. Yoder, interviewed Complainant separately and did not feel like Complainant would be a good addition to Respondent's pilot group. Tr. at 141. Mr. Yoder told Mr. Brown and Mr. Ferguson that that Complainant would not work well with others in the cockpit or be a good fit for any airline based on his CRM and personality. Tr. at 93, 141. Mr. Freeman also agreed that Mr. Yoder had no interest in hiring Complainant.⁵⁴ Tr. at 111-13.

There is no good reason to doubt the veracity of these testimonies. Thus, the Tribunal credits the testimonies of Mr. Ferguson, Mr. Freeman, and Mr. Brown, and finds that Respondent's non-hire of Complainant was unrelated to his contemporaneous whistleblower claim against DIA.

Complainant notes that Mr. Ferguson testified he relied heavily on the recommendation from Mr. Brown (Tr. at 83), but asserts that Mr. Brown actually testified that he was supportive of Complainant's candidacy for the position. Compl. Br. at 18-22. That is not completely accurate. While Mr. Brown did express during the hearing that he would not have a problem with Complainant's hire (Tr. at 160) and had been "hoping that things might work out" for Complainant (Tr. at 140), Mr. Brown testified that he *told* Mr. Ferguson that he had advised his former employer to "exercise caution" when considering Complainant for employment, based on

⁵⁴ While evidence of Mr. Yoder's opinion is hearsay, it is unrefuted. The Tribunal finds it noteworthy that the chief pilot made this recommendation. Given Mr. Ferguson's representations about group decisions, the undersigned finds it credible that a senior company manager with a small pilot cadre would not hire a pilot without the chief pilot's buy-in.

certain negative things he had heard about Complainant from the aviation community.⁵⁵ Tr. at 139-40. And Mr. Ferguson testified that he considered what Mr. Brown had told him about Complainant's previous work history at two airlines other than DIA. Tr. at 85-86. Thus, the Tribunal finds Mr. Ferguson and Mr. Brown's testimonies to be consistent and credible.

In sum, the Tribunal finds that Complainant has failed to establish that Respondent knew of his whistleblower suit against DIA or that its decisionmakers declined to hire him on that basis.

5. Conclusion: Complainant's *Prima Facie* Case

Complainant and Respondent are subject to the Act. Complainant's AIR 21 proceeding against DIA was protected activity. Respondent's failure to hire an otherwise qualified pilot was an adverse action. However, Complainant has failed to establish that his protected activity was a contributing factor in Respondent's decision not to hire him. Thus, Complainant's complaint fails and this Tribunal must dismiss it.

V. CONCLUSION

Although Complainant and Respondent are subject to the Act and Complainant suffered an adverse action, he has failed to establish that his protected activity was a contributing factor to Respondent's adverse action. Thus, Complainant is not entitled to relief under AIR 21.

VI. ORDER

For the reasons stated above, Complainant's complaint is hereby DISMISSED with prejudice.

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

⁵⁵ Though Mr. Brown did not go into detail about what he told Mr. Ferguson about Complainant, he testified that he recounted "what had happened" while at Freedom Air. Tr. at 140. These events included his negative hiring recommendation to a supervisor based on "some of [Complainant's] character issues that had been reported to [Mr. Brown] and that [he] had seen, and had later even heard about." Tr. at 139. Complainant responded to Freedom Air's decision not to hire him with a failed age discrimination suit, which Mr. Brown also likely relayed to Mr. Ferguson. Tr. at 139-140.

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) and (b).