



**Issue Date: 19 June 2019**

CASE NO.: 2018-AIR-00044

*In the Matter of:*

**AZIZ AITYAHIA,**  
*Complainant,*

vs.

**MESA AIRLINES**  
*Respondent,*

APPEARANCES:

CHRIS PITTARD, Esq.,  
For the Complainant

STEPHANIE QUINCY, Esq.,  
For Respondent

Before Christopher Larsen  
Administrative Law Judge

**DECISION AND ORDER DENYING COMPLAINT**

This matter was brought by Aziz Aityahia (“Complainant” or “Mr. Aityahia”) against Mesa Airlines (“Respondent”) under the whistleblower provision of the Wendell F. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21” or “the Act”). The Act, 49 U.S.C.S. § 42121, and the regulations promulgated thereunder, 29 C.F.R. Part 1979, prohibit an air carrier from discriminating against an employee who reports air carrier safety concerns.

**I. PROCEDURAL BACKGROUND**

On December 12, 2017, Mr. Aityahia filed an online whistleblower complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”). (CX 5.) On August 3, 2018, OSHA dismissed the complaint, and Complainant timely requested a hearing on the matter. On February 13, 2019, Respond-

ent submitted its Response to Charge of Retaliation,<sup>1</sup> and on February 15, 2019, Complainant submitted his Pre-Hearing Statement. I held the hearing in this matter in Phoenix, Arizona, on February 27, 2019. Mr. Aityahia and his counsel, Chris Pittard; Respondent's counsel, Stephanie Quincy; Respondent's Chief Pilot, Captain Alvin Isaacs; and Respondent's in-house counsel, Andrew Granger, all appeared. I gave the parties a full and fair opportunity to present evidence and argument. I admitted Claimant's Exhibits ("CX") 1-11 and Respondent's Exhibit ("RX") 1-2. After the hearing, the parties submitted post-hearing briefs.<sup>2</sup> The findings and conclusions which follow are based on a complete review of the entire record, applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

## II. ISSUES

1. Whether Mr. Aityahia engaged in activity protected by AIR 21;
2. Whether Mr. Aityahia suffered an adverse personnel action(s);
3. If so, whether Mr. Aityahia's protected activity was a contributing factor in the adverse personnel action(s);
4. Whether Respondent would have taken the same adverse personnel action irrespective of Mr. Aityahia's protected activity; and,
5. The damages, if any, to which Mr. Aityahia is entitled.

## III. EVIDENCE OF RECORD

### 1. Employment History

Mr. Aityahia is a licensed pilot. (Hearing Transcript, "HT," p.12.) He served as a pilot for Respondent Mesa Airlines from 2008 to 2009, when he was furloughed. (RX 2, p. 79.) In March, 2013, Respondent recalled him from that furlough in accordance with the requirements of its collective bargaining agreement. *Id.* To resume his position as a pilot, Mr. Aityahia had to complete a recertification process, including a training program consisting of ten different lessons. *Id.* at 8. He failed to pass the required training, and Respondent terminated him in May, 2013. *Id.* at 22. He has not flown a commercial aviation vehicle since 2009. *Id.* at 67.

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<sup>1</sup> This filing serves as Respondent's Pre-hearing Statement.

<sup>2</sup> Mr. Aityahia, who was represented by counsel, requested permission "to add to the closing argument already submitted by [his] attorney." On June 12, 2019, I issued an Order Striking Request for Additional Briefing.

## 2. The Recertification Course

Federal Aviation Administration (“FAA”) regulations require a recertification course for pilots returning from a furlough. (HT, p. 13.) It includes ground school and simulator training. *Id.* at 78. The FAA is “just up the street” from Respondent, and is “constantly in the simulators and at the training center.” *Id.* at 95. The FAA approves, and monitors, Respondent’s recertification training program. *Id.* The training is not intended to teach someone how to fly an airplane, but rather instructs pilots on how to handle a particular aircraft. In Mr. Aityahia’s case, the training was for a Canadair Regional Jet. *Id.* at 93. Mr. Aityahia began the recertification process with approximately nine other pilots. *Id.* at 54. He successfully passed the ground portion of the training. *Id.* at 16. But on three different attempts at simulator training “number 4,” he received an unsatisfactory rating. (RX 2, p. 8.)

On April 2, 2013, he received his first unsatisfactory rating on the simulator training with the stated reason being “lack of situational awareness.” (HT, p. 17.) On the training debrief form, Mr. Aityahia explained he performed unsatisfactorily because he had the flu and experienced stress. *Id.* He further indicated his performance was affected by “an outside influence” and “scheduling, hotel or transportation problems.” (CX 11, p. 40.) Mr. Aityahia received another unsatisfactory rating on his second attempt at the simulator test on April 29, 2013. (HT, p. 17.) He testified he received no remedial training between the simulator training sessions on April 2, 2013, and April 29, 2013. *Id.* at 18. On the debrief form, Mr. Aityahia again indicted his performance was affected by scheduling, poor accommodations, and the “outside influence” of stress from the death of a colleague. (CX 11, p. 42); (HT, p. 20.) Mr. Aityahia’s third attempt occurred the next day, April 30, and he received another unsatisfactory rating. (HT, p. 21.)

The unsatisfactory ratings for Mr. Aityahia’s simulator tests were because of his “lack of situational awareness.” *Id.* at 17. Mr. Aityahia understands the term “situational awareness” to mean “the ability to perceive the world around you.” *Id.* at 23. He testified fatigue, stress, and emotions could impact a pilot’s situational awareness. *Id.* at 24. Capt. Isaacs, the Chief Pilot for Mesa Airlines, testified “situational awareness is a variety of situations that a person prioritizes and applies for the safety of the airplane.” *Id.* at 82. At the arbitration hearing one of Mr. Aityahia’s instructors stated “situational awareness/positional awareness is huge when you’re flying an airplane, especially a jet airplane that’s going this fast,” and Mr. Aityahia “is lost in the aircraft and cannot keep up with what’s going on in the cockpit.” (RX 2, p. 213.)

Mr. Aityahia asserts he failed because of both the conditions under which he took the simulator trainings and a lack of remedial training by Respondent. He testified the instructor for one of the simulations was unsure as to whether Mr.

Aityahia or the other trainee caused the crash. (HT, p. 69.) He also contends the procedure which caused the crash was not supposed to be part of the lesson and was wrongly added by the instructor. *Id.* But Capt. Isaacs testified such a procedure is typically part of the syllabus and is designed to test “alertness.” *Id.* at 80. When asked whether Mesa Airlines has a remedial training program to help pilots who have a deficiency in a particular area, Capt. Isaacs responded remedial training would consist of re-doing the simulator training. *Id.* at 85. The remedial simulator training would be the same as the first time, but the instructors would focus on the pilot’s deficiencies. *Id.* at 85-86.

### 3. Termination on May 10, 2013

The Director of Training and two Captains at Mesa reviewed Mr. Aityahia’s training documentation, and concluded “he lacked necessary positional and situational awareness to safely operate the aircraft and that additional training would not resolve such basic, fundamental and potentially fatal errors.” (CX 2, p. 9.) The Training Department recommended Mr. Aityahia’s training be discontinued. *Id.* On May 10, 2013, Capt. Isaacs wrote a letter to Mr. Aityahia summarizing the training review findings, and informing him of his termination. (CX 1.) In the letter, Capt. Isaacs detailed each of the three incidents in which Mr. Aityahia received an unsatisfactory rating on the simulator trainings. He further reminded Mr. Aityahia that after each incident he was advised on the areas where he needed to improve, and “indicated on the debriefing form that [he] agreed with the results of the training event.” (CX 1.) The company terminated Mr. Aityahia because “during each training event [he] exhibited a lack of situational awareness that led to the errors which resulted in the unsatisfactory rating.” *Id.* A handwritten note indicates Mr. Aityahia refused to sign the termination letter. *Id.*

Mr. Isaacs testified the decision to terminate Mr. Aityahia had nothing to do with any safety complaints, and noted pilots who fail recertification often have excuses. (HT, p. 97.) He further testified that in the time he was Chief Pilot Mesa had never rehired an individual who failed a simulator training three times, and “they would not be rehirable.” *Id.* at 92.

### 3. Alleged Complaints

Mr. Aityahia contends he engaged in protected activity in both 2013 and 2017. He contends he first told David Hatch, the pilot in charge of the Training Department, about issues with the training in 2013 after he completed the ground portion, and before he began the simulator training. (HT, p. 14.) He testified “there were many issues that surfaced at that time,” but only specifically recalled reporting “the fact that the manual that they provided in [his] case missed... at least one chapter or a few chapters missing,” and “the final examination had at least a dozen questions, inverted questions that didn’t have a reason to be [sic].” *Id.* at 15. He was

unaware of any action taken by Respondent to address the reported issues. *Id.* at 16. Capt. Isaacs had no knowledge of any complaints made by Mr. Aityahia to Mr. Hatch during the training period. *Id.* at 80.

On May 1, 2013, after he had already failed the simulator three times, Mr. Aityahia met with Capt. Isaacs and Mr. Hatch. *Id.* at 23. He alleges he brought up “issues of training concerns” at the meeting, which they did not address. *Id.* at 22. Capt. Isaacs testified he could not recall whether Mr. Aityahia complained about the training in the meeting on May 1, 2013. *Id.* at 82. Mr. Aityahia also testified he raised concerns about the training at his termination meeting on May 10, 2013, with management officials, including Mr. Hatch, Capt. Isaacs, and the head of human resources. *Id.* at 23. He did not elaborate on what aspect of the training he complained about, simply stating he raised concerns “about the training.” *Id.* He also stated he made a formal complaint to Mike Ferwerda, the Vice President of Operations, during the grievance process in July, 2013. *Id.* at 28. Mr. Aityahia did not describe whether the complaints made to Mr. Ferwerda were oral or written, and failed to offer any specific detail, instead generally stating he “raised those concerns.” *Id.* at 27. Finally, Mr. Aityahia alleges he made complaints about the training to Capt. Isaacs and the union in either late in November or in December, 2013. *Id.* at 28. He admitted that before his termination in 2013 he never made a written complaint, and he raised no complaints with the FAA until 2017. *Id.* at 51.

#### 4. FAA Regulations

Mr. Aityahia testified he received no training in between the simulator tests. *Id.* at 18. He testified FAA regulations require remedial training. *Id.* at 26. He submitted into evidence a print-out of portions of the electronic code for 14 C.F.R. Part 121, which governs the Operating Requirements of Air Carriers and Commercial Operators. (CX 8.) Specifically, he included Sections 401, 403, and 413-415. *Id.* I reviewed the entirety of the regulations provided, but discuss only those portions of the regulations which could be potentially relevant in this matter.

Under 14 C.F.R. § 121.401, entitled “Training Program: General,” air carriers must “implement a training program” and “obtain initial and final FAA approval of the training program.” *See id.* § 121.401(a)(1). The carrier must provide “appropriate training material, examinations, forms, instructions, and procedures for use in conducting the training and flight checks, and simulator training courses permitted.” *Id.* § 121.401(a)(3). Under 14 C.F.R. § 121.415, entitled “Crewmember and dispatcher training program requirements,” certificate holders are required to have programs providing ground training and flight training. Each training program “must include a process to provide for regular analysis of individual pilot performance to identify pilots with performance deficiencies during training and checking,” and “include methods for remedial training and tracking of pilots identified in

the analysis.” *Id.* § 121.415(h)-(i). The statutory compliance date for the required analysis and remedial training program was March 12, 2019. *See id.* § 121.415(j).

Mr. Aityahia also submitted FAA Advisory Circular 121-39 which addresses “Air Carrier Pilot Remedial Training and Tracking Program.” (CX 9.) The advisory was issued on December 30, 2014, and “presents guidelines for developing and implementing remedial training and tracking of pilots” in accordance with 14 C.F.R. Section 121.415. *Id.* In its “Background” section, the Circular lists two separate airplane crashes, one in December 2003, resulting in significant damage to the plane, and one in February 2009, resulting in 50 fatalities. *Id.* at 1. Investigations following the accidents revealed the pilots at fault had demonstrated performance deficiencies before the accidents. *Id.* In response to these accidents, the FAA recommended air carriers provide additional training to flight crew members with failures or deficiencies in their performance record. *Id.* at 2. The final rule requires air carriers “identify pilots with performance deficiencies during training,” and establish a program by March 12, 2019, which “include methods for remedial training and tracking of the pilots identified by the analysis process.” *Id.* at 4. Remedial training may include “additional ground and flight training, additional line-oriented flight training, repeat of all flight training modules, or a combination.” *Id.* at 4.

## 5. The Arbitration

On May 16, 2013, Mr. Aityahia filed a grievance with Respondent through his union, the Airline Pilots Association. On July 10, 2013, Respondent held a hearing presided over by Respondent’s Vice President of Operations, Michael Ferwerda. (CX 2, p.11) On July 15, 2013, Respondent issued its written decision denying the grievance, which Mr. Aityahia appealed to the System Board of Adjustment (“the Board.”) *Id.*

On December 3-4, 2013, Mr. Aityahia arbitrated his grievance in front of the Board to determine if Respondent had just cause to terminate his employment. *Id.* at 2. Mr. Aityahia sought reinstatement and the opportunity to continue with training. Airline Pilot Association’s Senior Labor Relations Counsel, John B. Dean, represented Mr. Aityahia at the arbitration. Respondent argued it had just cause to terminate Mr. Aityahia, and any procedural errors occurring in the process of termination were harmless. *Id.* The Union argued Respondent failed to conduct contractually-required Training Review Boards (“TRB”) each time Mr. Aityahia failed the simulator training and also failed to provide notice of a termination meeting as required in the collective bargaining agreement. *Id.* at 13. Specifically, a provision in the collective bargaining agreement requires a pilot who fails “any one training, validation or checking event” be given the opportunity to meet with a TRB within three days. *Id.* at 3. The TRB should consist of the pilot’s instructor, the Chief Instructor, the Director of Training, the Chief Pilot, and the designated Safety Committee Representative. *Id.* The TRB makes a recommendation regarding additional

training. On behalf of Mr. Aityahia, the Union contended these procedural requirements are required to provide pilots with fundamental fairness and due process, and Respondent's violations warranted Mr. Aityahia's reinstatement. *Id.* at 13.

The Opinion of Chairman Dana Edward Eischen ("Opinion") and Award of the Board ("Award") were issued on October 30, 2014.<sup>3</sup> *Id.* at 20. The System Board of Adjustment found Respondent violated the procedural provision in the collective bargaining agreement requiring TRBs, and awarded Mr. Aityahia backpay and benefits on those grounds. *Id.* at 19. Despite Respondent's procedural violations the Board found Respondent had just cause to terminate Mr. Aityahia's employment because of his performance deficiencies. It found "the Employer persuasively demonstrated that its termination of the Grievant was justified on the grounds of passenger/crew member safety." *Id.* The Chairman was not reserved in his decision to deny reinstatement, stating Respondent "made out a colorable case that arbitral reinstatement of this Grievant might well constitute a violation of public policy." *Id.* at 18.

The Chairman detailed how Mr. Aityahia's position was that "the training provided him was inadequate and that he had no responsibility for his consistently poor performance." *Id.* at 11. But the Chairman found "no persuasive showing" that any of Mr. Aityahia's training conditions, including his scheduling, materials, instructors, and partners, differed significantly from the conditions under which the other nine pilots all successfully completed the training. *Id.* at 15. According to the

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<sup>3</sup> Complainant directs a significant portion of his argument in his "Objections to the Secretary of Labor Findings" to the issue of the "fairness" and "completion" of the arbitration. Further, in its dismissal of Mr. Aityahia's case, OSHA deferred to the System Board of Adjustment's arbitration decision, stating the "outcome of the proceedings were neither palpably wrong nor repugnant to the purpose of policy of the AIR21." (CX 6.) I review the matter before me *de novo*, and thus I need not address the proffered reasons for OSHA's dismissal. But for the sake of clarity I feel compelled to clarify the role of the prior arbitration in the current proceeding.

The System Board of Adjustment's arbitration decision is not binding in this proceeding. The causes of action for an AIR 21 remedy and an arbitration remedy under a collective bargaining agreement are different and wholly independent. *Lucia v. American Airlines, Inc.*, ARB Nos. 10-014, 015, 016, ALJ Nos. 2009-AIR-017, 016, 015 (ARB Sept. 2011)(finding error in the ALJ's interpretation of the Act to preclude arbitration under a collective bargaining agreement because of the administrative whistleblower proceeding). The distinctly separate nature of the statutory and contractual rights at issue is not made less separate because they concern some or all of the same facts. *See id.* at 16. While not binding or preclusive, arbitration decisions can be used as evidence to support or rebut a party's argument. *See Duprey v. Florida Power & Light Co.*, ARB No. 00-070; ALJ No. 2000-ERA-00005 (Feb. 2003)(upholding the ALJ's evidentiary ruling admitting an arbitration decision into evidence because it was relevant to the employer's policy on absenteeism). In this matter the arbitration transcript and decision are part of the evidentiary record, and where relevant can be used to lend support to or rebut arguments. But this is an entirely separate proceeding, and any finding or conclusion in the arbitration decision is not controlling. My role is not to address the validity of the arbitration decision. The System Board of Adjustment's task was to interpret and enforce the parties' collective bargaining agreement, while my task is to determine if Mr. Aityahia was retaliated against under AIR21.

Chairman Mr. Aityahia's performance "was evaluated by three different instructors and was reviewed by several high level management officials, including the director of Training, the chief pilot, and the vice president of Operations, all who came to the same conclusion that [he] lacked situation awareness and was too much of a safety risk to continue his employment with the company." *Id.* at 16. The Chairman concluded, "when each of grievant's excuses is examined, they fail to mitigate or justify his unsatisfactory results in the simulator." *Id.* He further asserted "reinstatement [was] not appropriate because the egregious conduct that warranted termination [was] particularly inimical to the type of employment involved." *Id.* at 19.

On May 25, 2015, Mr. Aityahia filed an extensive request for the Chairman to revise the final decision, which the Chairman did not grant. (CX 11.)

## 6. Complaint to the FAA

In August, 2017, Mr. Aityahia made a complaint with the FAA alleging his termination in May, 2013, was improper and asserting he received inadequate training during the recertification process. (HT, p. 28.) Mr. Aityahia did not introduce into evidence the actual complaint filed with the FAA. But he did provide an email from the FAA whistleblower protection program coordinator, Al Westrom, which states Mr. Aityahia had "filed a Whistleblower Protection Program Complaint with the FAA," and directs Mr. Aityahia to provide basic details of his allegations for an intake analysis. (CX 3.) There is no indication in the record as to whether Mr. Aityahia provided the requested details, or whether the FAA investigated the complaint.

## 7. Failure to Rehire

After filing the complaint with the FAA, Mr. Aityahia sent an email to Respondent's human resources email account, informing them of his decision to file a complaint with the FAA. (CX 3.) The email asserted his complaint was "supported by Advisory Circular No 120-81, as it relates to inadequate training requirements and falsification of records." *Id.* He closed his email with the statement "I am available to discuss re-instatement to the First Officer position at your earliest convenience." *Id.*

He then updated his application with Respondent online, and sent an email inquiring about its status. (HT, p. 29.) On November 27, 2017, Mesa Airlines Flight Operations Recruitment sent Mr. Aityahia an email stating they appreciated his interest in a First Officer position, but the "human resources department has noted that you are ineligible for rehire." (CX 3.) Mr. Aityahia testified the first time he became aware he was ineligible for rehire with Respondent was upon receipt of this email. (HT, p. 30.)

### III. ANALYSIS

#### The Legal Standard and Burdens of Proof

It is a violation of AIR21 “for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee” because the employee has engaged in protected activity. 29 C.F.R. § 1979.102(b).

Under the Act a complainant engages in protected activity if he:

- (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 [49 USCS §§ 40101 et seq.] 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 [49 USCS §§ 40101 et seq.] 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.S § 42121(a).

There is a two-pronged burden-shifting framework applicable to a whistleblower claim under AIR21. 42 U.S.C § 42121(b). The complainant has the initial burden of satisfying prong one of the two-part test. *Id.* To satisfy prong one he must demonstrate, by a preponderance of the evidence, that: (1) he engaged in protected activity; (2) employer had knowledge of the protected activity; (3) he suffered an adverse personnel action; (4) and, his protected activity was a contributing factor in the adverse action. *Powers v. Union Pacific Railroad Co.*, ARB No 13-034, ALJ No. 2010-FRS-30, slip op. at 10-11 (ARB Mar. 20, 2015)(en banc); *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR -11, slip op. at 6 (ARB June 29, 2007). If the complainant cannot demonstrate each of the four elements, then his case is unsuccessful, and the employer prevails. If the complainant demonstrates all four elements, then the burden shifts to the employer to show, by clear and convincing evidence, that it would have taken the same adverse personnel

action notwithstanding the protected activity. *Cain v. BNSF Railway Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 3 (ARB Sep. 18, 2014).

### a. Complainant's Prima Facie Case

#### 1. Protected Activities

Protected activities under AIR 21 include: providing to the employer or (with knowledge of the employer) the Federal Government “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . .” 49 U.S.C.A. § 42121(a)(1); *see also* 29 C.F.R. § 1979.102. The complaints may be oral or in writing, but must be specific in relation to a given practice, condition, directive or event. *See Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-00021 (ARB Mar. 14, 2008); *but see Occhione v. PSA Airlines, Inc.*, ARB No. 15-090, ALJ No. 2011-AIR-12 (ARB July 26, 2017). Though the complainant need not prove an actual violation, the complainant's belief that a violation occurred must be objectively reasonable. *See Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014 (ARB Sept. 30, 2009). A reasonable belief has both objective and subjective components. *Hukman v. U.S. Airways, Inc.*, ARB No. 15-054, ALJ No. 2015-AIR-3 (ARB July 13, 2017). To prove subjective belief, a complainant must prove he actually “believed that the conduct he complained of constituted a violation of relevant law.” *Id.* at 4-5. To determine whether a subjective belief is objectively reasonable, one assesses a complainant's belief taking into account “the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.*

Mr. Aityahia contends he engaged in numerous instances of protected activity. First, he asserts he complained about the ground portion of the training to David Hatch, the pilot in charge of Mesa's Training Department. (HT, p. 14.) Mr. Aityahia's alleged complaints to Mr. Hatch included missing portions of a training manual and improper questions on an examination. *Id.* at 15. The occurrence of the complaints is uncontroverted.<sup>4</sup> At issue is whether Mr. Aityahia has demonstrated the alleged complaints constitute protected activity. In his exhibits Mr. Aityahia provided a copy of a regulation requiring an air carrier provide “appropriate training material, examinations, forms, instructions, and procedures for use in conducting the training and flight checks, and simulator training courses permitted.” (CX 8); 14 C.F.R. § 121.401(a)(3). Mr. Aityahia did not testify he had a belief a violation of the regulation occurred. He did not describe the content of the manual overall, and could not recall which chapter of the manual was missing. He also failed to provide specifics as to the questions he found unfair on the examination. (HT, p. 37.) Based on the evidence presented to the court it is possible the manual had nothing

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<sup>4</sup> Respondent's Chief Pilot, Alvin Isaacs, testified he was unaware of any complaints made by Mr. Aityahia to Mr. Hatch during the training period, but Capt. Isaac's lack of knowledge of the complaints does not establish Mr. Aityahia did not make them. (HT, p. 80.)

whatsoever to do with air carrier safety, and that the training materials provided to him were “appropriate” under the regulation. Similarly, Mr. Aityahia’s failure to describe or provide the questions on the test which he alleges were unfair makes it impossible to determine if the examination was “appropriate” under the regulation. While the complainant need not prove an actual violation, the complainant's belief that a violation occurred must be reasonable. *See Douglas v. Skywest Air-lines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014 (ARB Sept. 30, 2009). Mr. Aityahia’s unspecific testimony is insufficient to demonstrate he had an either objectively or subjectively reasonable belief the training materials provided were “inappropriate” under the FAA regulations. Thus, I find Mr. Aityahia has failed to demonstrate his alleged complaints to Mr. Hatch constituted protected activity under AIR 21.

Mr. Aityahia contends his statements on the training debrief forms constitute protected activity. On the debrief form for the April 2, 2013, simulator test Mr. Aityahia checked the “yes” box to indicate his performance was affected by “an outside influence” and “scheduling, hotel or transportation problems.” (CX 11, p. 40.) On the debrief forms for both the April 29, 2013, and April 30, 2013, simulator trainings Mr. Aityahia again indicated his performance was affected by “scheduling, hotel, or transportation problems” and “outside influences.” *Id.* at 41-42. At the hearing he explained the outside influence was stress from the death of a colleague. (HT, p. 20.) While the debrief forms reflect Mr. Aityahia’s disapproval of the personal circumstances under which he had to take the training, I find the complaints consist of personal excuses rather than training issues concerning air carrier safety. Mr. Aityahia does not point to any FAA regulations or other federal law regulating the type of schedule, hotel, or transportation that must be provided to a pilot completing a recertification course, and provides no evidence to demonstrate he had a reasonable belief such conditions constituted a violation.

Next, Mr. Aityahia alleges he complained about the training in several meetings with Respondent. He contends he engaged in protected activity on May 1, 2013, when he met with Capt. Isaacs and Mr. Hatch. (HT, p. 23.) He alleges he raised “issues of training concerns” at the meeting, which they did not address. (HT, p. 22.) Similarly, Mr. Aityahia testified he raised concerns about the training at his termination meeting on May 10, 2013, with management officials, including Mr. Hatch, Capt. Isaacs, and the head of human resources. (HT, p. 23.) Mr. Aityahia also testified he made a formal complaint to Mike Ferwerda, the Vice President of Operations during the collective bargaining agreement grievance process in July, 2013. (HT, p. 28.) He contends he made additional complaints about the training to Capt. Isaacs and the union in either late November or December, 2013. (HT, p. 28.)

Mr. Aityahia offers no evidence of these complaints other than his own testimony. For all of the alleged complaints, Mr. Aityahia failed to elaborate on what aspect of the training he complained about, simply stating he raised concerns “about the training” or reported “issues of training concerns.” (HT, p. 22-23.) This testimo-

nial evidence is insufficient. Complainant has the burden to demonstrate he engaged in protected activity, and the general testimony that he raised concerns “about the training” fails to carry that burden. His concerns could have been of a personal nature, *i.e.* that he did not get enough sleep or felt sick on the particular days he did poorly in the trainings. I could continue to speculate as to the substance of Mr. Aityahia’s alleged complaints, but ultimately it is his burden to introduce evidence of their nature. His reporting of “issues of training concerns” lacks specificity, and fails to appraise this court of whether the complaints were protected activity. Thus, I find Mr. Aityahia did not demonstrate his general complaints of training concerns to Respondents were protected activity.

Next, I must address whether Mr. Aityahia’s participation in the arbitration hearing, specifically his testimony regarding alleged inadequate training, was protected activity. At his two-day arbitration hearing on December 3-4, 2014, Mr. Aityahia raised concerns regarding his training, including that “the training provided him was inadequate.” (HT, p. 55.) He testified at the arbitration that upon failing the simulator training he hoped an instructor would “provide [him] with a detailed feedback,” and that “any additional training is always welcome.” (RX 2, p. 373.) The arbitrator found Mr. Aityahia’s concerns with the training “fail[ed] to mitigate or justify his unsatisfactory results in the simulator.” (HT, p. 58.) To argue his testimony at the arbitration constituted protected activity Mr. Aityahia points to the regulations on remedial training requiring air carriers’ training programs provide “methods for remedial training.” 14 C.F.R. § 121.415(h)-(i). But there is no evidence to suggest a violation of the remedial training regulation occurred, and Mr. Aityahia has failed to demonstrate he had a reasonable belief a violation occurred. First, the regulation does not require air carriers comply with the remedial training regulation until March, 2019, and thus Respondent could not have violated it in 2013. Besides, terminating a pilot with performance deficiencies is clearly consistent with the safety-focused purpose of the regulation.<sup>5</sup> Thus, I find Mr. Aityahia has not demonstrated he had a reasonable belief a violation occurred, and his testimony concerning requests for additional training at the arbitration hearing was not protected activity.

Finally, Mr. Aityahia contends he engaged in protected activity when he filed a complaint with the FAA in 2017. (HT, p. 28.) He asserts the complaint included

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<sup>5</sup> FAA Advisory Circular 121-39, which presents guidelines for developing the remedial training required by 14 C.F.R. Section 121.415, makes plain the purpose of the regulation is to ensure air safety, not to provide pilots second, or in this case fourth, chances. (CX 9.) The “Background” portion of the Circular lists two separate airplane crash incidents, in which the pilots at fault had performance deficiencies before the accidents, and explains the purpose of the additional training is aimed at avoiding these incidents in the future. Undoubtedly, removing the pilot from the air entirely, rather than engaging him in remedial training with the hope his performance will improve, goes one step further to ensure air safety. Thus, the remedial training requirement applies only in situations where the carrier wishes to continue to employ the pilot, and would not apply in the case of Mr. Aityahia.

allegations of his wrongful termination in May, 2013, and inadequate training provided by Respondent. *Id.* Even if Mr. Aityahia's purpose in filing a complaint with the FAA approximately four years after the alleged safety violation was less than genuine, under the Act a complainant engages in protected activity if he "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." 49 U.S.C.S § 42121(a)(1). His complaint provided information to the federal government relating to an alleged violation of an FAA regulation, and thus I find Mr. Aityahia engaged in protected activity when he filed his complaint with the FAA.

Based on the above analysis, I find the only protected activity Mr. Aityahia engaged in was his filing a complaint with the FAA in 2017.

## 2. Knowledge

The record demonstrates Respondent knew of Mr. Aityahia's protected activity of filing a complaint with the FAA. On August 17, 2017, Mr. Aityahia sent an email to Respondent's human resources email account, informing them of his decision to file a complaint with the FAA. (CX 3.) In the email he asserted his complaint was "supported by Advisory Circular No 120-81, as it relates to inadequate training requirements and falsification of records." *Id.*

## 3. Adverse Action

Mr. Aityahia alleges Respondent took an adverse action against him by failing to rehire him when he applied for a position in September, 2017. Mr. Aityahia updated his application with Respondent online, and sent an email inquiring about its status. (HT, p. 29.) On November 27, 2017, Complainant received an email from Mesa Airlines Flight Operations Recruitment stating they appreciated his interest in a First Officer position, but the "human resources department has noted that you are ineligible for rehire." (CX 3.) The backdrop to his ineligibility for rehire includes his training failures and termination in 2013. But any actions Respondent took against Mr. Aityahia in 2013 are no longer actionable.<sup>6</sup> While discrete adverse ac-

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<sup>6</sup> The limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. *See Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 6 (ARB Jan. 30, 2004). The ninety-day limitation period for filing an AIR 21 complaint is not jurisdictional and may, therefore, be subject to equitable tolling. *Ferguson v. Boeing*, ARB No. 04-084; ALJ No. 2004-AIR-5, slip op. at 19 (Dec. 29, 2005). The ARB has recognized three situations in which it will accept an untimely petition: 1) if the respondent has actively misled the complainant concerning his cause of action, 2) if the complainant has been in some extraordinary way prevented from asserting his rights, or 3) if the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 4 (ARB Aug. 31, 2005). Claimant bears the burden of justifying the application of equitable modifica-

tions occurring outside statutory filing period are not actionable, they may be used as background evidence in support of a timely claim. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002).

Where a complainant alleges that the adverse action was the employer's refusal to hire him, the complainant must establish:

- 1) he applied and was qualified for a job for which the employer was seeking applicants;
- 2) despite his qualifications, he was rejected and
- 3) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*See Hasan v. Sargent & Lundy*, ARB No. 03-030, ALJ No. 2000-ERA-007, slip op. at 3 (ARB July 30, 2004); *Levi v. Anheuser Busch Co.*, ARB No. 08-086, ALJ No. 2008-SOX-028 (Sept. 25, 2009) (holding failure to rehire was not adverse action where complainant failed to provide evidence of job vacancy for which he was qualified and for which he properly applied).

Mr. Aityahia has failed to establish the requisite elements to prove Respondent's decision to not hire him was an adverse action. He presented no evidence Respondent was seeking applicants for first officer positions at the time he submitted his application. But even if Respondent was hiring, the evidence in the record confirms Mr. Aityahia was not qualified for the position because of his prior extensive training failures.

His training failures in 2013 resulted in his termination, and also rendered him ineligible for rehire. Mr. Aityahia's performance "was evaluated by three different instructors and was reviewed by several high level management officials, including the Director of Training, the chief pilot, and the vice president of Operations, all who came to the same conclusion that [he] lacked situation awareness and was too much of a safety risk to continue his employment with the company." (CX 2, p. 16.) According to Capt. Isaacs, the Chief Pilot for Mesa, no individual who failed a simulator training three times has ever been rehired. (HT, p. 92.) He further asserted "they would not be rehirable." *Id.* He explained Mr. Aityahia will never be eligible for rehire "because of his past performance." *Id.* at 100. The Chairman's statements in the arbitration decision upholding Mr. Aityahia's termination also support a finding that he was not qualified for a pilot position. The Chairman found "the Employer persuasively demonstrated that its termination of the Grievant was

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tion principles. *Ferguson*, ARB No. 04-084, slip op. at 20. Here, the limitations period had run long before Mr. Aityahia filed his complaint, and Mr. Aityahia has offered no justification for the application of equitable tolling.

justified on the grounds of passenger/crew member safety.” (CX 2.) The Chairman further opined the Respondent “made out a colorable case that arbitral reinstatement of this Grievant might well constitute a violation of public policy.” *Id.* at 18. The Chairman’s position that reinstatement “might well constitute a violation of public policy” gives significant weight to the legitimacy of Respondent’s designation of Mr. Aityahia as ineligible for rehire. Mr. Aityahia’s training performance in 2013 was so poor it warranted his termination to ensure passenger/crew member safety, and he did not provide any evidence to indicate his performance skills had drastically improved in the four years since his termination. On the contrary, the record reflects that he has not flown a commercial aviation vehicle since 2009. (HT, p. 67.) Without any evidence to prove Mr. Aityahia is qualified for a first officer position, and with an abundance of evidence demonstrating his poor performance is a safety risk, I must defer to the Chief Pilot’s assertion that a person with such poor performance is not rehireable.

If the complainant cannot demonstrate each of the required elements then his case is unsuccessful, and the employer prevails. *See Cain*, ARB No. 13-006, slip op. at 3. Mr. Aityahia has shown no adverse action, and therefore I need not address the remaining element of contribution. Mr. Aityahia’s claim is denied.

But even assuming, for the sake of thoroughness, that Respondent’s decision not to rehire Mr. Aityahia was an adverse action, and his protected activity contributed to that decision, Mr. Aityahia’s claim would still fail. Respondent strongly proved with clear and convincing evidence it would have taken the same employment action regardless of the protected activity.

#### b. Respondent’s Rebuttal

Respondent has satisfied its burden of rebuttal by showing through clear and convincing evidence it would have taken the same employment action irrespective of any protected activity. “Clear and convincing evidence is evidence that suggests a fact is ‘highly probable’ and ‘immediately tilts’ the evidentiary scales in one direction.” *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074 (Apr. 25, 2014). Respondent’s burden is to show that it “would have” terminated the Complainant for the incident. *Douglas v. Skywest Airlines*, ARB No. 08-070, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009.) Whistleblowers should be held to no greater accountability and disciplined evenhandedly, but should be no less accountable than others for their infractions or oversights. *Daniel v. Timco Aviation Serv., Inc.*, ALJ No. 2002-AIR-026, slip op. at 25 (June 11, 2003).

Respondent’s proffered reason for refusing to rehire Mr. Aityahia is his “dramatic and dangerous failures and inability to complete required recertification process.” (Prehearing Statement, p. 3.) Respondent has demonstrated through clear and convincing evidence that its proffered reason, Mr. Aityahia’s training failures, is the actual and only reason for the decision. While Mr. Aityahia “should be held to

no greater accountability” than a pilot who failed the trainings and did not file a complaint with the FAA, he is also “no less accountable than others for their infractions.” *See Daniel*, ALJ No. 2002-AIR-026, slip op. at 25. If a pilot with Mr. Aityahia’s performance record would not be generally be rehired by Respondent, then his filing of a complaint with the FAA does not shield him from the same outcome.

The evidence discussed above in evaluating whether Mr. Aityahia was qualified for the position is also relevant in determining whether Respondent would have declined to rehire him even if he had not made a complaint to the FAA. The unrefuted testimony of Chief Pilot Isaacs establishes Respondent would not rehire a pilot who failed the simulator training three times. A pilot who cannot pass lesson four despite being offered three attempts to do so “is not capable of continuing on and basically taking control over command of an aircraft that needs to be controlled.” (HT, p. 93.) Capt. Isaacs testified he would not want to be on an aircraft operated by Mr. Aityahia because he “can’t control, can’t operate the aircraft.” *Id.* at 94. Such a statement by the Chief Pilot establishes it would be imprudent and dangerous for Respondent to rehire Mr. Aityahia. The Chairman’s statements in the arbitration decision that “arbitral reinstatement of this Grievant might well constitute a violation of public policy,” and “reinstatement [was] not appropriate because the egregious conduct that warranted termination [was] particularly inimical to the type of employment involved,” further confirm that not rehiring Mr. Aityahia was a prudent business decision. (CX 2, p. 19.) A respondent does not need to have any reason to fire an employee, let alone a legitimate business reason. *Powers*, ARB No. 13-034, slip op. at 17. Here, concern for the safety of passengers and crew provided Respondent with a more than legitimate business reason to not rehire Mr. Aityahia.

The record is devoid of any evidence demonstrating Respondent retaliated against Mr. Aityahia for filing his complaint with the FAA. On the contrary, the record establishes by clear and convincing evidence Respondent did not rehire Mr. Aityahia because of his extensive prior performance failures, and would not have absent the complaint to the FAA. Hence, even if Mr. Aityahia had succeeded in establishing his prima facie case, his claim would still be denied.

#### IV. ORDER

The claim of Aziz Aityahia for relief under AIR 21 is hereby DENIED.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge

**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](mailto: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).