

**U.S. Department of Labor**

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**Issue Date: 26 March 2019**

Case No.: 2018-AIR-00024

In the Matter of

**BRITANNY ANTONELLIS**

Complainant

v.

**REPUBLIC AIRWAYS**

Respondent

Appearances:

Jason L. Jones, Esq.  
For the Claimant

David J. Carr, Esq.  
Paul C. Sweeney, Esq.  
For the Employer

Before: **SCOTT R. MORRIS**  
Administrative Law Judge

**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 May 29, 2017. In its February 16, 2018 letter, OSHA made the following determinations: Complainant timely filed her complaint; Respondent and Complainant are covered by the Act; Complainant engaged in protected activity by submitting an Aviation Safety Action Program (“ASAP”) report regarding event that occurred on February 8, 2017; and

that Respondent terminated Complainant's employment. However, OSHA found that Respondent had demonstrated by clear and convincing evidence that Complainant's protected activity was not a contributing factor in the adverse employment action. Accordingly, OSHA dismissed the complaint. On March 16, 2018, Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

Subsequently, on March 26, 2018, this matter was assigned to the undersigned. On March 28, 2018, this Tribunal issued the Notice of Assignment and Conference Call. Complainant responded to the Notice of Assignment by letter dated April 13, 2018, and attached her statement, which was originally transmitted as part of her complaint to OSHA. This Tribunal issued a Notice of Hearing and Pre-Hearing Order on April 18, 2018, and set the hearing for August 27-29, 2018 in Cherry Hill, New Jersey.

On July 10, 2018, Respondent filed a Motion for Summary Decision, relying in large part on requests for admissions being deemed admitted. On July 24, 2018, Complainant filed her response. In this response, Complainant's counsel acknowledged an oversight on his part and immediately submitted responses to Respondent's requests for admissions. On July 25, 2018, the Tribunal held a teleconference to address Complainant's failure to respond to Respondent's First Request for Admission and ultimately granted additional time to respond. In light of this ruling, on July 27, 2018, the Tribunal ordered the parties to readdress Employer's Motion for Summary Decision. On August 3, 2018, Respondent submitted a revised brief in support of its Motion for Summary Decision. Complainant submitted a response on August 9, 2018. On August 16, 2018, the Tribunal issued an Order Denying Respondent's Motion for Summary Decision.

Respondent submitted its prehearing statement and proposed exhibit list on August 16, 2017. Complainant submitted her prehearing statement and proposed exhibit list on August 17, 2018.

This Tribunal held a hearing in this matter in Cherry Hill, New Jersey from August 27 to August 29, 2018.<sup>1</sup> Complainant, who was represented by counsel, and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Respondent's Exhibits ("RX") 1 – RX 42 and RX 44-47,<sup>2</sup> and Complainant's Exhibits ("CX") 1 – CX 21.<sup>3</sup> Both parties made brief opening statements.<sup>4</sup>

Complainant submitted her closing brief on November 16, 2018. Respondent submitted its closing brief on January 18, 2019. Complainant submitted her reply brief on February 1, 2019.

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

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<sup>1</sup> The Transcript of the August 27 to August 29, 2018 proceedings will hereafter be identified as "Tr."

<sup>2</sup> Tr. at 24, 139, 154, 278, 284, 322, 324, 329, 331, and 406.

<sup>3</sup> Tr. at 24 and 405.

<sup>4</sup> Tr. at 8-20.

## II. FACTUAL BACKGROUND AND EVIDENCE

### A. Stipulated Facts

While there were no written stipulations submitted to the Tribunal, the parties agreed that Complainant and Respondent are subject to the Act. Tr. at 7. Additionally, the parties agreed that Respondent's termination of Complainant was an adverse action. Tr. at 21. Accordingly, this Tribunal finds that Complainant has established these two elements of her *prima facie* case. However, Complainant also maintained that Respondent's report of Complainant as refusing a drug test and her selection for the drug test itself were adverse actions. Those alleged adverse actions will be addressed further below.

### B. Summary of Testimonial Evidence

#### *Overview of the Events at Issue*

This case involves a former First Officer for Respondent. On a trip that began February 8, 2017, her flight experienced maintenance and safety issues. On February 20, 2017, Complainant submitted an Aviation Safety Action Program ("ASAP") report concerning the February 9, 2017 flight. Two days later, on February 22, 2017, Complainant was selected for a random drug test.<sup>5</sup> The parties' accounts diverge over the events that day. Complainant did go

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<sup>5</sup> By way of background, the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §§ 45101-45107, requires drug and alcohol testing of safety-sensitive transportation employees in aviation and other transportation industries. Under the Act's authority, the Department of Transportation (DOT) promulgated regulations requiring pre-employment, random, and post-accident drug and alcohol tests for employees throughout the transportation industry. 49 C.F.R. Part 40. The FAA promulgated drug and alcohol testing regulations specific to aviation. In 2007, the drug and alcohol testing regulations applicable to air carriers operating under Part 121 were found in Part 121, Appendices I (drug testing program) and J (alcohol misuse prevention program). Section 121.457 required each certificate holder or operator operating under Part 121 to test each of its employees who performed a safety-sensitive function for certain drugs in accordance with the standards forth in Part 121, Appendix I. Air carriers operating under Part 121 also were required to test employees performing safety-sensitive functions for alcohol misuse in accordance with the standards set forth in Appendix J under Section 121.459(b). In 2009, the drug and alcohol testing regulations for Part 119 certificate holders were consolidated in a new 14 C.F.R. Part 120. 74 Fed. Reg. 22,563 (May 14, 2009). The requirements of § 121.457(a) are now set forth in the Federal Aviation Regulations (FAR) at 14 C.F.R. § 120.35. Consequently, under the current drug and alcohol regulations, 14 C.F.R. § 120.105, the following duties are considered safety sensitive functions:

- (a) Flight crewmember duties.
- (b) Flight attendant duties.
- (c) Flight instruction duties.
- (d) Aircraft dispatcher duties.
- (e) Aircraft maintenance and preventive maintenance duties.
- (f) Ground security coordinator duties.
- (g) Aviation screening duties.

to the clinic for the test, but did not submit a urine sample. As a result, on March 7, 2017, Respondent terminated Complainant's employment for refusing to take the FAA required drug test. The FAA subsequently revoked Complainant's medical certificate and pilot's license.<sup>6</sup>

### *Complainant's Aviation Background*<sup>7</sup>

Complainant enlisted in the Army Reserves in 2008. After joining ROTC and earning her degree, she was commissioned in 2010 in the Army's Adjutant General's Corp but branch transferred to aviation for flight school in January 2011. She graduated from flight school in August 2012 for helicopters and then attended the Army's fixed-wing multi-engine course where she received her fixed-wing certification on the C-12 King Air.<sup>8</sup> In 2014 she transferred to the New York Army National Guard where she continues to serve.<sup>9</sup> She received her G-200 rating in October 2015. She has about 1510 hours total time, about 800 hours being in jets.<sup>10</sup> At the time of the events at issue she held an Airline Transport Pilot<sup>11</sup> and commercial rotary instrument certificates. However, following the FAA's revocation of her prior certificates, she currently has been able to re-obtain a commercial certificate. Tr. at 85-90.

Respondent offered Complainant employment on October 21, 2015 (RX 8; Tr. at 136), but she did not come on board until November, 3, 2015. At that time Complainant underwent a pre-employment drug test on November 3, 2015; the results were negative. Tr. at 90.-91. During her indoctrination training ("INDOC"), she does not recall training specific to Respondent's drug misuse prevention policy or the shy bladder procedure.<sup>12</sup> Tr. at 91. However, she acknowledged that during in-processing she was informed about Respondent's policies and procedures, and one of the databases referenced contained frequently asked questions related to Respondent's drug and alcohol policy. Tr. at 138-40; *see* RX 38. Complainant also understood that during her employment with Respondent that it was her duty to follow Respondent's policies, including its drug and alcohol policy. Tr. at 140; RX 3.

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(h) Air traffic control duties.

<sup>6</sup> The Tribunal took official notice of FAA Order 2150.3B. Tr. at 20. The FAA enforcement guidance provides for revocation of all airman certificates should the airman either fail a drug test or refuse to take a random drug test.

<sup>7</sup> *See also* RX 41 at 161-63.

<sup>8</sup> *See* RX 6.

<sup>9</sup> In the military, Complainant has served as a platoon leader, executive officer and battalion assistant S-3. She acknowledged being aware of the Army's drug and alcohol program, in particular Army Regulation 600-85. She has also participated in the urinalysis program while in the military. Tr. at 187-88.

<sup>10</sup> Because of her military service, Complainant was able to obtain employment at Republic as a pilot with less than 1500 flight hours. Tr. at 135. According to Respondent's Vice President of Labor and Employee Relations, hiring of pilots industry wide has become increasing more difficult once the FAA raised the minimum number of flight hours required from 250 to 1,500 hours. There is an exception to the 1500 flight-hours requirement for any military pilot; they are only required to have 750 hours flight time. RX 47 at 7; *see* 14 C.F.R. § 61.167.

<sup>11</sup> She obtained her ATP on December 18, 2015. Tr. at 93.

<sup>12</sup> When asked, Complainant did not recall seeking a video about what would happen if one was unable to complete the drug test or could not provide a specimen. Tr. at 142-45, 170.

Complainant agreed that a pilot is a safety-sensitive position, where she would be subject to quarterly random drug tests. Tr. at 141. She also admitted that she testified at her National Transportation Safety Board (“NTSB”) hearing that she understood that a refusal to test for random drugs would result in termination of her employment. Tr. at 146; *see* RX 41 at 167. However, prior to February 23, 2017 (the day after this incident) she never recalled seeing a policy, or reviewing information about, shy bladder procedures. Tr. at 172-73.

#### *Overview of Respondent’s Training about its Drug and Alcohol Program*

Respondent’s drug and alcohol program is addressed during an employee’s orientation. Tr. at 273. RX 5 is an extract of eLearn questions and answers that all Respondent employees have access to. Tr. at 274. Back in 2015, there was only one eLearn video on the drug and alcohol policy and RX 40 is a copy of that video. Tr. at 280. RX 3 is Respondent’s drug and alcohol policy and it tells employees the odds of them being selected for a random drug test. Tr. at 284.

According to Ms. Kinkade, Respondent’s human resource manager of compliance,<sup>13</sup> during the course of Complainant’s orientation with Respondent, Complainant should have received training specific to the shy bladder procedures, but Ms. Kinkade would not provide documents or specific dates on when that occurred. RX 46 at 35-37.

According to Respondent’s Chief Pilot, pilots become aware of the issues of drugs and alcohol in aviation as early as during private pilot training. Tr. at 402. Commercial pilots learn about the air carrier’s drug and alcohol program during indoctrination training. Tr. at 403.

#### *The February 7, 2017 Incident and Subsequent ASAP*

Complainant worked for Respondent on February 8, 2017 and recalled that trip. She and the captain of the aircraft flew Newark to San Antonio. Tr. at 93. As she was doing her pre-flight checks, Captain Gajdosik<sup>14</sup> arrived and apologized for being late. The captain relayed to Complainant that he had just bought a car in Miami and had just driven it to Spokane before this trip. During this flight Captain Gajdosik also mentioned that he was trying to get back for his commute home from Newark to Spokane the following day, but that his commute left 40 minutes prior to their expected arrival time there. Complainant tried to explain to him that that was not very realistic. Tr. at 94-95.

The following day was the second part of the trip. The first leg was a hop from San Antonio to Houston. In conducting the pre-flight inspection of the aircraft for the trip departing Houston, a ramp agent stopped Complainant and informed her that there was a crack in the service door that he was reporting. In addition, during Complainant’s walk-around of the aircraft she noticed that one of the brake lines had severe friction marks with metal shavings all over the landing gear. Tr. at 96. She told the captain of the discrepancies and he went to check on them himself. He came back into the cockpit and told Complainant that he was going to call

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<sup>13</sup> RX 46 at 5.

<sup>14</sup> The Captain’s full name does not appear to be in the record.

maintenance as he agreed with her about the discrepancies. However, about ten minutes later, the captain returned to the cockpit and claimed that he sent a picture of the deficiency to maintenance and they had approved the flight to go based on the picture. That was not the normal procedure and Complainant never saw him write the discrepancies up in the logbook, so she did not believe him. She explained that she would be uncomfortable taking the aircraft without maintenance coming and actually looking at the aircraft. Tr. at 97. This frustrated the captain and he started asking the flight attendants if they were also commuting because now they were all going to miss their flights. At one point Complainant ended up going into the aft galley to try to call Professional Standards, which is a branch of the union where one can try to mitigate what happened rather than get Respondent's management involved. However, she received no response so she sent them a text message. Tr. at 97-98.

Once maintenance arrived the captain asked Complainant to go out and greet them. She asked if the discrepancies were in the logbook and the captain said no. Tr. at 100. She acquiesced and went out to maintenance. From about 20 feet away from the landing gear, maintenance could see the problem and asked for the logbook. Tr. at 100. When the captain handed it to maintenance person, he asked the captain why it was not written up in the logbook. The captain said that he did not know what to write. The mechanic told the captain to write metal shavings in the logbook and he did. Tr. at 100, 177. The mechanics then repaired the discrepancy. Tr. at 177. At this point, Operations management was there because the delay had been so long. Complainant later received a telephone call from the assistant chief pilot who told her that she did the right thing and that if she did not want to continue the flight she did not have to. Tr. at 103.

The flight departed Houston three hours later than the scheduled departure time. During this flight the captain tried to talk to Complainant about what happened, but she did not want to talk to him and muted her intercom system except for normal procedure call outs. They arrived in Fayetteville and thereafter flew back to Newark. Tr. at 104.

The next time Complainant heard about the events of that trip was February 17, 2017 when she received a call from Anthony Campo, who is part of the ASAP program. Mr. Campo relayed to her that he was concerned with the ASAPs he received concerning the flight from Houston to Fayetteville, and that the ASAPs from the captain and flight attendants did not match so he asked her what happened. After talking with Mr. Campo, he suggested Complainant submit an ASAP report. She had reservations because management was already aware of the matter and so she was concerned that she would not have protections under ASAP because it would not be sole-sourced information.<sup>15</sup> Tr. at 107-08. However, Complainant did file an ASAP report about the incident on February 20, 2017. Tr. at 109. CX 20 contains the notes she drafted in Word and later copied and pasted into her ASAP report. Tr. at 110.

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<sup>15</sup> Complainant believed that, under the ASAP program, there are only protections when one reports safety issues that could result in any type of FAA violation, but that these protections did not apply once management has knowledge of the issues. Tr. at 108.

### *Respondent's ASAP Program*

The ASAP program is based upon a memorandum of understanding between the Union, Respondent and the FAA.<sup>16</sup> Tr. at 194, 220-21; *see* RX 9. The ASAP is a confidential program; it is not an anonymous program. Tr. at 218. An ASAP report is an electronic form that goes into a secure database that is submitted by one of their associates. Respondent encourages employees to make ASAP reports. Tr. at 194.

The Event Review Committee's ("ERC") role is to obtain and investigate any identifying safety issues through the ASAP program. The ERC consists of a representative from the Union, Respondent, and the FAA, and they meet weekly. Tr. at 193. Everyone on the ERC signs a letter of confidentiality. The ERC rules include, if an ASAP report is identified where they need to gather additional information, that information is provided to the ERC. If the matter requires contact with a union member, the ERC union representative will reach out and request participation or counsel of the union member. Tr. at 218.

Respondent's ERC receives 50-60 ASAP reports a week. Tr. at 193. Once an ASAP report is submitted it goes into the secure system,<sup>17</sup> the personal identifying information on that submittal is redacted as is the submitter's name, the flight number and date.<sup>18</sup> It then goes to the ERC who has the option to accept or reject the report based upon the program's memorandum of understanding. To reject a report, it must concern criminal activity, substance abuse, controlled substance, alcohol, or intentional falsification: the "big five." Tr. at 194, 204. The incentive to participate in the program is, so long as an employee does not meet one of the five exclusions above, no adverse action can be taken against that employee that submits an ASAP. Tr. at 222. The ASAP program plays no role in disciplining or terminating Respondent's pilots. Tr. at 195

Ms. Jennifer Hoagland,<sup>19</sup> the ASAP manager, is familiar with the ASAP reports filed concerning the February 8, 2017 incident. The flight attendant filed her ASAP report on

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<sup>16</sup> *See* FAA Advisory Circular 120-66B, available at [https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC120-66B.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC120-66B.pdf) and FAA Order 8000.82, a copy of which is at RX 10.

Ms. Hoagland later explained that Respondent actually has four ASAP programs, each has its own signed MOU and there is an Event Review Committee ("ERC") for each group: pilots, mechanics, dispatchers and in-flight. Tr. at 213-14.

<sup>17</sup> According to Ms. Hoagland, "just a very limited amount of us [] have access to that." Tr. at 193. Only four people within the company have access to the un-redacted information: the director of safety, herself, and her two safety analysts. Tr. at 195-96, 201-03. Only one of her safety analysts actually performs the redactions and processes the reports. Tr. at 204.

<sup>18</sup> Tr. at 216.

<sup>19</sup> Ms. Jennifer Hoagland has worked for Respondent ten years, the last nine years as the ASAP manager. Tr. at 191. Her duties are to collect data from pilots, mechanics, dispatchers, and in-flight looking for systemic issues and provide that data back to the company, put corrective action measures in place based on the Event Review Committee ("ERC"). Tr. at 191-92. Employees training about the ASAP during their initial training. Tr. at 229.

February 10, 2017. The captain also filed an ASAP report about the February 8, 2017 incident.<sup>20</sup> Tr. at 210. Complainant filed her ASAP report on February 20, 2017. Tr. at 197-98. The Union ERC representative was Mr. Campo, the person that asked Complainant to file her ASAP report. Tr. at 198. This was done at the request of all of the ERC members. Tr. at 211. The ASAP department has nothing to do with drug testing of Respondent's pilots, had nothing to do with Complainant's selection for a drug test in the first quarter of 2017, and had no involvement in the decision to terminate Complainant's employment. Tr. at 199-201. Prior to Complainant filing her AIR 21 complaint, Ms. Hoagland had no knowledge of Complainant being selected for a random drug test. Tr. at 201, 216.

### *Respondent's Selection Process for Drug and Alcohol Screening*

Respondent hired a third party provider, FirstLab, to administer its drug testing as required by 14 C.F.R. Part 120 and 49 C.F.R. Part 40. It has no affiliation with Respondent. Tr. at 273. In the first quarter of 2017, Ms. Tracy Kinkade<sup>21</sup> pulled a list of safety-sensitive employees from the human resources information system and sent it to FirstLab to pull the names for random selection. RX 46 at 7.<sup>22</sup> RX 15 is FirstLab's explanation of their random generating process. The list Ms. Kinkade provided to FirstLab contained a couple thousand names. RX 46 at 11.

FirstLab generated a random list of employees for Respondent to test, RX 17.<sup>23</sup> Tr. at 232-33; *see also* RX 15. Respondent provided an initial list of all its safety-sensitive employees on an Excel spreadsheet via email. Tr. at 235, 237. RX 16 is the email where Tracy Kinkade had retrieved the safety-sensitive employees for the first quarter and sent it to FirstLab for their selection. Tr. at 286, 319-21; *see* RX 44. FirstLab had no involvement in the creation of the list that was sent by Republic to it. Tr. at 238. This is Respondent's only involvement on who can be selected for drug testing. Tr. at 235.

On January 10, 2017, Respondent provided FirstLab with a list of every employee that is covered under the DOT regulations and that is loaded into its random generator, and FirstLab produces the names to be used for the drug testing. Tr. at 233. Out of the list provided to FirstLab, FirstLab selected 350 to 400 people to be tested in the first quarter of 2017. Tr. at 287,

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<sup>20</sup> The transcript states "The captain submitted not the 10<sup>th</sup>." Tr. at 197. Given the totality of the evidence in this case, the Tribunal questions the accuracy of this portion of the transcript.

Additionally, following the Captain's submission, he received counselling from the ERC, but that was not disciplinary and HR had no involvement in that. Tr. at 219.

<sup>21</sup> Ms. Kinkade worked for Respondent for 16 years, her last position being the Human Resource Manager of Compliance and was a DER. RX 46 at 5. Her duties were to maintain compliance with the federal regulations under the DOT, FAA and TSA, which included Respondent's drug and alcohol program. RX 46 at 6.

<sup>22</sup> The Tribunal has not only considered the transcript of Ms. Kinkade's deposition (RX 46) but also watched the videotaped deposition during the hearing. *See* Tr. at 327-30.

<sup>23</sup> This information comes from the testimony of Ms. Regina Doural who is the general manager of compliance services at FSSolutions, formerly known as FirstLab. Her duties are to oversee all the compliance for the drug testing results, as well as the random list and anything dealing with the applicable state or federal regulations.

319-21; *see* RX 45. FirstLab published that list on its website that day<sup>24</sup> and Respondent accesses the list on January 11, 2017. Tr. at 234. The FirstLab provided list identifies the employees selected, what type of testing they are to be subjected to (alcohol, drug, or both), a field where the client can put data in to tell them where to find the selectees, and the dates they have to test within. Tr. at 240. Per the regulations, Respondent is required to test 25 percent of their covered employees for drugs for the year and ten percent for alcohol for the year. Tr. at 238; *see* 14 C.F.R. § 120.113(c)(3). Ms. Kristi Harasty<sup>25</sup> was the person that pulled the random selection after FirstLab had done the selection for Respondent. Tr. at 285.

As the Designated Employer Representative (“DER”), Ms. Harasty was the one that started to schedule Complainant’s test after FirstLab provided her name on January 11, 2017. Tr. at 288. FirstLab selected who Respondent could test, Ms. Harasty selected when the employee would test. Tr. at 289. Respondent started scheduling drug tests from the January 2017 provided list in January. Tr. at 310. Respondent had no involvement in FirstLab’s selection of Complainant for a random drug test. RX 46 at 14.

RX 19 is Ms. Harasty’s email notification to the base supervisor that those individuals need to be tested and provided them with the date, flight, time, their name, ID number and what position the employee holds. Tr. at 290. Complainant was originally scheduled to be tested on February 17, 2017, but she was unavailable. Tr. at 290; RX 20. The testing was to be rescheduled for February 21, 2017 but was changed again because the base supervisor was not going to be able to do the notification to send her for testing; so Complainant was rescheduled for February 22, 2017. Tr. at 291, 304; RX 21. Drug testing has to occur during a crewmember’s duty day. Tr. at 325.

#### *The February 22, 2017 Urinalysis Incident*

On February 22, 2017, Complainant had an early show at Newark that morning for a flight to Charlotte and return, arriving back in Newark about 11 a.m. After the passengers had deplaned, James Wilson<sup>26</sup> entered the flight deck and handed Complainant a drug test notification form and a packet with directions.<sup>27</sup> Tr. at 149, 249-51, 265-66. This was the first

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<sup>24</sup> *See* RX 46 at 13. From there the DER would access the report and started scheduling random tests for the first quarter immediately. *Id.* at 14.

<sup>25</sup> Ms. Harasty works for Respondent as a designated employer representative (“DER”). She started with Respondent in August 2016 as a drug and alcohol coordinator and became the sole DER in November 2016. Tr. at 313. She is in charge of keeping Respondent in compliance with the FAA drug and alcohol-testing program. Prior to working for Respondent she worked 17 years in flight operations for another air carrier and also worked for a third-party administrator that did DOT compliance work as well as drug and alcohol testing. Tr. at 272. While there she trained people to be DERs. Tr. at 314.

Ms. Harasty also testified that she had no involvement with Respondent’s ASAP program. Tr. at 293.

<sup>26</sup> Mr. Wilson is a flight attendant for Respondent. However, on February 22, 2017 he was serving as a company business person; a flight attendant pulled from the line to assist a supervisor with administrative duties. Tr. at 248.

<sup>27</sup> Mr. Wilson has received Complainant’s name as a selectee as early as February 3, 2017 (*see* Tr. at 248; RX 19) but due to scheduling Complainant was not actually notified to take the test until the morning of

notification Complainant had received from Respondent about being selected for a random drug test since her initial pre-employment testing. Tr. at 170. The map with directions had black and white photographs of signs on it and a narrative. Tr. at 111. Complainant is familiar with Newark, but not with the route that was presented in those directions. Tr. at 111. Mr. Wilson explained she had to go to P-6, meet the bus and to specifically tell the driver that she was going to the Medport Clinic. Tr. at 111-12 and 251; see RX 22. The Medport Clinic is about a mile or two from the terminal. Tr. at 266. At that time Complainant mentioned that she had a meeting with the FAA in Teterboro. Tr. at 266.<sup>28</sup> Almost immediately Complainant told Mr. Wilson that she was going to file an ASAP report. Tr. at 251, 257.

Complainant asked how long the shuttle would take because she really had to go to the bathroom. Mr. Wilson told her about 10 minutes, so she gathered her things and started to follow the directions to the terminal shuttle. She got onto the shuttle and told the driver that she needed to go to Medport building 340. However, the driver told her he could not take her there because the Port Authority had closed the gate. Tr. at 112.

Between the time Complainant departed for Medport and actually arrived a Medport, she made several calls to Respondent personnel. One of calls that Complainant made to find the testing facility was to Ms. Harasty, a DER. During this phone call Complainant mentioned that she had other things to do that day including an FAA appointment.<sup>29</sup> Tr. at 113, 154.

Ms. Harasty had a direct conversation with Complainant and heard two other conversations. Tr. at 291-92. She first received a call from Complainant around noon. Tr. at 298. In the conversation she had with Complainant, Complainant informed her that she had been dropped off in an area that was industrial and he was trying to get the location so she could get her to the clinic to get the testing complete. Tr. at 300. Ms. Kinkade was over her shoulder listening in because she was fairly new and Ms. Kinkade was making sure that she was following Respondent's procedures. Complainant mentioned five or six times that she had a meeting with the FAA that day. Tr. at 292. After ten to fifteen minutes (Tr. at 301) Ms. Kinkade assisted in the conversation<sup>30</sup> and during that conversation Ms. Kinkade warned Complainant about termination if she did not complete here test. Tr. at 293.

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February 22, 2017. At the time Mr. Wilson received that email, the redactions on RX 19 did not exist. Tr. at 265.

<sup>28</sup> Mr. Wilson initial said the FAA meeting was in Trenton (Tr. at 251), but on cross-examination changed his testimony that Complainant said her meeting was in Teterboro (Tr. at 261).

<sup>29</sup> Complainant testified that she spoke with Kristi Harasty and Tracy Kinkade, although at the time of the calls she did not know their names. Tr. at 150. She said that call occurred at 11:28 a.m. *Id.*

<sup>30</sup> Ms. Kinkade testified that, prior to this date, she did not even know who Complainant was. RX 46 at 16. Ms. Harasty's, a DER, cubicle was right outside her office and she could hear her having an elevated conversation with someone. Ms. Harasty put this person on hold and asked that Ms. Kinkade come to her desk and assist. Complainant was put on speakerphone. RX 46 at 16. Complainant was angry, speaking loudly saying that she had been dropped off at an unsafe location. Ms. Kinkade encouraged her to catch a taxi and expense it to her so that they could get her to the clinic. Complainant said that she was going to file an ASAP. RX 46 at 17. Complainant used the term ASAP. RX 46 at 42. Ms. Kinkade told her that was fine and could do all of that as long as they could get her to the clinic for the random test. RX 46 at 17. During this phone call, Ms. Kinkade does not know where Complainant was located. RX 46 at 45.

Once Complainant was notified that she was to take a drug test, Respondent has three hours to have that test completed so they needed Complainant to get to the clinic and get signed in to take the test. Tr. at 324.

Mr. Wilson testified that about 30 minutes after notifying Complainant of the test and providing her with written directions, he received a telephone call from her with Tracy Kinkade and Kristi Harasty on the phone because Complainant was lost.<sup>31</sup> Tr. at 252-53, 259-60. He was not able to help her. Complainant again stated that she had a meeting with the FAA. During that call she reported no health concerns. Tr. at 253.

After much difficulty and after walking about a mile,<sup>32</sup> she arrived at the clinic. Around 12:10 p.m.,<sup>33</sup> she was taken back and asked to provide a urine specimen. She went into the bathroom and started producing a specimen. The specimen she produced was over the third or fourth line of the cup. Complainant put the cup down to finish voiding but she could not void any more, but needed to.<sup>34</sup> She said she was in a lot of pain. She left the stall and eventually presented her specimen to the collector, who immediately said that Complainant had not produced a sufficient specimen and said that Complainant would have to produce another specimen.<sup>35</sup> Complainant explained that she did not believe that she should produce another specimen, was in a lot of pain, and could not go to the bathroom anymore. Complainant said she needed medical attention and could not use the bathroom. Tr. at 118.

At the request of a staff member, Dr. Jeffrey Witz,<sup>36</sup> the executive director at the Newark Medport, came in and asked Complainant what was going on.<sup>37</sup> Complainant reported that she had abdominal pain and needed to leave to go see her doctor, and that she had to walk 2 to 3 miles to get to the collection site. Tr. at 119 and 343. He replied that she would have to follow the shy bladder procedure, and would have to stay for 3 hours and drink 40 ounces of fluid to produce a 45-milliliter specimen. Tr. at 119; 155. She explained that she needed to go to the bathroom but could not and was in pain. Tr. at 119. Dr. Witz replied that she did not look like an emergency case to him and said that if she had an issue with it she needed to call her company. Tr. at 119-20. He also told Complainant that, if she cannot produce a specimen, she would be considered a refusal to test. Tr. at 120; 155, 157.

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According to Ms. Kinkade, after working for Respondent for 15 years, she did not even know what the ASAP program was and had no idea what Complainant meant by the use of the term ASAP. RX 46 at 32, 71, 73.

<sup>31</sup> Mr. Wilson recalled there being some mention of Complainant being near oil tanks or oil container tanks. Tr. at 268-70.

<sup>32</sup> See Tr. at 114-16.

<sup>33</sup> Tr. at 117.

<sup>34</sup> Tr. at 117.

<sup>35</sup> Tr. at 117-18; see Tr. at 343 and 351.

<sup>36</sup> Dr. Witz is a chiropractic physician. Tr. at 351. He has never served as an MRO. Tr. at 361. He also was not the specimen collector. Tr. at 343 and 351.

<sup>37</sup> The staff member told him that Complainant had given an insufficient specimen and when Complainant was instructed that she would have to sit and wait to give another specimen she started to get agitated and upset. Tr. at 343 and 353.

After Complainant asked why she could not leave, he instructed her on the protocols of specimen collection. If she left before giving a specimen or before waiting for the 3-hour time period, it was considered a refusal to test. Tr. at 343-44, 354, 360. The exchange went back and forth with Complainant explaining that she had a bad back and, if she was to stay, she would not be able to make an appointment with her primary doctor. Complainant mentioned that she was on diuretics and she was severely dehydrated. Dr. Witz he contacted Respondent's DER and Complainant was on the phone with them for a little while. Tr. at 344.

Complainant called the number for the DER again and one of the woman that she had spoken to early answered<sup>38</sup> and Complainant explained to her what happened and that she needed medical attention. Ms. Kinkade reminded her that she had previously told Ms. Harasty that she could not take the test because she had a meeting with the FAA. RX 46 at 19; Tr. at 121. Complainant reiterated her concern that she needed medical attention yet she could not produce a specimen. Ms. Kinkade explained to her the shy bladder procedures (RX 46 at 20-21),<sup>39</sup> but she did not ask Complainant if she understood what the shy bladder procedure required. RX 46 at 63; Tr. at 120. When asked if she was not allowed to seek medical attention, the lady on the phone said that she cannot tell her not to seek medical attention. Ms. Kinkade told Complainant that, if she did not produce a specimen, it would be considered a refusal to test. Tr. at 121, 155, 157. Ms. Kinkade did not give her permission to leave and not complete the random drug test. RX 46 at 22.

Dr. Witz also explained to Complainant that, after an insufficient quantity is given, the initial specimen is discarded and then the 3-hour time period begins where she could drink up to 40 ounces of water and then try to give a sufficient specimen. If after three hours, a sufficient specimen is not provided, it is considered a shy bladder situation,<sup>40</sup> it gets documented as such and then it gets sent to the Medical Review Officer ("MRO"). The MRO would work with her to determine if there is an actual medical reason why a sufficient sample cannot be provided. Tr. at 345, 360. This was explained to Complainant several times. Tr. at 345, 347. Ultimately, Complainant decided that she was a refusal either way and she was worried about risking not only her FAA medical but her military medical so she left the building. Tr. at 122.

After Complainant left, Dr. Witz's office contacted the DER (Ms. Kinkade) and let them know that Complainant left and they filled out the chain of custody form as a refusal to test and sent the form to Respondent via facsimile. Tr. at 348-49; RX 46 at 22-23; *see* RX 25. The two strips on the bottom of the form at RX 25 reflect that the Complainant's specimen was never sent. Tr. at 371. Once learning of this, Ms. Kinkade emailed RX 24 notifying personnel at Respondent that Complainant needed to be suspended as soon as possible and started

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<sup>38</sup> Complainant later learned that the person she spoke to was Ms. Tracy Kinkade. Tr. at 120-21.

<sup>39</sup> RX 36 explains Respondent's Shy Bladder procedures. RX 46 at 21.

<sup>40</sup> However, Dr. Witz stated that the shy bladder procedure does not apply here because Complainant left before the 3-hour period and it is considered a refusal to test; so they contacted the DER immediately and send the chain of custody form to them. Tr. at 346.

documenting the refusal.<sup>41</sup> RX 46 at 23-26, 40-41; *see* RX 25-26A. Ms. Kinkade also reported the refusal to test to the FAA and as part of that process provided them with a statement. RX 46 at 27; *see* RX 27.

### *Complainant's Actions on February 22, 2017 After Leaving Medport*

After leaving the building Complainant called her boyfriend. He picked Complainant up around 1:20 p.m. During the ride, Complainant called her doctor's office to see if she could get an appointment with him that day. Tr. at 122, 158. Complainant then had her boyfriend take her back to her apartment so she could change out of her uniform. Tr. at 122. After changing Complainant went back out, but she had not received a call back from her doctor. She was afraid that it would look suspicious if she did not show up for her FAA appointment, so she went to the FAA office.<sup>42</sup> The appointment was to have the restriction removed from her ATP certificate. Tr. at 123. Complainant signed in at the FAA office at 2:18 p.m. and signed out at 4:26 p.m. RX 33. While waiting to complete the paperwork at the FAA, she received a call from her doctor's office that he could not see her that day, and that she should go to the emergency room.<sup>43</sup> After receiving the paperwork from the FAA inspector, she went to the Morristown Medical Center emergency room. Complainant testified that she arrived there around 4:30 p.m. (Tr. at 124), however RX 34 notes a triage time of 5:09 p.m. At the Morristown Medical Center they inserted a catheter and ran a drug test from a urine specimen that they got from the catheter. Tr. at 125. Those results were negative. RX 34. Complainant later provided a copy of those results to Ms. Kinkade. RX 46 at 39.

While in the ER Complainant noticed that she had a voicemail from scheduling; they told her that she had been suspended. She contacted the union's counsel and explained the situation to him. He tried to see if the hospital could hold the urine to test it at the FAA standards, but he was told they could not hold it. Tr. at 125. However, the urine taken at Morristown tested negative. Tr. at 125-26; RX 34. Complainant left the hospital that night around 9 p.m. Tr. at 126.

### *Post February 22, 2017 Events Related to the Urinalysis*

On February 23, 2017, the union's attorney wanted her to take a DOT/FAA observed drug test. However she still had catheter in and that needed to be removed to do that. Tr. at 127. She was able to reach Dr. Michael Ingber, a urologist,<sup>44</sup> who agreed to see her that day and he

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<sup>41</sup> However, Ms. Kinkade testified that she had no involvement in disciplinary decisions. RX 46 at 6. She also testified that she had no knowledge of Complainant's February 20, 2017 ASAP report or its resolution. RX 46 at 32.

<sup>42</sup> *See also* Tr. at 158.

<sup>43</sup> However, on March 2, 2017 Complainant wrote to the FAA stating that her doctor called her back at 1539 hours and directed her to go to the ER. RX 42 at 6.

<sup>44</sup> Dr. Ingber is board certified in urology with a subspecialty in female pelvic medicine and reconstructive surgery. He also serves as an assistant clinical professor of urology at Cornell. Tr. at 44. He currently works for Garden State Urology in Morristown, NJ and runs the women's health division. Tr. at 43.

removed the catheter. Complainant arrived at Dr. Ingber's office on February 23, 2017, with a complaint of urinary retention, and he performed a physical assessment.<sup>45</sup> Tr. at 46, 52. At the time of her visit she already was catheterized. Tr. at 52; *see also* Tr. at 126. CX 1 are his notes of that visit. Tr. at 48. Dr. Ingber performed a "CMG" test which checks the patient's bladder capacity. His notes reflect that he was able to put 275 milliliters of saline solution into Complainant's bladder. Tr. at 55. Following this test, Dr. Ingber removed the catheter and told her to return in six weeks. Tr. at 53-54. Complainant was able to urinate normally after Dr. Ingber removed the catheter. Tr. at 54. His notes reflect that he suspected acute retention and sent a medical referral letter (CX 21) to her employer, per her request. Tr. at 55-56. CX 21 makes mention that Complainant had told him that when her catheter was initially placed, her bladder contained 700 milliliters.<sup>46</sup> Tr. at 57. To Dr. Ingber's knowledge, Complainant has not had any further problems with urinating since that visit. Tr. at 62.

Following that appointment Complainant went to Urgent Care in Morristown that did DOT/FAA drug tests and she did an observed test there. CX 2 is a copy of the custody control for that test which was negative. Tr. at 127.

Dr. Stephen Kracht<sup>47</sup> reviewed Complainant's custody control form (CX 2) for a test taken on February 23, 2017<sup>48</sup> and that was verified by his office on February 24, 2017. Tr. at 73. Complainant's urine was to be tested for the presence of the metabolites for use of marijuana, cocaine, phencyclidine, opiates, and amphetamines. Tr. at 74, 76. RX 34 reflects that the test was reported negative. Tr. at 78. Dr. Kracht did not know who requested that drug test. Tr. at 84.

#### *Subsequent Disciplinary Action by Respondent and the FAA*

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<sup>45</sup> Complainant also reported having chronic back pain, but she did not tell him that she had back pain that day. Tr. at 61-62. Dr. Ingber's notes reflect that Complainant reported using, among other medications, Mobic, which is a prescription pain medicine, oftentimes prescribed by orthopedic surgeons, back doctors, or pain doctors. Tr. at 63-64. Dr. Kracht, a former airman medical examiner, identified the drug's generic name is Meloxicam and is an anti-inflammatory prescription drug and would be required to be reported on Complainant's airman's medical application. Tr. at 83.

<sup>46</sup> Dr. Ingber later testified that most women when they have that much fluid in their bladder are quite uncomfortable. Tr. at 65-66.

<sup>47</sup> Dr. Kracht was trained in family practice before getting into occupational medicine. He has been a certified medical review officer ("MRO") since 1992. Tr. at 70-71. For details of an MRO's training and duties, *see generally*, 49 C.F.R. Part 40 and <https://www.transportation.gov/odapc/mro>. At one point he was an Airman Medical Examiner, but is not currently. Tr. at 82.

A MRO reviews drug test results that come from the laboratory that are non-negative; tests which are invalid or a positive test. Upon receipt of the result, a MRO contacts the donor to determine if there is a medical explanation for that result. If there is a medical reason, the result is reported as negative; if not, the result is reported as positive. Tr. at 71.

<sup>48</sup> At the time the specimen was taken, Dr. Kracht was in Kansas and the collection occurred in New Jersey. Tr. at 80-81. He has no firsthand knowledge of the chain of custody between the taking of the specimen and testing of the specimen. Tr. at 81.

Captain Gomez, Respondent's Chief Pilot,<sup>49</sup> first learned of Complainant's drug test refusal on February 22, 2017 when she received an email (RX 24) from Ms. Kinkade. Captain Gomez has no involvement in the drug testing of pilots; that is done by the compliance department.<sup>50</sup> Tr. at 376. Captain Gomez contacted the Vice President of Flight Operations and they had a discussion and made a decision to suspend Complainant with pay, pending the results of an investigation. Tr. at 378. Captain Gomez contacted the VP of flight operations because she does not make a sole decision on this issue,<sup>51</sup> she wanted to make him aware of the situation, and she was new having only been in the chief pilot position for about a week and she was still learning the ropes. Tr. at 379. Prior to this incident, Captain Gomez had had no involvement in terminating a pilot at Republic for a drug test refusal. Tr. at 396.

Ms. Rose Doria, Respondent's Vice President of Labor and Employee Relations,<sup>52</sup> first became aware of Complainant's refusal to test on February 22 when she received a telephone call from Ms. Kinkade and Ms. Harasty, and later received a couple of emails, concerning Complainant had refused to test, that it was a reportable matter to the FAA and that they needed to suspend Complainant from her flight duties.<sup>53</sup> RX 47 at 8-11 and 32. Dr. Witz, who is not Respondent's employee, first reported Complainant's drug testing refusal. RX 47 at 11. Thereafter, the chief pilot scheduled an Article 18 hearing to take place the following week. RX 47 at 12. Article 18 is the article from the collective bargaining agreement with the union that represents Respondent's pilots that requires an investigation prior to any disciplinary action. RX 47 at 12. That hearing was scheduled for March 6 or 7, 2017. RX 47 at 13. Ms. Doria did not attend that meeting. RX 47 at 16. RX 34 is a medical report Complainant's union counsel provided to Ms. Doria. RX 47 at 14. Complainant's union counsel offered this document to Ms. Doria to show that Complainant had gone for her own testing and that her testing results were negative. RX 47 at 45.

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<sup>49</sup> Captain Gomez started flying in 1996 and started flying commercially in 2000. She holds an ATP multi-engine certificate with type ratings in the Embraer 145, Embraer 170 and 190 series, a commercial pilot, single-engine land with instrument rating. She holds a CFI, but it is not current. She has about 13,000 total flight time, at least 11,000 hours being in jets. She has been Respondent's Chief Pilot since February 2017. Tr. at 374-76. Her responsibilities are to ensure that all pilots follow the policy and procedures set forth in Respondent's manual. She is also responsible for termination and disciplinary actions. Tr. at 376.

<sup>50</sup> Captain Gomez testified that, prior to February 22, 2017, she had no knowledge of Complainant or Complainant's selection for a random drug test the first quarter of 2017. Tr. at 376-77 and 388. She is not involved in the selection of individuals for random drug tests. Tr. at 377.

<sup>51</sup> However, Captain Gomez later testified that, at the time that she consulted with the VP of flight operations, she had the capacity to independently suspend Complainant for her position. Tr. at 395.

<sup>52</sup> Ms. Doria has worked for Respondent for five and one-half years. She is responsible for the labor relationships with all three of Respondent's labor unions and advises the employee group on all disciplinary and termination procedures. RX 47 at 5-6Tr. at 46-48. In her capacity, she has not provided training to Complainant. RX 47 at 30 and 51-52.

Ms. Doria testified by video deposition. In addition to considering the videotaped deposition transcript (RX 47), the Tribunal also observed the videotaped deposition during the hearing itself. *See* Tr. at 337-40 and 372.

<sup>53</sup> Ms. Doria also testified that she had no involvement in Complainant's selection for a random drug test on February 22, 2017. RX 47 at 8 and 31-32.

On March 6, 2017, Respondent conducted an Article 18 investigative hearing and came to the conclusion that Complainant refused to test. Tr. at 380-81. Present for the Article 18 investigative hearing was Ms. Doria, the former chief pilot, an employee relations manager, a union attorney for Complainant and the Complainant. Tr. at 381. At the conclusion of the investigation, they found that there was no reason why Respondent should not proceed with termination.<sup>54</sup> RX 47 at 17. On or about March 7, 2017, Captain Gomez, on behalf of Respondent, sent Complainant a termination of employment letter (RX 30) for her refusal to test.<sup>55</sup> Tr. at 128 and 382. Captain Gomez testified that she plays no roll in processing ASAPs at Respondent. Tr. at 385-86. Complainant's February 8, 2017 incident ASAP played no role in the decision to terminate her employment. Tr. at 386-87. And Captain Gomez is not on the ASAP committee. Tr. at 400.

After that termination of employment letter was issued, the union filed a grievance and Respondent agreed to settle the grievance where Respondent would reinstate Complainant pending the outcome of the FAA investigation into her refusal to test. RX 47 at 19-21; RX 31. Complainant was placed on leave pending the findings of the FAA investigation. RX 47 at 22.

The FAA revoked her ATP on April 27, 2017.<sup>56</sup> Tr. at 131, 165. In late April, early May 2017, Ms. Doria informed Ms. Gomez that the FAA had completed its investigation and they had revoked her license and medical certificate because of Complainant's refusal to test. Tr. at 383. Based on that information, Respondent made a final decision to terminate her employment and send a second termination of employment letter in May (RX 32) but it was dated March 7, 2017. Tr. at 384-85; RX 47 at 23. This letter indicated that her termination was effective May 11, 2017. Tr. at 130.

Complainant filed her AIR 21 complaint on May 29, 2017. Tr. at 131. Complainant believes that the timing of her termination was very strange in that she was selected for a drug test two days following submitting an ASAP that she was asked to submit, that she had no chance to provide medical records and she has no evidence that she was randomly selected for her drug test. Tr. at 131, 148

### III. ISSUES

#### 1. Did the Complainant engage in protected activity?

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<sup>54</sup> Ms. Doria also testified that Complainant's February 8, 2018 ASAP submission played no role in Complainant's selection for drug testing and she has no exposure to the ASAP process. She has never known what facts are contained in Complainant's ASAP report. RX 47 at 25-27. She had not even been aware that Complainant had filed an ASAP. RX 47 at 60.

<sup>55</sup> Ms. Doria approved the letter from Captain Gomez to Complainant terminating her employment. RX 47 at 17.

<sup>56</sup> Complainant objected to the FAA's revocation of her certificates. Consequently, a NTSB ALJ held a hearing in that matter and upheld the FAA's revocation action. Tr. at 165-66. Complainant's appeal of that Order is pending before the full board. For an overview of the FAA's policy guidance on its procedures for drug test refusals, *see* FAA Order 2150.3B. For the NTSB's procedures for emergency revocation actions, *see* 49 C.F.R. Part 821, subpart I. *See also* [https://www.nts.gov/legal/alj/Pages/process\\_faq.aspx](https://www.nts.gov/legal/alj/Pages/process_faq.aspx)

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

#### IV. CONCLUSIONS OF LAW

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

##### A. Credibility

In deciding the issues presented, this Tribunal 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 taken into account all relevant, probative, and available evidence and attempted to analyze and assess its cumulative impact on the record 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).

Moreover, based on the unique advantage of having heard the testimony firsthand, this Tribunal has observed the behavior, bearing, manner, and appearance of witnesses which have garnered impressions of the demeanor of those testifying. These observations and impressions also form part of the record evidence.

This Tribunal finds Complainant's assertions about her lack of knowledge about Respondent's drug testing program unconvincing.<sup>57</sup> From the very onset of training in both the military<sup>58</sup> and in aviation, one is informed of drug testing procedures. Beginning with private pilot training, one becomes aware of the hazards and regulations prohibiting the use of alcohol or drugs in aviation.<sup>59</sup> *See, e.g.*, 14 C.F.R. §§ 61.15, 91.17, 61.105(b)(1), 67.307(b). This training includes the refusal to submit to an alcohol or drug test.<sup>60</sup> 14 C.F.R. §§ 67.307(b)(3), *see also* § 61.16. Further, the requirement for random drug testing is implemented in any air carrier operation. *See* 14 C.F.R. Part 120. A refusal by the holder of a certificate issued under 14 C.F.R. Part 67 to submit to a drug or alcohol test required under 14 C.F.R. Part 120 is a specifically disqualifying medical condition under the medical standards in 14 C.F.R. Part 67. This provision applied to Complainant's airman's medical certificate. Further, under 14 C.F.R. § 120.11, a refusal by a certificate holder under Part 61 to submit to a drug or alcohol test required under 14 C.F.R. Part 120 is grounds for revocation of any certificate issued under 14 C.F.R. Part 61. In this case, Complainant held an ATP certificate and worked for a Part 121 air carrier. To obtain this certificate a pilot receives extensive training on a wide array of subjects pertinent to commercial operations. Every commercial air carrier operator is required to train every employee that performs a safety sensitive function about the requirements of Part 120. 14 C.F.R. § 120.31. It begs credulity for her to assert that she was not aware of the procedures applicable when a random drug selectee was unable or unwilling to provide a specimen.

In addition, the contemporaneous inconsistency for her reasons to depart the drug testing facility—to seek medical treatment or to attend a previously scheduled FAA appointment—casts serious doubt on the credibility of her statements. Complainant left the drug testing facility by 1:22 p.m., February 22, 2017. RX 25; RX 24. Instead of seeking immediate medical treatment, Complainant went to a nearby FAA office, signing in at 2:18 p.m. where she remained until 4:26 p.m. RX 33. During her time with the FAA inspectors, they observed Complainant having no

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<sup>57</sup> The Tribunal also notes the Complainant acknowledged receipt of Respondent's FAA approved drug testing policy. RX 3. This policy sets forth in detail the consequences of an employee, such as Complainant, that refuses to submit a urine sample. *See also* Tr. at 141.

<sup>58</sup> *See* DoDI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program* (Oct. 10, 2012), *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/101016p.pdf>. The program is implemented in the Army by Army Regulation 600-85, *The Army Substance Abuse Program* (Nov. 28, 2016), *available at* [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/AR600-85\\_WEB\\_Final.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/AR600-85_WEB_Final.pdf). As a military officer, particularly a military aviator who has served as an executive officer and worked in the S-3 shop, it is inconceivable that Complainant would not be aware of the military's drug testing program.

<sup>59</sup> "Since 1990, the NTSB has cited pilot impairment due to drugs as a cause or contributing factor in 3.0% and impairment or incapacitation from a medical condition in 1.8% of fatal US civil aviation accidents. The proportion of accidents for which the NTSB cited pilot impairment from drugs or medical conditions has not changed appreciably over the study period." NTSB Safety Study, *Drug Use Trends in Aviation: Assessing the Risk of Pilot Impairment*, NTSB/SS-14/01 (Sept. 9, 2014), at 2 *available at* <https://www.ntsb.gov/safety/safety-studies/Documents/SS1401.pdf>.

<sup>60</sup> *See* FAA Flight Standards Service Document FAA-S-ACS-6B, *Private Pilot – Airplane, Airman Certification Standards* (June 2018), *available at* [https://www.faa.gov/training\\_testing/testing/acs/media/private\\_airplane\\_acs.pdf](https://www.faa.gov/training_testing/testing/acs/media/private_airplane_acs.pdf).

discomfort or pain.<sup>61</sup> See RX 37; RX 41. It is only after this meeting, a meeting to have a restriction on her ATP certificate removed, that she sought medical attention—arriving at the emergency room at 5:09 p.m. RX 34. The fact that she did not even obtain medical treatment until several hours after leaving the drug testing facility, and after spending a lengthy period of time at the FAA’s offices, casts further doubt on Complainant’s testimony about her level of discomfort and the urgency of the need to depart the drug testing facility.

## B. Complainant’s Prima Facie Case

### 1. Covered Employer and Employee

As the parties stipulated to being subject to the Act, further discussion of this element is not warranted. Accordingly, the Tribunal finds that the parties are covered by the Act and this element is established.<sup>62</sup>

### 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.

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<sup>61</sup> Complainant represented to Dr. Ingber on February 23, 2017, that when initially catheterized at Morristown Center the late afternoon of February 22, 2017, there was 700 ml of fluid in her bladder. CX 21; Tr. at 57. Dr. Inger testified that a normal woman’s bladder holds about 400ml of fluid and, in Complainant’s case during his examination of her, she could hold about 275ml of fluid before she felt great urgency to urinate. Tr. at 55, 65. He also testified that that amount of fluid would be “quite uncomfortable” and can manifest itself as severe pressure or a severe urgency to urinate, or the patient would just be in severe pain. Tr. at 66. This is not how Complainant presented herself at the FAA office following her departure from the drug testing facility.

<sup>62</sup> Had the parties not so stipulated, the Tribunal would have independently found that they are subject to the Act. The Respondent is a Part 121 air carrier and Complainant was a certificated airman piloting Respondent’s aircraft. See generally, *Cobb v. FedEx Corp. Svcs., Inc.*, ARB Case No. 12-052, ALJ 2010-AIR-24 (Dec. 13, 2013).

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, “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)) (emphasizing that “an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement”) (emphasis in original)). 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). 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 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 the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). However, the Board observed, 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). Similarly, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.” *Malmanger*, at 8 (internal quotation marks omitted) (holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and therefore “did not reasonably believe that safety violations existed at the time he made his complaint”).<sup>63</sup>

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<sup>63</sup> See also *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, slip op. at 9 (June 30, 2008); *Williams v. U.S. Dep’t of Labor*, 157 Fed. App’x 564, 570 (4th Cir. 2005); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, slip op. at 1 (Nov. 12, 1996).

### Discussion of Protected Activity<sup>64</sup>

Complainant voiced safety concerns related to maintenance issues on February 8-9, 2017 and submitted a voluntary ASAP report on February 20, 2017. The Tribunal finds that the filing of the ASAP report and Complainant's actions in reporting her safety related concerns on February 8-9, 2017 were protected activity. *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1 (Nov. 5, 2013).

Complainant also asserts that she engaged in protected activity when she told Ms. Kinkade that she intended to file a safety report pertaining to the conditions she encountered walking to the drug testing facility, and complained to her Assistant Chief Pilot, about to her trip to the Newark Medport Clinic on February 22, 2017. Compl. Br. at 21.

The Tribunal finds that Complainant would not have a reasonable belief that the events from the time she departed the terminal until arriving at the drug testing facility were a violation of some order, regulation, or standard relating to air carrier safety. *See* 49 U.S.C. § 42121(a)(1). At no time does Complainant identify how the events en route to the drug testing facility related to air carrier safety. Granted, Complainant may have had legitimate concerns about her safety once she left the bus that was supposed to take her to the drug testing facility, and those work and bus transportation matters might be within the purview of OSHA or port authority for closing the gate that normally provided access to the drug testing building, but the safety or inconvenience of a flight crew member's transportation or movement to take a random drug test away from the airport terminal are not matters relating to air carrier safety covered under the Act.<sup>65</sup>

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<sup>64</sup> In her brief, Complainant alleges four protected activities:

1. Refusal to fly an aircraft with a maintenance deficiency discovered on pre-flight until maintenance repaired the aircraft;
2. Filing an ASAP regarding the maintenance and safety issues presented on February 9, 2017, per the request of an ERC representative;
3. Relaying to Ms. Kinkade that she would be submitting a safety report regarding the perilous conditions that Complainant encountered walking over a mile to the clinic; and,
4. Reporting the safety problem that Complainant experienced en route to the Medport Clinic to an Assistant Chief Pilot.

Compl. Br. at 21.

<sup>65</sup> Even if Complainant's reports to Ms. Kinkade and the Assistant Chief Pilot, of her intent to report what she experienced that morning while will traveling to the Medport Clinic were somehow considered protected activity, Complainant has provided no evidence that those reports played any part in Respondent's decision to terminate her. The testimony from Respondent's witness is uniform that its focus was on her drug test refusal. Complainant wants this Tribunal to somehow contort the facts to find some sort of linkage between her reporting safety issues in getting to the testing facility with the adverse action of being reported a drug test refusal. But this ignores the underlying fact that Complainant left the drug testing facility prior to the expiration of the time required under the shy bladder procedures. This intervening event breaks any causal connection that might have otherwise existed. In sum, given the aviation culture and the emphasis aviation places on prohibiting drug and alcohol use and abuse, the Tribunal finds Respondents' witnesses on this issue highly credible.

The Tribunal makes this finding despite its recognition that union agreement between Respondent and its pilots' union requires random drug testing occur during a scheduled day of duty.<sup>66</sup> Complainant was on a duty status at the time of these events. The reasoning is obvious: not all safety issues that occur during a duty day are related to safety in air commerce. Take, for example, a flight crewmembers transiting between flights who are walking thru the terminal, when they slip and fall on a recently waxed floor. The company may require a report of that incident because it was a work related incident, but that does not mean that the event or resulting report is a protected activity as defined by the Act. The safety issues Complainant alleges here in her trip to the drug testing clinic are too attenuated and ancillary to be encompassed in the term "air carrier safety" under the Act. Finally, the Complainant cites no caselaw or regulation that supports the proposition that these types of events are within the purview of the Act.

### 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). However, the Board has clarified, "*Burlington's* adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15.

The Board has held "that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions." *Menendez*, ARB Nos. 09-002, 09-003, slip op. at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated, "Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.<sup>67</sup> Accordingly, the

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<sup>66</sup> RX 2 at 3.

<sup>67</sup> *See also Williams*, ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: "To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as

Board views “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)).

### Discussion of Adverse Action

The parties stipulated that Respondent terminating Complainant’s employment was an adverse action.<sup>68</sup> Tr. at 21. However, Complainant also asserts that Respondent reporting Complainant as a drug test refusal was an adverse action and its selection of her for the drug test was an adverse action. Therefore, a brief discussion of the latter two assertions is warranted.

The reporting of a drug test refusal is an adverse action. It matters not that the FAA regulations required Respondent to report the drug test refusal. 14 C.F.R. § 120.111(d). An adverse action is simply something unfavorable to an employee, not necessarily unfair, retaliatory, or illegal. *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ No. 2011-AIR-12 (Nov. 26, 2014). Being reported for refusing a drug test smacks of drug use, thereby tarnishing the image and reputation of the pilot in the aviation community, especially a professional pilot. In this community, a pilot would far rather receive a warning letter in their personnel file than to be associated in any fashion with subsequent scrutiny that comes with any type of allegation involving drugs. Warning letters generally stay in-house and are of limited durational impact. A drug testing refusal must be reported immediately to the FAA<sup>69</sup> and, as Complainant’s case demonstrates, subjects a pilot to immediate action by FAA inspectors and medical staff, and the pilot’s aviation employer. Under the FAA’s enforcement guidance, alleged drug violations result in immediate revocation of all of an airman’s certificates on an emergency basis. *See* FAA Order 2150.3B, Ch. 6. Under this process the pilot immediately loses the certificates and does not regain them, if at all, until the end of her hearing.<sup>70</sup> These actions all have long-term

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retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress”).

<sup>68</sup> Given the March and May terminations were identical, the Tribunal treats these two letters as one action for purposes of this decision and the parties agree that both were adverse actions.

<sup>69</sup> Complainant seemed to take umbrage with the speed at which Respondent’s personnel reported her drug testing refusal. The Tribunal finds no issue whatsoever in immediately reporting her drug testing refusal because it engenders an immediate safety issue to air commerce.

<sup>70</sup> 49 U.S.C. § 44709(e); FAA Order 2150.3B, chap. 6. For examples of drug test refusal adjudications, see *FAA v. Lee*, SE-19055, 2011 NTSB LEXIS 32 (May 18, 2011) (emergency revocation for drug test refusal affirmed); *FAA v. Tullos*, SE-19196, 2011 NTSB ALJ NEXIS 520 (Dec. 19, 2011) (FAA failed to establish airman refuse to submit to a drug test and reinstate the airman’s certificates). With rare exceptions, a revocation action, if affirmed, lasts for one year after which an individual can attempt to again obtain their certificates by taking the appropriate knowledge and practical tests.

consequences to the career of an aspiring professional pilot. Given the stigma associated with a drug refusal report, the Tribunal finds this is an adverse action.

However, the Tribunal finds that the random selection of Complainant for a drug test was not an adverse action. Airline pilots—including Complainant—know that they will be subject to random drug testing during the course of their employment. *See* Tr. at 141. Moreover, 14 C.F.R. §§ 120.113(d)(3) and 120.217(c)(3)(i) require Respondent to test annually at least 10% and 25% of their covered employees for alcohol and drugs, respectively. *See* Tr. at 238. Since random drug tests are part and parcel of a pilot’s employment expectations, selection for a single random drug test would not “deter a reasonable employee from engaging in protected activity.” *Menendez*, ARB Nos. 09-002, 09-003, slip op. at 20. Mandatory random drug testing is an inconvenience, to be sure, but mere selection of an employee for a single drug test does not rise to the level of an unfavorable or discriminatory employment action.

The Tribunal recognizes the potential that such testing could be implemented in such a fashion that it would deter reasonable employees from engaging in protected activities. For instance, repeatedly selecting the same employee for “random” testing could constitute an unfavorable employment action, if it could be shown that the employer had deliberately selected the employee for such testing. However, the overwhelming evidence in this case shows that Complainant was treated no differently than any other employee subject to the drug testing regulations in 14 C.F.R. Part 120. Respondent had no involvement in the selection of Complainant for a drug test; rather, FirstLab—a third party—used a random process to select Complainant from a list of Respondent’s safety-sensitive employees. Tr. at 232-33; RX 15. That list of safety-sensitive employees contained every employee at Respondent covered under DOT regulations, and Complainant was merely one of 350-400 employees selected for drug testing in the first quarter of 2017. Tr. at 287, 319-21; RX 45.

Accordingly, Respondent convincingly established that it played no role in the selection of Complainant for random drug testing. Respondent’s sole action was to implement FirstLab’s selection and find a time when Complainant’s schedule permitted her to be tested. In the absence of any evidence that her selection was non-random,<sup>71</sup> this Tribunal finds the selection of Complainant for random drug testing was not an adverse action.

#### Adverse Action: Conclusion

Complainant has successfully established that Respondent took adverse action against her when it terminated her employment and when it reported her a drug test refusal. However, Complainant’s selection for the single drug test at issue was not an adverse action.

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<sup>71</sup> In her reply brief, Complainant references facts by omission pertaining to what Ms. Doural could not testify to. Compl. Reply at 3. However, it is Complainant—not the Respondent—that bears the burden to establish some sort of impropriety in the selection process. Respondent provided credible evidence that the process for selecting employees for drug testing was random.

#### 4. Contributing Factor Analysis

Complainant successfully established that Respondent took adverse actions against her when it reported her drug test refusal and terminated her employment. Accordingly, the Tribunal must determine whether Complainant's protected activity was a contributing factor in those unfavorable personnel actions. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

The Board has held 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 Case 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 of showing that the person making the adverse employment decision knew about the employee's past or imminent protected activity. *Id.*

## Discussion of Contributing Factor Analysis

### *Selection of Complainant for Drug Testing*

Complainant argues that Respondent required her to undergo the drug test in retaliation for her reporting safety-related matters on February 8-9, 2017. However, this Tribunal has already determined that the selection of Complainant for drug testing was completed randomly by a third party and therefore *not* an adverse employment action. But even if it were, the selection of Complainant for a drug test took place on January 10, 2017—weeks prior to Complainant’s protected activity. Further, Respondent, through the efforts of Ms. Harasty, started the process of scheduling Complainant for her drug test on February 3, 2017,<sup>72</sup> five days prior to any of her safety complaints. Tr. at 290-91; RX 2; RX 19; RX 20.

In short, Claimant’s protected activity on February 8-9 could not have been a contributing factor to Respondent’s selection of Complainant for drug testing because her selection occurred prior to that day. Granted, the test did not occur until after she had filed her ASAP, but the cogs to the drug testing clock had already begun to move. Since Complainant has established no link between her random drug test and her ASAP report, her ASAP report could not have been a contributing factor in Respondent’s selection of Complainant for random drug testing.

### *Reporting Complainant’s Drug Test Refusal*

Complainant next contends that Respondent’s reporting of her drug test refusal was in retaliation of her reported safety matters on 8-9 February and the later filing of her ASAP report.<sup>73</sup> Tr. at 93-106. The Tribunal finds this assertion unsupported by the evidence.

In support of her contention, Complainant first argues that Respondent failed to establish that Complainant refused a drug test on February 22, 2017. Compl. Reply at 6. The undersigned disagrees. It is undisputed that Complainant initially went to the drug testing facility and provided a urine sample—albeit an insufficient amount. What occurred thereafter is where Complainant ran afoul of the drugs testing regulations. The drug test refusal was consummated the moment she stepped out of the drug test facility’s door prior to the expiration of the three-hour waiting period under the shy bladder procedures. See 49 C.F.R. § 40.193(b)(2). “If the employee refuses to make the attempt to provide a new urine specimen *or leaves the collection site before the collection process is complete*, you must discontinue the collection, note the fact on the ‘Remarks’ line of the [chain of custody form], and immediately notify the DER.” 49 C.F.R. § 40.193(b)(3). The DER must then “direct the employee to obtain, within five days, an

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<sup>72</sup> On February 3, 2017, Ms. Harasty scheduled Complainant for a random drug test for February 17, 2017, but since Complainant was unavailable Ms. Harasty rescheduled Complainant’s drug test for February 21, 2017. Tr. at 290-91, RX 2, RX 19, RX 20. However, due to a conflict, Complainant’s drug test was rescheduled yet again for February 22, 2017. Tr. at 291, 304-05, RX 21.

<sup>73</sup> For details of Respondent’s ASAP program, see RX 9, RX 10, RX 35. The Tribunal also took official notice of Advisory Circular 120-60B and the provisions of FAA Order 8900.1 that pertain to the ASAP program. Tr. at 6-7.

evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee’s failure to provide a sufficient sample.” 49 C.F.R. § 40.193(c).

The burden to establish a medical reason for her refusal is upon Complainant, not the Respondent. The fact that she later went to the Morristown Medical Center, was catheterized, thereafter provided a negative sample at another medical facility (which did not follow DOT testing standards), and sought treatment from a urologist the following day is irrelevant. The regulations require the MRO or another physician to subsequently perform an evaluation of the possible reasons why Complainant was not able to produce a specimen. To be excused from being considered a drug testing refusal, the examining physician must find that Complainant has, or with a high degree of probability could have, a medical condition that precluded her from providing a sufficient amount of urine. 49 C.F.R. § 40.193(d). Further, the “medical condition includes an ascertainable physiological condition (e.g. a urinary system dysfunction) or a medically documented pre-existing psychological disorder . . .” 49 C.F.R. § 40.193(d).

Here, Complainant has provided no evidenced that Dr. Ingber—the physician who examined her on February 23, 2017—was a physician “acceptable to the MRO.” 49 C.F.R. § 40.193(c). However, the Tribunal notes that Dr. Ingber is Board certified in urology and is certainly qualified in his field. *See* Tr. at 44-45. Further, Dr. Ingber’s treatment note does not state one way or the other whether Complainant had a medical condition that precluded her from providing a sufficient urine sample the day prior. CX 1. To the contrary, he prepared a letter to Respondent stating that Complainant “presented to the office where the catheter was removed, and a simple test showed she is able to empty well with a good urine flow.” CX 21. During his testimony, Dr. Ingber explained that the letter was offered to explain that Complainant should be safe to go back to work and that she was able to empty her bladder without a problem. Tr. at 57. This Tribunal finds that this letter, and Complainant’s actions after departing the Medport Clinic do not meet the regulatory criteria required to excuse her departure from this drug testing facility. Accordingly, the undersigned rejects Complainant’s assertion that Respondent failed to evidence sufficient grounds for reporting her drug test refusal.

Moreover, even if the evidence only tenuously supported Respondent’s belief that Complainant had refused her drug test, there is no evidence linking the reporting of her drug test refusal to her protected activities. Complainant provided no evidence to support any inference that Respondent’s reporting of her refusal—which is mandated by regulation—related to her reporting of safety matters. The ASAP report is a confidential non-punitive report. Tr. at 195, 207-08. Complainant has provided no evidence that her statements in her ASAP were reported to anyone outside the ERC prior to her drug testing. Tr. at 121-93, 222-29. No evidence has been presented that any person on the ERC committee violated their obligation to keep her report confidential.<sup>74</sup> To the contrary, Respondent provided testimony that its flight operations management was not even aware of Complainant’s ASAP report. Tr. at 198-99. Simply put,

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<sup>74</sup> There is evidence that Respondent’s management was aware that Complainant had refused to fly on February 8, 2017, but no evidence has been presented that the ERC relayed its request for Complainant to file an ASAP to management, or that management even knew that she had filed an ASAP report at the time of the urinalysis incidents.

there is no evidence that Respondent's ASAP program played any role in disciplining Complainant or any other pilot.<sup>75</sup>

### *Termination of Complainant's Employment*

Lastly, Complainant asserts—without any substantive argument—that Respondent's termination of her employment was also in retaliation for her protected activities. The undersigned finds this contention utterly unsupported by the evidence.

To operate as pilot for Respondent under Part 121, Complainant must hold a current and valid medical certificate. 14 C.F.R. § 61.23(a). She must also hold an Airline Transport Pilot certificate. 14 C.F.R. §§ 61.167, 121.383(a). Complainant held both prior to her drug testing refusal. Per 14 C.F.R. §§ 120.1 and 120.103(b), as a Part 121 air carrier, Respondent is required to comply with the drug testing requirements in 14 C.F.R. Part 120 or face stiff civil penalties,<sup>76</sup> and must conduct drug testing of its pilots. 14 C.F.R. § 120.105(a). A finding that a pilot refuses to submit to a drug or alcohol test under 14 C.F.R. part 120<sup>77</sup> is a specifically disqualifying medical condition rendering Complainant ineligible to hold a First Class medical certificate under 14 C.F.R. § 67.107(b)(2).<sup>78</sup> A disqualifying medical condition renders invalid Complainant's medical certificate. And once Respondent notified the FAA of Complainant's drug test refusal, it was precluded from allowing her to perform a safety-sensitive function until Complainant had been issued a new airman medical certificate and met certain return-to-duty requirements. 14 C.F.R. § 40.113(d)(4).

Further, the FAA has long held the position that a pilot's refusal to submit to a drug test establishes a lack of qualification to hold any certificates and revocation of all certificates is the appropriate course of action. *See* FAA Order 2150.3B.<sup>79</sup> The NTSB Board precedent supports that revocation is the appropriate sanction for such refusals. *See, e.g., Administrator v. Pineda*, NTSB Order EA-5769 (2016); *Administrator v. Heyl*, NTSB Order No. 5420 at 20 (2008); *Administrator v. King*, NTSB Order No. EA-4997 at 7 (2002) (no actual showing of illicit drug usage needed to sustain a revocation for drug test refusal); *Administrator v. Pittman*, NTSB Order No. EA4678 at 5 (1998); *Administrator v. Krumpter*, NTSB Order No. EA-4724 (1998). Once the FAA revoked Complainant's certificates, she could no longer exercise the privileges of

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<sup>75</sup> The Tribunal recognizes that there are five circumstances where a reporting individual does not receive the benefits of the ASAP program, one of those being substance abuse. Tr. at 222, RX 9 at ¶4. However, Complainant has provided no evidence the ASAP she filed on February 20, 2017 would be subject to exclusion of the protections afforded the ASAP program.

<sup>76</sup> *See* FAA Order 2150.3B, Ch. 7. The civil penalties for violating an air carrier's drug abatement program can be in the tens of thousands if not the hundreds of thousands of dollars for large air carriers. *See id.* at Figure 7-3 and App. B, figure B-5.

<sup>77</sup> *See also* 14 C.F.R. §§ 120.7(o), 40.191 (explaining what constitutes a refusal to submit to a drug test).

<sup>78</sup> Similarly provisions exist to render ineligible second and third class medical certificates. *See* 14 C.F.R. §§ 67.207(b)(2) and 67.307(b)(2).

<sup>79</sup> FAA Order 2150.3B, App B, Figure B-5-v. The Order was cancelled and replaced by 2150.3C in September 2018, but was in effect at the time of these incidents. Implementation of the FAA enforcement policy for Part 120 violation came in Change 3 to FAA Order 2150.3B in May 2011.

a pilot, the position for which she was employed. 14 C.F.R. § 61.2(a)(1), (5); *see also id* § 61.53(a)(1).

Given the gravity of drug and alcohol allegations to the aviation community, it is not at all surprising that Respondent followed its “Drug Misuse Prevention Policy and Program” which provides:

The Company will not permit an Associate who refuses to submit to testing to perform or continue to perform his/her job functions. Associates who refuse to submit to the required will be immediately removed from duty and will be subject to discipline up to and including termination.

RX 3 at 9.

Respondent complied with Article 18 of its collective bargaining agreement concerning Complainant’s random drug test refusal, and terminated her on March 6, 2017. RX 31. The Union filed a grievance related to Complainant’s termination. RX 47 at 17. On April 25, 2017, Respondent and the Union resolved the grievance by having Complainant reinstated until the FAA made a final determination. RX 31; RX 12. On April 27, 2017, the FAA revoked her certificates. Tr. at 131, 165. Respondent ultimately terminated Complainant on May 11, 2017 after learning that the FAA had issued an order revoking all of Complainant’s certificate. Tr. at 130; RX 32. On August 1, 2017, an NTSB judge affirmed the FAA emergency revocation of Complainant’s certificates. Tr. at 166; RX 41. Without holding either a current medical certificate or even a pilot’s license, Complainant was prohibited from operating an aircraft of any kind. 14 C.F.R. § 61.2(a). Therefore, Respondent had every reason to terminate her employment as a pilot.

Notwithstanding the above analysis, Complainant could still demonstrate that her protected activity was a contributing factor to her termination by showing that “protected activity play[ed] a role, *any* role whatsoever, in the adverse action.” *Palmer*, ARB No. 16-035, slip op. at 52 (emphasis in the original). The Tribunal finds no evidence to warrant such a conclusion. Respondent followed its internal policies and the FAA regulations in effectuating Complainant’s termination following the loss of her certificates. Complainant cites to no facts from which this Tribunal could conclude that her protected activity played any role in her termination. Accordingly, the Tribunal finds that Respondent did not retaliate against Complainant when it terminated her employment.

#### 1. Conclusion: Complainant’s *Prima Facie* Case

Complainant and Respondent are subject to the Act. Complainant’s reporting safety issues on February 8-9, 2017 and the subsequent filing of her ASAP report pertaining to those events constituted protected activities.<sup>80</sup> Respondent’s report to the FAA (or to Respondent’s management) that Complainant refused a drug test, and Respondent’s subsequent termination of

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<sup>80</sup> Complainant’s reporting, or statement of her intent to report, her concerns about her safety while transiting to the drug testing facility were not protected activities.

Complainant as a pilot were adverse actions. Finally, Complainant has failed to establish that her protected activity contributed in any way to Respondent's report of her drug test refusal or to her termination. Thus, Complainant's complaint fails and this Tribunal must dismiss it.

Nevertheless, even if Complainant had met her burden of establishing a prima facie case, Respondent would establish by clear and convincing evidence<sup>81</sup> that it would have taken the same unfavorable action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). Respondent is mandated by the regulations to report the drug test of any pilot to the FAA. 14 C.F.R. § 120.111(d). The fact that Respondent reported it within a matter of hours, instead of the two days in which it was required, is to be commended—not criticized—because this goes to the heart of air carrier safety.<sup>82</sup> Similarly, Respondent would have terminated Complainant's employment when she lost her medical certificate and pilot's license, as she was prohibited from operating any aircraft. *See* 14 C.F.R. § 61.2(a).

## V. CONCLUSION

Although Complainant and Respondent are subject to the Act and Complainant suffered adverse actions, she has failed to establish that her 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

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<sup>81</sup> “Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11 (May 26, 2010). The Board further explained, “Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.” *Id.*

<sup>82</sup> The operation of aircraft as a common carrier, as were the types of operations Complainant was conducting, under the influence of alcohol or drugs is a crime under 18 U.S.C. §§ 341-343 punishable with up to 15 years confinement.

Cherry Hill, New Jersey

**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).