



Issue Date: 25 July 2018

In the Matter of:

BRIAN BAHN

COMPLAINANT

v.

2018-AIR-00001

JET BLUE AIRWAYS CORPORATION

RESPONDENTS

Complainant

Pro Se

Christopher R. Lepore, Esquire

For Respondents

DECISION AND ORDER

DISMISSAL OF COMPLAINT

This case came to hearing March 20, 2018 in Miami, Florida, pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997) and the implementing regulations at 29 C.F.R. Part 1979 (2003) and in accordance with 29 C.F.R. Part 18 of the Rules of Practice and Procedure of the Office of Administrative Law Judges. At that time, I admitted Claimant's exhibits, "CX"-1 through CX-11 and Respondent's exhibits "RX"-1 through RX-23, Transcript, and "TR" pages 8 to 10. The Complainant, Boris Rogoff and Vincent Giudice testified.¹

Both of the parties submitted briefs. After I reviewed the briefing, I initiated an email colloquy regarding Complainant's alleged adverse personnel actions. In a second response, Complainant submitted an affidavit of a purported witness, Dario Laredo, who he did not identify in advance of or call to testify during the hearing in this matter. *See* Comp. PHB at EX 12. Respondent identified Mr. Laredo as someone it "believed to have discoverable information that Respondent may use to support its claims and defenses" (i.e., as part of its initial disclosures) in its pre-hearing submission.² However, Mr. Laredo was not called to testify,

¹ Mr. Rogoff testified via telephone from Las Vegas, Nevada.

² Respondent argues that it was never put on notice that Complainant intended to rely on Mr. Laredo's testimony, which references alleged privileged communications from JetBlue's legal department, to support his claims and did not have an opportunity to cross-examine him.

Respondent also did not have the opportunity to question its own witnesses about the allegations in Mr. Laredo's testimony, given that it was not provided such information until after the submission of its Opening Brief. JetBlue would therefore be irreparably prejudiced if the Court were to countenance

therefore, I will not consider that affidavit.³

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 the record preponderantly establishes the three foregoing elements of Complainant's establishes prima facie case, the burden then 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)).

In his brief, after a review of the transcript of hearing, and after I had made several evidentiary rulings and narrowed the issues, the Complainant alleged:

I (Brian Bahn) am a former JetBlue Airways employee who provided information relating to air carrier safety violations to my employer (JetBlue Airways) and the Federal Government. JetBlue Airways leadership discriminated against me by way of a series of adverse actions for bringing forward this information. After exhausting all resources both internally at JetBlue Airways, and externally via the AIR21 Whistleblower Protection Program in trying to rectify my aircraft safety and adverse employment action concerns. I resigned my position from JetBlue Airways due to a continuation of the adverse working conditions and an additional violation of Federal Aviation Regulations. My resignation meets the criteria of a Constructive Discharge / Termination.

The record shows that Complainant began work with Respondent JetBlue in November 2004. TR at 17. Complainant was employed as an Aircraft Router in JetBlue's Maintenance Planning and Routing Department based in JetBlue's headquarters in Long Island City, New York. RX2. An Aircraft Router's duties include "maintain[ing] the safety and integrity of the maintenance fleet." TR at 132: 2-3.

During the relevant time in his employment, Complainant reported to on-duty supervisors, who, in turn, reported to Vincent Giudice, Manager of the Maintenance Planning and Routing Department. *Id.* at 134: 1-20. Mr. Giudice reported to Boris Rogoff, who is currently the Director of Engineering and Maintenance Planning at JetBlue. *Id.* at 76. During Complainant's employment, Mr. Rogoff was the Director of Maintenance Planning. *Id.* at 75-76. In both of these roles, Mr. Rogoff was responsible for the entirety of the Maintenance Planning Department. *Id.* Neither Mr. Giudice nor Mr. Rogoff directly evaluated Complainant's performance (although Mr. Giudice reviewed the performance reviews prepared by Complainant's supervisors). *Id.* at 77, 134-135.

Complainant's inappropriate tactics. Thus, although Mr. Laredo's testimony largely relates to time-barred events (and is irrelevant), Respondent respectfully submits that the Court should strike this affidavit from consideration. [cases omitted] Indeed, although Complainant may be pro se, this fact alone does not deprive JetBlue of any and all rights it may have to confront the evidence presented against it.

³ I note that he was discussed in testimony.

At hearing, Mr. Rogoff was asked:

You know, Mr. Bahn is representing himself, and he's not a lawyer, so I'm going to ask a few questions, normal questions that I would expect would have been asked. So you were his ultimate supervisor, is that right, during the period of time in 2016 until about September of 2016?

THE WITNESS: Yeah, I was responsible for the department.

JUDGE SOLOMON: Was he a good employee?

THE WITNESS: He knew the technical job well.

JUDGE SOLOMON: Is there any reason that he would have been fired?

THE WITNESS: He did have some disciplinary actions we called progressive guidance, but those were in his record. But there's no particular reason I would have fired him.

JUDGE SOLOMON: Well, I'm not his lawyer, but I read his record. ... that was a long time ago. Most of that was in 2012, I assume. So did anybody ever ask you whether or not he should be fired?

THE WITNESS: No. I have never been approached to go down the termination path, I guess.

JUDGE SOLOMON: And I don't know what the policy is at Jet Blue. But, if somebody had asked you about whether he was a good employee or he was eligible to return, what would your response be?

THE WITNESS: Well, there's two paths to separate an employee, either in violation of some ethics or one of our corporate rules, and it's typically doing something --

JUDGE SOLOMON: Yeah, I don't think that's the question I asked.

THE WITNESS: Okay.

JUDGE SOLOMON: Would your company take him back if he applied for a job?

THE WITNESS: I know we leave in good standing. He left in good standing, I believe, so I think we would consider it.

TR at 125 to 126.

Respondent argues that throughout Complainant's employment, Complainant received solid feedback with respect to his technical skills. RX 3-EX 8, RX 12; TR at 164. It maintains that on October 29, 2015, he was cautioned when he told a fellow coworker to "get the hell away." *Id.* at EX 12. pg. 2. Although Respondent does not contest the fact that Complainant had raised safety issues, it argues that Complainant's interpersonal issues both predated and post-dated any of his alleged safety complaints and/or protected activity.

PROTECTED ACTIVITY

Respondent does not contest that the Complainant engaged in protected activity.⁴ By necessary implication, I find that as the Respondent acquiesced to this issue, it knew that Complainant was in protected status.

ADVERSE EMPLOYMENT ACTION

Section 42121(a), AIR-21 states that “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 of the employee’s protected activity.” These provisions are the statutory foundation for the requirement that a complainant must show an adverse employment action. The implementing regulations specify that it is a violation of the act for an employer “to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee for engaging in protected activity.” 29 C.F.R. § 1979.102(b).

The Complainant alleged in his brief:

4. Did JetBlue Airways and my direct leadership retaliate against me in various ways for raising multiple safety concerns in any or all of the following ways:

- Trade License Put at Risk (A&P)
- Blacklisting & Failure to Promote
- Poor Performance Review(s)
- Over scrutinizing of work
- Subtle harassment
- Filing false or embellished statements & reports regarding my job performance, reduced annual pay and compensation increases,
- Denied industry comparison pay and compensation review adjustments.

In the Complainant’s brief and in his testimony, I found that I could not discern exactly what adverse actions he alleged were taken against him.⁵ Therefore I asked him to restate them

⁴ MR. LEPORE: We, for purposes of this hearing, do not dispute that Mr. Bahn engaged in protected activity.

⁵ Events that transpired within 90 day AIR21 filing requirements:

Reference Exhibit 1:

- Item 23 - Harassment Event, Over scrutinizing of work.
- Item 24 & 25 - Break of Confidentiality
- Item 26 - Harassment Event, Over scrutinizing of work
- Item 27 – Human Resources failure to act (See Item section G in this document)
- Item 28 – Safety Department failure to act (See Item section B & F in this document)
- Item 29 – Denied Pay & Comp Review Adjustment based on time on core metrics – Licenses, Education, Cost of Living, Time in Position (T-111 thru 113)
- Item 30 – Compromising Safety Event – JetBlue failure to correct in timely manner despite my inquiry in January of 2015. (See Item section B in this document)
- Item 31 – Failure to promote, Blacklisted
- Item 32 – Additional Protected Activity, (in addition to filing internal Safety Action Report in November

and direct me to his proof so that I could understand them.⁶

Complainant submitted the following:

Due to my inexperience in regards to OSHA Law and Regulations, and no access to historical case law to cite or reference, I may have mislabeled or misclassified some of my complaints in my complaint documents and during the hearing.

After the last official submission of formal complaint arguments to the OSHA investigator between the respondent and myself, the OSHA portion of the case (Case # 2-2600-17-027) remained open from October 17th 2016 until September 14th, 2017. (EX-14)

L. March 20th, 2018 Hearing was a De Novo Proceeding:
(TR-72, L-4 thru 10).

M. Complainant experienced a series of adverse work actions over course of employment directly correlated with questioning and reporting aircraft safety issues:

1. 2010 Incident & FAA Investigation – JetBlue’s counsel makes reference to my 2010 Performance Review (TR-221, L-16 thru 25, TR-222, L-1 thru 13). In 2010 there was a safety incident that TR-anspired because of a misstep by the

10, 2015)

Item 34 – Adverse work conditions – JetBlue failure to take corrective action.

Item 35 – Compromising Safety Event – After close of FAA Investigation. (See Item section B in this document)

Item 36 - Human Resources failure to act – During open OSHA Investigaton.

⁶ Complainant tried to incorporate items by reference to line items, but I had advised him not to do it and I found it was impossible to separate his argument about protected activity from his argument about adverse actions. A June 21 email stated:

I know that you aren’t a lawyer. I hope that you took my advice and showed the file to a lawyer. The Respondent has acquiesced to the protected activity issue. You don’t have to prove it.

In the brief you mix protected activities and adverse actions and I can’t understand what you mean regarding what actions the Respondent took against you. According to the Respondent, the adverse actions listed in the complaint are limited to:

- (1) Complainant’s denial of market-based salary adjustment in April 2016;
- (2) “increased scrutiny” to which Complainant claimed he was subjected; and
- (3) Complainant’s failure to be selected for “acting supervisor” on one day in June 2016.

Your complaint is at CX 1,item 32. Attachment W- Filed Whistleblower Complaint With FAA & OSHA - (2 pages)

Also at hearing you alleged constructive discharge. Please set forth what evidence shows that you were constructively discharged. You have a general burden of establishing entitlement and the initial burden of going forward with the evidence.

Aircraft Maintenance Planning Department. At the time I was a Maintenance Planner and had repeatedly advised my Supervisor of a safety concern pertaining to critical maintenance failing to be scheduled. Soon after, an aircraft had to be immediately grounded for over 10 days due to this very same issue I advised my Supervisor about. The FAA was contacted (not by me) and two investigators came to the facility and the Maintenance Planning office to investigate. The Supervisor was not onsite at the time of the FAA visit. I was asked to meet with the investigators and explain the issue and the corrective action we planned to take. I felt that my leadership suspected that I was the one who contacted the FAA regarding this issue. I attempted to file a Freedom of Information Act request for supporting documentation from the FAA regarding this incident, but was advised that this record has been expunged (EX-17).

Action:

Provided to the Federal Government or to my employer information relating to any violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety.

Adverse Actions:

1.1 Poor Performance Review:

a) Poor 2010 Performance Review, as compared to 2009 and 2011. (EX-3, Attachment B, C, D)

1.2 - Change in Position:

a) Shortly after this incident, it was agreed that it would be best if I Transferred the Aircraft Routing Department. (EX-2, Attachment A, P-1 & 2).

2. January 2015 – Discovery of Expired Passenger Oxygen Generators – (TR-20, L-25) (TR-21, L1-25)(TR-22, L-1-16)

Action:

Provided to my employer information relating to any violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety.

Adverse Actions:

2.1 Denying Promotion / Internal Blacklisting:

a) February 2015 - Despite being one of the most senior, experienced, and credentialed candidates for the Heavy Maintenance Representative, in February of 2015 I was not awarded this position. (TR-86, L 14-16)

b) March 13, 2015 - I applied for Supervisor of Maintenance

Planning. Despite being the most senior, experienced, and credentialed candidates, I was not awarded the position – The Director was Boris Rogoff. The Manager was Vincent Giudice. The Human Resources Recruiter was Linda Phaneuf.

c) April 15, 2015 - I applied for Supervisor of Maintenance Planning. This position was reTR-acted by Human Resources with no explanation given. – The Director was Boris Rogoff. The Manager was Vincent Giudice. The Human Resources Recruiter was Linda Phaneuf.

d) September 1, 2015 – Applied for Manager of Business Partner Relations. I received no follow-up or response and my application was left open indefinitely in the Human Resources Recruiting system. Recruiter was Linda Phaneuf.

e) Fourth Quarter 2015 – Two Supervisor of Maintenance Planning Positions were posted. I was not permitted to apply due to my open application for Manager of Business Partner Relations. JetBlue HR policy does not permit crewmembers to apply for multiple positions simultaneously. I verbally spoke to Planning Manager Vincent Giudice asking if he could inquire to see what the status was regarding my open application. I asked if I should cancel the Manager application and apply for Planning Supervisor position. He said he would get back to me, but I received no follow-up or response before the application deadline. Three Supervisor positions were awarded even though only two were posted. The Manager was Vincent Giudice. The Human Resources Recruiter was Linda Phaneuf. (TR-203, L-22 thru 25)

2.2 Internal Blacklisting / Ostracizing / Ignoring My Safety Concerns, Failing Take Immediate Corrective Action, and Putting My FAA Credentials At Risk.

a) The Chemical Oxygen Generator issue was not immediately resolved and I received no follow-up response to my inquiry with Don Peterson – (Bahn – Post Hearing Brief – Section J) (EX-8, Attachment E)

b) Between October 16 thru 20, 2015 – I discovered a glitch in the Service Check TR-acking system that could potentially have caused overflying of FAA mandated Service Check. I verbally disclosed this to Director Rogoff, and Manager Giudice during a visit to my workstation. I received no response or follow-up and there was no corrective action.

c) October 28, 2015 – There was another near overfly event regarding the Service Check issue. Because of how past events were handled and that there was no follow-up from the last conversation with Mr. Giudice & Mr. Rogoff, I decided it would be best to start documenting all issues

going forward. (EX-18) I received to response to this email.

3 – Filed Safety Action Report with JetBlue Safety Department – November 10, 2015 – (EX- 19)

Action:

Provided to my employer information relating to any violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety.

Adverse Actions:

3.1 Violation Confidentiality:

a) (Section V., D of Bahn – Post Hearing Brief)

3.2 Negative 2015 Performance Review:

a) See Respondent witness signed Affidavit (EX-12) [This is the affidavit of Mr. Laredo, that was submitted post briefing, which I will not consider.]

3.4 Safety – Violation of FAA Regulations / Ignoring email /Compromising my Credentials

a) January 21, 2016 – Discover another safety related aircraft maintenance Tracking glitch – Email ignored – No follow-up to corrective action. (EX-20)

a) Adverse Employment Actions That Transpired Within the OSHA 90 Filing Requirement:

Action: I officially filed my OSHA Retaliation Complaint on June, 5th 2016. (EX-21)

Adverse Actions:

4.1 Hostile Work Environment / Securitizing Work

a) April 6, 2016 - Training of New Employee Incident – Contacted Human Resources Department after this incident (*See* Section V., G of Bahn – Post Hearing Brief)

4.2 Denied Opportunity for Promotion / (Blacklisting Internal at JetBlue)

a) June 7th, 2016 – Denied Appointment of Acting Supervisor - JetBlue

and my leadership was well aware of my goal and numerous attempts to be promoted to a leadership roll. When an acting Supervisor position became available, and despite being one of the most senior, experienced, and credentialed employees in the department. I was not notified or offered a chance for the position. (TR-51, L 21-14)

4.3 Violation Confidentiality / Ostracizing / Blacklisting:

a) Email newsletter sent throughout JetBlue advising of my filing a Safety Report (EX-22)

4.4 Failure to Assist / Ostracizing / Blacklisting:

a) Unsuccessful attempts to seek help from JetBlue Human Resources (Section V., G of Bahn – Post Hearing Brief)

b) Unsuccessful attempts to seek help from JetBlue Safety Department (Section V., F of Bahn – Post Hearing Brief)

4.5 Denied Pay & Compensation Adjustment:

a) I was denied a Pay and Compensation Review that took into account the industry standards such as tenure, cost of living, experience, credentials, education, and shift differential. Based on these variables my pay should have matched a crewmember that was based in Orlando, Florida with similar metrics. (TR-113, L 2-12) ((TR-111, L 3-5)(TR-111, L 16-17)

4.6 Change in Duties:

a) Sent email to Supervisor regarding the Planning Department failing to backup critical maintenance data as called out in the mandated GMM. Supervisor Giudice reassigned the responsibility to my Department going forward. (EX-23, Page 5)

4.7 Safety – Violation of FAA Regulations / Compromising my Credentials

a) After close of FAA investigation and despite notifying my leadership of failing to backup critical Aircraft Maintenance data on August 15, 2016, it was missed again on August 20, 2016. (EX-23, Page 4)

N. Complainant was Constructively Discharged from JetBlue Airways:

Due to all issues outlined in Sections IV. & V. of Complainant – Brian Bahn Post Hearing Brief and Section V. of this document, I felt I had exhausted all internal and external resources in TR-ying in TR-ying to resolve my safety and adverse working

conditions. There were many other adverse events that simply were not documentable as well. The adverse working conditions and relationship with leadership was beginning to take a toll on my physical and mental well being which could have compromised safety in my job function. The continuation of violating FAA Regulations did put my FAA Airframe and Powerplant (A&P) Rating at some degree of risk. I felt I had no other option to resign my position from JetBlue Airways and TR-y to find employment elsewhere.

O. Potential Future Blacklisting Variable / Future Job Prospects:

Due to major airline consolidation, there are only 6 major airlines in North America that are equivalent or larger than JetBlue's size and market share. https://en.wikipedia.org/wiki/List_of_largest_airlines_in_North_America

My particular industry and job profession is relatively small. Each of the 6 airlines employs an average of 15 to 20 Aircraft Maintenance Planners. In my industry there is reasonably high possibility of word of mouth blacklisting. Please note the unsuccessful job applications to United Airlines and Spirit Airlines (TR-235, L 6-10) (EX-24, EX-25) (Where Mr. Giudice is currently employed again). Mr. Giudice also stated he worked for a major airline supplier which has worldwide connections (TR-128, L-19-25). Mr. Rogoff's testimony that I would be rehired at JetBlue was most likely stated to appease the court. (TR-125, L12 -25) (TR-126, L-1-12). If all things remain constant, I doubt JetBlue would rehire me if I applied. I was asked to leave the property before my last official day with the company and they have made no offer of rehire to date, even proclaiming my case to be frivolous. A job with the FAA would be unlikely as well.

Even if I were able to obtain a similar position of Aircraft Maintenance Planner or Aircraft Maintenance Router with a comparable airline, it would take me a minimum of 2 to 4 years to have the seniority and fair opportunity to be promoted to a leadership position.

After Complainant filed his allegations in his post briefing filings, I asked Respondent to comment. On July 19, I received the following:

1. Alleged Adverse Action: "Poor 2010 Performance Review, as compared to 2009 and 2011."⁷

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent's Post-Hearing Brief and Rebuttal, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. See 49 USC § 42121(b)(1). Because Complainant filed his Complaint on June 5, 2016, he is barred from challenging any alleged adverse action prior to March 7, 2016. Moreover, Complainant cannot avail himself of the continuing violation doctrine – to the extent the doctrine is even available for a retaliation claim under AIR21 (it is not) – to

⁷ I inserted the numbering to clarify the allegations and responses.

avoid the statute of limitations, given that his alleged negative performance review was a discrete act (and potentially actionable at the time). *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, (2002). Complainant, therefore, cannot challenge his 2010 performance review.

Notably, even though Complainant's claim has been pending for two years, he never raised this alleged adverse action, which occurred approximately eight years ago, until after the hearing in this matter. Complainant has failed to explain how this performance review was even negative. And, even if this Court could consider this alleged adverse action, Complainant has presented no actual evidence that this purported adverse action was in any way retaliatory.

2. Alleged Adverse Action: "February 2015 - Despite being one of the most senior, experienced, and credentialed candidates for the Heavy Maintenance Representative, in February of 2015 I was not awarded this position. (TR-86, L 14-16)."

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent's Post-Hearing Brief and Rebuttal, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Moreover, Complainant cannot avail himself of the continuing violation doctrine to avoid the statute of limitations, since this alleged failure to promote is a discrete action. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 at 907; *Nat'l R.R. Passenger Corp.*, 536 U.S. 101 at 114 ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify" and holding failure to promote is a discrete act not amenable to continuing violation exception). Complainant, therefore, cannot challenge this alleged failure to promote in February 2015.

In any event, even if the Court could consider this alleged adverse action (it cannot), Complainant has not demonstrated it was retaliatory. Complainant simply states in conclusory fashion that he "was not awarded the position," and without any evidence, that he was "one of the most senior, experienced, and credentialed candidates." Indeed, the only evidence that Complainant cites from the hearing was that Mr. Rogoff recalled Complainant interviewed for the position. *See* Tr: 86:14-16. Moreover, Complainant did not establish that his protected activity at all factored into that decision (or that Mr. Rogoff or anyone else even knew of his protected activity at the time).

3. Alleged Adverse Action: "March 13, 2015 - I applied for Supervisor of Maintenance Planning. Despite being the most senior, experienced, and credentialed candidates, I was not awarded the position – The Director was Boris Rogoff. The Manager was Vincent Giudice. The Human Resources Recruiter was Linda Phaneuf."

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent's Post-Hearing Brief and Rebuttal, under AIR21,

a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Moreover, Complainant cannot avail himself of the continuing violation doctrine to avoid the statute of limitations, since this alleged failure to promote is a discrete action. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 at 907; *Nat'l R.R. Passenger Corp.*, 536 U.S. 101 at 114 (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify” and holding failure to promote is a discrete act not amenable to continuing violation exception). Complainant, therefore, cannot challenge this alleged failure to promote in March 2015.

In any event, even if the Court could consider this alleged adverse action (it cannot), Complainant has not demonstrated it was retaliatory. Complainant simply states, in conclusory fashion and without any evidence, that he was “one of the most senior, experienced, and credentialed candidates.” Complainant, therefore, has presented no evidence to suggest this alleged adverse action was the product of retaliation.

4. Alleged Adverse Action: “April 15, 2015 - I applied for Supervisor of Maintenance Planning. This position was retracted by Human Resources with no explanation given. – The Director was Boris Rogoff. The Manager was Vincent Giudice. The Human Resources Recruiter was Linda Phaneuf.”

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent’s Post-Hearing Brief and Rebuttal, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Moreover, Complainant cannot avail himself of the continuing violation doctrine to avoid the statute of limitations, since this alleged failure to promote is a discrete action. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 at 907; *Nat'l R.R. Passenger Corp.*, 536 U.S. 101 at 114, (2002) (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify” and holding failure to promote is a discrete act not amenable to continuing violation exception). Complainant, therefore, cannot challenge this alleged failure to promote in April 2015.

In any event, even if the Court could consider this alleged adverse action (it cannot), Complainant has not demonstrated it was retaliatory. In fact, according to Complainant’s own allegations, the position was not even filled.

5. Alleged Adverse Action: “September 1, 2015 – Applied for Manager of Business Partner Relations. I received no follow-up or response and my application was left open indefinitely in the Human Resources Recruiting system. Recruiter was Linda Phaneuf.”

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent’s Post-Hearing Brief and Rebuttal, under AIR21,

a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Complainant cannot avail himself of the continuing violation doctrine to avoid the statute of limitations, since this alleged failure to promote is a discrete action. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 at 907; *Nat'l R.R. Passenger Corp.*, 536 U.S. 101 at 114, (2002) (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify” and holding failure to promote is a discrete act not amenable to continuing violation exception). Complainant, therefore, cannot challenge this alleged failure to promote in September 2015.

In any event, even if the Court could consider this alleged adverse action (it cannot), Complainant has not demonstrated it was retaliatory. Complainant has presented absolutely no evidence regarding Linda Phaneuf whatsoever, much less demonstrated that she even knew of Complainant’s protected activity or factored it into any employment decision.

6. Alleged Adverse Action “Fourth Quarter 2015 – Two Supervisor of Maintenance Planning Positions were posted. I was not permitted to apply due to my open application for Manager of Business Partner Relations. JetBlue HR policy does not permit crewmembers to apply for multiple positions simultaneously. I verbally spoke to Planning Manager Vincent Giudice asking if he could inquire to see what the status was regarding my open application. I asked if I should cancel the Manager application and apply for Planning Supervisor position. He said he would get back to me, but I received no follow-up or response before the application deadline. Three Supervisor positions were awarded even though only two were posted. The Manager was Vincent Giudice. The Human Resources Recruiter was Linda Phaneuf. (TR-203, L-22 thru 25).”

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent’s Post-Hearing Brief and Rebuttal, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Complainant cannot avail himself of the continuing violation doctrine to avoid the statute of limitations, since these alleged failures to promote were discrete actions. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 at 907; *Nat'l R.R. Passenger Corp.*, 536 U.S. 101 at 114 (“Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify” and holding failure to promote is a discrete act not amenable to continuing violation exception). Complainant, therefore, cannot challenge this alleged failure to promote in 2015.

Even putting aside that this purported adverse action did not occur within the statute of limitations period, Complainant admits that he did not even apply for position in question because “JetBlue HR policy does not permit crewmembers to apply for multiple positions simultaneously.” JetBlue’s alleged failure to promote Complainant to a job to which he

did not apply cannot qualify as an adverse action for purposes of establishing a retaliation claim.

7. Alleged Adverse Action: “Negative 2015 Performance Review.”

Response: This alleged adverse action is unquestionably time barred by the statute of limitations. As set forth in Respondent’s Post-Hearing Brief and Rebuttal, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Complainant cannot avail himself of the continuing violation doctrine to avoid the statute of limitations, since this purported negative performance review was a discrete action. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 at 907; *Nat’l R.R. Passenger Corp.*, 536 U.S. 101 at 114. Complainant, therefore, cannot challenge his 2015 performance review, which was administered in February 2016. *See* Tr. 209:15-25.

In any event, despite the constructive feedback Complainant was provided on his 2015 performance review, which reflected feedback Complainant consistently received throughout the entirety of his tenure at JetBlue, the review was not, on the whole, even negative. Complainant’s “trajectory” was a “valuable contributor” and his overall competency rating was “highly developed.” *See* Respondent Ex. 13. In fact, Mr. Giudice testified that this evaluation was “good.” Tr. 205:25-206:1. Accordingly, Complainant cannot cite a largely positive performance review (that, again, occurred outside of the statute of limitations) as an adverse action.

8. Alleged Adverse Action: “Safety – Violation of FAA Regulations / Ignoring email /Compromising my Credentials a) January 21, 2016 – Discover another safety related aircraft maintenance Tracking glitch – Email ignored – No follow-up to corrective action. (EX-20).”

Response: This alleged adverse action is time barred by the statute of limitations. As set forth in Respondent’s Post-Hearing Brief and Rebuttal, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1). Complainant is barred from challenging any alleged adverse action prior to March 7, 2016. Nor can Complainant, as noted supra, avail himself of the continuing violation doctrine to avoid the statute of limitations for his employer’s discrete action.

In any event, Complainant’s attempt to claim that JetBlue’s alleged general failure to adequately respond to his safety concerns is an adverse action against him personally otherwise fails as a matter of law. Indeed, although Complainant never cited this as an adverse action previously (and there was no evidence regarding this alleged adverse action presented at the hearing in this matter), the email correspondence in question plainly did not require or expect a response: Complainant began the email, “FYI.” *See* Complainant Ex. 20. Accordingly, the alleged lack of response to this email did not materially affect the terms and conditions of Complainant’s employment.

9. Alleged Adverse Action: “Hostile Work Environment / Securitized Work ... April 6, 2016 - Training of New Employee Incident – Contacted Human Resources Department after this incident (See Section V., G of Bahn – Post Hearing Brief).”

Response: It is unclear what Complainant’s reference to the “Training of New Employee Incident” even means. Apart from a number of roundabout questions he posed at the hearing, Complainant has not provided any evidence regarding this alleged incident or how it might qualify as an adverse action. At the hearing, Complainant repeatedly asked Mr. Giudice, his manager, whether he recalled if Complainant had trained an employee. Mr. Giudice did not recall. See Tr. 194-198. No further evidence was presented on this topic.

However, it is clear that, whatever Complainant means, this incident was, at worst, nothing more than benign criticism from a supervisor, which does not, as a matter of law, qualify as an adverse action for purposes of a retaliation claim. See, e.g., *Meder v. City of New York*, Case No. 05-CV-919(JG), 2007 WL 1231626, at *4 (E.D.N.Y. Apr. 27, 2007) (“Unfair criticism and other unpleasant working conditions are not adverse employment actions[.]”). Furthermore, in response to questioning from Your Honor, Mr. Giudice denied ever over-scrutinizing Complainant, especially since Complainant did not report directly to him. See Tr. at 193: 10-15.

10. Alleged Adverse Action: “Denied Opportunity for Promotion / (Blacklisting Internal at JetBlue) ... June 7th, 2016 – Denied Appointment of Acting Supervisor - JetBlue and my leadership was well aware of my goal and numerous attempts to be promoted to a leadership roll. [sic] When an acting Supervisor position became available, and despite being one of the most senior, experienced, and credentialed employees in the department. I was not notified or offered a chance for the position. (TR-51, L 21-14).”

Response: Respondent addressed this issue at length in its Post-Hearing Brief and Rebuttal. See Post-Hearing Brief at 9; Post-Hearing Rebuttal Brief at 4. In sum, Complainant’s claim that he was denied one assignment on one day fails to constitute an adverse action as a matter of law. See, e.g. *Weisbecker v. Sayville Union Free Sch. Dist.*, 890 F.Supp.2d 215, 233 (E.D.N.Y. 2012) (“Not receiving a requested or desired assignment is not an adverse employment action.”).

Indeed, Mr. Giudice testified that “Acting Supervisor” was not an actual position; rather, it was only an on-call assignment when no supervisors were available. See Tr. 194: 8-19. Mr. Giudice further testified that the failure to be appointed “Acting Supervisor” did not negatively affect a JetBlue Crewmember’s promotion prospects and even gave two examples of individuals who had been promoted without ever receiving that assignment. See Tr. 203: 16-25. Accordingly, Complainant’s failure to receive an “Acting Supervisor” assignment on one day was not material.

11. Alleged Adverse Action: “Violation Confidentiality / Ostracizing / Blacklisting ... Email newsletter sent throughout JetBlue advising of my filing a Safety Report (EX-

22).”

Response: Complainant, who did not raise or address this issue during the hearing (and cites no testimony regarding it), claims JetBlue somehow violated confidentiality, but provides no evidence of this alleged confidentiality breach or any explanation of how it possibly qualified as an adverse employment action. The only evidence to which Complainant cites reflects, consistent with the evidence presented at the hearing, he was rewarded for submitting a Safety Action Report (and makes no reference to any specific report he filed). Otherwise, Complainant’s Exhibit 22 only contains inadmissible hearsay with its reference to the substance of the contents of an alleged “newsletter.” Complainant lacks adequate information, therefore, to even fully understand Complainant’s allegations. Clearly, however, Respondent’s decision to provide Complainant with a safety award does not qualify as an adverse action.

12. Alleged Adverse Action: “Failure to Assist / Ostracizing / Blacklisting ... a) Unsuccessful attempts to seek help from JetBlue Human Resources (Section V., G of Bahn – Post Hearing Brief) ... b) Unsuccessful attempts to seek help from JetBlue Safety Department (Section V., F of Bahn – Post Hearing Brief).”

Response: As a threshold matter, Complainant did not present any evidence or testimony whatsoever regarding this alleged failure by JetBlue at the hearing, including any evidence to establish that: (a) JetBlue actually failed to investigate or adequately respond to his complaint(s); or (b) any such failure, if true, was intentional, much less retaliatory. But Complainant’s attempt to claim JetBlue’s alleged inadequate response to his was an adverse action fails as a matter of law. To that end, courts have recognized that an employer’s alleged “lack of a thorough investigation” does not qualify as an adverse action, especially where, as here, Complainant expressed no qualms about reporting purportedly unlawful conduct. *Milne v. Navigant Consulting*, No. 08 CIV. 8964 NRB, 2010 WL 4456853, at *8, n. 16 (S.D.N.Y. Oct. 27, 2010) (“We note the particular irony in plaintiff’s argument that she suffered an adverse action in this case because of the lack of a thorough investigation by [her employer]. Not only would this not deter a reasonable employee from making or filing a charge of discrimination, but the complaint makes clear that plaintiff herself was not at all deterred by the lack of an investigation.”).

13. Alleged Adverse Action: “Denied Pay & Compensation Adjustment ... I was denied a Pay and Compensation Review that took into account the industry standards such as tenure, cost of living, experience, credentials, education, and shift differential. Based on these variables my pay should have matched a crewmember that was based in Orlando, Florida with similar metrics. (TR-113, L 2-12)((TR-111, L 3-5)(TR-111, L 16-17).”

Response: Respondent addressed this issue at length in its Post-Hearing Brief and Rebuttal. *See* Post-Hearing Brief at 10,12-13; Post-Hearing Rebuttal Brief at 5-6. In sum, Complainant’s failure to receive a market-based salary adjustment in April 2016 was not an adverse action (*see Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (holding adverse action must be a “materially adverse change” in

employment status, i.e., a “decrease in wage or salary”), but, in any event, Respondent conclusively established it had market-based reasons, completely unrelated to Complainant’s protected activity, for declining to provide Complainant with an adjustment. If the Court requires additional information regarding this topic, please do not hesitate to contact the undersigned counsel.

14. Alleged Adverse Action: “Change in Duties ... Sent email to Supervisor regarding the Planning Department failing to backup critical maintenance data as called out in the mandated GMM. Supervisor Giudice reassigned the responsibility to my Department going forward. (EX-23, Page 5).”

Response: Although Complainant does not cite evidence he presented of this alleged action at the hearing in this matter, thereby making it difficult to assess the exact nature of his claim, Complainant himself indicates the task in question was reassigned to Complainant’s entire department (not to him personally). Accordingly, Complainant’s alleged “change in duties” was not an adverse action taken against him individually. In any event, a supervisor’s decision to assign one additional task to Complainant’s department did not materially affect the terms and conditions of Complainant’s employment.

15. Alleged Adverse Action: “Safety – Violation of FAA Regulations / Compromising my Credentials ... After close of FAA investigation and despite notifying my leadership of failing to backup critical Aircraft Maintenance data on August 15, 2016, it was missed again on August 20, 2016. (EX-23, Page 4).”

Response: Complainant’s attempt to claim that JetBlue’s alleged general failure to adequately respond to his safety concerns is an adverse action against him personally fails as a matter of law. Indeed, as noted, Complainant’s dissatisfaction with JetBlue’s alleged response to safety reports does not qualify as an adverse action. *See Milne*, 2010 WL 4456853, at *8, n. 16.

FINDINGS OF FACT RE ADVERSE ACTIONS

As a predicate, I find that the Complainant is credible that he had an exceptional performance history with Respondent. He worked for 11 years and 9 months as:

- Aircraft Maintenance Planner,
- Aircraft Maintenance Scheduler,
- Heavy Maintenance Planner,
- Aircraft Maintenance Router.

CX 2 – Attachment A. I accept Complainant’s representation that he was highly qualified for his final position “due to my past internal positions, extensive aircraft maintenance technical background, pilot experience, and education. I am an FAA licensed Airframe and Powerplant Aircraft Technician (A&P), Commercially rated Helicopter Pilot, and Private Airplane Pilot. CX 2 – Attachments A thru I. I also accept as alleged that Complainant had an exemplary safety

record.⁸ He alleges and there is no controvert that he had an excellent attendance, tardiness, & sick call record. He alleges and there is no controversion that he received 47 Awards over a 4 year period. ⁹ He also alleges and is unchallenged that he was the primary crewmember tasked with training of all new employees that joined the department. He alleges that prior to raising safety concerns in 2015,

I was often tasked with attending Lead and Supervisor meetings. In 2012 I was rewarded for successfully attending a West Coast Lead / Supervisor Summit. (CX-4 – Attachment B – Page 15)

Brief.

The Complainant bears the burden of proof as to whether he has established that Respondent took an adverse action against him. ¹⁰ Once a case has proceeded to hearing, a complainant's burden is to prove by a preponderance of evidence ("demonstrate") that the protected activity was a contributing factor in the alleged adverse action).¹¹

UNTIMELY CLAIMS

The Complainant filed his claim June, 5th 2016. (EX-21). After taking administrative notice, under AIR21, a Complainant must file a claim regarding an alleged violation within 90 days thereof. *See* 49 USC § 42121(b)(1).¹² Because Complainant filed his Complaint on June 5, 2016, he is barred from challenging any alleged adverse action prior to March 7, 2016. Therefore, I find that Numbers 1 through 8 are untimely. *Barrett v. Shuttle America*, ARB No. 12-075, ALJ No. 2012-AIR-10 (ARB Feb. 28, 2014).

⁸ He states in his brief: I had a perfect safety record during my entire career with JetBlue with zero events of missing required aircraft safety inspections and maintenance requirements .

⁹ He states:

In midyear 2012 JetBlue launched a job performance reward system that allows leadership and co-workers to reward and employee if he or she goes over and above their job expectations. This system was named "Lift". From Mid 2012 up to the month before my separation from JetBlue (September 2016) I was awarded and received 47 Lift Awards for a wide range of reasons including helping other crewmembers. (CX-4 – Attachment A & B).

¹⁰ In *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014), a split panel of the Administrative Review Boar indicated that a prima facie case is merely a term referring to the four elements of a whistleblower complaint, and that "[T]he same basic four-part framework of the complainant's prima facie case applies not only when deciding whether the allegations are legally sufficient, *see* 29 C.F.R. § 1980.104(e)(2), but also when an ALJ considers whether the complainant has satisfied his or her evidentiary burden under 49 U.S.C.A. § 42121(b)(2)(B)(iii)."

¹¹ *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11 (ARB June 29, 2007).

¹² The parties advised in emails that they have no objection to administrative notice of the calendar.

POTENTIALLY VIABLE ADVERSE ACTIONS

Complainant alleges that he was wrongfully denied a salary adjustment in the 2016 pay and compensation review in his department in April, 2016 because of his protected status.¹³ This would be a timely complaint. Complainant avers:

Beginning in January of 2015 after discovering and inquiring to my leadership about operating aircraft with potentially expired Passenger Oxygen Generators there is a direct correlation between my bringing forward safety concerns, filing safety reports, and a pattern of adverse employment actions for doing so. Please see (EX-1, Items 1-36) (EX-1 – Attachment E2)

Most notably, I applied for 4 positions where I was one of the most qualified candidates in terms of experience, seniority, credentials, and solid job performance, but was passed over for each position. The one common thread between these job applications was the Director was Boris Rogoff, and or the Human Resources Recruiter was Linda Phaneuf.

See prehearing compliance, TR pp. 53 to 54 and brief.

In April 2016, Respondent’s Maintenance and Planning Department conducted a review of Aircraft Router salaries to determine whether they aligned with their competitors. TR at 79. Respondent argues that those decisions were made on a department-wide basis in light of market conditions and did not involve performance or any merit. Mr. Rogoff was solely responsible for making decisions with respect to the compensation adjustments in April 2016. *Id.* at 78-79. Respondent argues that Mr. Rogoff did not consider performance with respect to those adjustments. *Id.* at 79.

As noted above, Mr. Rogoff played no role in evaluating the performance of Aircraft Routers. *Id.* at 78. Complainant admitted he had no personal knowledge with respect to how Mr. Rogoff made compensation adjustments. *Id.* at 214.

According to Mr. Rogoff, Complainant did not receive a market-based adjustment because “[h]is salary was the second highest, and higher than other supervisors, as well, that ... he may have reported to.” *Id.* at 84.

See Brief.

Respondent argues that Complainant was “well within the salary range, and our focus was to bring people into a fair range.” *Id.* It maintains that like all other Aircraft Routers, Complainant’s performance was not considered. *Id.* at 85. *See* Brief. It also maintains that Mr.

¹³ He alleges the following damages:

If Promoted in 2015 - Up to 15% Salary Increase (85,106.59 x 0.15)
If Promoted in 2016 - Up to 15% Salary Increase (109,611.88 x .015)
If Promoted in 2017 - Up to 15% Salary Increase (120,748.37 x .015)

See Brief.

Rogoff did not have any knowledge of any safety issues Complainant had raised. *Id.* at 84-85, 105, 108. Thus, Complainant's alleged protected activity could not have possibly factored into whether Mr. Rogoff granted Complainant received a salary adjustment.

I am advised that Complainant earned \$78,500 annually at the time of the adjustment, and was the second-highest paid Aircraft Router in his Department (by \$281 annually) and was paid higher than four of six supervisors (who were above him in title and rank). RX-1; *Id.* at 80-84. After Complainant, the next-highest paid Aircraft Router earned \$70,797 (approximately \$7,300 less). *Id.* Eleven Aircraft Routers had lower salaries than Complainant. *Id.* at 82. Of the 13 Aircraft Routers under consideration, only four (4) received adjustments (ranging from \$1,200 to \$2,800 annually). RX1; TR at 82-83.

I asked Complainant how much he lost in pay as a result of this incident:

JUDGE SOLOMON: How much money did you lose in the salary adjustment? What would have happened had you gotten the salary adjustment?

THE WITNESS: Salary adjustment, so there were two events. Well, there's two events that happened. There's the pay and comp review, and then there's the annual performance pay adjustment. So there's two distinct events, and I was -- both were affected by, what I feel, the filing of this complaint.

JUDGE SOLOMON: How much? How much money is involved in each of those?

THE WITNESS: So an annual raise at Jet Blue for the average crewmember can range between three and five percent if you're a good crewmember within good standing. I was given, I believe, two percent, which is one percent -- let's say possibly potentially three percent -- less than I would have gotten, so three percent of at the time I think close to \$77,000.00 at the time, so several thousand dollars.

The pay and comp review, that I don't know the answer to because I don't know what the industry standards were. I don't know the variables that went into it. But I know for a fact that after I left Jet Blue I think there was across-the-board eight percent in pay increase across the board.

And I know the supervisors in that position are at or near \$100,000.00 a year now. So potentially the range could be between \$25,000.00 to \$30,000.00 of pay that -- and then, if you multiply that times the amount of years in question, the numbers go up exponentially.

TR 45 – 46.

I cannot discern from the briefs or from the email colloquy exactly how much was involved. I also cannot distinguish the two incidents and assume both flow from the April, 2016 incident.

Respondent argues that it was amply justified in not providing Complainant a market-based salary adjustment: Complainant's compensation was above-market.

I credit Mr. Rogoff's testimony.

I find that Complainant has not established that he was wrongfully denied a salary adjustment in the 2016 pay and compensation review in his department in April, 2016 because of his protected status. I accept the Respondent argument that the increases given to other employees were not based on merit, and that Complainant misrepresented the nature of the increases.¹⁴

HOSTILE WORK ENVIRONMENT

In Number 9, Complainant avers a hostile work environment. In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court ruled that an employer may be liable for all acts contributing to a hostile work environment as long as one of the contributing acts occurred within the applicable filing period. If the Complainant were the subject of violence and hostility he can prove a claim for life on this basis. *Leiva v. Union Pac.R.R. Co., Inc.*, ARB No. 14-016; ALJ No. 2013-FRS-0019 (ARB May 29, 2015). During the hearing, the following colloquy occurred:

JUDGE SOLOMON: And what you're saying is that there was a hostile work environment. I get cases like that, it's my grist, get cases like that all the time. And typically the party can tell me what the hostile work was, what the activity was. But you haven't told me yet.

MR. BAHN: Well, if I would be able to cross examine --

JUDGE SOLOMON: No, you've got to tell me. Please, just tell me. That's what we call a proffer.

MR. BAHN: Okay. So do you want to start at the 90-day --

JUDGE SOLOMON: No, I want you to tell me.

MR. BAHN: Sir, but, Your Honor, there was a series of events that transpired.

JUDGE SOLOMON: I don't want to know about the events. What was hostile?

MR. BAHN: I would -- I never said hostile. I said harassment.

JUDGE SOLOMON: Okay.

MR. BAHN: There was --

JUDGE SOLOMON: It's the same thing.

MR. BAHN: Okay.

JUDGE SOLOMON: How were you harassed?

MR. BAHN: Over-scrutinizing of my work.

JUDGE SOLOMON: Who did that?

MR. BAHN: Mr. Giudice.

JUDGE SOLOMON: When did he do that? In the brief that you give [sic:gave] me, I'm directing you to itemize every time in the documentation, or through your memory, that he in any way over-directed you or over-examined you or whatever, however you want to characterize it.

MR. BAHN: So I'll put this in layman's terms. I think that's what you're looking for, correct?

JUDGE SOLOMON: Any terms is what I'm looking for. I haven't heard it.

¹⁴ Had the increases been based on merit, the Complainant would have a viable complaint.

MR. BAHN: In 2015, I discovered a violation, a serious violation of the rules and regulations of the FAA, which I hold true to value of my A&P license.

JUDGE SOLOMON: Okay, I accept that, all right?

MR. BAHN: Number two, then, through a series of events throughout the year or the next year, I discovered yet another issue, and then another issue. And then I brought the claim, a safety report, filed a safety report, and the relationship between myself and Mr. Giudice deteriorated to a point where my work was being overly scrutinized.

JUDGE SOLOMON: I asked you when and where your work was overly scrutinized.

MR. BAHN: Again, I would have to walk you through each event.

JUDGE SOLOMON: You do not have to do that.

MR. BAHN: Okay.

JUDGE SOLOMON: You just have to itemize what they are.

MR. BAHN: The first being, I was not -- just give me a second.

THE WITNESS: Can I grab some water over there?

Time passed.

JUDGE SOLOMON: Sure. Okay, you haven't come up with anything yet.

MR. BAHN: Well, despite -- okay. So, despite being one of the most qualified, most experienced people in the position --

JUDGE SOLOMON: All right, I'm going to ask your question. Mr. Giudice, you're sitting there, and you're listening to him. Did you ever over-scrutinize him?

THE WITNESS: Me?

JUDGE SOLOMON: Yes.

THE WITNESS: No, sir. He didn't report to me. He reported to the supervisors, so I never dealt with him on a day-to-day basis.

TR at 190 – 193.

Complainant continued to examine the witness. Earlier, Complainant had testified that Mr. Giudice had animus for him because he was a whistleblower.¹⁵ But he did not challenge the statement that Mr. Giudice did not directly supervise him and therefore no harassment occurred. TR 193.

Respondent argues that Complainant has not provided any evidence regarding this alleged incident or how it might qualify as an adverse action. I am reminded that at the hearing, Complainant repeatedly asked Mr. Giudice, his manager, whether he recalled if Complainant had trained an employee. Mr. Giudice did not recall. *See* Tr. 194-198. Respondent states that no

¹⁵ Complainant: The relationship between Mr. Giudice and I was already -- I want to say not good ever since filing the safety report. Now, many things weren't documented, so I'm not going to get into what -- because I didn't think I had to document it. I just felt it was just he was upset about filing the report, but the relationship was deteriorated to a point where it really wasn't a good working relationship at that point.

TR 30. This was during 2015. He alleged that when he asked for assistance, CX-1-G, Mr. Giudice failed to provide it. TR 31 – 32.

further evidence was presented on this topic.

Although I asked Complainant to provide me with each incident of harassment or incidents that would shoe Respondent over scrutinized his work, TR 190 – 193, I find that he failed to do so. I have reviewed the briefs and email correspondence, and I can't find any evidence to support the allegation.

As to blacklisting, I find that Complainant failed to establish any overt actions against him. In *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, ALJ Case No. 01-CAA-018 (ARB Nov. 28, 2003), the ARB set out a definition of blacklisting under the environmental whistleblower statutes. Its definition included the following observations:

A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guard*, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); see *Black's Law Dictionary* 154 (5th ed. 1979). As *Black's* explains, a trade union may blacklist workers who refuse to conform to its rules, or a commercial agency or mercantile association may publish a blacklist of insolvent or untrustworthy persons.

A blacklisting may also arise —out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment. 48 Am. Jur. 2d, Labor and Labor Relations § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted).

...

In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. See *Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec'y July 3, 1991), aff'd sub nom., *Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992) (table) (the existence of a memorandum and status report on whistleblower complaints was insufficient to establish blacklisting without further indications of specific adverse action). Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. See

As stated, under the Pickett definition, the Complainant bears the burden to show an “objective action.” I find that AIR-21 as amended, uses the same definition. I find further that no objective action has been established.

Therefore, I find that the Complainant has not established a hostile work environment.

ALLEGED DENIAL OF OPPORTUNITIES FOR PROMOTION

In Number 10, Alleged Adverse Action: “Denied Opportunity for Promotion /

(Blacklisting Internal at JetBlue) ... June 7th, 2016 – Denied Appointment of Acting Supervisor, Respondent directs me to testimony from Mr. Giudice that “Acting Supervisor” was not an actual position; rather, it was only an on-call assignment when no supervisors were available. See TR 194: 8-19. Mr. Giudice further testified that the failure to be appointed “Acting Supervisor” did not negatively affect a JetBlue Crewmember’s promotion prospects and even gave two examples of individuals who had been promoted without ever receiving that assignment. See TR 203: 16-25. Respondent argues that Complainant’s failure to receive an “Acting Supervisor” assignment on one day was not material.

In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB adopted the “materially adverse” deterrence standard of *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). The majority for the ARB wrote: “*Burlington Northern* held that for the employer action to be deemed “materially adverse,” it must be such that it “could well dissuade a reasonable worker from making or supporting a charge of discrimination.” See further *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 (ARB Dec. 29, 2010); see also *Strohl v. YRC, Inc.*, ARB No. 10-116, ALJ No. 2010-STA-035, slip op. at 4-5 (ARB Aug. 12, 2011).

In this case, Complainant has not established that he lost any money or any status as a result of not being selected for this temporary, one day, position. Therefore the loss of this position is not "materially adverse" as defined in *Burlington Northern* and by AIR-21, 49 U.S.C.A. § 42121, “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.

“INTERNAL” AND EXTERNAL BLACKLISTING

This may be an extension of the hostile work environment argument. I restate that the *Pickett* definition requires the showing of some overt action by Respondent. Although Complainant argues that Respondent failed to address adverse action concerns he does not show how his job duties or his professional employment were affected.

In Number 11, Complainant alleged: “Violation Confidentiality / Ostracizing / Blacklisting ... Email newsletter sent throughout JetBlue advising of my filing a Safety Report (EX-22).”

During the hearing, Complainant alleged:

So there's a maintenance tracking system, which you're going to hear throughout the hearing, called TRAX, and that's responsible for all these mistakes, a lot of the issues that I found. And, because the system is inherently unreliable, the FAA and our GMM mandates that -- a GMM is a general maintenance manual. That's the rule book that we have to follow within tech ops to stay compliant within FAA regulations, and they dictate that every day you're supposed to take a hard copy download of the data from that system in the event of a system failure.

So I had noticed that two days they had missed the downloading of this data. And

Jet Blue was -- or, I mean, Mr. Giudice and Jet Blue was trying to paint this picture of, hey, we want to try to fix this. They didn't say that, but in so many terms -- they tried to give me an award. They tried to say that I could take part in some kind of improvement process.

So with that mindset I said, okay, let me give it another shot with Jet Blue. On paper, they would try to paint that picture. But in the interactions in reality that were not documented, the perception and the bite was much different.

At any rate, the event that -- back to the event in question -- we were supposed to download this data, so I found that it wasn't being done. So I sent a simple e-mail, very nice, very respectful, to my supervisors, and I said, in essence -- I have the exhibit, it's exhibit CX-1, attachment Y.

And basically I said, gentlemen, or such, we missed this downloading of data the last two days, can we please make sure it gets done because I personally use that report for my own scheduling and planning purposes. And the supervisor responded and said, yeah, we'll look into it, we'll get -- we'll make sure that's done, or something.

I have to read the e-mail chain, but basically what happened was, Mr. Giudice took my e-mail and forwarded it to the entire department, carbon-copied Boris Rogoff, the director -- which I don't know it went to director level -- and basically changed and issued a directive violating the GMM and said from now on the routers have to run this report.

There's a planning department and a routing department. I was in system ops in the routing department. The maintenance planning department is a separate but within the same umbrella, and their job function is to run -- one of their main job functions is to run this report.

So I felt in kind of a retaliatory way he said going forward now the routers have to do it. So it added extra work to the workload. And then he kind of alluded to the fact that some of the people used to be planners so they should know how to do that, which was directed towards me. So it was a sarcastic, condescending e-mail.

And then also the people that were carbon-copied, now it made me look like I ratted people out in planning, I got them in trouble.

TR 64 – 66.

As stated above, Respondent alleges that Complainant did not raise or address this issue during the hearing (and cites no testimony regarding it), claims JetBlue somehow violated confidentiality, but provides no evidence of this alleged confidentiality breach or any explanation of how it possibly qualified as an adverse employment action. The only evidence to which Complainant cites reflects, consistent with the evidence presented at the hearing, he was rewarded for submitting a Safety Action Report (and makes no reference to any specific report he filed). Otherwise, Complainant's Exhibit 22 only contains inadmissible hearsay with its reference to the substance of the contents of an alleged "newsletter." Complainant lacks adequate information, therefore, to even fully understand Complainant's allegations. Clearly, however, Respondent's decision to provide Complainant with a safety award does not qualify as an adverse action.

I accept the Complainant's position. A review of the record shows that this was

addressed as an issue at hearing.

In Number 12, Complainant alleges Alleged Adverse Action: “Failure to Assist / Ostracizing / Blacklisting ... a) Unsuccessful attempts to seek help from JetBlue Human Resources (Section V., G of Bahn – Post Hearing Brief) ... b) Unsuccessful attempts to seek help from JetBlue Safety Department (Section V., F of Bahn – Post Hearing Brief).”

Respondent argues that as a threshold matter, Complainant did not present any evidence or testimony whatsoever regarding this alleged failure by JetBlue at the hearing, including any evidence to establish that: (a) JetBlue actually failed to investigate or adequately respond to his complaint(s); or (b) any such failure, if true, was intentional, much less retaliatory.

But Complainant’s attempt to claim JetBlue’s alleged inadequate response to his was an adverse action fails as a matter of law. To that end, courts have recognized that an employer’s alleged “lack of a thorough investigation” does not qualify as an adverse action, especially where, as here, Complainant expressed no qualms about reporting purportedly unlawful conduct. *Milne v. Navigant Consulting*, No. 08 CIV. 8964 NRB, 2010 WL 4456853, at *8, n. 16 (S.D.N.Y. Oct. 27, 2010) (“We note the particular irony in plaintiff’s argument that she suffered an adverse action in this case because of the lack of a thorough investigation by [her employer]. Not only would this not deter a reasonable employee from making or filing a charge of discrimination, but the complaint makes clear that plaintiff herself was not at all deterred by the lack of an investigation.”).

Respondent reply to email colloquy.

After a review of the allegations that his work was over-scrutinized, I find that Complainant did not establish this issue. He did not show how he was ostracized or blacklisted. In fact, the record shows that he was continually praised for his whistleblowing efforts. Although the Complainant claims that he is owed a duty of confidentiality, although Respondent’s arguments are not credible, Complainant did not establish that public acknowledgment of receipt of a safety award constitutes an adverse action. He did not allege a single incident where his fellow employees held him in lower esteem or adversely reacted against him because they considered him to have been a whistleblower.

ALLEGED LOSS OF PAY DUE TO PROTECTED ACTIVITY

In Number 13, Complainant alleged: “Denied Pay & Compensation Adjustment ... I was denied a Pay and Compensation Review that took into account the industry standards such as tenure, cost of living, experience, credentials, education, and shift differential. Based on these variables my pay should have matched a crewmember that was based in Orlando, Florida with similar metrics. (TR-113, L 2-12) ((TR-111, L 3-5)(TR-111, L 16-17).”

Mr. Guidice testified that he was not involved in this issue. TR 190 – 193.

Respondent argues that Complainant’s failure to receive a market-based salary adjustment in April 2016 was not an adverse action citing to *Galabya v. New York City Bd. of*

Educ., 202 F.3d 636, 640 (2d Cir. 2000) (holding adverse action must be a “materially adverse change” in employment status, i.e., a “decrease in wage or salary”).

...but, in any event, Respondent conclusively established it had market-based reasons, completely unrelated to Complainant’s protected activity, for declining to provide Complainant with an adjustment. If the Court requires additional information regarding this topic, please do not hesitate to contact the undersigned counsel.

Respondent response on July 19 to an email colloquy. A review of the cited case shows that the evaluation was derived from a holding that no genuine issue of material fact existed as to whether appellant's alleged job transfer was an adverse employment action, and thus that appellant had failed to establish a prima facie case of age discrimination under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) “pretext” rubric.¹⁶ The AIR 21 burden of proof framework is much more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard. See, e.g., *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013).

However the Complainant had alleged that he wanted to become a supervisor. Mr. Giudice was Respondent’s manager of maintenance planning and aircraft routing and was Complainant’s ultimate supervisor but Complainant was an aircraft router, so he reported to whichever supervisor was on duty. He acknowledges that Complainant had received a safety award dated July 26, 2016. RX-16, TR. 135.¹⁷ He related that: “...safety is Jet Blue's number one core value.” He also related that although Complainant had expressed views concerning certain oxygen generators, Respondent had voluntarily notified the FAA that they were a concern. TR 58. This would have related to the April 2016 allegation. However, as to the allegation about the August, 2018 application, he testified:

¹⁶ The court ruled that

In this context, appellant's argument rests on the premise that the special education, junior high school keyboarding class presented job responsibilities that were so different from the mainstream high school keyboarding class that the change in responsibilities was a setback to his career. We cannot adopt this conclusion as self-evident, and no evidence in the record supports it. There is no evidence detailing what responsibilities appellant performed during his years as a special education teacher. Similarly, appellant has not shown what particular expertise he developed during those years, nor how the transfer impacted on that expertise.³ Indeed, appellant has not even proffered evidence to show what particular job responsibilities he would have had as the keyboarding instructor at P.S. 4, or how those responsibilities would have differed from those he had at Van Arsdale.

¹⁷ Mr. Giudice: I believe it was \$50.00, yes.

Q Did you approve that award?

A I would have, yes.

JUDGE SOLOMON: What exhibit number is that?

MR. LEPORE: Mr. Bahn submitted the exhibits of his safety lift awards. It would be, for the record --

MR. BAHN: I don't think I had the -- I don't think I included the -- it's just a statement on page 6 of exhibit CX-1.

MR. LEPORE: They are definitely in here.

MR. BAHN: I don't remember.

MR. LEPORE: It's exhibit CX-4 in Mr. Bahn's exhibits. It reflects that he was awarded a \$50.00 lift award on March 21st, 2016.

Q [By Mr. Lepore] Are you aware -- or, did you give Mr. Bahn any opportunities for professional advancement in August of 2016?

A Yes.

Q Can you tell me about those?

A So we have -- so Jet Blue had a one team member continuous improvement team, and she was beyond inundated and overwhelmed, could not handle all the projects within tech ops. So I had suggested during what was called a project renaissance meeting -- we were looking to implement massive change within the system operations center, which is the nerve center of the airline.

It's where all flight decisions are made, crew decisions are made, maintenance decisions are made, passenger decisions are made. And project renaissance was getting kicked off the ground, and there were three teams involved.

And, in those three teams, we were the only one that did not have a continuous improvement liaison because she was inundated. I had shown up to three or four meetings without a continuous improvement team member to represent us.

So I was kind of doing both, but I was overwhelmed. So I had suggested to Boris, can I pick a team member within routing to be a project manager or a continuous improvement person to help me with the project so that I could lean on them to support the project, because I had five or six other projects going on. And he said, I think that's a fantastic idea, who do you think we should use.

And I said, well, Brian is definitely one of my top-skilled routers, he knows the routing business very well, and I think I want to give him the opportunity. And he said, okay, have at it, it's your ship, run it. And that's when I approached him and asked him if he'd be interested.

Q And then what happened?

A He said, why now? And I said, what do you mean, why now, what's the difference? And he goes, well, I was just curious why you're asking me now. And I didn't understand his line of questioning. And I said, because I need you now, I think you've definitely got what it takes, I think I am relying on someone that has the capability of knowing swap matrix, what it takes to swap an aircraft, what are the criteria, what are the -- you know, how are we tracking our maintenance, and one of the most important things in maintenance, you know, are the intervals.

And I said, look, you don't have to give me an answer right away, but I definitely want you to think about it, I could definitely use you. And he got back to me and said he would like the opportunity. And I said, okay, great.

Q Did he ever follow up on that?

A So I gave him a swap tool that was created by Boris -- Boris, being an engineer, is probably one of the smartest guys I know in the aviation business -- he came up with a swap matrix tool which I thought was the coolest thing ever invented.

So he gave it to me, and I forwarded it to Brian and said, hey, I want you to use this tool doing your swaps, and I think I also gave it to another person, as well, and give me some feedback on the tool. And I never got any feedback because -- I don't know.

Q All of this was happening in August of 2016 --

A Yeah.

Q -- to your knowledge?

A Around that time frame.

Q And why was this an opportunity for professional advancement?

A I don't know if it was an opportunity of professional advancement. I don't know that it was necessarily an opportunity of -- it was an opportunity to show his participation, to bring out a positive in Brian. Brian's track record within Jet Blue wasn't always the best. I found that out more as a leader than I did as his peer. And there were multiple complaints against Brian, specifically towards his attitude, very negative.

If you look at his performance reviews, every one of his performance reviews reads, fantastic crewmember as far as technical ability and capability, needs improvement on attitude, the way he treats his peers, the way he speaks to his peers, the way he speaks to his superiors, the way he speaks to superiors in other work groups.

Q Was this an opportunity for Brian to contribute on a policy level?

A Absolutely. This was a way for me -- one of the best leaders I ever worked for, Tony Lowry, which was a VP of Jet Blue -- he taught me, as a leader, it is our job to bring the good out in people, especially when they are not performing to standard, we need to bring it out in all of our crewmembers that are not performing to standard. And I lived by those words to this day.

And so I was doing everything under my ability, as the manager of the department, to ensure that the supervisors were treating all our crewmembers fairly in that, if there were any crewmembers that were not performing, give them training, give them the tools, give them whatever they need to bring out the best in them. And that was what I lived by.

That was what I preached to my supervisors, to my direct reports. And so in this particular instance I went to Brian and I said, I think this is a great project for you, you could bring out your ability and show, you know, what you're capable of doing.

Q And would success on that project be something that might be considered going forward when you're considering new positions?

A Absolutely.

Q When you're considering someone for promotion, would you consider contribution on a project like that?

A Yes.

Q And you would interview and promote people during your employment as a manager at Jet Blue, correct?

A Yes.

Q Did Mr. Bahn ever reach out to you or come to you to discuss, you know, your relationship, your working relationship?

A Yes.

Q And when was that?

A So he had put in for a supervisor position for planning. And, when he was not awarded the position, he was very discontent, very upset, and so I spoke to him and made him understand why. And it was -- instead of it being a coaching session, it was more of a confrontational on his part, very aggressive, almost borderline insubordinate. I actually sought out consultation with the director of people department, Bob Bylack, to which he said, look, you don't have to give him a progressive guidance for insubordination for the way he spoke to you, but you could give him an e-mail setting expectations, which I did.

Q And do you remember what you communicated to Brian?

A That during an interview for a leadership role the last thing you want to do is bash

previous leadership and current leadership, which is what he did, in front of me, Linda Phaneuf, and I forget who the third person was in the room that was interviewing. There was three of us. But I coached him in letting him understand that, you know, when you're interviewing for a leadership role you can't bash leadership, it's a poor practice, you also have to maintain a positive demeanor and positive attitude.

And overall the people that I did select -- at that particular time, I selected one particular individual who also had an A&P license, worked as a maintenance planner and an aircraft mechanic for North American Airlines, and that was Samson O'Kaine, so I promoted him, at which point he --

Q So the concerns that he raised were basically -- well, was that disagreement in management style?

A Well, I mean, he didn't have any -- he was kind of all over the place. He was just irate. He was cursing, you know, that's bullshit, don't tell me how to -- excuse my language -- you know, that's bullshit, that's all right, whatever, whatever, okay, whatever. And it wasn't -- you know, he wasn't listening, he was just basically no matter what coaching or no matter what advice I was giving him it was the, whatever, okay, so I'll just stay in my role and you promote people that don't need to be promoted and you're the boss, you're the boss, trying to undermine me, trying to undercut me.

TR 161 - 167.

In Number 14, Complainant alleges “Change in Duties ... Sent email to Supervisor regarding the Planning Department failing to backup critical maintenance data as called out in the mandated GMM. Supervisor Giudice reassigned the responsibility to my Department going forward. (EX-23, Page 5).”

Respondent argues that although Complainant does not cite evidence he presented of this alleged action at the hearing in this matter, thereby making it difficult to assess the exact nature of his claim, Complainant himself indicates the task in question was reassigned to Complainant's entire department (not to him personally). Accordingly, Complainant's alleged “change in duties” was not an adverse action taken against him individually. In any event, a supervisor's decision to assign one additional task to Complainant's department did not materially affect the terms and conditions of Complainant's employment.

In Number 15: “Safety – Violation of FAA Regulations / Compromising my Credentials ... After close of FAA investigation and despite notifying my leadership of failing to backup critical Aircraft Maintenance data on August 15, 2016, it was missed again on August 20, 2016. (EX-23, Page 4).”

Respondent states that Complainant's attempt to claim that JetBlue's alleged general failure to adequately respond to his safety concerns is an adverse action against him personally fails as a matter of law.

Indeed, as noted, Complainant's dissatisfaction with JetBlue's alleged response to safety reports does not qualify as an adverse action. *See Milne*, 2010 WL 4456853, at *8, n. 16.

Respondent response dated July 19.

I attempted several times to ask Complainant to articulate exactly what job prospects he felt he had lost after March 2016. I was not provided a list of any jobs that he felt he had lost. There is no showing that he had applied for a specific supervisor position that was rejected because of his protected status. According to Mr. Rogoff, the Complainant was eligible to return to work for Respondent. However, the Complainant did not reapply for a job. I also was not provided any evidence that his status as a whistleblower reduced his pay or benefits for the period after March, 2016. Although I do not rely on the cases cited by Respondent, I find that the Complainant failed to show that any of the incidents addressed in paragraphs 13-15 resulted in a change in responsibilities so significant as to constitute a setback to his career.

CONSTRUCTIVE REMOVAL

Although he did not list it in his email colloquy, Claimant argues a de-facto constructive removal of his job. Respondent argues that Complainant voluntarily resigned his employment with two weeks' notice dated August 22, 2016. RX-18.

The legal standard for a constructive discharge is whether the employer has created "working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign." *Loftus v. Horizon Lines, Inc.*, ARB CASE NO. 16-082, 2018 WL 2927676 (May 24, 2018); *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016)(citing *Strickland v. United Parcel Svc.*, 555 F.3d 1224, 1228 (10th Cir. 2009)) reversed on other grounds, *Dietz v. Semiconductor Corp.*, 711 Fed. Appx. 478 (10th Cir. 2017). Constructive discharge is a question of fact,¹⁸ and the standard is objective: the question is whether "a reasonable person" would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant. *Loftus*, *Dietz* and *Strickland*.

Complainant alleged the following in his brief:

J. Events that led to my resignation from JetBlue Airways.

1) Un-documented Events – There were various other adverse employment events that were simply not documented. The treatment by my leadership had changed to an overly guarded and distant relationship. While JetBlue tried to paint a documented picture of a change and correction in their treatment towards me (EX-1, Item 33), the actual interactions and treatment was much worse.

2) Mr. Giudice Physical Altercation with Subordinate Crewmember – Mr. Giudice had an altercation and made physical contact with a subordinate crewmember. JetBlue has a zero tolerance policy for this kind of behavior. From what we could tell within the department, he was not disciplined for this event. I was dismayed that once again, it seems the Human Resources Department failed to act. I felt that it was only matter of time until this could happen to me.

¹⁸ *Loftus*, ARB No. 16-082; *Deitz*, ARB No. 15-017, slip op. at 12 (citing *Strickland*, 555 F.3d at 1228).

3) Violation of Additional FAA Regulation – I found that the Planning Department missed a critical step of backing up our Maintenance Tracking System Data (EX-1, Attachment Y) as dictated in the JetBlue General Maintenance Manual – GMM (EX-5, Attachment D).

Even after sending email correspondence on August 15th, 2016 regarding this issue, the procedure was missed yet again on August 20th, 2016.

It was at this point I realized that the safety and adverse working conditions were not going to improve and promptly submitted my letter of resignation.

4) HR Department Notified But Took No Action – I forwarded the email exchange regarding the safety issue to Peter Haber (EX-1, Attachment Z). Mr. Haber acknowledged receipt of the email but did not follow up. His next contact with me was to ask me to leave the property earlier than my planned last day of work at JetBlue.

See Brief.

Although I gave him several opportunities to do so, Complainant did not aver that he was physically threatened by anyone.

Mr. Giudice testified:

Q Do you recall Mr. Bahn's resignation?

A I do.

Q Do you recall any specific events leading up to Mr. Bahn's resignation?

A Yes.

Q Can you describe those events for me?

A Sure. So there was a lot of change going on at Jet Blue during my tenure, and one of the changes was, the airline started with aircraft routing and planning being one team. And through the course of time the department -- or, for some reason the two roles, although they report under one umbrella of maintenance planning, the two roles morphed into I'm planning, I'm routing.

But it's -- you're one team. And so my job was to pull the teams back together and have them work together simultaneously, as one maintenance planning and routing team. And, with the help of my supervisors, we had reached that point. There were several crewmembers -- Brian Bahn being one of them -- that did not believe in that, did not want to uphold to those expectations, and he wanted things to go his way.

...

THE WITNESS: And, to make a short story, leading up to the event, one of the expectations -- or, one of the decisions I had made was to change the internal operating procedure because the planning team was going through a software change with our M&E, our maintenance and engineering system. It's our tracking system for our forecasts.

So, because I was actually down a couple of planners -- some planners were

promoted, some planners had resigned, moved on to other areas -- I was a little short in the planning side. So I had given some responsibilities -- or, pulled some responsibilities from the planning department and moved them over to the routing department. And one of those was to run a forecast.

Now, throughout the course of the day, an aircraft router runs a forecast every time a swap is requested. So knowing how to do the job function is part of the job function of a router. A forecast can be run set by the date in the tracking system.

You just set the date, you can do a three-day forecast, a four-day forecast, a five-year forecast, 10-year forecast. You could forecast maintenance out as long as you want through this tracking system. Per the GMM, we're supposed to be running a forecast every day.

BY MR. LEPORE:

Q What's the GMM?

A So the GMM is the general maintenance manual, which is basically the Bible of any airline. It tells -- it's basically the operating procedures of the airline. It's an overview. It's not Gospel to what each department does.

It's an overview, a general -- that's why it's called a general maintenance manual -- it's a general overview of how the airline will conduct its business. And each department has what's called IOP's, internal operating procedures, okay? So one of the rules I had put -- or, one of the expectations I had set forth was that the routing team would assist in running this report every day and filing it. On one particular day --

Q Was that previously in the responsibility of a different team?

A It's all under the aircraft maintenance planning and routing umbrella. And in that umbrella, if you read the GMM, if you read the GMM, part of your responsibilities is, planning is supposed to do it, and in routing you're running forecasts as well.

But there is also a clause in the GMM -- in every single airline's GMM -- other duties as assigned. So other duties as assigned is almost an escape clause to allow the leadership, in times of need, when you need manpower, when you need assistance, when you're in need of a report to be run, a supervisor can go to any crewmember and say, hey, I need help, can you just run this report for me? So that's other duties as assigned.

Q And you referred to an IOP, an internal operating procedure?

A Uh-huh.

Q Are you aware of any changes to the IOP's in relation to this report at that time?

A We were in the process of making changes. And, when you are making changes to the GMM, you do reach out to the tech pubs team. But there was also an implementation at Jet Blue that was mandated by the FAA -- not for just Jet Blue but for the entire airline industry -- of what's called the SMS system, which is called the safety mitigation system.

So in years past airlines would just make changes to their manuals and not realize that those changes might affect another department, which might affect another department, which might affect another department, and then somewhere you line up the Swiss cheese and there is an accident or there is an incident or there is a missed process.

With this SMS system, safety mitigation system, the manager who is implementing change to the GMM has to actually go through this long, drawn-out process of finding out what departments this change you're doing or change you're implementing, what effects will it have on systems ops, what effects will it have on front-

line maintenance, what effects will it have on ground ops, what effects will it have on -- and it's a long, drawn-out process. So as much as I as a leader -- or any leader, for that matter -- wants change to happen quickly, sometimes it takes time. It could take a month, it could take two months, it could take a week.

Q And that's different from an IOP, correct?

A That's correct.

Q And how is an IOP different?

A An IOP is an internal operating procedure, a change that I do for my department, internal, that I know 200 percent does not affect anyone because it's basically telling my group, okay, instead of you guys running this report, you guys are going to run this report. And this report is only run by my team, so it can't possibly affect anyone else.

Q And the report that you reference, would that be an IOP or an SMS?

A It lives in both. So the IOP addresses it immediately within my internal of my team. The GMM needed to be revised, and we were in the process of doing that through SMS.

Q Are you able -- was it within your authority to immediately implement IOP's?

A Yes.

Q Was it within your authority to change the way these reports -- or, withdrawn. Was it within your authority to just -- I'm sorry, can you describe your authority around changing the procedures for this particular report?

A So the aviation business is very very fast-paced, very very volatile, very very quick decision-making processes, especially in the support groups. I've been in leadership roles in the aviation business say about 11 years of my 22-year career, and every GMM or every job description I've ever read always leaves a bullet point to say, other duties as assigned. And, for the purposes of my authority as the manager of the group is to be to be able to tell my supervisor, who also under his job description says other duties as assigned.

So if, in fact, I need my supervisor to be an aircraft router today, I could tell my supervisor, hey, you're not supervising today, I need you to be an aircraft router. And he can't tell me, I'm not going to do that, that's not part of my job description. In fact, it is. It says, other duties as assigned.

Q Do you recall Mr. Bahn -- withdrawn. Do you recall whether you had any discussions at that time with Mr. Bahn about running reports?

A I do not. I believe my supervisor did, as I directed my supervisor. So the morning that -- or, the day that -- the afternoon, actually, because he worked afternoon shift -- it was the afternoon that Brian had submitted his resignation, he out of the SOC, very irate, uncontrollably, and he stormed over to the maintenance planner and duty and said, you guys need to run this report, there's two reports missing from the file, this is not acceptable per the FAA. He started dictating FAR's and FAA and all that stuff.

And the supervisor and I turned quickly to look to the left to see Brian pointing and doing this motion to the planner, giving the planner direction, which is not in his job description. If he had any issue he should have reported it to the supervisor.

And then immediately after that he had sent the e-mail which I believe he referenced earlier, an e-mail referencing the fact that there's copies missing from the file, which no one is disputing that. There was an error made, and it was a human error that someone missed pulling the report and filing it.

And the e-mail I sent back was to the leadership team to basically make them understand that Brian is correct, in fact Brian is correct that there's a file missing, but please let Brian and the routing team understand that it is their responsibility to run reports or to back up the planning team when the planning team is unable to run reports. So it's not a matter of it's not my job or it's my job. It's teamwork. It's one team. It's not I'm routing and you're planning. It's one team, run the report.

You have the capability of doing it. Don't storm out of the room and start dictating what you want done. You're not a leader in the group. If you have an issue, you need to bring it to the supervisor's attention. And it was immediately after that an e-mail came through --

Q I just want to direct --

A -- Brian had resigned.

TR 149 – 157.

Mr. Rogoff testified that Complainant was a good employee and is eligible to return. Complainant has not indicated that he sought reinstatement. Mr. Giudice testified that he had nothing to do with the resignation:

BY MR. BAHN:

Q Vinnie, regarding the incident where you said that I came back and yelled at a planner and point my finger, did you get involved? Did you stop it? Regarding the policy change with the backing of the maintenance data you said I came back in the room and --

A So it's not -- in my profession, it's not how I conduct myself. When I see a crewmember acting irate, I don't jump in the middle. I allow the crewmember to finish venting and then the supervisors address it, not me because they --

JUDGE SOLOMON: Okay, so I'm going to take that as a no.

THE WITNESS: Okay.

JUDGE SOLOMON: Just answer his question.

THE WITNESS: Okay. No.

BY MR. BAHN:

Q Was I issued a PG, progressive guidance, for that incident?

A I don't believe you were.

Q Okay. Is there any reason why not?

A Because I believe the supervisor spoke to you.

Q Does Jet Blue have a policy, a zero tolerance policy for violence in the workplace?

A Yes.

Q Or threats?

A They have a workplace violence -- yes.

Q Okay. So, if you saw me acting irate and physically or aggressively pointing my finger at a crewmember, wouldn't it be appropriate for you to get involved or stop it or have the supervisor stop it and then issue me a progressive guidance so it's documented?

A So the answer would be yes.

Q Why didn't --

A The supervisor did approach you. But you were done venting at that point, and they followed you into the SOC.

Q And so they didn't issue me a PG?

A I don't believe they did.

TR 173 – 174.

As set forth above, this incident apparently occurred before March, 2016, and therefore is not relevant to the claim. I asked Mr. Giudice:

JUDGE SOLOMON: Right. So, at the time that he was submitting his letter of resignation, did anybody in management, anybody in HR, ask you whether or not they should fire him?

THE WITNESS: No.

TR 185.

I asked the complainant to explain why he resigned:

JUDGE SOLOMON: Did you communicate any of this [complaints leading to resignation] to anybody in the company?

THE WITNESS [COMPLAINANT]: Communicate what?

JUDGE SOLOMON: Your feelings about this.

THE WITNESS: The human resources.

JUDGE SOLOMON: The fact that you were about to resign.

THE WITNESS: No. But I put a two-week notice in. And, if they really wanted to rectify things or realize that, hey, you know, we were wrong, they had two weeks to say, hey, you know what, that was a misunderstanding or I apologize or we shouldn't have done that or, hey, what's the problem?

Nobody contacted me. As a matter of fact, human resources came and tried to escort me out of the building earlier than my two-week resignation. They said it was a voluntary thing. They said, we'll pay you until your final end date.

But, you know, you would just walk out of the building now, basically. And I negotiated because I had some stuff to tie up and I negotiated staying until like a Sunday. I said, look, I can work on Sunday, management's not here, leadership is not here. And that's how that ended.

But the relationship was irreparably broken. And, if they really wanted to save it, if they really valued me, they would have stopped me or they would have come to say, hey, let's work this out. But nobody came and contacted me. Nobody -- they were glad I was gone, and I was glad to be gone.

JUDGE SOLOMON: Did they offer you a severance?

THE WITNESS: No.

JUDGE SOLOMON: Did you ask for a severance?

THE WITNESS: No. I didn't know how I could do that. I wasn't aware.

JUDGE SOLOMON: Did you talk to a lawyer before you wrote the letter?

THE WITNESS: No.

JUDGE SOLOMON: Anything else that you want to tell me?

THE WITNESS: I have to make this one statement regarding legal help in this regard. All the other five major airlines are -- and especially tech ops and maintenance -- are unionized. Jet Blue is like one of the few airlines that has a -- it's not unionized. Their pilots are going union, but right now it's not union. The one attorney -- out of all the attorneys I contacted, the one attorney that had any --

JUDGE SOLOMON: You may not want to talk to me about this.

THE WITNESS: Okay, sir. I'm finished.

JUDGE SOLOMON: So do you rest now?

THE WITNESS: I rest, sir.

TR 66 – 68.

He did not relate the resignation with the episode described by Mr. Giudice:

So he had put in for a supervisor position for planning. And, when he was not awarded the position, he was very discontent, very upset, and so I spoke to him and made him understand why. And it was -- instead of it being a coaching session, it was more of a confrontational on his part, very aggressive, almost borderline insubordinate. I actually sought out consultation with the director of people department, Bob Bylack, to which he said, look, you don't have to give him a progressive guidance for insubordination for the way he spoke to you, but you could give him an e-mail setting expectations, which I did.

TR 165 – 166.

Although the Complainant alleged that Mr. Giudice discriminated against him, I find that there is no showing that he initiated any concrete adverse employment activity. I accept that the Complainant and Mr. Giudice do not like each other, but the Complainant bears the burden to show that there was an adverse employment activity.

Neither the transcript nor the Complainant's brief or the email exchanges allege that Complainant applied for and was rejected from an application for a supervisor position. I realize that Mr. Giudice addressed a rejection from a supervisor position, but the Complainant did not specifically address it. Therefore, I find that Complainant did not meet his burden of proof to show any adverse employment activity.

According to the Administrative Review Board ("ARB") both the statute and regulations guide in determining which employment actions may fall within the coverage of the AIR 21 whistleblower statute. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9 (ARB Feb. 13, 2015). Under the AIR 21 statute, no employer "may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment." The regulations make it "a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee because the employee" has engaged in protected activity. 29 C.F.R. § 1979.102(b). The ARB regards "the list of prohibited activities in Section 1979.102(b) as quite broad and

intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline.¹⁹

Any counselling session memorialized in the record occurred after the Complainant submitted his resignation.

In this case, the Complainant cannot prove from the record that he has received any reprimands from Respondent, written or verbal because of his protected activities. 49 U.S.C.A. § 42121 states 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.” Therefore I find that Complainant was not forced to resign and cannot establish constructive removal.

CONCLUSION

I find that the Complainant failed to establish that Respondent subjected him to an adverse employment activity as defined by 29 C.F.R. § 1979.102(b).

¹⁹ Please note that I find that this resignation fact pattern is different than in *Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB May 31, 2013) (reissued with corrected caption on June 12, 2013). In that case, the judge determined that Nagle met his burden to prove by a preponderance of the evidence that he suffered an adverse employment action. To the contrary, the judge found that “Nagle did not resign” and Respondent’s behavior, rather than Nagle’s, ended the employment relationship.

ORDER

Accordingly,

The claim is **DISMISSED**.

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

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

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

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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).

