

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 December 2004

CASE NOs. 2004-AIR-00010, 2004-SOX-00023

In the Matter of:

GREG HENDRIX,
Complainant,

vs.

AMERICAN AIRLINES, INC.,
Respondent.

Appearances:

Susan H. Stock, Esq.
For Claimant

Donn C. Meindertsma, Esq.
For Respondent

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER

Greg Hendrix (“Complainant”) brings this complaint against American Airlines (“Respondent”) under the employee protection provisions of Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (“SOX”) and Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; 49 U.S.C. § 42121 (“AIR 21”). A hearing was held in this case on June 16-18, 2004. The following exhibits have been admitted into evidence: Complainant’s exhibits (“CX”) 1, 3-8, 17-23, 27-40, 49-52, 54-71; Respondent’s exhibits (“RX”) 1-3, 5-8, 10-17; Administrative Law Judge Exhibits (“ALJX”) 1-5.¹

¹ ALJX-1 is Complainant’s pre-trial statement; ALJX-2 is Respondent’s pre-trial statement; ALJX-3 is an

Complainant filed a complaint on June 16, 2003. On January 5, 2004, the Regional Administrator issued a determination that the complaint lacked merit. On January 23, 2004, Complainant filed a request for hearing. On February 26, 2004, Respondent filed a motion to dismiss. On March 5, 2004, Complainant filed a response to Respondent's motion to dismiss. On March 10, 2004, Respondent filed a reply to Complainant's opposition to the motion to dismiss. On March 11, 2004, I granted Complainant five days to amend his complaint. On March 15, 2004 Complainant filed his amended pre-hearing complaint. On March 22, 2004, Respondent filed a motion to dismiss complainant's amended pre-hearing complaint. On March 23, 2004, I issued an order denying Respondent's motion to dismiss. On June 7, 2004, Respondent filed a motion for summary decision. On June 9, 2004, I denied Respondent's motion for summary decision.

On June 9, 2004, Respondent filed a motion in limine, seeking to bar Complainant from presenting evidence of time-barred adverse actions. On June 16, 2004, Complainant filed his response to Respondent's motion, arguing that the statute of limitations does not bar an employee from using prior acts of retaliation as background evidence in support of a timely claim. On June 16, 2004, I denied Respondent's motion on the grounds that though adverse actions are not actionable if time-barred, evidence of such acts is admissible as background evidence. Tr 37.

Respondent's post-trial brief was received on August 18, 2004, as was Complainant's. These are hereby admitted as ALJX-6 and ALJX-7.

Stipulations:

1. Respondent is an air carrier within the meaning of 49 U.S.C. § 42121.
2. Respondent engaged in interstate commerce.
3. Respondent is a covered employer within the meaning of 18 U.S.C. § 1514A(a).
4. Complainant is an employee of Respondent within the meaning of 49 U.S.C. § 42121.
5. Complainant has been employed by Respondent since 1999.

Issues in Dispute:

1. Did Complainant engage in activities protected under the Sarbanes-Oxley Act and under AIR 21?

organizational chart of Respondent's Tulsa base; ALJX-4 is Respondent's motion in limine to exclude evidence concerning alleged adverse actions other than Complainant's placement on a layoff list; ALJX-5 is Complainant's Response to Respondent's motion in limine.

2. Was Complainant retaliated against for protected activity?
 - a. when he was placed on a preliminary lay-off list on or around March or April of 2003 and then removed from that list on April 22, 2003; and
 - b. when, after being removed from the lay-off list, he was allegedly harassed to the present and continuing?

SUMMARY OF DECISION

Complainant engaged in activity protected under the Sarbanes-Oxley Act and AIR 21 when he participated in the investigation of Eddie Alderman and then filed a whistleblower complaint and an amended complaint. Complainant was subjected to an adverse action when Respondent placed his name on the preliminary lay-off list; however, Complainant's protected activity (the Alderman investigation) was not a contributing factor in Respondent's decision to do so. Complainant has not shown he was subjected to a hostile work environment. Even assuming he was subjected to a hostile work environment, Complainant has failed to establish a nexus between his protected activity (participation in the Alderman investigation and the whistleblower complaint he filed on June 16, 2003) and the hostile work environment. Moreover, Respondent has shown that it would have taken the same employment actions in the absence of Complainant's protected activity.

SUMMARY OF EVIDENCE

Complainant Gregory Hendrix is forty years old and resides in New Orleans, Louisiana. He is currently employed by Respondent American Airlines and is also a Major in the United States Marine Corps. Tr 203. At the time of the hearing, he was on military leave from American Airlines. Tr 204. Complainant's career with the military is an extensive one. When he was nineteen, Complainant enlisted with the Air Force. Tr 205. When he left the Air Force, he continued in the Air Force Reserve and then was accepted into a marine officer commissioning program. Tr 205. He then completed several officer candidate schools and military leadership schools. Tr 205. Complainant also attended an aircraft maintenance officer school, Tr 205-06, and, for the duration of his military career, he held various positions related to aircraft maintenance. Tr 206-07. Complainant left active duty in 1998 and joined the reserves approximately a year later. Tr 207. He began working for Respondent in March 1999. Tr 204.

Complainant's first assignment with Respondent was as a supervisor in the plating shop at the Power Plant Maintenance organization ("PPM") located in Tulsa, Oklahoma. Tr 208-09. During this time, Complainant and his employees received a commendation for a plating process that they developed. Tr 215. Complainant's tenure in the shop was not without controversy, however. On several occasions, Complainant raised concerns regarding his treatment by Respondent. Complainant recalled that sometime in 1999 or 2000, he felt that other supervisors were going on trips, leaving him behind to manage the shop. Tr 326. Complainant testified that he raised the issue with his superiors because he wanted an explanation for what he perceived to be disparate treatment. Tr 326. He also complained to an investigator that he did not receive a pay raise when he should have. Tr 326-27.

Complainant was involved in several conflicts with employees of the plating shop: a union member filed harassment charges against Complainant because Complainant was investigating the employee's "light duty" status and his eligibility for handicapped parking.² Tr 214. Those charges were ultimately dropped. Tr 214. Another union member threatened Complainant with bodily harm because Complainant questioned his attendance record. Tr 213. That employee also filed harassment charges against Complainant. Tr 333.

Complainant had problems with Steve Pulcher, his co-supervisor in the plating shop, as well. Tr 66. Darrell Rollins, who sometimes stepped in for Complainant's manager in the plating shop, conducted a "coaching session" with Mr. Pulcher and Complainant because the two were not getting along. Tr 66. Mr. Rollins informed Complainant that his "military style of leadership" was not effective at the Tulsa base. Tr 160. Mr. Rollins testified that he thought Complainant had difficulty interfacing with his co-workers and that his "presentations with workers" were sometimes too forceful. Tr 159. During the hearing, Complainant, who is a major in the Marines, Tr 322, agreed that he "developed a leadership style" in the military, Tr 323.

Ultimately, Ray Singh, Complainant's manager, transferred Complainant to a special projects position because of the conflict with Mr. Pulcher. Tr 212, 217. Complainant was unhappy with Mr. Singh's decision to transfer him and notified Oliver Martins, the director of the PPM. Tr 725. Complainant felt that he had been "pushed out" of the plating shop and that Mr. Pulcher was "out to get him." Tr 328.

Complainant requested and was granted a transfer to the Pratt and Whitney clean shop, where he again worked as a production supervisor. Tr 218-19. During the time Complainant worked in the clean shop, he received a perfect attendance award, a verbal performance review that was above average, and an eight percent pay raise. Tr 221-25.

Around mid-2000, Complainant transferred to a new position as supervisor in the landing gear department. Tr 225. Complainant stated that while in this assignment, he received a verbal evaluation that was above average from his manager, John Hohenstein. Tr 231. This evaluation resulted in a pay raise. Tr 231. Complainant's difficulties with co-workers persisted however, and Complainant had "problems" with Rick Hackathorn, another supervisor in the landing gear department. Tr 229-30. Complainant testified that the problems arose because Mr. Hackathorn disagreed with Complainant's management style. Tr 229.

In October 2001, based on the consensus of the PPM managers and Mr. Martins, Complainant was assigned to a new position as administrative supervisor. Tr 730-31. This position required Complainant to act as a liaison for all of the managers in the PPM unit, Tr 728, and to report directly to Mr. Martins. Tr 727-28. Mr. Martins testified that Complainant was selected for the position because management felt Complainant could develop "interpersonal and influencing skills to be able to do his job better." Tr 729-30.

² It is a common practice at the Tulsa base for the union to file harassment charges if a union member is being investigated for potential wrongdoing. Tr 435.

In early 2002, while serving as administrative supervisor, Complainant had at least one conflict with Mr. Hohenstein. Tr 339-41. Complainant also complained to Mr. Martins and Tom Purcell, a PPM manager, that he was being harassed by one of Mr. Purcell's employees. Tr 342-46. Complainant believed that the employee was deliberately creating a conflict between Complainant and Mr. Purcell. Tr 343.

Complainant testified that he received two above average verbal performance evaluations from Mr. Martins, Tr 237, between February and May of 2002, Tr 365-66. However, within that timeframe, Mr. Martins also advised Complainant that Complainant needed to recognize “. . . that he came from the military, that there was a certain style and method in which [Complainant] managed interpersonal skills which was different in the civilian world, that he needed to address a change in the way he handled himself.” Tr 732.

In approximately October 2002, Complainant applied for a position as production control manager and was selected for an interview. Tr 239-40. Mr. Martins initially approved Complainant's application. However, on November 1, 2002, Complainant was informed that the hiring committee had not selected him for the position. Tr 384-88; ALJX-5, p. 2.

The Alderman Investigation

In August 2002, Mr. Rollins, learned that Eddie Alderman, a welder in his department, ordered weld filler wire without proper approval. Tr 75. When Mr. Rollins questioned Mr. Alderman about the wire, Mr. Alderman informed him that he used the wire to create sculptures for Mr. Hohenstein. Tr 78. Mr. Rollins reported this to Mr. Purcell, who was his manager at the time. Tr 81-82. Mr. Purcell instructed Mr. Rollins to hold an investigative meeting with Mr. Alderman and asked Mr. Rollins to include Complainant.³ Tr 83-84. Although Mr. Rollins objected to Complainant's participation, feeling that Complainant was aggressive and “too high strung,” Tr 84, Mr. Purcell insisted that Complainant be included. Tr 162.

Complainant and the other participants in the Alderman investigation searched Mr. Alderman's work area and discovered several sculptures made out of aircraft parts. Tr 93-94. Mr. Rollins reported this discovery to Mr. Purcell. Tr 101. During the investigative meeting which Complainant and Mr. Rollins conducted, Mr. Alderman admitted that for the past sixteen years, he had created sculptures from aircraft parts, which management presented to employees in honor of their retirement. Tr 102. Management officials, including Mr. Martins, Tr 102, were aware of Mr. Alderman's activities and condoned them. Tr 102-103. Mr. Hohenstein arranged for Mr. Alderman to be paid for the sculptures through an employee incentive program in which employees were awarded points that could be converted into cash or gift certificates. Tr 103-104. In April 2002, Steve Cason, a PPM manager, permitted Mr. Alderman to remove scrap-expendable hardware from the Tulsa base with the understanding that Mr. Alderman would use the parts in his sculptures. Tr 110-111, CX-1.

³ The participation of the administrative supervisor (Complainant's position at this time) as a witness during this type of investigatory meeting was customary. Tr 84, 166.

Complainant informed Mr. Martins of the investigation and Mr. Martins instructed him to contact Marilyn Suarez, who worked in management advisory services, and to contact the corporate security department as well. Tr 404-5.

The corporate security department assigned senior investigator Balfour Rast to investigate Mr. Alderman's allegedly improper use of aircraft parts. Tr 119-20. Mr. Alderman informed Mr. Rast that he had sculptures in his home, as well as other parts, and that he also had parts in a storage facility. Tr 126-27. Mr. Rast, Mr. Rollins, and Complainant searched Mr. Alderman's storage facility, where they discovered aircraft parts which were new, serviceable, or repairable. Tr 129-30, 249-60; CX-21-23. The parts were not properly scrapped or tagged, in accordance with FAA rules and regulations. Tr 822-23. Mr. Rollins reported their findings to Mr. Purcell and indicated that he felt there was evidence of violations of Respondent's general procedural manual and of the FAA regulations. Tr 115, 140, 143.

On August 15, 2002, Bob Trimble, an employee of management advisory services, was assigned to assist in the Alderman investigation. CX-15; Tr 166, 405. Mr. Trimble informed Complainant that Mr. Alderman was filing harassment charges against him, Tr 261-63, and asked Complainant for his documentation of the investigatory meeting with Mr. Alderman. Although Mr. Trimble asked for Complainant's notes on several occasions, Complainant did not turn them over. Tr 436. Mr. Trimble became angry with Complainant after Complainant told him that the notes were at home and that he was too busy to retrieve them. Tr 436-37. Mr. Trimble told Complainant that Complainant would have to defend the harassment charges using Complainant's own resources. Tr 261-63. Complainant acknowledged that Mr. Trimble informed him of the harassment charges only after the union came to Mr. Trimble. Tr 437.

Complainant reported that Mr. Alderman removed aviation parts from the Tulsa base and was storing them at his home. Tr 103, 240-60; CX-8, 9. Complainant testified that he reported that some of the parts were new or serviceable and subject to FAA mandated scraping procedures and that he believed the applicable FAA regulations had been violated. Tr 244-45, 274, 463, 517-525; CX 14-17; CX 61.

October 2002 Performance Evaluation

On October 3, 2002, Mr. Martins reviewed Complainant's first written performance evaluation with him. Tr 278; RX-3. Complainant received a below average rating, Tr 278, with low scores in the areas of teamwork and partnering, building and maintaining relationships, and industry knowledge. RX-3, p. 13; Tr 738-40. In conducting the evaluation, Mr. Martins considered the input of the PPM managers, including Tom Purcell, Steve Cashon, John Hohenstein, Keith Kelley, Steve Carroll, John Turner, and Ray Singh. Tr 280, 781. According to Mr. Martins, Complainant's below average rating was partly the result of Ray Singh's and Steve Cashon's negative comments about Complainant's interpersonal skills. Tr 780-82. Mr. Hohenstein testified that he also believed that Complainant's people skills were deficient. Tr 823-24. However, John Turner stated that Complainant was "pretty much middle of the pack most of the time . . . He certainly was not in the lower echelon of supervisors." Tr 513.

Complainant's Allegedly "Unfavorable" Transfer to the Clean Shop

Complainant was transferred to the GE clean shop on February 3, 2003. Tr 783, 875. Complainant did not request this transfer, Tr 283-84, and felt that the clean shop was "not a desired location for production supervisors." Tr 285. Mr. Martins testified that the transfer was initiated because management believed Complainant's marine reserve group might be called up and it was necessary to train another employee to take over the administrative supervisor position should that occur. Tr 746.

During the time Complainant worked in the clean shop, his problems with co-workers continued. He believed that he was being harassed by another employee, Fernie Maples, and he complained to Steve Carroll, his manager at the time. Tr 347-48. He felt that Mr. Carroll was "out to get him" and had conspired with Ms. Maples. Tr 349. Complainant also felt that he was being harassed by another employee, Ms. Angela Kendall, with whom he previously had a sexual relationship. Tr 389-90.

2003 Lay-off List

In the spring of 2003, in order to avoid bankruptcy, Respondent implemented a system-wide staff reduction. Tr 440. Performance was "the critical issue" in deciding who might be subject to the staff reduction. Tr 752. The PPM managers met and ranked their supervisors. Tr 830-31. Complainant's poor people skills were discussed at the meeting. Tr 830-31. Mr. Carroll, who was Complainant's manager at the time, ranked Complainant as the lowest performing of his supervisors. Tr 872; 883-84. On the final lay-off list, Complainant was ranked as one of the "bottom performers." Tr 752-53. Mr. Martins submitted four names for consideration for lay-off, including two supervisors and two planners. Tr 753. Complainant was one of the two supervisors. Tr 753.

In late March 2003, Complainant asked Mr. Carroll whether he was on the lay-off list. Tr 294-95. Mr. Carroll did not explicitly confirm that Complainant was on the list. Tr 295. However, when the lay-offs occurred, although the other supervisor on the list was laid off, as were fifty other management employees, Complainant was not. Tr 443-46. Mr. Martins explained that the legal department recommended retaining Complainant at that time because Mr. Rollins had filed a whistleblower complaint and Complainant was a witness in that proceeding. Tr 754.

Allegedly Hostile Work Environment

In late April 2003, Complainant took family leave for approximately two weeks. Tr 296. When he returned to work, he did not have access to his email. Tr 295-96. Complainant testified that he was informed that Mr. Martins no longer wanted Complainant to send him emails regarding continuous improvement. Tr 296-98. Mr. Martins stated that he did not tell Complainant to cease emailing him, but merely asked what he was meant to do with the emails. Tr 747-49. He explained that Complainant was sending him three to five emails a week and that the emails were not "useful" to him. Tr 747.

On June 16, 2003, before his transfer to the seat shop, Complainant filed his whistleblower complaint with OSHA. Tr 392.

Prior to taking family leave, Complainant had requested a transfer. Tr 301. Complainant testified that his discomfort in working with Ms. Kendall was “a primary reason” he wanted to be transferred out of the clean shop. Tr 390. However, he also requested the transfer because he wished to move out of Mr. Martins’ unit. Tr 392. Complainant was eventually transferred to the seat shop in the CAM building on July 7, 2003. Tr 391. Leon Robinson was Complainant’s immediate manager in this new position. Tr 391. Complainant stated that he did not experience any conflicts with his co-workers or with Mr. Robinson initially. Tr 302. He testified that Mr. Robinson “got pretty aggressive and verbal” around the time he filed his whistleblower complaint. Tr 302. However, Complainant later admitted that he had not yet begun working for Mr. Robinson when the complaint was filed. Tr 392.

Complainant testified that Mr. Robinson shouted, cursed, and yelled at Complainant and his co-supervisor. Tr 303. Complainant explained that Mr. Robinson was concerned about the production schedule and the discipline of an employee with a high absentee rate. Tr 303. Following this incident, Complainant filed a harassment complaint against Mr. Robinson. Tr 648-9, 863. Mr. Robinson denied yelling at Complainant. Tr 634. He explained that he was concerned that the supervisors in the seat shop were communicating inaccurate information about the production schedule. Tr 634. Mr. Robinson testified that he addressed his concerns to both Complainant and the other supervisors involved. Tr 634.

Complainant was called away on military duty. Tr 303. Complainant stated that, when he returned, he was reassigned to the second shift and found he did not have access to a work-related computer system. Tr 304-06. The system is necessary for a supervisor to report his employees’ hours and get them paid. Tr 153-54. Dominique Sexton assisted Complainant in regaining access to the computer program. Tr 595. She did not know why it took longer than usual for access to be granted to Complainant. Tr 595. However, Complainant made his initial request on December 22 during a time when the base was closed for the holidays. Tr 597. Mr. Robinson testified that Complainant was given the second shift because Complainant’s previous position had been filled and the second shift was open.

ANALYSIS

Complainant asserts that he engaged in protected activity when he reported his good faith belief that Eddie Alderman violated FAA regulations and defrauded Respondent’s shareholders by using company resources to construct sculptures made of aircraft parts, which he removed from company property without following mandated procedures. Complainant contends that Respondent knew of Complainant’s protected activity and subjected him to “adverse action” by 1) placing him on a lay-off list and 2) creating a hostile work environment. Complainant argues that his protected activity was a contributing factor in these unfavorable personnel actions.

Respondent counters that Complainant did not himself engage in protected activity, but was merely a witness to the protected activity of another employee. Furthermore, Respondent asserts, Complainant’s speculation that safety might be compromised if aircraft parts made their

way to a secondary market is not protected activity because that concern is not objectively reasonable and does not definitively and specifically implicate matters of safety. Respondent argues that being placed on and then removed from a lay-off list is not an adverse action and that Complainant was not subjected to a hostile work environment.

To prevail on a complaint of retaliation under the whistleblower provisions of AIR 21 and SOX, a complainant must establish by a preponderance of the evidence that: 1) he engaged in protected activity; 2) the employer was aware of the protected activity; 3) the complainant suffered an adverse employment action; and 4) the protected activity was a contributing factor in the adverse action (causation). 49 U.S.C. § 42121(b)(2)(B)(iii); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004); *Collins v. Beazer Homes U.S.A., Inc.*, 334 F.Supp.2d 1365, 1375 (N.D. Ga. Sept. 2, 2004). Once the complainant has established these elements, the employer may avoid liability if it can establish by clear and convincing evidence that it would have taken the same employment action in the absence of the protected activity. *Collins*, 334 F.Supp.2d at 1376.

I. Protected Activity

A. Sarbanes-Oxley Act

Complainant asserts that he engaged in activity protected under the Sarbanes-Oxley Act when he reported to upper-level management, corporate security, and human resources his good faith belief that Eddie Alderman was defrauding Respondent and thus Respondent's shareholders. Respondent argues that, at most, Complainant was merely a witness to the protected activity of Mr. Rollins. Respondent contends that Complainant did not report violations of section 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any federal law relating to fraud against shareholders, as required by the Sarbanes-Oxley Act.⁴

The Sarbanes-Oxley Act confers whistleblower protection on employees of publicly traded companies who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of" certain Federal provisions criminalizing fraud, including section 1341 [fraud and swindles], 1342 [fraud by wire, radio, or television], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. The information must be provided to a Federal regulatory or law enforcement agency, any member of Congress or any committee of Congress, the employee's supervisor, or "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C. § 1514A.

I find Complainant engaged in activity protected under the Sarbanes-Oxley Act when he participated in the investigation of Eddie Alderman. Complainant reasonably believed that Eddie Alderman was committing fraud against Respondent and its shareholders by creating art

⁴ Respondent also contends that Complainant did not establish that Respondent operates within scope of SOX. Since the parties stipulated to this fact (see stipulation 3), I do not consider this argument.

objects for personal gain out of company material, on company time. No one disputes that Mr. Alderman engaged in such activity, nor that it was reasonable for Complainant to believe that Mr. Alderman's activity was fraudulent. Mr. Alderman undoubtedly used the mail or wires as part of his sculpture business, and thus his fraudulent activity is of a kind proscribed by Federal law.

Respondent contends, however, that Complainant was only a "witness" to Mr. Rollins' protected activity and that it was Mr. Rollins who reported the alleged fraudulent activity to upper management. Because Complainant did not himself provide information regarding the allegedly fraudulent activity to his supervisors, Respondent concludes he did not engage in protected activity. Respondent misconstrues the Act. Whether it was Complainant or Mr. Rollins who actually articulated the suspicions of fraud is irrelevant. The Act protects an employee who provides information or *otherwise assists* in the investigation of fraudulent activity. Thus, the fact that Complainant participated in the investigation is sufficient to constitute protected activity. Although Complainant never identified a particular code section he believed had been violated, such specificity is not required under the Sarbanes-Oxley Act. The Act merely requires that the complainant have a reasonable belief he is blowing the whistle on fraud and protecting investors. *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1377 (N.D.Ga. Sept. 2, 2004).

Finally, I note that filing a whistleblower complaint with OSHA is itself protected activity. See *Gain v. Las Vegas Metropolitan Police Dept.*, ARB No. 03-108, ALJ No. 2002-SWD-00004 (ARB June 30, 2004). Thus, both Complainant's June 16, 2003 initial complaint and his March 15, 2004 amended complaint are protected activities under the Sarbanes-Oxley Act.

B. AIR 21

Complainant argues that he engaged in activity protected under AIR 21 when he reported to upper-level management, corporate security, and human resources his good faith belief that Eddie Alderman violated specific rules and regulations of the FAA. Respondent argues that, at most, Complainant was merely a witness to the protected activity of Mr. Rollins. Respondent contends that Complainant's speculation that safety might be compromised if aircraft parts made their way to the secondary market is not protected activity because such concern was not objectively reasonable and did not definitively and specifically implicate matters of safety.

AIR 21 prohibits employers from discriminating against employees who provide to their employer or to the Federal government information "relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration" 49 U.S.C. § 42121(a). An employee's complaint may be oral or in writing, but must be specific in relation to a given practice, condition, directive, or event. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). The complainant must have a reasonable belief that his complaint is valid. *Id.*

I find that Complainant engaged in activity protected under AIR 21 when he participated in the Alderman investigation. The FAA and Respondent's general procedural manual mandate certain procedures be followed when disposing of scrap aircraft parts. See CX-61. There is no dispute that at least some of the aircraft parts found in Eddie Alderman's possession were subject to these requirements and that the requirements were not followed. Thus, Complainant's belief that FAA regulations had been violated was reasonable. Moreover, there is no dispute that Mr. Rollins, who initiated the investigation into Alderman's conduct, reported specific violations of the general procedural manual and the FAA regulations. Even assuming that Complainant did not himself articulate these specific violations, Complainant's conduct constituted protected activity because he was assisting Mr. Rollins in the Alderman investigation. The Act protects employees who provide or "cause to be provided" information relating to the relevant violations. Assisting in an investigation is tantamount to causing information to be provided. Accordingly, I conclude that Complainant engaged in activity protected under AIR 21.

Again, I note that filing a whistleblower complaint with OSHA is itself protected activity. See *Gain v. Las Vegas Metropolitan Police Dept.*, ARB No. 03-108, ALJ No. 2002-SWD-00004 (ARB June 30, 2004). Thus, both Complainant's June 16, 2003 initial complaint and his March 15, 2004 amended complaint are protected activities under AIR 21.

II. Adverse Action⁵

Complainant asserts that he was subjected to two adverse actions as a result of his protected activity. He contends that it was an unfavorable personnel action to place him on the 2003 lay-off list and that he was subjected to a hostile work environment. With regard to the latter claim, Complainant alleges that he was subjected to threats from human resources, a poor performance rating, an unfavorable transfer, denial of promotion, verbal abuse from management, a directive that he cease emailing upper management, assignment to the second shift, and denial of access to computer resources.⁶ Respondent counters that being placed on a lay-off list is not an adverse action because only "tangible and materially adverse" employment actions are remediable. Respondent further contends that Complainant was not harassed and that there is no evidence Complainant was singled out for disparate treatment, nor is there any evidence that the alleged harassment was severe and pervasive.

A. Definition of Adverse Action for Purposes of Whistleblower Adjudication

Under the Sarbanes-Oxley Act, a covered employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee engaged in protected activity. 18 U.S.C. § 1514A(a). AIR 21 similarly proscribes employer retaliation, stating that no employer "may discharge an employee or otherwise discriminate against an employee with respect to

⁵ Because the parties do not dispute that Respondent was aware of Complainant's protected activity, I have not analyzed this element of Complainant's case in chief.

⁶ The complaint also contains an allegation that Complainant was denied vacation time, but as Complainant gave no testimony regarding the denial of vacation time, I have not considered this allegation in my analysis.

compensation, terms, conditions, or privileges of employment” because of the employee’s protected activity. 42 U.S.C. § 42121(a). These provisions are the statutory foundation for the requirement that a complainant must show an “adverse action” as part of his case in chief.

There has been some discord in administrative decisions considering the meaning of “adverse action” under the various whistleblower acts. Several decisions hold that a complainant must show his employer’s allegedly adverse action had some “tangible job consequence.” See *Shelton v. Oak Ridge Nat’l Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001)(holding that in the absence of a tangible job consequence, a verbal reprimand and accompanying disciplinary memo are not adverse actions); *Ilgenfritz v. U.S. Coast Guard*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001)(holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action); *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002)(holding that a supervisor’s criticism does not constitute an adverse action); *Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003) (citing to *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742,761 (1998) (“*Ellerth*”) for the proposition that an adverse action must have a tangible job consequence). See also *Dolan v. EMC Corp.*, 2004-SOX-1 (ALJ Mar. 24, 2004); *Robichaux v. American Airlines*, 2002-AIR-27 (ALJ May 2, 2003). A tangible job consequence has been defined by the Supreme Court as one which “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, U.S. 742 at 761.

The whistleblower cases requiring a showing of tangible job consequence look to Title VII case law from several different circuits, but are primarily founded on the Eleventh Circuit’s decision in *Davis v. Town of Lake Park*, 245 F.3d 1232 (11th Cir. 2001) and the Seventh Circuit’s decision in *Oest v. Illinois Dep’t of Corrections*, 240 F.3d 605 (7th Cir. 2001). In *Davis*, the court held that an adverse action must be materially adverse as viewed by a reasonable person. *Davis*, 245 F.3d at 1239. The court concluded that a negative job performance memorandum is not an adverse action if it does not trigger more tangible consequences, such as a loss in benefits, ineligibility for promotional opportunities, or more formal discipline. *Id.* at 1241. In *Oest*, the court reached an identical conclusion. *Oest*, 240 F.3d at 613.

In contrast to the aforementioned cases, several whistleblower decisions define “adverse action” more liberally. See *Bassett v. Niagara Mohawk Power Corp.*, No. 85-ERA-34 (Sec’y Sept. 28, 1993)(holding that negative comments in a performance evaluation can constitute adverse action, even absent a showing of adverse economic impact); *Guitierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002) (holding that the narrative contained in a performance appraisal constituted an adverse action, even if the ultimate rating did not because the performance assessment was a factor in determining the complainant’s salary); *Varnadore v. Oak Ridge Nat’l Lab.*, Nos. 92-CAA-2, 5, 93-CAA-1, 94-CAA-2, 3 (ARB June 14, 1996); *Boytin v. Pennsylvania Power and Light Co.*, No. 94-ERA-32 (Sec’y Oct. 20, 1995). These decisions originate with *Bassett*, which finds its authority in a Ninth Circuit decision concluding that transfers of job duties and undeserved performance ratings can constitute adverse actions. See *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987).

Finally, two recent ALJ decisions reason that although Title VII case law generally guides whistleblower decision-making, important differences between Title VII and whistleblower statutes suggest that an adverse action must be more broadly construed under the latter.⁷ See *Daniel v. TIMCO Aviation Servs., Inc.*, 2002-AIR-26 (ALJ June 11, 2003); *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004). These decisions hold that an adverse action is one that is reasonably likely to deter employees from making protected disclosures.

Some of the discord in these administrative decisions may be attributed to disagreement among the circuits as to what constitutes an adverse action for purposes of Title VII. The Board has looked to Title VII case law for guidance in determining whether employer conduct constitutes an adverse action because Title VII's prohibition of discriminatory acts is similar to the language used to proscribe retaliation in whistleblower statutes. See *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001). Title VII provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." 42 U.S.C. § 2000e-2(a). Title VII also prohibits retaliation for protected activity, providing that it is an unlawful employment practice for an employer "to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter" 42 U.S.C. § 2000e-3(a).

The circuits have reached no agreement on the interpretation of these Title VII provisions and the Supreme Court has not yet ruled on the issue.⁸ The Second and Third circuits define an adverse action as an act that "materially affects" the terms and conditions of employment. See *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997). The Fifth and Eighth circuits hold that only an "ultimate employment action," constitutes an adverse action. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Lederberger v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). The Ninth Circuit holds the most expansive definition of adverse action, defining such an action as one that is

⁷ In *Daniel*, the ALJ reasoned that whistleblower laws "affirmatively seek to encourage workers to participate in public processes" while Title VII provides protection "to a class of workers by virtue of passive characteristics relating to who they are . . ." *Daniel*, at 13-14. Based on this distinction, the ALJ reasoned that for the purposes of whistleblower law, the definition of "adverse action" should be construed broadly to include any conduct "designed to counteract a worker's incentive to engage in activities Congress sought to encourage." *Id.* at 15. While this is persuasive reasoning, I note that the Title VII cases interpreting adverse action do not distinguish between adverse action for the purposes of a discrimination claim and adverse action for the purposes of a retaliation claim. Thus, the circuit courts which employ more restrictive tests for adverse action do so even when the claim is for retaliation. See for e.g. *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). Title VII retaliation claims are comparable to whistleblower claims in the sense that both "affirmatively seek to encourage workers to participate in public processes." Thus, the distinction drawn by the ALJ in *Daniel*, while persuasive, is not a distinction followed by the circuit courts when analyzing retaliation claims.

⁸ The issue in *Ellerth* was the scope of an employer's liability for sexual harassment by a co-worker. See *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004). The Court limited its analysis of adverse action to the resolution of the vicarious liability issue, declining to adopt the concept of tangible employment action outside of that context. See *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

“reasonably likely to deter employees from engaging in protected activity.” *See Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000).

Although these circuit court decisions are not binding precedent for purposes of a whistleblower claim, to the extent that Title VII decisions provide “guidance” in whistleblower adjudications, it makes sense to follow the case law of the circuit in which a given whistleblower claim arises. The instant claim arises in the Tenth Circuit, which has an expansive definition of adverse action. *See Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004). In *Hillig*, the Tenth Circuit held that a plaintiff need not demonstrate she suffered a tangible injury in order to satisfy the adverse action element of her *prima facie* case. *Id.* at 1030-31. The court noted that “the fact that this unlawful personnel action turned out to be inconsequential goes to the issue of damages, not liability.” *Id.* at 1934 (quotations and citations omitted). Noting that its decision was “in harmony” with the view of the Ninth Circuit,⁹ *Id.* at 1034, the court instructed that it “liberally” construes adverse action, taking “a case-by-case approach, examining the unique factors relevant to the situation at hand.” *Id.* at 1031. Demarcating the boundaries of this liberal standard, the court warned that its standard does not encompass “a mere inconvenience or an alteration of job responsibilities.” *Id.* (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996)).

Based on the foregoing analysis, I adopt the definition of adverse action utilized by the Tenth Circuit, in which this case arises. Accordingly, I will liberally construe the term adverse action when examining the unique factors of Complainant’s situation.

B. Complainant’s Allegations of Adverse Action under AIR 21 and SOX¹⁰

Lay-off List

Applying the case-by-case approach of the Tenth Circuit, which is in “harmony” with the approach of the Ninth Circuit, I conclude that being placed on a lay-off list constitutes an adverse action. Complainant suffered no “tangible consequence” as a result of being placed on the lay-off list because his name was removed before the lay-offs took effect. However, the fact that Complainant did not lose his job goes to the issue of damages, not liability. *See Hillig*, 381 F.3d at 1034. In determining whether Respondent is *liable* for retaliation, the real crux of the issue is whether placement on a lay-off list was reasonably likely to deter Complainant from continuing to engage in protected activity. I have no doubt that an employee who is placed on a lay-off list

⁹ Although the *Hillig* court opined that “harm to future employment prospects” is a strong indicator that an employer’s conduct is an adverse action, the court’s holding does not require a plaintiff to show such harm in order to prove adverse action. *Hillig* at 1031.

¹⁰ The distinctive language of the Sarbanes-Oxley Act supports a broader reading of the meaning of adverse action for claims arising under this Act. The Act specifically states that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.” (emphasis added). This wording is unique among the whistleblower statutes and diverges from the language of Title VII as well. The proscriptions of the Sarbanes-Oxley Act are far more specific than the proscriptions of the other acts. By explicitly prohibiting threats and harassment, the Sarbanes-Oxley Act has included adverse actions which are not necessarily tangible and most certainly are not ultimate employment actions. Because the Tenth Circuit’s liberal definition of adverse action is in keeping with the unique proscriptions of the Sarbanes-Oxley Act, I find application of the Tenth Circuit’s standard appropriate.

reasonably fears that he will lose his job when that list goes into effect. Undoubtedly, an employee would be deterred from blowing the whistle if he fears he will lose his job for reporting the unlawful conduct of his employer. Therefore, under the Tenth Circuit's liberal test for adverse action, Complainant was subjected to an adverse action when Respondent placed his name on the 2003 lay-off list.

Hostile Work Environment

Complainant's hostile work environment claim includes events that are untimely under SOX and AIR21 because they transpired more than ninety days prior to the date his initial complaint was filed. Additionally, this claim includes events that occurred after he filed his initial complaint, but more than ninety days prior to the date his amended complaint was filed. Prior to determining whether Complainant was subjected to a hostile work environment, I must determine exactly which acts comprise the hostile work environment by determining whether the acts fell within the filing period, or, if not, whether the untimely acts are nonetheless actionable under the doctrine of continuing violations.

Timeliness

Prior to the hearing in this matter, Respondent filed a motion to dismiss, arguing, in part, that Complainant alleged no act of retaliation falling within the ninety day limitations period of AIR 21 and the Sarbanes-Oxley Act. Following Respondent's motion, I granted Complainant leave to amend his complaint in order to state with specificity the nature and timing of the allegedly adverse actions taken against him. Complainant did so, filing his amended complaint on March 15, 2004. In his amended complaint, Complainant asserted that his complaint was timely because Respondent placed him on lay-off list on March 23, 2003, which was within ninety days of the June 16, 2003, the date the initial complaint was filed.

On March 23, 2004, I issued an order denying Respondent's motion to dismiss, finding that the initial complaint was filed within ninety days of an arguably adverse action (placement on the preliminary lay-off list). I did not consider or rule on the timeliness of any other allegedly adverse actions in the March 23, 2004 order.

On June 9, 2004, Respondent filed a motion in limine to exclude evidence concerning alleged adverse actions other than complainant's placement on a lay-off list on the grounds that the other actions were time-barred. On June 16, 2004, Complainant filed his response to Respondent's motion, arguing that the statute of limitations does not bar an employee from using prior acts of retaliation as background evidence in support of a timely claim. On June 16, 2004, I denied Respondent's motion on the grounds that though adverse actions are not actionable if time-barred, evidence of such acts is admissible as background evidence. Tr 36-37. However, I did not rule that any specific adverse action was in fact time-barred. Tr. 36-37.

Complainant alleges that he was subjected to threats from human resources, a poor performance rating, an unfavorable transfer, denial of promotion, verbal abuse from management, a directive that he cease emailing upper management, assignment to the second shift, and denial of access to computer resources, and that, taken together, these acts constitute a

hostile work environment. Employer argues that Complainant was not harassed and even assuming that the alleged incidents of harassment upset Complainant, he failed to establish that the harassing conduct was severe and pervasive.

Under both the Sarbanes-Oxley Act and AIR 21, a complaint must be filed within ninety days of an alleged adverse action. 49 U.S.C. § 42121(b)(1); 18 U.S.C. § 1514A(b)(2)(D). However, under the doctrine of continuing violations, a hostile work environment claim is not time barred if all of the acts comprising the claim are part of the same pattern and practice and at least one act falls within the filing period. *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002). The Supreme Court explained that a hostile work environment is based on the cumulative effect of individual acts. *Id.* at 115. Thus, taken together, these acts constitute one unlawful employment practice. *Id.* at 117. In contrast to a hostile work environment claim, a discrete discriminatory act has a tangible effect. *Id.* at 114. Examples of discrete acts include conduct such as “termination, failure to promote, denial of transfer, or refusal to hire.” *Id.* at 114. Because a discrete act occurs at a single point in time, such an act is “not actionable if time barred, even when [it is] related to acts alleged in timely filed charges.” *Id.* at 113.

Not all of the alleged acts comprising Complainant’s hostile work environment claim fall within ninety days of June 16, 2003, the date on which he filed his initial complaint, or within ninety days of March 15, 2004, the date the amended complaint was filed. The threats from human resources, poor performance rating, unfavorable transfer, and denial of promotion all occurred in 2002 or in February 2003, well beyond the statutory period for the initial complaint. Only the directive to cease emailing upper management (which occurred on or shortly before May 27, 2003, within ninety days of the initial complaint), “verbal abuse” from Mr. Robinson (which was allegedly on-going), assignment to the second shift (which occurred in late December 2003, within ninety days of the amended complaint), and denial of access to computer resources (which also occurred in late December 2003) are timely. Under *Morgan*, the aforementioned untimely acts are not actionable unless they may be considered part of the same pattern and practice as the timely filed events.

Initially, I find that several of these events cannot be considered part of Complainant’s hostile work environment claim because they are discrete acts. Neither Complainant’s poor performance rating, his allegedly unfavorable transfer, nor Respondent’s failure to promote him involve repeated conduct. These acts occurred on the day they happened and were not repeated. Therefore, they are discrete discriminatory acts. Regardless of whether these acts are related to the acts in the timely filed hostile work environment charge, because the discrete acts did not occur within ninety days of June 16, 2003 or March 15, 2004, they are not actionable.¹¹

Complainant also includes as part of his hostile work environment claim “threats” from human resources made by Mr. Trimble. Although Mr. Trimble’s conduct would be actionable if considered a component of the timely hostile work environment claim, the alleged threats are not sufficiently related to the incidents comprising the timely charge. Mr. Trimble was from Respondent’s human resources department and had no connection to the seat shop, the department in which the timely filed “harassing” events occurred, nor to the alleged harasser, Mr. Robinson. Indeed, Mr. Trimble had no connection to the PPM department, the department

¹¹ These prior acts may be considered as background evidence. *Morgan*, 536 U.S. at 113.

in which Alderman and all those involved in his sculptural activities worked. Finally, I find that Mr. Trimble's comments were motivated by Complainant's failure to hand over his notes from the meeting with Mr. Alderman. Because I find the alleged threats are not related to the incidents comprising the timely hostile work environment claim and thus time-barred, the threats are not actionable.

Merits of Claim

In addition to the aforementioned acts, Complainant contends that he was subjected to verbal abuse from Mr. Robinson, assigned to the second shift, and denied access to computer resources. These incidents are the only remaining components of Complainant's hostile work environment complaint. All of these acts fall within the statutory period.¹²

The concept of a hostile work environment, first developed under Title VII case law, is equally applicable under the whistleblower statutes. *Varnadore v. Oak Ridge Nat'l Laboratory*, 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1 (ARB June 14, 1996). If proven, a hostile work environment is an adverse action. *Id.* To establish the existence of a hostile work environment, a complainant must show 1) the harassing conduct was sufficiently severe or pervasive so as to alter the conditions of employment and 2) the harassment would have detrimentally affected a reasonable person and did so affect the complainant. *See Pickett v. Tennessee Valley Auth.*, 2000-CAA-9 (ARB Apr. 23, 2003); *Williams v. Mason Hangar Corp.*, ARB No. 98-030, ALJ nos. 97-ERA-14 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2/9 (ARB Feb. 29, 2000). Discourtesy or rudeness should not be confused with harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). In determining whether a hostile work environment exists, courts look to "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

Even assuming that the "verbal abuse" from Mr. Robinson, assignment to the second shift, and denial of access to computer resources were sufficiently related so as to constitute one unlawful employment practice, they were not so severe and pervasive that they altered the terms and conditions of Complainant's employment. After reviewing the record, I find specific evidence of only one incident of "verbal abuse" from Mr. Robinson – when production in the seat shop was behind schedule. This "abuse" was neither physically threatening, nor particularly humiliating. The difficulty that Complainant experienced with his computer access did not unreasonably interfere with his ability to perform his job duties, nor did it result in any type of negative performance evaluation. Complainant presented no evidence that his assignment to the second shift caused him any specific hardship. A reasonable person would not have been detrimentally affected by these allegedly harassing acts. Each of these incidents is nothing more than the kind of inconvenience an employee should expect to endure in the normal workplace. Accordingly, I conclude that Complainant has not shown he was subjected to a hostile work environment.

¹² It is not clear to me that the verbal abuse charge is timely. Although Complainant alleges that Mr. Robinson's abuse has been ongoing, Complainant fails to present any specific evidence that Mr. Robinson's abuse continued beyond September 2003.

III. Causation

Under both AIR 21 and the Sarbanes-Oxley Act, a complainant must establish that his protected activity was a “contributing factor” to the unfavorable personnel action. 29 U.S.C. § 42121(b)(2)(B)(iii); 18 U.S.C. § 1514A(b)(2). A contributing factor means any factor tending to affect the decision to take the adverse action. *Collins*, 334 F.Supp.2d at 1379. Although temporal proximity between the protected activity and the adverse employment action circumstantially creates an inference of causation, it may not be sufficient to establish a violation of the Act. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 3, 2004).

Lay-off List

Complainant has not shown that there was any connection between his protected activity and his placement on the 2003 lay-off list. Complainant argues that he was placed on the lay-off list because of a poor performance review in October 2002. Complainant asserts that the temporal proximity between the performance review and the Alderman investigation in August 2002 is evidence that the investigation was a contributing factor in his poor performance review and hence in his placement on the lay-off list.

Even accepting that there was a temporal proximity between the investigation and the events leading to Complainant’s placement on the lay-off list, there is ample evidence in the record that the investigation was not a contributing factor in Respondent’s decision. Significantly, the conduct of the various management officials involved in the Alderman investigation is hardly the kind of secretive behavior one would expect in a conspiracy to silence a whistleblower. Management supported the Alderman investigation from its inception. In fact, it was Mr. Purcell, a PPM manager, who involved Complainant in the investigation in the first place. Moreover, it was Mr. Martins who suggested that Complainant go outside his department and alert both corporate security and management advisory services. I find it difficult to believe that management would have encouraged Complainant’s participation and encouraged him to involve internal security officials if management had something to hide. Accordingly, I find that Complainant has not met his burden to show that the investigation was a contributing factor in his placement on the lay-off list.

Hostile Work Environment

Assuming *arguendo* that Complainant had shown that the alleged verbal abuse from Mr. Robinson, assignment to the second shift, and denial of access to computer resources altered the terms and conditions of his employment, he has not established that he was subjected to a hostile work environment because he is unable to establish a causal connection between these incidents and his protected activity. Complainant has not offered any direct evidence showing that the events in the seat shop were related to his participation in the Alderman investigation or to his whistleblower complaint. Mr. Robinson had no connection to the Alderman investigation and there is no evidence that anyone connected with that investigation ordered Mr. Robinson to retaliate against Complainant. Complainant’s testimony that Mr. Robinson became abusive around the time Complainant filed the whistleblower complaint is simply not credible.

Complainant testified that he initially had a positive relationship with Mr. Robinson, but that the relationship deteriorated after he filed the whistleblower complaint. In fact, Complainant filed the complaint before he began working in the seat shop. Therefore, the complaint could not have led to the deterioration of Complainant's relationship with Mr. Robinson.

While the incidents in the seat shop occurred in relatively close temporal proximity to the filing of the initial complaint, under *Peck, infra*, this proximity, standing alone, does not necessarily prove a violation of the whistleblower acts occurred. In the absence of any other evidence, direct or indirect, that the events in the seat shop were connected to Complainant's participation in the investigation or his whistleblower complaint, I find that Complainant has not established that his protected activity was a contributing factor.

In summary, Complainant has not established his case in chief: he has not shown by the preponderant evidence that he was subjected to reprisal for protected activity when he was placed on a lay-off list, nor is he able to show that he was subjected to a hostile work environment. Assuming *arguendo* that he had, Respondent is able to carry its burden of rebuttal.

IV. Respondent Would Have Taken Same Action in Absence of Protected Activity

An employer may avoid liability if it can establish by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity. *Collins*, 334 F.Supp.2d at 1376. Respondent has done so here.

Lay-off List

Mr. Martins testified that Complainant was placed on the lay-off list because of his poor performance as a supervisor. Complainant's performance evaluation reflects that poor performance, specifically in the areas of interpersonal relations. Several witnesses, including Mr. Rollins, who testified on Complainant's behalf, stated that Complainant had a "military style" that was not well received. Mr. Rollins also described Complainant as too aggressive and high strung. Complainant had been verbally counseled about his supervisory style *even before* he engaged in protected activity.

Certainly, Complainant's history of difficulties at American preceded his involvement with the investigation. Although Complainant received a few commendations for his work performance, conflict surrounded him from the inception of his employment. He has consistently had numerous conflicts with his superiors, his peers, and the employees he supervised. As early as 2000, two years before his protected activity in the Alderman investigation, Complainant felt he was subjected to disparate treatment, as evidenced by his complaints about being overlooked for a pay raise and for travel opportunities.

I conclude that Respondent has shown, by clear and convincing evidence, that it would have placed Complainant on the lay-off list because of his history of conflict and poor interpersonal relations, regardless of whether Complainant participated in the Alderman investigation.

Hostile Work Environment

Mr. Robinson's explanation for the incident of "verbal abuse" was credible and supported by Complainant's own testimony: production was behind schedule and Complainant, along with other supervisors, had not been forthright about the delay. I also accept Mr. Robinson's testimony that Complainant was assigned to the second shift because Complainant's previous position had to be filled during the time he was on military leave. When Complainant returned, Mr. Robinson assigned Complainant to the second shift because it was available. Finally, I find that Complainant's inability to access certain computer resources was inadvertent. It took less than three weeks for his access to these resources to be restored. Given that the base was shut down for at least part of that time due to the holidays, this delay was not unreasonable.

Based on the foregoing, I conclude that Respondent has shown, by clear and convincing evidence that the incidents compromising Complainant's hostile work environment claim would have occurred even in the absence of Complainant's protected activity.

CONCLUSION

Complainant engaged in activity protected under the Sarbanes-Oxley Act and AIR 21 when he participated in the investigation of Eddie Alderman and then filed a whistleblower complaint and an amended complaint. Complainant was subjected to an adverse action when Respondent placed his name on the preliminary lay-off list; however, Complainant's protected activity (the Alderman investigation) was not a contributing factor in Respondent's decision to do so. Complainant has not shown he was subjected to a hostile work environment. Even assuming he was subjected to a hostile work environment, Complainant has failed to establish a nexus between his protected activity (participation in the Alderman investigation and the whistleblower complaint he filed on June 16, 2003) and the hostile work environment. Moreover, Respondent has shown that it would have taken the same employment actions in the absence of Complainant's protected activity.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I recommend the following Order:

Complainant shall take nothing.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS (under AIR 21): This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b) as found OSHA, Procedures for the Handling of Discrimination Complaints under Section 519 by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).

NOTICE OF APPEAL RIGHTS (under SOX): This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).