



Issue Date: 29 November 2016

Case Nos.: 2014-AIR-21
2016-AIR-11

In the Matter of:

JOHN SWINT,
Complainant,

v.

NETJETS AVIATION, INC.,
Respondent.

**DECISION AND ORDER GRANTING IN PART, AND DENYING IN PART,
RESPONDENT'S MOTION FOR SUMMARY DECISION**

These consolidated proceedings arise under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121, and the implementing regulations found at 29 CFR Part 1979 (2013).

Complaint Number 5-1800-13-067 was filed by John Swint ("Complainant") with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor on August 24, 2013. This complaint was amended on March 21, 2014, to add additional claims of adverse action. Following an investigation by OSHA, Complainant's complaint was dismissed on July 22, 2014. On July 31, 2014, Complainant sought a hearing before the Department of Labor's Office of Administrative Law Judges ("OALJ"). This case was assigned OALJ case number 2014-AIR-21.

Complaint Number 5-1800-15-004 was filed by Complainant on October 22, 2014. Following an investigation by OSHA, it was determined that a one-day suspension issued to Complainant on October 17, 2014, was retaliation for Complainant reporting safety violations, and thus a violation of the whistleblower protection provisions of AIR-21. OSHA ordered that Complainant receive the pay lost during his one-day suspension, awarded him attorney fees, and awarded him other incidental relief. On February 19, 2016, NetJets Aviation, Inc. ("Respondent") requested a hearing before OALJ. This case was assigned OALJ case number 2016-AIR -11.

On October 24, 2016, I issued an order consolidating cases 2014-AIR-21 and 2016-AIR-11 for prehearing preparation and for hearing. I set a hearing date of December 12, 2016, in Cleveland Ohio. I also ordered that any motion for summary decision should be submitted on or before November 15, 2016. I set forth in my October 24, 2016, order the procedure to be followed by the non-moving party when responding to a motion for summary decision.

Summary Decision Standard

The standard for adjudicating summary decision motions brought pursuant to 29 C.F.R. §18.72¹ is analogous to the adjudication of summary judgment motions brought under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, slip op. at 5 (ARB June 28, 2011); *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 323-24 (1986). Under 29 C.F.R. §18.72(a), an administrative law judge may enter summary decision for either party “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” “A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation.” *Celotex* at 323-24. No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex* at 325. The burden then shifts to the nonmoving party, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). In reviewing a motion for summary decision, I must view all of the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 393 (6th Cir. 2008).

The party moving for summary decision has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex* at 325. The burden then shifts to the nonmoving party, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Liberty Lobby* at 257 (1986). The ARB has directed, “The first step is to determine whether there is any genuine issue of material fact,” but that “[d]etermining whether there is an issue of material fact requires several steps.” *Lee*, ARB No. 10-021 at 4 (citing *Anderson*, 477 U.S. at 248). After examining the elements of the complainant’s claims, the factfinder must “sift the material facts from the immaterial.” *Id.* After assessing materiality, the factfinder examines the parties’ “arguments and evidence to determine whether a genuine dispute exists as to the material facts. *Id.* The parties may submit evidence (such as documents or affidavits) in support of their positions. *See* 29 C.F.R. § 18.72(c)(4). The procedural regulations provide that the factfinder “need consider only the cited materials, but the judge may also consider other materials in the record.” 29 C.F.R. §18.72(c)(3).

Complainant’s Prima Facie Case

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 protected activity; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014)(citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If Complainant establishes this *prima facie* case, the

¹ On May 19, 2015, the Department of Labor published final Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“Rules of Practice and Procedure”). 80 Fed. Reg. 28767 (May 19, 2015). The Rules of Practice and Procedure are published in Title 29, Part 18, of the Code of Federal Regulations (“C.F.R”).

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)).

Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

The ARB has explained, “As a matter of law, an employee engages in protected activity any time [h]e provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee’s belief of a violation is subjectively and objectively reasonable.” *Sewadev Halo-Flight, Inc.*, ARB No.13-098, slip op. at 7-8 (Feb. 13, 2015)(citing 49 U.S.C § 42121(a))(emphasizing, “an employee need not prove an *actual* FAA violation to satisfy the protected activity provided that the employee’s report concerns a federal law related to air carrier safety and the employee’s belief that the violation occurred is subjectively and objectively reasonable”). The “complainant must prove that he reasonably believed in the existence of a violation,” and the reasonableness of this belief has both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016). Regarding the former, “To prove subjective belief, a complainant must prove that he held the belief in good faith.” *Id.* Regarding the latter, the Board explained, “To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” *Id.* (internal quotation marks omitted).

The ARB has observed that “mere words do not create an FAA violation when the parties “actual conduct does not violate FAA regulations.” *Hindsman v. Delta Air Lines, Inc.*, ARB No.09-023, slip op. at 6 (June 30, 2010). Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air EvacEMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009). Similarly, “once an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities

initially protected lose their character as protected activity.” *Id.* at 8 (internal quotation marks omitted)(holding that the complainant did not engage in protected activity since he knew that his concerns had already been resolved at the time he complained to management and “did not reasonably believe that safety violations existed at the time he made his complaint”).

Adverse Employment Action

Section 42121(a) of AIR-21 proscribes employer retaliation, stating 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).

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.’” The majority further stated that the purpose of the employee protections that the Labor Department administers “is to encourage employees to freely report noncompliance with safety, environmental, or securities regulations and thus protect the public. Therefore, we think that testing the employer's action by whether it would deter a similarly situated person from reporting a safety or environmental or securities concern effectively promotes the purpose of the anti-retaliation statutes.” *Melton*, slip op. at 20. Moreover, the majority believed that that both ARB and federal case law demonstrated that the terms “tangible consequences” and “materially adverse” are “used interchangeably to describe the level of severity an employer's action must reach before it is actionable adverse employment action. *Id.* The majority summarized:

The Board has consistently recognized that not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action....Actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions, or privileges of employment. Therefore, the fact that the *Burlington Northern* test is phrased in terms of “materially adverse” rather than “tangible consequence,” or “significant change,” or “materially disadvantaged,” or the like, is of no consequence. Applying this test would not deviate from past precedent.

Id. at 23.

Consequently, the finding of an adverse action in an AIR-21 statute will be based on the standards set forth in *Burlington Northern. Hirst v. Southeast Airlines, Inc.*, ARB No. 04-116, 04-160, ALJ No. 2003-AIR-0004, slip op. at 7 (ARB January 31, 2007). Suspensions and

transfers have been found to constitute an adverse employment action under the *Burlington Northern* standard. See, e.g., *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021 slip op. at 6-7 (ARB December 30, 2004). The ARB has held that a warning letter issued to an employee does not constitute adverse action. *Simpson v. United Parcel Service*, ARB No. 06-065 (ARB: Mar. 14, 2008).

Submission of Complaint

An employee who believes that he or she has suffered unlawful discrimination in violation of AIR-21 may file a complaint with OSHA not later than 90 days of the date on which the violation occurred. 49 U.S.C.A. § 42121(b)(1), 29 C.F.R. §1979.103(d). The 90 day period begins to run when the affected individual receives a “final, definitive, and unequivocal notice of the adverse employment action.” *Barrett v. Shuttle America/Republic Airways*, ARB No. 12-075, ALJ No. 2012-AIR-010 (February 28, 2014).

Department of Labor regulations require that discrimination claims made to OSHA under AIR-21 must be made in writing. 29 C.F.R. §1979.103(b).

Summary of Complainant’s Claims

Complainant is a pilot employed by Respondent. Complainant has filed two Complaints with OSHA. Complaint Number 5-1800-13-067 was filed on August 24, 2013, and was amended on March 21, 2014 to add additional claims of adverse action. That complaint was dismissed on July 22, 2014. On July 31, 2014, Complainant sought a hearing before OALJ. This case was assigned OALJ case number 2014-AIR-21.

Complaint Number 5-1800-15-004 was filed by Complainant on October 22, 2014. Following an investigation by OSHA, it was determined that a one-day suspension issued to Complainant on October 17, 2014 violated the whistleblower protection provisions of AIR-21. OSHA ordered that Complainant receive the pay lost during his one-day suspension, awarded him attorney fees, and awarded him other incidental relief. On February 19, 2016, Respondent requested a hearing before OALJ. This case was assigned OALJ case number 2016-AIR -11.

In his affidavit, Complainant states: “I suffered 14 adverse employment actions that I reported to OSHA as outlined above when discussing timeliness.” He then provides a table of these alleged adverse employment actions, which I summarize here:

Adverse Action Number	Date of Adverse Action	Event	Detail
1	4/26/2013	Pressure to fly after bird strike	Attempted to have me wipe off the bird and continue
2	4/27/2013	Demotion	Status changed to PIOE
3	6/22/2013	Retraining	Retrained for post flight “failure”
4	6/22/2013	Record of Training	Record of training entered in training record
5	6/22/2013	Pressured to fly with out of date charts	Lack of current charts

6	11/20/2013	Denied Promotion	Challenger 350 check airman
7	11/20/2013	Denied Promotion	Challenger 350 IP
8	1/17/2014	Pressured to fly with incorrectly documented discrepancies	FMS TAWS N630QS
9	3/25/2014	Denied Promotion	Challenger 350 IOE positon
10	3/31/2014	Pilot Review Board	Sick day use and email
11	9/19/2014	Denied Promotion	Challenger 605 IP
12	9/19/2014	Denied Promotion	Challenger 605 check airman
13	10/18/2014	Suspension	Crew Activity email
14	5/7/2015	Denied Promotion	Not interviewed for CL-650 TR due to suspension

For the convenience of the parties, and for the sake of brevity, my discussion of the events of this case will reference the numbers assigned in the table above.

Claims 1, 2, 3 and 4

After carefully reviewing all of the materials submitted by the parties, I find that Complainant suffered no adverse employment action as a consequence of reporting a bird strike on Citation Excel jet bearing tail number N685QS. Complainant flew that aircraft to Austin, Texas on April 25, 2013. During a post-flight inspection performed with a flashlight in the dark, Complainant did not notice that the aircraft had apparently struck a bird. Complainant did see evidence of the bird strike during a pre-flight inspection of the aircraft he performed the following day. Complainant reported the bird strike to Respondent's Maintenance Controller in Columbus, Ohio. On page 7 of Complainant's affidavit, he says that he was encouraged not to record the bird strike in the logbook of the aircraft. He alleges that he was asked to "wash the bird strike off and continue [with the scheduled flight]".

Ultimately, Complainant did annotate the logbook to note the bird strike.² The aircraft was inspected and not flown as scheduled.³ Complainant returned to his home base by a commercial flight. Complainant was not discharged or suspended for anything having to do with the bird strike. He makes no claim in any of his summary judgment papers that he suffered financial consequences as a result of his April 26, 2013, report of a bird strike. However, he does argue that he was forced to attend additional training on post-flight procedures.

The record before me -- including Complainant's own affidavit -- does not support Complainant's allegation that he was "pressured to fly" the aircraft. Complainant did not see any damage from the bird strike to the airframe or to the engines.⁴ The aircraft's instrumentation showed no indication that the engines were not working properly.⁵ During his conversations with Respondent's Maintenance Controller, there was a discussion whether the aircraft could be flown as scheduled given the fact that there was no visible damage. Complainant was not ordered by a superior to fly the aircraft. He was not ordered by a superior not to note the bird

² Complainant's deposition at 114-15.

³ *Id.* at 115.

⁴ *Id.* at 111-12.

⁵ *Id.* at 114.

strike in the logbook of the aircraft. Complainant's own affidavit fails to support his claim that he was "pressured to fly" the aircraft. I find that Complainant has not supported his allegation that he was "pressured to fly" the Citation Excel on April 26, 2013.

I further find that Complainant did not engage in protected activity during his activities of April 26, 2013. In view of Complainant's own observations that there was no evidence of damage to the airframe or engines of the aircraft, and in light of the fact that the engines on the aircraft performed normally, I am unpersuaded that Complainant actually engaged in the type of conduct defined as "protected activity" in 49 U.S.C. § 42121(a) on April 26, 2013 – Complainant certainly was not reporting a "violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety."⁶ There is no evidence anywhere in the record which supports a claim that Respondent sought "to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against [Complainant] for engaging in protected activity" as proscribed by 29 C.F.R. § 1979.102(b).

I find no evidence in the record that Complainant actually believed at any time on April 26, 2013, that the aircraft had suffered damage, and I thus cannot conclude that Complainant had a subjective and objectively reasonable belief that he was reporting a condition related to air carrier safety on April 26, 2013. At this stage of the proceedings, Complainant has an obligation to come forward with at some affirmative evidence supporting that he was engaging in protected activity on April 26, 2013. I find there to be a lack of such evidence.

I do not find that Complainant suffered an adverse employment action when he was required to undergo additional training after the bird strike incident of April 25-26, 2013. Complainant has produced no evidence of any materially adverse consequence for being required to attend this training on June 22, 2013. Instead, Complainant asserts on page 9 of his affidavit that: "I found the requirement to attend retaining to be humiliating and used out of spite because I would not relent when asked to wipe off the bird strike and continue without the [Citation Excel N685QS] first being inspected." Even crediting Complainant's feelings of humiliation, I cannot conclude from the evidence in the record that the requirement that Complainant attend one day of training would dissuade a reasonable worker from reporting a bird strike in the same manner as did Complainant.

As to Complainant's belief that he was assigned to training in retaliation for the manner in which he reported the bird strike, I have previously determined that Complainant did not engage in protected activity with regard to the bird strike incident. The claimed retaliatory act of requiring training is thus unrelated to any protected activity, and is not actionable in this case.

Complainant alleges that he was demoted after the bird strike incident. Specifically, Complainant testified that during this period of alleged demotion his "status" in Respondent's records was changed from "TR" ("Training Captain") to "PIOE" (Pilot In Command, Additional Operating Experience"). Complainant admits that that his compensation and benefits were not changed after the alleged demotion.⁷ In fact, in his affidavit (at page 8) he does not describe any adverse impact arising out of the alleged demotion. Complainant has an obligation to come

⁶ 49 U.S.C. § 42121(a).

⁷ Complainant's deposition at 55, 59.

forward with such evidence at this summary decision stage of the case. Complainant has not satisfied his duty to come forward with evidence supporting his claim.

Complainant alleges on page 8 of his affidavit that his demotion lasted from April 27, 2013, until July 8, 2013.⁸ However, he notes in his deposition that he was on a medical leave from work from immediately after April 27, 2013 until he returned “within a couple of days that you actually received the training.”⁹ Complainant states at page 6 of his affidavit that this retraining took place on June 22, 2013. Complainant was thus not even flying for the vast majority of the period during which he claims to have been demoted. According to the declaration of Christopher Eastman,¹⁰ during the entire period of Complainant’s alleged demotion (between April 27, 2013 and July 8, 2013¹¹), Complainant was only changed from “pilot in command” to “second in command” on one occasion – during the training flight conducted on June 22, 2013.¹²

The evidence of record indicates that Complainant was the pilot in command of the flight to Austin, Texas on April 25, 2013. During his post-flight inspection of the aircraft that evening, he did not see that the aircraft had struck a bird. Complainant discovered the bird strike the next morning. Respondent made the decision that Complainant was in need of additional training. I have already found that no act of Complainant in his handling of the bird strike matter on April 26, 2013 amounts to protected activity under the statute or regulations. I have found that Complainant has failed to produce any evidence that the alleged demotion was an adverse employment action. Even if there were evidence that Complainant had engaged in protected activity, and even if the requirement to undergo training was an adverse employment action, Complainant points to no evidence in the record which suggests that Respondent required Complainant to undergo one day of training in order to retaliate against him.

I have found above that Complainant was not required to attend the June 22, 2013 training as retaliation for Complainant engaging in protected activity on April 26, 2013. Complainant has not demonstrated that having a record of the June 22, 2013 training in his files has caused him any economic or other harm to date. I find that he has suffered no adverse employment action.

⁸ Exhibit 6 to Complainant’s Brief in Opposition to Summary Decision appears to be a record of Complainant’s flight activity, and appears to show that Complainant was flying as second in command on July 9 and 10, 2013, which is at odds with Complainant’s affidavit. Given my conclusion that Complainant was not subjected to an adverse employment action by undergoing training, it is not necessary for me to determine the precise dates of Complainant’s alleged demotion. Nor is it necessary to resolve the disagreement between Complainant’s testimony as to the dates of the alleged demotion and the dates referenced in paragraph 3 of the Declaration of Christopher Eastman.

⁹ Complainant’s deposition at 57.

¹⁰ Attached at Exhibit C to Respondent’s Motion for Summary Decision.

¹¹ There is an apparent typographical error in paragraph 3 of Eastman’s declaration. “July 8, 2014” should be “July 8, 2013”.

¹² Eastman declaration at paragraph 3.

Claim 5

Complainant alleges that he was “pressured to fly with out of date [aeronautical] charts”. According to page 7 of Complainant’s affidavit, this incident occurred on June 22, 2013.¹³ Complainant advised an Assistant Chief Pilot that the aeronautical charts in an aircraft Complainant was scheduled to fly (tail number N612QS) were out of date. The conversation between Complainant and the Assistant Chief Pilot is described on page 7 of Complainant’s affidavit. Based upon Complainant’s affidavit and deposition testimony,¹⁴ I believe Complainant did engage in protected activity during his conversation(s) with the Assistant Chief Pilot about the charts. However, I am not persuaded that Complainant suffered any adverse employment action as a consequence of his report. Complainant certainly was not fired or suspended or suffered any economic harm for making these calls. Nor am I persuaded that Complainant has come close to satisfying his burden at this stage of the proceedings to demonstrate that other reasonable workers would be dissuaded from raising similar issues. He has thus suffered no adverse employment action.

Claims 6 and 7

Complainant admits that he learned on November 30, 2013, that he had not been selected as a check airman for Challenger 350 aircraft. On that same date, he learned that he would not be selected as Challenger 350 instructor pilot. Complainant’s written complaint concerning these non-selections was not filed with OSHA until March 21, 2014 – well more than 90 days following his notification that he would not receive either of the positions. The AIR-21 regulations require that a written complaint of discrimination be submitted within 90 days of a complainant learning of the adverse action. 29 C.F.R. § 1979.103(b) (complaint must be in writing) and (d) (complaint must be filed within 90 days). The fact that Complainant may have attempted to report these matters to OSHA by telephone does not satisfy the clear requirement of the regulation that a written complaint be filed within 90 days after the complainant learns of the adverse action. Complainant has not established any factual basis for the 90-day limit to be tolled.

Claim 8

Complainant alleges that he was pressured to fly on January 17, 2014 when there was an alleged maintenance issue involving the flight management and terrain awareness warning systems on the aircraft. I find no evidence that Complainant ever brought concerns involving a January 14, 2014 flight to the attention of OSHA by the submission of a timely written complaint. I find nothing in OSHA’s papers indicating that OSHA ever made Respondent aware of these allegations, or that OSHA ever invited a response from Respondent about this allegation. OSHA has never issued a decision concerning this allegation. Allegations about “pressure to fly” on January 17, 2014 were never presented to OSHA, and are not properly before me. *See, Collins v. Ameriprise Financial Services, Inc.*, ALJ No. 2016-SOX-15, slip op. at 27-28 (June 6, 2016), *Coates v. Southeast Milk Inc.*, ARB No. 05-050, ALJ No. 2004-STA-60)(ARB July 31, 2007), slip op. at 8 n.3.

¹³ I note this is the same date on which Complainant has stated his “demotion” training flight took place.

¹⁴ Pages 62-70.

Claim 9

Claims 6 and 7 (discussed above) concern promotional opportunities for Challenger 350 check airman and instructor pilot positions that were posted in 2013. Claim 9 concerns a Challenger 350 training captain promotional opportunity that was posted in 2014. On March 3, 2014, Complainant learned that he would not be interviewed for the position posted in 2014. On March 21, 2014, Complainant brought this alleged act of retaliation to the attention of OSHA.¹⁵

During Complainant's November 8, 2016 deposition, he was shown a file memorandum prepared on July 11, 2014 by William H. Yost, the OSHA investigator assigned to Complainant's matter.¹⁶ This memorandum summarizes a telephone conversation between Complainant and Yost held on July 11, 2014. Paragraph 3 of the memorandum states:

(3) As to [Complainant] not being selected for a Check Airman and Instructor position on a new aircraft, Complainant's amended was not filed within the prescribed 90-day filing period, thus untimely. Complainant stated that there were two postings, one in November and another in January 2014. He also commented about the November dates and conversation. He was informed that this new information may delay the sending out of the findings. **Complainant then stated not to investigate the second posting of the position.**

(emphasis added).

Complainant was asked the following questions about the Yost memorandum during his deposition:

Q. -- with you and Mr. Yost. Do you remember reading this?

A. Yeah, I've read it, but it's been several months at least, if not six months.

Q. Okay. Read the paragraph numbered (3) to yourself and let me know if this is an accurate description of the conversation you had with Mr. Yost.

A. Yes.

Q. Okay. Take a minute to read the whole thing. Is there anything in this that you believe is inaccurate from your closing conference with Mr. Yost.

A. No.¹⁷

¹⁵ See Complainant's affidavit at 2.

¹⁶ The memorandum was marked as deposition exhibit 9.

¹⁷ Complainant's deposition at 146.

In the Findings issued by OSHA on July 22, 2014, there is no discussion of Complainant's non-selection for the Challenger 350 training captain position in 2014.

As discussed above with regard to Claim 8, the investigation of a claim by OSHA is a prerequisite for me entertaining the matter. *See, Collins v. Ameriprise Financial Services, Inc.*, ALJ No. 2016-SOX-15, slip op. at 27-28 (June 6, 2016), *Coates v. Southeast Milk Inc.*, ARB No. 05-050, ALJ No. 2004-STA-60)(ARB July 31, 2007), slip op. at 8 n.3. Here it appears that Complainant instructed OSHA not to investigate the 2014 Challenger 350 training captain non-selection, and it appears that OSHA followed Complainant's instruction.

Complainant's 2014 non-selection as a Challenger 350 training captain was not investigated by OSHA, and is not properly before me.

Claim 10

On February 18, 2014, Complainant sent an email to a co-worker on his company-provided cell phone. The subject line of the email sent from Complainant was "Fcuk y." Approximately one month later, Complainant was directed to attend a meeting of the Pilot Review Board ("PRB") to discuss the "Fcuk y" email. Complainant asserts that being required to attend the PRB meeting by itself was an adverse employment action. I disagree. Respondent had the ability to require Complainant to appear and explain the email sent from Complainant's phone. Sending the email was not protected activity. The requirement to explain the email to the PRB was not protected activity. Complainant suffered no adverse employment action simply by being required to appear at the PRB.¹⁸

Claims 11 and 12

Complainant alleges that he did not receive consideration for promotion to Challenger 605 instructor pilot and check airman positions in 2014. Respondent moves for summary decision on grounds that Complainant's assertion that he was not considered for these positions because of Respondent's retaliatory animus is "pure speculation." At this point of the summary decision procedure, Complainant has the burden to come forward with some evidence to establish the existence of a genuine question of material fact. Complainant has produced no such evidence. Neither his Brief in Opposition to Summary Decision¹⁹ (32 pages in length) nor his affidavit²⁰ (16 pages in length) contain any discussion, analysis or argument supporting the claim that Respondent not giving Complainant an interview for the Challenger 605 promotional opportunities was retaliatory. Complainant was unable to articulate an argument of retaliatory animus in his deposition.²¹ I find that Complainant has failed to meet his burden to articulate and support with some evidence an argument as to why he believes Respondent violated AIR-21

¹⁸ I find below that the circumstances surrounding the issuance of the *decision* of the PRB on the "Fcuk y" email are such that I cannot grant Respondent's motion for summary decision as to Complainant's suspension.

¹⁹ Actually entitled "Memorandum of Points and Authorities in Support of Complainant John Swint's Motion in Opposition to Respondent's Motion for Summary Decision on Complainant's Claims."

²⁰ Complainant captions the document "Declaration of John J. Swint." The document is notarized (declarations are not). For purposes of this Decision and Order, it makes no difference whether the document is called an affidavit or a declaration. I have called it an affidavit.

²¹ Complainant's deposition at 128-134.

when it did not interview him for the Challenger 605 promotional opportunities. Based on the record now before me, there is no question of material fact as to these claims, and Respondent is entitled to summary decision.

Claims 13 and 14

As noted above in the discussion of Claim 10, Complainant sent an inappropriate email from his employer-issued cell phone. That email was sent of February 18, 2014. He was directed to attend a Pilot Review Board meeting to discuss the email. That PRB meeting was held on March 31, 2014.

Complainant was notified on October 17, 2014, that he would serve a one-day suspension for the inappropriate email. That suspension was served on October 18, 2014, with a consequent loss of pay.

I have carefully reviewed Respondent's papers with respect to Claims 13 and 14. At this point, I find no credible explanation for why Respondent waited from March 31, 2014, to October 18, 2014, to discipline Complainant for the email which Complainant admits writing, and which is inarguably inappropriate.

There is ample evidence in the record is that during the period between March 2014 and October 2014, Complainant participated in protected activities, including reporting safety issues to a Member of Congress. In the week immediately preceding the imposition of the one day suspension, Complainant was responsible for the grounding of 3 different aircraft for a variety of safety issues.

I am aware of the various arguments made by Respondent which attempt to persuade me that the protected activities in which Complainant participated have no causal relationship to the one-day suspension levied against Complainant on October 18, 2014. I believe I would be required to impermissibly weigh the evidence in order to grant summary decision to Respondent as to Claims 13 and 14. At this summary decision stage, I decline to perform such an assessment of competing facts and inferences.

ORDER

For the reasons stated above, I **GRANT** Respondent's Motion for Summary Decision as to the Claims designated as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 on the Table above. For the reasons stated above, I **DENY** Respondent's Motion for Summary Decision as to Claims 13 and 14. At the formal hearing scheduled for December 12, 2016, I will hear evidence regarding only Claims 13 and 14.

Steven D. Bell
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).