No. 15-60012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONTINENTAL AIRLINES, INC.,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR

Respondent.

On Petition for Review of the Final
Decision and Order of the United States
Department of Labor's Administrative Review Board
ARB Case Nos. 10-026, 10-068, 13-009, 13-026
ALJ Case No. 2008-AIR-009

BRIEF FOR THE SECRETARY OF LABOR

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BRIEF FOR THE SECRETARY OF LABOR

JURISDICTIONAL STATEMENT

The whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. 42121, conferred subject matter jurisdiction upon the Secretary of Labor ("Secretary") over this case, which Intervenor Roger Luder initiated by filing a complaint against Continental Airlines, Inc. ("Continental") with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA").[1] This Court has jurisdiction to review the final order of the Secretary under AIR 21.

[1] Congress has granted the Secretary the authority to administer AIR 21 through adjudication. The Secretary has delegated the authority and assigned the responsibility to investigate

See 49 U.S.C. 42121(b)(4)(A). The Department of Labor's Administrative Review Board ("ARB" or "Board") issued a Final Decision and Order on November 3, 2014.[2] Continental filed a timely petition for review with this Court on December 31, 2014. This Court has jurisdiction to review the ARB's Final Decision and Order because the violation with respect to which the ARB issued its order occurred in Texas. *See* 49 U.S.C. 42121(b)(4)(A).

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the decisions of the Administrative Law Judge ("ALJ") and the ARB that retaliation in violation of AIR 21 occurred in this case.

2. Whether substantial evidence supports the ARB's award of lost wages in this case.

STATEMENT OF THE CASE

1. AIR 21's Employee Protections

AIR 21 protects an employee who provides information to an employer or the federal government that he reasonably believes relates to a violation, or alleged violation, of any order, regulation or standard of the Federal Aviation Administration ("FAA"). *See* 49 U.S.C. 42121(a)(1). It additionally protects an employee who is about to cause to be filed a proceeding relating to a violation, or an alleged violation, of any order, regulation or standard of the FAA. *See* 49 U.S.C. 42121(a)(2). A covered employer may not discriminate against an employee because he engages in either form of protected activity. *See* 49 U.S.C. 42121(a)(1)-(2). Luder filed a complaint with OSHA alleging that Continental's suspension of his employment without

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whistleblower complaints under AIR 21 to OSHA. *See* Secretary's Order No. 01-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. 1979.103-.105.

[2] The Secretary has delegated the authority to issue final agency decisions in cases arising under AIR 21 to the ARB. *See* Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. 1979.110(a).

pay, and issuance of an 18 month termination warning letter, constituted discrimination against him because of his protected activity. *See* R.99(5-6).[3]

2. Statement of Facts

Luder piloted planes for Continental for 22 years. R.64, CX 3(8). Continental hired Luder as a First Officer/Co-pilot on June 3, 1985. R.63, JX 19(1). It promoted him to Captain on November 1, 1998. *Id*. There is no evidence that Continental disciplined Luder prior to October 2007. R.136(2).

On September 15, 2007, Continental scheduled Luder to captain flight #391 in aircraft #304. R.63, JX 8. The flight embarked from Miami, Florida with a final destination of Houston, Texas. *Id*. Continental scheduled First Officer John Wofford to be Luder's co-pilot on flight #391. *Id*.

Earlier that day, Captain John Lemaire and First Officer Thomas Solsbery had piloted two flights on aircraft #304. R.63, JX 7. Lemaire and Solsbery's first leg aboard aircraft #304 was a flight from McAllen, Texas to Houston, Texas. *Id*. The second leg was a flight from Houston, Texas to Miami, where Luder and Wofford would take the reins from Lemaire and Solsbery. *Id*.

During the first leg of Lemaire and Solsbery's journey, aircraft #304 encountered turbulence. R.103, Solsbery Dep.(36). When the aircraft landed in Houston, Lemaire did not order a mechanical inspection prior to piloting the plane from Houston to Miami. R.102, Lemaire Dep. 14-16. After Lemaire and Solsbery landed aircraft #304 in Miami, Solsbery discussed with Wofford the turbulence the plane had encountered in route from McAllen to

[3] This memorandum contains the following citation conventions: "R." refers to the record as identified in the April 10, 2015 Amended Certified List; "Tr." refers to transcript from the ALJ hearing; "CX" refers to Complainant's Exhibits; "JX" refers to Joint Exhibits; "Dep." refers to depositions; and "Dec." refers to declarations.

Houston. R.103, Solsbery Dep.(36). Solsbery informed Wofford the turbulence had registered as "pink" on the radar and "nearly ripped the wings off," and that one of the plane's flight attendants sought medical treatment for injuries she sustained due to the turbulence. *Id*.(36, 41).

Wofford repeated Solsbery's narrative "verbatim" to Luder. R.104, Wofford Dep.(28). The spectrum of the radar measuring turbulence goes from "no color to green to yellow to red, then magenta is the strongest." R.12, Luder Dep.(74). Luder understood Solsbery and Wofford's use of "pink" to describe the radar's color as a reference to magenta. *Id*.(73-74). Luder responded to the information Wofford provided by stating "that sounds like severe turbulence." R.104, Wofford Dep.(29).

Continental's Flight Operations Manual ("FOM") requires that a plane that encounters severe turbulence must undergo a mechanical inspection before embarking on a subsequent flight. R.63, JX 22(000282) (noting "[a]ction by maintenance is required before the aircraft can be redispatched").[4] An FAA regulation required Luder, as well as Lemaire, to "comply[] with the operating limitations specified" in the FOM. 14 C.F.R. 91.9(a). Thus, if Luder or Lemaire piloted a plane that had experienced severe turbulence without subjecting the plane to a mechanical inspection, the failure to conduct the mechanical inspection would violate an FAA regulation. R.102, Lemaire Dep.(50); R.62, Tr. 104, 235-236, 460-461.

Luder checked aircraft #304's logbook to determine if Lemaire had ordered a mechanical inspection in Houston following the turbulence the plane encountered on the flight from McAllen. R.12, Luder Dep.(74). The logbook contained no record of a mechanical inspection. *Id*. Consistent with the process required by Continental's FOM, *see* R.63, JX 22(000368), Luder then called his dispatcher, Lou Bass, and asked Bass to connect him with Continental's

[4] The FOM also provides that "Safety is paramount for our employees and customers."

Maintenance Control so that Luder could request a mechanical inspection. *Id*.(75). Bass connected Luder to Larry McClure in Maintenance Control, from whom Luder requested the inspection. *Id.*(76-78).

Following the call with McClure, Luder instructed Continental station personnel not to board the plane. R.76(1186). Luder made this instruction because he believed the mechanical inspection he had requested would delay take-off. *Id*.(1187-1188). After Luder instructed Continental personnel not to board the plane, a Continental employee, Hopton Fife, informed Luder that Continental was going to board the aircraft because System Operations Coordination Center ("SOCC") wanted the flight to leave the gate on schedule. *Id*.(1188).

Then Luder received a phone call from Continental's Assistant Chief Pilot, John Komidor. R.12, Luder Dep. (81); R.63, JX 4. Luder had to take the call at the "gate podium" in the presence of the passengers scheduled to fly on aircraft #304. R.12, Luder Dep.(81). Continental's FOM provides that "[a]t no time shall a pilot discuss in the presence of customers . . . any matter which would cast doubt on the safety of the operation of a flight." R.63, JX22(593). James Sunbury, Continental's Senior Manager of Maintenance Control, and Ed Gubitosa, Operations Director of SOCC, *see* R.108(4) & R.105(5), joined Komidor on the call. R.107, Komidor Dep.(22). Just prior to the call to Luder, Gubitosa and Sunbury had called Komidor and explained that Luder had requested a mechanical inspection. *Id*.(16). Continental's purpose in making the call to Luder was to convince him to fly the plane without an inspection. *See* R.107, Komidor Dep.(16) ("[Gubitosa and Sunbury] wanted me to help them talk to Captain Luder and assure him the airplane was safe to fly the way it was").

After Luder explained to Komidor, Sunbury and Gubitosa what Solsbery had represented to Wofford regarding the turbulence aircraft #304 faced in route from McAllen to Houston,

Sunbury stated that Continental does not write-up airplanes based on hearsay. R.12, Luder Dep.(81). Luder hung up the phone "rather than to say something that might get me in trouble." *Id*.(82). Komidor called Luder back on Luder's cellphone. *Id*.(82). In this call, Luder informed Komidor that he had written-up the aircraft. *Id*.(84,202). He further informed Komidor that he intended to contact the FAA if Komidor tried to keep Luder from having the airplane inspected. *Id*.(202). The airplane was then inspected and departed 37 minutes late. R.63, JX6.

In this same call between Komidor and Luder, Komidor instructed Luder he wanted to meet with him regarding the events of September 15, 2007 on Monday September 17, 2007. R.66, Tr.(1012) Luder informed Komidor he had a vacation that began on Monday, September 17 and therefore could not meet with Komidor that day. *Id.* On September 24, 2007, while Luder was still on vacation, Komidor mailed a letter to him at his home address in California seeking his attendance at an "investigatory meeting in the office of the Chief Pilot" scheduled for October 4, 2007. R.63, JX 1. The letter notified Luder the meeting's purpose was to discuss the events that occurred on September 15, 2007. *Id*. It further advised Luder that disciplinary action may result from the investigation. *Id*.

Luder was on vacation in Arizona visiting his mother when Komidor sent the September 24 letter. R.12, Luder Dep.(61). Luder's vacation, which started on September 17, lasted two weeks, and he had additional scheduled "days off" following his vacation. R.76, Tr.(1085-1086). Luder accordingly was not aware of the letter's contents until on or about October 3, 2007. *Id*.(59); R.76 Tr.(1084).

Shortly after finding out about the letter, Luder informed Komidor in an email that he was unable to attend the meeting. R.63, JX 2. Komidor rescheduled the investigatory meeting for October 11, 2007. *Id*., JX 3. Following the investigatory meeting, Komidor issued Luder a

letter dated October 19, 2007 that recapped Continental's investigation of Luder's conduct on September 15, 2007. *Id.*, JX 4. The letter stated that Luder's behavior on September 15, 2007, including, in part, his decision "in calling for the inspection" justified imposition of an "unpaid disciplinary suspension" and a "Termination Warning level of discipline." *Id.*

At the time Continental disciplined Luder, Andrew Jost was the company's Chief Pilot in Houston. R.106, Jost Dep.(5). Jost collaborated with Komidor in making the decision to discipline Luder. *Id.*(17). Jost admitted part of the reason Continental disciplined Luder was because he called for an inspection of aircraft #304 on September 15, 2007, and had written up an airplane he had not flown. *Id.*(19,119).

Continental scheduled Luder for flight simulator training on November 10, 2007. R.63, JX15(01109). On the form memorializing the training, Luder noted "outside influences [were] affecting [his] ability to perform" that day. *Id.* When Luder called in sick the second day of the training, Continental removed him from qualified flight status. *Id.*(01110). Luder was on sick leave from Continental until December 13, 2007, and subsequently applied for, and obtained, long-term disability benefits, as described below. R.110, RX-R1(174).

Dr. Vitaliy Shaulov, a psychiatrist, conducted over 25 sessions with Luder from January 2008 through September 2011. R.2(3). In his initial psychiatric evaluation, Dr. Shaulov identified Luder as suffering from symptoms consistent with Panic Disorder, Posttraumatic Stress Disorder ("PTSD"), Major Depressive Disorder, Generalized Anxiety Disorder, Adjustment Disorder with Predominant Anxiety and Anxiety Not Otherwise Specified. R.35, Shaulov Dec.(¶4); R.110, RX-R2(79). Luder had suffered no psychiatric condition prior to his suspension without pay and receipt of the Termination Warning. R.35, Shaulov Dec.(¶4). Based on his long treatment and evaluation of Luder, and the absence of any mental abnormality prior

to Luder's dispute with Continental, Dr. Shaulov concluded that "Luder's functional decline and mental health problems were caused by his reaction to the treatment he has received by Continental officials." *Id*.(4, ¶9); R.11, Shaulov Dep.(57).

Dr. Sandra Jorgensen, a psychologist, conducted 22 sessions with Luder from 2008 through 2010. R.110, RX- R3(25). Dr. Jorgensen identified Luder as experiencing high distress, high anxiety, depression and paranoid ruminations, which symptoms she diagnosed as PTSD. *Id*.(15). Luder's focus in the sessions was so intently on the airlines and his career, *id*.(19), that Dr. Jorgensen concluded Luder formed "the majority of his identity and his purpose in the world" from his career. *Id*.(18). Dr. Jorgensen attributed Luder's mental "stress" to the consequences he endured based on fulfilling his duty not to fly aircraft #304 without an inspection. *Id*.(31).

Dr. Robert Elliott, a psychologist, evaluated Luder on May 12-13, 2008. R.64, CX4(00221). The purpose of Dr. Elliott's evaluation was to determine if Luder was eligible to receive Long-Term Disability ("LTD") benefits from a plan sponsored by Continental. Dr. Elliott diagnosed Luder as having Major Depression Disorder, Moderate, with Psychotic Features and Generalized Anxiety Disorder. *Id*.(00230). Dr. Elliott noted that Luder believed that the initiating event for his mental problems was the September 15 event. *Id*.(00222, 00224). Due to his mental state, and the need to take medications to treat the mental state, Dr. Elliott concluded Luder was unfit for duty. *Id*.(00231). In April 2008, Continental's LTD provider, Harvey Watt & Company, concluded Luder's mental condition was a disability rendering him eligible to receive LTD benefits. R.110, RX-R1(174), Luder Dec.(¶4), Ex. A.

Luder began experiencing tachycardia, i.e., a faster than normal heart rate, for the first time in his life following his suspension without pay and Termination Warning. R.11, Shaulov

Dec.(4,¶9); R.64, CX 9(00024). Dr. Elliott confirmed this condition. R.64, CX4(00231). Dr. Shaulov concluded the tachycardia was a physical manifestation of the trauma Luder experienced based on his dispute with Continental. R.11, Shaulov Dep.(56). In February 2011, Harvey Watt concluded Luder's tachycardia was also a disability rendering him eligible to receive LTD benefits. R.110, RX-R1(174), Luder Dec.(¶5), Ex. B.

3. Procedural History

In January 2008, Luder filed a complaint with OSHA alleging Continental violated the whistleblower provisions of AIR 21. R.63, JX 18. On April 18, 2008, OSHA issued findings that there was not reasonable cause to believe that Continental violated AIR 21. *Id*., JX20. Luder subsequently exercised his right to request a de novo ALJ hearing on the matter. R.78(2). The ALJ conducted a 5-day evidentiary hearing in April and August 2009. R.78(2).

a. ALJ's November 6, 2009 Finding that Continental Violated AIR 21

On November 6, 2009, the ALJ issued a Recommended Decision and Order. R.78. The ALJ found that Continental's suspension of Luder without pay and its issuance of the 18 month termination warning constituted unlawful discrimination against Luder in violation of AIR 21. *Id*.

The ALJ stated that Luder must show by a preponderance of the evidence that: (1) he engaged in protected activity; (2) Continental took adverse action against him; (3) Continental knew he engaged in protected activity; and (4) that his protected activity was a contributing factor in the adverse action. R.78(34). The ALJ further stated that if Luder makes that showing, Continental may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Id*.(33) (citing 49 U.S.C. 42121(b)(2)(B) and 29 C.F.R. 1979.104(c)).

First, the ALJ found that Luder's written entry into the logbook of the severe turbulence and his order to inspect aircraft #304 constituted protected activity. R.78(35). The ALJ noted that three elements comprise protected activity: (1) the information provided by the complainant must involve a purported violation of an FAA regulation, standard or order relating to air carrier safety, or any other provision of federal law relating to air carrier safety; (2) complainant's belief about the purported violation must be objectively reasonable; and (3) the complainant must provide the information to an employer or the federal government. *Id*. (citing *Svendsen v. Air Methods, Inc.*, ARB No. 03-074, slip op. at 48, 2004 WL 1923132 (Aug. 26, 2004).

The ALJ found that there was "no question" the information Luder provided Continental "dealt directly and specifically with aircraft safety." R.78(35). He further found Luder had "an objective and reasonable belief that aircraft #304 had flown through severe turbulence … so informed [Continental] in his communication with McClure and Komidor . . . and threatened to, and eventually reported, [Continental] to the FAA and DOL." *Id*. Thus, the ALJ found Luder satisfied the elements necessary to prove he engaged in protected activity.

Second, the ALJ determined that Luder suffered an adverse action based on his suspension without pay and receipt of the 18 month termination warning. R.78(36). The ALJ opined that the finding of an adverse action in an AIR 21 case "will be based on the standards set forth by" *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2415 (2006), which "[f]or purposes of the retaliation statutes that the Labor Department adjudicates" looks to whether the "employer action could dissuade a reasonable worker from engaging in protected activity." *Id*. (35, 36). The ALJ concluded the suspension and termination warning were materially adverse because they:

> depriv[ed] [Luder] not only of pay . . . but the right to legitimately question airline safety. This was accomplished by placing [Luder]

> in a situation wherein he would be extremely reluctant to question airline safety because of the notice he received that for [18] months if he engaged in any similar unacceptable behavior, he could be terminated.

Id.(36).

Third, the ALJ found that the "two persons responsible for [Luder's] discipline, Jost and Komidor, were aware of his actions in raising safety complaints dealing with aircraft #304 and its operation in potential unsafe severe turbulence." R.78(37). The ALJ accordingly concluded Continental knew of Luder's protected activity.

Fourth, the ALJ found that Luder's protected activity was a contributing factor in Continental's decision to suspend him without pay and issue the 18 month termination warning. R.78(38). The ALJ noted that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision," *id*.(37) (citations omitted), and that one may infer a retaliatory motive when the adverse action is temporally proximate to the protected activity. *Id*. The ALJ concluded that Luder had shown "by a preponderance of the evidence that . . . not only temporal proximity, but direct and circumstantial evidence shows that Complainant's protected activity was at least a contributing, if not the sole cause, for his suspension and warning." *Id*.(38).

The ALJ further found that Continental failed to demonstrate by clear and convincing evidence that it would have suspended Luder without pay and issued the 18 month termination warning absent his protected activity. R.78(39). The ALJ stated that Continental "failed to prove by the presentation of credible testimony or evidence that it would have disciplined [Luder] in any event notwithstanding his credible testimony." *Id*.(40). The ALJ thus determined that Continental's explanation for his discipline - that he was unprofessional, disrespectful and insubordinate - was pretextual. *Id*.

Because Luder satisfied his burden and Continental failed to demonstrate by clear and convincing evidence that it would have disciplined him absent his protected activity, the ALJ concluded that Continental violated AIR 21 and was liable to Luder. *Id*.

b. ALJ's Award of Damages

The ALJ awarded Luder lost income totaling $3,418.26 plus interest for the 4 day period of his suspension, reasonable attorney fees and costs, and ordered Continental to expunge the 18 month termination warning letter. R.78(40-41). The ALJ additionally concluded that, based on Luder's, Dr. Shaulov's and expert witness Mitchell Whatley's testimony, that the September 15, 2007 incident, coupled with the subsequent investigation and discipline, caused the PTSD, depression and anxiety that rendered Luder wholly unable to fly, as well as the anxiety that rendered him unable to complete Continental-ordered simulator training in November 2007. *Id*.(41). The ALJ thus ordered Continental to make Luder whole for his monthly salary, plus interest (with a discount for the LTD benefits paid to Luder) until Luder "sufficiently recovered from the PTSD to continue flying or to perform other suitable alternative employment." *Id*.[5] The ALJ also ordered Continental to make Luder whole for any loss of benefits he suffered commencing with his cessation of flying for Continental. *Id*.

c. The Board's January 31, 2012 Affirmance and Order of Remand

On January 31, 2012, the Board issued a Final Decision and Order affirming the ALJ Liability Order, affirming in part the damages award and remanding the matter for further consideration of Luder's entitlement to lost wages occurring after November 10, 2007. R.136(21). The Board stated that it reviews the ALJ's factual findings under the substantial evidence standard, *id*.(6) (citing 29 C.F.R. 1979.110(b)), and conclusions of law de novo.

[5] This memorandum will refer to the monetary damages award for the period following November 10, 2007 as a "Monthly Pay Award."

R.136(6). It first dismissed Continental's claim that the ALJ had applied the wrong burden of proof with respect to Luder's *prima facie* case, confirming the ALJ had properly applied the preponderance of evidence standard. *Id*.(7). The Board then ruled that substantial evidence fully supported the ALJ's findings that Luder engaged in protected activity, that the suspension without pay and 18 month termination warning constituted adverse action, and that Luder's protected activity contributed to the adverse action. *Id*.(8-11). The Board further ruled that the ALJ appropriately determined Continental failed to produce clear and convincing evidence that it would have disciplined Luder even absent his protected activity. *Id*.(12). Specifically, the Board concluded that the "core" of what Continental asserted was Luder's "unprofessional [behavior], violat[ion] of company policies, and fail[ure] to use good judgment," was "Luder's protected activity" itself . *Id*.

With respect to damages, the Board concluded that the "record supports" the ALJ's lost income award. R.136(13). Continental did not appeal the ALJ's order to expunge the termination warning, to make Luder whole for the period of his unpaid suspension, or to make Luder whole for any loss of benefits, beyond its challenge to the ALJ's liability ruling. *Id*. For these reasons, the Board affirmed the suspension-related lost income, expungement and lost benefit components of the ALJ's damages award. *Id*.

The Board remanded the Monthly Pay Award issue:

> to provide the ALJ the opportunity to clarify the basis for [it], which necessarily will require addressing the issue of medical causation and the amount of damages, if any, connected to Mr. Luder's long-term disability.

R.136(20). The Board noted that a complainant's burden in a "claim . . . for lost wages based on [his] medical or psychological condition" is to demonstrate by a "preponderance of the evidence that the unfavorable personnel action caused the harm." *Id*.(16) (quoting *Rooks v. Planet*

Airways, Inc., ARB No. 04-092, slip op. at 10 (ARB Jan. 29, 2006) citing *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, slip op. at 9, 2002 WL 31662915 (ARB Nov. 13, 2002). The Board additionally noted that if the ALJ concluded front pay, i.e., a Monthly Pay Award, was an appropriate remedy, the ALJ must issue such an award "for a set amount of time" and base it on factors Luder proves are reasonable. *Id*. The Board also observed that reinstatement is the presumptive remedy for an unlawful termination and that it is only proper to use "front pay as a substitute when reinstatement is not possible for some reason." *Id*.(15). After the Board provided significant guidance regarding medical causation in the context of this type of dispute, *id*.(15-19), it concluded that:

> [g]iven what we hope by this decision is a clarification of the law with respect to establishing when medical evidence may be necessary to prove causation in the range of emotional distress cases (some of which stem from specific medical conditions), arising under AIR 21, it is left to the ALJ's discretion upon remand to determine, consistent with this opinion, how to address this issue in further proceedings.

Id.(20).

d. ALJ's October 22, 2012 Recommended Decision and Order on Remand

On remand, the ALJ reopened the record to accept additional evidence from both sides regarding whether Luder's medical conditions resulted from the suspension and termination. The ALJ then found that record evidence demonstrated that Continental's treatment of Luder based on his protected activity caused the medical conditions that rendered Luder unable to complete the simulator training and to fly at all. R.2(3-4). First, the ALJ observed that the three mental health medical professionals - Drs. Shaulov, Jorgensen and Elliott - that evaluated Luder all agreed that he exhibited serious mental health issues, *id*., and that Shaulov and Elliott both diagnosed tachycardia, sleep disorder and diarrhea as medical conditions related to his psychological condition. *Id*. Next, the ALJ noted that Dr. Shaulov had concluded Continental's

treatment of Luder "relat[ing] to his refusal to fly an aircraft he believed had been flown through severe turbulence" worked a serious trauma on him causing his mental and physical health problems, *id*.(3), and that Dr. Elliott's evaluation confirmed that Luder was "re-experiencing symptoms associated with the 'initiating event', i.e., Luder's refusal to accept an aircraft on September 15, 2007 and [Continental's] disciplinary action thereafter." *Id*.(4). The ALJ additionally observed that the record revealed that Luder was "functioning as a responsible pilot" before his protected activity and Continental's adverse action, but that "closely following the adverse action Luder experienced deteriorating symptoms which is an important consideration in determining causation." *Id*. Finally, the ALJ concluded that Luder's psychiatric problems which Continental's adverse action caused, namely his paranoia, rendered him unable to complete the simulator training. *Id*.

The ALJ further concluded the Monthly Pay Award was an appropriate substitute remedy for reinstatement because there was no dispute Luder's medical condition rendered him unable to pass the required FAA medical exam. R.2(5). The ALJ saw no evidence in the record that Luder would be able to pass the FAA medical exam before the mandatory pilot retirement age of 65, that Continental had offered him alternative employment or that Luder was qualified or able to perform other work. *Id*. The ALJ accordingly ordered a Monthly Pay Award for the period of December 13, 2007 through July 1, 2016, when Luder will turn 65. *Id*. The ALJ additionally ordered Continental to make Luder whole for any loss of benefits he would have received during the prescribed Monthly Pay Award period, including funding his retirement account at a rate of 12.75% of his pay, reimbursing Luder for additional COBRA paid following his discharge, and issuing to him and his dependents a travel pass in accordance with Continental's Pass Travel policy. *Id*. Finally, the ALJ granted Continental a credit for LTD benefits paid to Luder

covering over a 4 year period during which Continental paid Luder approximately one-half his regular salary, and allowed Continental to take a 4% discount rate for all lump sum payments it made to Luder prior to future payments' due date. *Id*.(6).

e. The Board's November 3, 2014 Final Decision and Order

On November 3, 2014, the ARB affirmed the ALJ's finding that Continental's suspension without pay of Luder and 18 month termination warning caused Luder's medical conditions. R.118(6). The ARB first dismissed Continental's contention that the ALJ's decision on remand to reopen the record was improper, finding the ALJ acted within his discretion in allowing for the submission of supplemental evidence. *Id*.(5). It noted that its remand order had explicitly "left to the ALJ's discretion upon remand to determine . . . how to address [the medical causation] issue in further proceedings." *Id*. It further observed that 29 C.F.R. 18.54 which renders the record closed at a hearing's conclusion "unless the [ALJ] directs otherwise . . . affords [an] ALJ discretion to reopen [a] record on remand." *Id*.(5-6). It additionally noted reopening records on remand is consistent with administrative practice. *Id*.(6).

The ARB next concluded that substantial evidence supported the ALJ's determination that Continental's adverse action caused Luder's mental and physical health conditions. R.118(6-11). The ARB reviewed in extensive detail the record evidence offered through Drs. Shaulov and Jorgensen that the cause of Luder's mental decline and tachycardia was Continental's retaliation. *Id*.(7-10). In response to the medical evidence indicating that Continental's adverse action caused Luder's mental and physical conditions, the ARB noted Continental "did not proffer any independent medical evidence to directly refute the opinions of Dr. Shaulov and Dr. Jorgensen . . . ." *Id*.(6 n.4). Rather, the ARB noted, the medical evidence in the record from Dr. Elliott "supports the opinions of Dr. Shaulov and Dr. Jorgensen that the

initiating events of Luder's refusal to accept an aircraft on September 15, 2007, and the Company's disciplinary action that followed, caused Luder's symptoms." *Id.*

Because the ARB agreed Continental caused Luder's mental and physical health conditions, it approved the issuance of a Monthly Pay Award. R.118(11-12). However, the Board noted that the monthly pay award, as a form of make-whole relief, must be "proportionate to the harm inflicted." *Id*.(12) (quoting *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081, slip op. at 3, 2011 WL 4915755 (ARB Sept. 2, 2011). Since there was no "evidence of record indicating that beyond [September 21, 2011 Luder] ha[d] suffered any mental, psychological, or physical condition attributable to the retaliation he suffered," the ARB concluded his entitlement to a Monthly Pay Award ended on September 21, 2011. *Id*.(12). The ARB accordingly modified the Monthly Pay Award to require Continental to make Luder whole only until September 21, 2011. *Id.*

SUMMARY OF ARGUMENT

Substantial evidence supports the ALJ's determination, affirmed by the Board, that Luder engaged in protected activity and that his protected activity was a contributing factor in Continental's subsequent adverse actions. Luder engaged in three forms of protected activity: he informed Continental that he had ordered an inspection of aircraft #304 that he reasonably believed FAA regulation required; he informed Continental of his reasonable belief that Lemaire had piloted aircraft #304 in violation of FAA regulation from Houston to Miami by failing to conduct a mechanical inspection prior to departing; and he also notified Komidor that he intended to cause to be filed an FAA complaint against Continental. Continental noticed a disciplinary meeting with Luder just over a week after his protected activity, and suspended him without pay and issued the termination warning just over a month after the protected activity.

The October 19, 2007 disciplinary letter acknowledges that Continental suspended Luder without pay and issued the termination warning, in part, due to Luder calling for the inspection. And Continental's Chief Pilot, Jost, one of the officials responsible for the decision to discipline Luder, admitted Luder's protected activity was a contributing factor in his discipline.

Substantial evidence also supports the ALJ's conclusion, affirmed by the Board, that Continental failed to overcome Luder's showings by demonstrating by clear and convincing evidence that it would have disciplined Luder in the absence of his protected activity. Continental failed to meet this higher burden. The ALJ's review of the evidence showed that Continental's assertion that it disciplined Luder for poor judgment, insubordination and lack of professionalism was pretextual. Luder exercised prudence, not poor judgment, in ordering an inspection under the circumstances, and his actions hewed to Continental policy. Most notably, they were consistent with the "paramount" concern specifically identified in Continental's FOM – the safety of passengers and Continental personnel. Moreover, as the ARB noted, the "core" of Luder's alleged lack of professionalism, insubordination and bad judgment was his protected activity itself.

Finally, substantial evidence supports the ALJ's finding that Continental's discipline of Luder caused the medical conditions that rendered him unable to complete the simulator training and unable to work. Drs. Shaulov and Jorgensen, each of whom met with Luder for approximately two dozen counseling sessions, attributed the cause of his mental and physical health conditions, which did not exist prior to his discipline, to the trauma he incurred when Continental disciplined him. Dr. Jorgensen opined that Luder's identity and purpose in the world emanated from his status as a pilot, and that Continental's actions questioning Luder's fulfillment of what he perceived as his duty as a pilot resulted in mental trauma. Dr. Shaulov

similarly observed that Luder derived his identity from his work, and opined that the unfairness of Continental's accusations against Luder worked a psychological trauma on him, especially since they implicated his job security. The doctors' diagnoses were consistent with Luder's own statements that Continental's adverse employment action caused his health issues. And Continental produced no medical evidence to rebut Dr. Shaulov's and Dr. Jorgensen's medical conclusions, or Luder's statements. Because substantial evidence supports the ALJ's conclusions, affirmed by the Board, that Continental violated AIR 21, that Continental failed to sustain its clear and convincing evidence burden, and that Continental's AIR 21 violation caused Luder's medical conditions resulting in lost wages, this Court should affirm the ARB's decision.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S CONCLUSIONS, AFFIRMED BY THE BOARD, THAT CONTINENTAL RETALIATED AGAINST LUDER FOR REPORTING POTENTIAL VIOLATIONS OF FAA RULES AND THAT LUDER SUFFERED SIGNIFICANT LOSS OF PAY DUE TO THAT RETALIATION.

A. Standard of Review

AIR 21 renders the Secretary's final decisions under the Act subject to Administrative Procedure Act ("APA") review. *See* 49 U.S.C. 42121(b)(4)(A). Thus, the APA governs this Court's review of the Board's decision. *See Ameristar Airways, Inc. v. ARB, Dept. of Labor*, 650 F.3d 562, 566 n.4 (5th Cir. 2011). Under the APA, this Court must affirm the Board's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or is "unsupported by substantial evidence." 5 U.S.C. 706(2)(A), (E). *See also Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 (5th Cir. 2008).

The Court reviews the Department's "conclusions of law de novo." *Ameristar*, 650 F.3d at 566. It reviews the Department's "findings of fact for substantial evidence." *Id.* "Substantial evidence" means "more than a mere scintilla but less than a preponderance." *Allen*, 514 F.3d at

476 (quotation and citation omitted). The standard of review here is deferential, as it requires the Court to "affirm the Board's decision unless it would not be possible for a reasonable trier of fact to agree with its conclusions." *Ameristar*, 650 F.3d at 566 n.7 (citing *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 366-67, 118 S.Ct. 818 (1998)). Moreover, this Court is "especially reluctant to disturb an agency determination where, as here, the Board upholds the findings of an [ALJ] who conducted live hearings." *Ameristar*, 650 F.3d at 566.

B. Substantial Evidence Supports the Decisions of the ALJ and the Board that Continental Retaliated Against Luder for Reporting Potential Violations of FAA Rules.

1. Substantial Evidence Supports the Finding that Luder Engaged in Protected Activity and that Komidor and Jost Knew of his Protected Activity.

Substantial evidence supports the ALJ's and the Board's determination that Luder engaged in protected whistleblowing under AIR 21 and that Komidor and Jost, who jointly made the decision to discipline Luder, knew of his whistleblowing. AIR 21 protects an employee when he provides information or is about to provide information to the employer or the federal government that the employee reasonably believes relates to a violation, or alleged violation, of any order, regulation or standard of the Federal Aviation Administration ("FAA"). *See* 49 U.S.C. 42121(a)(1), 29 C.F.R. 1979.102(a), *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, 2015 WL 1005044, *5 (ARB Feb. 13, 2015). AIR 21 likewise protects conduct that indicates one is about to cause to be filed a proceeding relating to a violation, or an alleged violation, of any order, regulation or standard of the FAA. *See* 49 U.S.C. 42121(a)(2), 29 C.F.R. 1979.102(a).

"[A]n employee engages in protected activity any time [ ]he provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee's belief of a violation is subjectively and objectively reasonable." *Sewade*, 2015 WL 1005044 at *5; *see also Allen*, 514 F.3d at 477

(discussing reasonable belief standard under analogous Sarbanes-Oxley whistleblower provision). The employee need not cite the particular regulation that he believes would be violated in his communications to his employer, but the employee's communications must identify the conduct that the employee believes impacts aviation safety. *See Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 109-110 (5th Cir. 2014) (discussing analogous requirements of Sarbanes-Oxley whistleblower provision).[6] "The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Allen*, 514 F.3d at 477. Furthermore, an employee's reasonable but mistaken belief that certain conduct would violate FAA rules is protected. *See Allen*, 514 F.3d at 477. Based on these standards and the evidence in the record, the ALJ and Board correctly found that Luder engaged in protected activity.

Continental's FOM requires a mechanical inspection of a plane that experiences severe turbulence. R.63, JX 22(000282). It constitutes a violation of an FAA regulation not to comply with the FOM. *See* 14 C.F.R. 91.9(a) (noting, in pertinent part, that "no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual"). Thus, if a Continental plane experiences severe turbulence, it constitutes a violation of an FAA regulation not to subject the plane to a mechanical inspection prior to its next flight. *See Id*. The FOM and FAA regulations also charge the pilot in command

[6] Continental and the ALJ's decision in this case both suggest that the employee's complaint must definitely and specifically relate to an alleged violation of FAA rules in order to be protected. Br., p. 27; R.78(35). In fact, the ARB has found that this requirement need not be met for a report to be protected and, at any rate, the ALJ found that Luder's reports to Continental dealt "directly and specifically with aircraft safety." S*ee Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, 2014 WL 6850016, *5 (ARB Nov. 26, 2014) (explaining rejection of the "definitely and specifically" requirement under Sarbanes-Oxley and declining to apply such a requirement under AIR 21).

(i.e. Luder) with the authority to make the final determination regarding the operation and safety of the flight. *See Id*.(00609); 14 C.F.R. 91.3(a).

There is no dispute that Luder had ordered a mechanical inspection based on his belief that aircraft #304 had encountered severe turbulence in route from McAllen to Houston. R.107, Komidor Dep.(22). There is likewise no dispute that Luder notified Komidor that he intended to report him to the FAA if he stopped the inspection Luder had ordered and included in aircraft #304's logbook. The bases for Luder's ordering a mechanical inspection were the statements of Wofford (relaying what Solsbery had informed Wofford) that the plane had nearly had the wings ripped off while flying to Houston, the turbulence meter had registered pink and a flight attendant had sustained injuries due to the turbulence that required medical attention. These undisputed facts are substantial evidence supporting the ALJ's finding that Luder "had an objective and reasonable belief that aircraft #304 had flown through severe turbulence . . . so informed [Continental] in his communication with McClure and Komidor," and thus engaged in a protected activity when he informed Continental on the need for an inspection of aircraft #304 prior to takeoff. R.78(35). Furthermore, the ALJ credited the testimony of Whatley, Luder's expert, that Luder had all of the information he needed to make a proper judgment call seeking an inspection and that Luder had a valid basis for not believing what he was told by Komidor about LeMaire and Solsbery denying severe turbulence because if they had admitted going through severe turbulence they could have been subject to FAA sanctions. R.78(31). *See Ameristar*, *supra* at 20 (noting this Court's reluctance to disturb an ARB determination upholding the findings of an ALJ that conducted live hearings). This testimony further supports the conclusion that Luder reasonably believed the FOM, and thus FAA rules, required an inspection of aircraft #304.

The information Luder provided additionally constituted protected activity because it included an allegation that a violation of FAA regulation occurred when Lemaire piloted aircraft #304 from Houston to Miami without conducting a mechanical inspection. Substantial evidence in the record demonstrates that Luder was reporting what he reasonably believed to be an earlier violation of FAA regulation because Luder had received information from Wofford indicating the plane had experienced severe turbulence on the flight from McAllen to Houston necessitating a mechanical inspection prior to the Houston to Miami leg. Thus, Luder also engaged in protected activity by reporting to Continental an alleged violation of an FAA regulation in the failure to perform a mechanical inspection of aircraft #304 prior to disembarking from Houston.

The record also confirms that Luder informed Komidor he intended to cause to be filed a proceeding relating to an alleged violation of an order, regulation or standard of the FAA. Luder expressly notified Komidor that he intended to report Komidor to the FAA if he stopped the inspection of aircraft #304. Because substantial evidence in the record indicates Luder was about to cause to be filed a proceeding related to an alleged violation of FAA rules, Luder engaged in protected activity for this reason also.

Given these record facts, substantial evidence also supports the ALJ's finding that Jost and Komidor, who jointly made the decision to discipline Luder, were aware of his protected activity.[7] The ALJ found that Komidor and Jost were responsible for disciplining Luder. R.78(37). Substantial evidence in the record supports this finding, as Jost confirmed that he

[7] To establish the requisite employer knowledge under AIR 21, an employee generally must establish either that the individuals who subjected him to the alleged adverse employment action knew of his protected activity, *see Peck v. Safe Air Int'l, Inc*., ARB Case No. 02-028, slip op. at 11, 2004 WL 230770 (ARB Jan. 30, 2004), or that an individual who provided "substantial input" with respect to the adverse employment action knew of the protected activity. *See Kester v. Carolina Power & Light Co*., ARB Case No. 02-007, slip op. at 9, 2003 WL 25423611 (ARB Sept. 30, 2003).

collaborated with Komidor with respect to the decision to discipline Luder, R.106 Jost Dep.(17), and Komidor himself signed the disciplinary letter. R.63, JX 4. There is no dispute that Luder informed Komidor in their first telephone call on September 15, 2007 that he had ordered a mechanical inspection based on his belief that aircraft #304 had encountered severe turbulence in route from McAllen to Houston. R.107, Komidor Dep.(22). There is likewise no dispute Komidor knew that Luder had asserted he intended to report Komidor to the FAA since Luder made the representation to Komidor himself. Komidor informed Jost about the events of September 15, 2007 within days after they occurred. R.106(10); R.66, Tr. 789.

The information of which Komidor and Jost were aware when they disciplined Luder, not their perception of such information, determines whether Continental knew of Luder's protected activity. Thus, what Komidor or Jost "thought, or might reasonably have perceived" with respect to whether "it would have been unlawful for Luder to fly without inspection" is not controlling. Br., p. 30-31. There is substantial evidence in the record that Luder provided information to Komidor regarding conduct that Luder reasonably believed related to a violation or alleged violation of an FAA regulation—i.e. that aircraft #304 had flown through severe turbulence, that the prior crew failed to report the turbulence and order a mechanical inspection prior to flying a second leg, and that Luder was required to order a mechanical inspection in order to ensure the safety of aircraft #304—and that Komidor knew that Luder was about to be cause to be filed a proceeding with the FAA relating to a violation or alleged violation of an FAA regulation. There is substantial evidence in the record that Jost knew these same facts in advance of the discipline he admitted he collaborated on with Komidor. Such substantial evidence is sufficient to demonstrate that Continental knew of Luder's protected activity.

2. Substantial Evidence Supports the Finding that Continental's Unpaid Disciplinary Suspension of Luder and Its Issuance of an 18 Month Termination Warning Constituted Adverse Employment Action.

Substantial evidence supports the ALJ's and the Board's conclusion that Luder suffered adverse action when Continental subjected Luder to an "unpaid disciplinary suspension" and placed Luder on a "Termination Warning level of discipline" for 18 months. R.63, JX 4. To meet his burden, Luder needed to show the suspension and termination warning "well might have dissuaded a reasonable worker from [engaging in the protected activity]." *See Halliburton v. ARB*, 771 F.3d 254, 260 (5th Cir. 2014) (concluding a disclosure of an employee's identity as a whistleblower to his colleagues constitutes adverse action); *Allen*, 514 F.3d at 476 n.2 (citing *Burlington*, 126 S. Ct. at 2415). Continental's suspension of Luder deprived him of pay. Its issuance of the termination warning rendered him subject to deprivation of his job should Continental unilaterally conclude, in the subsequent 18 months, that he had committed "infractions of violations of Company policy." The actual deprivation of pay and the threatened deprivation of one's job based on protected activity well might dissuade a reasonable worker from engaging in protected activity. Thus, substantial evidence in the record supported the ALJ's finding that Continental's suspension of Luder, and its issuance of the 18 month Termination Warning constituted adverse employment action.

Continental wrongly asserts that its unpaid disciplinary suspension is not materially adverse. Br., p. 35-36.[8] The suspension resulted in a loss of four day's pay, or more than $3,000.00 in income for Luder. This Court has ruled that "a two-day suspension without pay

[8] Continental's disciplinary letter informed Luder that "you will be subject to an **unpaid disciplinary suspension**." R.63, JX4 (emphasis added). The Court should not adopt Continental's re-characterization of Luder's unpaid disciplinary suspension a "decision to temporarily clear Luder's schedule." Br., p. 35.

might have dissuaded a reasonable employee from making a charge of discrimination" and accordingly constitutes adverse employment action. *LeMaire v. Louisiana Dept. of Trans. & Dev't*, 480 F.3d 383, 390 (5th Cir. 2007). And as Continental recognizes, *Burlington* is the controlling case with respect to material adversity, and the Supreme Court there upheld a jury decision finding a suspension without pay was materially adverse even though the employer later paid the employee for all time missed. 126 S. Ct. at 2418. Thus, the ALJ and ARB's conclusion that Continental's unpaid disciplinary suspension of Luder constituted adverse action was appropriate and should be affirmed.

Continental is likewise wrong to suggest that the ARB's affirmance of the ALJ's finding that issuance of the termination warning letter constituted adverse action is a "departure from . . . [the ARB's] own precedent." Br., p. 37. On the contrary, the ARB's affirmance on this issue comports with AIR 21 Board caselaw. In *Williams v. American Airlines, Inc.*, ARB No. 09-018, 2010 WL 5535815 at *3 (ARB Dec. 29, 2010), the ARB specifically addressed whether a written counseling record documenting alleged unsatisfactory work performance, and warning of future corrective action up to and including termination, constituted materially adverse action. The ARB first opined that the Department's regulation implementing AIR 21's nondiscrimination requirement, 29 C.F.R. 1979.102(b),[9] "intend[s] to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline." *Williams*, 2010 WL at *6. Because the Board determined 1979.102(b) contained a "clear mandate" that a written letter warning of

[9] The regulation states "it is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has" engaged in protected activity. 29 C.F.R. 1979.102(b).

possible future termination constitutes adverse action, it concluded it was unnecessary to consult *Burlington* to resolve the adverse action question. *Id*. at *7.

The Board nevertheless analyzed whether *Burlington* renders a written letter warning of future possible termination adverse action for purposes of AIR 21. It concluded that:

> [e]ven under *Burlington Northern*, we believe that the supervisor's warning and threatening counseling session in this case constitutes a materially adverse action (more than trivial). Employer warnings about performance issues are manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*. Such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them. We simply doubt that the Court intended to consider a supervisor's written warning or reprimand or threatened discipline as "trivial." To the contrary, we are of the opinion that they are patently not trivial and, therefore, presumptively "material" under *Burlington Northern*.

Id. at *7. Because there is an AIR 21 decision explicitly finding a written letter documenting allegedly unsatisfactory work, and warning of future corrective action up to and including termination, constitutes adverse action under AIR 21's implementing regulations and *Burlington*, it is incorrect for Continental to assert the ARB departed from its precedent on this issue. [10]

Moreover, the letter was a written warning *with* evidence of consequences. It effectively placed Luder on probation by stating in no uncertain terms that he could face termination if another incident occurred within 18 months. It imposed an unpaid disciplinary suspension. And it rendered Luder ineligible for voluntary intra-company transfers. *See* R.63, JX22(01154). Under these circumstances, the written warning constitutes adverse action. *See Pierce v. Texas Dept. of Criminal Justice*, 37 F.3d 1146, 1150 (5th Cir. 1994) (examining whether employee's protected speech was a substantial or motivating factor in her "probation/reduction in pay" for purposes of §1983 1st Amendment retaliation claim); *Alvarado v. Texas Rangers*, 492 F.3d 605,

[10] Counsel for Continental in this proceeding was counsel to American Airlines in *Williams*.

613 (5th Cir. 2007) (observing that under certain circumstances "the denial of a transfer *may* be the objective equivalent of the denial of a promotion, and thus qualify as an adverse employment action" under Title VII); *Willis v. Cleo Corp.*, 749 F.3d 314, 318 (5th Cir. 2014) (assuming that a disciplinary warning placed in the employee's personnel file is adverse action under Title VII); *Thibodeaux-Woody v. Houston Community College*, 593 Fed.Appx. 280, 286 (5th Cir. 2014) (unpublished opinion) (noting a "written reprimand, *without* evidence of consequences," does not constitute an adverse action under Title VII) (emphasis added) (citations omitted).

Finally, Continental mistakenly suggests it was improper for the ARB to make the adverse employment action determination without first determining the adverse action was "in retaliation for protected conduct." Br., p. 34. Whether an adverse action constitutes retaliation for protected activity is the question a reviewing body answers when it determines whether retaliation was a contributing factor in the decision to take adverse action. The contributing factor analysis, and the adverse employment action analysis, constitute distinct elements in the determination of whether a party violated AIR 21. Br., p. 20. *See Ameristar*, 650 F.3d at 566-67. Thus, the ALJ and the Board properly considered separately whether Continental subjected Luder to an adverse employment action, and whether Luder satisfied the contributing factor causation element of his case.

3. Substantial Evidence Supports the Finding that Luder's Protected Activity Contributed to His Unpaid Suspension and 18 Month Termination Warning

The law required Luder to demonstrate by a preponderance of the evidence that his protected activity was "a contributing factor" in Continental's decision to suspend him and issue the 18 month Termination Warning. *Allen*, 514 F.3d at 475 n.1 (quoting 49 U.S.C. 42121(b)(2)(B)(iii)). *See also* 29 C.F.R. 1979.109(a). A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the

decision." *Ameristar* 650 F.3d at 567 (quoting *Allen*, 514 F.3d at 476 n.3). The contributing factor standard is "'broad and forgiving.'" *Halliburton*, 771 F.3d at 263 (quoting *Lockheed Martin Corp. v. ARB*, 717 F.3d 1121, 1136 (10th Cir. 2013). The standard "'[wa]s specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a significant, motivating, substantial, or predominant factor in a personnel action.'" *Lockheed Martin*, 717 F.3d at 1136 (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). And it "is much more protective of plaintiff-employees than the *McDonnell Douglas* framework" applied in Title VII and other cases. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

Evidence to support the conclusion that protected conduct contributed to an employer's adverse action may include both direct evidence and a wide variety of circumstantial evidence, such as:

> temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

Ray v. Union Pac. RR. Co., 971 F. Supp. 2d 869, 884-85 (S.D. Iowa 2013) (citing *DeFrancesco v. Union RR. Co.*, ARB No. 10-114, 2012 WL 694502, at *3 (ARB Feb. 29, 2012); *Bobreski v. J. Givoo Consultants*, ARB No. 13-001, 2014 WL 4660840, at *10 (ARB Aug 29, 2014); *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, 2011 WL 4915751, at *8 (ARB Sept. 30, 2011), *aff'd Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 448 (2d Cir. 2013).

Substantial evidence in the record supports the ALJ's finding, affirmed by the Board, that Luder showed his protected activity was a contributing factor in Continental's decision to suspend him without pay and issue the 18 month termination warning. As the ALJ noted, Jost

admitted at the hearing that Continental disciplined Luder, in part, because he wrote-up aircraft #304. R.78(38). Jost's testimony was consistent with the disciplinary letter Continental issued Luder, which based his unpaid suspension and 18 month termination warning, in part, on his "calling for an inspection," R.63, JX 4, and Jost's own deposition testimony, R.106(19, 119).[11]

In addition, Continental initiated its investigation of Luder approximately one week after he engaged in protected activity, and disciplined him within a month after the protected activity. The ALJ correctly found that the close temporal proximity in this sequence of events along with other direct and circumstantial evidence supported the conclusion that Luder's "protected activity was at least a contributing, if not the sole cause, for his suspension and warning." R.78(38). Because the record contains an admission by Continental that it disciplined Luder, in part, because he ordered an inspection of aircraft #304, which admission was consistent with the disciplinary letter Continental issued to Luder roughly a month after the protected activity, substantial evidence in the record supports the ALJ's finding that Luder's protected activity was

[11] The Department did not "cherry-pick[] . . . the record." Br., p. 41. Jost's testimony is plain:

> Q. Okay. So part of the reason that he received corrective action was because he had written up an airplane he hadn't flown. Yes or no?
>
> A. That's correct.

R.106(19).

> Q. But he is, in fact, at least in part being counseled in this letter for calling for the inspection, correct?
>
> A. Correct.

Id.(119).

a contributing factor in Continental's decision to suspend him without pay and issue the 18 month termination warning.[12]

Continental inaccurately suggests that there is no "finding that management's decision to [suspend Luder without pay] was an act of retaliation." Br., p. 35. The ALJ explicitly found "Jost admitted part of the reason he disciplined [Luder] was because [Luder] wrote up an airplane that he had not yet flown." R.78(22) (citing Tr.782-83, 841). Jost similarly admitted in his deposition that it was "correct" that Continental had "at least in part . . . counseled [Luder] . . . for calling for the inspection." R.106(119). Thus, there is substantial evidence to support the ALJ's finding, affirmed by the Board, that Luder's protected activity was a contributing factor in Continental's decision to suspend Luder without pay.

4. Continental Failed to Show by Clear and Convincing Evidence that It Would Have Disciplined Luder in the Absence of Protected Activity.

Once Luder showed his protected activity was a contributing factor in his discipline, Continental needed to show by clear and convincing evidence that it would have disciplined him even in the absence of his protected activity based on his alleged misconduct. 29 C.F.R. 1979.109(a); 49 U.S.C. 42121(b)(2)(B); *Ameristar*, 650 F.3d at 567. "To meet the burden, the employer must show that 'the truth of its factual contentions are highly probable.'" *Araujo*, 708 F.3d at 159 (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, 2014 WL 1870933, at *6 (ARB Apr. 25, 2014)

[12] Continental appears to suggest that to find Luder's protected activity was a contributing factor in Continental's discipline the ARB needed to find Continental had a wrongful motive in disciplining him. Br., p. 39 n.11. This is flatly wrong. *See Halliburton*, 771 F.3d at 263 (5th Cir. 2014) (noting this argument "conflicts with" *Allen* and "entirely lacks support in the case law"). It is of no moment that *Halliburton* is a Sarbanes-Oxley Act case, rather than one arising under AIR 21, because Sarbanes-Oxley imports the "contributing factor" burden of proof from AIR 21 and thus under both statutes "[r]egardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." *Id*. (quoting *Marano v. DOJ*, 2 F.3d at 1141).

("The burden of proof under the 'clear and convincing' standard is more rigorous than the 'preponderance of the evidence' standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."). In this instance, substantial evidence supports the ALJ and the Board's conclusion that Continental did not meet this high standard.

The ALJ found that Continental's asserted basis for disciplining Luder was pretextual, and Continental thus did not satisfy its burden. Continental relies on Jost's asserted "honestly held belief" that Luder violated company policies as the reason for the discipline. Br., p.42. But as the record indicates, Luder's actions generally comported with Continental's "paramount" concern – the safety of its passengers and employees. *See* R.112, JX 22(00266) (The FOM stating "Safety is paramount for our employees and customers"). *See also* R.66, Tr. 788 (Jost testifying that "Our top priority is safety"). Indeed, Komidor acknowledged Luder took the course of action he believed was the safest. R.66, Tr. 962.

Luder's actions were additionally consistent with the policy Continental has devised in the FOM that authorizes the Captain to refuse, or defer, a flight based on a maintenance issue. R.112, JX 22(00318, 00368). In accordance with this policy, *see* R.112, JX 22(00368), Luder spoke first with a dispatcher (Bass) regarding the need for a mechanical inspection. *See* R.66, Tr. 993. Luder then spoke with Maintenance Control (McClure) regarding the issue, and subsequently conducted a phone call with the Operations Director of SOCC (Gubitosa) in which Komidor and Sunbury participated and Luder once again explained that a mechanical inspection was necessary due to the representations made by Solsbery regarding the turbulence aircraft #304 encountered in route from McAllen to Houston. After conducting these phone calls in accordance with Continental's policy, Luder still reasonably believed a mechanical inspection

was necessary to ensure passenger and employee safety. As Jost testified, the Captain possesses "final" authority under its maintenance issue policy, R.66, Tr. 809, and Luder reasonably exercised such authority on the side of safety when he directed an inspection of the plane. Finally, as the ARB noted, while Jost and Komidor testified that Luder was "unprofessional, violated company policies and failed to use good judgment," the core of the alleged "poor judgment" was Luder's protected activity. R.36(12).

In sum, Continental must do more than articulate a non-retaliatory basis for the discipline to satisfy its burden; it must prove by clear and convincing evidence that the articulated basis would have been the actual basis for Luder's discipline absent the protected whistleblowing. Substantial evidence supports the ALJ's ruling, affirmed by the Board, that Continental failed to provide such evidence. Indeed, the substantial evidence in the record supports the ALJ's conclusion that Continental's purported reason for disciplining Luder, his asserted failure to abide company policies, is pretextual.

C. The ARB's Monthly Pay Award is Proper and Supported by Substantial Evidence

1. Substantial Evidence Supports the Monthly Pay Award.

Luder's burden with respect to the "claim . . . for lost wages based on [his] medical or psychological condition" was to demonstrate by a "preponderance of the evidence that [Continental's adverse] action caused the harm." *Rooks*, slip op. at 10 citing *Gutierrez*, slip op. at 9. Because substantial evidence in the record demonstrates that Continental's discipline of Luder caused his mental and physical health conditions, the Monthly Pay Award should be affirmed. Dr. Shaulov, who saw Luder more than two dozen times, opined that Continental's treatment of Luder related to his refusal to fly the plane caused Luder's functional decline and mental health problems. Dr. Jorgensen, who saw Luder nearly two dozen times, likewise opined

that Continental caused the psychological trauma Luder experienced. Continental offered no medical evidence to rebut the opinions of Shaulov and Jorgensen. Instead, the medical evidence in the record from Dr. Elliott, the doctor to whom Continental's LTD provider sent Luder in May 2008, "supports the opinions of Dr. Shaulov and Dr. Jorgensen that the initiating events of Luder's refusal to accept an aircraft on September 15, 2007, and the Company's disciplinary action that followed, caused Luder's symptoms." R.118(6 n.4). Since substantial evidence in the record supports the ALJ's finding that Continental's discipline of Luder caused his mental and physical health condition, the Court should affirm the ARB's Monthly Pay Award.

Substantial evidence likewise supports the term of the Monthly Pay Award. The ALJ had ordered Continental to pay Luder until he reached 65 on July 1, 2016. The ARB concluded Continental's Monthly Pay Award obligation terminated on September 21, 2011. September 21, 2011 is the last session that Dr. Shaulov conducted with Luder. Dr. Shaulov affirmed that:

> [o]n September 21, 2011 my assessment of Mr. Luder remained unchanged. He was suffering [PTSD] related to his treatment by Continental officials arising out of his refusal to fly an aircraft he believed had been flown through severe turbulence. He continued feeling depressed despite being on medications for depression at that time.

R.35, Shaulov Dec.(¶7); R.110, RX-R2(97). Continental presented no evidence to undermine the real-time documentary evidence of Dr. Shaulov, *see* R.110, RX-R2(97), or his declaration. Because September 21, 2011 is the last date for which there is record evidence that Luder continued to suffer from the mental health conditions caused by Continental's discipline, the ARB appropriately reduced the period of the Monthly Pay Award from nearly 9 years to less than 4 years.[13]

[13] Continental itself continued to pay Luder disability benefits based on his mental health condition until April 2010, and only terminated issuance of benefits based on Luder's mental

The ARB engaged in extensive, conventional proximate cause analysis to conclude that Continental's discipline of Luder resulted in his mental and physical health conditions. It identified, and relied on, the applicable medical evidence in the record from Drs. Shaulov, Jorgensen and Elliott, as well as the testimony from Luder, to determine whether it indicated a causal connection between Luder's health conditions and Continental's adverse action. R.118(7-11). When one considers the medical evidence from Dr. Shaulov cited in the Board's opinion, and the additional evidence from the record, Continental's assertion that Dr. Shaulov's "entire analysis relied on post hoc thinking" is both puzzling and wrong. Br., p. 46. The Board specifically identified deposition testimony from Dr. Shaulov explaining that Luder's emotional response to Continental nearly firing him was significant psychological trauma. R.118(8). Dr. Shaulov further explained that psychological trauma is a common response to a situation implicating one's job security. R.11(14). The Board also cited to Dr. Shaulov's testimony indicating Luder's attachment to his job was so strong the events with Continental made him feel 'all his life is done.' R.118(9). Dr. Shaulov's deposition testimony stating that Luder's job as a pilot "was his identity," R.11(43), reinforces the effect Continental's adverse action had on him, particularly where he reasonably believed the discipline worked an "injustice" on him. R.118(9).

The record does not support Continental's assertion that the simulator training triggered Luder's mental health issues. Br., p. 50. Rather, as the ALJ found, the mental health conditions caused by Continental's issuance of the 18 month termination warning and unpaid suspension, including Luder's anxiety and paranoia, rendered Luder unable to complete the training. R.2(4). The record evidence from Dr. Shaulov and Dr. Jorgensen supports the finding that Continental's adverse action, rather than the simulator training, caused Luder's mental health trauma. Dr.

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health condition because the LTD plan only provided benefits for mental health conditions for 24 months. R110, RX-R1(180).

Shaulov attributed Luder's psychological trauma to Continental almost firing him based on being accused of something unfairly:

> Q. Was it significant to you professionally that [Luder] felt he was almost fired?
> A. Yes.
> Q. Why?
> A. It was significant because he was accused of something unfairly, not objectively . . . of doing something, and then almost fired for that, it was kind of psychological . . . trauma. I don't know what degree [it] would be, but it's serious.

R.11(14). Dr. Jorgensen, like Dr. Shaulov, noted that Luder was fighting an "injustice," R.110, RX 3(16), that had challenged the core of his "identity," *id*.(18), and tied the mental "stress" Luder experienced to his refusal to fly the plane without an inspection, i.e., "the certainty that he had done the right thing, that he felt it was his duty in the position he was in to make the decision that he made." *Id*.(31).

The record demonstrates Dr. Shaulov accurately reported Luder's mental health condition to Harvey Watt on January 17, 2008. Dr. Shaulov's first session with Luder was on January 3, 2008. In the January 3, 2008 session, Dr. Shaulov "found that Luder ha[d] been suffering symptoms consistent with Panic Disorder, [PTSD], Major Depressive Disorder, Generalized Anxiety Disorder, Adjustment Disorder with Predominant Anxiety, and Anxiety Not Otherwise Specified." R.35, Shaulov Dec.(¶4); R.110, RX-R2(79). But because it was the first session with Luder, Dr. Shaulov felt "he didn't have enough information at that point to make a conclusive diagnosis or to make a definitive diagnosis." R.11(20). Dr. Shaulov conducted a second session with Luder on January 17, 2008 in which he had another opportunity to analyze his patient. R.35, Shaulov Dec.(¶5); R.110, RX-R2(83). After that session, he accurately represented to Continental's LTD provider that he had treated Luder for "symptoms consistent

with [PTSD] since 1/3/08," R.110, RX-R2(81), and had concluded that Luder "is believed [to be] suffering from [PTSD] . . . ." *Id*.(82). Thus, the record substantiates the truth of Dr. Shaulov's representations to Harvey Watt. [14]

Luder's marital history is irrelevant. Br., p. 51. With respect to the causes of his mental health issues, Dr. Jorgensen identified family matters as "side issues in his life. His focus was so intently on what was going on with the airline and his career." R.110, RX-R3(19). Dr. Shaulov, when directly questioned by Continental's counsel, stated "[o]f course . . . there are many people whose psychiatric . . . deterioration related to the family or situation. And at least my impression [was] that it was not the case with him." R.11(60). Thus, there is no record evidence that Luder's marital history caused, in any way, his health issues.

2. Reopening the Record on Remand Was Lawful.

Continental mistakenly asserts that 29 C.F.R. 18.54 prohibited the ARB from authorizing the ALJ to conduct further proceedings to address the issue of medical causation and amount of damages, if any, owed to Luder. Br., p 55. That regulation restricts an ALJ, on his own cognizance, from accepting additional evidence into a closed record, absent a showing that the evidence "was not readily available prior to the closing of the record." 29 C.F.R. 18.54(c). The regulation does not address the authority of an ALJ to reopen the record in response to questions raised by an appellate body's review of the case. Such a circumstance occurs periodically[15] and is similar to a district court reopening a record when the court of appeals' review makes clear that reopening the record is necessary on remand.

[14] Continental's assertion that Dr. Shaulov "falsely reported" a medical condition is reckless, at best, when viewed in the full context of Dr. Shaulov's representations to Harvey Watt. Br., p. 51.

[15] *See* R.118(6) (citing *Zinn v. Commercial Lines*, ARB No. 13-021, slip op. at 4, 2013 WL 6979720 (ARB Dec. 17, 2013).

When, as here, neither Part 18 (nor a statute or executive order) addresses a procedural situation, Part 18 stipulates that the "Rules of Civil Procedure for the District Courts of the United States shall be applied" by an ALJ. *See* 29 C.F.R. 18.1(a). This Court may authorize a District court to reopen a record on remand consistent with the Rules of Civil Procedure; the ARB may likewise do so here. *See, e.g., Eavenson v. Amresco*, 213 F.3d 639, 2000 WL 554955, at *8 (5th Cir. 2000) (remanding with instruction to permit plaintiff to take further discovery when District court had improperly denied *FRCP* 59(e)/60(b)[16] motion) (unpublished opinion). *See also Logue v. U.S.*, 488 F.2d 1090, 1092 (5th Cir. 1974) ("further consideration . . . should in the first instance be undertaken by the trial court, upon the original or upon a supplemental record").[17]

Continental also mistakenly states that the introduction of new evidence on remand "deprived [it] of due process fairness." Br., p. 57. As discussed above, section 18.54 limits an ALJ's power to reopen a record following the close of a hearing; it does not restrain an ALJ from exercising the discretion to reopen the record if necessary based on an appellate body's remand. Since there is no abrogation of section 18.54 when the ARB authorizes an ALJ to reopen a

[16] The *Eavenson* Court found it unnecessary to determine whether plaintiff's motion had been "treated by the district court as a Rule 59 or a Rule 60 motion." 2000 WL 554955, at *5.

[17] It would be peculiar if the ARB did not possess the power to authorize an ALJ to conduct further proceedings on remand when federal appellate courts have found they possess the authority to remand matters to administrative agencies for further proceedings. *See, e.g., Lin v. Dept. of Justice*, 473 F.3d 48, 52 (2d Cir. 2006) (stating in dictum "we believe that we possess the inherent equitable power to remand cases to administrative agencies for further proceedings in sufficiently compelling circumstances"); *Cissell Manufacturing Co. v. Dept. of Labor*, 101 F.3d 1132, 1136 (6th Cir. 1996) (identifying well settled rule of law that appellate court should remand to an agency for further proceedings when an agency has made an error of law) (listing cases). *See also Rogers v. Astrue*, 224 Fed.Appx. 351, 2007 WL 1026375 (5th Cir. 2007) (unpublished opinion) (remanding for "further administrative proceedings pursuant to 42 U.S.C. §205(g)).

record, the Department has not failed "to follow [its] own procedures," Br., p. 57, and Continental's assertion of a due process violation is without merit.

Even assuming a due process violation occurred here, to prevail on this claim, Continental must demonstrate the reopening caused it "substantial prejudice." *See, e.g., Ali v. Gonzalez*, 435 F.3d 544, 547 (5th Cir. 2006); *Arthur Murray Studio of Washington, Inc. v. FTC*, 458 F.2d 622, 624 (5th Cir. 1972). That Continental "los[t] on wage-continuation damages" before the ALJ on remand cannot constitute substantial prejudice. Br., p. 58. Otherwise, the power to remand to reopen the record would be ineffectual, since a party that opposed the reopening could always successfully challenge a subsequent adverse order by lodging a due process claim. Continental identifies no other prejudice it incurred from the record reopening, perhaps because the reopening permitted it, like Luder, to introduce new evidence – an opportunity of which it significantly availed itself. *See* R110 & R.111. In sum, the ALJ's decision to reopen resulted in no possible actionable process violation.

Finally, *Leslie v. Attorney General*, 611 F.3d 171 (3d Cir. 2010) does not stand for the proposition that "a party need not prove prejudice in order to seek a judicial remedy for an agency's violation of its own rules." Br., p. 58. The regulation that a party alleges an agency has not followed must (as Continental accurately quoted a page earlier) "protect[] fundamental statutory or constitutional rights" in order for the substantial prejudice requirement not to attach. Br., p. 57 (quoting *Leslie* at 180). Continental's brief identifies no fundamental statutory or constitutional right that 29 C.F.R. 18.54 protects, nor does the regulation protect a fundamental statutory or constitutional right. Rather, it constitutes a rule of internal practice aimed to facilitate the efficient management of hearing records by foreclosing parties from presenting, and

an ALJ from accepting, evidence in a matter after a time certain. For all these reasons, the ALJ's reopening of the record on remand was lawful.

CONCLUSION

For the foregoing reasons, this Court should affirm the Board's Final Decision and Order and deny Continental's Petition for Review.

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary will gladly participate in any oral argument scheduled by this Court but he does not believe that oral argument is necessary because substantial evidence supports the Board's affirmance of the ALJ's decisions in favor of Luder and the pertinent evidence can be reviewed by this Court based on the parties' briefs and the materials in the Joint Appendix.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Times New Roman 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains less than 14000 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Quinn Philbin
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor was served this 22nd day of June, 2015, via this Court's ECF system, on each of the following:

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