In the Matter of:

COLIN W. YATES,

COMPLAINANT,

v.

SUPERIOR AIR CHARTER LLC d/b/a JETSUITE AIR,

RESPONDENT.

ARB CASE NO. 2017-0061

ALJ CASE NO. 2015-AIR-00028

DATE: September 26, 2019

Appearances:

***For the Complainant*:**
Gary M. Gilbert, Esq.; Cori M. Cohen, Esq.; and Elizabeth N. Moran, Esq.; *Gilbert Employment Law, P.C.*; Silver Spring, Maryland; George A. Shohet, Esq; *Law Offices of George A. Shohet*; Beverly Hills, California

***For the Respondent*:**
Wayne A. Hersh, Esq.; John F. McCarthy, Esq.; and Mustafa El-Farra, Esq.; *Littler Mendelson, P.C.*; Irvine, California

BEFORE: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. This matter arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.[1] In a complaint filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), Colin Yates alleged that his employment with Jetsuite Air was terminated in retaliation for raising air transportation safety concerns. OSHA dismissed the complaint. Complainant requested a hearing before an administrative law judge (ALJ), which hearing was held from May 23, 2016, to May 27, 2016. Subsequently, the ALJ issued a Decision and Order (D. & O.) Granting Relief in which he concluded that Complainant proved his case by a preponderance of the evidence and that Respondent failed to prove by clear and convincing evidence that it would have taken the same unfavorable personnel action absent Complainant's protected activity. He ordered back wages plus interest and other damages. We affirm with one modification of the ALJ's damages award.

BACKGROUND[2]

Respondent hired Complainant as a pilot in March 2011. D. & O. at 4. On May 25, 2011, Complainant was working as the second-in-command or First Officer under the command of a pilot (Captain) on a Phenom 100 aircraft when it crash landed at the airport in Sedona, Arizona. D. & O. at 6, 12, 64-65.

During the landing, it was a part of Complainant's duties as First Officer to monitor the aircraft's speed. D. & O. at 13. In preparing to land, the Captain called for the before-landing checklist. D. & O. at 6. Complainant began going through the checklists and when he called out "Vapp," which is the approach speed, the Captain responded "Vappish," which was not the correct response. *Id.* (citing Tr. at 148). Complainant believed that they were coming in faster than they should be. D. & O. at 6, 15.

For the landing, the Captain landed the aircraft directly on the runway and soon after hit the brakes, but the aircraft immediately pulled off to the right. D. &

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[1] 49 U.S.C. § 42121 (2000) (AIR 21); 29 C.F.R. Part 1979 (2019).

[2] We have assembled the ALJ's findings of fact from the section of the decision "Conclusions of Fact and Law," but where we could not do so, we used the ALJ's summary of the evidence to form this background narrative. As the ALJ found Complainant to be a credible witness, we looked especially to his testimony. D. & O. at 68.

O. at 6 (citing Tr. at 151). The Captain yelled that the aircraft was fighting him. *Id.* The next time the Captain applied the brakes, the aircraft went to the right again. *Id.* Complainant felt like the aircraft kept releasing the left wheel. *Id.* A few hundred feet before the end of the runway, the aircraft came back to the left, hit the fence, and there was a crash. *Id.* (citing Tr. at 153). When the aircraft came to rest, the pilots shut down the engines and evacuated. *Id.* (citing Tr. at 154). The National Transportation Safety Board (NTSB) opened an investigation into the accident immediately after it occurred. D. & O. at 65.

The day after the Sedona incident, Complainant was interviewed by NTSB Investigator, Joshua Cawthra. D. & O. at 6. Complainant told Cawthra that he "did not feel [that the brakes] were one hundred percent effective and the airplane was not stopping." D. & O. at 64 (citing CX 201). When Cawthra asked Complainant whether they had approached at the proper approach speed, Complainant responded "No way. Not even close. We were really fast." D. & O. at 6-7. Complainant admitted to Cawthra "that he did not call out speeds or tell the flying pilot to go around during the approach." D. & O. at 14 (Tr. at 341). Brian Coulter, Respondent's Vice President of Operations, sat next to Complainant during his interview with the NTSB. D. & O. at 6.

On June 24, 2013, the NTSB released its factual report about the accident. D. & O. at 65. In it, the NTSB found Complainant and the Captain of the aircraft responsible for the crash. D. & O. at 100 n.130. Complainant knew before it came out that the NTSB Factual Report was going to find pilot error because the aircraft came in fast on landing and he told the NTSB investigator as much when he gave his statement to the investigator the day after the accident. D. & O. at 15.

After reviewing the report, on June 26, 2013, Complainant sent an email to Cawthra. D. & O. at 62. The report concerned him because it contained some inaccurate information and was missing information about slope, which the Complainant felt was very important in understanding why the crash happened. D. & O. at 15-16. In his email Complainant related concerns about problems with the report including allegations that there were serious miscalculations in the manuals he had been provided, that necessary information including the importance of slope was lacking from the manuals, and that the Phenom had an awful braking system such that it should not land at airports like Sedona. Complainant also reported in his email that Respondent did not use "Opera," the program the NTSB used to analyze the Sedona incident. D. & O. at 62 (JX M). The same day, Cawthra

forwarded Complainant's email to Alex Wilcox, Respondent's CEO, who forwarded it to Coulter. D. & O. at 64 (JX N).

The next day, June 27, 2013, Wilcox called Complainant and asked him why he would send such an email which could hurt the company further than it had already been hurt by the Sedona incident. D. & O. at 9. Complainant responded that he had questions about the NTSB report and concerns about the Phenom 100 braking system. D. & O. at 9, 66. On the call, Wilcox suspended Complainant, saying that he did not know why Complainant would email the NTSB. D. & O. at 71, 72. Respondent planned a meeting with Complainant to discuss the contents of Complainant's email. D. & O. at 71.

On July 2, 2013, Complainant met with Wilcox and Coulter to discuss Complainant's email to the NTSB. D. & O. at 66. Wilcox and Coulter entered the meeting with Complainant's final paycheck printed "check-in-hand." D. & O. at 75. At the meeting, Complainant reiterated his concerns about the Phenom's braking system and the problems he saw with the NTSB report regarding the Sedona accident. D. & O. at 66. When asked if he could have done anything to try to prevent the crash, "Complainant acknowledged that they could have been on speed or done a go around or Complainant could have said something to the captain, but they did not." D. & O. at 9. Respondent fired Complainant at the meeting. D. & O. at 70.

The NTSB formally adopted its findings about the Sedona accident on August 29, 2013. D. & O. at 65.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to hear appeals and issue final agency decisions under AIR 21 and its implementing regulations.[3] The ARB reviews questions of law presented on appeal de novo, but is bound by the

[3] Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. § 1979.110(a).

ALJ's factual findings as long as they are supported by substantial evidence.[4] The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."[5]

DISCUSSION

The ALJ concluded that Complainant had proved by a preponderance of the evidence that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. The ALJ also concluded that Respondent had failed to prove by clear and convincing evidence it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Respondent has alleged error by the ALJ in these determinations except for the element of adverse action, as well as the ALJ's damages award. We discuss each in turn.

1. Protected Activity

The ALJ concluded that Complainant engaged in protected activity 1) on May 26, 2011, when he expressed safety concerns about the brakes on the aircraft he had helped pilot which had crashed, and 2) on June 26, 2013, when he emailed Joshua Cawthra, NTSB investigator, about his concerns with the NTSB report about the crash. D. & O. at 64.

On appeal, Respondent objects to the ALJ's finding that Complainant engaged in protected activity because it argues that the June 26, 2013 email, which it states is the only alleged protected activity, fails to identify any Federal Aviation Administration or other air safety order, regulations, or standard that was violated. Br. at 23. Respondent also argues that the ALJ erred because it asserts that Complainant's belief in a violation related to the June 26, 2013 email was not objectively reasonable. Br. at 25.

Under AIR 21, employers may not take adverse action against employees because they have engaged in protected activity, as set forth here:

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[4] 29 C.F.R. § 1979.110(b); *Luder v. Cont'l Airlines, Inc.* ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 5-6 (ARB Jan. 31, 2012).

[5] *Luder*, ARB No. 10-026, slip op. at 6 (citations omitted).

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
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> (2) . . . 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;
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> (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); *see* 29 C.F.R. § 1979.102(b).

It is clear that both Complainant's May 26, 2011 interview with the NTSB and his June 26, 2013 email to the NTSB qualify as assistance or participation in a proceeding relating to carrier safety as described in 49 U.S.C. § 42121(a)(4). The ALJ also so found. D. & O. at 64-65, 65 n.69.[6] This is so regardless of whether the reports themselves also constitute protected activity independently under 49 U.S.C. § 42121(a)(1) or (2). Thus, we affirm the ALJ's conclusion that Complainant engaged in protected activity on both of these occasions.

2. Contributing Factor Causation

The ALJ concluded that the record demonstrated a causal connection between Complainant's protected activity and the adverse personnel action Respondent took against him. D. & O. at 71. The ALJ explained that the record showed that Respondent suspended Complainant as a direct result of

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[6] "Thus, at the very least, Complainant —assisted or participated . . . [in a] proceeding about air carrier safety." We note that this finding alone is sufficient to resolve the question of whether Complainant engaged in protected activity when he sent his email to NTSB on June 26, 2013. The parties zealously argued additional facts and theories of law but the ALJ correctly resolved the matter with this basic finding.

Complainant's June 26, 2013 email which was protected activity. *Id.* at 72. Additionally, the meeting during which Complainant's employment was terminated occurred directly as a result of the same protected email. *Id.* The ALJ declined to credit Respondent's explanation that there was an intervening event consisting of Complainant's attitude and expressions during the meeting that would have caused the termination decision even without contribution of the protected activity. *Id.*

Respondent argues on appeal that the ALJ applied an incorrect burden of proof to the issue of contributing factor causation. Br. at 18. Respondent at first argues that the Board's decision in *Palmer v. Canadian Nat'l Ry. / Ill. Cent. R.R. Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 14-15 (ARB Sept. 30, 2016, reissued Jan. 4, 2017) misstates the burden of proof, but then in seeming conflict with its first argument, argues that the ALJ actually applied a test for causation more like the dissent in *Palmer*, than the majority. Respondent appears to be confusing what level or quantum of causation that a complainant is required to show with a complainant's burden of proof to establish the required causation exists. These two burdens are distinct, as *Palmer* attempted to explain, with an apparently questionable degree of success.[7]

Regardless of *Palmer's* explanations about contributing factor causation or the ALJ's recitations of them, we conclude that the ALJ correctly analyzed causation in this case.[8] The ALJ expressly found direct causation of the adverse action based on Respondent's statements and actions about Complainant's protected

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[7] *Palmer*, ARB No. 16-035, slip op. at 21, n.89 ("We use the term 'standard of proof,' as the United States Supreme Court recently has, 'to refer to the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion.' *Microsoft Corp., v. i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011). The 'standard of proof' does not affect the underlying question to be asked. Rather, as the Court explained, the term 'standard of proof' simply 'specifies how difficult it will be for the party bearing the burden of persuasion to convince the [factfinder] of the facts in its favor.'" *Id.*) and 52 (On the question of whether "the employee's protected activity *play a role, any role*, in the adverse action," "the complainant has the burden of proof, and the standard of proof is by a preponderance.") (emphasis added).

[8] We note that even the most venerable and frequently cited of our past decisions should not be regarded as talismans and that each case deserves analysis on its own merits both as to the governing statutory and regulatory law and the instant facts. In this appeal it appears that the discussion of *Palmer* may have created confusion rather than dispelled it.

activity. This finding rested on evidence that Respondent found fault with Complainant's email, questioned his decision to write it and then suspended and terminated his employment because of his email. We conclude that substantial evidence in the record supports the ALJ's finding that Complainant's protected activity caused the adverse action in this case. While another ALJ looking at the same record might have decided for Respondent, our standard of review requires us to affirm the ALJ because substantial evidence supports his resolution of the matters at issue. Stated even more simply, the ALJ believed Complainant and disbelieved Respondent as to the reason for Complainant's termination, and, as the trier-of-fact, that decision is largely his responsibility rather than ours.

3. Whether Respondent Would Have Taken the Same Action Absent Protected Activity[9]

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[9] At one point the ALJ stated that Complainant's protected activity was "inextricably intertwined with the adverse employment action." D. & O. at 75. We take the ALJ to mean that he found that Complainant's protected activity directly led to the adverse action, rather than that the protected activity and the adverse action were essentially the same event. The Board has used the term "inextricably intertwined" in the past when the reason the employer gives for taking an adverse action arises out of the same occurrence which the employee cites as protected activity and when the two characterizations of the same event cannot be discussed or understood separately. *See Speegle v. Stone & Webster Constr. Inc.*, ARB No. 11-029-A, ALJ No. 2005-ERA-006, slip op. at 12-13 (ARB Jan. 31, 2013) (holding that complainant's protected activity was inextricably intertwined with the employer's reasons for taking adverse action against complainant because complainant used profane language while making protected statements). In this case, it is more appropriate to conclude merely that the protected activity (Complainant's report to the NTSB the day after the accident and the June 26, 2013 email) directly led to the adverse action. These protected actions are not, however, "inextricably intertwined" with Respondent's stated reasons for the adverse action. Respondent asserted that Complainant's attitude and expressions *during the July 2nd meeting with Wilcox and Coulter* caused Respondent to decide to terminate Complainant. On a different set of facts, had Respondent alleged as its stated reason for terminating Complainant that his protected activity had violated a company policy about reporting unsafe situations or that he had made false statements, then our previous decisions would support a description that the evidence was "inextricably intertwined." But even if the protected activity in a given case and the stated basis for the adverse action were legally and factually "intertwined," the ALJ must still thoroughly examine and analyze the evidence proffered in connection with any affirmative defense. Evidence that shows that protected activity and adverse action are sufficiently intertwined to establish that protected activity was, inescapably, a cause of an adverse employment action may nevertheless be insufficient to undermine clear and convincing counter evidence that Respondent would have taken the same action even in the absence of the protected activity.

For many of the same reasons that led the ALJ to find that there was contributing factor causation, he also found that Respondent had not proven that it would have terminated Complainant's employment absent the protected activity. D. & O. at 74-76. The ALJ found that the meeting at which Respondent fired Complainant was called to address Complainant's protected activity (the email). D. & O. at 74. The ALJ did not believe that Respondent lost faith in Complainant's ability as a pilot during the meeting. *Id.* The ALJ found it significant that Respondent had already printed out Complainant's last paycheck prior to the meeting and had it there to deliver after it fired him, belying the argument that the decision to terminate had not already been made prior to the meeting. *Id.* at 75. The ALJ also found that Respondent did not prove that it would have fired Complainant because of any allegedly new information derived from the NTSB report. D. & O. at 76 n.78. Finally, the ALJ found that Respondent engaged in disparate treatment relating to Complainant's firing because Wilcox was not normally involved in pilot discipline, but was in Complainant's case—the ALJ concluded this was additional direct evidence that Respondent could not clearly and convincingly prove that it would have taken the same action against Complainant absent protected activity.

On appeal, Respondent argues that there is clear and convincing evidence that Respondent fired Complainant because he refused to accept any responsibility for the crash. Br. at 27. Respondent's argument ignores key ALJ findings which caused him to reach the opposite conclusion. The ALJ found that Complainant knew at the time of the accident that the aircraft was approaching too fast and admitted this in his initial interview with Cawthra, while Coulter was sitting right next to him. Complainant stated that "that he did not call out speeds or tell the flying pilot to go around during the approach." D. & O. at 14 (Tr. at 341). Thus, the ALJ found that Complainant did acknowledge that there was pilot error and that Coulter heard that admission. [10] We affirm the ALJ conclusion that the Respondent failed to prove it would have taken the same action absent protected activity as it is supported by substantial evidence in the record.

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[10] The ALJ stated that Complainant knew that the NTSB Factual Report would find pilot error because the aircraft came in fast on landing and Complainant told the NTSB investigator as much when he gave his statement to the investigator the day after the accident. D. & O. at 15.

4. Damages

The ALJ ordered Respondent to 1) pay Complainant back pay in the amount of $122,957.26, 2) pay Complainant $7,500.00 in compensatory damages for reimbursement for training to work for STA Jets, 3) pay Complainant $3,986.87 in costs and expenses associated with his move to Phoenix to work for Swift, 4) expunge negative personnel records that relate to either the Sedona incident or the parties' actions surrounding the NTSB report which led to Complainant's discriminatory firing,[11] 5) email copies of his D. & O. to all of its employees, officers and directors, 6) pay Complainant $9,390.42 as nominal compensation for emotional damages, and 7) pay Complainant pre- and post-judgment interest on his back pay award. The ALJ also allowed for Complainant to submit an attorney's fee petition.

With respect to damages, Respondent's only objection on appeal is that the ALJ erred by ordering Respondent to email the D. & O. to all of its employees, officers, and directors. It asserts that because Complainant did not establish that Respondent engaged in a pattern or practice of discrimination such action is not warranted. Br. at 28. We reverse this aspect of the ALJ's damages award, specifically, the ALJ's order that Respondent must email copies of its D.&O. to employees, officers, and directors, provide and place a summary of the order in the email, and provide the summary as well as Respondent's plans to effectuate further training regarding AIR 21 to the ALJ. The regulations provide that if we conclude that the employer has violated the law, we shall order the employer to abate the violation. 29 C.F.R. § 1979.110(d). We hold that the ALJ erred by requiring Respondent to email the D. & O. to all of its employees, officers, and directors and submit its training plans to the ALJ; such measures are not authorized by statute or regulation and go further than necessary or appropriate to ensure abatement of the injury suffered in this case. We do not disturb any other aspects of the ALJ's damages award as they have not been appealed. *See* 29 C.F.R. § 1979.110(a).

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[11] We recognize that other administrative and legal obligations may require that certain information and records about the incident and Complainant's involvement be retained and used for reasons unrelated to Complainant's employment status. We clarify that Respondent should take reasonable steps to keep those records segregated from Complainant's employment records to ensure that Complainant suffers no further adverse employment action as a result of his protected activities.

CONCLUSION

Because the ALJ's findings of fact are supported by substantial evidence in the record, we hereby **AFFIRM** the ALJ's conclusions that 1) a violation of AIR 21 has occurred because Complainant's protected activity contributed to Respondent's decision to take adverse action against him, and that 2) relief may be ordered because Respondent failed to prove that it would have taken the same action against Complainant absent his protected activity. We **SET ASIDE** that portion of the relief ordered by the ALJ's that requires Respondent to email the D. & O. to various individuals and provide the ALJ with Respondent's plans to effectuate further training regarding AIR 21 as discussed above. In all other respects the relief ordered by the ALJ is **AFFIRMED**.[12]

SO ORDERED.

[12] At the request of the Complainant, the Board must assess against Respondent all costs and expenses (including attorney's and expert witness fees) reasonably incurred. 29 C.F.R. § 1979.110(d). If neither party seeks judicial review of this Order, Complainant may file a petition with the Board seeking costs and expenses incurred in the prosecution of this complaint no earlier than 60 days after the date of issuance of this Order. Any such petition must be served on Respondent, accompanied by supporting affidavit or declaration, and include such documentation as will allow the Board to assess the accuracy and reasonableness of the costs and expenses sought. Respondent may file a response to the petition within 14 days of the date of receipt. If judicial review is sought, no petition may be filed until when and if that appeal is concluded in favor of Complainant.