



**In the Matter of:**

**DANIEL FORRAND,**

**ARB CASE NO. 2019-0041**

**COMPLAINANT**

**ALJ CASE NO. 2017-AIR-00016**

**v.**

**DATE: January 4, 2021**

**FEDEX EXPRESS,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Daniel Forrand; *pro se*; Castiac, California**

***For the Respondent:***

**Jamie Chu, Esq.; *Federal Express Corporation*; Irvine, California**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Randel K. Johnson, *Administrative Appeals Judges***

**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 (AIR 21).<sup>1</sup> Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 16, 2015, alleging that Respondent retaliated against him in violation of the whistleblower protection provisions of AIR 21. The complaint was amended on December 4, 2015, March 14, 2016 and April 4, 2016. After an investigation, OSHA dismissed the complaint on March 7, 2017. Complainant filed a complaint with the Office of Administrative Law Judges on

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<sup>1</sup> 49 U.S.C. § 42121 (2000). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2018).

March 29, 2017. Respondent moved for summary decision, which was granted in part on November 3, 2017. A hearing was held November 13-16, 2017. On January 27, 2019, the Administrative Law Judge (ALJ) issued a Decision and Order Denying Relief (D. & O.).<sup>2</sup> Complainant filed a petition requesting that the Administrative Review Board (ARB or the Board) review the D. & O. We affirm the ALJ's decision.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the Administrative Review Board to issue agency decisions in this matter.<sup>3</sup> In AIR 21 cases, the ARB reviews questions of law presented on appeal de novo and reviews the ALJ's factual findings under the substantial evidence standard.<sup>4</sup> The Board reviews an ALJ's determinations on procedural issues under an abuse of discretion standard, examining whether the ALJ abused his power to preside over the proceedings in ruling as he did.<sup>5</sup>

### **DISCUSSION**

In the D. & O., the ALJ found that Complainant engaged in one instance of protected activity and suffered one adverse action, but that Complainant's protected activity was not a contributing factor to the adverse action. The ALJ further found that Complainant was not subjected to a hostile work environment. Upon thorough review of the record and the D. & O., we hold that the ALJ properly concluded that the Complainant was not a victim of retaliation, and was not subjected to a hostile work environment.

The ALJ's decision provides a thorough summary of events, which we will not repeat here. We will, however, address Complainant's arguments on appeal and clarify both Complainant's protected activity and the ALJ's analysis of the hostile work environment claim.

On appeal, Complainant argues, first, that the ALJ erred by omitting evidence related to his prior complaints, second, that the ALJ's factual findings are not supported by substantial evidence, and finally, that he was the victim of retaliation by his employer. Complainant also raises issues that are outside the

<sup>2</sup> D. & O. at 1.

<sup>3</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>4</sup> 29 C.F.R. § 1979.110(b).

<sup>5</sup> *Hoffman v. Netjets Aviation, Inc.*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 14 (ARB Mar. 24, 2011).

Board's authority to address, including an allegation of racketeering. We do not address any matters outside of the Board's jurisdiction.

## **1. Evidentiary Rulings**

As a preliminary matter, we address Complainant's argument that the ALJ should have admitted into evidence two settlement agreements which the ALJ excluded below. Although the ALJ did not admit the agreements into evidence, the ALJ liberally allowed relevant testimony regarding the events at issue in and the substance of all matters covered by the agreements. Upon reviewing the record, we find that the ALJ did not abuse his discretion by excluding the two pieces of evidence.

## **2. AIR 21 Whistleblower Retaliation**

To establish a case of retaliation under AIR 21, a Complainant must demonstrate by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) his protected activity was a contributing factor to the adverse action.<sup>6</sup> Once the Complainant establishes these elements, the burden shifts to the Respondent to show, by clear and convincing evidence, that it would have taken the same unfavorable employment action in the absence of the protected activity.<sup>7</sup>

### ***A. Protected Activity***

Protected activity under AIR 21 has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order, or standard of the FAA or federal law relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be subjectively held and also objectively reasonable.<sup>8</sup> The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft

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<sup>6</sup> *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 6 (ARB Feb. 13, 2015) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)).

<sup>7</sup> 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

<sup>8</sup> *Hindsman v. Delta Air Lines, Inc.*, ARB No. 2009-0023, ALJ No. 2008-AIR-00013, slip op. at 5 (ARB June 30, 2010). We note the obvious fact that the text of the statute directs us to consider whether the safety of the flying public is, or might be, enhanced by the whistleblower's behavior. Air 21 is not a general remedy for employment grievances unrelated to air safety.

safety.<sup>9</sup> A complainant's belief is objectively reasonable if it is one that a person of similar training and experience would hold.<sup>10</sup>

Of note on appeal are two instances of alleged protected activity. The ALJ found that Complainant engaged in only one instance of protected activity, while we find that Complainant actually engaged in two additional instances of protected activity, for a total of three.<sup>11</sup> The ALJ's findings related to all other instances of protected activity alleged by Complainant are consistent with the law and supported by substantial evidence.

#### *i. October 2015 E-mail Regarding Elevator Policy Change*

In October 2015, Respondent issued a policy to avoid damage to plane doors by moveable elevators. The policy was issued to all employees in Complainant's position and required that they contact their managers before moving an elevator. Complainant did not like the way the policy change was worded. As a result, he emailed his supervisor with some of the wording altered. Complainant said he thought the policy's original language conflicted with its intent. Management altered the wording of the policy to improve clarity, based on Complainant's feedback.<sup>12</sup>

While the ALJ discussed the events of this policy in the adverse action portion of his decision, he failed to identify or consider it as protected activity. Complainant's e-mail to his supervisor about the policy is protected activity because it relates to protecting the airplane's doors and, obviously, to air safety. The Complainant's subjective belief and objective reasonableness of that belief are undisputed because Respondent accepted Complainant's suggestion and took action in response to it. Thus, it was protected activity.

#### *ii. April 4, 2016 Printing Documents during Visit to Burbank Facility*

Complainant visited Respondent's Burbank facility when he was in the area for personal reasons. While there, he printed documents to supply to OSHA. The ALJ held that this was not protected activity because Complainant's "individual steps" of printing the documents were not discreet protected activity under the

<sup>9</sup> *Id.*; see also *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 2014-0059, ALJ No. 2013-AIR-00016, slip op. at 5-6 (ARB Jan. 21, 2016).

<sup>10</sup> *Burdette*, ARB No. 2014-0059, slip op. at 5.

<sup>11</sup> As we affirm the ALJ's conclusion that Complainant was not retaliated against for his protected activity, the ALJ's error is harmless.

<sup>12</sup> D. & O. at 11-13.

Act.<sup>13</sup> This is correct as far as it goes, but AIR 21 protects an employee from retaliation when the employee is “about to provide” any information about an alleged violation of Federal law related to air safety.<sup>14</sup> The Board has held that “an employee engages in protected activity if he attempts to provide information of retaliation that violates AIR 21.”<sup>15</sup> In this instance, Complainant printed documents. In printing the specific documents he did, Complainant was “about to provide” relevant information for his AIR 21 complaint, which concerned an alleged violation of Federal law related to air safety. Complainant therefore engaged in protected activity.<sup>16</sup>

#### *B. Adverse Action*

AIR 21 prohibits an employer from discharging or otherwise discriminating “against an employee with respect to compensation, terms, conditions, or privileges of employment” for engaging in protected conduct.<sup>17</sup> It is illegal “to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee” who engages in protected activity.<sup>18</sup> The Board has said that adverse action may also include firing, failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.<sup>19</sup> An adverse action is “more than trivial” when it is “materially adverse” so as to “dissuad[e] a reasonable worker” from protected activity.<sup>20</sup>

Of note on appeal is one allegation of adverse action that the ALJ omitted—an allegation by Complainant that Respondent surveilled him or threatened him. According to Complainant, his supervisor told him to “be careful, they are watching you.” Respondent claims it was difficult to tell if Complainant was wearing the correct safety gear on his head because he was wearing a hat, which prompted the comment. Subsequently, Complainant met with another manager about the conversation and said he felt threatened. The manager assured Complainant that he was not under surveillance. Afterwards, Complainant filed a workplace violence

<sup>13</sup> D. & O. at 45.

<sup>14</sup> 49 U.S.C. § 42121(a)(1).

<sup>15</sup> *Benjamin v. Citationshares Mgmt., L.L.C., N/K/A Citationair*, ARB No. 2012-0029, ALJ No. 2010-AIR-00001, slip op. at 8 (ARB November 5, 2013).

<sup>16</sup> The error is harmless because Complainant was not subject to retaliation.

<sup>17</sup> 49 U.S.C. § 42121(a)(1).

<sup>18</sup> 29 C.F.R. § 1979.102(b).

<sup>19</sup> *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 2004-0116, 0160, ALJ No. 2003-AIR-00047, slip op. at 9 (ARB Jan. 31, 2007).

<sup>20</sup> *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 2015-00080, ALJ No. 2015-AIR-00016, slip op. at 11 (ARB May 8, 2017).

complaint.<sup>21</sup> The ALJ did not address this alleged adverse action specifically in his opinion, although he did make credibility findings on the relevant events. We find that a supervisor's comment of this kind, without more, is not an adverse action.

The ALJ's analysis related to all other alleged adverse actions, including his finding that the Complainant suffered an adverse action when he was issued an Online Compliment and Counseling for sending unprofessional e-mails, is supported by substantial evidence and is consistent with the law.

### *C. Contributing Factor*

We do not address the contributing factor analysis because the ALJ's holding is supported by substantial evidence and consistent with the relevant law.

### *D. Hostile Work Environment*

Our final issue is Complainant's hostile work environment claim. To prevail, Complainant must prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.<sup>22</sup>

Proving a hostile work environment is a high bar. Courtesy or rudeness is not harassment, nor are the ordinary tribulations of the workplace, such as sporadic use of abusive language, joking about protected status or activity, and occasional teasing.<sup>23</sup> Relevant circumstances to consider in assessing whether conduct amounts to a hostile work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."<sup>24</sup>

Complainant argues that the circumstances that gave rise to his earlier AIR 21 complaints, combined with the ongoing incidents detailed in his complaint,

<sup>21</sup> D. & O. at 17-18.

<sup>22</sup> *Brune v. Horizon Air Industries, Inc.*, ARB No. 2004-0037, ALJ No. 2002-AIR-00008, slip op. at 10-11 (ARB Jan. 31, 2006) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>23</sup> *Brune*, ARB No. 2004-0037, slip op. at 11.

<sup>24</sup> *Id.*

create a hostile work environment.<sup>25</sup> In addition to the incidents the ALJ addressed in his decision and the additional incidents the Board has outlined above, Complainant alleges that smaller events in the workplace contributed to the harassment. For example, as a part of the conversation with Complainant regarding safety gear, his supervisor told Complainant that he should be an inspector, which would require a transfer to a department where Complainant had a prior negative history. Another time, Complainant asked for a cab ride home because he was upset, a manager offered to drive him instead, and Complainant felt threatened. Complainant cites other examples. In sum, he argues his employer has retaliated against him in ways both large and small, and that the alleged retaliation is sufficiently pervasive to create a hostile work environment.

The ALJ correctly held that Complainant failed to prove that he was subject to a hostile work environment. He held that Complainant only satisfied the first prong—engaging in protected activity—of the four prong test. However, the ALJ failed to specifically acknowledge the smaller incidents Complainant alleged. Because a hostile work environment is an alternative theory of relief, those small incidents should be noted and given consideration. Despite a less than complete analysis, the ALJ’s conclusion is sound—Complainant makes no allegations that amount to a sufficiently severe and pervasive harassment. The ALJ’s conclusion here, as elsewhere, is supported by substantial evidence and is consistent with the law.<sup>26</sup>

## CONCLUSION

Accordingly, we **AFFIRM** the ALJ’s Decision and Order Denying Relief.

**SO ORDERED.**

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<sup>25</sup> The ALJ held that the earlier instances of retaliation were not raised in a timely manner.

<sup>26</sup> The ALJ’s failure to acknowledge these more minor incidents in his analysis constitutes harmless error.