U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MARK PRINTZ,

COMPLAINANT,

v.

STS AVIATION GROUP,

and

FRONTIER AIRLINES, INC.,

RESPONDENTS.

ARB CASE NO. 2022-0045

ALJ CASE NO. 2021-AIR-00013
ALJ SCOTT R. MORRIS

DATE: December 15, 2023

Appearances:

For the Complainant:
Mark Printz; *pro se*; Orlando, Florida

For Respondent STS Aviation Group:
Samuel Mogensen, Esq. and John Ho, Esq.; *Cozen O'Connor*; Minneapolis, Minnesota and New York, New York

For Respondent Frontier Airlines, Inc.:
Thomas M. L. Metzger, Esq.; *Littler Mendelson, P.C.*; Columbus, Ohio

Before HARTHILL, Chief Administrative Appeals Judge, and PUST and WARREN, Administrative Appeals Judges

DECISION AND ORDER VACATING IN PART AND REMANDING

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the whistleblower protections of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) and its implementing regulations.[1] On May 25, 2022, a United States Department of Labor (Department) Administrative Law Judge (ALJ) issued a Decision and Order Denying Relief (D. & O.). The ALJ determined that Complainant Mark Printz's (Complainant or Printz) whistleblower claim failed because Complainant failed to establish by a preponderance of the evidence that his protected activity contributed in any way to the termination of his employment from Respondent STS Aviation Group (STS). The ALJ also found that Respondent Frontier Airlines, Inc. (Frontier) was not Complainant's employer for purposes of AIR21. Complainant filed a petition for review with the Administrative Review Board (ARB or Board). For the reasons explained below, we vacate the ALJ's dismissal of Complainant's complaint and remand for further proceedings consistent with the Board's opinion.

BACKGROUND

1. Relationship Between the Parties

STS is a third-party aircraft maintenance provider to Frontier, and its aircraft technicians handle all basic aircraft maintenance activities for Frontier's aircraft at the Orlando International Airport (MCO).[2] STS's main office, where STS's aircraft maintenance technicians (AMTs) would start and end their workday, is located off-property from MCO, about a thirty to thirty-five minute drive away.[3]

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[1] 49 U.S.C. § 42121, as implemented by the regulations at 29 C.F.R Part 1979 (2023). In the Consolidated Appropriations Act, 2021 (CAA, 2021), Congress replaced the "air carrier and contractor and subcontractor" language with "a holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder." The pre-amendment language applies to the events in 2019 that gave rise to Printz's claim and therefore we use the term "air carrier" herein. We note, however, that our statutory analysis in Part I also applies to the amended text.

[2] D. & O. at 4, 6-7. On June 24, 2022, the ALJ issued a Corrected Decision and Order Denying Relief because the prior decision did not contain a complete Notice of Appeal Rights, which the corrected version did. References to the ALJ's D. & O. Denying Relief are to the Corrected D. & O.

[3] *Id.* at 14, 26.

Under the contract between STS and Frontier, Frontier paid for AMTs' labor by the hour.[4] STS's AMTs carried a duty phone while working to receive information and tasks from Frontier's Maintenance Control Center (Control Center) located in Denver.[5]

Complainant worked for STS as an AMT from December 19, 2016, until the termination of his employment on June 4, 2019.[6] During his entire employment with STS, Complainant worked exclusively at MCO on Frontier aircraft.[7] Complainant received maintenance tasks primarily from Frontier's Control Center and he logged into Frontier's computers daily.[8] Complainant was paid hourly by STS.[9] He was never paid wages by Frontier.[10]

Joshua Robbins (Robbins), STS's top management official at its Orlando facility, was Complainant's direct supervisor throughout his employment.[11] Robbins reported to Ray Strickland (Strickland), STS's Director of Maintenance and Southeast Regional Director.[12] Strickland tried to visit STS's operations at MCO once per quarter.[13]

Frontier's Southeast Senior Manager for Regional Line Maintenance, Kevin Ketterer (Ketterer), was based at MCO.[14] Ketterer had no supervisory function over STS's AMTs and did not assign their work.[15] Ketterer primarily interacted with

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4 *Id.* at 7.

5 *Id.*

6 *Id.* at 3, 5.

7 *Id.* at 4.

8 *Id.* at 7. During the period of Complainant's employment, Frontier was STS's only customer at MCO. *Id.* at 26.

9 *Id.* at 7.

10 *Id.* at 5.

11 *Id.*

12 *Id.* at 5, 8.

13 *Id.* at 11.

14 *Id.* at 5-6.

15 *Id.* at 6.

STS through Robbins, his counterpart at STS.[16] Frontier had two personnel stationed at MCO who did assign work to STS's AMTs: Frontier's Regional Maintenance Representatives Tibor Hobler (Hobler) and Carlos Herrera (Herrera).[17] Complainant testified that he received the majority of his work assignments from Frontier personnel, either through the Frontier computer system, which AMTs checked daily, or from the two on-site representatives.[18]

2. STS's Line Maintenance Employee Break Policy

STS employees were entitled to a thirty-minute unpaid meal break and two fifteen-minute rest periods each day.[19] STS's policy for meal or rest breaks for line maintenance employees, including AMTs who worked on Frontier's aircraft, was that employees were to take breaks between aircraft maintenance calls, rather than having a set meal or break time.[20]

In 2019, AMTs had an outdoor space to take breaks, but also took breaks in Frontier's lounge area inside MCO.[21] Complainant normally took his breaks in Frontier's lounge area, but two months prior to the termination of his employment, Frontier's Chief Pilot issued a memorandum which directed that no more than two STS employees were to be in the Frontier lounge area at the same time performing company business, and that STS personnel were not to use the lounge area as a break room.[22] A few weeks prior to the termination of Complainant's employment, Robbins also informed AMTs that they were not allowed take their breaks in STS's trucks with the air conditioning running.[23] After these directives, Complainant began taking his breaks in the MCO terminal.[24]

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16 *Id*. at 6, 9.

17 *Id*. at 7, 9; Hearing Transcript (Tr.) at 223.

18 D. & O. at 7; Tr. at 32.

19 Complainant's Exhibit (CX) 1 (STS Employee Handbook & Policy Manual) at 9.

20 *Id*.

21 D. & O. at 7.

22 *Id*. at 7, 15.

23 *Id*. at 15.

24 *Id*. Robbins was unaware that AMTs took breaks in the MCO terminal. Tr. at 234.

3. Workplace Discord

On February 24, 2019, Frontier's Control Center contacted Complainant to request an AMT to drain fluid from a departing plane's hydraulic reservoirs.[25] Before performing this work, Complainant asked the flight attendant and the pilots to remove the passengers and the luggage from the plane.[26] According to the flight crew, Complainant seemed annoyed and immediately gave Frontier personnel orders that the aircraft needed to be deplaned.[27] Prompted by Complainant's interactions with the flight crew on the February 24, 2019 flight, a Frontier pilot emailed Frontier's Orlando Base Chief Pilot detailing Complainant's actions towards the flight attendants that occurred in front of passengers and explained that the situation "could have been handled much more differently with some good communication between [Complainant] and the flight crew."[28] The Chief Pilot forwarded the email to Ketterer, who in turn forwarded the message to Robbins noting that further related reports would follow.[29] This was the first time Ketterer had ever received a complaint about an STS mechanic.[30]

On February 27, Ketterer received a second email from the Orlando Base Chief Pilot, attaching the co-pilot's description of the February 24 incident.[31] After

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25 D. & O. at 8.

26 *Id*. at 9.

27 *Id*.

28 *Id*.; Joint Exhibit (JX) A (Frontier personnel's February 25, 2019 email to Frontier's Orlando Base Chief Pilot) at 1-2 ("[Complainant] popped his head into flight deck and we told him we needed the hydraulics serviced. He immediately turned to the A [sic] flight attendant and said we need everybody off the aircraft, and all the bags removed from below, and in the process made some reference to the coffee pot (which we had also written up). He then made a statement this [aircraft] would be down 3-6 hours. [The co-pilot] had a previous bad experience with this particular mechanic, and I asked to speak with him on the tarmac. We told him that that was not his call to just start talking to [flight assistants] like that as several passengers heard him in [the] first 3 rows of [the] plane and thought we were asking them all to get off because of a coffee pot. [I]t was very unprofessional.").

29 D. & O. at 9.

30 *Id*.

31 *Id*. at 9; JX B (Feb. 27 email); RX 5 (co-pilot's description); *see* Tr. at 422 (establishing that RX 5 was the attachment to the Feb. 27 email).

receiving the second email, Ketterer asked Robbins to talk to Complainant "about being more approachable – and working as a team."[32]

On March 4, 2019, Hobler emailed Ketterer about an interaction he had with Complainant after he observed Complainant playing a game on his phone rather than working.[33] Hobler had noticed two of Frontier's aircraft on the north pad, and when he inquired about their status, Complainant and another AMT told the representative that the aircraft were both "good."[34] Hobler later learned from the next follow-on AMT shift that both aircraft had required a periodic check and one of the aircraft required troubleshooting of its anti-icing system.[35] Hobler advised Ketterer that both of the aircraft had been at the airport for several hours prior to the follow-on shift coming on duty.[36] Ketterer forwarded this email to Robbins stating "I just want to pass this along to you. This is now the third time

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[32] *Id*. at 9.

[33] *Id*. Ketterer testified that "at [the] time" he received Hobler's March 4 email he also "received some verbal gripes . . . about [Complainant] . . . [about] his lack of . . . motivation and is [sic] unwillingness to help his team" from Hobler and Herrera. Tr. at 426-27. Herrera reported to Ketterer that Complainant "pretty much sat in the break room on his phone most of the time, . . . tended to feel that he was better than the other guys because of his experience, didn't go out and help the team very often. [A]cted like a boss or a manager, . . . didn't act like on of the . . . equals." *Id*. at 427.

[34] D. & O. at 9.

[35] *Id*. at 9-10.

[36] *Id*. at 10. Hobler's email to Ketterer indicated that a "technician was playing a game on his phone while talking to me, and he seemed to be more preoccupied with his game than work. After [Complainant] gave me a brief description of his background, he also told me that he wasn't sure if he was retiring this summer or not. It seemed as though he couldn't care less about anything but putting in his time for the day, then going home. At least that's the impression I got." JX C (Ketterer's March 4, 2019 email to Robbins) at 1. Hobler told Ketterer that "[i]t would have been helpful . . . [for] the technicians [to] help [the third shift] out and take a bit of the workload off of them, instead of sitting around since N202 arrived at 1755hr and N704 arrived at 1451hr. This is an unacceptable way of performing line maintenance. Everyone should work as a team, and sharing the workload throughout the day. It seems as though this is happening too often, where the work gets past [sic] onto 3rd shift." *Id*.

[Complainant's] name has come up to me [in] the past couple [of] weeks."[37]

On March 6, 2019, Complainant sent an email to Ketterer offering to meet with him to discuss Frontier's "problems in Orlando."[38] Ketterer declined to meet, saying he had a rough idea of their "growing pains" at MCO, which he later testified he attributed to a lack of technicians.[39] A week later, on March 13, 2019, Complainant sent a text to Robbins with a picture of one AMT with his shirt untucked and wearing baggy jeans.[40]

On April 23, 2019, AMT William Galloway (Galloway) and Hobler, Frontier's maintenance representative, were working on a Frontier aircraft because of an irregularity on the aircraft concerning the hydraulic fluid in the yellow hydraulic system, known as a hydraulic maintenance event.[41] Following the service, the two were performing a leak check when Complainant noticed that the pneumatic head press on the yellow hydraulic system was not returned to its normal position.[42] Complainant pointed this out and asked if the two thought they should check the pump to see if it had overheated or caused cavitation and metal shavings, but both said Complainant should disregard this mistake and that they would just put the head press back in position before flight.[43]

On May 12, 2019, during a shift turnover, Complainant told two other AMTs who were turning the shift over to him that he did not "give a [expletive]" and that

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37 D. & O. at 10. Robbins testified that in making his decision to recommend Complainant's termination, he relied on "information that was provided to me from each of the Frontier employees and entities, not one in particular. It was a [sic] accumulation of each complaint." Tr. at 244.

38 JX D (Complainant's March 6, 2019 email to Ketterer, and Ketterer's March 7, 2019 response to Complainant) at 2.

39 *Id*. at 1; Tr. at 439-40.

40 D. & O. at 19; Tr. at 47. Complainant testified that he sent the photograph to Robbins "[j]ust [to] mak[e] sure he was aware of the uniform appearance of some of the technicians on my crew." Tr. at 47.

41 D. & O. at 10.

42 *Id*.

43 *Id*. at 10, 14.

he was not going to act as the lead that day.[44] The two AMTs filed complaints with STS about the incident.[45]

4. Strickland's June 2, 2019 Visit to MCO and Complainant's Protected Activity

On Tuesday, June 2, 2019, Strickland arrived unannounced at MCO and brought pizza into the Frontier offices for the STS mechanics while Complainant was working.[46] This was the first time Complainant met Strickland.[47] During Strickland's visit, Complainant raised several concerns with him, including regarding the use of six-foot collapsible ladders, and requested that Strickland authorize purchase of solid A-frame ladders on wheels.[48] After this issue was raised to him, Strickland texted Robbins asking about the ladders and, after several text exchanges, Strickland called Robbins.[49] Robbins advised that they did have A-frame ladders available, but that Complainant chose not to go get them and would grab whatever was closest instead.[50] After their phone call, Strickland had someone take him to where the ladders were stored and he saw the solid A-frame ladders.[51]

Later during his visit, Strickland went off property with Complainant to purchase coffee and pizza for the remaining crews.[52] During their drive, Complainant raised more concerns to Strickland, including the following issues:[53]

- AMTs wearing non-compliant safety shoes and safety vests, shirts not always being tucked in, and Robbins not wearing composite toed shoes while out on

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44 *Id.* at 10-11.

45 *Id.* at 11.

46 *Id.*

47 *Id.*

48 *Id.* Complainant testified that the AMTs were comfortable with him speaking to Strickland on their behalf and asked him to the raise the ladder issue. Tr. at 56.

49 D. & O. at 12.

50 *Id.*

51 *Id.*

52 *Id.* at 11.

53 *Id.*

the ramp.[54] Complainant advised that he had previously talked to Robbins about these issues.[55]

- A cracked lower step on STS's Ford F-350 high-lift truck that was subsequently removed by STS.[56] With the missing step, the first step to the lift was three and a half feet up from the ground.[57]
- A lack of correct communication methods and location of safety personnel while an aircraft was being towed to and from the remote north ramp.[58]
- Contaminated servicing of Frontier-owned passenger and crew oxygen bottles due to the STS's oxygen-servicing equipment being left outdoors in the rain in an unclean environment.[59]
- Contaminated servicing of Frontier aircraft hydraulic fluid as open containers were being left outdoors and exposed to the environment and rain.[60]
- The April 23, 2019 hydraulic maintenance event in which Hobler and Galloway failed to check the pump to see if it overheated or if it caused cavitation and metal shavings.[61]
- STS storing new serviceable aircraft tires outdoors in an exposed environment.[62] STS's normal storage area was located in the STS building (located thirty to thirty-five minutes away from MCO), but STS would also store tires by outdoor gates.[63]

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54 *Id*. at 12.

55 *Id*.

56 *Id*.

57 *Id*. At the time the step was removed, Robbins contacted the manufacturer of the truck to get a replacement but was informed that the step was not a requirement for the type of certification of that lift and it was not necessary to replace it. Tr. at 262-63.

58 D. & O. at 12.

59 *Id*. at 13. STS replaced the oxygen system at some point after Complainant's termination. *Id*.

60 *Id*.

61 *Id*. at 10, 13-14.

62 *Id*. at 14.

63 *Id*. After learning of Complainant's complaint, Robbins checked and found out that there was a manufacturer requirement that the tires should not be stored in direct sunlight. *Id*.

- STS's high-lift safety harness for its cherry picker was past its inspection date.[64]
- STS's line maintenance workers driving on public roads with unsecured bottled gas.[65]

After Strickland's discussion with Complainant, Strickland called Robbins.[66] Their conversation mainly concerned the ladders; Robbins did not recall any other issues being discussed.[67]

5. Ketterer's Observation of Complainant and Frontier's Request to STS on June 3, 2019

On Wednesday, June 3, 2019, Complainant reported to work at 2 p.m., and proceeded to the Frontier flight line at MCO where AMTs handle all incoming issues from all inbound and outbound pilots.[68] Robbins called Complainant on his personal cell phone and asked him to work the flight line by himself while two other AMTs worked on an out-of-service aircraft parked at the remote pad.[69] Throughout the afternoon, Frontier's Control Center called Complainant to handle work requests, which he worked back-to-back until he took his break.[70] After the two other AMTs returned to Frontier's lounge area to conduct research, and Complainant finished some paperwork around 6:45 p.m., Complainant told them that he was going to go upstairs to get a cup of coffee.[71] The last flight before Complainant took his break left at 6:30 p.m., and the next flight was not scheduled to arrive until 8:00 p.m., so Complainant decided to take his break upstairs in the terminal because it had air conditioning.[72]

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64 *Id*.

65 *Id*.

66 *Id*.

67 Tr. at 269.

68 D. & O. at 15; Tr. at 86, 234. When an AMT works the flight line by him or herself, the AMT stands by until a pilot raises an issue. Tr. at 84-85.

69 D. & O. at 15.

70 *Id*.

71 *Id*.; Tr. at 89.

72 D. & O. at 15.

After getting coffee, Complainant sat across from the window to the gate where the next flight was to arrive.[73] Unbeknownst to Complainant, Ketterer was also near the gate and observed Complainant.[74] Ketterer did not approach or identify himself to Complainant.[75] After observing Complainant, Ketterer texted Robbins asking if Frontier was paying for overtime.[76] Ketterer was concerned that Frontier did not have enough manpower to work the flight line and he knew Frontier had an out-of-service aircraft that needed to be repaired which required at least two mechanics.[77] Ketterer expected STS's employees to be "on-call downstairs in case there w[ere] any issues" given that Frontier paid AMTs on an hourly basis.[78] Ketterer testified that he felt that Complainant's extended time at the terminal equated to stealing.[79]

Ketterer texted Robbins that he had been observing Complainant sitting in the terminal from the time Ketterer arrived at the gate area at 7:15 p.m. until Ketterer stood up at 8:30 p.m. to catch his 9:00 p.m. flight.[80] As he was leaving, Ketterer took a photograph of Complainant and sent a text message of the photograph to Robbins.[81] After receiving the text message, Robbins spoke to Ketterer on the phone, and during this phone conversation, Ketterer asked that STS remove Complainant from working on Frontier's aircraft.[82]

Around 8:50 p.m., Robbins called Complainant angrily telling him that "he was tired of hearing his name and that Complainant 'needed to retire or maybe he

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73 *Id*.

74 *Id*. Ketterer was at the airport for the purpose of taking a flight and was not there to monitor workers. Tr. at 397. This was the second time in about a month that Ketterer witnessed Complainant in the terminal area. D. & O. at 16; Tr. at 409. Ketterer "was kind of shocked [] that there was a technician sitting with the passengers in the boarding area" and he felt it was "pretty unprofessional." Tr. at 409.

75 D. & O. at 15.

76 *Id*.

77 *Id*.

78 *Id*. at 16.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id*. at 17.

would just take it for me.'"[83] Robbins told Complainant that Ketterer observed him in the terminal for an extended time.[84] Complainant admitted that he was taking a break and that there were no live flights and "everything was handled."[85] Complainant told Robbins that he received a phone call at 8:20 p.m. to service an 8:00 p.m. inbound flight, and as soon as it arrived, he serviced a passenger oxygen mask that needed to be replaced.[86] After his phone conversation with Robbins, Complainant parked aircraft and signed out for the night at midnight.[87]

6. Termination of Complainant's Employment

The next morning, on Thursday, June 4, 2019, Complainant called STS's Human Resources (HR) department and reported what Robbins had said to him the night before.[88] Complainant asked if there was any new documentation in his HR file, and the HR representative advised that there was no adverse information in his file.[89]

As soon as Complainant clocked in for his shift at 2:00 p.m. on June 4, 2019, Robbins called him into his office.[90] There were two Frontier representatives present as witnesses, one of which was Hobler.[91] The Frontier representatives did not say anything during the meeting and Robbins testified that he did not consult

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83 *Id.* (citations omitted). At the hearing, two of Complainant's co-workers testified, including Galloway and Richard Brutt (Brutt). Brutt's shifts with Complainant overlapped for about two and one-half hours three or four days a week. *Id.* at 6 n.10. Brutt thought Complainant was lazy and testified that Complainant would often disappear and not be working. *Id.* Galloway worked the same shift with Complainant and worked approximately 20 hours a week with him. *Id.* at 6 n.11. Galloway thought Complainant's work ethic was up to par, but noted Complainant would disappear during their shifts for several hours by going upstairs. *Id.* at 6 n.12.

84 *Id.* at 17.

85 *Id.*; Tr. at 90.

86 D. & O. at 17; Tr. at 90.

87 D. & O. at 18.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

them about STS's decision to terminate Complainant's employment.[92] Robbins informed Complainant that his employment was terminated due to job performance issues and "the compilation of Frontier complaints" from January and February 2019 through the May 19, 2019 incident.[93] Robbins accused Complainant of hiding in the terminal the day before and denied Complainant's request to retrieve and present his log sheets to show that he was constantly working except for the time he was getting a cup of coffee.[94] Robbins advised that it did not matter and told Complainant to turn in his badge and work shirts.[95] Complainant turned in his badge and drove home and called an HR representative to ask if she knew anything about the termination.[96] The HR representative recommended that Complainant reach out to Strickland by text and email, which Complainant did.[97] On June 17, 2019, Complainant received a letter confirming the termination of his employment.[98]

7. Procedural History and ALJ Decision

On July 1, 2019, Complainant filed an AIR21 whistleblower complaint with the Department's Occupational Safety and Health Administration (OSHA).[99] During OSHA's subsequent investigation, Complainant asked OSHA to terminate its investigation and make a decision based on the information gathered to that point.[100] On March 3, 2021, OSHA determined it was unable to conclude if there was cause to believe a violation occurred.[101] Complainant objected to OSHA's

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92 *Id*.

93 *Id*. Robbins explained that Ketterer's photograph of Complainant was "the final straw" in deciding to terminate Complainant in consideration of the other complaints from Frontier that had gathered over the course from January 2019 through May 2019. *Id*. at 18 n.50.

94 *Id*. at 18.

95 *Id*.

96 *Id*.

97 *Id*. Strickland replied ten days later. *Id*.

98 *Id*. at 19.

99 *Id*. at 2.

100 *Id*.

101 *Id*. at 2, 4.

findings and requested a formal hearing before the Department's Office of Administrative Law Judges.[102]

On May 25, 2022, after an evidentiary hearing, the ALJ issued a D. & O. in which he found that Complainant, Frontier, and STS were subject to AIR21, that Complainant engaged in protected activity,[103] and that Complainant suffered an adverse action.[104] The ALJ further found that Frontier was not Complainant's employer for purposes of AIR21, and that Complainant failed to establish that his protected activity contributed to STS's adverse action against him.[105]

Specifically, the ALJ found that while the temporal proximity between Complainant's protected activity and Complainant's termination could provide circumstantial evidence of causation, in this case it did not.[106] Instead, the ALJ found that Complainant's protected activity "played no role whatsoever in STS's decision to terminate Complainant's employment."[107] In finding that Complainant's protected activity was not a contributing factor in STS's decision, the ALJ found that the basis for "Robbins's determination to terminate Complainant was Complainant's conduct when he was not actually working on Frontier's aircraft coupled with the reported poor interactions, not only with other mechanics, but also with his interactions with Frontier personnel where he had passengers deplane."[108] The ALJ found the evidence demonstrated that Complainant's actions garnered the attention of both Robbins and Ketterer, and that "[t]he focus of Complainant's discharge were his interactions with STS's customer and had nothing to do with reporting his concerns to" Strickland.[109]

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102 *Id.*

103 The ALJ found that three of Complainant's reports on June 2, 2019, constituted protected activity: the potentially contaminated oxygen servicing station; the over-servicing of yellow hydraulic fluid; and the lack of communication during the towing of an aircraft with the tug. *Id.* at 33.

104 *Id.* at 33-34.

105 *Id.* at 27, 36.

106 *Id.* at 35.

107 *Id.* at 35-36.

108 *Id.* at 35.

109 *Id.*

On June 6, 2022, Complainant petitioned the Board to review the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and to issue agency decisions in cases arising under AIR21.[110] In AIR21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings if they are supported by substantial evidence.[111]

DISCUSSION

In 2019, AIR21 provided that:

> No air carrier, contractor, or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . 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 . . . .[112]

To prevail in a retaliation case under AIR21, a complainant must prove by a preponderance of the evidence that they engaged in protected activity and that the protected activity was a contributing factor in the adverse employment action taken against them.[113] If the complainant meets this burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken

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110 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); 29 C.F.R. § 1979.110(a)

111 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019) (citation omitted).

112 49 U.S.C. § 42121(a)(1).

113 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021) (citation omitted).

the same unfavorable personnel action in the absence of the complainant's protected activity.[114]

Upon review of the ALJ's D. & O., the parties' arguments on appeal, and the record, the Board concludes that: (1) Frontier is potentially liable under AIR21; and (2) the ALJ failed to fully analyze and weigh all of the evidence in the record on the issue of contributing factor as to Complainant's whistleblower claim.[115]

1. Frontier Is Potentially Liable for Violations of AIR21's Anti-Discrimination Clause

In relieving Frontier of potential liability, the ALJ concluded that "there must be an employer-employee relationship between the air carrier or contractor or subcontractor employer who allegedly violates the Act and the employee it subjects to discharge or discrimination."[116] In determining whether Frontier was an employer under AIR21, the ALJ first stated that it need not be the employee's immediate employer under the common law,[117] and then set forth the Board's test to determine employer status:

> [T]he test as to whether *an employer* is subject to AIR 21 liability is whether an air carrier or contractor or

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[114] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4-5 (citations omitted).

[115] Complainant's petition for review failed to appeal the ALJ's protected activity findings, but notwithstanding this omission, his brief to the Board mentions two of his failed purported claims of protected activity before the ALJ, both of which concern additional reports Complainant made to Strickland on June 2. As the ALJ found that Complainant's other reports to Strickland on June 2 constituted protected activity, it is not necessary to reach the issue of whether these two other reports also constituted protected activity.

[116] D. & O. at 24. Frontier argues that Complainant failed to appeal the issue of Frontier's employer status. Respondent Frontier Response Brief (Br.) Br. at 2. To the contrary, Complainant raised the issue of Frontier's direct liability and liability as a putative joint employer by arguing that "the evidence has established that the adverse action taken against Mr. Printz *was perpetrated by both STS and Frontier*" and that "the companies *acted jointly* in terminating Mr. Printz's employment." Complainant's (Comp.) Br. at 11 (internal citations omitted) (emphasis added).

[117] D. & O. at 24 (citing *Fullington v. AVSEC Servs., LLC*, ARB No. 2004-0019, ALJ No. 2003-AIR-00030, slip op. at 6 (ARB Oct. 26, 2005)).

> subcontractor of an air carrier *exercised control* over the terms, conditions, or privileges of the complainant's employment. Such control includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant.[118]

To aid in making this determination, the ALJ applied an eight-factor test used by the Eleventh Circuit, ultimately concluding that Frontier "did not exercise sufficient control over Complainant to be deemed an employer under the Act."[119]

Direct or joint employer liability is, however, only one basis on which an air carrier can be liable for the acts of its contractors (or vice versa). In the instant case, the ALJ did not consider whether the plain text of AIR21's anti-discrimination clause does in fact always require an employer-employee relationship.[120]

A. The Text of AIR21's Anti-Discrimination Clause Does Not Require an Employer-Employee Relationship Between the Alleged Retaliator and the Whistleblower

The language of AIR21's anti-discrimination clause does not ineluctably require that an employer-employee relationship exist between Frontier and Printz before the prohibition against discrimination by an air carrier against "an employee" can be enforced against Frontier."[121] The starting point for all statutory

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118 *Id*. at 24 (citing *Evans v. Miami Valley Hosp.*, ARB Nos. 2007-0118, -0121, ALJ No. 2006-AIR-00022, slip op. at 10 (ARB June 30, 2009) (emphasis added)).

119 *Id*. at 27.

120 In *Fullington* and *Evans*, the Board also did not appear to consider either a plain reading of AIR21's anti-discrimination clause or the eight-factor test used in the instant case. In *Evans*, the facts demonstrated that the air carrier was a joint employer so there was no need to address direct liability under the plain text of the statute. *Evans*, ARB Nos. 2007-0118, -0121, slip op. at 9-11. In *Fullington*, the complainant appears to have raised a "control test" argument before the ALJ, *Fullington v. Sw. Airlines Co.*, ALJ No. 2003-AIR-00030, slip op. at 3 (ALJ Sept. 25, 2003), and the Board focused its analysis of the air carrier and worker relationship on the definition of "employee." *Fullington*, ARB No. 2004-0019, slip op. at 6-7.

121 The parties stipulated that Frontier is an air carrier subject to AIR21. D. & O. at 24.

interpretation is the language of the statute itself.[122] We must first "'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'"[123] "'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'"[124]

The text of the statute provides that *"[n]o air carrier* or contractor or subcontractor of an air carrier may discharge *an employee* or otherwise discriminate against *an employee* . . . because *the employee* [engaged in protected activity]."[125] The statute names the entities who are prohibited from engaging in retaliation: an air carrier or contractor or subcontractor.[126] The statute identifies the person protected: an employee. And the statute identifies the prohibited conduct: discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment.[127]

The statute does not define the term "an employee," thereby creating some initial ambiguity about whose employees Congress meant to protect. But in context and under a plain reading of the statute, the meaning is clear: an "employee" protected by AIR21 is an employee of any of the entities identified in the preceding part of the sentence, i.e., an air carrier or contractor or subcontractor, even if the employee does not have a direct employer-employee relationship with the alleged retaliator. If Congress had intended the term "an employee" to be limited to certain employees, it easily could have said so. For example, Congress could have added limiting language, such as "no air carrier or contractor may discharge or discriminate against *its own* employee" or "no air carrier may discharge or

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122 *Med. Transp. Mgmt. Corp. v. Comm'r of Internal Revenue Serv.*, 506 F.3d 1364, 1367-68 (11th Cir. 2007), *cert. denied*, 553 U.S. 1034 (2008) (quoting *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999)); *see also Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010).

123 *Med. Transp. Mgmt. Corp.*, 506 F.3d at 1368 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation." *Id.* (citation omitted).

124 *Id.* (quoting *Robinson*, 519 U.S. at 341).

125 49 U.S.C. § 42121(a)(1) (emphasis added).

126 The term "contractor" under Section 42121 is defined at (e) as "a company that performs safety-sensitive functions by contract for an air carrier." For brevity, references to "contractors" in this opinion include subcontractors.

127 49 U.S.C. § 42121(a)(1).

discriminate against *the air carrier*'s employee."[128] Congress did neither of these things. That omission must be presumed intentional.[129] Likewise, we must presume that Congress deliberately chose to refer to an air carrier or contractor as the alleged violator, rather than the narrower term "employer."[130] Thus, under a plain reading of the statute, AIR21 applies to air carriers who retaliate against their own employees or the employees of contractors.[131]

The right to file a complaint is also not limited to employees of the alleged violator—"[a] person who believes that he or she has been discharged or otherwise discriminated against *by any person* in violation of subsection (a) may" file a complaint.[132] Likewise, the statutory remedies are not confined to the employer of the affected employee—the Secretary shall order remedies against "*the person* who committed such violation."[133]

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[128] *Cf.* 29 U.S.C. § 206(a) ("Every employer shall pay to each of *his employees* who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates . . . ") (emphasis added); *id.* § 207(a)(1) ("[N]o employer shall employ any of *his employees* who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours . . .") (emphasis added).

[129] *See, e.g.*, *Lawson v. FMR LLC*, 571 U.S. 429, 441 (2014); *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 215-16 (2012).

[130] *See Lawson*, 571 U.S. at 441-42 ("[N]othing in § 1514A's language confines the class of employees protected to those of a designated employer.").

[131] *Lawson* is not to the contrary. Although the Court in *Lawson* interpreted Sarbanes-Oxley's protection of "an employee" expansively to mean that a contractor may not retaliate against its own employees, the Court did not decide the precise issue here: whether the words "an employee" should conversely be read narrowly to mean that an employer is *only* prohibited from retaliating against its own employees. *See id.* at 441 ("In contrast, nothing in § 1514A's language confines the class of employees protected to those of a designated employer. Absent any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity."), 441 n.7 ("We need not decide in this case whether § 1514A also prohibits a contractor from retaliating against an employee of one of the other actors governed by the provision.").

[132] 49 U.S.C. § 42121(b)(1) (emphasis added).

[133] *Id.* § 42121(b)(3)(B) (emphasis added).

This plain reading of the statute is supported by the broad regulatory definition of employee, which does not require an employer relationship between the employee and the alleged retaliating air carrier:

> Employee means an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or *an individual whose employment could be affected by an air carrier* or contractor or subcontractor of an air carrier.[134]

This application of AIR21 is also consistent with the Secretary's interpretation of almost identical language in Section 11(c) of the Occupational Safety and Health Act of 1970 (OSH Act).[135] Section 11(c) provides that "no person" shall discharge or otherwise discriminate against "any employee" because of OSH Act protected activity. OSHA's regulations interpreting that section provide that "because section 11(c) speaks in terms of any employee, it is also clear that the

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[134] 29 C.F.R. § 1979.101 (emphasis added). Notably, the first clause of the regulation also does not limit the definition of protected employees to an air carrier or contractor's *own* employees. We are bound to observe this regulation. *See* Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

[135] 29 U.S.C. § 660(c). Reading AIR21's whistleblower protection provisions and Section 11(c) in harmony makes sense in this context because facts that would constitute a violation of either statute often overlap, as recognized by the Secretary in the regulatory scheme. *See* 29 C.F.R. § 1979.103(e):

> ***Relationship [of AIR21 complaints] to section 11(c) complaints.*** A complaint filed under AIR21 that alleges facts which would constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), shall be deemed to be a complaint filed under both AIR21 and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of AIR21 shall be deemed to be a complaint filed under both AIR21 and section 11(c). Normal procedures and timeliness requirements for investigations under the respective laws and regulations will be followed.

employee need not be an employee of the discriminator."[136]

The Secretary and ARB have also similarly applied the plain language of statutory text under whistleblower statutes with less expansive language than AIR21.[137] In *Hill v. Tenn. Valley Auth.*,[138] the Secretary analyzed Section 5851(a) of the Energy Reorganization Act (ERA), which provided that '[n]o employer may discharge any employee or otherwise discriminate against any employee . . . ."[139] In that case, the complainants were employees of QTC, which had a contract with respondent TVA. The complainants brought an action against TVA when it significantly restricted the scope of the QTC contract and then refused to renegotiate the contract, causing the termination of complainants' employment. Then-Secretary Dole read the statute to not limit its terms to discharges or discrimination against any specific employer's employees or to "his" or "its" employees. As a result, any "employee" could bring an action against any "employer," *regardless of the relationship between the two*.[140] Secretary Dole specifically stated that the ALJ in that case erred by focusing on a "right-to-control" test when the statute's plain language did not require any type of employee-employer relationship at all. The Secretary acknowledged that a cause of action may of course exist when there was a "right-to-control," but it was not necessary in light of the language of the statute and the broad purpose and scope of the ERA.[141]

In *St. Laurent v. Britz, Inc.*, then-Secretary Martin likewise stated that the Complainant could pursue his ERA claim against the contractor and licensee even though they were not his direct employers. Secretary Martin explained:

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136 29 C.F.R. § 1977.5(b). This interpretation is also consistent with the AIR21 regulatory definition of "employee," which protects former employees and applicants from retaliation even though there is no employer-employee relationship at the time of the discrimination. *Id.* § 1979.101(a).

137 *Hill v. Tenn. Valley Auth.*, Case Nos. 1987-ERA-00023, -00024 (Sec'y May 24, 1989); *St. Laurent v. Britz, Inc.*, Case No. 1989-ERA-00015 (Sec'y Oct. 26, 1992); *Robinson v. Triconex Corp.*, ARB No. 2010-0013, ALJ No. 2006-ERA-00031 (ARB Mar. 28, 2012); *Nelson v. Energy Nw.*, ARB No. 2013-0075, ALJ No. 2012-ERA-00002 (ARB Sept. 30, 2015).

138 *Hill*, Case Nos. 1987-ERA-00023, -00024, slip op. at 2.

139 42 U.S.C. § 5851(a)(1) (1978); other sections of § 5851 amended by Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as 42 U.S.C. § 5851 (2005)).

140 *Hill*, Case Nos. 1987-ERA-00023, -00024, slip op. at 2-6.

141 *Id.* at 4 & n.2.

> Jurisdiction here does not depend on a direct employer-employee relationship, but derives from the construction and application of the statute. Section 5851(a) of the ERA provides that '[n]o employer . . . may discharge any employee or otherwise discriminate against any employee. . . . It is not limited in terms to discharges or discrimination against any specific employer's employees, and under the circumstances presented here, where Complainant is a contract employee whose responsibility includes reporting safety concerns to the contractor and the licensee, the Act applies.[142]

The ARB has not always relied on a plain reading of AIR21, the ERA, and other similar statutes in subsequent cases. Sometimes the Board has focused on the employer-employee relationship, like the ALJ did in this case,[143] and sometimes it has relied upon the plain text of the statute.[144] In *Robinson v. Triconex Corp.*, for example, the complainant-engineer owned and operated a company, R&R, which provided services to the respondents.[145] The Board, citing to *Hill*, reiterated that *any* employee could bring an action against *any* employer, and that no employee-employer relationship had to exist.[146] The same occurred in *Nelson v. Energy Nw.,* where the Board held that the control test was not necessary, given the ERA's

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142 *St. Laurent,* Case No. 1989-ERA-00015, slip op. at 2 (citing *Hill*, Case Nos. 1987-ERA-00023, -00024, slip op. at 3-5). Secretary Martin further stated that, in light of the statute's broad text, it was "not necessary for [her] to consider the applicability of the right to control and joint employer tests addressed by Respondents and the ALJ." *Id.* (citing *Hill,* Case Nos. 1987-ERA-00023, -00024, slip op. at 7 n.2).

143 *See, e.g., Stephenson v. NASA (Stephenson III)*, ARB No. 1996-0080, ALJ No. 1994-TSC-00005, slip op. at 2 (ARB Apr. 7, 1997) (Environmental Acts); *see also Evans*, ARB Nos. 2007-0118, -0121 (AIR21); *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 2003-0026, ALJ No. 1996-CAA-00008 (ARB Sept. 29, 2004) (ERA); *Seetharaman v. Gen. Elec. Co.*, ARB No. 2003-0029, ALJ No. 2002-CAA-00021 (ARB May 28, 2004) (Clean Air Act and other Environmental Acts); *Lewis v. Synagro Techs., Inc.*, ARB Nos. 2002-0072, -0116, ALJ Nos. 2002-CAA-00012, -00014, -00017 (ARB Feb. 27, 2004) (Environmental Acts); *Fullington*, ARB No. 2004-0019 (AIR21).

144 *Robinson*, ARB No. 2010-0013; *Nelson*, ARB No. 2013-0075. Along the way, the ARB has articulated variations of a joint employer test, discussed in Part I.B, *infra.*

145 *Robinson*, ARB No. 2010-0013, slip op. at 2-3.

146 *Id.* at 7-9.

statutory text.[147] The Board's interpretation of the ERA in *Hill*, *Robinson*, and *Nelson* is even more persuasive when applied to AIR21's more expansive anti-discrimination clause, which expressly prohibits "air carriers or contractors" from retaliating, not "employers."

The legislative history of both AIR21 generally and Section 42121 specifically provides additional support for this conclusion. Although it is not necessary to rely on legislative history because the text of the statute is unambiguous, the legislative history of both AIR21 generally and Section 42121 specifically provides additional support for this conclusion. AIR21 contained wide ranging reforms to the U.S. aviation system intended "to ensure that we continue to have the safest, most efficient aviation system well into the 21st century."[148] The whistleblower provisions "must be viewed primarily as a means for achieving AIR21's greater aviation safety goals."[149] Contractor employees, such as Printz, can be an important source of information regarding air safety. Congress recognized that "[f]light attendants and other airline employees are in the best position to recognize breaches in safety regulations and can be the critical link in ensuring safer air travel."[150] Simply put, an unduly restrictive reading of AIR21's whistleblower

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147 *Nelson*, ARB No. 2013-0075, slip op. at 7; *see also Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 1996-0173, ALJ No. 1995-CAA-00012, slip op. at 2 n.1 (ARB Apr. 8, 1997) (noting that "*a person* who discriminates against employees of another employer, for example, by directing a subcontractor to fire its employees for whistleblowing, is subject to the provisions of the employee protection laws") (emphasis added). The applicable laws in *Kesterson* were Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Clean Air Act (CAA), Toxic Substances Control Act (TSCA), Solid Waste Disposal Act (SWDA) and the ERA. *Id*. at 1.

148 146 Cong. Rec. S1247-07, S1248 (Mar. 8, 2000) (statement of Sen. Gorton); *see also* 146 Cong. Rec. H1002-01, H1008 (Mar. 15, 2000) (statement of Rep. Boehlert) ("That is our overarching objective, to maintain an aviation system that continues to be the finest and safest in the world."); *Cobb v. FedEx Corp. Servs., Inc.*, ARB No. 2012-0052, ALJ No. 2010-AIR-00024, slip op. at 8-13 (ARB Dec. 13, 2013) (interpreting "air carrier" broadly based on AIR21's text and legislative history).

149 146 Cong. Rec. S1247-07, S1252 (Mar. 8, 2000) (statement of Sen. Grassley) ("Whistle-blower protection adds another, much needed, layer of protection for the traveling public using our Nation's air transportation system."); 146 Cong. Rec. S1255-01, S1257 (daily ed. Mar. 8, 2000) (statement of Sen. Hollings) (AIR21 includes "whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems.").

150 145 Cong. Rec. S2841-02, S2855 (Mar. 17, 1999) (Introductory Statement of Sen.

protections that would allow an air carrier to retaliate against a contractor's employee for reporting safety concerns, especially about that air carrier's practices, would not serve AIR21's aviation safety goals.

In this case, however, liability does not attach to Frontier under the plain language of AIR21, because the ALJ found that Frontier (Ketterer) did not know about Printz's protected activity.[151] The ALJ found that there was no evidence that Ketterer was aware of Complainant's protected activity at the time he asked Robbins to remove Complainant from servicing Frontier's aircraft.[152] This finding is supported by substantial evidence.[153]

B. Frontier May Alternatively Be Liable as Printz's Joint Employer

Although relying upon the plain reading of the statute will appropriately determine air carrier[154] liability in many AIR21 cases, examining joint employer

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John Kerry pertaining to the AIR21 legislation).

[151] AIR21 requires that the air carrier retaliated against an employee "because" the employee engaged in protected activity. 49 U.S.C. § 42121(a).

[152] The ARB generally defers to an ALJ's credibility determinations unless they are "inherently incredible or patently unreasonable." *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012), *aff'd* No. 12-9563 (10th Cir. 2013) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 2006-0035, ALJ No. 2004-AIR-00030, slip op. at 13 (ARB Feb. 29, 2008)). The ALJ specifically found that both Ketterer and Robbins were credible witnesses, D. & O. at 23, and we find no basis to disturb those findings.

[153] D. & O. at 26 n.57 ("Complainant provided no evidence that Mr. Ketterer had any knowledge of his safety related complaints."); *see also id.* at 35 ("There is little to no evidence that Mr. Ketterer even knew of the concerns Complainant reported to Mr. Strickland the day prior when he asked Mr. Robbins to remove Complainant from further servicing Frontier's aircraft.") (citing JX G (Affidavit of Kevin Ketterer)); JX G at 2 ("At no time did Complainant report any safety-related concerns to me, nor do I have knowledge of concerns that Complainant may have reported to his employer, STS Line Maintenance.")).

[154] As noted, *supra* n.1, the CAA, 2021 amendment to AIR21 changed "air carrier" language from "[n]o air carrier or contractor or subcontractor of an air carrier . . ." to "[a] holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder . . .". 49 U.S.C. § 42121 (2021).

status is another way that liability can attach to an air carrier or contractor.[155] AIR21 does not define "employer" or "joint employer."[156] In the present case, the ALJ applied the Eleventh Circuit's "economic realities" test to determine whether Frontier was Printz's joint employer.[157] The Eleventh Circuit's test was developed to determine joint employer status under the Fair Labor Standards Act (FLSA) and

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[155] Liability may also attach when two putative employers constitute a single employer. This is variously referred to as horizontal joint employment, integrated employer, or a single employer. This analysis applies where two, separate legal entities are sufficiently associated that they share control over the employee. Because there is no suggestion in the instant case that Frontier and STS are anything but separate, disassociated entities, an integrated employer analysis is not applicable here. *See, e.g., Palmer v. W. Truck Manpower* (*Palmer I*), Case No. 1985-STA-00006, slip op. at 2-3 (Sec'y Jan. 16, 1987) (affirming the ALJ's finding that there was "interrelation of operations" over the employee's employment between the two employers to qualify as joint employers); *see also Myers v. AMS/Breckenridge/Equity Grp. Leasing 1*, ARB No. 2010-0144, ALJ Nos. 2010-STA-00007, -00008, slip op. at 9 (ARB Aug. 3, 2012) (noting that the test used in *Palmer I* is used "for determining whether two [entities are] so interrelated to justify treating them as one entity.").

[156] Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation. *Med. Transp. Mgmt. Corp.*, 506 F.3d at 1368; *see United States v. Williams*, 790 F.3d 1240, 1245 (11th Cir. 2015), *cert. denied*, 577 U.S. 1111 (2016) ("In the absence of a statutory definition, this Court must first consider whether the language at issue has a plain and unambiguous meaning.").

[157] D. & O. at 24-25. The factors under the economic realities test include: (1) the nature and degree of the putative employer's control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the right, directly or indirectly, to hire, fire, or modify the workers' employment conditions; (4) the power to determine the workers' pay rates or methods of payment; (5) the preparation of payroll and payment of workers' wages; (6) the ownership of facilities where the work occurred; (7) whether the worker performed a line job integral to the end product; and (8) the relative investment in equipment and facilities. *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996). Any appeal in the instant case would likely be to the Eleventh Circuit. *See* 49 U.S.C. § 42121(b)(4)(A) (stating that review of agency order may be brought in the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of such violation). The ALJ also relied on *Fullington,* ARB No. 2004-0019, and *Evans*, ARB Nos. 2007-0118, -0121. As explained, *infra*, however, these decisions set forth an unduly narrow joint employer test.

Migrant and Seasonal Workers' Protection Act (MSPA).[158] Although the FLSA and MSPA provisions and definitions do not exactly align with AIR21's anti-discrimination text, we agree that the economic realities test developed under those worker protection statutes is instructive in the instant case and in AIR21 cases generally, as clarified below.[159]

In *Layton v. DHL Express (USA), Inc.*,[160] the court explained that the existence of "a joint employment relationship depends on *the economic reality* of all the circumstances" and the eight "factors are used because they are indicators of *economic dependence*."[161] "They are aids—tools to be used to gauge the degree of dependence of alleged employees on the business to which they are connected . . . . Thus, the weight of each factor depends on the light it sheds on the []workers' economic dependence (or lack thereof) on the alleged employer, which in turn depends on the facts of the case."[162] Further, "a joint employment relationship is not determined by a mathematical formula . . . . The purpose of weighing the factors is

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158 D. & O. at 25 (citing *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012) (FLSA); *Cornell v. CF Ctr., LLC*, 410 F. App'x 265, 268 (11th Cir. 2011) (citing *Antenor*, 88 F.3d 925) (FLSA); *Likes v. DHL Express (USA), Inc.*, No. 2:08–cv–00428–AKK, 2012 WL 8499732 (N.D. Ala. 2010) (FLSA); *Woldu v. Hotel Equities, Inc.*, No. 1:09-cv-0685-HTW-CCH, 2009 WL 10668443 (N.D. Ga. 2009) (Section 1981)).

159 *Admin., Wage & Hour Div., U.S. Dep't of Lab. v. Halsey*, ARB No. 2004-0061, ALJ No. 2003-CLA-00005, slip op. at 8 (ARB Sept. 29, 2005), *aff'd* No. 3:06-cv-00205 JWS, 2007 WL 4106268 (D. Alaska 2007) ("'Employees' for purposes of the FLSA are those who as a matter of economic reality are dependent upon the business to which they render service."); *Admin., Wage & Hour Div., U.S. Dep't of Lab. v. Elderkin*, ARB Nos. 1999-0033, -0048, ALJ No. 1995-CLA-00031, slip op. at 8-9 (ARB June 30, 2000) ("In order to determine whether [the worker] was an [employee or] independent contractor, we look to the "economic reality" of his relationship with Elderkin.") (FLSA); *Reich v. Baystate Alt. Staffing, Inc.*, ARB No. 1994-FLS-00022, slip op. at 3 (ARB Dec. 19, 1996), *aff'd in part and rev'd in part sub nom. Baystate Alt. Staffing v. Herman*, 163 F.3d 668 (1st Cir. 1998) ("[T]he ultimate issue is whether as a matter of 'economic reality' the particular worker is an employee of the business or organization in question.") (overtime compensation provisions of the FLSA); *Echaveste v. Horizon Publishers & Distribs.*, Case No. 1990-CLA-00029, slip op. at 4-5 (Sec'y May 11, 1994) (affirming the ALJ's use of FLSA's economic realities test to determine whether the children-employees were subject to FLSA's protections against oppressive child labor).

160 686 F.3d 1172 (11th Cir. 2012).

161 *Id.* at 1177 (quoting *Antenor,* 88 F.3d at 932-33 (emphasis added)).

162 *Id.* (quoting *Antenor*, 88 F.3d at 932-33) (brackets in original).

not to place each in either the contractor or the [alleged employer's] column, but to view them qualitatively to assess the evidence of economic dependence, which may point to both."[163] Finally, the *Layton* court instructed, "in considering a joint-employment relationship, we must not allow common-law concepts of employment to distract our focus from economic dependency."[164]

These principles are equally applicable when assessing joint employer status under AIR21.[165] The broad language of the anti-discrimination provision, the legislative purpose, and the regulatory definition of "employee" all point to Congressional concern with protecting whistleblowers whose employment is affected by an air carrier or contractor.[166] We therefore conclude that determination of joint employer status under AIR21's anti-discrimination provision is more properly aligned with the economic realities test than with a narrow control test.

Although the ALJ recognized this as the proper approach, in applying the Eleventh Circuit's eight-factors, he did not qualitatively assess whether Printz was *economically dependent* on Frontier. Indeed, the ALJ elevated Frontier's power to control over other factors. This is understandable given the Board's apparent focus

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[163] *Id*. at 1178 (quoting *Antenor*, 88 F.3d at 932-33) (brackets in original).

[164] *Id*. (citing *Antenor,* 88 F.3d at 932-33).

[165] If upon examination we find statutory text to be ambiguous, including when the ambiguity is caused by the absence of a statutory definition, we look to traditional canons of statutory construction, context, and legislative history, to resolve the ambiguity. *See Williams*, 790 F.3d at 1245; *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 80 (ARB Sept. 30, 2016), *reissued with full dissent*, Jan. 4, 2017 (Royce, J., concurring, in part, and dissenting, in part) ("When statutory provisions are unclear, we necessarily turn to other means of statutory construction, including legislative history and other statutes, as interpretive tools.") (citing *Spinner v. Landau & Assocs., LLC*, ARB Nos. 2010-0111, -0115, ALJ No. 2010-SOX-00029, slip op. at 9-16 (ARB May 31, 2012) (in which the Board used different interpretative tools, including textual analysis, the use of certain words in the statute's title, review of other statutes, and legislative history, when the relevant statutory provision was unclear and resulted in ambiguity)).

[166] *See supra,* Part 1.A. *Cf.* 29 C.F.R. § 1977.5(a) ("All employees are afforded the full protection of [OSH Act] section 11(c) . . . The Act does not define the term "employ." However, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts."); *see also* 29 C.F.R. § 1979.103(e) (recognizing factual overlap and relationship between AIR21 and Section 11(c) complaints).

on control under the particular facts in *Fullington* and *Evans*. To be sure, whether the entity has the power to control the work to be performed or power to control employment conditions is relevant. Control over the power to hire and fire and set wages, however, should not be elevated over other factors, such as whether the individual's work is an integral part of the air carrier's business,[167] or whether the work is performed in the putative employer's facilities.[168]

In sum, whether to rely on the plain text of AIR21's antidiscrimination provision or apply the joint employer test to determine air carrier or contractor liability depends on the particular facts and circumstances of each case. In the vast run of AIR21 cases, there should be no need to analyze joint employer status, but where appropriate,[169] the focus of the analysis should be on the economic realities of

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[167] *See, e.g., Cobb*, ARB No. 2012-0052, slip op. at 8-13 (reviewing AIR21 statutory text and legislative history to determine a contractor was also an "air carrier" within the pre-CAA, 2021 amendment definition because its services were integral to the air services of an air carrier).

[168] 29 C.F.R. § 1979.101 references "an individual whose employment could be *affected by* an air carrier or contractor or subcontractor of an air carrier." (emphasis added). An air carrier could affect an individual's employment by interfering with the employment relationship without exercising or retaining any traditional indicia of control over the employment terms and conditions. This is illustrated by the facts of the instant case. Frontier could (and apparently did) "affect" Printz's employment with a phone call requiring STS to remove him from working on Frontier's airplanes. D. & O. at 35-36 (finding that the focus of Complainant's discharge was his actions and inactions while working that garnered Ketterer's attention enough to ultimately ask "Robbins to remove Complainant from further servicing Frontier's aircraft.").

[169] While we cannot predict every set of facts where the joint employer analysis might be the appropriate analytical framework, this case may present an example of such. Under a plain reading of the statute, Frontier would not be liable because the ALJ found that Frontier lacked knowledge of Printz's protected activity. *See* Part I.A, *supra.* However, joint or integrated employers may be liable even if they did not knowingly participate in the alleged illegal conduct. *See Palmer v. W. Truck Manpower (Palmer III)*, Case No. 1985-STA-00016 (Sec'y Mar. 13, 1992) (holding that knowing participation not required for joint employer to be vicariously liable); *Jones v. Consol. Pers. Corp.,* ARB No. 1997-0009, ALJ No. 1996-STA-00001 (ARB Jan. 13, 1997) (acknowledging the Secretary's holding in *Palmer* that under the employee protection provision of the STAA, a joint employer may be held vicariously liable, even in the absence of knowing participation, for the discriminatory act of another); *Cook v. Guardian Lubricants, Inc.*, Case No. 1995-STA-00042 (Sec'y May 1, 1996) (same). *But see Logan v. B H 92 Trucking, Inc.*, No. 19-cv-1875, 2022 WL 198806, at *7-8 (N.D. Ill. 2022) (in a STAA case, finding joint employer was not liable for co-employer's

the complainant's dependence on the putative employer. This includes consideration of whether the putative employer had the authority or power to affect the employment of the Complainant as one factor, but it should not be the dominant factor. In this case, because the ALJ did not qualitatively apply all the factors to assess Printz's economic dependency on Frontier, we remand to the ALJ to do so.[170]

2. The ALJ's Contributing Factor Analysis Does Not Demonstrate that the ALJ Considered or Weighed All the Evidence in the Record

Complainant has the burden to prove, by a preponderance of the evidence, that his protected activity was a contributing factor to the employer's adverse action.[171] "A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'"[172]

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conduct where complainant did not offer any evidence that it either participated in the violative conduct or failed to take corrective measures within its control); *Myers*, ARB No. 2010-0144, slip op. at 12-14 (Cooper-Brown, J., concurring) (distinguishing between liability for vertical joint employers (joint employer knew or should have known of other employer's illegal action) and integrated enterprise test (non-acting employer may be vicariously liable notwithstanding lack of knowing participation in the retaliatory action)); *but cf. Whitaker v. Milwaukee Cnty.*, 772 F.3d 802, 811-12 (7th Cir. 2014) (concluding that joint employers are not automatically liable under the ADA and liability may be imposed for co-employer's discriminatory conduct only if defendant employer knew or should have known about other employer's conduct and failed to undertake prompt corrective measures within its control); *Capitol EMI Music, Inc.*, 311 N.L.R.B. 997 (1993) (concluding that vicarious liability may be ascribed to a joint employer under the NLRA depending on the employment arrangement and circumstances); EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, 1997 WL 33159161, at *11 (Dec. 3, 1997) (staffing agency joint employer liability may be imposed for co-employer's discriminatory conduct only if defendant employer knew or should have known about other employer's conduct and failed to undertake prompt corrective measures within its control).

[170] Notably, Printz's work was an integral part of Frontier's business, and all his work was performed on Frontier's aircraft, if not on their premises. D. & O. at 4.

[171] *Petitt v. Delta Airlines, Inc.*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 18 (ARB Mar. 29, 2022).

[172] *Id.*

The ARB reviews an ALJ's factual findings under the substantial evidence standard.[173] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[174] A finding of fact lacks contextual strength and substantial evidence if the fact finder ignores, or fails to resolve, a conflict created by countervailing evidence or "if it is overwhelmed by other evidence or if it really constitutes mere conclusion."[175] "The ARB's appellate review requires that the ALJ conduct an appropriate analysis of the evidence to support his findings."[176] It is essential that the ALJ "adequately explain why he credited certain evidence and discredited other evidence."[177] Although an ALJ "need not address every aspect of [a party's claim] at length and in detail," the findings "must provide enough information to ensure the Court that he properly considered the relevant evidence underlying [the party's] request."[178] A reviewing court must be able to "discern what the ALJ did and why he did it."[179]

In support of his finding that Complainant did not establish by a preponderance of the evidence that his protected activity was a contributing factor to the adverse action taken against him by STS, the ALJ found although "the temporal proximity between [Complainant's] protected activity [on June 2] and Respondent's adverse action [on June 4] could provide circumstantial evidence" that Complainant's protected activity contributed to the termination of his employment, that it did not do so in this case.[180] As grounds for this determination, the ALJ found persuasive that Robbins's decision to terminate Complainant's employment was based on reports of Complainant's conduct when he was not working on Frontier aircraft and Complainant's poor interactions with other AMTs and

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173 29 C.F.R. § 1979.110(b).

174 *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 8 (ARB June 29, 2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

175 *Dalton v. U.S. Dep't of Lab.*, 58 F. App'x 442, 445 (10th Cir. 2003) (citations omitted); *Carter v. Marten Transp., Ltd.*, ARB Nos. 2006-0101, -0159, ALJ No. 2005-STA-00063, slip op. at 7-8 (ARB June 30, 2008) (citations omitted).

176 *Clem v. Comput. Scis. Corp.*, ARB No. 2016-0096, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 17 (ARB Sept. 17, 2019).

177 *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (citations omitted).

178 *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013) (citations omitted).

179 *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (quotations and citation omitted).

180 D. & O. at 35.

Frontier personnel, and not Complainant's protected activity.[181] The ALJ found Robbins's reasoning was supported by evidence in the record of Complainant's actions and inactions that garnered the attention of both Ketterer and Robbins, including Ketterer's observation of Complainant on June 3 taking a prolonged break on his phone in the terminal area.[182] The ALJ noted that there was no evidence that Ketterer was aware of Complainant's protected activity at the time he asked Robbins to remove Complainant from further servicing Frontier's aircraft.[183]

Although the ALJ applied the correct contributing factor standard, and correctly noted that "[t]he Board has observed, 'that the level of causation that a complainant needs to show is extremely low,'"[184] the ALJ's contributing factor analysis failed to address certain evidence in the record and its potential impact on a contributing factor analysis that may have weighed in Complainant's favor in establishing by a preponderance of the evidence that his protected activity contributed to the termination of his employment. Specifically, the ALJ failed to discuss the June 3 conversation between Robbins and Complainant, during which Robbins told Complainant that Ketterer witnessed Complainant in the terminal for an extended period of time, and that he was "tired of hearing [Complainant's] name and that [he] 'needed to retire or maybe he would just take it for me.'"[185]

Robbins's phone call about "hearing [Complainant's] name" occurred one day after Complainant's reports to Strickland, who in turned called Robbins advising him of Complainant's reports, and one day before Robbins decided to terminate Complainant's employment. As the ALJ did not analyze Robbins's statement that he was "tired of hearing [Complainant's] name," we are unable to ascertain whether Robbins made this statement solely in the context of Ketterer's multiple reports to Robbins regarding Complainant's poor work behavior leading up to and culminating in Ketterer's observation of Complainant in the terminal on June 3, or if the statement was also made partially in the context of Complainant's protected activity on June 2. Because the ALJ failed to analyze Robbins's statement, the Board cannot reasonably discern whether Complainant's protected activity was included in the reasons he was "tired of hearing" Complainant's name. It may be that the ALJ found that Robbins's statement (June 3) was not made considering

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181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.* at 34 (citing *Canadian Nat'l Ry.*, ARB No. 2016-0035, slip op. at 15).

185 *Id.* at 17.

Complainant's protected activity (June 2), or was ambiguous, or was not made at all, and thus Complainant's protected activity was not a consideration in his decision to terminate Complainant's employment (June 4), but without any specific findings or analysis to that effect the Board is unable to ascertain the ALJ's decision-making process.

The ALJ also appears to have unduly discounted Complainant's argument that STS chose not to follow its progressive disciplinary process and that STS has applied its process inconsistently.[186] STS's Handbook describes its four-step progressive discipline policy and procedure,[187] and also lists certain behavior and conduct issues that are "not subject to progressive discipline and may be grounds for immediate termination."[188] Although the Handbook did not *require* STS to follow that process,[189] the fact that STS *chose* to bypass the disciplinary steps for Complainant's behavior that is not included in Handbook's list of behavior "not subject to progressive discipline," and proceeded immediately to terminate his employment, may provide circumstantial evidence that Complainant's protected activity was a contributing factor in STS's decision to terminate his employment.[190]

An ALJ does not need to address every aspect of a complainant's claim.[191] However, the ALJ's contributing factor analysis in this case shows that the ALJ did not analyze or adequately weigh relevant evidence as to the issue of contributing factor, including STS's decision to bypass its usual progressive disciplinary process, or explain how he credited or discredited Robbins's statement to Complainant in

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186 Comp. Post-Hearing Br. at 22-24.

187 CX 1 at 19-21 (STS's progressive discipline policy has four steps: Counseling and Verbal Warning, Written Warning, Suspension and Final Warning Letter, and Recommendation for Termination of Employment).

188 *Id*. at 21 (such conduct issues include behavior that is illegal, theft, substance abuse, intoxication, fighting and other acts of violence at work).

189 *Id*. at 19 ("STS Line Maintenance reserves the right to combine or skip steps depending on the facts of each situation and the nature of the offense.").

190 Employees may meet their evidentiary burden to establish contributing factor with circumstantial evidence. *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan. 17, 2023) (citing *Palmer*, ARB No. 2016-0035, slip op. at 53. Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism. *Id*. at 12 (citations omitted).

191 *Mori*, 917 F. Supp. 2d at 65.

support of his temporal proximity and contributing factor findings. As the ALJ noted, "the level of causation that a complainant needs to show is extremely low."[192] Thus, STS's choice to bypass its usual disciplinary process, Robbins's statement that he was tired of hearing Complainant's name (within 24 hours of having heard Complainant's name when he engaged in protected activity), and the temporal proximity between Complainant's protected activity and the adverse action, may have met that level of causation.

We conclude that the ALJ's finding that there was no contributing factor causation was not adequately explained in light of these facts in the record. Accordingly, the Board cannot affirm the ALJ's determination that Printz's protected activity "played no role whatsoever in STS's decision to terminate Complainant's employment."[193] Therefore, we remand to the ALJ to reconsider his contributory factor finding, taking into account these identified facts.[194]

CONCLUSION

We **VACATE** the ALJ's finding concerning Frontier's status as a joint employer, **VACATE** the ALJ's finding concerning whether Printz's protected activity was a contributing factor to the determination to terminate his employment, and **REMAND** for additional fact-finding and analysis in accordance with our instructions.

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192 D. & O. at 34 (citation omitted).

193 *Id*. at 36.

194 Respondent STS also argues before the Board that "the substantial evidence in the record clearly and convincingly establishes STS would have terminated the Complainant" absent his protected activity. Respondent STS Response Br. at 27. We decline to independently assess the record to make this affirmative defense determination on appeal, but recommend the ALJ do so on remand, regardless of the outcome of his contributing factor analysis.

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge