



In the Matter of:

ROBERT KREB,

ARB CASE NO. 2018-0065

COMPLAINANT,

ALJ CASE NO. 2016-AIR-00028

v.

DATE: September 28, 2020

JACKSON JET CENTER, ET AL.,

RESPONDENT.

Appearances:

For the Complainant:

Erin M. Pettigrew, Esq.; *EMP Law, LLC; Portland, Oregon;* and David E. Breskin, Esq.; *Breskin Johnson Townsend, PLLC; Seattle, Washington*

For the Respondent:

Brad P. Miller, Esq. and Carsten A. Peterson, Esq.; *Hawley Troxell Ennis & Hawley LLP; Boise, Idaho*

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

DECISION AND ORDER

PER CURIAM. The Complainant, Robert Kreb, filed a retaliation complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)¹ with the Department of Labor's Occupational Safety and Health Administration (OSHA). Complainant alleged that Respondent, Jackson Jet Center (JJC) retaliated against him in

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

violation of the whistleblower protection provisions of AIR 21. OSHA concluded Complainant neither engaged in protected activity, nor was he blacklisted from employment with Corporate Air Center. Complainant appealed this decision to the Office of Administrative Law Judges (OALJ). A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint after a hearing and receiving evidence. He found that Complainant had failed to prove by a preponderance of the evidence that he engaged in protected activity. Complainant has appealed the dismissal of his complaint to the Administrative Review Board (ARB). We affirm the ALJ's denial.

BACKGROUND²

Complainant was hired as a Fixed Wing Pilot by JJC under its Part 135 Certificate to Fly Life Flight Network's (LFN) aircraft for medical transport services. Complainant was based at LFN's Lewiston, Idaho base.

On March 6, 2014, Respondent's Chief Pilot, Mr. Ryan Pike, emailed Complainant a template copy of the Flight Risk Assessment Tool (FRAT) form used by pilots to determine the risk of a single flight by checking off different safety risks producing a numerical result to determine an overall risk score. The pilots were routinely directed to fill out a single FRAT for each flight.

On July 8, 2014, Complainant worked an evening shift into the morning of July 9. At 9:00 a.m., Complainant completed this shift and then went home to rest. Complainant woke up to an email sent by Respondent's Director of Operations, Mr. Steve Bower, with a flight assignment: reposition aircraft N890WA from the Lewiston base to the Dallesport, Washington base, and then return with a Dallesport pilot the next morning. Complainant was expected to cover the night shift and perform any EMS flights assigned to him out of the Dallesport base. Complainant returned Mr. Bower's email expressing safety concerns if he accepted the assignment and advising that the assignment was a medium to high risk flight

² This background follows the ALJ's Decision and Order and undisputed facts. In reciting these background facts, we make no independent findings of fact.

under the FRAT checklist.³ He suggested changes to the pilot schedules to mitigate the flight risk. Mr. Pike called and instructed that they were to go ahead as planned with the flight.

Complainant arrived for his evening shift. He had not received a response from his email other than the phone call with Mr. Pike. Around 10:00 p.m., LFN redirected him to fly to Aurora, Oregon, with a helicopter pilot. Complainant contacted LFT's COM Center, or dispatch, to get feedback about his safety concerns with LFN. Complainant spoke to the manager, and reiterated his concerns that the assignment would be a medium to high risk flight, because he was not familiar with the Dallesport base, and he would be encroaching on the surrounding mountains in the dark. He also stated he expected to run out of time, potentially violating the 14-hour duty rule, and that he would become fatigued, causing the aircraft to be grounded somewhere inconvenient.

Around 10:45 p.m., Complainant filled out a FRAT and generated a Risk Assessment Total of 60.⁴ Under the Respondent's metrics, a score of 60 falls within a medium level of risk. Complaint submitted the FRAT via email to Mr. Bower and Mr. Pike, and repeated his scheduling concerns. Ten minutes later, Complainant called Mr. Pike who advised that he had not received the FRAT, but Complainant could get a hotel if he ran out of duty time or became too tired. Complainant prepared to depart for the airport, but received a phone call from dispatch advising LFN cancelled the reposition flight and to stand down. Ultimately, the Complainant did not fly during the July 9 shift. In the afternoon of July 10, 2014, Mr. Pike told Complainant that his employment with Respondent was terminated. Respondent filled out a Personnel Action Form, which indicated Complainant's employment was terminated in part for falsifying company documentation to indicate that the flight assignment was unsafe and for being dishonest with management.

³ Complainant listed the following safety concerns: “[u]nfamiliar/unknown/limited FW base accommodations in DLS; [h]ostile nighttime operational equipment (Columbia gorge); [n]o synthetic vision installed on N890WA to increase safety margins; [h]eavy encroachment of rest periods yesterday/today book-ending a long duty period last night due to scheduling mix-ups; [and] [a]nticipation of typically heavy LFN demand from DLS and [r]epositioning flights risk increasing fatigue and possible [g]rounding from flight/duty rest requirements under recently [c]larified restrictions to Part 91 Flight completion within duty [p]eriods by JJC.”

⁴ Complainant filled out the FRAT as an evaluation of not just one flight, but as to the cumulative effect of the whole shift, with his expectation of returning to the Lewiston base the next morning on July 10. D. & O. at 11-12.

Sometime in 2015, Complainant was interviewing with Corporate Air Center's Chief Pilot and flew with him to Seattle during the interview process. While in Seattle, Complainant witnessed but did not hear a conversation between Corporate Center's pilot and a Charter and Maintenance Supervisor for Respondent. Two weeks after this interaction, Complainant received a voicemail advising that Corporate Air Center was going to go in another direction for the position.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ's AIR 21 decision.⁵ The Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.⁶

DISCUSSION

AIR 21's employee protection provisions generally prohibit covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the AIR 21 whistleblower statute.⁷ To prevail on an AIR 21 whistleblower complaint, the Complainant must prove by a preponderance of the evidence that he or she was an employee who engaged in activity the statute protects, suffered an adverse employment action, and that the protected activity was a contributing factor in the employer's decision to take the adverse action.⁸ The failure to prove any one of these elements necessarily requires dismissal of a whistleblower complaint. As the ALJ found that Complainant did not establish by a preponderance of the evidence that

⁵ 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. 13,186 (Mar. 6, 2020).

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

⁷ See 49 U.S.C. § 42121(a).

⁸ See 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. §1979.109(a); *Hukman v. U.S. Airways, Inc.*, ARB No. 2018-0048, ALJ No. 2015-AIR-00003, slip op. at 5 (ARB Jan. 16, 2020). See also *Poulter v. Cent. Cal Transp. LLC*, ARB No. 2018-0056, ALJ No. 2017-STA-00017, slip op. at 11-13 (ARB Aug. 18, 2020) (the ALJ must evaluate the countervailing evidence to determine whether a complainant engaged in protected activity).

he engaged in protected activity, a required element, we will limit our discussion to this finding and will not reach the other elements of Air 21 actions.

Complainant argues the ALJ erred in requiring him to prove an actual violation or use specific citations to a Federal Aviation Administration (FAA) rule to establish protected activity. We note that the ALJ correctly stated more than once that Complainant did not need to identify or describe an actual violation or to prove that a violation was certain to occur.⁹ We find that Complainant misstated the standard the ALJ employed to define “protected activity.”

Complainant also argues on appeal that the ALJ should have considered the reasonableness of the safety reports at the time the first report was made. However, the ALJ was correct to hold that an employee engages in protected activity whenever the employee provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee’s belief of a violation is subjectively and objectively reasonable.¹⁰

In the case before us, the ALJ thoroughly considered Complainant’s contention that he engaged in protected activity when he raised safety concerns about the July 9 flight assignment.¹¹ The ALJ carefully went through the potential federal aviation regulation violations and safety concerns Complainant raised,

⁹ The ALJ properly summarized the law on this point by noting: “Though the complainant “need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).” D. & O. at 56 (citing *Malmanger v. Air Evac EMS, Inc.*, ARB No. 2008-0071, slip op. at 9 (ARB July 2, 2009)).

¹⁰ 49 U.S.C.A. § 42121(a)(1).

¹¹ The employee must persuade the factfinder—here, the ALJ—of the existence of protected activity. See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (“The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.”) (alterations in original and internal quotation marks omitted); *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 2012-0028, ALJ No. 2010-SWD-00001, slip op. at 11 (ARB Apr. 25, 2014) (“[T]he preponderance of the evidence standard requires that the employee’s evidence persuade[] the ALJ that his version of events is more likely true than the employer’s version. Evidence meets the ‘preponderance of the evidence’ standard when it is more likely than not that a certain proposition is true” (alteration in original and internal quotation marks omitted)).

made credibility findings,¹² and evaluated the evidence to determine whether Complainant held an objectively reasonable belief that the safety information he provided in the FRAT and emails was a violation of federal aviation regulations or laws.

After reviewing the FAA regulations and other provisions of Federal law relating to air carrier safety, the ALJ found Complainant did not have an objectively reasonable belief that a violation existed or was likely to occur considering the knowledge available to a reasonable person in the same factual circumstances. Critical in this regard are the ALJ's findings, supported by the substantial evidence of record, that none of the safety concerns were imminent or entirely truthful. The record shows that a pilot with the same experience and training would not have thought the cited safety concerns were likely or imminent violations of federal aviation standards, but at most possibilities dependent on factors that were unknown or unlikely at the time Complainant raised his concerns. Complainant offered no evidence that a pilot with his training and experience would have agreed that accepting the July 9 flight assignment would have posed a safety risk. The ALJ found that Complainant's refusal to accept the flight assignment, his FRAT report, and his other comments about safety concerns did not meet the definition of protected activity.

Substantial evidence supports the ALJ's finding that Complainant's report of safety concerns exaggerated or misrepresented the risks of the July 9 flight assignment.

The ALJ concluded, as noted earlier, that Complainant did not have an objectively reasonable belief that he engaged in protected activity when he provided safety concerns relating to federal law or regulations that he believed would be violated if he completed his intended flight assignment. We agree. Accordingly, we affirm the ALJ's finding that Complainant did not engage in protected activity.

¹² The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted). Complainant did not offer any evidence that the ALJ's credibility determinations were inherently incredible or patently unreasonable.

CONCLUSION

The ALJ's determination that Complainant did not engage in protected activity is supported by the substantial evidence. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** Robert Kreb's complaint.

SO ORDERED.