



**In the Matter of:**

**RONALD ROOKS,**

**ARB CASE NO. 04-092**

**COMPLAINANT,**

**ALJ CASE NO. 03-AIR-35**

**v.**

**DATE: June 29, 2006**

**PLANET AIRWAYS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***Martin E. Leach, Esq., Feiler, Leach & McCarron, P.L., Coral Gables, Florida***

***For the Respondent:***

***Michael Moulis, Esq., Moulis & Associates, P.A., Fort Lauderdale, Florida***

**FINAL DECISION AND ORDER**

Ronald Rooks filed a complaint alleging that his former employer, Planet Airways, Inc., retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005) and its implementing regulations, 29 C.F.R. Part 1979 (2005). A Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that Planet violated AIR 21 when it fired Rooks, and awarded Rooks back pay and compensatory damages. The ALJ subsequently awarded costs and attorney's fees. For the following reasons, we affirm the ALJ's decisions.

## BACKGROUND

The record supports the ALJ's findings of fact, R. D. & O. at 3-17, which we summarize briefly. Planet Airways was a charter air service operating out of Fort Lauderdale, Florida, with its corporate office in Orlando. Planet hired Rooks, a commercial pilot for more than 12 years, as a captain in January 2002. Planet's Exhibit (PX) 13.

The events leading up to Rooks's firing began after he and his crew flew to Denver, Colorado. About 11:00 p.m. on August 27, 2002, one of the flight attendants went to the emergency room of a hospital and was later admitted. Hearing Transcript (TR) at 269. The other four attendants, including senior flight attendant Sabine Fulks, stayed up most of the night with their ailing colleague. TR at 113-14.

The next day, August 28, one flight attendant stayed behind with the hospitalized employee and the other three flew with Rooks, the first officer, and the flight engineer to Memphis, Tennessee, and then onto Orlando, Florida, arriving about 8:00 p.m. TR at 117-20. They were scheduled to leave Orlando at 8:30 a.m. on August 29, 2002, fly to Nassau to pick up repatriated Haitians, take them to Port-au-Prince, and then return to Miami. Rooks's Exhibit (RX) 5. About 7:00 a.m., Rooks learned that the departure had been delayed until 11:00 a.m. because the client's check for the charter to Port-au-Prince had not cleared. TR at 270-73.

Later that morning, the Planet dispatcher informed Rooks that the check had still not cleared and departure was again delayed until 2:00 p.m. TR at 275. Rooks and the crew arrived at the airport after lunch, but the flight remained on hold. TR at 276-77. The Planet dispatcher told Rooks at about 5:00 p.m. that the flight could go, but by that time the six-hour deadline on the paperwork necessary to release the flight had expired. TR at 48-54, 277-80; PX 14.

At 5:45 p.m., the dispatcher related to Rooks that he should go to Delta Airlines to pick up the paperwork. Rooks explained that he had no way of getting to Delta and asked that the papers be faxed to him at the charter facility. TR at 56-57, 280, 283-84; PX 10, RX 6-7, 12.

Later, Rooks informed the chief pilot, James Phinney, that some crew members were starting to show signs of fatigue and making negative remarks about being up all day and flying all night. TR at 290-91. Phinney emphasized the importance of the flight and suggested that the crew fly to Port-au-Prince, which was the revenue leg, and spend the night there. TR at 91-93, 537. Phinney told Rooks to discuss the situation with the crew and report back. RX 16.

Rooks called the crew together. Supervisor Fulks testified that she told Rooks at the meeting that she was fatigued and did not think she could make the 10-to-12 hour trip, that it would not be safe to make the flight. TR at 122, 145. Fulks added that Rooks tried to convince the crew to fly, but two other flight attendants were also fatigued. TR at

123-24, 153. Fulks stated that the flight attendants agreed it would be best to overnight in Orlando or Nassau and do the flight to Port-au-Prince the next day. TR at 142, 147, 152-53, 202, 232. On cross-examination, Fulks termed “a lie” Phinney’s testimony that the crew did not report being fatigued but simply followed Rooks’s instructions and canceled the flight. TR at 153, PX 16.

Flight attendant Marc Stetler described the medical emergency that occurred on August 27, TR at 166, the flight to Memphis and then Orlando, and the repeated delays in departure for Nassau. TR at 170-74, 196-97; PX 9-10, RX 9-10. Stetler told Rooks at the meeting that he was “too tired” to complete the trip. TR at 175-76, 190. He testified that the flight attendants were fatigued, “all way too tired,” and had been on duty for at least 10 hours. TR at 181. Stetler added that he stated to Rooks he was “too fatigued to fly according to FAA regulations,” but was okay with a ferry flight to Nassau because he could ride as a passenger. TR at 199-200.

Jose Yannes, who accompanied Stetler to the hospital on August 27, testified that before Rooks talked about the number of hours the crew had been on duty, he told Rooks he was “tired, exhausted” from the “long day” and personally noticed that the other attendants were, too. TR at 218-22. Yannes added that he was even too fatigued to fly to Nassau and would rather stay overnight in Orlando, but could have done the ferry flight. TR at 222-28. While long delays in the charter business were not unusual, according to Yannes, the question was whether the crew could “keep flying all night after being up all day here waiting.” TR at 236-38; PX 30.

First Officer Matt Gorshe, who joined the flight at Denver, testified that Rooks asked the crew at the meeting about their readiness to complete the trip. TR at 57. The consensus was that the flight attendants were too fatigued to fly, Gorshe stated, but Rooks had been told by Phinney that it was in “everyone’s best interests” to do the flight and that there would be “repercussions” if the flight was canceled. TR at 63, 77, 294, 325-26.

After his discussion with the crew, Rooks called Phinney at 6:45 p.m. and said that he still did not have the required paperwork and that some of the crew members were too fatigued to fly. TR at 316. Rooks suggested that the crew go as far as Nassau or stay in Orlando and do the trip to Port-au-Prince the next day, but Phinney said that the client insisted on the trip occurring that day. TR at 304, 324-25, 569.

Phinney testified that he told Rooks to end the flight in Port-au-Prince and stay overnight, but that Rooks refused to make the crew stay there. TR at 492-94, 536. Rooks testified that he joked with Phinney about Port-au-Prince being a dangerous place, but that he reassured crew members that it was safe enough. TR at 292-96. Gorshe testified that he did not want to spend the night in a hotel in Port-au-Prince, but would have gone there and stayed overnight in the airplane. TR at 91-92, 98-99. Fulks testified that the flight attendants had a short discussion about Haiti being unsafe, but that was after they told Rooks they were too fatigued to complete the trip. TR at 146, 178.

At 7:00 p.m., Planet's Chief Executive Officer, Peter Garranbone, called Rooks to tell him that Planet did not want the crew to fly "tired" and asked if they could ferry the plane back to Fort Lauderdale. TR at 324. The plane finally left Orlando at 8:18 p.m. and was diverted to Miami. TR at 71; RX 14.

Rooks and the crew were told to report to Phinney on August 30, 2002. TR at 327. Rooks and his first officer were suspended with pay until September 3, 2002. RX 16. At a meeting on September 5, Phinney fired Rooks after he stated that his actions on August 29 were appropriate and that he would do the same thing again. TR at 330-32; PX 4, 9, 17; RX 15.

Subsequently, Rooks filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Planet had terminated his employment in retaliation for raising safety concerns. OSHA dismissed the complaint, RX 19, and Rooks requested an administrative hearing, which was held on October 21-22, 2003.

### **ISSUES PRESENTED**

The issues before the ARB are: (1) whether the ALJ correctly concluded that Planet violated AIR 21 and (2) whether the ALJ's rulings on remedies, which are unchallenged on appeal, should be affirmed.

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

The ARB has jurisdiction to review the ALJ's recommended decision under AIR 21 § 42121(b)(3) and 29 C.F.R. § 1979.110. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121).

We review the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). *See* 68 Fed. Reg. 14,106 (Mar. 21, 2003) (the ARB "shall accept as conclusive ALJ findings of fact that are supported by substantial evidence"). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

We review conclusions of law de novo. *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-4, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 03-AIR-10, slip op. at 4 (ARB Dec. 30, 2004).

## DISCUSSION

### Elements of an AIR 21 whistleblower complaint

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air commerce safety. The statute prohibits air carriers, contractors, and their subcontractors from discharging or “otherwise discriminat[ing] against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)” engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a). Under AIR 21, an employee is protected if he:

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States....

49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(b)(1).

The AIR 21 complainant must allege and later prove that he was an employee who engaged in activity the statute protects; that an employer subject to the act had knowledge of the protected activity; that the employer subjected him to an “unfavorable personnel action;” and that the protected activity was a “contributing factor” in the unfavorable personnel action. 49 U.S.C.A. § 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the complainant proves by a preponderance of the evidence that the respondent has violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.104(d). *See, e.g., Negron*, slip op. at 6; *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004).

The federal aviation regulations (FARs) governing air safety confer on the pilot in command “final authority and responsibility for the operation and safety of the flight.” 14 C.F.R. § 1.1 (2006). That responsibility is spelled out in § 121.553, which covers supplemental operations such as Planet’s and requires a pilot in command to restrict and suspend operations when he becomes aware of conditions that are a hazard to safe

operations. 14 C.F.R. § 121.553. Further, the regulation governing flight attendants provides detailed duty period limitations, rest requirements, and number of attendants assigned. 14 C.F.R. § 121.467. Finally, § 121.597 provides flight release authority for supplemental operations; it states in pertinent part that the pilot in command may sign the flight release only when he believes that the flight may be made with safety and that a new flight release is necessary if the plane has been on the ground more than six hours. 14 C.F.R. § 121.597(b)(c).

ARB case law under analogous whistleblower statutes governing transportation and the environment holds that protection for activities that further the purposes of the statutes depends on whether the complainant reasonably believed that the employer was violating or would violate the pertinent act and its implementing regulations. *See Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 93-ERA-006 (ARB July 14, 2000), and cases cited therein. Thus, a complainant need not prove an actual violation, but need only establish a reasonable belief that his or her safety concern was valid. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4-5 (ARB Apr. 8, 1997). Therefore, protected activity has two elements: (1) the complaint itself must involve a purported violation of a regulation relating to air safety, and (2) the complainant's belief must be objectively reasonable. *Id.*

### **The ALJ's opinion on the merits**

In discussing protected activity, the ALJ found Rooks to be a credible witness and accorded great weight to his concerns about crew fatigue, which the testimony of three crew members corroborated. R. D. & O. at 18. Although he discerned no actual violation of an air safety regulation, the ALJ determined that Rooks reasonably believed that flying to Port-au-Prince with a fatigued crew would be a violation. Therefore, the ALJ found that Rooks engaged in protected activity when he voiced his concerns about crew fatigue to Phinney as the reason for his refusal to make the complete flight. R. D. & O. at 18-19.

Planet was aware of Rooks protected activity, according to the ALJ, because Phinney's testimony corroborated that of Rooks, who explained to him that crew members were showing signs of, and complaining about, fatigue. The ALJ found that, whether Phinney agreed with Rooks's assessment of the crew's condition, Phinney at least understood that Rooks was claiming crew fatigue as a reason for refusing the flight to Port-au-Prince. Therefore, the ALJ concluded that Rooks established Planet's knowledge of his protected activity. R. D. & O. at 19.

Planet did not dispute that Rooks's firing was an adverse employment action. The ALJ noted that Phinney requested immediate termination at the September 5, 2002 meeting after Rooks stated that he believed his decision to refuse the flight to Port-au-Prince on August 29 was correct under the circumstances. The ALJ determined that the timing of Rooks' firing shortly after he refused the flight raised an inference that Rooks's protected activity was a contributing factor in his discharge. R. D. & O. at 20.

The ALJ considered Planet's "alternate theory," i.e., that Rooks manipulated the crew members into claiming fatigue so he would have a legitimate pretext for refusing the flight. According to the theory, Rooks was suffering from personal distress related to a family situation and his wife's appearance at the hotel the night before. The ALJ decided that Planet had offered "little to no evidence to support" this theory. He determined that the testimony of the crew members corroborated Rooks's version of events on August 29, including that Port-au-Prince was dangerous came up only after the flight attendants reported their fatigue. Thus, the ALJ concluded that Rooks refused the flight due to crew fatigue and not because of some unrelated personal situation. R. D. & O. at 21.

Further, the ALJ stated that, if Rooks had not commented at the September 5, 2002 meeting that he would have made the same decision, Phinney would not have fired him. The ALJ ruled that Rooks proved that his protected activity in refusing the flight was a contributing factor in his firing. R. D. & O. at 21. Therefore, the ALJ concluded that Planet had violated the AIR 21's whistleblower protection provision.

The ALJ then turned to Planet's affirmative defense, that it would have fired Rooks absent any protected activity, because he was both an incompetent airman and an insubordinate employee. Planet cited the following incidents in support: (1) Rooks failed two check rides before being hired in January 2002; (2) passengers on a February 2002 flight complained about improper stowage of luggage and rude flight attendants, PX 6; (3) Planet issued a written warning to Rooks after he insisted on a hotel change during an August 10, 2002 flight sequence to South America, CX 7-8; and (4) Rooks repeatedly threatened to rent a van and drive the crew back to Fort Lauderdale if he did not get the necessary paperwork on August 29. R. D. & O. at 21-22.

The ALJ found that Planet could not have been too concerned about the failed check rides since it hired Rooks after he passed a subsequent check. The ALJ noted that, while Rooks's "tactics for getting things done" were perhaps not the most effective, he took the FAA regulations seriously. R. D. & O. at 22. In addition, Rooks explained that (1) the February flight involved a two-hour delay, which irritated some passengers, PX 5; (2) the written warning stated only that his behavior was inappropriate, PX 7-8; and (3) the threat to rent a van was intended only to expedite the paperwork required to release the flight, PX 10; TR at 287-89, 436-37. The ALJ determined that Planet had failed to produce clear and convincing evidence that the incidents Planet cited would by themselves have resulted in the termination of Rooks's employment had he not engaged in protected activity on August 29. R. D. & O. at 22.

### **Concurrence in the ALJ's analysis and rejection of Planet's arguments**

We agree with the ALJ in concluding that Rooks engaged in protected activity when he refused to complete the Port-au-Prince trip as scheduled. Rooks's belief that flying to Port-au-Prince with a fatigued crew would violate a FAR was reasonable. However, Planet argues that the ALJ disregarded substantial evidence in making this

determination and failed to consider whether any violation of the FARs actually occurred. Respondent's Initial Brief at 7-10.

Rooks testified that he believed that flying with a fatigued crew was a hazard covered by FAR section 121.553. 14 C.F.R. § 121.553; TR at 422-24. The evidence supports the ALJ's finding that Rooks and the crew members who testified were credible witnesses. The crew members' testimony consistently supported that of Rooks concerning the events of August 29. Rooks's belief was reasonable under the circumstances. Three flight attendants had been up all night on August 27 tending to a sick colleague, they had flown all day on August 28, and then they waited around for almost 12 hours on August 29 because of delays caused by Planet. Accordingly, because substantial evidence supports the ALJ's credibility determinations and his findings of fact regarding Rooks's protected activity, we affirm them. Rooks did not have to prove that flying with fatigued crew members actually violated the FARs, so as long as Rooks's belief was reasonable. *See* R. D. & O. at 18-19. Therefore, we reject Planet's argument.

Planet also argues that it was not aware of Rooks's protected activity because he warned Phinney only of potential crew fatigue, and the FARs do not protect such anticipatory fatigue. Alternatively, Planet contends that if Rooks actually did warn Planet of present crew fatigue, then he deliberately violated AIR 21 himself when he flew back to Miami with a fatigued crew. *See* 49 U.S.C.A. § 42121(d).<sup>1</sup> Brief at 11-13.

That is not the case. Phinney corroborated Rooks's testimony that they discussed crew fatigue as a reason for Rooks's refusal of the flight during their telephone calls on the evening of August 29. TR at 490-94; R. D. & O. at 19. The record shows that the flight attendants were complaining of present fatigue as well as stating that they would be too tired to perform safely on the Nassau to Port-au-Prince leg of the planned flight. Even if Phinney thought the crew was only potentially fatigued, he knew at the very least that Rooks refused to fly to Port-au-Prince because of their fatigue. Moreover, Rooks did not violate the statute or any safety regulation in flying the plane home to Miami, because it is undisputed that the attendants were not needed on a ferry flight that had no passengers. TR at 296-97, 547. Therefore, we reject Planet's argument, and hold that Rooks proved by a preponderance of the evidence that his protected safety complaint was a contributing factor in his termination.

Finally, Planet argues that the ALJ ignored clear and convincing evidence that Rooks's firing was inevitable, regardless of any protected activity, because he was "incompetent at best and insubordinate at the very least." Brief at 13-17. We disagree. The ALJ fully considered each of Planet's alleged non-discriminatory reasons for firing Rooks. While Phinney testified that he felt Rooks "manipulated the truth" to get the hotel changed in Chile, he issued Rooks a written warning that merely asked him to communicate more clearly with the company. PX 7. The record evidence supports the

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<sup>1</sup> Subsection (d) provides that whistleblower protection will not be afforded to an employee who deliberately causes a violation of any requirement relating to air safety if acting without the direction of the employer. 49 U.S.C.A. § 42121(d).



ALJ's findings that Rooks's threat to rent a van and drive the crew home was meant to speed up Planet's dispatch of the paperwork required to release the flight and that nothing ever came of the February 2002 baggage complaint. Inasmuch as substantial evidence supports the ALJ's factual findings, we affirm them. We also affirm his determination that Planet's proffered reasons were insufficient to establish by clear and convincing evidence that Planet would have fired Rooks notwithstanding his protected activity.

## Remedies

Having ruled that Planet violated AIR 21, we turn to remedies. When an AIR 21 complainant establishes that his employer retaliated against him for whistle-blowing activities, the Secretary of Labor shall order the employer to "(i) take affirmative action to abate the violation; (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and (iii) provide compensatory damages." 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). Accordingly, as the prevailing party, Rooks is entitled to reinstatement as well as back pay and potentially compensatory damages. 49 U.S.C.A. § 42121(b)(3)(B); *Lebo v. Piedmont-Hawthorne*, ARB No. 04-020, ALJ No. 03-AIR 25, slip op. at 7 (ARB Aug. 30, 2005); *Negron*, slip op. at 8.

Although reinstatement is the statutory remedy, the ARB has held that circumstances may exist in which reinstatement is impossible or impractical and alternative remedies are necessary. *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 03-STA-36, slip op. at 8 (ARB June 30, 2005); see *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 93-ERA-24, slip op. at 9 (Sec'y Feb. 14, 1996) (front pay in lieu of reinstatement where the parties have demonstrated "the impossibility of a productive and amicable working relationship"). See also *Doyle v. Hydro Nuclear Servs., Inc.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 7-8 (ARB Sept. 6, 1996), *rev'd on other grounds sub nom. Doyle v. United States Sec'y of Labor*, 285 F.2d 243, 251 (3d Cir. 2002) (reinstatement was impractical because the company no longer engaged workers in the job classification complainant occupied, and had no positions for which he qualified). The preference of the prevailing complainant is not determinative. See *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (ARB Mar. 31, 2005) (the ALJ erred in accepting at face value a statement from the complainant that he was not seeking reinstatement).

Rooks testified that he did not want his job back, TR at 361, and the ALJ did not order reinstatement. Although under the applicable law and the record before us, reinstatement would have been the appropriate remedy, neither party has raised the issue on appeal. See 29 C.F.R. § 1979.110(a) (a party's petition for review to the ARB must specifically identify the findings, conclusions, or orders to which exception is taken; any exception not specifically urged ordinarily shall be deemed to have been waived). We deem the issue of reinstatement waived and accept the ALJ's recommended remedy of back pay.

Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e *et seq.* (West 2003). *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36, slip op. at 5. (ARB June 30, 2005) (citation omitted). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by the evidence. *Bryant*, slip op. at 5.

Here, Rooks sought and the ALJ awarded back pay for the time he was unemployed. The ALJ found that, while Planet employed him, Rooks earned about \$4,500.00 a month, plus \$200.00 to \$300.00 per diem benefits each time he flew. From the time of his discharge until he obtained new employment in October 2003, Rooks would have earned \$58,500.00, according to the ALJ. Rooks received \$275.00 per week in unemployment compensation for 44 weeks and earned about \$9,600.00 as an electrician while unemployed. After these offsets, the ALJ calculated that the total back pay award should be \$36,800.00. R. D. & O. at 23.

On appeal, neither Rooks nor Planet has contested the back pay award in any respect. Therefore, we find that both parties have waived any exception. 29 C.F.R. § 1979.110(a). We affirm the amount of \$36,800.00 as supported by substantial evidence.

Compensatory damages are designed to compensate whistle-blowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, and mental anguish, and emotional distress. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 169, ALJ No. 90-ERA-30, slip op. at 33 (ARB Feb. 9, 2001) (citations omitted). A key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Id.* To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 12 (ARB Nov. 13, 2002) (complainant failed to produce competent evidence that his high blood pressure was caused by the employer's unfavorable personnel actions).

Here, the ALJ discussed the \$10,000.00 compensatory damages awarded in *Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996) and determined that Rooks's situation was "not as dire" as Crow's. The ALJ therefore awarded \$5,000.00 in compensatory damages on the bases that Rooks had to borrow about \$8,000.00 after he was fired, that he testified it was "hard to get by" even though his wife was working, and that he could no longer afford health insurance. R. D. & O. at 24.

Neither party objected to the ALJ's award of compensatory damages. Therefore, the parties have waived any objections and the issue is not before us. 29 C.F.R. §

1979.110(a). We express no opinion on whether the evidence in this case is sufficient to support the ALJ's award of \$5,000.00 in compensatory damages.

### **Attorney's fees**

The ALJ issued a Decision and Order on Attorney Fees on October 27, 2004. Planet did not object to the fees and costs that Rooks's attorney sought, but the ALJ found the attorney's \$300.00 an hour rate to be excessive and reduced it to \$225.00 an hour. Stating that the attorney's application listing services and costs was reasonable, the ALJ awarded \$32,655.16 for 136.3 hours of representation and \$1,987.66 for expenses.

As the prevailing party in this case, Rooks is entitled to reimbursement for attorney's fees and costs. 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. §1979.109(b). Planet did not challenge the ALJ's October 27, 2004 decision awarding Rooks a total of \$34,642.82 in attorney's fees and costs. Because Planet did not request review of the amount awarded, the ALJ's decision became final. 29 C.F.R. § 1979.110(a); *Negron*, slip op. at 9.

### **CONCLUSION**

Substantial evidence in the record as a whole supports the ALJ's findings of fact, and he correctly applied the pertinent law. We **AFFIRM** the ALJ's conclusion that Rooks's protected activity was a contributing factor to Planet's termination of his employment, and that Planet therefore violated AIR 21. We also **AFFIRM** the ALJ's award of damages as unchallenged on appeal. Finally, the ALJ's October 27, 2004 supplemental decision on attorney's fees and costs became final.

Rooks's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, Planet shall have 30 days from its receipt of the fee petition to file a response.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**