In the Matter of:

RAY GARY, **ARB CASE NO. 04-112**

COMPLAINANT, **ALJ CASE NO. 2003-AIR-38**

v. **DATE: January 31, 2006**

CHAUTAUQUA AIRLINES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Ray Gary, pro se, *Franklin Lakes, Indiana*

For the Respondent:
David J. Carr, Esq., Eric C. Scroggins, Esq., *Ice Miller, Indianapolis, Indiana*

FINAL DECISION AND ORDER

Ray Gary alleges that Chautauqua Airlines violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act) when it fired him because he had filed a whistleblower suit against a former employer, also an airline company. The Act prohibits air carriers from discharging or otherwise discriminating against employees who inform their employers or the federal government, or who file proceedings, about violations or alleged violations of any order, regulation, or standard of the Federal Aviation Administration or of any other federal law concerning air safety.[1] After a hearing, a United States Department of

[1] 49 U.S.C.A. § 42121(a) (West 2005 Supp.).

Labor Administrative Law Judge (ALJ) dismissed Gary's complaint because he did not prove an essential element of his case. We affirm.

BACKGROUND

Before beginning his employment with Chautauqua, Gary flew night cargo airplanes and then worked for a regional airline in Albany, New York. After that company dissolved, Gary flew airplanes for an air taxi charter company until approximately 1995 when that company also went out of business. At that point he worked as a flight instructor and flew charter airplanes until September 2000 when Air Group, a charter aircraft company, hired him. Transcript (TR) 75-81.

Air Group hired Gary to fly one particular airplane, the Citation CE 500, a two engine jet. Gary completed Air Group's training program to fly this plane. But since Air Group was having a problem obtaining a Federal Aviation Administration (FAA) certification for the Citation, Gary had to wait to fly the plane. In the interim, Air Group asked him to work with another Citation pilot who it had just hired. After working with this pilot, Gary concluded that this man was not competent to fly the Citation. He told Air Group's chief pilot that the pilot he had worked with presented a safety risk. On that same day, in July 2001, the chief pilot fired Gary. TR 82-85.

Later that month, after he had submitted a resume to Chautauqua, Gary traveled to Indianapolis where Rita Moseley, Chautauqua's recruiter, interviewed him. A few days later, Chautauqua offered him a co-pilot position, but Gary declined the offer because of a family medical complication. Nevertheless, he advised Moseley that he was interested in the position if it became available in the future and thereafter called her regularly to check on vacancies. TR 89-93. Meanwhile, Gary had consulted with attorneys who advised him that he should pursue a whistleblower action against Air Group. Eventually, in April 2002, Gary filed a complaint in the superior court for Bergen County, New Jersey alleging that Air Group had violated New Jersey's "Conscientious Employee Protection Act" because it terminated his employment because he expressed safety concerns to the chief pilot. Gary's case was later removed to federal court. TR 86-88; ALJX-1.

Then, in November 2002, Gary reapplied for a position with Chautauqua and again traveled to Indianapolis to interview with Moseley. According to Gary, at the end of the interview he told Moseley that Air Group had terminated his employment and that his court case against Air Group was pending. Four or five days later, Moseley called Gary and offered him a first officer position on Chautauqua's Embrauer ERJ aircraft if he successfully completed their training program. TR 97-108.

After Gary started training in December 2002, Chautauqua began a background investigation, an FAA requirement. By January 2003, Gary had advanced to the simulator phase of the training regimen. Simulators are used to replicate various flying situations and conditions. Midway through this training, Gary's simulator instructor

informed Gary Santos, Chautauqua's Director of Pilot Training, that Gary was having difficulty with some basic maneuvers. Santos investigated further and determined that Gary would need considerable additional training just to bring him up to the level of proficiency that he should already have attained. Therefore, on January 17, 2003, Santos fired Gary.

Gary filed this AIR 21 complaint with the U. S. Department of Labor's Occupational Safety and Health Administration (OSHA).[2] He alleges that Chautauqua terminated him because, during the course of the background investigation, Chautauqua learned that Air Group had terminated him and that he had filed the New Jersey whistleblower complaint. OSHA investigated and found no violation of AIR 21's employee protection provisions. Gary requested a hearing before a Labor Department ALJ.[3] Following a two day hearing, the ALJ issued his Recommended Decision and Order (R. D. & O.) dismissing Gary's complaint.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision.[4] The Board reviews the factual determinations of the administrative law judge under the substantial evidence standard.[5] In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[6] The Board accordingly reviews questions of law de novo.[7]

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[2] *See* 29 C.F.R. § 1979.103.

[3] *See* 29 C.F.R. §§ 1979.106, 1979.107.

[4] 49 U.S.C.A. § 42121(b)(3); 29 C.F.R. § 1979.110. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, AIR 21)

[5] 29 C.F.R. § 1979.110(b). *See* 68 Fed. Reg. 14,106 (Mar. 21, 2003) (the Board "shall accept as conclusive ALJ findings of fact that are supported by substantial evidence").

[6] 5 U.S.C.A. § 557(b) (West 1996), *quoted in Goldstein v. Ebasco Constructors, Inc.*, No. 86-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992) (applying analogous employee protection provision of Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (West 1995)). *See* 29 C.F.R. § 1979.110.

[7] *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir.1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same). *See generally Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level

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In weighing the testimony of witnesses, the ALJ as fact finder has had an opportunity to consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence.[8] The ARB gives great deference to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses."[9]

DISCUSSION

To prevail here, Gary must prove by a preponderance of the evidence that he is an employee covered under the statute, that he engaged in activity the statute protects, that Chautauqua subjected him to an unfavorable personnel action, and that his protected activity contributed to the adverse action. The requirement that protected activity must have contributed to Chautauqua's decision to take unfavorable action assumes that Chautauqua knew about Gary's protected activity.[10]

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administrative official was bound by ALJ's decision); *McCann v. Califano,* 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

[8] *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988).

[9] *Stauffer v. Wal-Mart Stores, Inc.,* ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.,* 701 F.2d 659, 663 (7th Cir. 1983). *Accord Lockert v. United States Dep't of Labor,* 867 F.2d 513, 519 (9th Cir. 1989)(court will uphold ALJ's credibility findings unless they are "'inherently incredible or patently unreasonable.'").

[10] 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). *See Peck v. Safe Air Int'l, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). The ALJ correctly applied the preponderance of evidence standard when discussing whether Gary proved protected activity, adverse action, and Chautauqua's knowledge of the protected activity. R. D. & O. at 18-23. But the ALJ also wrote: "Once the complainant has established by a preponderance of the evidence that the protected activity was likely a contributing factor in the adverse action, the burden shifts to the respondent. In order to rebut the inference established by the prima facie case, the respondent must demonstrate by clear and convincing evidence that it would have taken the same adverse action even in the absence of the protected activity. In other words, the respondent must demonstrate by clear and convincing evidence that its motivation in undertaking the adverse action against complainant was legitimate." R. D. & O. at 18 (citations omitted). This statement is, at best, confusing.

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The ALJ found that Gary had proven that he engaged in protected activity when he filed the whistleblower complaint in New Jersey. R. D. & O. 18-20. AIR 21 protected activity includes filing "a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States."[11] And the ALJ found that Gary proved that Chautauqua took adverse action when it terminated his training and ended his employment. R. D. & O. at 20-21. Substantial evidence supports these findings. Nonetheless, the ALJ dismissed Gary's complaint because he did not prove by a preponderance of the evidence that Chautauqua knew about the whistleblower suit when it fired him. R. D. & O. at 21-23. For the following reasons, we find that substantial evidence also supports this finding.

Gary testified that he told Moseley about the lawsuit during his November 2002 interview. TR 107. But Moseley denied that Gary told her about the Air Group litigation, and her interview notes confirm this. TR 213-214; Respondent's Exhibit (RX) 17. Even so, Gary argues that Chautauqua must have been aware of the lawsuit after it contacted Air Group during its background investigation of his prior employment. Gary Brief at 7-8. The record shows that Chautauqua, through its agent, faxed various forms to Air Group on December 11, 2002, requesting information about drug and alcohol testing and whether Gary had been fired, subject to other discipline, or removed from flying status while employed there. Air Group executed the forms on December 20, 2002, returned them to the agent, and Moseley received them on January 10, 2003. But though Air Group indicated on one of the forms that Gary's employment had been terminated, none of the other information it sent to Chautauqua mentions a lawsuit or Gary being a whistleblower. Moreover, Moseley denied ever talking to anyone from Air Group. RX 5; TR 213, 236-238.

At the hearing stage of the litigation, when the AIR 21 complainant has presented only enough evidence from which discrimination may be inferred, the employer is only required to *produce* evidence, not prove, that its reason for the adverse action was legitimate. The ALJ may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant in an AIR 21 case has proved by a preponderance of the evidence that protected activity contributed to the dismissal. *See Peck*, slip op. at 9-10. On the other hand, the AIR 21 complainant who, at the hearing stage of the litigation, proves the elements of his case by a preponderance of the evidence has not established an "inference" "by the prima facie case." Rather, he has *proven* that the employer has discriminated and thus violated AIR 21. Only if the complainant has *proven* discrimination does the employer have the opportunity to avoid liability if it can prove by clear and convincing evidence that it had another motive, *i.e.*, that it would have taken the same adverse action even in the absence of the protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

[11] 49 U.S.C.A. § 42121(a)(2).

Even if Moseley did know about the lawsuit, Gary still had to show that Santos knew about it too since it was Santos, the Director of Training, who terminated his employment. An AIR 21 complainant must prove by a preponderance of the evidence that the person making the adverse employment decision had knowledge of the protected activity.[12] Santos testified that he did not know about the Air Group lawsuit until after Gary filed this complaint. TR 291. And Moseley testified that she did not tell Santos anything about Air Group's response to the background investigation. TR 217.

Gary argues that "there is very little chance for Chautauqua to not have known of the lawsuit, since it was required for them to contact all former employers" and "it is highly improbable, if not impossible, for Ms. Moseley to have not of [sic] heard of my protected activity from The Air Group" since it is "standard practice" for airline companies to divulge such information. Gary Brief at 7-8, 11. But Gary does not provide any evidence to support these assertions. Furthermore, the ALJ specifically found that Moseley and Santos credibly testified that they had no knowledge of the Air Group litigation. R. D. & O. at 21-22. Though he argued that Moseley and Santos were not truthful, Gary did not demonstrate, as he must, that the ALJ's credibility determinations were incredible or unreasonable.[13] Finally, like the ALJ, we find it "troubling" that Gary did not indicate either in the initial complaint he filed with OSHA or in his response to Chautauqua's motion for summary judgment that he had told Moseley about the lawsuit. Instead, he waited until the hearing to divulge this information. TR 156; R. D. & O. at 22. Gary's testimony is, therefore, less than credible.

CONCLUSION

Substantial evidence supports the ALJ's finding that Gary did not adequately prove that Santos knew about Gary's protected activity, an essential element of his case.

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[12] *Peck*, slip op. at 14, citing *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd* 73 F.3d 100 (6th Cir. 1996) (under employee protection section of Energy Reorganization Act, 42 U.S.C.A. § 5851).

[13] *Lockert*, 867 F.2d at 519.

Therefore, that finding is conclusive and we, like the ALJ, must **DENY** Gary's complaint. We also **DENY** Chautauqua's request for attorney fees because Gary's complaint is not frivolous or brought in bad faith.[14]

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[14] 29 C.F.R. § 1979.110(e) permits the ARB to award the employer up to $1000 for attorney fees if it finds that the complaint was frivolous or brought in bad faith.