



In the Matter of:

H. PAUL WALKER,

ARB CASE NO. 05-028

COMPLAINANT,

ALJ CASE NO. 2003-AIR-17

v.

DATE: March 30, 2007

AMERICAN AIRLINES,

RESPONDENT.

Appearances:

For the Complainant:

Jimmie Johnson, Esq., Los Angeles, California

For the Respondent:

Robert Jon Hendricks, Esq., Morgan, Lewis & Bockius, Los Angeles, California

FINAL DECISION AND ORDER

Harry Paul Walker complained that American Airlines (American) violated the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2007) when it disciplined and then terminated him after he made a knowingly false allegation during a call to American's hotline. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint. Walker appeals, and we affirm.

BACKGROUND

For convenience, we briefly restate certain background facts. More details are provided in the ALJ's Recommended Decision and Order (R. D. & O.). *See Walker v. Am. Airlines*, 2003-AIR-17, slip op. at 2-32 (ALJ Nov. 16, 2004).

American hired Walker in 1986 to work in its Tulsa, Oklahoma maintenance department. R. D. & O. at 2. After fourteen years with no negative reports, Walker transferred in August 2000 to American's maintenance operations at Los Angeles International Airport (LAX). *Id.*

Walker testified he sought a transfer to LAX because he had experienced harassment, intimidation, and stress at Tulsa. *Id.*

When Walker transferred, American's LAX maintenance department was run by Anthony Evans, who also was the Managing Director of Aircraft Maintenance and Engineering for American's Western Division. *Id.* Evans supervised Jimenez Bailey, American's Regional Manager of Aircraft Maintenance for Southern California. *Id.* Bailey supervised Level 5 managers including Anthony Nasdeo, Mel Rogers, and Ron Merrill. *Id.* at 3. The Level 5 managers collectively supervised Walker, who was a level 4 supervisor. Walker supervised the mechanic crews and crew chiefs. *Id.*

Walker believed that inadequate staffing at LAX caused excessive pressure to timely finish maintenance work. *Id.* at 4-5. This pressure took the form of pencil whipping, described by Walker as pressure on the supervisors, crew chiefs, and mechanics to falsify work sheets to indicate that they had performed inspections or completed work that they had not. *Id.* at 4; *see* Transcript (T.) 97-98, 173, 1200. On several occasions, Walker reported to the Federal Aviation Administration (FAA) by means of an ASAP (Aviation Safety Action Partnership) report. R. D. & O. at 8, 26. Mechanics and other personnel use ASAP reports for voluntary disclosures of mistakes in performing aircraft maintenance. *Id.* at 8 n.2.

Until July 2001, supervisors had induced mechanics to work after hours by allowing the mechanics to record, and be paid for, more overtime hours than they had worked. *Id.* at 6-7. These NBO deals were recorded on exception sheets.¹ *Id.* In early June 2001, senior managers at LAX told managers and supervisors to stop making NBO deals. *Id.*; *see* T. 1937; RX 10 (July 10 notes from Nasdeo).

Walker did not like the new policy. He told Nasdeo of his concern that without NBO deals mechanics would not be able to inspect or repair planes quickly enough to meet deadlines. R. D. & O. at 11. On July 10 Nasdeo reaffirmed the new policy, explaining to Walker that although NBO deals were now barred, overtime was still permitted. *Id.* at 12. Walker testified that he relayed this information to the crew chiefs, expecting that they would inform the mechanics. T. 602, 609.

On July 11, a plane's B-check (a type of maintenance procedure) was not timely completed. *Id.* at 12. After a brief investigation, Nasdeo suspected that Walker had mishandled the NBO policy change and had told the mechanics that even properly documented overtime was no longer permitted. R. D. & O. at 12-13. Bailey, who was in charge then, discussed the

¹ American referred to the process of signing in and out as "badging." A failure to badge out, for whatever reason, was termed a "no badge out" (NBO). T. 1203. An exception sheet was used when a mechanic had worked more hours than were shown on the mechanic's timecard – for example, when the mechanic had worked through lunch, worked overtime, or had not badged out. R. D. & O. at 6. Both the crew chief and the level 4 manager had to approve an exception sheet. *See* T. 514, 604. In an NBO deal the employee intentionally did not badge out, which allowed the supervisor to record a departure hour later than the employee's actual one. R. D. & O. at 6.

incident with Nasdeo and Walker.² Also present was Susie Kimball, the Human Resources member who worked with the maintenance department. *Id.* at 3, 13.

After the meeting, Walker expressed concern that Bailey was planning to fire him and asked Bailey to allow him to transfer to a different city instead. *Id.* at 13-14. Bailey told Walker he did not plan to fire him but that he was transferring Walker to a different position at LAX. *Id.* A few days later, Walker spoke with Merrill. *Id.* According to Walker, Merrill told Walker that Evans wanted to fire him. *See* T. 490-93.

The next day, July 16, Walker called American's hotline and spoke with hotline operator Jay Stone. R. D. & O. at 15. Although hotline rules did not require it, Walker gave his name as the caller. *Id.* He testified that Stone had told him that if Walker did not give his name then nothing would be done about his complaint. *Id.* at 17. Stone denied having said this. *Id.* The ALJ credited Stone, *id.* at 35, and Walker does not take exception to this finding.

Stone's synopsis of the call, which both parties agree is accurate, is included in full in the R. D. & O. (pages 15-17). According to the synopsis, most of the hotline call focused upon the NBO policy. In addition, in a statement that is the focus of this case, Walker complained that "Bailey, Rogers, and Nasdeo have been intimidating him into signing off on tasks that have not been completed or are not safe just so they can get the plane out." *Id.* at 15 (quoting RX 20 (synopsis of hotline call), at 1).

The record of the hotline call was forwarded to Evans, who asked Kimball to investigate it. *Id.* at 18; *see* T. 1259, 3170. Although Evans did not know it, and both Kimball and Rogers denied it, the ALJ suggested that Kimball and Rogers were having a relationship at this time. *Id.* at 35 n.11.³

Kimball prepared a list of questions for Walker. She then briefly interviewed the three accused managers, including Rogers. Because each of them denied the accusation, Kimball added to her list of questions a further question: "Why would you make such a strong statement without facts to back it up?" *Id.* at 18 (quoting RX 24 (Kimball's interview notes) at 2). On July 25 Kimball interviewed Walker, taking handwritten notes. *Id.* at 18-20.

Kimball testified that during the interview Walker retracted his charge, admitting that his hotline call was "false" in charging that managers knowingly released incomplete or unsafe planes. R. D. & O. at 21; *see* T. 1276-77, 1282-83, 1292-93. Kimball asked Walker to write a

² From March 2001 through July 2001, while Evans was away on medical leave and then on assignment in Tulsa, Bailey performed most of Evans's duties as managing director and Nasdeo performed Bailey's duties. R. D. & O. at 3; *see* T. 2385, 3067, 3163-64.

³ The ALJ stated: "Although Kimball and Rogers have both testified that their romantic relationship did not begin until well after the investigation was completed, that testimony is less credible than the countervailing testimony indicating that their affair had in fact begun as early as May of 2001." R. D. & O. at 35 n.11.

statement documenting this retraction, and Walker wrote the following statement (the Retraction).

Jim Bailey, Tony Nasdeo, Mel Rogers. With a feeling of intimidation from the above named, the statement I made was general and was made without a clear and concise recollection of what happened. The statement of signing off planes was not accurate to the point that they [did not⁴] know what condition the planes were in. I was never directly told to sign off unsafe or incomplete paper work but the feeling was such that if the planes didn't go out I would no longer be working here.

R. D. & O. at 20 (quoting RX 26 (Walker's handwritten retraction statement)).

Walker testified that he did not retract his charge, but did provide the handwritten statement because Kimball threatened to terminate his employment if he did not. *Id.* at 21; *see* T. 345-49, 862-63, 889-92. Walker further testified that he told Kimball that documents supporting his charge were in his employee locker, and that the documents were stolen from his locker about a week after he told her about them. R. D. & O. at 21.

After the interview, Kimball told Evans that Walker had retracted his charge. *Id.* She sent Evans her interview questions, her handwritten notes, and Walker's handwritten statement. *Id.* Evans initially wanted to fire Walker for making a false charge to the hotline. *Id.* A charge such as this, if true, would have been serious enough to cause termination of the accused managers. *See* T. 2016, 2243. After discussing the matter with her manager and one of American's lawyers, Kimball suggested that Evans instead impose a Career Decision Day – a paid day off during which the employee decides whether to sign a disciplinary letter or end his employment. R. D. & O. at 23-24. Short of termination, this was American's highest level of discipline. *See* T. 365-66.

After returning from Tulsa, Evans met with Walker and Kimball on August 6. R. D. & O. at 23-24; T. 3067, 3094. Evans first asked Walker if he wished to provide any further information. According to Evans, Walker "shook his head and said no." T. 3075. Evans then read aloud to Walker an Advisory explaining the reason for the Career Decision Day. R. D. & O. at 23. It included the following paragraphs:

On July 16, 2001, you filed a formal complaint accusing three (3) managers of "intimidating you into signing off on tasks that have not been completed or are not safe just so they can get the planes out."

⁴ In the original handwritten retraction, the words "did not" are written in the margin.

During a Company investigation into this matter you admitted that these allegations were untrue and that you made them because you were “scared and thought I would be fired.”

R. D. & O. at 23 (quoting RX 30 (Career Decision Day Advisory) at 1). The Advisory gave Walker three options: “(1) sign a letter of commitment to comply with all company rules, (2) resign with temporary company benefits in return for agreeing to not appeal, or (3) be terminated with the option to grieve.” *Id.* at 24 (summarizing RX 30). The Letter of Commitment stated: “I acknowledge that I have a performance problem, which I fully admit I have not corrected despite prior counseling sessions.” RX 31 (draft Letter of Commitment) at 2. Walker offered to sign the Letter of Commitment before Evans finished reading the other two options, but Evans told him to consider all three options during the Career Decision Day. R. D. & O. at 24.

The next day, Walker met with Evans again. Again, Walker did not challenge the assertion in the Advisory that he had “admitted that [his] allegations were untrue.” *Id.* at 24; T. 3083-84. Walker did object to the Letter of Commitment’s statement that he had received prior counseling. R. D. & O. at 24. After Kimball removed that assertion from the letter, Walker signed it. *Id.*

After the events of September 11, 2001, American decided to implement a reduction in force (RIF) of several thousand employees. *Id.* at 29. Bailey was told to recommend for layoff one level 5 manager and three level 4 managers. *Id.* Among the managers and supervisors Bailey reviewed, Walker was the only one whose file included a Letter of Commitment. *Id.* Accordingly, Bailey recommended that Evans select Walker for the RIF. *Id.*

Walker was on sick leave when he learned on September 28 that his leave was being converted to a layoff. R. D. & O. at 30-31; *see* CX 46 (formal termination letter) at 1. Because Bailey checked the “do not rehire” box on the layoff form, R. D. & O. at 30, 39; *see* T. 3183, the layoff was a permanent termination of Walker’s employment.

Walker immediately wrote Kimball requesting reinstatement and expressing his view that he was

being laid off in retaliation for [his] complaints to the FAA, the Department of Fair Employment and Housing and the EEOC. Specifically, on September 5, 2001, I complained to the DFEH concerning harassment of me, retaliation against me for protesting racial harassment of other workers and retaliation against me for reporting and resisting violations of aircraft safety rules This claim was also filed with the EEOC [Equal Employment Opportunities Commission]. On September 27, 2001, I filed an amended claim with the EEOC making the same allegations.

RX 46 (letter to Kimball) at 1; R. D. & O. at 31. Walker did not list the hotline call as one of the “complaints” that he believed had prompted the retaliation. Kimball wrote back on October 5,

denying a retaliatory motive in Walker's termination and stating that "[a]lthough you claim in your letter that your layoff was in retaliation for complaints you had made to the FAA, EEOC and DFEH, [American] was unaware of any such complaints at the time of your layoff." RX 47 (Kimball's Oct. 5 response) at 1; R. D. & O. at 31.

As permitted by AIR 21's implementing regulations, 29 C.F.R. Part 1979 (2006), Walker then filed a complaint with DOL's Occupational Safety and Health Administration (OSHA). R. D. & O. at 31 (citing RX 49 (OSHA complaint)). After an investigation, OSHA concluded that Walker had "failed to establish a causal relationship between his protected activities and termination" because "[t]he Complainant failed to provide sufficient countervailing evidence to demonstrate that the Respondent's defense was pretextual and implicit of a retaliatory intent." Jan. 15, 2003 letter from Christopher Lee, Deputy Regional Administrator at 1, 2.

Walker timely requested a hearing before an ALJ. The ALJ held thirteen days of hearing in October and December 2003. Before the ALJ issued his decision, American terminated the employment of Evans and Bailey in March 2004 for (allegedly) embezzling company property. R. D. & O. at 37; *see* Letter from ALJ to Walker, dated Jan. 7, 2005, at 1; ALJX 3, 4 (formal letters of termination given to Evans and Bailey). The ALJ admitted certain evidence pertaining to the embezzlement, but did not admit all the evidence that Walker submitted. On November 16, 2004 the ALJ recommended dismissal. R. D. & O. at 39.

Walker timely appealed. We have jurisdiction under 49 U.S.C.A. § 42121(b)(3) (granting Secretary of Labor authority to issue final decisions in AIR 21 cases). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating, to Board, Secretary's authority to review ALJ decisions and issue final decisions in AIR 21 cases); 29 C.F.R. § 1979.110 (allowing appeals to Board in AIR 21 cases). As provided by applicable regulations, we must uphold the ALJ's factual findings if they are supported by substantial evidence. *See* 29 C.F.R. § 1979.110(b) ("The Board will review the factual determinations of the [ALJ] under the substantial evidence standard."); 68 Fed. Reg. 14,106 (Mar. 21, 2003) (the ARB "shall accept as conclusive ALJ findings of fact that are supported by substantial evidence"); *Rougas v. Se. Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 9 (ARB July 31, 2006) (discussing AIR 21 regulation requiring that ALJ factual findings be reviewed under substantial evidence standard). We review the ALJ's conclusions of law de novo. *See* 5 U.S.C.A. § 557(b) (West 1996) ("On appeal from or review of the initial decision, the agency [here, the Board] has all the powers which it would have in making the initial decision . . .").

ANALYSIS

In order to receive relief under AIR 21, a complainant must prove that he was a covered employee, that he engaged in activity protected under AIR 21, and that a protected activity contributed to a covered employer's decision to subject him to an unfavorable personnel action. *See* 49 U.S.C.A. § 42121(a), (b); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining "scope of coverage, procedures, and burdens of proof under AIR 21"). Coverage is not disputed. Therefore, we proceed to examine the other elements.

1. Adverse Action

The ALJ appears to have assumed without discussion that both the termination of Walker's employment and the imposition of the Career Decision Day were unfavorable personnel actions (adverse actions). *See* R. D. & O. at 38 (referring to "either of the adverse actions"). Because neither party contests this aspect of the ALJ's decision, and because of our disposition of the case, for discussion purposes we make the same assumption.

2. Protected Activity and Knowledge Thereof

Walker argued to the ALJ that he had engaged in protected activity before and after his July hotline call. We briefly discuss these other activities before turning to the hotline call in the next section.

Pre-July 16 protected activity

The ALJ found that before Walker made the hotline call, he had "bona fide and reasonable concerns that aircraft safety was potentially being jeopardized by inadequate staffing of the work crews he supervised and by what he perceived as unreasonable pressures on supervisors and others to meet departure deadlines." *Id.* at 33. The ALJ did not discuss whether the other requirements for protected activity were met (i.e., whether Walker had expressed his concerns and whether there was an underlying "violation or alleged violation," *see Rougas*, slip op. at 9). Nonetheless, the ALJ appears to have assumed without discussion that Walker's pre-July 16 activities met the other requirements for protected activity. Because neither party contests the ALJ's assumption, and because of our disposition of the case, we assume for discussion purposes that Walker did engage in pre-July 16 protected activity. Thus we need not discuss the merits of the exceptions Walker takes to the ALJ's exclusions of certain evidence that had been offered in order to prove Walker's protected activity.⁵

Post-July 16 protected activity

The ALJ did not make a finding as to whether Walker had engaged in post-July 16 protected activity. *See* R. D. & O. at 36-37 (hypothesizing that "[i]f all nine incidents occurred as claimed by Complainant, each of the incidents *would* constitute a protected activity"; but not deciding whether the incidents had so occurred, and noting that "it has . . . been necessary to weigh [Walker's] testimony with . . . skepticism") (emphasis added). As we discuss below, the ALJ did determine that Evans and Bailey did not know about any such activity. *Id.* at 36-38.

⁵ A list of these errors is provided in footnote 17.

Knowledge of protected activity

The ALJ found that Evans and Bailey knew about Walker's July 16, 2001 hotline call, but also concluded that the hotline call was not protected activity. We discuss in the next section Walker's challenge to this conclusion.

With respect to the activities that the ALJ assumed were protected, the ALJ noted that there was "some evidence that both Bailey and Evans had, at least some knowledge of some of the Complainant's protected activities." *Id.* at 38. While the ALJ did not make a clear finding as to whether Evans and Bailey in fact knew of Walker's pre-July 16, 2001 activities, the ALJ appears to have assumed such knowledge in his subsequent discussions. Because of our disposition of the case, we make the same assumption.

As for Walker's post-July 16, 2001 activities, the ALJ found that Walker did not show that Evans and Bailey were aware of any of this activity. *Id.* at 37-38. Walker does not contest this finding.

3. Hotline Call

Regarding Walker's July 16, 2001 hotline call, the ALJ noted that "[a]lthough the Complainant's statement to the hotline operator about being pressured to sign off unsafe aircraft can arguably be interpreted in different ways, during the trial the Complainant admitted that it was his intention to allege that Bailey, Rogers and Nasdeo were pressuring him to sign off items that they knew were unsafe." *Id.* at 36 n.12. The ALJ found that "the Complainant did not have a good faith and reasonable basis for making [this] . . . allegation," and concluded that the allegation in the hotline call was not protected activity. *Id.* at 36.

The primary basis for the ALJ's finding was his decision to credit Kimball's testimony that Walker made "a truthful, non-coerced admission to Kimball that he made a knowingly false hotline complaint," R. D. & O. at 39, rather than Walker's testimony that he had not. The ALJ also relied upon Walker's Retraction. Walker challenges both decisions.

The ALJ's credibility determinations

Walker argues that the ALJ should have believed him rather than Kimball, and therefore should not have found that Walker knew his hotline allegation was false. Brief at 24-26. Walker begins by noting that the ALJ's credibility determination was not demeanor-based, and arguing that we should therefore review the determination de novo. Petition at 14-15; Reply at 1. Walker contends that if we did, we would believe him rather than Kimball. Brief at 26 ("An objective fact finder would likely find that Walker did not confess to making a false hotline complaint, and that finding would lead to a completely different conclusion."). American, of

course, argues that we should defer to the ALJ's credibility determination, because "the ALJ as factfinder has had the opportunity to consider all indicia of credibility."⁶ Response at 9.

Walker's argument in this regard is waived because he did not raise it in his brief.⁷ In any case, the decisions Walker cites in support of his argument that the Board reviews "findings of fact . . . de novo," Reply at 1, were issued in environmental cases. In AIR 21, as we have noted, the Board reviews findings of fact under the substantial evidence standard. Because the ALJ's credibility determinations were not explicitly based on demeanor, we do not give them the "great deference" that a demeanor-based determination would receive. *See Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 12 n.14 (ARB June 29, 2006) ("The ALJ did not explicitly state that his credibility determination was based on witness demeanor. Therefore, we do not accord his determination [the] great deference" given to demeanor-based credibility determinations.).⁸ Nonetheless, because these determinations were factual findings, we must uphold them if they are supported by substantial evidence. As we explain, Walker has failed to show that these determinations were not so supported.

Walker's key ammunition for his attack upon the ALJ's credibility determination is the ALJ's finding that "Kimball's investigation was in fact heavily biased against Walker."⁹ Brief at 24 (quoting R. D. & O. at 35 n.11). But the ALJ considered whether Kimball's bias had affected her truthfulness, and concluded that it had not. The ALJ gave four reasons: (1) Kimball's interview notes supported her testimony; (2) Kimball was less likely to lie because she knew that Walker would have at least two opportunities to challenge her report; (3) Walker lacked credibility; and (4) Walker failed to dispute Kimball's report during his two meetings with Evans. *See* R. D. & O. at 36. Walker challenges each of these reasons, and we discuss each in turn.

⁶ American appears to have abandoned its initial argument that "[t]hese credibility findings . . . rest upon the demeanor of witnesses." Respondent's Opposition to Complainant's Motion for Extension of Time at 4.

⁷ Although Walker raised this argument in his petition, he did not provide any argument or case citation until his reply. Walker's brief asserted that the ALJ's determination was not demeanor-based, but did not discuss the appropriate standard of review. *See* Brief at 1.

⁸ In SOX cases, as with AIR 21, we review findings of fact under the substantial evidence standard. *See Henrich*, slip op. at 7-9 (noting that "[a]ctions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of [AIR 21]").

⁹ American appears to disagree with this finding. *See* Response at 6 n.1. Because we conclude that substantial evidence supports the ALJ's determination that Kimball testified truthfully about Walker's confession, and because a finding that Kimball was not biased would merely provide further support for that determination, we need not delve into this issue.

(1) *Kimball's interview notes*

Walker argues that the ALJ should not have given weight to Kimball's handwritten interview notes because there was no "electronic recording . . . express written and signed confession, or . . . objective third party witness," and thus the ALJ had "nothing but her word that the confession was made." Brief at 27-28. But Walker did not object to American's introduction of the notes as evidence, and he backed down under cross-examination from his initial testimony that Kimball did not take the notes during the interview. T. 341, 864. Therefore, we conclude that the ALJ did not err in giving these contemporaneous interview notes some corroborative weight. Our conclusion is more certain because, as the ALJ pointed out, the notes "were submitted to Evans well before [Kimball] had any reason to believe that [Walker] would deny her version of the interview." R. D. & O. at 36. As we discuss in the next section, this sequence of events makes the notes more likely to be accurate.

(2) *Likelihood that Kimball would have been deterred from submitting a false report by Walker's opportunities to challenge it*

In his reply, Walker argues that the ALJ engaged in "pure non sequitur" by reasoning that Kimball "would have been deterred from making a false accusation because she knew that Walker would have two opportunities to deny [it]." Reply at 3, 2 (apparently referring to R. D. & O. at 36). According to Walker, the ALJ reasoned that because "'A' makes an accusation against 'B' before 'A' knows whether 'B' will contest the accusation, it follows that the accusation is true." *Id.* at 3. As Walker explains, "[a]pplying this reasoning, false accusations would never be made . . . because the object of the false accusation could later deny it. Applying that same reasoning to this case, Walker did not make a false hotline complaint against the three accused managers, because each one of them could later deny the accusations." *Id.* at 2.

Even if Walker's argument is not raised too late, it fails to persuade. Walker misunderstands the ALJ's logic. The ALJ did not reason that the *possibility* of discovery *prevents* a lie. Rather, the ALJ reasoned that *awareness* of the possibility of discovery (and the adverse consequences that come from being caught in a lie) makes a person *less likely* to lie – particularly when the person has time to think about it. This reasoning is logical. The ALJ had to determine who had lied: Kimball or Walker. The ALJ's reasoning does not prove that Kimball did not lie; but it does show that a lie by her was less likely than a lie by Walker. By noting that Kimball knew Walker would have two opportunities to challenge Kimball's report, the ALJ was acknowledging that Kimball knew she risked discovery if she lied. By so acknowledging, the ALJ was suggesting that in the circumstances Kimball probably would not have taken this risk. In contrast, Walker made his hotline call under stress; the allegation against Rogers and the others may have been intended only to convince the hotline operator of the seriousness of the NBO matter. Walker may not have known about the procedures that would follow, and may not have anticipated that the allegation would result in a Career Decision Day letter that would lead to the termination of his employment. Thus, when he made his allegation Walker may not have been aware of, or focused upon, the risk.

Moreover, people generally do not take on the risk of lying without a reason. The ALJ suggested that Walker had such a reason: he made the hotline call because he was concerned about being fired over the B-check/NBO incident. *See* R. D. & O. at 34 (finding “[h]ighly significant” the evidence “suggesting that [Walker] made his hotline call in order to discourage Bailey from attempting to fire him for having disregarded instructions concerning NBOs and for having possibly incited a work slowdown by the mechanics on duty on the night of [the B-check]”). Walker appears to take issue with this reasoning.¹⁰ Brief at 5 (arguing that “there is no evidence that Walker even knew what a whistleblower case was” and that “American could produce no evidence that Walker would be effected [sic] any differently than any other supervisor by the change in NBO policy”); Petition at 8 (“unrefuted evidence” of a prior, anonymous hotline call “refutes the theory that Walker was trying to create a whistleblower case”). But the ALJ did not suggest that Walker planned to make a whistleblower case, but rather suggested that Walker was prompted to call the hotline “in order to discourage Bailey from attempting to fire him.” This reasoning makes sense. Walker was affected differently from other level 4 supervisors because he, unlike the others, had mishandled the transition and was seen as responsible for a late plane. Walker testified that Merrill had told him Evans wanted to fire him after the B-check incident. *See* T. 490-93. And according to Kimball’s notes, Walker called the hotline because he was “[s]cared” and had a “feeling . . . that [he] would be fired.” R. D. & O. at 19 (quoting RX 24 at 6, 3).

In contrast to Walker, Kimball did not have a reason to lie. Walker suggests that she did. Specifically, he suggests that she wanted to protect Rogers from the adverse consequences that might otherwise result from Walker’s allegation.¹¹ Brief at 4 (suggesting that Kimball was biased because she “was investigating a complaint against her boyfriend”). But Walker’s “actual hotline allegation” was that Rogers was knowingly ordering the release of unsafe planes. Walker did not then, and does not now, argue that this allegation was true. (At most, Walker argues that he had a good faith basis for a different allegation – that Rogers and other managers were intimidating him. But the ALJ found that Walker’s “actual” allegation was about knowingly releasing unsafe planes, and Walker does not contest this finding.) If the actual hotline allegation was not based on fact, then Rogers had nothing to fear from it and Kimball had no need to protect him – so she did not need to lie, and therefore she was less likely to take the risk involved in lying. Based upon this analysis, we think it reasonable for the ALJ to have reasoned that Kimball was less likely to have lied.

¹⁰ Walker’s attempts to attack this finding are included only in his petition’s Factual Summary and his brief’s Statement of Facts. (Although prepared by counsel, the brief has no designated argument section. We assume based on its content that the argument section begins on page 12.) As we discuss below, argumentative suggestions located only in recitations of facts are disfavoured and justifiably may be considered waived.

¹¹ As with his previous argument, Walker’s suggestion in this regard took the form of a side comment during his recitation of facts.

(3) Walker's lack of credibility

The ALJ determined that “although Kimball was not an entirely credible witness, [Walker’s] trial testimony, including his allegation that Kimball was physically menacing . . . was even less credible.” R. D. & O. at 36. Walker, apparently in an attempt to undercut this rationale, argues that the ALJ’s determination not to credit his testimony “appears to be retaliation by the ALJ for allegations made by Walker” concerning Kimball’s threats and physical menace. Reply at 3.

According to Walker, he never stated that Kimball in fact tried to hit him, only that for a moment he thought she would. Reply at 3 (“Walker never said that Kimball in fact tried to strike him.” Rather, “during [their] meeting, . . . their voices were raised and at one point Kimball reached across the desk and handed him a pen and paper and her motion startled him, so he momentarily thought that she was going to strike him.”). But Walker’s testimony that he “honestly thought [he] was going to get hit,” T. 343, supports the ALJ’s finding that Walker “alleg[ed] that Kimball was physically menacing.” Moreover, as American points out, Walker also testified that Kimball physically abused mechanics out on the hangar floor.¹² T. 863 (Walker testified that Kimball “had been seen on the floor, not only by myself, hitting other mechanics and yelling.”). Because the ALJ viewed Kimball as she testified and assessed the degree of physical menace she posed, we do not disturb his determination that Walker’s credibility was diminished by allegations that Kimball was physically menacing.

Moreover, the ALJ appears to have based his assessment of Walker’s credibility not only upon the allegation that Kimball was physically menacing, but also upon his earlier determination that “Walker has made a number of other statements of doubtful accuracy” including:

[1] Walker’s assertion that documents concerning “pencil whipping” were stolen from his work locker after he told Kimball he was storing such papers in his locker [2] Walker’s insistence during his trial testimony that he never personally authorized the use of NBOs[, which was] directly inconsistent with a variety of documents indicating that he viewed NBOs as an essential supervisory tool and had in fact repeatedly signed documents authorizing NBO payments to the mechanics under his supervision[; and 3] . . . [Walker’s] initial AIR21 complaint letter to OSHA[, which] inaccurately suggest[ed] that safety-related actions that the Complainant took in August of 2001 preceded his Career [Decision] Day discipline, even though that disciplinary action actually occurred [before then].

¹² See Response at 2 (“[Walker’s] lies could not withstand the rigors of multiple days of hearing. . . . [Walker] was forced to spin an increasingly fantastic story . . . such as his claim that . . . Kimball[] was regularly seen on the hangar floor physically abusing aircraft mechanics.”).

R. D. & O. at 35.

Walker does not directly take issue with any of those three points. With regard to the first, he does argue that the ALJ “erroneously . . . refused to allow evidence regarding other locker burglaries at LAX.”¹³ Brief at 28-29. But we see no abuse of discretion here. Walker offered no proof that American was behind the locker burglaries; and evidence of other burglaries would not show that Walker’s locker was burgled, whether by American or anyone else. Moreover, what the ALJ found hard to believe was not the fact (or otherwise) of the burglary, but rather Walker’s testimony that he “told Kimball” that evidence was in his locker. The ALJ reasoned that telling Kimball about the locker evidence was “inconsistent with Walker’s alleged distrust of Kimball,” R. D. & O. at 35, and that this inconsistency made Walker less credible. Walker has not attempted to explain this inconsistency, so we see no reason to disagree with the ALJ’s reasoning that the inconsistency supports a determination that Walker was “less credible” than Kimball.

Walker fails to dispute any part of the other two statements. Having reviewed the record, we conclude that substantial evidence supports the ALJ’s assessment of these two statements. *See, e.g.*, T. 2903-2909 (Walker’s testimony regarding whether he had authorized NBO deals); RX 49 (Walker’s letter to OSHA) at 4. We also conclude that all three statements, along with Walker’s assertions that Kimball was physically menacing, together constitute substantial evidence for the ALJ’s determination that Walker was even less credible than Kimball.

(4) Walker’s failure to dispute Kimball’s report

Walker does not quarrel with the ALJ’s finding that he failed “during . . . his two subsequent meetings with Evans” to dispute Kimball’s report that he “had admitted making a false statement to the hotline.”¹⁴ R. D. & O. at 36. Walker does suggest (in the Factual

¹³ The ALJ indicated: “I don’t think the evidence [of other locker break-ins] would have much value at all without some proof that American was behind the break-ins. So I’m going to exclude that evidence.” T. 2607.

¹⁴ We understand the ALJ’s finding to be that Walker did not dispute Kimball’s report during either the August 6 or the August 7 meeting. In response to American’s contention that Walker did not even dispute Kimball’s report in his OSHA complaint, but rather waited until American moved for summary decision, *see* Response at 1-2 (“Complainant’s contention that his hotline report was in fact truthful, that his admissions were coerced or not truly admissions at all came only after Complainant faced a Motion for Summary Decision and needed a strategy to allow his case to survive.”), Walker’s petition argued that his post-termination requests for reinstatement and an investigation were “tantamount” to a denial of Kimball’s report. Petition at 16. Walker sensibly abandoned this argument in his brief. None of Walker’s seven requests included any challenge to Kimball’s report that he had confessed. *See* RX 46 (Walker’s September 28, 2001 letter requesting reinstatement), 48 (Walker’s subsequent requests for reinstatement). More important, what the ALJ found significant was Walker’s failure to challenge Kimball’s report while still employed. Even if

Summary section of his brief) that the ALJ should not have attached significance to his failure to dispute Kimball's report, because that failure was due to "duress." Brief at 11.¹⁵ According to Walker, he had to stay quiet in order "to keep his job." *Id.* But Walker does not explain why he could not also have "ke[pt] his job" if he had told Evans that his hotline call was accurate. As we discuss below, Walker offers no persuasive evidence that protected activity played any part in his discipline or termination.

The ALJ's credibility determinations are supported by Kimball's notes and her knowledge that Walker could challenge her report to Evans, and by Walker's lack of credibility and failure to challenge Kimball's report when he met with Evans. Together, this evidence is substantial – so both these determinations, and the ALJ's finding that Walker confessed that his hotline call was knowingly false, are conclusive.

Walker's Retraction

In his Statement of Facts, Walker suggests that the ALJ should not have relied upon Walker's handwritten Retraction as further evidence for his determination that Walker's July 16 complaint was not in good faith.¹⁶ Brief at 9-10. Walker gives several reasons. First, the Retraction was not really a retraction because "portions of [it] were perfectly consistent with the hotline complaint." Petition at 3; *see* Brief at 9-10. That "portions" of the Retraction were consistent with the Complaint does not, however, prove that the rest of the Retraction did not retract the charge. Indeed, although the Retraction is not a model of clarity, it contains the following statement: "I was never directly told to sign off unsafe or incomplete paper work." RX 26. Despite Walker's attempt to deny it, *see* T. 346-47, this statement flatly contradicts Walker's allegation to the hotline. Moreover, Walker does not explain how the ALJ may have erred in reasoning that the phrase "not accurate" was intended to convey that the hotline allegation was false.

Second, Walker also suggests that the Retraction was "coerced" and therefore was not probative. Brief at 9-10 ("The RDO ignores that the alleged retraction document was coerced."); *see* Petition at 3 ("[A]ny objective reading of the convoluted statement would conclude that it . . . appeared to be written by someone acting under duress"). But in light of the ALJ's credibility determination, which we have determined is conclusive, there is no evidence that any such coercion occurred.

Walker did challenge Kimball's report after his employment ceased, such a tardy challenge would not eliminate the significance of his failure to make an earlier challenge.

¹⁵ As with many of his arguments, Walker makes his duress argument only in his brief's Statement of Facts, and only in cursory fashion. As we discuss below, both these tactics are highly disfavored.

¹⁶ As we discuss below, arguments found only in a recitation of facts are not properly raised, and could justifiably be ignored.

Third, Walker argues that the ALJ “radically changed” his interpretation of the Retraction: the ALJ denied summary decision because he thought the Retraction was ambiguous, yet later decided that the Retraction was indeed a retraction. *See* Reply at 7-8. According to Walker, these “conflicting analyses by the ALJ impeach his [the ALJ’s] credibility.” *Id.* at 8. This argument is waived because it was raised too late. In any case, the ALJ’s original belief that the Retraction was ambiguous was formed prior to the hearing, when the ALJ also was not sure why Walker had made the hotline call. At the hearing, Walker testified that in his hotline call he had intended to accuse the managers of instructing him to release unsafe planes. *See* R. D. & O. at 36 n.12. This testimony explains the change in the ALJ’s view. Once Walker’s intent in making the hotline call was clarified and the Retraction’s inconsistency with that call became evident, then the Retraction was more definitely a retraction. Therefore, we conclude that substantial evidence supports the ALJ’s finding that the Retraction was indeed a retraction.

Having reviewed the entire record, we conclude that this finding, and the ALJ’s finding that Walker confessed, together provide substantial evidence for the ALJ’s finding that Walker’s hotline allegation was not in good faith.

Whether the hotline call was protected activity

Walker next suggests that despite the finding that the hotline call was not in good faith, the ALJ erred in concluding that the hotline call was not protected activity. In Walker’s view, the hotline call was protected because it “contains one statement that expressly concerns safety, namely that three managers ‘have been intimidating him into signing off on tasks that have not been completed or are not safe just so they can get the plane out.’” Brief at 14, *see also* Reply at 4-6 (arguing that two sentences, rather than one, relate to intimidation). But even if one statement in the hotline call “expressly concerns” safety – a matter on which we express no view – that one statement is the same statement that was not in good faith. The provision of “information” is protected activity only when the complainant actually “believe[s]” in the existence of a violation. *Peck*, slip op. at 13. Here, the finding that Walker did not make his hotline call in good faith is a finding that Walker did not actually believe the charge he made in that call. Therefore, regardless whether it otherwise provides sufficient information about safety to qualify as a protected activity, Walker’s hotline call cannot qualify as protected activity. Therefore, the ALJ did not err in concluding that the false charge in the hotline call was not protected under AIR 21.

Our conclusion that the falsehood was not protected makes irrelevant Walker’s argument that the ALJ erred in finding that the rest of the hotline call related to the NBO incident rather than to safety, and thus erred in concluding that the NBO portion of the call was not protected. Regardless whether the NBO discussion related to safety, the ALJ also found that “the adverse actions were solely motivated by the fact that the Complainant had admittedly made a false hotline complaint.” R. D. & O. at 38. As we discuss below, there is substantial evidence for this finding so it is conclusive.

4. Causation

Portions of Walker's pleadings appear to take issue with the ALJ's finding, *see* R. D. & O. at 38, that Walker failed to prove that protected activities were a contributing factor in the adverse actions taken against him. But Walker did not take exception to the ALJ's finding that American terminated Walker's employment "solely" because he "had admittedly made a false hotline complaint."

Walker's petition raises 33 errors. Most relate to the ALJ's evidentiary decisions, rulings on Walker's motions, credibility determinations, and supposed legal error in his treatment of the burden of proof when a termination is made in connection with a RIF.¹⁷ Four relate specifically to other findings – that Walker gave his name to the hotline operator because he sought protection from being fired (error 4), that Walker did not deny Kimball's assertion that Walker had admitted having made a false charge to the hotline (error 30); that Walker did not have a good faith basis for his hotline call (error 31) and that Walker had learned of Kimball's relationship with Rogers later than Walker originally had suggested (error 33). Petition at 8, 16, 17.

Two of the errors (errors 12 and 32) generally assert that the entire R. D. & O. was flawed, *see* Petition at 12, 16-17, and thus arguably could be read to include an attack on the ALJ's finding that the hotline call "solely" caused the termination. But under the regulations implementing AIR 21, Walker's petition had to "specifically identify the findings, conclusions or orders to which exception is taken." 29 C.F.R. § 1979.110(a) ("Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties."). Walker's two general errors do not meet this standard.

The first of Walker's general errors is as follows:

Equally flawed and suspicious is the reasoning in the RD&O which says essentially that Complainant proved everything that he needed to prove at the trial, to wit that (a) he made a safety complaint, (b) witnesses corroborated the essence of the safety complaint (the fact of pressure on mechanics to pencil whip) (c)

¹⁷ Errors 2-3, 6-10, 13-16, and 21-29 relate to the ALJ's evidentiary rulings. Petition at 7-8, 8-9, 12-14, 15-16. Error 1 relates to the ALJ's ruling on Walker's motion requesting that the ALJ sanction American for spoliation of evidence, and error 18 relates to the ALJ's decision not to award Walker attorney's fees as such a sanction. Petition at 6, 14. Errors 5 and 11 relate to the ALJ's credibility determinations, and errors 17 and 20 relate to the ALJ's supposed failure to make specific credibility determinations. Petition at 8, 9, 14-15. Error 19 relates to Walker's contention that the ALJ committed legal error in his treatment of the burden of proof when a termination is made in connection with a RIF. Petition at 14. In his brief, Walker asserts that the burden of proof "is *not* increased when adverse employment action . . . occurs in the course of a [RIF]." Brief at 11. But Walker does not assert that the ALJ erred in this regard, or pursue any related argument, so we conclude that he has abandoned error 19.

management knew about the safety complaint, (d) management conducted a shallow, biased investigation of the safety complaint (e) management took adverse action against Complainant with knowledge of the safety complaint. Still, Complainant is not to be believed and Complainant loses.

Petition at 12 (error 12). Because this error attacks as “flawed” the determination that Walker was “not to be believed,” a generous reading might construe it as an attack on the ALJ’s credibility determination with regard to Walker. Even a generous reading, however, could not discover an attack on the ALJ’s finding that Walker did not prove causation. Indeed, this error conspicuously omits causation from its list of “everything” that Walker needed to prove.

The second error, in its entirety, states as follows:

The ALJ erred in concluding that Complainant failed to show by a preponderance of the evidence that his bona fide protected activities were a contributing factor in the adverse actions taken against him.

Petition at 16-17 (error 32). This error takes exception to everything, and thus does not “specifically identify” anything. Unpacked, it appears to contain an attack on the causation standard used by the ALJ as well as attacks on at least three of the ALJ’s findings (that Walker failed to prove his case “by a preponderance of the evidence,” that Walker’s hotline charge was not “bona fide,” and that no protected activities contributed to American’s decision). Exceptions to the first two findings were specifically and repeatedly urged elsewhere in the petition. Does this mean that we should read this general statement as an exception to that third finding? We are concerned that doing so would render the regulation meaningless.

If we treat this general statement as sufficiently specific to raise this error, then we might in the future have to treat even a petition consisting solely of this one sentence as having raised all of the errors we have suggested, and more. (In a different case, it might also be read to raise an error concerning adverse action, for example.) Federal courts have not been as lenient in analogous circumstances. *See, e.g., Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1212 (8th Cir. 1993) (holding appellants had waived points of error included in single sentence that “in effect, assert[ed] 11 different errors . . . while providing no hint as to the nature of the asserted error on any of the 11 [issues]”).

Walker is slightly more specific in the Factual Summary section of his petition, but we are disinclined to consider as argument Walker’s passing references and commentary. *See, e.g., United States v. Wiggins*, 104 F.3d 174, 177 n.2 (8th Cir. 1997) (holding appellant’s challenge to certain procedure was waived even though he “made passing reference to [certain] procedure as erroneous,” because “he failed to argue this point or cite any law in support of this contention.”); *All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1434 (9th Cir. 1993) (holding issue waived where “mention is made of it in the recitation of facts contained in the opening brief,” but appellant “first raise[d] this issue as a grounds [sic] for appeal in its reply brief”).

In any case, Walker's suggestions are misguided. Walker notes that Evans initially wanted to fire Walker when he learned about Walker's false hotline call, and he suggests that this initial reaction shows that American's asserted reason for the termination (the disciplinary letter) was "pretextual."¹⁸ Petition at 6. But "pretextual" means false, a cover for a discriminatory reason – yet Walker admits that the hotline call was at least one of the reasons that American selected him for the RIF. Indeed, Walker admits that it was "the primary reason." Petition at 5.

If Walker is attempting to argue that American's claimed reliance upon the *disciplinary letter* was pretextual because American actually relied upon the *hotline call*, this is a distinction without a difference. There is no dispute that American issued the disciplinary letter at least primarily because of Walker's false hotline charge. Moreover, as we have stated, Walker admits that the hotline call was, at a minimum, "the primary reason for the termination." *Id.* Indeed, Walker's pleadings acknowledge frequently that the hotline call was the only reason. *See, e.g.*, Brief at 4 ("The discipline was imposed by Evans for the alleged dishonesty of making a false hotline complaint."); 16 ("Although Walker engaged in several protected activities, the crux of this case involves the hotline complaint of July, 2001."); 20 ("Evans terminated Walker on the basis of the mere claim by a third party (Kimball) that Walker said that his hotline complaint was made up.").

Because Walker has conceded that the hotline call (together with Kimball's report that he had admitted it was false) was at least the primary reason for the discipline and termination, a different sort of causation argument is required. Walker cannot prevail by showing that American's reason is not true, because he already has admitted that it is. Rather, Walker can prevail only by showing that American's "reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is [Walker's] protected activity." *Henrich*, slip op. at 10 (quoting *Rachid v. Jack in the Box*, 376 F.3d 305, 312 (5th Cir. 2004)). This he has not done.

While Walker suggests that he engaged in multiple instances of protected activity and further suggests that "his hotline complaint *and other complaints about aircraft safety and refusals to sign off unsafe aircraft* were the reasons for his termination," Petition at 5 (emphasis added), he offers virtually no evidence on this point. It is clear from Walker's pleadings that

¹⁸ Walker also argues that "[n]either Evans nor Bailey can claim in good faith that he relied on the investigation of Kimball (the CDDA [Career Decision Day Advisory] and LOC [disciplinary letter of commitment]) in selecting Walker for layoff." Reply at 10. This argument was raised too late. In any case, it is premised upon Walker's view that any reliance upon Kimball's investigation was flawed because "[n]either Evans nor Bailey enquired into the nature or the results of Kimball's investigation." *Id.* Thus, we do not understand this argument as an attempt to take issue with the ALJ's ruling that the termination was "solely" due to Walker's false hotline call. Rather, we understand it as an acknowledgment that Evans and Bailey relied upon Kimball's investigation, coupled with an argument that they should not have so relied (or that their reliance was a pretext for discrimination – but, as our discussion below explains, pretext is not what Walker needs to prove). In any case, this argument was raised too late.

insofar as he argues that “protected activity” played any part in his termination, such argument is based almost entirely upon his argument that he did not confess, so the hotline call was in good faith, so it was protected activity.¹⁹

Walker’s argument that there was temporal proximity between the hotline call and the termination, *see* Brief at 16-17, merely supports the ALJ’s finding that the hotline call was the reason for the termination. Walker’s argument that American’s reason for the termination shifted, *see* Reply at 8, was not in his petition or his brief and so it is raised too late.²⁰

As for Walker’s other arguments, the one with the most potential is based upon his assertion that Evans and Bailey told Merrill they intended to fire him prior to his hotline call. *See* Petition at 8 (error 5); *see also* Brief at 11-12 (“[T]here was unrefuted testimony at trial that . . . Merrill told Walker in response [to “complaints . . . about pressure to pencil whip”] that Evans and Bailey said that they were going to fire him.”). But although this was mentioned in the brief’s Statement of Facts, the brief contained no argument on this point, so this argument has been abandoned and thus waived. Moreover, Walker also testified that Merrill’s communication occurred after the incident in which the B-check was delayed due to Walker’s mishandling of the change in NBO policy. *See* T. 490-93; *see also* R. D. & O. at 14 (Merrill was on vacation when the B-check incident took place). Thus even if Merrill made this statement – which, in light of Walker’s doubtful credibility, is not at all clear – the statement does not suggest that protected activity contributed to any desire on the part of Evans and Bailey to fire Walker.

Walker also suggests in his Statement of Facts that American’s destruction of the exception sheets signed by other supervisors “is circumstantial evidence of a pretextual reason

¹⁹ For example, Walker argues in his brief that the ALJ’s “conclusions are ultimately based on the fallacious reasoning that Kimball told the truth when she reported that Walker confessed that the hotline complaint was false.” Brief at 25. Walker states in his petition’s Factual Summary that “this entire case turns on Kimball’s claim that Walker orally told her during this investigation that he made up the hotline complaint.” Petition at 10. And Walker argues in his reply that “[t]he ALJ’s findings that Walker did not make the hotline complaint in good faith . . . [and that] Complainant’s protected activities were not contributing factors in his termination . . . are . . . based on the conclusion that Walker admitted that he made up the hotline complaint.” Reply at 8-9.

²⁰ Moreover, because this argument was not in the reply except by “incorporat[ion],” it is not properly presented. *See Administrator v. Am. Truss*, ARB No. 05-032, ALJ No. 2004-LCA-12, slip op. at 2 n.1 (ARB Feb. 28, 2007) (concluding arguments waived when included in petition only by incorporation); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6, slip op. at 4 (ARB Dec. 30, 2005) (reissued Jan. 5, 2006) (dismissing appeal for repeated violations of Board’s briefing rules, including persistent attempts to incorporate by reference); *see also DiSilva v. DiLeonardi*, 181 F.3d 865, 866 (7th Cir. 1999) (refusing to consider argument presented only through incorporation, because “adoption by reference amounts to a[n] [impermissible] self-help increase in the length of the appellate brief”).

for disciplining Walker.”²¹ Brief at 7. But the destruction of these sheets does not tend to show that protected activity contributed to American’s discipline of Walker, because the sheets would not have damaged American’s defense even if they had showed that other supervisors continued to sign exception sheets after the policy change, and even if they had showed that other supervisors had done so more than Walker. Walker does not contend that the exception sheets would indicate that Bailey’s assignment of Walker to a different shift was due to protected activity rather than to the B-check incident American believed had been caused by Walker’s mishandling of the NBO policy change.

Walker also argues that the participation by Evans and Bailey in the embezzlement scheme showed that they were “not terribly concerned about dishonesty,” so they must not have been concerned about the dishonesty reflected in Walker’s false hotline call, so they must have had another reason, and that reason must have been “the whistleblowing itself.” *See* Brief at 21. But except for its first step, this far-fetched argument is entirely speculative. Moreover, an embezzler’s lack of concern about his own dishonesty does not prove that the embezzler does not remain concerned about another’s dishonesty. It certainly does not show, here, that retaliation was the reason.

Finally, Walker asks us to admit the evidence that the ALJ excluded. According to Walker, that evidence would show “disparate treatment” because Evans terminated Walker’s employment but did not terminate the employment of those involved with Evans in the embezzlement scheme, *see* Brief at 16-17, 19-22, and because American’s investigation of his hotline call was brief and performed only by Kimball, but its investigation of the embezzlement scheme was extensive and performed by “‘teams’ of investigators.” *Id.* at 19-21. In Walker’s view, that evidence also “demonstrates that Evans did not want outside investigators at LAX who might uncover the criminal activity, and that therefore he had a reason to have it shown that the hotline complaint was false.” Brief at 19.

Because the evidence Walker asks us to admit was presented to and rejected by the ALJ, we understand Walker’s argument as an argument that the ALJ abused his discretion by failing to admit this evidence. Abuse of discretion is difficult to show – and because a hearing has been held, Walker would have to show not only that the ALJ abused his discretion but also that the

²¹ Although Walker argued in his petition that the ALJ abused his discretion in denying Walker’s motion for sanctions against American for destruction of evidence, he does not pursue this argument in his brief or his reply. An argument raised in a petition, but not discussed in a brief, is considered abandoned and thereby waived. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 481 n.78 (1970) (“The Bondholders Committee raised the question in its petition for certiorari . . . [but] has not revived the issue in its brief, nor has it responded in its reply brief to the Government’s contention that it has abandoned the claim. Accordingly, we do not consider the matter further.”); *see also Mitchell v. Cellone*, 389 F.3d 86, 92 (3d Cir. 2004) (“Where an appellant presents an issue in his statement of issues raised on appeal, but not in the argument section of his brief, he has ‘abandoned and waived that issue on appeal’”) (quoting *Travitz v. Ne. Dep’t ILGWU Health & Welfare Fund*, 13 F.3d 704, 711 (3d Cir. 1994)). In any case, we see no abuse of discretion in the ALJ’s decision not to sanction American. The ALJ was told that American had destroyed the evidence prior to the ALJ’s order and without knowing it would be relevant to the case. *See* T. 8-9.

admission of this evidence might alter the outcome. It would not. Co-conspirators of Evans are not appropriate comparators to Walker, and investigating an embezzlement scheme differently from a hotline call is not evidence of disparate treatment. And even if Walker is correct in speculating that Evans “had a reason to have it shown that the hotline complaint was false,” Walker does not show how the excluded evidence would tend to show either that Evans took any action to influence Kimball’s report, or that protected activity prompted Evans to approve the termination.

We conclude that substantial evidence supports the ALJ’s finding that the falsehood solely motivated the termination. Even if we had reached the opposite conclusion, Walker has conceded that it was the primary reason. With this concession, Walker undercuts his argument – not made in his brief and raised only in the Factual Summary of his petition, *see* Petition at 6, and unsupported by any evidence or argument other than those points already discussed above – that American failed to prove it would have terminated his employment anyway. Therefore, we conclude that Walker would not prevail even in a dual motive analysis.

CONCLUSION

Walker’s hotline call was not protected activity, and substantial evidence supports the ALJ’s finding that that Walker’s termination was solely due to that call. Therefore, we **AFFIRM** the ALJ’s order and **DISMISS** Walker’s complaint.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge