



**In the Matter of:**

**THOMAS B. JETER,**

**ARB CASE NO. 06-035**

**COMPLAINANT,**

**ALJ CASE NO. 2004-AIR-030**

**v.**

**DATE: February 29, 2008**

**AVIOR TECHNOLOGIES OPERATIONS,  
INC., d/b/a FLIGHTWORKS,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Loreen M. Robinson, Esq., *Faulkner, Muskovitz & Phillips, LLP*, Cleveland, Ohio**

***For the Respondent:***

**Matthew W. Clarke, Esq., *Smith, Gambrell & Russell, LLP*, Atlanta, Georgia**

**FINAL DECISION AND ORDER**

Thomas B. Jeter filed a complaint alleging that his former employer, Avior Technologies Operations, Inc., d/b/a FlightWorks (FlightWorks), 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 2007) and its implementing regulations, 29 C.F.R. Part 1979 (2007). A Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Decision and Order – Dismissal of Complaint (D. & O.).

## BACKGROUND

Substantial evidence in the record supports the ALJ's comprehensive findings of fact. D. & O. at 37-47. We summarize.

C.T. Aviation initially hired Jeter in late May 2002 to be the second pilot for its Hawker aircraft, for which Francis Parker was pilot. Shortly thereafter, on July 1, 2002, Jeter and Parker involuntarily became FlightWorks employees by virtue of a business transaction between C.T. Aviation and FlightWorks. FlightWorks is an on-demand charter aircraft carrier and management company. The parties stipulated that FlightWorks is an air carrier within the meaning of AIR 21. At the relevant time, FlightWorks provided charter and other flight services, including pilots, for the principals and owners of C.T. Aviation. As a FlightWorks pilot, Jeter was required to fly Part 91 and Part 135 (charter) flights, as scheduled to meet the needs of both FlightWorks and C.T. Aviation. Jeter was required to follow FlightWorks' rules, regulations, and manuals. Jeter continued to work for FlightWorks in Atlanta as second pilot on the C.T. Aviation-owned Hawker aircraft, until FlightWorks terminated his employment on May 16, 2003.

As a new hire at FlightWorks, Jeter received indoctrination training in July 2002 from Randy Rakes, FlightWorks' Director of Operations. Jeter testified that during the course of this training, he and other pilots questioned Rakes about the absence of any oral or written test. Jeter testified that Rakes responded that no test was required by Federal Aviation Regulation (FAR). Jeter subsequently underwent hazardous materials training in October 2002, which was conducted by Richard Young (Young), FlightWorks' Chief Pilot.

By November 2002, Jeter and Parker became concerned that FlightWorks' maintenance records on the Hawker aircraft were inaccurate. Jeter and Parker believed that these inaccuracies both affected the safety of the Hawker aircraft and led FlightWorks to bill C.T. Aviation for maintenance work that Flightworks had not actually performed. Jeter and Parker shared their concerns with officials at C.T. Aviation including its co-owner, Mr. Cook, and its accountant, Charlene McNabb. Cook responded by asking Jeter and Parker to review the maintenance and billing records and to report back. Cook asked Scott Beale, FlightWorks' President and Chief Executive Officer, to provide detailed maintenance bills.

In December 2002, the FAA notified Beale that it was investigating an incident involving a pilot operating under FlightWorks' Part 135 charter flight certificate, who flew with an expired medical certificate. The FAA later extended the scope of its investigation to include FlightWorks' training and testing procedures.

Beale and Rakes met with FlightWorks pilots, including Jeter, in January 2003 and informed them of the FAA investigation. When Rakes presented a proposed

procedure as corrective action, Jeter challenged the plan. Rakes and Jeter exchanged loud remarks and later apologized to each other.

FAA investigator, Robert R. Rogers, interviewed Jeter on January 31, 2003. Rogers' form report indicates that Jeter answered in the affirmative when asked whether Young had administered an oral examination following the hazardous materials training Young conducted in October 2002.<sup>1</sup> See Respondent's Exhibit 12; Hearing Transcript (T.) at 329-330.

Sometime in February 2003, C.T. Aviation decided to make their Hawker aircraft available for Part 135 charter flights. As a result, Jeter and Parker started flying more charters.

In early February 2003, Jeter and Parker completed their review of FlightWorks' billing of C.T. Aviation through December 2002 and Jeter discussed their conclusions with McNabb. Also at this time, McNabb initiated an e-mail exchange with Jeter when she asked him to explain a \$400.00 pilot fee bill Jeter had submitted to FlightWorks. Jeter responded that because he was now flying charters for FlightWorks, which was outside his main employment with C.T. Aviation, he charged FlightWorks a captain's rate of \$400.00 per day which was the industry standard. Jeter questioned why Beale should collect pilot fees at FlightWorks when "not a single dime of [FlightWorks'] money goes into our salaries, benefits, etc." Jeter indicated that recent dealings at FlightWorks had "made it difficult to function in the job description which was outlined to me in my original employment."

McNabb responded to Jeter and explained that FlightWorks received a management fee and a percentage of C.T. Aviation's revenue and a percentage of charter revenue. McNabb also explained that Jeter was paid to fly the Hawker aircraft and any charters to which she agreed. The \$400.00 fee Jeter sought would have to come from C.T. Aviation not FlightWorks. McNabb added that if Jeter wanted additional money to fly C.T. Aviation's aircraft for FlightWorks' charters, he needed to discuss that with her. McNabb stated that Jeter was a FlightWorks employee and subject to their policies. McNabb expressed her desire to meet with Jeter, Parker and Beale to discuss the situation.

On February 14, 2003, Jeter replied to McNabb by e-mail. Jeter indicated that while he understood the billing arrangement between C.T. Aviation and FlightWorks, there were huge discrepancies in revenues reported and revenues collected. Jeter asserted that FlightWorks was adding unauthorized charges which resulted in FlightWorks overcharging C.T. Aviation by tens of thousands of dollars. Jeter expressed his belief that FlightWorks' practices constituted operational mismanagement and were an

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<sup>1</sup> Rogers' form report, signed and dated February 7, 2003, contains a handwritten notation signed by "H Ray Belcher" that is dated February 20, 2003. Respondent's Exhibit 12. The notation reads: "The 135.293(a)(1) + (8) was not recorded/signed off on the recent 8410-3, From FSI Houston, dated 10/19/02." *Id.*

“absolute outrage.” Jeter stated his misgivings about flying an increasing number of charters for FlightWorks which, he asserted, affected his ability to operate aircraft in a safe manner and presented quality of life issues. Jeter also charged that the FAA’s investigation of FlightWorks raised serious concerns about “ethical decision-making and administrative oversight” that could lead to serious FAA action in response to “numerous violations and offenses.” Jeter added that FlightWorks was becoming “an unacceptable work environment to any professional pilot interested in flying legally and safely.”

McNabb replied on February 17, 2003, and explained to Jeter that she would try not to ask Jeter to fly an excessive number of charters. McNabb indicated that while she appreciated Jeter’s loyalty to C.T. Aviation, she believed that most of his concerns about FlightWorks’ billing practices were “confused.” McNabb was concerned about Jeter and Parker’s deteriorating attitudes towards FlightWorks and reminded Jeter that he was a FlightWorks employee and subject to its rules. McNabb counseled Jeter that he and Parker would have to reconcile their differences with FlightWorks and sought a resolution within a week.

On February 18, 2003, McNabb forwarded to Beale the above-detailed string of e-mails between herself and Jeter and requested a meeting with Beale, Jeter, and Parker.

On February 24, 2003, Jeter and Parker met with Rakes and Beale and McNabb to discuss Jeter and Parker’s billing concerns, as well as the pilots’ expanding role in flying charters. Jeter testified (1) that Rakes asked Parker why he and Jeter had not initially brought their billing concerns to FlightWorks’ attention but had gone directly to C.T. Aviation without advising FlightWorks; and (2) that Beale told Jeter that he would have appreciated if Jeter had come to him first and that he, Beale, felt that he was being labeled a crook and was very disappointed in Jeter. T. 360, 363-365, 369. Jeter testified that neither Beale nor Rakes advised him at the February 24, 2003 meeting that he was being put on a sixty-day probationary period. T. 366-368. Jeter testified that, rather, Beale acknowledged that mistakes in billing had been made and said that he would look into the billing and maintenance issues and would get back to Jeter, Parker, and McNabb in sixty days. T. at 366-367.

Rakes and Beale each testified, however, that they considered the focus of the February 24, 2003 meeting to be Jeter’s and Parker’s disruptive behavior in having gone behind their employer’s back and reported billing concerns to a client. Rakes and Beale each testified that they believed Jeter and Parker showed disloyalty to their employer and should have come to FlightWorks first with their concerns. Both Rakes and Beale testified that the purpose of the sixty-day period discussed at the meeting was both that FlightWorks could address the billing issues and Jeter and Parker would have an opportunity to change their attitudes towards their employment at FlightWorks.

The next day, Jeter sent an e-mail to Beale, thanking him for the previous day’s meeting and expressing his appreciation for Beale’s willingness to listen to Jeter’s and Parker’s concerns. Jeter referred to the fact that they would meet again in sixty days “to re-evaluate our relationship.” Complainant’s Exhibit 28.

By letter dated February 26, 2003, the FAA notified Jeter that it was investigating his alleged violation of FAR 135 when he operated aircraft for FlightWorks without having “met the training requirements under FAR 135.293.” Complainant’s Exhibit 11.

Jeter sought the advice of counsel, Alan Armstrong, whose fees C.T. Aviation agreed to pay. Jeter met with Armstrong on March 11, 2003. Armstrong, at that time, finalized and faxed a statement to the FAA on Jeter’s behalf. Therein, Armstrong detailed Jeter’s training at FlightWorks, including his July 2002 indoctrination training by Rakes and Rakes’ statement to Jeter and other pilots that no examination was required by FAR to complete the training. *See* Complainant’s Exhibit 30. Several other FlightWorks pilots received similar notices from the FAA and responded thereto.

Later that day, Beale and Rakes met with FlightWorks’ pilots. Jeter did not attend the meeting. T. at 395. Jeter testified that other pilots who were at the meeting, namely Parker and Scott Ross, informed him that Beale referred to pilots’ written statements which the pilots had submitted to the FAA, and that Beale indicated that he had copies of these statements. T. at 396-397, 399, 401, 402, 512, 536. Jeter testified that his own statement, faxed by his counsel to the FAA earlier that same day, could not have been in Beale’s possession at the meeting. T. at 397. But Jeter testified that he believed, but could not prove, that Raymond Belcher, an FAA employee involved in the investigation of FlightWorks, gave Jeter’s March 11, 2003 statement to FlightWorks through Rakes who knew Belcher.<sup>2</sup> T. at 400, 417-418. Jeter believed that Belcher gave FlightWorks his March 11, 2003 statement prior to Beale and Rakes’ May 2003 decision to terminate his employment and that the statement’s content was the reason for their decision to terminate his employment. T. at 417-418, 513, 536, 537.

Rakes testified that he did not remember seeing or discussing any particular pilot’s statement and never saw any pilot’s statement prior to the conclusion of the FAA’s investigation. T. at 177, 180, 193. Rakes also testified that Belcher neither asked him about nor shared any information contained in any pilot’s statement. T. 180, 193. Rakes also testified that he was not aware of the substance of Rogers’ January 31, 2003 form report of Jeter’s interview, *see* Respondent’s Exhibit 12, until he first saw it two weeks before the March 2005 hearing. T. at 193-195.

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<sup>2</sup> During discovery, Jeter’s counsel obtained a subpoena signed by the Administrative Law Judge on November 19, 2004, ordering Belcher to appear at the hearing. Counsel’s attempt to have Belcher served with the subpoena was unsuccessful because Belcher was unavailable. Jeter’s counsel was informed that Belcher had been deployed to Iraq on active military duty and was not expected to return until approximately July 2005. The ALJ denied the Complainant’s motion to continue the hearing until Belcher’s return to the United States. The ALJ left the record open for forty-five days after the hearing for the limited purpose of providing the Complainant’s counsel further opportunity to reach Belcher and submit relevant information from him. T. at 631-635.

Beale testified that he did not see Jeter's March 11, 2003 statement until a couple of weeks before the March 2005 hearing. T. at 577. Therefore, Beale testified that he never saw Jeter's March 11, 2003 statement before he terminated Jeter's employment on May 16, 2003. T. 577-578, 580. Beale also testified that in early April 2003, after the FAA concluded its investigation, FlightWorks' counsel gave him all of the FAA investigative form reports of pilot interviews, including Rogers' January 31, 2003 form report of Jeter's interview, *see* Respondent's Exhibit 12. T. at 577, 578, 580. Beale testified that Rogers' report had no adverse impact on FlightWorks as it documented that Young *had* administered an oral examination to Jeter during his October 2002 training. T. 578-579.

In April 2003, Lance Warren, FlightWorks' scheduler, contacted Jeter and Parker in Dallas to schedule a charter departing Atlanta the next day at 6:30 a.m. Jeter and Parker were undergoing simulator flight training in Dallas. They were scheduled to return to Atlanta on an early evening flight. Jeter told Warren that he was concerned that he and Parker would not have the requisite ten hours of crew rest if they flew again at 6:30 a.m. the next day. Warren responded that the morning flight would be legal because Jeter and Parker were already in crew rest. Jeter disagreed with Warren's position that simulator training was crew rest. Warren asked Jeter if he was refusing the morning flight. Jeter responded by asking to speak to the Chief Pilot. Later, Rakes called Jeter and stated that simulator training was crew rest. Jeter again disagreed. Eventually, FlightWorks moved the charter's departure time to 7:30 a.m. As a result, Jeter and Parker had sufficient crew rest upon their return and flew the charter.

A few days later, Warren e-mailed Jeter and thanked him for his assistance in scheduling the charter and indicating that he appreciated the teamwork involved. Jeter responded by e-mail, with copy to the Hawker aircraft's owners at C.T. Aviation and to McNabb, Beale, and Parker. Jeter indicated that teamwork was hardly involved. He stated that due to FlightWorks' poorly coordinated effort, his flight plans were changed three times. Jeter stated that he wondered whether the hundreds of dollars of costs associated with those changes would be passed on to C.T. Aviation. He noted that the charter had been initially illegally scheduled since the 6:30 a.m. departure time would have denied the crew their requisite ten-hour rest. Jeter also stated that the changes in schedule had had an adverse effect on pilot morale; he explained that flying the charter had changed his schedule for the week and that he was forced to cancel a surprise anniversary party for his wife. Jeter indicated that he did not appreciate the detrimental effect that the schedule changes had had on his personal life. Jeter's tone surprised Warren who did not think it was warranted. Warren forwarded Jeter's response to Beale.

Also in April 2003, Jeter sent Beale an e-mail indicating that he would be unavailable May 8 and 9 for a C.T. Aviation flight to the west coast, because he was scheduled to be deposed in court in Cleveland on May 9. Beale forwarded the request to the flight scheduler, but did not consider Jeter's e-mail to be a formal request for days off. Nevertheless, Jeter had May 9 off from work but was on standby May 6 through May 8. In an attempt to accommodate a requested charter for May 8, Warren contacted Jeter on May 6. Jeter responded that he intended to fly from Atlanta to Cleveland on the first

flight May 8 and could not take the charter. Warren, as well as another scheduler, unsuccessfully attempted to contact Jeter again to see if he could modify his travel plans, take the charter on May 8, and still make his deposition on May 9. The two schedulers left messages to which Jeter did not respond. The requested May 8 charter did not go, and another requested charter for May 7, which would not have interfered with Jeter's plans, was lost.

Sometime between May 8 and May 13, 2003, Beale and Rakes decided to terminate Jeter's employment. On May 13, Rakes' assistant asked Jeter to come to Rakes' office on May 16. On May 16, 2003, while still at home, Jeter received a May 13, 2003 letter from the FAA advising him that its investigation of his training had disclosed no violation by Jeter and he could consider the matter closed. Jeter then went to Rakes' office for the arranged meeting. Rakes and Beale were both present for the meeting wherein Rakes terminated Jeter's employment with FlightWorks.

Jeter filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on August 8, 2003. Jeter alleged that FlightWorks terminated his employment in retaliation for his participation in the FAA's investigation of FlightWorks. OSHA investigated and found insufficient evidence to show that Jeter's protected activity was a factor in FlightWorks' decision to terminate his employment. Jeter requested a hearing. The ALJ held a hearing on March 2 and 3, 2005. The ALJ dismissed Jeter's complaint. Jeter petitioned the Administrative Review Board (ARB or Board) for review, and both parties filed briefs before the Board.

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

The Secretary has jurisdiction to review the ALJ's recommended decision. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to the ARB her authority to review cases under, inter alia, AIR 21. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

In AIR 21 cases, the ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). This means that if substantial evidence in the record supports the ALJ's findings of fact, they shall be conclusive. We review conclusions of law de novo. *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

### **DISCUSSION**

#### *Elements of an AIR 21 whistleblower complaint*

The whistleblower provision of AIR 21 extends protection to employees in the air carrier industry who engage in certain activities that are related to air carrier 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). The implementing regulation describes the protected activities, including the following:

- (1) Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the 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 subtitle VII of title 49 of the United States Code or under any other law of the United States . . . .

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. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004).

*Jeter engaged in protected activity and FlightWorks had knowledge of it*

The ALJ found that between the end of January and May 13, 2003, Jeter participated through an interview and by submitting a written statement in the FAA’s investigation of FlightWorks’ training practices and documentation and Jeter’s own qualifications. D. & O. at 47. The ALJ noted that the specific area of inquiry related to Part 135, the FAR that concerns certification to conduct commercial charter flight service. *Id.* The ALJ found, (1) that Jeter informed the FAA when he met with an investigator January 31, 2003, that Young had administered an oral examination when he conducted training under Part 135 in October 2002; and (2) that Jeter, through counsel, had informed the FAA in a March 11, 2003 written statement, that while Rakes had provided the requisite indoctrination training in July 2002, he had not administered an examination. *Id.* The ALJ determined that the FAA’s investigation fell within the meaning of a “proceeding” relating to any violation or alleged violation of any order,

regulation, or standard of the FAA under 49 U.S.C.A. § 42121(a)(2) and (4). *Id.* The ALJ concluded that Jeter engaged in protected activity in January and March 2003, when he responded to the FAA's inquiries, given the nature of the FAA's investigation and the content of Jeter's responses. *Id.* at 47, 48.

The ALJ further found that FlightWorks did not contest that it knew that Jeter responded to an FAA investigator's inquiries in January 2003. *Id.* The ALJ added, "Considering the continued FAA investigation in March 2003, FlightWorks, Mr. Beale and Mr. Rakes were aware that all the FlightWorks pilots, including Mr. Jeter, were notified of the additional investigation. Consequently, I find that Mr. Beale and Mr. Rakes were aware of Jeter's protected activity of participating in the FAA investigation in January and March 2003." *Id.*

The parties stipulated at the hearing that Jeter engaged in protected activity on January 31, 2003 when he provided information to the FAA investigator about FlightWorks training. T. at 15. In its brief to the Board, FlightWorks states that the ALJ properly took into account the "fact" that Beale and Rakes were aware that Jeter engaged in protected activity in both January and March 2003, by virtue of his participation in the FAA's investigation. Respondent's Brief at 6. Therefore, we conclude that Jeter met his burden to establish that his participation in the FAA's investigation constituted protected activity and that FlightWorks had knowledge of his protected activity.

*Jeter experienced an unfavorable personnel action*

The ALJ found that it was uncontested that FlightWorks subjected Jeter to an "unfavorable personnel action" under AIR 21 when on May 16, 2003, Rakes terminated his employment as a pilot. D. & O. at 47. FlightWorks stipulated at the hearing that Jeter suffered an adverse employment action when it terminated his employment on May 16, 2003. T. 25-26; *see* Respondent's Brief at 2. We therefore conclude that Jeter met his burden to establish that his employer subjected him to an unfavorable personnel action.

*Jeter failed to prove that his protected activity was a contributing factor in FlightWorks' decision to terminate his employment*

Jeter has established that he engaged in protected activity by participating in the FAA's investigation of his employer and his qualifications, that his employer was aware of his protected activity, and that his employer subjected him to an unfavorable personnel action by terminating his employment. To establish discrimination under AIR 21, Jeter must also establish by a preponderance of the evidence that his participation in the FAA's investigation was a "contributing factor" in the decision by Beale and Rakes to terminate his employment. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 5 (ARB June 29, 2006). Jeter need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006).

The ALJ indicated that resolution of the issue of whether Jeter's participation in the FAA's investigation contributed to FlightWorks' termination of his employment "requires analysis and evaluation of conflicting circumstantial and direct evidence to determine FlightWorks' motive, or motives, behind the decision to terminate Mr. Jeter." D. & O. at 48. The ALJ added:

Absent direct evidence of the requisite causation component, Mr. Jeter relies on not insignificant circumstantial evidence as the basis for his AIR 21 discrimination complaint that FlightWorks fired him due to the statement that he provided to the FAA in March 2003.

*Id.*

The ALJ detailed the three components of Jeter's circumstantial case on causation as follows: First, that Jeter's March 11, 2003 statement provided evidence that Rakes, and derivatively FlightWorks, had violated a FAR by failing to administer an examination to Jeter and other pilots in his July 2002 indoctrination training. Second, that as a result of the FAA's investigation, Rakes was removed as FlightWorks' Director of Operations, which must have been disruptive to FlightWorks' operations. Third, that May 13, 2003, the date of the FAA's notice to Jeter that its investigation of his qualifications was closed, was also the day that Rakes' assistant contacted Jeter to come to Rakes' office on May 16, 2003. And that on that day, May 16, 2003, Jeter actually received the FAA's May 13 letter, and Rakes terminated his employment.

Temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation. 29 C.F.R. § 1979.104(b)(2). While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-019, slip op. at 6-7 (ARB Apr. 28, 2006).

In this case, the ALJ determined:

While Jeter's circumstantial case is not without merit, it rests principally upon the timing of his termination at the conclusion of the FAA investigation to support a finding of illegal discrimination under AIR 21. Upon consideration of other evidence in the record, Mr. Jeter's circumstantial case of purported illegal discrimination based on the timing of events starts to unravel.

D. & O. at 49.

The ALJ noted that implicit in Jeter's circumstantial case was the assumption that despite their sworn testimony to the contrary, Beale and Rakes were aware of the contents of Jeter's March 11, 2003 statement prior to their May 2003 decision to terminate his employment and that content motivated them to terminate his employment on May 16, 2003. The ALJ found, however, that "insufficient evidence exists to establish that Mr. Beale referenced FAA pilot statements at the crucial March 11, 2003 pilot meeting." D. & O. at 49. The ALJ added that even if Beale had such statements in hand at the meeting, "little probative evidence exists" that he later also obtained Jeter's statement. *Id.* The ALJ explained that while FlightWorks was aware that Jeter, as one of its pilots flying on its Part 135 charter certificate, had received FAA notice that it was investigating his qualifications, Beale and Rakes would not have known whether Jeter actually responded to the notice. *Id.* The ALJ added that since the FAA investigated several FlightWorks pilots and not only Jeter, Jeter would not necessarily be identified as *the* source for the FAA's ultimate finding regarding FlightWorks' indoctrination training.<sup>3</sup> *Id.* Critically, the ALJ found that the testimonies of three other FlightWorks pilots, namely Parker, Miller (Clay) Smith, and Gregory Franklin, showed that FlightWorks did not react to the adverse content of its pilots' statements by terminating their employment. *Id.* at 52. The ALJ determined that this evidence made it less likely that FlightWorks discriminated against Jeter by terminating his employment because of his statement. *Id.* The ALJ thus determined that the preponderance of the evidence indicates that Jeter's protected activity was not a contributing factor in FlightWorks' decision to terminate his employment. *Id.* at 53.

We agree with the ALJ's ultimate conclusion that temporal proximity was insufficient to establish that Jeter's protected activity contributed to FlightWorks' decision to fire him. Substantial evidence in the record supports the ALJ's factual findings and we affirm them. D. & O. at 48-53. Therefore, we affirm the ALJ's conclusion that Jeter's protected activity was not a contributing factor in FlightWorks' decision to terminate his employment. We conclude that Jeter failed to establish by a preponderance of the evidence an essential element of his claim, namely causation. Therefore, Jeter's claim must fail.

*The ALJ found that FlightWorks had a legitimate reason for terminating Jeter's employment*

The ALJ found that a preponderance of the evidence contradicted Jeter's assertion that his March 11, 2003 statement must have motivated Beale and Rakes to fire him because the alleged personnel issues presented by FlightWorks as a basis for his firing "were not real." D. & O. at 49. The ALJ found that rather, the preponderance of the evidence established that FlightWorks had a legitimate reason for terminating Jeter's

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<sup>3</sup> The ALJ declined to admit into the record the Consent Order reached by FlightWorks and the FAA.

employment, namely Jeter's "continued incompatible attitude towards the Part 135 flying that FlightWorks required." *Id.* at 50. The ALJ reviewed the evidence detailing Jeter's February e-mail exchange with McNabb regarding the billing issues and his dissatisfaction with FlightWorks; Jeter's subsequent meeting with McNabb, Beale, and Rakes; Jeter's April 2003 e-mail response to Warren citing the absence of teamwork, and Jeter's failure to return FlightWorks' schedulers' calls in early May 2003. The ALJ concluded:

The preponderance of the more probative evidence establishes that Mr. Jeter's participation in the FAA investigation in March 2003 did *not* contribute to his employment termination. Instead, due to a demonstrated continued incompatible attitude towards his employment with FlightWorks and failure to return a FlightWorks' scheduler[']s phone calls in the beginning of May 2003, Mr. Beale and Mr. Rakes terminated his employment on May 16, 2003.

*Id.* at 53.

At the hearing stage, a complainant under AIR 21 has the burden to prove by a preponderance of the evidence that his protected activity motivated a respondent to take adverse action against him. 49 U.S.C.A. § 42121(b)(2)(B)(iii). Only if the complainant carries this burden is it necessary for the fact-finder to determine whether a respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006). We need not decide whether the respondent in this case, FlightWorks, met its burden of proof, because Jeter failed to prove that his protected activity was a contributing factor in FlightWorks' termination of his employment. *Id.*

#### *Jeter's arguments on appeal*

The regulation at 29 C.F.R. § 1979.110 sets forth procedures for the handling of discrimination complaints under AIR 21. Subsection (a) provides that a petition for review filed with the ARB "must specifically identify the findings, conclusions or orders to which exception is taken" and that "[a]ny exception not specifically urged ordinarily shall be deemed to have been waived by the parties." 29 C.F.R. § 1979.110(a).

In his Petition for Review, Jeter sets forth four arguments. First, Jeter argues that the ALJ limited his ability to provide reliable, direct evidence in support of his discrimination complaint when the ALJ "refused to allow Counsel for Complainant to issue subpoenas to individuals involved in the FAA investigation of FlightWorks, including but not limited to Raymond Belcher, Scott Ross and Fran DeJoseph." Petition

for Review at 1. Jeter argues that the ALJ “should have permitted Complainant to delay this matter in order to obtain the testimony of Mr. Belcher.” Brief at 4.

Jeter’s arguments lack merit. The case file shows that the ALJ did not refuse to subpoena Belcher but signed the subpoena ordering Belcher to appear at the hearing. *See supra* at n.2. Belcher was unavailable due to his deployment overseas on active military service, a circumstance beyond the ALJ’s control. *Id.* Further, the ALJ delayed closing the record for the sole purpose of providing Jeter’s counsel with further opportunity to reach Belcher. *Id.*; *see also* T. at 631-635. The case file also shows that Jeter’s counsel dropped Ross and DeJoseph from her witness list. Critically, Jeter presents no supporting arguments regarding Ross or DeJoseph in his brief.

Second, Jeter asserts that the ALJ’s D. & O. “lacks sufficient evidentiary basis” because of the absence of any witness from the FAA who was involved in its investigation of FlightWorks. Jeter’s argument is plainly erroneous. The ALJ’s D. & O. is fully supported by the record as developed by the parties in the case before him.

Jeter’s third and fourth contentions concern the ALJ’s weighing of evidence. Jeter contends that the ALJ erred when he stated, in the “Specific Findings” section of his D. & O, “I believe that the principal events associated with Mr. Jeter’s termination were his February e-mails, the subsequent meeting with Mr. Beale, his April 2003 e-mail response, and the events of May 6<sup>th</sup>.” D. & O. at 45. Jeter argues that the ALJ’s “belief is not based upon a review of witness testimony, which was either evasive, based on the subsequent opinion of the witness and not the witness’ [sic] opinion at the time the events occurred, or a mere factual recitation of the facts as they reflected the self-interest of each witness.” Petition for Review at 2. Jeter’s fourth and final contention is that the ALJ’s analysis and evaluation of the “conflicting circumstantial and direct evidence” on the causation issue, *see* D. & O. at 48, “was subjective and does not balance the conflicting testimony of either witnesses from FlightWorks and/or C.T. Aviation.” Petition for Review at 2.

The ARB generally defers to an ALJ’s credibility determinations, unless they are “inherently incredible or patently unreasonable.” *Negron*, slip op. at 5. In weighing the testimonies of witnesses, the ALJ as fact finder considers 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 their testimony, and the extent to which their testimony is supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006) (citations omitted).

The ALJ in this case issued a comprehensive Decision and Order in which he included an extraordinarily detailed discussion and analysis of the evidence. As part of that analysis, the ALJ conducted an intensive review of the testimony of each witness and considered the witnesses’ affiliations and interests. We do not find the ALJ’s decision

biased or lacking in fairness to the Complainant's case but find it appropriately balanced in adjudicating the issues presented, including the determinative issue – causation.

### **CONCLUSION**

Substantial evidence in the record supports the ALJ's finding that Jeter failed to establish that his protected activity was a contributing factor in FlightWorks' decision to terminate his employment. We affirm that finding. The ALJ correctly applied the relevant statutes, regulations, and case precedent, and his decision is thorough and well reasoned. Therefore, we conclude that Jeter failed to meet his burden to prove by a preponderance of the evidence an essential element of his claim, namely causation. Jeter's claim must fail. Accordingly, we **DENY** the complaint.

**SO ORDERED.**

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

**DAVID G. DYE**  
**Administrative Appeals Judge**