



**In the Matter of:**

**DEBBIE SIMPSON,**

**ARB CASE NO. 06-065**

**COMPLAINANT,**

**ALJ CASE NO. 2005-AIR-031**

**v.**

**DATE: March 14, 2008**

**UNITED PARCEL SERVICE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Debbie Simpson, *pro se*, Lexington, South Carolina**

***For the Respondent:***

**David Hoskins, *Frost Brown Todd, LLC*, Louisville, Kentucky**

**FINAL DECISION AND ORDER**

This case arises under section 519 (the whistleblower protection provision) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2008). Regulations implementing section 519 appear at 29 C.F.R. Part 1979 (2007).

The Complainant, Debbie Simpson, filed a complaint of unlawful discrimination against United Parcel Service (UPS) which, after investigation, the Occupational Safety and Health Administration (OSHA) found to be without merit. Following timely

objection, an Administrative Law Judge (ALJ) heard the complaint and ultimately issued a Decision and Order (D. & O.) denying the complaint. Simpson petitioned for review of the D. & O. We affirm the ALJ's decision as described below.

## BACKGROUND

Substantial evidence in the record supports the ALJ's exposition of the facts. D. & O. at 2-4. We summarize them briefly.

UPS offers commercial air freight service worldwide. D. & O. at 2. Federal Aviation Administration (FAA) air safety regulations govern its operations. *Id.* Simpson worked for UPS as a licensed mechanic for 17 years prior to the incident in question at the UPS facility in West Columbia, South Carolina. D. & O. at 2; Transcript (Tr.) at 7-8.

When a typical flight arrived at the airport in West Columbia, the mechanics, working with a crew, would observe the airplane exterior and interior, checking for noticeable problems, would discuss malfunctions with the flight crew, and would review the flight log for defects not previously remedied, referred to as "deferrals," noted in the plane's logbook. Tr. at 8-11. Simpson reviewed and fixed defects in the airplane, noting them in the logbook and signing off on a plane as completed. Tr. at 52, 56-57.

On April 20, 2005, Simpson worked the night shift, from 10 p.m. to 8 a.m., with fellow mechanic Dave Rose, under the guidance of Rock Underwood, acting supervisor. D. & O. at 2; Tr. at 7-9, 11. Early the next morning, UPS aircraft N122UP arrived from Louisville, Kentucky. D. & O. at 2; Tr. at 8. Simpson and Rose received the aircraft, checked the log for defects, and talked to the flight crew to discern the nature of any problems. D. & O. at 2; Tr. at 10. The flight crew reported that they had been unable to pressurize the cabin and had been forced to wear oxygen masks during the flight. *Id.*, Tr. at 44. The cabin pressurization system was designed with built-in redundancies: two independent automatic control systems, a manual control system, and two independent outflow valves. The aircraft was safe to fly under FAA regulations, even if one of each of the systems was inoperative. D. & O. at 3; Joint Exhibits (JX) 2 (Pressurization Description Chart), 4 (Aircraft Minimum Equipment List). When N122UP left Louisville, it had been marked as safe and airworthy in the aircraft log, despite the fact that one of the pressurization systems was inoperative and one of the outflow valves was inoperative. D. & O. at 3; JX 2; Tr. at 92-93. But by the time of N122UP's arrival in West Columbia, both automatic control systems had malfunctioned. D. & O. at 3; Tr. at 88.

Around 7 a.m. on April 21, Simpson informed Underwood that she, along with Rose, had decided to take N122UP out of service to correct the defective redundant system. D. & O. at 3; Tr. at 11. Underwood instructed Simpson and Rose to return the aircraft to working status as soon as possible and to continue working until the next shift arrived at 8:30 a.m. *Id.*; Tr. at 47, 99. At 8:10 a.m., Underwood returned to the aircraft. *Id.* Simpson and Rose reported that the deficient pressurization control system had been

fixed. *Id.* They signed the logbook to confirm the correction. D. & O. at 3; JX 3 at 5 (Mechanic's Logbook). Underwood then informed his manager, Darrell Crier, at 8:30 a.m. that the mechanics had signed the logbook and N122UP could be dispatched. D. & O. at 3; Tr. at 103-04.

At 8:50 a.m. Underwood found Simpson in the cockpit of N122UP. D. & O. at 3; Tr. at 104. Simpson stated she was working on the aircraft because there were "too many deferrals" and something was "illegal." Tr. at 104-06. Underwood called Crier and had him speak to Simpson over the phone to determine what the problem was with the aircraft. Tr. at 104-05. Underwood then asked Simpson to talk with Scott Wahls, a mechanic in Aircraft Maintenance Control (AMC) about her concerns. Underwood listened to the conversation but Simpson handed the phone back to Underwood while Wahls was in midsentence and went back to work. D. & O. at 3; Tr. at 105-6. Underwood then said to Simpson that the aircraft was "green," ready to fly, as noted by Simpson's own log entry, and that she needed to sign out for the day and go home. D. & O. at 3; Tr. at 106. Underwood called Wahls again to discuss his thoughts. Regarding that conversation he testified:

I didn't see anything wrong with the airplane. We fully complied with the DMP procedures. We said, "It's green, it's good to go." Signed off. We haven't heard anything specific as the - to a problem, any - and I've asked on several occasions as to what specific problem there is? What's illegal? What's wrong[?] I've never been pointed to anything in particular, just that it doesn't seem right. There's [sic] too many deferrals, which there's no such thing. Nothing that I can grab onto. I gave Ms. Simpson the opportunity to talk to AMC several times to help clarify the issue and feel comfortable with it. I didn't get anywhere with that.

Tr. at 105-106.

Shortly before 9 a.m., Underwood and Simpson left the aircraft and returned to the maintenance office, where Simpson proceeded to enter into a conversation with Ram Logan, another mechanic, about the discrepancy on N122UP. Tr. at 107. Underwood once again told Simpson she needed to "punch out." *Id.* Simpson refused. *Id.* Underwood left the office to consult with Crier about Simpson's refusal to leave the premises. Tr. at 107-08. Underwood and Crier discussed Simpson's concerns about the aircraft. Underwood contacted Wahls to determine the specific nature of the complaint and to insure that the aircraft was safe to fly. Tr. at 110. Wahls told Underwood that N122UP was airworthy, since several mechanics had signed off on the logbook that the aircraft was ready to go for the next flight. *Id.* Further, Wahls commented that he could not act on Simpson's concerns since they were too vague. *Id.* Satisfied that N122UP was safe, Crier left his office and approached Simpson, telling her to sign out and go home. D. & O. at 4; Tr. at 108-11, 128. Simpson clocked out at 9:18 a.m. Tr. at 25.

On April 29, following a hearing with Simpson's union representative, UPS issued Simpson a warning letter for insubordination for not clocking out and leaving the premises when instructed to do so. D. & O. at 4; Tr. at 26-27. The warning letter states that it serves as a "formal warning" in accordance with the union bargaining agreement. JX 1 (April 29 Warning Letter). The warning letter was part of a progressive discipline scheme, stating that "any further behavior of this nature will result in further disciplinary action up to and including discharge," which allowed UPS to suspend Simpson if she engaged in further insubordination over a period of nine months, at the end of which she was no longer subject to the disciplinary period. D. & O. at 4; JX 1; Tr. at 140- 41.

After a one-day hearing in Columbia, South Carolina, the ALJ issued a decision in February 2006, finding no violation of AIR 21. The ALJ found that Simpson's complaints were not specific enough to be protected under AIR 21, and that the April 29 warning letter was not an unfavorable personnel action, since it had no effect on the terms and conditions of her employment. Simpson filed a timely petition for review and the parties submitted briefs.

### **ISSUES PRESENTED**

The issues before the Board are: whether the ALJ erred in finding that (1) Simpson's allegations about the unsafe nature of Aircraft N122UP were not protected activity under AIR 21, and that (2) the warning letter UPS issued to Simpson was not an unfavorable personnel action under AIR 21.

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

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

This Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). We review conclusions of law de novo. *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

### **DISCUSSION**

#### **I. Elements of an AIR 21 Whistleblower Complaint**

AIR 21 provides that "[no] air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with

respect to compensation, terms, conditions, or privileges of employment,” 49 U.S.C.A. § 42121(a), because the employee has engaged in certain protected activities.

The AIR 21 complainant must allege and later prove that she 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 her 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). *Cf.* 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the employer has violated AIR 21, the employee is entitled to relief unless the employer 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). *Cf.* 29 C.F.R. § 1979.104(d). *See, e.g., Negron*, slip op. at 6 (ARB Dec. 30, 2004); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

In this case, it is undisputed that Simpson was an employee of UPS, and that UPS was an employer subject to AIR 21. We turn to whether she engaged in protected activity, and alternatively whether she suffered an unfavorable personnel action.

## **II. Protected Activity**

Protected activities under AIR 21 include: providing to the employer or (with knowledge of the employer) 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 . . . ” 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102. While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Peck*, slip op. at 13.

Simpson’s complaints must relate to a regulation or order, she must be specific, and she must reasonably believe them. Simpson expressed her concern that Aircraft N122UP was “illegal” and “unsafe.” Tr. at 17, 19. She expressed concern that the aircraft suffered from too many deferrals, but she did not know the exact problem with the aircraft. Tr. at 107. Although a complainant need not cite to a specific violation, allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety). It is undisputed that following Simpson and Rose’s work, the pressurization system on N122UP was once again in compliance with FAA regulations. Simpson was never able to indicate to any supervisor a concern related to a violation of any other safety regulation or order.

In her brief before the Board, Simpson argued that Underwood forced her out of the cockpit of N122UP before she was allowed to perform a “turnover” as required by 14 C.F.R. § 121.369 (2007). Brief by Complainant (CB) at 3-4. However, by signing the

logbook at the end of her shift on April 21, Simpson had successfully turned over the maintenance of the aircraft to the next shift. *See* 14 C.F.R. § 121.701.

In addition to relating to a regulation, the complaint must be specific. When both Underwood and Cried asked her to detail the issue with N122UP, Simpson asserted that she did not know the exact problem. When AMC asked her over the phone to explain the problem, she ended the conversation. In her brief before the Board, Simpson states she “was not sure exactly what the problem was.” CB at 3. In contrast to her complaints, she signed in the aircraft safety log that N122UP was safe and airworthy. Simpson has failed to communicate any specific safety defect that her employer could take corrective action on as required by AIR 21.

Even if her complaints were specific, Simpson must also prove that she had a reasonable belief that a violation of an FAA regulation or order existed. Although she insisted that the plane was still illegal, she had signed off on its safety in the mechanic logbook prior to her complaints. JX 3. By signing the logbook reporting the correction of problems, Simpson was taking ultimate responsibility for the safety of the aircraft. Tr. at 39; *see* 14 C.F.R. § 121.701. Both AMC and Underwood believed that the aircraft was properly configured and airworthy. D. & O. at 3, 6. Given that she signed off on the safety of N122UP in the log, and others involved believed the aircraft was safe, Simpson did not demonstrate a reasonable belief that a violation of an air safety regulation or order existed.

Since Simpson failed to prove that she engaged in protected activity, a requisite element of her case, her entire claim must fail. *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005).

### **III. Unfavorable Personnel Action**

Even assuming that Simpson engaged in protected activity, her AIR 21 claim fails because the April 29 warning letter did not constitute an adverse action.

Under AIR 21, an employer may not “discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment.” 42 U.S.C.A. § 42121(a). The implementing regulations specify that it is a violation of the act for an employer “to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee” for engaging in protected activity. 29 C.F.R. § 1979.102(b).

ARB precedents have held that warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have tangible job consequences. For example, in *West v. Kasbar*, ARB No. 04-155, 2004-STA-034 (ARB Nov. 30, 2005), the respondent issued a second formal written warning to the complainant that he violated company policy by taking naps in the cab of the truck and

logging the time as on rather than off duty. The letter advised that future violations would result in more severe disciplinary action up to and including discharge. We noted that written reprimands under a progressive discipline system did not have tangible job consequences and could lead to corrected performance. *Id.* at 4.

In *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, 2004-STA-040 (ARB Dec. 29, 2005), the respondent issued a warning letter to the complainant for excessive absenteeism. The respondent could discipline a driver for absenteeism only within nine months of issuance of the written warning. The complainant challenged issuance of the warning but made no claim that it resulted in actual consequences. Therefore, we held that the complainant failed to allege an element of his whistleblower retaliation claim, an adverse action. *Id.* at 3.

As in *West* and *Agee*, the burden rests on the complainant to demonstrate that the personnel action in question is adverse. Simpson must show that the warning letter affected the terms, conditions, or privileges of her employment. The letter served as a “formal warning” for “fail[ing] to work as directed,” indicating that future incidents of similar behavior would “result in further disciplinary action.” JX 2. Simpson argues that “the warning letter is discipline [as] it relates to discrimination.” CB at 5. She did not produce evidence that the letter caused a tangible effect on her employment. Although the letter could lead to future consequences during the nine months, the warning letter did not suspend Simpson, nor did it change her salary, employment status, or benefits. The ALJ found that the warning letter had no effect on Simpson’s present “compensation, terms, conditions, or privileges of employment.” D. & O. at 6. We are bound by the ALJ’s findings of fact since substantial evidence in the record supports them. Simpson has thus failed to demonstrate that she suffered an adverse action under AIR 21.

## CONCLUSION

In sum, we hold that substantial evidence in the record supports the ALJ’s findings of fact and that he correctly applied the law. Accordingly, we **AFFIRM**, the ALJ’s D. & O. and **DENY** Simpson’s complaint.

**SO ORDERED.**

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

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