In the Matter of:

RICHARD EVANS, **ARB CASE NOS. 07-118, -121**

COMPLAINANT, **ALJ CASE NO. 2006-AIR-022**

v. **DATE: June 30, 2009**

MIAMI VALLEY HOSPITAL,

and

CJ SYSTEMS AVIATION GROUP, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert M. Lamb, Esq., *Robert A. Klinger Co., LPA*, Cincinnati, Ohio

For the Respondents:
Wayne Waite, Esq., *Freund, Freeze & Arnold*, Dayton, Ohio
Avrum Levicoff, Esq., and Edward I. Levicoff, Esq., *Levicoff, Silko & Deemer, PC*, Pittsburgh, Pennsylvania

FINAL DECISION AND ORDER

Richard Evans filed a complaint with the United States Department of Labor alleging that his employers, Miami Valley Hospital (MVH) and CJ Systems Aviation Group, Inc. (CJ) violated the employee protection provisions of the Wendell H. Ford

Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)[1] when they fired him after he raised concerns about air safety issues. After a hearing, a Labor Department Administrative Law Judge (ALJ) concluded that MVH and CJ violated AIR 21 and awarded Evans reinstatement, back pay, compensatory damages, and attorney's fees. MVH and CJ appealed. We affirm.[2]

BACKGROUND

MVH owns three helicopters and provides an air ambulance service called CareFlight, which operates in Ohio, Indiana, and Kentucky from its headquarters in Dayton, Ohio.[3] MVH contracted with CJ Systems, based in West Mifflin, Pennsylvania, to furnish the pilots to fly the helicopters and the mechanics to service them.[4]

Evans started work as a helicopter pilot in 2002 after being interviewed for the job by Candace Skidmore, program manager of MVH's CareFlight program, and David Gottschalk, on-site pilot/manager for CJ Systems and liaison with Skidmore.[5] Evans's job was to fly nurses and patients from accident scenes to hospitals as MVH's dispatchers directed.[6] CJ provided a procedure manual for its pilots and required them to consult with its mechanics before entering problems, called "discrepancies," in the pilots' logbooks.[7]

On June 12, 2003, Evans reported to the dispatcher that he was having trouble with stiff pedals during an emergency flight in nasty weather. Evans took the aircraft out of service while in the air. In the subsequent debriefing, Skidmore counseled Evans that he should never, "for whatever reason," transmit any service or maintenance-related

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1 49 U.S.C.A. § 42121 (West 2008). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2008).

2 We will issue a separate decision concerning attorney's fees.

3 Hearing Transcript (TR) at 21-22, 53, 75, 102, 1045.

4 TR at 46; Complainant's Exhibit (CX) 25. CJ Systems bought Indianapolis Heliport Incorporated and took over the contract. TR at 427.

5 TR at 45-47, 1048-49; Gottschalk Deposition at 7.

6 TR at 48-49.

7 TR at 276-81, 347-50, 396, 442-45. Gottschalk stated that either the pilot or the mechanic makes an entry in the logbooks. Deposition at 24-25.

issues over the radio because others might be listening. He was also not to discuss these issues with the nursing crew.[8]

In September 2003, Evans went on leave because of a back injury and did not return to work until April 2004. Before returning to work, Evans met with Skidmore and Gottschalk to discuss his future employment. According to Evans, Skidmore was "furious" that many nurses and pilots had pleaded with her to keep Evans's job open.[9]

Several months after returning to work, in June 2004, Evans learned that a plastic bag had been sucked into the tail rotor of the helicopter that he was scheduled to pilot. Earlier, pilot Dale Williams had flown the helicopter after persuading a mechanic to approve it for service without physically inspecting the rotor assembly. During his pre-flight inspection, Evans found pieces of the bag still embedded in the rotor. He took the helicopter out of service and reported to the dispatcher that he would not fly until a mechanic inspected the rotor. He also told Williams that he had no business flying that aircraft and called him a jackass. At a later meeting, Skidmore admonished Evans for grounding the helicopter, and Gottschalk counseled him in a written memorandum that he needed to "do a better job of getting along with his peers."[10]

In January 2005, Evans flew a helicopter with non-working radios and malfunctioning cockpit lights over a period of three days in snowy weather, which caused him to abort one flight, and a day later, ground the helicopter.[11] Evans testified that he discussed the aircraft's problems with fellow pilot Richard "Wyatt" Arp and Jack Weese, CJ's quality assurance officer and former MVH employee. Evans said that both he and Arp refused Weese's request to fly the helicopter because there were "too many things wrong with that aircraft."[12]

The next night, during a pre-flight inspection, Evans discovered that a fuel activator control had been jury-rigged with two springs twisted together like "coat hangers" because the correct size spring was unavailable.[13] Evans reported the matter to CJ's chief pilot, James Lynn, who informed Evans that another pilot had already flown

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[8] TR at 63-65, 70-71, 287; CX 3, Joint Trial Exhibit (JX) 51; Gottschalk Deposition at 28.

[9] TR at 76-81, 84-85, 1054-59.

[10] TR at 87, 90-94, 97-100; 1061-1064; JX 4.

[11] TR at 105-114; JX 8-10 (logbooks showing radio transmission problems).

[12] TR at 116-121. Evans added that the helicopter was put back in service the next day. TR at 122.

[13] TR at 122-29, 289-99, 432-33; JX 9.

the helicopter and had no problem. Evans then told Lynn that proper maintenance of the helicopters was lacking and that some of the nursing crew had complained to him about the way certain pilots conducted their pre-flight inspections.[14]

After Lynn sent a mechanic to look at the spring, Skidmore called Evans and asked him why he "continued to take the aircraft out of service" when another pilot had flown it. Skidmore testified that her nurses had complained to her about the pre-flight inspections of some pilots and that she had heard similar complaints from Evans himself. She met with Evans and Gottschalk to discuss the issues and testified that Gottschalk told Evans to start being part of the solution, not just part of the problem.[15]

At a meeting on January 26, 2005, to discuss pre-flight inspections, Skidmore told the pilots that Evans alleged they were not performing pre-flight inspections properly and were flying unsafe aircraft.[16] The meeting became quite heated and confrontational.[17] Evans admitted that he was angry with Skidmore and had upset other pilots by refusing to fly the aircraft they had flown. But he denied that he had discussed the matter with the nurses.[18]

Shortly thereafter, Gottschalk placed Evans on leave and ordered him to see a flight surgeon for an evaluation. While on leave, Evans met with Lynn to discuss his safety concerns regarding aircraft maintenance and gave him a detailed list of 30 items. After an evaluation, both the flight surgeon and a psychologist cleared Evans for duty without restrictions.[19]

Evans received a written warning dated February 15, 2005, that blamed him for the turmoil among the pilots. The attachment stated that Evans's "antagonistic conduct, based on his [safety] opinions, created an atmosphere of alarm, bitterness, and animosity within" the CareFlight program.[20] Gottschalk, Lynn, and Skidmore detailed the behavior they expected from Evans for him to continue as a CareFlight pilot.[21]

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14 TR at 131-132.

15 TR at 141-144,148-151, 1076-1085; JX 26.

16 TR at 151, 306, 864-872.

17 TR at 152-61, 435-36, 458-59, 782-87, 1089-94; JX 25.

18 TR at 303-311, 331-332, 334, 339.

19 TR at 162-169, 790-794; CX 16.

20 TR at 171-72; JX 27.

21 TR at 318-19, 794-95; CX 3.

In May 2005, Evans reported numerous mechanical problems with a backup helicopter known as "the whale." Evans took the aircraft out of service but was unsure whether the problems were ever fixed because the copter later crashed. Evans testified, however, that he believed the crash was caused by one of the problems he had noted.[22]

Then, on August 24, 2005, Evans flew a helicopter from Warren County to Moraine, the maintenance center, for its 100-hour inspection. He verbally informed the mechanics about the problems he had experienced: the rotor head drive link had too much play, the autopilot roll actuators were acting up, a poorly fitted windscreen was vibrating, and the wheel well had a hydraulic leak. After the mechanics finished the inspection, Evans and mechanic Josh Jones flew the aircraft for a power check but did not notice any problems during the brief flight. Evans got a flight request and returned the aircraft to the Warren County base.[23]

During his pre-flight inspection the next day, Evans found that the hydraulic leak and the link were worse. He reported the problems to Jones by phone and also called two other pilots, Bob Briggs and Arp, to ask them about the windscreen vibration. Arp informed Evans that a month earlier the mechanics had repaired a crack in the cabin bulkhead and that was why the windscreen vibration had become more severe. Evans then called the dispatcher and took the helicopter out of service.[24]

His action upset Jones, who told him that they now would need a ferry permit to fly the helicopter for repairs. Jones asked Evans what was wrong with the aircraft. Evans responded that "it's the same stuff we had problems with yesterday, same things that I tried to address to you yesterday."[25]

Later, Evans talked via phone with Lynn about the safety problems. He mentioned the windscreen and autopilot and said that the mechanics gave him reasons why they "couldn't" or "wouldn't" address his concerns. Evans explained that the day before he and Jones had done a power check, not a test flight, and that he had not made any entries in the logbook because Jones had it. Lynn informed Evans that because he had not entered the safety items in the logbook, he could be charged with violating an aviation regulation. Evans also called Skidmore, who wanted to know why he had grounded the helicopter when the mechanics had just finished its 100-hour overhaul.[26]

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22 TR at 173-181, 341-345, 350-356; JX 32, 58.

23 TR at 181-190, 364-380, 382-89, 407-408.

24 TR at 190-95, 391, 399-401, 403-406, 409-12, 436-440, 536; CX 5, JX 36.

25 TR at 195-96; Jones Deposition at 25-29.

26 TR at 200-205, 813-815, 889-902; Lynn Deposition at 70-77.

Eventually, Jones and another mechanic arrived, inspected the helicopter, and returned it to service, noting that the drive link "appeared to be within tolerances," the hydraulic leak was "too labor intensive" to fix at that time, the windscreen screws had been tightened, and the actuator was going bad but had not quit. Jones then told Evans what to write in the logbook about the autopilot problem. Evans asked Jones about the windscreen and the leak, and Jones reiterated the mechanic's notes. Evans was not comfortable with these assurances and called a Federal Aviation Administration (FAA) representative in Columbus, Ohio to complain about the windscreen problem and other issues.[27]

On August 26, 2005, a doctor grounded Evans because of an inner ear infection. A few days later Evans spoke with lead pilot Dale Williams, who informed him that Lynn had taken him off the schedule until further notice and that the FAA was meeting with Lynn.[28]

In a memorandum dated August 29, 2005, Skidmore told Lynn that Evans had not notified any mechanic that the aircraft was out of service on August 25, which was a failure to follow policy. Further, his secretiveness regarding the issue created turmoil with the staff, and his refusal to talk with the lead mechanic wasted time, was unprofessional, and resulted in further down time to the CareFlight program. The memo noted that MVH owned the aircraft that Evans was going to fly and that when he took a helicopter out of service, she expected that he would tell her why.[29]

Lynn informed Evans in a letter dated August 29, 2005, that CJ was firing him for his continued refusal to follow the performance expectations outlined in the February 15, 2005 written warning, for not following proper procedure in grounding the helicopter for three hours on August 25, and for causing turmoil in the program.[30] On August 31, 2005, Evans met with Lynn, who handed him Skidmore's memo and the termination letter, stating that "this is what CareFlight thinks" and "this is what CJ thinks."[31]

Evans filed a complaint with the Labor Department's Occupational Safety and Health Administration (OSHA), which dismissed his complaint on July 26, 2006.[32]

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27 TR at 206-214; JX 36-38.

28 TR at 212-15.

29 JX 42.

30 JX 41.

31 TR at 216-17; JX 41, 42.

32 Administrative Law Judge Exhibit (ALJX) 1-2.

Evans requested a hearing, which the ALJ held on January 16-19, 2007. In an August 31, 2007 Recommended Decision and Order (R. D. & O.), the ALJ determined that both MVH and CJ were covered employers under AIR 21 and had violated the Act in firing Evans. He ordered reinstatement and awarded Evans $79,945.44 in back pay and $100,000 in compensatory damages. MVH and CJ appealed to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.[33] In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.[34] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[35] Thus, if substantial evidence in the record supports the ALJ's findings of fact, they shall be conclusive.[36] The ARB reviews the ALJ's legal conclusions de novo.[37] The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."[38]

DISCUSSION

The Legal Standard

"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 because the employee . . . provided . . . to the employer or Federal Government information relating to any violation or alleged

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[33] *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

[34] 29 C.F.R. § 1979.110(b). CJ urges the ARB to review the ALJ's findings of fact de novo. Respondent's Brief at 2, n.3, 15.

[35] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

[36] *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).

[37] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

[38] *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States."[39]

An "air carrier" is "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[40] Air transportation means "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft."[41] Interstate air transportation means "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft" between states and territories "when any part of the transportation is by aircraft."[42] Contractor means "a company that performs safety sensitive functions by contract for an air carrier."[43]

To prevail against MVH and CJ, Evans must prove by a preponderance of the evidence that MVH and CJ are subject to the employee protection provisions of AIR 21, namely, that they are air carriers or contractors or subcontractors of an air carrier. Evans must also show that (1) he engaged in protected activity; (2) MVH and CJ knew that he engaged in the protected activity; (3) MVH and CJ took an adverse personnel action against him; and (4) the protected activity was a contributing factor in the adverse action.[44] Evans will not be entitled to the statute's remedies if MVH and CJ demonstrate by clear and convincing evidence that they would have fired him in the absence of the protected activity.[45]

MVH Is a Covered Employer under AIR 21

MVH argues that it is not an air carrier under the AIR 21 definition because it does not directly employ pilots or have an aviation certificate and therefore cannot "directly or indirectly provide air transportation."[46] MVH also argues that because the

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39 49 U.S.C.A. § 42121(a).

40 49 U.S.C.A. § 40102(a)(2); 29 C.F.R. § 1979.101.

41 49 U.S.C.A. § 40102(a)(5).

42 49 U.S.C.A. § 40102(a)(25).

43 49 U.S.C.A. § 42121(e).

44 *See* 49 U.S.C.A. § 42121(a), (b); *Peck v. Safe Air Int'l, Inc*., ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining scope of coverage, procedures, and burdens of proof under AIR 21).

45 *See* 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; *Peck v. Safe Air Int'l, Inc.*, slip op. at 9.

ALJ made no finding on its status, it is undisputed that it is not an air carrier under AIR 21.[47] The ALJ rejected MVH's arguments—no pilots and no air certificate, thus not an air carrier—as "unfounded," thereby implicitly finding that MVH is an air carrier.[48]

Substantial evidence supports a finding that MVH indirectly provided air carrier services, and is therefore an "air carrier."[49] Skidmore testified that MVH's CareFlight program "performs around 1,900 helicopter transports per year" and owns and operates three helicopters, one based at the hospital, and the others at Warren County airport and Urbana, Ohio.[50] MVH's own manual states: "CareFlight is an air ambulance service designed to provide rapid transport of highly skilled Registered Nurses to critically ill or injured patients and rapid transport of the patient and medical crew to a tertiary care center."[51] Thus, MVH clearly provides air transportation.

That MVH employs no pilots and has no air certificate is not determinative. Neither the statute nor the implementing regulations require that an air carrier hire pilots to be covered. That is why the statute refers to providing air transportation "directly or indirectly." Further, section 40109(a) permits an air carrier not directly engaged in operating aircraft to obtain an exemption from certification.[52] Therefore, an FAA certificate is not a requirement for coverage. The statute clearly covers those entities that provide interstate air transportation to passengers "directly or indirectly" for compensation. That is exactly what MVH does. Therefore, MVH is an air carrier under AIR 21.

MVH Directly Influenced Evans's Employment with CJ

As noted, AIR 21 provides, "No air carrier or contractor or subcontractor of an air carrier may discharge or otherwise discriminate against an employee" because of the employee's protected activities.[53] Although the statute refers to "employer" as the

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46 MVH Brief at 5-8. CJ does not dispute that it is an air carrier under AIR 21. Nor does CJ dispute that it is a contractor.

47 MVH Brief at 6.

48 R. D. & O. at 41.

49 Since we have found that MVH is an air carrier and thus covered under AIR 21, we need not address its argument that it is not a contractor. MVH Brief at 6-8.

50 TR at 1045.

51 TR at 49-53; CX 30 at 00483.

52 49 U.S.C.A. § 40109(a)(1)(A).

53 49 U.S.C.A. § 42121(a). *See also* 29 C.F.R. §1979.104(b)(1)(i)-(iv).

potentially liable party, and the regulations speak in terms of "named person," which they define as "the person alleged to have violated the Act," "employer" is not defined in the statute or regulations.[54] But the regulations define "employee" as "an individual . . . working for an air carrier or contractor or subcontractor . . . or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier."[55]

In *Fullington v. AVSEC Servs., LLC*,[56] we explained that an employer alleged to have violated AIR 21 need not be the complainant-employee's immediate employer under the common law. Rather, the test as to whether an employer is subject to AIR 21 liability is whether an air carrier or contractor or subcontractor of an air carrier exercised control over the terms, conditions, or privileges of the complainant's employment.[57] Such control includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant.[58]

MVH argued to the ALJ that Evans was not one of its employees and that it had no control over his employment or termination.[59] The ALJ, citing *Fullington*, found that MVH's Skidmore "was in control of [Evans's] employment and she exercised it every chance she got."[60] Substantial evidence supports this finding. By her own admission, Skidmore interviewed Evans before he was hired. Evans testified on cross-examination that Skidmore was "very involved" with the pilots and the maintenance issues, and her

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54 29 C.F.R. § 1979.104; 29 C.F.R. § 1979.101.

55 29 C.F.R. § 1979.101.

56 ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 6-7 (ARB Oct. 26, 2005).

57 *Id. See Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 2002-CAA-012, -014, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) (complaint brought under the environmental whistleblower acts, 29 C.F.R. Part 24) and cases cited therein. *See also BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-033, slip op. at 8-9 (ARB Oct. 31, 2003) (all involving the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004)).

58 *Fulllington*, slip op. at 6*; Lewis*, slip op. at 7.

59 R. D. & O. at 41.

60 *Id.* at 42.

thoughts, views, and opinions "dramatically affected how the mechanics and pilots thought about how to conduct business."[61] Skidmore participated in the disciplining of Evans in February 2005 after the trash bag incident when she informed CJ's Lynn of the specific performance standards which Evans would have to meet to remain in the program.[62]

Gottschalk, CJ's liaison with Skidmore, stated that Skidmore interviewed potential employees and approved the amount of salaries CJ paid its pilots.[63] He admitted that Skidmore had the ability to "take away" Evans's position and added that Skidmore gave him directions about operating MVH's three helicopter bases and asked questions of the CJ pilots and mechanics. Further, before he was promoted to site manager, Skidmore interviewed him for the position.[64] Finally, Lynn, CJ's chief pilot, testified that he understood that customers like MVH had a right to ask that CJ employees be removed from the CareFlight program.[65]

The record contains further indicia of MVH's control over CJ employees. MVH dispatchers directed CJ pilots and mechanics in response to requests for ambulance services. MVH and CJ operated a joint safety committee headed by Gottschalk and Skidmore, who chaired the February pilots meeting. MVH had to approve any replacement or reassignment of CJ pilots in the CareFlight program. MVH reimbursed CJ for the salaries of the CareFlight pilots and for all costs associated with their insurance and benefits, including the overtime charges incurred during Evans's six-month absence from work due to injury.[66]

Therefore, the record clearly supports the ALJ's finding that MVH exercised significant control over and directly influenced the terms and conditions of Evans's employment.

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61 TR at 270.

62 TR at 1097-1101, 1110-12; JX 27.

63 Gottschalk Deposition at 11-17. Pilot Thomas Blaho stated the Skidmore controlled the purse strings. Blaho Deposition at 11. Jones stated that Skidmore interviewed him and had "limited control" over whether he was hired. Jones Deposition at 9-11.

64 Gottschalk Deposition at 11-13.

65 Lynn Deposition at 36.

66 CX 25; TR at 417-18, 466, 848-54, 1064, 1087, 1092; Dawn Chambers Deposition at 12-15.

Evans Did Not Deliberately Violate Air Carrier Safety Requirements

AIR 21's employee protections "shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States."[67]

CJ contends that when Evans flew the helicopter to the Moraine hangar on August 24, 2005, for the 100-hour inspection and later flew a mission despite being aware of six mechanical discrepancies, he violated the FAA rule that prohibits any person from operating a civil aircraft unless it is in an airworthy condition, as determined by the pilot in command, who "shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur."[68] And both MVH and CJ contend that when Evans failed to note any of the discrepancies in the logbook on August 25, he violated the FAA regulation that requires the pilot in command to "enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to his attention during flight time."[69]

Since neither CJ nor MVH argued to the ALJ that Evans violated the rule about discontinuing a flight because of mechanical, electrical, or structural conditions, they waive that argument on appeal.[70] Even so, the record demonstrates that Evans did not violate that regulation. When Evans flew the helicopter to Moraine, CJ's maintenance operation center, for its 100-hour inspection on August 24, he informed the mechanics of the problems he had experienced a few days previously—windscreen vibration, autopilot, and hydraulic leak, among others. After the work was completed, Evans flew the aircraft back to Warren County because he believed the problems had been addressed as mechanic Jones had assured him.[71] Mechanic Jason Kinser testified that neither the windscreen vibration nor the leak was a safety issue and that the aircraft was airworthy.[72] Subsequently, at the direction of MVH dispatchers, Evans flew a medical mission but testified that he noticed no problems.[73] Only the next morning did he find that the

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67 49 U.S.C.A. § 42121(d).

68 CJ Brief at 32-37; *see* 14 C.F.R. § 91.7 (2008)

69 CJ Brief at 32-37; MVH Brief at 17-19. *See* 14 C.F.R. § 135.65.

70 *See Rollins v. Am. Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)).

71 TR at 389, 974-5.

72 TR at 1015-16.

73 TR at 385-89.

hydraulic leak had left oil on the ground and that the collective link had too much play.[74] It was then that Evans declared the aircraft out of service. Therefore, Evans certainly did not deliberately violate the regulation when he flew the August 24 mission.

The ALJ found that Evans did not violate the regulation pertaining to logging mechanical irregularities.[75] Pilot Thomas Blaho stated that either the pilot or mechanics entered discrepancies in the logbook, but there were times when a simple problem was not ever entered.[76] Mechanic John Jones stated that it was "normal practice" for the mechanic to write a discrepancy in the logbook to ensure that it was worded correctly.[77] Jones added that if a mechanic did not agree with the pilot's assessment, the discrepancy was not written up.[78] Pilot Dale Williams confirmed that the mechanic recorded the trash bag incident in the logbook after he had flown the aircraft, believing it was safe.[79] And Chief Pilot Lynn admitted that in practice at CJ, the pilot consulted with a mechanic and then made an entry in the logbook.[80] He also admitted that the autopilot problem was entered in the logbook on August 25, 2005, after Evans consulted with a mechanic.[81] Therefore, substantial evidence supports the ALJ's finding that Evans did not violate the regulation that requires a pilot to enter or have entered discrepancies in the logbook.

Evans Engaged in Protected Activity

As noted above, when an employee provides an employer or the federal government information relating to any violation or alleged violation of any FAA order, regulation, or standard or any other provision of federal law related to air carrier safety, he or she engages in AIR 21 protected activity. Protected activity under AIR 21 has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a

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74 TR at 391-94.

75 R. D. & O. at 42-43.

76 Blaho Deposition at 8, 14-15.

77 Jones Deposition at 13-15.

78 *Id*. at 19-21.

79 Williams Deposition at 43.

80 TR at 815-17, 905-08, 1012.

81 TR at 907-08.

violation occurred must be objectively reasonable.[82] The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety.[83]

The ALJ found that Evans engaged in protected activity when, on August 25, he called dispatch and grounded the helicopter because he reasonably believed that the autopilot malfunction, the windscreen vibration, and the hydraulic leak made it unsafe to fly. The ALJ also found that Evans's August 25 call to the FAA to report the windscreen vibration constituted protected activity. [84] CJ argues that grounding the helicopter was not protected because the statute does not expressly provide that grounding an aircraft, whether or not for safety reasons, constitutes protected activity.[85]

Substantial evidence again supports the ALJ's conclusions about protected activity. The record demonstrates that on August 24, 2005, Evans felt that the aircraft was safe to fly because the mechanics had assured him that the problems he orally noted had been addressed. The next day, he changed his mind after finding on inspection that the hydraulic leak was worse and the collective link had some play. Evans testified that on August 25 the hydraulic leak had spilled oil on the ground. After talking with another pilot he became worried about the windscreen vibration as well and took the aircraft out of service.[86] Then he called Jones, who, when he arrived later, addressed Evans's safety concerns. Evans also informed his chief pilot, Lynn, about the ongoing problems and how the mechanics gave him "reasons why" they "couldn't" or "wouldn't" address them.[87] He also called Skidmore.

While Evans did not identify a specific air safety regulation regarding these problems, the ALJ credited Evans's testimony and found that he reasonably believed the aircraft to be unairworthy. Evans's expert, Grady Wilson, testified that both the hydraulic leak and the windscreen vibration were or could become serious air safety

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82 *Rooks*, slip op. at 6.

83 *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008); *Rougas v. Southwest Airlines, Inc*, ARB No. 04-139, ALJ No. 2004-AIR-003, slip op. at 9 (ARB July 31, 2006).

84 R. D. & O. at 43-44.

85 CJ Brief at 16-23. CJ did not challenge the ALJ's conclusion that Evans's report to the FAA was protected activity. MVH did not contest the ALJ's findings and conclusion that grounding the helicopter and reporting the windscreen vibration to the FAA were protected.

86 TR at 190-195.

87 TR at 200-207.

concerns.[88] Pilot Arp agreed that the aircraft should have been taken out of service due to the windscreen vibration.[89] Even Lynn admitted that Evans reasonably believed that the problems he raised were safety concerns.[90] Finally, unconvinced by Jones that the windshield would be properly fixed, Evans spent most of the afternoon talking with the FAA about the safety of the windscreen vibration.[91]

The ALJ concluded that, although the mechanics found that the conditions were not as severe as Evans thought, he had a reasonable belief that the issues implicated safety when he called dispatch and took the aircraft out of service.[92] Evans did not have to prove that flying the helicopter on August 25 would have actually violated an air carrier safety regulation. And the record shows that his concerns about the condition of the helicopter were objectively reasonable. Therefore, the ALJ did not err in concluding that Evans engaged in activity that AIR 21 protects.[93]

MVH Took Adverse Action Against Evans

The ALJ found that both CJ and MVH took adverse action against Evans. CJ does not dispute that it fired Evans. MVH argued to the ALJ that it took no part in CJ's decision to terminate Evans. But the ALJ noted that Skidmore told Lynn on August 25, 2005, that Evans's grounding of the aircraft was the "last straw," and she wanted Evans out of the CareFlight program. MVH argues to us that since Skidmore did not make "the ultimate termination decision," the ALJ erred in finding that Skidmore influenced CJ to fire Evans.[94]

But substantial evidence supports the ALJ's finding. Skidmore informed Lynn that at the February pilots' meeting, Evans became red-faced, angry, and confrontational, and she thought at one point that the pilots would come to blows over Evans's

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88 TR at 696-98.

89 TR at 438-39.

90 TR at 896.

91 TR at 208-12.

92 R. D. & O. at 44.

93 As earlier noted, Evans must prove that MVH and CJ knew about his protected activity. Despite arguments from both MVH and CJ that they were unaware of Evans's protected activity because they had no knowledge as to why he grounded the helicopter, the ALJ found that both companies knew about the protected activity. Neither company argues this point on appeal. The issue of knowledge, therefore, is waived. *See Walker v. Am. Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 9 (ARB Mar. 30, 2007).

94 MVH Brief at 8-12; R. D. & O. at 45.

accusations that they were not doing complete flight checks.[95] Based on this information, Lynn sent Evans for a pilot status evaluation.[96] Following the physicians' clearance, Skidmore's influence continued when she informed Lynn of the conditions under which she would permit Evans to stay in the CareFlight program.[97]

While Lynn testified that Skidmore never put pressure on him to fire an employee, he agreed that Skidmore was very upset over the August 25 grounding and told him that Evans's action was the "last straw."[98] Lynn also agreed that he asked Skidmore for a memorandum on the events of August 25. Her August 29 memo informed Lynn that Evans had not followed company policy on August 25 because he had not notified any mechanic that he had grounded the helicopter. She stated, "His secretiveness regarding the issue created turmoil within the staff. His refusal to talk with the lead mechanic wasted time, was unprofessional, and resulted in further down time to our program." Skidmore also wrote that when she talked to Evans on the 25th about the grounding, he would not give her a direct answer as to why he took the aircraft out of service.[99]

Her memo went on to inform Lynn that Evans had been formally counseled about company policies, communication, and "being open when confronted by leadership/or authority figures." Furthermore, she let Lynn know that Evans's actions had a "negative impact on our program because of his failure to follow procedures, his 'cloak and dagger' approach and continued attempts to circumvent people he is required to communicate with." According to Skidmore, Evans "continues to be labor intensive and create work for all involve [sic], cost our program down time for no apparent reason, and our community a lack of resources to transport patients."[100] Lynn thought that this memo was important enough to give to Evans on August 31, along with the termination letter that he had written.[101]

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95 TR at 1086-94.

96 TR at 162-66.

97 TR 318-319, 794-795; CX 3.

98 TR at 915.

99 The ALJ found Skidmore's testimony "completely lacking in credibility" and discussed at length the numerous contradictions in her statements. R. D. & O. at 33-34.

100 JX 42.

101 TR at 835-37.

The record, especially Skidmore's August 29, 2005 memo to Lynn, amply supports the ALJ's finding that MVH, through Skidmore, directly influenced CJ's decision to fire Evans. Therefore, MVH took adverse action against Evans.

Evans's Protected Activity Contributed to His Discharge

Evans's termination is an adverse action. Evans's burden, therefore, is to prove by a preponderance of the evidence that his August 25th complaints to his supervisors and the FAA about air safety were a contributing factor in his firing.[102] A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse personnel] decision."[103] Evans need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent.[104]

The ALJ first determined that Evans was entitled to an inference that his protected activity contributed to his discharge because CJ took him off the schedule on August 26, the day after he grounded the aircraft, and fired him effective August 29, 2005.[105] Furthermore, the ALJ found "an abundance of circumstantial evidence" regarding the employers' state of mind at the time they fired Evans, including numerous incidents in which Evans raised safety issues, "only to be ignored or disciplined."[106] The ALJ concluded that Evans proved by a preponderance of the evidence that his protected activity contributed to his firing.[107] MVH and CJ advance various arguments that the ALJ erred in finding that Evans's protected activity contributed to his firing.[108]

But substantial evidence supports the ALJ's findings that Evans's reporting of air safety concerns generally, as well as his actions on August 25, contributed to his discharge. For example, in 2004, when Evans reported the trash bag in the tail rotor incident, Skidmore was furious that he had taken the aircraft out of service after it had been cleared twice, and Gottschalk chastised him for refusing to fly the aircraft when a

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102 49 U.S.C.A. § 42121 (b)(2)(B)(iii); *Rooks*, slip op. at 5.

103 *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)).

104 *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006).

105 R. D. & O. at 45-46.

106 *Id* at 46.

107 *Id* at 48.

108 MVH Brief at 12-15; CJ Brief at 37-38.

mechanic had examined it.[109] Then, in January 2005, Evans reported radio outages and flickering cockpit lights to CJ's mechanic, Jack Weese, who told him on successive nights that nothing was wrong, tried to pressure Evans into flying the aircraft, and accused him of being afraid to fly.[110]

Later that month Evans reported Weese's jury-rigged spring repair to Lynn and Skidmore. Lynn asked Evans why he was refusing to fly when another pilot had no problem. Skidmore called Evans and asked why he would not fly the aircraft when another pilot had. And, according to Evans, Weese told Skidmore that Evans was taking "your aircraft out of service for no reason at all. He's costing your program a ton of money, and if he was my employee I'd fire his fucking ass."[111] Gottschalk and Skidmore met with Evans to discuss the spring incident and reprimanded him for accusing other pilots of not doing proper pre-flights.[112]

Another instance that the ALJ points to occurred after the pilots' meeting on January 26, 2005. Evans provided Lynn with a list of safety issues which he felt the pilots and mechanics were overlooking.[113] Lynn took the list but ignored Evans's issues, suspended him, and ordered him to undergo a pilot evaluation.[114] Subsequently, Skidmore provided Lynn with a list of problems she had with Evans, which Lynn used to draft a written reprimand to Evans.[115]

And on August 25, 2005, after Evans told Lynn about the ongoing safety problems with the aircraft, Skidmore told Lynn that Evans's grounding of the aircraft was the "last straw." She admitted that she thought Evans grounded more aircraft than other pilots.[116] Lynn testified that Skidmore was "very, very upset with the whole situation" and wanted to know why her aircraft was out of service yet again.[117]

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109 JX 4; Gottschalk Deposition at 39-40; TR at 98-102.

110 TR at 106-21, 488-91, 507-08; JX 9.

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111 TR at 131, 141-42, 145; CX 12.

112 TR at 148-49.

113 TR at 266, 790-91.

114 TR at 163-66, 266-67.

115 TR at 795; JX 27.

116 TR at 1146.

117 TR at 829.

This chain of events, culminating in CJ's firing of Evans a few days after he reported his safety concerns to Lynn, supports the ALJ's determination that while MVH and CJ managers testified that air safety was a top priority at CareFlight, they fired Evans, at least in part, because he continued to report mechanical, electrical, and structural air safety concerns. Thus, the record demonstrates that Evans's protected activity contributed to his discharge.

CJ Would Not Have Fired Evans Absent his Protected Activity

Evans has proven discrimination and is entitled to relief unless the MVH and CJ demonstrated by clear and convincing evidence that they would have terminated Evans absent his protected activity.[118] As previously discussed, Skidmore testified that she did not play a role in Evans's firing. But in her August 29 memo to Lynn discussing the events of August 25, she stated that she was concerned that Evans had not followed company policy when he did not tell the dispatcher, the mechanics, or her why he grounded the helicopter. Lynn's August 29, 2005 letter to Evans informed him that CJ was terminating him because Evans had violated company procedure by not writing in the log book why he grounded the helicopter for three hours on August 25.

In addressing whether MVH and CJ had sufficiently proven that their reasons for terminating Evans were legitimate, the ALJ first noted that Evans had in fact followed CareFlight procedure on August 25. After grounding the helicopter and informing Lynn and Skidmore that he had done so, Evans waited for Jones and the other mechanic to inspect the aircraft. Jones then told Evans what to write in the log book about the autopilot problem and that since the hydraulic leak was "within limits" and the windscreen problem was "not a discrepancy," those items did not need to be logged.[119] Lynn himself testified that Evans's actions had been consistent with company practice.[120] The ALJ also noted that the fact that the aircraft had been out of service for three hours was partly due to Jones and the other mechanic's waiting to inspect the helicopter because, since they had inspected it the day before, they did not think anything could still be wrong and that Evans was being overly cautious.[121]

As for Evans's alleged lack of communication as to why he grounded the helicopter, the ALJ reasoned that Evans's hesitation to give Lynn and Skidmore all of the details was justified because of the way they had treated him in the past. And the ALJ pointed to the fact that Evans's failure to tell the dispatcher about his concerns on August 25 was attributable to Skidmore's earlier warning not to transmit safety concerns over the

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118 *See* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

119 TR at 961.

120 TR at 906-907.

121 R. D. & O. at 49.

radio. Furthermore, when Evans called Jones on the 25th and said, "You know what is going on," he was not being "vague," as Jones testified, but was referring to some of the same issues that they had discussed the day before when Evans brought the helicopter to Jones for inspection.[122]

Accordingly, we find that substantial evidence supports the ALJ's finding that the reasons MVH and CJ gave for firing Evans are pretexts.[123] Therefore, they did not prove by clear and convincing evidence that they would have fired Evans absent his protected activity.

Remedies

AIR 21 provides that if a violation of AIR 21 has occurred, the ALJ shall order the person who committed such violation to (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages.[124]

The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him; calculations of the amount due must be reasonable and supported by the evidence.[125] While a complainant must show reasonable diligence in attempting to mitigate damages, the employer bears the burden of proving that the employee failed to mitigate.[126]

Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.[127] A key step in determining the amount is a comparison with awards made in similar cases. To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.[128]

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122 TR at 941.

123 R. D. & O. at 49-50.

124 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b).

125 *Rooks*, slip op. at 10.

126 *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005).

127 *Rooks*, slip op. at 10.

128 *Id.*

Having found that MVH and CJ violated AIR 21's whistleblower protection provision, the ALJ properly ordered reinstatement.[129] The ALJ found that Evans was unemployed for 62 weeks before November 6, 2006, when he was hired as a pilot at Air Methods, but at a lower salary. The ALJ thus awarded Evans $79.945.44.[130] He awarded $100,000 in compensatory, non-economic damages for "severe emotional distress" and loss of reputation. The ALJ ruled that MVH and CJ are jointly liable for Evans's damages. [131]

CJ argues that the ALJ's $100,000.00 award of compensatory damages is unsupported by any evidence of Evans's loss of reputation and that Evans is entitled to only $19,126.29 in back pay because he was hired and fired the same day in January 2006 through his own fault.[132]

The ALJ rejected CJ's argument that Evans failed to mitigate his damages, finding that although an airline company hired him in January 2006, it rescinded the offer the same day when Evans explained his prior employment with CJ.[133] Substantial evidence supports this finding and the ALJ's finding that Evans exercised due diligence in seeking work. The record also sufficiently supports the fact that, as a result of his termination, Evans suffered damage to his reputation and marriage as well as mental anguish and depression.

Evans testified that he waited for a few months after his August 2006 termination to start looking for a pilot's job because he and his wife had a newborn child, and he was trying to sell real estate after obtaining his license. The market fell apart, however. Evans testified that he contacted other companies and found a position in January 2006, but the job offer was rescinded after the company contacted CJ. Not until the following November was Evans able to begin work for Air Methods, but he had to travel from Dayton to Portsmouth, Ohio and stay overnight at motels during the week. [134]

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129 R. D. & O. at 54.

130 Lost wages: 62 weeks (8-29-05 to 11-6-06) x $1,103.44 = $68,413.28. Difference between new salary, $993.06 a week, and old: $110.38. Differential: 32 weeks (11-6-06 to 7-6-07) x $110.38 = $3,532.16. $1,000 or $250 a week in travel expenses x 42 weeks = $8,000.00. Differential plus expenses = $11,532.16 plus $68,413.28 back pay = $79.945.44.

131 R. D. & O. at 53-54.

132 Respondent's Brief at 39-40. MVH does not dispute the ALJ's remedies.

133 R. D. & O. at 51.

134 TR at 229-237.

Evans testified that his firing took his confidence away—he was accused of being afraid to fly, of being too nitpicky about the aircraft, and that had made him second-guess his judgment, even now. He added that the biggest upset was that he could no longer provide for his family—his wife trusted him to make a living and did not renew her teaching contract when their son was born in February 2005 after twenty years of waiting. Evans stated that he and his wife were in and out of therapy together and individually, that they were still in family counseling, and that a doctor prescribed Paxil for depression and anxiety. [135]

Evans's wife, Tamyka, testified that Evans "loves flying" and CareFlight was his "dream job" which he took to avoid the long commute he had with his previous employer. She added that the termination "devastated" Evans, who came home, told her about it, and basically withdrew from their lives, just "shut down." Mrs. Evans added that for three months her husband was "unavailable, both physically, emotionally, in all facets of our life." She had planned to be a stay-at-home mother with their son, Ryan, but after Evans's firing she had to return to teaching. Mrs. Evans stated that Evans was better but would never be the same because the termination took away his integrity, what he believed in, and "drained him." [136]

The ALJ properly stated the case law governing non-economic damages, noting that such a determination is subjective based on the facts and circumstances of each claim.[137] Although Evans's testimony is not supported by medical evidence, it is unrefuted and corroborated by his wife. Further, the ALJ found both husband and wife to be credible witnesses. The record supports the ALJ's finding that the termination of Evans's employment caused emotional harm and damage to his reputation. Therefore, we will not disturb his award of $100,000.00.

CONCLUSION

Substantial evidence supports the ALJ's conclusion that MVH and CJ are covered entities under AIR 21. The record also fully supports the ALJ's finding that Evans did not deliberately violate any requirements related to air safety. And substantial evidence supports the ALJ's finding that Evans's protected activity was a contributing factor in the Respondents' decision to discharge him. Further, the ALJ's remedies regarding reinstatement, back pay, and compensatory damages are in accordance with law. Therefore, we **AFFIRM** the ALJ's recommended decision. Evans's attorney has 30 days in which to submit a petition for additional attorneys' fees and other litigation expenses.

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135 *Id.* at 243-245.

136 TR at 730-736.

137 R. D. & O. at 52.

He is to serve any such petition on MVH and CJ, which will have 30 days in which to file objections to the petition.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge