



In the Matter of:

ROGER A. LUDER,

ARB CASE NO. 10-026

COMPLAINANT,

ALJ CASE NO. 2008-AIR-009

v.

DATE: January 31, 2012

CONTINENTAL AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Howard T. Dulmage, Esq., *Law Offices of Howard T. Dulmage, PLLC,*
Houston, Texas

For the Respondent:

Donn C. Meindertsma, Esq., Melinda L. Kirk, Esq., *Conner & Winters, LLP,*
Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge;* Luis A. Corchado, *Administrative Appeals Judge;* and Lisa Wilson Edwards, *Administrative Appeals Judge,* concurring.

FINAL DECISION AND ORDER OF REMAND

Roger A. Luder alleged that Continental Airlines, Inc. 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 it disciplined him after he complained about an air safety issue. Following a hearing, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Continental had violated the Act and awarded damages. Continental appealed to the Administrative Review Board (ARB). We affirm the ALJ's finding of liability but remand for further proceedings on the issue of appropriate damages.

BACKGROUND²

Luder began work as a first officer for Continental on June 3, 1985, and became a captain on November 1, 1998. From then until September 2007, the record reveals no disciplinary or any other problems at work.

On September 15, 2007, Captain John LeMaire and First Officer Mack Solsbery flew a 737 plane from McAllen, Texas to Houston and then on to Miami. The plane encountered turbulence during a thunderstorm in the first leg of the flight. Neither pilot recorded the turbulence in the logbook.

Luder and his First Officer, John Wofford, took over the plane in Miami for a flight back to Houston. Prior to departure, Solsbery told Wofford that that he and LeMaire had flown through a "pink" radar echo showing turbulence that nearly "ripped the wings off" the plane, that they had been "bounced around pretty good," and that one of the flight attendants had gone to a clinic for medical treatment. Solsbery added that the plane was a "300" and "good." Wofford repeated Solsbery's comments to Luder, but did not mention that the plane was "good." Luder responded that it sounded as if LeMaire and Solsbery had flown through severe turbulence.³

Luder checked the plane's logbook for an entry noting the turbulence but found nothing. He then called maintenance control in Houston, reported what Wofford had told him, and requested a mechanical inspection. Controller Larry McClure asked Luder why

¹ 49 U.S.C.A. § 42121 (Thomson/West 2011). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2011).

² The background facts are taken from the ALJ's findings of fact in his Recommended Decision and Order (R. D. & O.) at 3-7 unless otherwise noted. The following abbreviations shall be used: Complainant's Exhibit (CX), Joint Exhibit (JX), hearing transcript (TR).

³ Continental's flight manual explains that the appearance of magenta (pink) in the green, yellow, or red areas on the radar screen indicates the presence of heavy turbulence. CX 1. Severe turbulence requires a mechanical inspection. If the Houston-to-Miami leg of LeMaire's flight encountered severe turbulence and LeMaire did not log it, that omission would violate the federal aviation regulations (FARs). See 14 C.F.R. § 91.3, Part 121.

Captain LeMaire had not reported the turbulence earlier. Luder said he did not know, but on the basis of what Wofford had said, Luder wanted to have the plane checked out before flying it to Houston.

Luder received a telephone call from Houston's operations control advising him that the passengers were to be boarded without delay and the plane was to depart on schedule. Luder contacted maintenance control and stated that he had written up the plane in the logbook, saying, "Prior to boarding, the inbound FO told my FO the captain flew through severe turbulence."

Before McClure ordered the inspection, Systems Operations Control Coordination (SOCC) Director Edward Gubitosa, whose job was to "keep airplanes moving efficiently and on time," arranged a conference call with Luder, Assistant Chief Pilot Kip Komidor, and Maintenance Control Director Jim Sunbury. Komidor questioned Luder about the need for an inspection and Luder relayed what Wofford had said. Komidor then said that LeMaire had reported only moderate turbulence and no inspection was needed, but Luder would not accept that statement. Sunbury then retorted that Continental did not "ground planes on hearsay." Luder hung up, but Komidor called him back. Luder handed the phone to Wofford who spoke with Komidor and then handed the phone to Luder, who told Komidor that if he were ordered to fly without an inspection, he would report the matter to the Federal Aviation Administration.

McClure ordered the inspection at 2:26 p.m. The inspection took 30 minutes. The mechanic found no defects in the plane. The plane left the gate 37 minutes late.

At 3:11 p.m., Gubitosa sent an e-mail to Komidor stating that Luder delayed departure for "an unnecessary inspection for turbulence" based on hearsay. Gubitosa added that "unfortunately, Capt. Luder flew off the handle" during the conference call and said he "was tired of being pressured" but "in my opinion he did not know how to be a team player." Gubitosa added that "we wanted to help gather the facts for the Capt. and avoid a delay."⁴

On September 24, Continental directed Luder to attend an "investigatory" meeting on the September 15 incident that was ultimately held on October 11, 2007.⁵ Two union officials, a human resources representative, the four pilots – LeMaire, Solsbery, Luder, and Wofford – Director Sunbury, Gubitosa, Komidor, and Chief Pilot Andrew Jost participated. Solsbery admitted in a written statement that he remarked to Wofford about the wings being ripped off and that the plane got "rocked pretty good" but did not feel that an inspection was needed. Wofford stated that Luder was upset after

⁴ JX 23.

⁵ Luder sent an e-mail to Komidor explaining that he was on vacation and describing in detail the events on September 15, 2007. *See* JX 2.

learning that the passengers were to be boarded and remarked that he was not going to let the company force him to take an unsafe plane.⁶

As a result of the meeting, Jost concluded that (1) Luder grounded the aircraft and delayed its departure without reasonable cause based on second-hand, unverified information; (2) Luder exhibited an inappropriate, unprofessional, and disrespectful attitude; and (3) Luder failed to follow Continental's flight operations procedures and policies. On October 19, 2008, Jost placed Luder on a "Termination Warning level of discipline," which would be effective for 18 months, and suspended him from flying a four-day trip without pay. The letter noted that "further infractions or violations" of company policy could result in additional discipline, including discharge. The letter also informed Luder about the availability of Continental's Employee Assistance Program (EAP), which could "be helpful to employees experiencing problems that may be disrupting their work."⁷

Following the four-day suspension, Luder resumed flying. On November 10, 2007, he underwent a line check and simulator training, required of all pilots. Luder passed the line check, but at the end of the first day of simulator training, instructor John Walker informed Luder that he needed additional training on basic aircraft control and should return the next day. The next day Luder called in sick and did not complete this training. As a result, he was removed from flight status on November 11.⁸ Luder then visited a medical clinic, which treated his viral GI syndrome and recommended that he "allow [his] gut to rest" for the next 48-72 hours.

On November 27, 2007, Luder contacted Continental's EAP, complaining of "hostile work environment, difficulty sleeping, stomach problems, racing heart, blood pressure." Luder stated that during the "meeting on 10-11-07, he felt berated, condescended to, intimidated, slandered me." EAP noted that Luder "did not want to talk further, he was getting upset," but that he did accept several referrals to physicians. That same day, Dr. Yoanda P. Gomez ordered no work or school until further notice, due to Luder's "arrhythmic tachycardia under evaluation."⁹

On January 3, 2008, Dr. Vitaliy Shaulov, a psychiatrist, examined Luder and diagnosed major depression, panic disorder, Post Traumatic Stress Disorder (PTSD), and anxiety, which Shaulov opined indicated a serious functional impairment. On a follow-up visit in March, Shaulov noted that Luder was experiencing panic attacks and that he

⁶ JX 9-10.

⁷ JX 4, 19.

⁸ JX 15-17.

⁹ CX 4. All the medical reports were included in this exhibit.

expressed a “fear of facing any Continental Airlines’ officials.” He stated that Luder’s condition had improved very little. Shaulov prescribed Zoloft and Zyprexa.

After Continental placed Luder on long-term medical disability, Dr. Haberman, Board-certified in psychiatry, examined Luder’s medical records. He concluded on April 14, 2008, that Luder might be experiencing an episode of a severe mental disorder. A psychotic illness, bipolar disorder, anxiety, and mood disorder were all possible and should be further evaluated.

In May 2008, Dr. Robert Elliott, a psychologist, evaluated Luder at Continental’s behest. Elliott reviewed Luder’s medical records and conducted a two-day neuropsychological evaluation. He diagnosed major depressive disorder with psychotic features and generalized anxiety. He found Luder unfit for duty as a pilot due to his symptoms and recommended further treatment. Elliott noted that Luder believed that the initiating incident was the September 15 event¹⁰ and that he would be out of work for a minimum of six to twelve months after he began outpatient counseling, with reassessment in six months. Elliott anticipated that treatment would be long-term, “considering the severity of his current symptom structure.”

Dr. Sandra Jorgensen, a psychologist, stated in an April 1, 2009 report that she had treated Luder four times in August 2008, twice in September and October 2008, three times in November and December 2008, three times in January and February 2009, and twice in March 2009.

Luder filed a complaint with the Department of Labor’s (DOL) Occupational Safety and Health Administration on January 3, 2008. OSHA dismissed Luder’s complaint on April 18, 2008, and he requested a hearing, which was held on April 13-15 and August 12-13, 2009.¹¹

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.¹² In AIR 21 cases, the ARB reviews the ALJ’s findings of fact under the

¹⁰ Luder stated in his October 16, 2008 deposition that the stress he experienced stemmed from the turbulence incident, the subsequent investigation and discipline, and the stimulator training. Luder asserted that the stimulator test was “purposefully made unmanageable” in retaliation by Continental managers. Deposition at 12-15, 33-42.

¹¹ JX 18, 20

¹² See Secretary’s Order 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110.

substantial evidence standard.¹³ Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁴ Thus, if substantial evidence supports the ALJ’s findings of fact, they shall be conclusive.¹⁵ The ARB reviews the ALJ’s legal conclusions de novo.¹⁶ The ARB generally defers to an ALJ’s credibility determinations, unless they are “inherently incredible or patently unreasonable.”¹⁷

DISCUSSION

AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee:

provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or 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 this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States^[18]

To prevail under AIR 21, Luder must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel

¹³ 29 C.F.R. § 1979.110(b).

¹⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

¹⁵ *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005).

¹⁶ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

¹⁷ *Jeter v. Arior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

¹⁸ 49 U.S.C.A. § 42121(a). An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

action; and (3) the protected activity was a contributing factor in the adverse personnel action.¹⁹ If Luder proves that his protected activity was a contributing factor to the discipline Continental imposed, he is entitled to relief unless Continental demonstrates by clear and convincing evidence that it would have taken the same unfavorable action absent his protected activity.²⁰

Burdens of proof standard required under AIR 21

Initially, Continental argues on appeal that the ALJ applied the wrong standard of proof required of Luder to prevail under AIR 21. Continental contends that the ALJ committed reversible error by holding Luder responsible for producing only prima facie evidence of retaliation, rather than proving such retaliation by a preponderance of the evidence.²¹ We disagree. While it is true that the ALJ commenced his legal analysis under AIR 21 with an erroneous statement of the respective burdens of proof required of the parties,²² he resorted in his analysis to the proper proof standards in requiring that Luder prove by a preponderance of the evidence that his AIR 21 protected activity was a contributing factor in the adverse action Continental took against him, holding “that not only temporal proximity, but [also] direct and circumstantial evidence shows that [Luder’s] protected activity was at least a contributing, if not the sole cause, for his suspension and warning.”

At the same time, the ALJ imposed the appropriate rebuttal burden of proof in requiring Continental, in order to defeat Luder’s showing, to prove by clear and convincing evidence that it would have taken the same adverse action against Luder in the absence of his protected activity.²³ Thus, unlike the situation in *Clemmons v. Ameristar Airways*²⁴ cited by Continental, the ALJ’s initial misstatement of the burdens of proof standard in this case does not present a situation where the ARB is unable to ascertain whether the ALJ properly applied AIR 21’s burden of proof requirements.

¹⁹ See 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006).

²⁰ See 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

²¹ Respondent’s Brief at 13.

²² R. D. & O. at 33-34.

²³ *Id.* at 38-39.

²⁴ ARB No. 05-048, ALJ No. 2004-AIR-011 (ARB June 29, 2007).

Whether Luder engaged in AIR 21-protected activity

The ALJ held that Luder engaged in protected activity when he wrote up the severe turbulence in the aircraft logbook and demanded inspection of the aircraft before he would pilot the plane. The ALJ found that in making the logbook entry and insisting upon a mechanic's inspection, Luder's belief that the plane had flown through severe turbulence that required the logbook entry and inspection before flying the plane was reasonable²⁵ and dealt directly and specifically with aircraft safety.²⁶

Substantial evidence supports the ALJ's factual findings underlying his conclusion that Luder engaged in protected activity. While the logbook entry in and of itself may not have constituted protected activity, Luder's action in writing up the turbulence based on the information he received from first officer Wofford, and his refusal to fly until the inspection required as a result of his logbook entry was undertaken, forced the required mechanical inspection following a situation involving severe turbulence.²⁷ Luder's actions are thus distinguishable from *Fabre v. Werner Enters.*, cited by Continental,²⁸ in which the ARB held that action taken as "an integral part of compliance with the regulations," without more, does not constitute protected activity. Furthermore, we agree with the ALJ's conclusion that Luder had a reasonable belief, both subjectively and objectively, that the reported air turbulence required him to undertake the actions that he did, especially in light of the testimony of all the witnesses except Jost, and that Luder took the safest course of action in requesting the inspection.²⁹

²⁵ A complainant need not prove an actual violation but need only establish a reasonable belief that his safety concern was valid. *Rooks*, ARB No. 04-092, slip op. at 6. Specifically, a complainant must show that he "subjectively believed that his employer was engaged in unlawful practices and his belief must be objectively reasonable in light of the facts and record presented." *Blount v. Northwest Airlines*, ARB No. 09-120, ALJ No. 2007-AIR-009, slip op. at 6 (ARB Oct. 24, 2011).

²⁶ The federal aviation regulations (FARs) governing air safety confer on the pilot in command "final authority and responsibility for the operation and safety of the flight." 14 C.F.R. § 1.1 (2011).

²⁷ It is undisputed that Wofford repeated Solsbery's turbulence comments to Luder, that Luder called McClure to request the inspection, and that McClure asked him why LeMaire did not write up the turbulence. When Luder said he did not know, McClure called Komidor, who then arranged the conference call to "discuss" the situation. TR at 916-24.

²⁸ ARB No. 09-026, 2008-STA-010 (ARB Dec. 22, 2009). Continental argues that the logbook entry was simply an integral part of compliance with the regulations. Respondent's Brief at 23.

²⁹ TR at 287-90, 455-56, 712-13.

Whether Continental subjected Luder to adverse action

The ALJ held that Luder’s four-day suspension from flying, which deprived him of about \$3,000.00 in pay, and the 18-month termination warning letter constituted adverse action. In reaching this conclusion, the ALJ relied on the “materially adverse” standard articulated in *Burlington Northern & Santa Fe Ry. Co. v. White*³⁰ to conclude that Luder sustained adverse action.³¹

Loss of wages is obviously an adverse personnel action, and it is undisputed that Luder lost pay due to the four-day flight suspension. Also, the 18-month termination warning clearly informed Luder that he was expected to conform and correct his behavior to acceptable flight operations standards. While the ARB has held that a corrective “warning letter” in and of itself may not constitute adverse action,³² the substantial evidence of record supports the ALJ’s conclusion that the warning letter qualifies as the type of personnel action expressly prohibited under AIR 21 regulations.³³

The warning that Luder received affected the terms, conditions, and privileges of his employment in that under Continental’s policy an employee with an active warning letter in his file is ineligible for voluntary transfer to another position within the company.³⁴ Moreover, and more importantly, the ALJ found that as a result of the letter’s warning, further “infractions or violations of Company policy may result in additional disciplinary action, up to and including termination of [his] employment,”³⁵ and Luder “would be extremely reluctant to question airline safety” because engaging in “similar unacceptable behavior” could result in his being fired.³⁶ Accordingly, we affirm the

³⁰ 548 U.S. 53 (2006).

³¹ In discussing the *Burlington Northern* standard, we previously held that a “materially adverse” personnel action is one that “could well dissuade a reasonable worker” from participating in protected activity or filing a retaliation complaint. *Melton v. Yellow Transp.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 24 (ARB Sept. 30, 2008) (JJ Douglass, Transue, concurring).

³² See, e.g., *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 6-7 (ARB Mar. 14, 2008).

³³ 29 C.F.R. § 1979.102(b).

³⁴ JX 21.

³⁵ JX 4.

³⁶ R. D. & O. at 36.

ALJ's determination that both the suspension and the termination warning letter fall within the meaning of adverse action under AIR 21.³⁷

Whether Luder's protected activity was a contributing factor in the adverse action

Substantial evidence supports the ALJ's factual findings underlying his conclusion that Luder proved that his protected activity was a contributing factor in Continental's adverse actions of suspension for four days from flight assignments and issuance of the warning letter. We further find that the ALJ's conclusion that Luder met his burden of proof in this regard consistent with applicable law.

The ALJ relied on direct and circumstantial evidence as well as the temporal proximity between the September 15 incident and the October 11 discipline in concluding that Luder met his burden of proving by a preponderance of the evidence that his protected activity contributed to Continental's adverse action.³⁸ The record convincingly supports the ALJ's conclusion.

Direct evidence included Chief Pilot Jost's admission under cross-examination that at least part of the reason for Continental's "corrective action" was that Luder had written up an airplane he had not flown.³⁹ Asked if Luder was "at least in part being counseled in this [termination warning] letter for calling for the inspection," Jost responded, "correct."⁴⁰

Circumstantial evidence included the fact that neither of the other first officers involved in the incident received any discipline. Solsbery, the first officer of the flight that experienced the turbulence, was not disciplined for exaggerating its severity when he mentioned it to Wofford, Luder's first officer. Wofford was not disciplined for neglecting to tell Luder that Solsbery said the plane was "good." LeMaire, the pilot of the flight that experienced the turbulence, subsequently indicated that the turbulence was "moderate." However, he did not deny that he had told Solsbery at the time that it was "the worst" he

³⁷ See *Williams v. Am. Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 (ARB Dec. 29, 2010) (discussing adverse action and "presumptively" adverse action under AIR 21).

³⁸ *Id.* at 38-39.

³⁹ TR at 782-83, 840-41.

⁴⁰ TR at 874, 891. Jost insisted that he disciplined Luder for the process he used in forcing an inspection of the aircraft, not for the logbook entry itself. See TR at 891, 1219-20. Regardless, the protected logbook entry was part of the process and thus constituted a contributing factor in the discipline.

had flown through and that it “felt like the wings were going to rip off.”⁴¹ Solsbery’s subsequent account corresponded with LeMaire’s, but he also admitted that they had been bounced around and “rocked pretty good, nearly ripping the wings off.”⁴² Also, Jost testified that Luder’s write-up was “untruthful,” but admitted that he had no concrete evidence of that. Finally, it is undisputed that a SOCC agent ordered the passengers boarded on time, thus indicating to Luder that an inspection might not be done.

Finally, the temporal proximity of the September and October events is further circumstantial evidence of a causal connection between Luder’s protected activity and Continental’s adverse action. Luder’s protected activity occurred on September 15 and was followed within days, on September 24, by Continental’s letter to Luder directing him to attend “an investigatory meeting” on October 4. The meeting was reset for October 11, and Continental imposed the discipline on October 19. The close timing of these events provides a strong inference of causation.⁴³

A “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.”⁴⁴ The ALJ’s determination that Luder’s protected activity was a contributing factor in the adverse action Continental took is supported by the substantial evidence of record and in accordance with applicable law.

⁴¹ JX 5. Interestingly, LeMaire stated at the hearing that, assuming he had flown through severe turbulence, he would have ordered a mechanical inspection before flying on to Miami an hour and a half later. TR at 88, 101-08.

⁴² JX 9.

⁴³ JX 1. Temporal proximity is “evidence for the trier of fact to weigh in deciding the ultimate question of whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

⁴⁴ *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4 (ARB Jan. 30, 2008). Therefore, a complainant may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity. *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-007, slip op. at 7 (ARB Mar. 24, 2011).

Whether Continental established by clear and convincing evidence that it would have disciplined Luder absent his protected activity

Since Luder has proven that Continental violated AIR 21, he is entitled to relief unless Continental demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.⁴⁵

The ALJ properly applied the clear and convincing standard of proof in analyzing Continental's evidence that it would have imposed the discipline absent Luder's protected activity. He concluded that Continental failed to prove by the presentation of any credible evidence or testimony that it would have disciplined Luder "in any event notwithstanding his credible testimony" about writing up the aircraft.⁴⁶

Substantial evidence supports the ALJ's findings. Jost and Komidor testified that Luder was "unprofessional, violated company policies, and failed to use good judgment" because he did not obtain enough information from other sources before ordering the inspection.⁴⁷ But the core of this alleged "poor judgment" was Luder's protected activity. Furthermore, these contentions ignore the federal regulation that the pilot-in-command is the ultimate arbiter of the aircraft's safety.⁴⁸ And after listening to Wofford's description of the turbulence, as conveyed by Solsbery, Luder was convinced of a potential safety issue and took the most prudent action, even if Jost and Komidor believed that he failed to cooperate with Continental management.

Jost also claimed that Luder was insubordinate when he hung up on the coordinating team – Komidor, Gubitosa, and Sunbury – who were attempting to provide him essential information to make a decision on the need for an inspection. The ALJ discounted this statement, noting that Luder had already called Houston maintenance control about his safety concerns prior to talking with Komidor. Also, Komidor told Luder that Solsbery and LeMaire were denying severe turbulence before Komidor had even contacted them. Of course, for Solsbery and LeMaire to admit that the turbulence was severe would subject them to discipline for not making a logbook entry about it. In sum, we agree with the ALJ that Continental failed to meet its burden of proof that it would have disciplined Luder absent his protected activity.

⁴⁵ *Clemmons*, ARB No. 08-067, slip op. at 5.

⁴⁶ R. D. & O. at 39-40.

⁴⁷ TR at 800-18, 846-50; 965-74.

⁴⁸ Continental's flight manual states that the pilot-in-command and the aircraft dispatcher are jointly responsible for the preflight planning, delay, and dispatch release of a flight. The pilot-in-command of an aircraft is ultimately responsible for the safe conduct of the flight. *See* JX 22, 14 C.F.R. § 121.533.

Remedies

When an AIR 21 complainant establishes that his employer retaliated against him for whistleblowing activities, the Secretary of Labor shall order the employer to “(i) take affirmative action to abate the violation; (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and (iii) provide compensatory damages.”⁴⁹ A successful complainant is also entitled to “all costs and expenses (including attorney’s and expert witness fees) reasonably incurred” in bringing the complaint.⁵⁰

In this case, the ALJ’s award included monetary and equitable relief. As part of the monetary award, the ALJ determined that Luder was entitled to lost income from a cancelled flight assignment, and ordered Continental to pay \$3,418.26 (21.03 hours of lost time at \$157.00 an hour and \$116.55 in per diem) plus interest. The record supports these figures. As part of the equitable relief, the ALJ ordered Continental to (1) expunge the termination warning letter from Luder’s personnel record after 30 days, and (2) make Luder whole for any loss of employee benefits Luder may have suffered. Beyond its appeal of the liability issues, Continental did not challenge these particular orders for relief. Therefore, we affirm these orders.

The remainder of the ALJ’s award focused on Luder’s lost pay after November 10, 2007, when Luder ceased flying. Based on the Complainant’s, Whatley’s and Dr. Shaulov’s “testimonies,”⁵¹ the ALJ found that Luder “experienced such anxiety” following Continental’s unlawful discriminatory conduct “that he was not able to successfully complete his simulator training and suffered thereafter with disabling PTSD, depression, and anxiety, causing him to be unable to fly.” Neither party disputed that Luder was medically unfit to return to flight duty at the time of the evidentiary hearing. The ALJ ordered Continental to pay Luder for lost wages accruing after November 10, 2007, and continuing “until he has sufficiently recovered from the PTSD to continue flying or to perform other suitable alternative employment” (the Monthly Pay Award).⁵²

⁴⁹ 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). See *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 20 (ARB June 30, 2009).

⁵⁰ 29 C.F.R. § 1979.110(d) .

⁵¹ Contrary to the ALJ’s finding, Shaulov did not actually testify.

⁵² R. D. & O. at 41. The ALJ also ordered Continental to deduct from this award the long-term disability amounts Luder had received since he stopped work and stated that if Luder never resumed flying, Continental would receive a credit for any income he earned from suitable alternate employment.

For several reasons, Continental objects to the ALJ's Monthly Pay Award. Continental argued that the "alleged retaliatory acts were not the proximate cause of lost wages, past or future." Luder stopped working, according to Continental, because "he did not satisfy pilot training requirements." More specifically, Luder failed "to complete the first day of normal recurrent pilot training." Continental further argues that there was insufficient competent evidence connecting any unlawful conduct by Continental with Luder's loss of wages after November 11, 2007. Continental points out that Luder completed flight assignments between September 15 and November 11, 2007, but stopped only after failing the simulator test.⁵³

Luder counters with a limited and generalized response on the issue of medical causation. He suggests that, even though the award included ongoing "front pay," such an award does not always require medical causation between the unlawful act and the reason for lost wages. Even if such evidence was required in this case, Luder argues that (1) the undisputed evidence demonstrates that Luder suffered from major depression or other serious psychological condition, and (2) two medical doctors connected his psychological condition to the September 15, 2007 event.⁵⁴ Luder did not point to any particular language in the medical evidence where the doctors expressly opined on the issue of causation between Luder's long-term disability and the suspension and 18-month warning letter.

We must remand this case because the ALJ failed to provide sufficient reasons and basis for the Monthly Pay Award. The ARB must determine whether the ALJ's findings of fact upon which the award is based are supported by the substantial evidence of record and whether the award is in accordance with applicable law. As explained more fully below, there are material conflicts and ambiguities in the evidentiary record regarding medical causation as well as ambiguity in the ALJ's findings related to the debilitating impact, if any, of the suspension, the 18-month warning letter, and the November 2007 line check and simulator test. Without resolution of these issues, the ALJ's Monthly Pay Award cannot be reviewed on appeal.

Like other whistleblower statutes, the remedial purpose of AIR 21 is to make the successful complainant whole. More specifically, the goal is to compensate him for losses caused by the unlawful conduct and restore him to the terms, conditions, and privileges of his former position that existed prior to the employer's adverse action.⁵⁵

⁵³ Continental's Response Brief at 20-22.

⁵⁴ Luder's Response Brief at 21-23.

⁵⁵ See *Rooks*, ARB No. 04-092, slip op. at 10 (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).

The issues of damages and remedies are elements of a complainant's claim. Like other elements, the complainant must prove damages and entitlement to the remedies he seeks.⁵⁶ Damages must be causally related to the unlawful conduct and cannot be presumed.⁵⁷ Where the employee's loss of employment is due to unlawful discrimination, reinstatement is the express and presumptive statutory remedy.⁵⁸ As the Board explained in *Berkman v. U.S. Coast Guard Acad.*, "front pay is used as a substitute when reinstatement is not possible for some reason."⁵⁹

Remedy based on Luder's inability to fly for Continental

The ALJ also awarded Luder his monthly salary, plus interest, "commencing when he ceased to fly because of PTSD, to present and continuing, until he has sufficiently recovered from the PTSD to continue flying or to perform other suitable alternative employment." The ALJ cited as the basis for concluding that Luder ceased to fly because of PTSD the "credible testimonies" of Luder, Whatley, and Dr. Shaulov⁶⁰

⁵⁶ *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 10 (ARB Nov. 13, 2002).

⁵⁷ *Id.* See also *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088; ALJ No. 2005-STA-040, slip op. at 8 (ARB Nov. 30, 2007).

⁵⁸ *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 5 (ARB Mar. 31, 2005).

⁵⁹ ARB No. 98-056, ALJ No. 1997-CAA-002, -009; slip op. at 27 (ARB Feb. 29, 2000). (The ARB ordered that if the ALJ, on remand, determined that the complainant's medical condition would permit reinstatement at some future time, the ALJ was required to order payment of front pay for the period until reinstatement was possible. If, on the other hand, the ALJ were to find that the complainant would not be able to be reinstated to his former position, the ALJ was directed to order payment of front pay for the period until the complainant was able to obtain other work commensurate with that position.)

See also *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 13 (ARB Nov. 30, 2009); *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 6 (ARB Oct. 9, 1997), *reversed on other grounds sub nom., BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38 (1st Cir. 1998) (reinstatement not possible because of complainant's depression); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, -042; ALJ No. 1989-ERA-022, slip op. at 7 (ARB Sept. 6, 1996) (reinstatement not possible because of divestiture of business in which complainant had been employed).

⁶⁰ As previously noted, Dr. Shaulov did not testify. Presumably the ALJ was thus referring to Shaulov's medical notes.

that Luder “experienced such anxiety following the September 15, 2007 incident, followed by the October 12, 2007 investigatory meeting, and subsequent disciplining, that he was not able to successfully complete his simulator training and suffered thereafter with disabling PTSD, depression, and anxiety, causing him to be unable to fly.”⁶¹

Within the context of determining a complainant’s entitlement to compensatory damages based on the complainant’s mental suffering or emotional distress, the ARB has held that the complainant “must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.”⁶² Moreover, a respondent may be held liable for compensatory damages where the complainant proves that the respondent’s unlawful conduct aggravated a preexisting psychiatric condition.⁶³ A complainant’s burden of proof is no different when the claim is for lost wages based on the complainant’s medical or psychological condition. Thus, the circumstances of the case and lay testimony about physical or mental consequences of retaliatory action may support such awards.⁶⁴ The ARB has held that while the testimony of medical or psychiatric experts “can strengthen the case for entitlement to compensatory damages, it is not required.”⁶⁵ The ARB has affirmed compensatory damage awards for emotional distress, even absent medical evidence, where the lay witness statements are “credible” and “unrefuted.”⁶⁶

⁶¹ R. D. & O. at 41.

⁶² *Rooks*, ARB No. 04-092, slip op. at 10, citing *Gutierrez*, ARB No. 99-116, slip op. at 9.

⁶³ See *Berkman*, ARB No. 98-056, slip op. at 29.

⁶⁴ *Gutierrez*, ARB No. 99-116, slip op. at 10, citing *Lederhaus v. Paschen & Midwest Inspection Servs., Ltd.*, No. 1991-ERA-013, slip op. at 7-8 (Sec’y, Oct. 26, 1992).

⁶⁵ *Jones v. EG&G Def. Materials*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 23 (ARB Sept. 29, 1998). See also *Smith v. ESICORP*, ARB No. 97-065, ALJ No. 1993-ERA-016, slip op. at 4 (ARB Aug. 27, 1998) (citing *Lederhaus*, the ARB awarded compensatory damages based on the severity of the retaliation the complainant experienced and the testimony of the complainant and his wife as to the mental and emotional injury suffered); *Thomas v. Arizona Pub. Serv. Co.*, No. 1989-ERA-019 (Sec’y, Sept. 17, 1993) (the testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant’s case for entitlement to compensatory damages).

⁶⁶ *Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, -053; ALJ No. 2005-STA-035, slip op. at 8 (ARB Jan. 31, 2008) (ARB affirms award for emotional distress based on complainant’s testimony alone where it is “unrefuted and, according to the ALJ, credible.”). See also *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7-8 (ARB Aug. 31, 2011); *Shields*, ARB No. 08-021, slip op. at 13.

However, in other cases, such as *Gutierrez* for example, where the claim for an award of damages for emotional stress is based solely on the complainant's testimony that he suffered a specific and diagnosable medical condition, the ARB has reasonably required "medical or other competent evidence" showing that the complainant suffered from the medical condition and that it "was causally related to the unfavorable personnel actions" the respondent took. Absent such evidence, the ARB held in *Gutierrez* that complainant "failed to meet his burden of proving a causally-related condition, even under the generous evidentiary standards of 29 C.F.R. § 24.6(e)."⁶⁷

Since Luder's condition involved a medical diagnosis that included possible PTSD and/or depression,⁶⁸ reliance on a qualified medical expert's opinion in determining causation may nevertheless prove critical.⁶⁹ Here, the parties point to three factors that contributed to Luder's inability to pilot planes for Continental after November 10, 2007. One cited factor was Luder's failure to pass the simulator test that day.⁷⁰ A second factor purportedly contributing to Luder's inability to continue flying after November 10, 2007, was his GI bowel problems and anxiety, which the ALJ appears to have found attributable, at least in part, to the retaliatory discipline to which

⁶⁷ *Gutierrez*, ARB No. 99-116, slip op. at 11. Cf. *Michaud* ., ARB No. 97-113, slip op. at 6) (affirming award of compensatory damages because medical evidence in that case was sufficient).

⁶⁸ For example, the diagnoses were based on the *Diagnostic and Statistical Manual for Mental Disorders* published by the American Psychiatric Association, commonly referred to as the DSM-III or DSM-IV.

⁶⁹ In other ARB decisions discussing expert evidence, we have referred to the principles announced in *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Kumho Tires, Inc. v. Carmichael*, 526 U.S. 137 (1999). See, e.g., *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-021 (ARB July 31, 2001). However, we do not suggest that hearings under the AIR 21 whistleblower statute require the ALJ to engage in the "gatekeeper" role required under Rule 702 of the Federal Rules of Evidence. Under that rule, it may be error for a federal court to admit testimony without ensuring that expert testimony is based on "sufficient facts or data" and "reliable principles and methods." Rule 18.702 in the OALJ's rules of evidence does not contain the same gatekeeper requirements. Moreover, the administrative process is deliberately less formal than federal court litigation, making the "gatekeeper" requirements of the Federal Rules of Procedure unduly onerous for administrative hearings.

⁷⁰ However, because the ALJ did not find that the simulator test was an unlawful discriminatory act, a finding that is supported by the substantial evidence of record, an award of damages for lost income based solely on failing the test would not be sustainable.

Luder was subjected -- although this is not at all clear.⁷¹ The third factor was the major depression with which Luder was diagnosed in 2008, which continued to the date of the hearing in 2009.⁷²

As previously noted, the ALJ concluded from the testimony of Luder, Whaley, and presumably Dr. Shaulov's medical report, that Luder was not able to resume flying after November 10, 2007, due to "disabling PTSD, depression, and anxiety" that began with "anxiety following the September 15, 2007 incident, followed by the October 12, 2007 investigatory meeting, and subsequent disciplining" that resulted in Luder's inability to successfully complete his simulator training and that in turn led to Luder's emotional state that made it impossible for him to resume flying.⁷³ There nevertheless are several problems with the ALJ's analysis.

The record contains substantial evidence by way of undisputed medical evidence that Luder experienced initial GI bowel problems and anxiety and subsequently suffered from more severe forms of depression and emotional distress. Luder's and Whatley's testimony provides competent evidence of commonly understood anxiety associated with the simulator test that certainly could prove the difference between passing and failing that test. However, it is not clear from our review of the ALJ's decision as to how this evidence supports the ALJ's apparent conclusion that the disciplinary action taken by Continental in retaliation for Luder's protected activity "produced substantial psychological symptoms [that] prevented Complainant from successfully completing his training." It is even less clear how, having apparently determined that Luder's GI bowel problems and anxiety were causally related to the disciplinary action, the ALJ reached his ultimate conclusion that Luder's subsequent and more serious depression and emotional condition resulted in Luder's inability to continue piloting Continental planes.

The Board's obligation, in fulfillment of its agency appellate review function, is in significant part to determine whether substantial evidence of record supports an ALJ's findings of fact. The lack of specificity in parts of the ALJ's analysis, with findings of material fact lacking at times and in other instances failing to establish the evidentiary

⁷¹ The ALJ opined, "The termination warning was so effective it along with Respondent's other discipline, including the meeting of October 11, 2007, produced substantial psychological symptoms [that] prevented Complainant from successfully completing his training." R. D. & O. at 36.

⁷² The parties do not dispute that Luder suffered from a long-term disability related to major depression, which was diagnosed by Dr. Shaulov in January of 2008 as involving, among other things, PTSD (CX-4 at 182-84), although a second consulting psychiatrist, Dr. Elliot, was of the opinion that Luder's condition was "not consistent with PTSD" (CX-4 at 229).

⁷³ R. D. & O. at 41.

basis for findings the ALJ made, places the Board in the untenable position of not being able to fulfill this role.

The ALJ's award of damages based on Luder's long-term medical disability is problematic for two reasons. First, the ALJ did not sufficiently explain the basis for his general conclusion that Luder's anxiety in November 2007 led to his long-term disability. Only a few conclusory sentences in the ALJ's decision linked Continental's unlawful actions with the Monthly Pay Award. The ALJ stated that "[t]he termination warning was so effective it along with Respondent's other discipline . . . produced substantial psychological symptoms [that] prevented Complainant from successfully completing his training."⁷⁴ Also, the ALJ summarily implied in his "Order" that Continental's unlawful actions resulted in Luder failing his simulator training and "disabling PTSD, depression, and anxiety, causing him to be unable to fly."⁷⁵ These conclusory statements are insufficient to allow for a meaningful review of the award of the Monthly Pay Award.

A second problem related to the Monthly Pay Award is our difficulty upon review in finding competent medical evidence in the record supporting the ALJ's award. Whatley, upon whom the ALJ appears to rely as an "expert" witness, was not a medical doctor and was not qualified to offer a medical opinion on the issue of medical causation.

The parties implicitly accepted Dr. Elliott and Dr. Shaulov as qualified psychiatric experts, but we are unable to find where either doctor discusses medical causation. The written medical evidence consists of one exhibit of combined medical records, which includes limited mental health records. In these medical records, there is substantial evidence supporting the ALJ's finding that Luder suffered from major depression. But those records contain no expressed conclusion on the issue of causation and certainly no explanation or analysis of the causation question.⁷⁶ Luder did not point to any expressed medical opinion concluding that the September 15 incident, suspension, or warning letter caused Luder's major depression.⁷⁷ Those reports did not account for the fact that the ALJ rejected the November line check and simulator test as an unlawful employment action.

Dr. Elliott's May 12-13, 2008 report contains a section entitled "Initiating Incident (Information provided by Capt. Luder)," but he did not explain the purpose and

⁷⁴ R. D. & O. at 36.

⁷⁵ *Id.* at 41.

⁷⁶ *Dalton v. United States Dep't of Labor*, No. 01-9535, 2003 WL 356780, at 445 (10th Cir. Feb. 19, 2003), quoting *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989) (evidence is not substantial if it constitutes "mere conclusion").

⁷⁷ Luder's Response Brief at 13, 15, 23.

significance of this section. Because we cannot determine on the face of the ALJ's decision his factual basis or rationale for finding a causal link between the adverse action the Respondent took against Luder and his disabling depression and emotional distress, the ALJ's award requiring the continued payment of Luder's monthly salary must be vacated.

Remand is dictated to provide the ALJ the opportunity to clarify the basis for the Monthly Pay Award, which necessarily will require addressing the issue of medical causation and the amount of damages, if any, connected to Luder's long-term disability. Given what we hope by this decision is a clarification of the law with respect to establishing when medical evidence may be necessary to prove causation in the range of emotional distress cases (some of which stem from specific medical conditions), arising under AIR 21, it is left to the ALJ's discretion upon remand to determine, consistent with this opinion, how to address this issue in further proceedings.

Finally, on the assumption that the ALJ's award of salary into the future was in lieu of reinstatement, i.e., front pay, it is not clear from the record that before making this award the ALJ first determined not only that Luder was unable to return to his former position as a pilot because of a causally related medical condition or conditions, but also that his condition prevented him from returning to a comparable position with Continental. As the ARB has previously held, "front pay is used as a substitute when reinstatement is not possible for some reason."⁷⁸ To bypass the presumptive remedy of reinstatement, the ALJ must provide reasons and bases justifying his decision.⁷⁹ We understand that, at the time of the hearing, Luder was medically unfit to pilot Continental planes. But it is unclear whether there was any other suitable, alternative job available at Continental.

Moreover, should front pay be a proper remedy, it must be awarded "for a set amount of time" and must be based on factors that the complainant proves are reasonable, e.g., "the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate."⁸⁰ To the extent that Luder requests and proves

⁷⁸ *Berkman*, ARB No. 98-056, slip op. at 27; *Michaud*, ARB No. 97-113, slip op. at 6.

⁷⁹ *Cf. Berkman*, ARB No. 98-056, slip op. at 23-25 (immediate reinstatement for the complainant was not possible because "undisputed medical evidence indicated that work place harassment was the cause of [complainant's] anxiety attacks and his need for anti-depressant medication and psychotherapy").

⁸⁰ *See Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999) (front pay awarded for 11 years); *Doyle*, ARB Nos. 99-041, -042, 00-012 (formerly ARB No. 98-022), slip op. at 7 (front pay awarded for 5 years); *Michaud*, ARB No. 97-113, slip op. at 6 (front pay awarded for two years to employee who suffered medical condition stemming from adverse action).

entitlement to “front pay” rather than reinstatement on remand, the ALJ must set parameters that Luder proves as reasonable.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ’s findings of fact and his conclusion that Continental violated AIR 21. Therefore, we affirm his decision on liability. We also affirm the ALJ’s order for expungement and the monetary award based on Luder’s lost flight in October 2007. We vacate and remand for further consideration of Luder’s entitlement to a monetary award for lost wages occurring after November 10, 2007. On remand, the ALJ shall have discretion to determine the fairest and most expeditious way to proceed consistent with this opinion.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

Lisa Wilson Edwards, *Administrative Appeals Judge*, concurring.

I agree with the decision, but write separately to add my views as to the portion of the opinion set out *supra* pp. 15-19, on the evidentiary showing needed to support the ALJ’s front pay award. It is well established in whistleblower cases emanating from the ARB, that “front pay may be awarded as a substitute when reinstatement is inappropriate due to * * * an employee’s medical condition that is causally related to her employer’s retaliatory action.” *Hagman v. Washington Mutual Bank, Inc.*, ALJ 2005-SOX-00073 (ALJ Dec. 19, 2006), citing *Michaud v. BSP Transport, Inc.*, ARB No. 97-113 (ARB Oct. 9, 1997). This requires a showing by a “preponderance of the evidence that the unfavorable personnel action caused the harm.” *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 12 (ARB Nov. 13, 2002). In support of the front pay award in this case, the ALJ relied on the testimony of complainant and American Airlines Pilot Whatley. As the majority decision correctly holds, this evidence alone (Whatley’s and complainant’s testimony at the hearing) is insufficient to support an award of front pay based on medical condition because it is well established that such a showing requires medical evidence that links the adverse action to complainant’s medical condition that precludes him from performing his duties at work. See *Michaud* at *2-*3; *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056 (ARB Feb. 29, 2000), slip op. at 6 (finding that complainant’s physician “attributed his deteriorated and physical and mental state to work-place harassment.”).

What requires closer examination here, though, is the level of specificity of expert evidence required that links the retaliation to the resulting medical condition. For instance, in support of the front pay award in *Michaud*, the ALJ relied on evidence provided by complainant's family physician that showed that complainant's "loss of employment as a truck driver as either the sole or major contributor to [his] depression." *Id.* at *2. The ALJ in *Michaud* also relied on evidence from a licensed social worker who examined complainant and "opined that the causes of [complainant's] depression were the loss of his job with BSP, the ensuing financial distress, and the foreclosure on his home." *Ibid.* Based on that expert evidence, the ALJ "projected that it would take two years to rehabilitate Michaud to the point that he could work again." *Id.* at *3. We affirmed that finding. *Ibid.* The ALJ in *Berkman* determined that immediate reinstatement for complainant was not possible because of his mental condition based on "undisputed medical evidence indicat[ing] that work place harassment was the cause of [complainant's] anxiety attacks and his need for antidepressant medication and psychotherapy." *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056 (ARB Feb. 29, 2000). The causation evidence in the case showed that "the Academy's harassment was the cause of Berkman's debilitation and, in turn, the cause of his inability to work a full day at the office." *Id.* at *20; see also *id.* at *6 (finding that complainant's physician "attributed his deteriorated and physical and mental state to work-place harassment.").

While the ALJ erred in relying on complainant's and Whatley's lay testimony in support of the front pay award, I believe he correctly relied on the Medical Report prepared by Dr. Vitaliy Shaulov, the medical doctor who examined Luder after the retaliation occurred. In addition, there is significant evidence in the record showing Luder's condition prior to the retaliation, to support his contention that his depression was caused by the adverse action. The record shows that in May 2008, following the retaliation Luder suffered, that he was subjected to a two-day neuropsychological examination by Dr. Richard Elliott, who is a specialist in clinical neuropsychology. See CX-4: Elliott Medical Report. The Report states that Luder denied having any chronic medical conditions and that he had never been hospitalized overnight for any condition. Medical Report at 2. The Report states that Luder's last FAA physical examination in July 2007 was "clear" and limited only to the requirement that he "wear glasses when flying." *Ibid.* The Report states that Luder "underwent general medical examination and cardiology exams during December 2007" and the "results were normal." *Ibid.* The doctor administering the general examination recommended that Luder "consult/meet with a psychiatrist to evaluate his racing heart symptom." *Ibid.* Prior to the adverse actions he experienced, the Medical Report reflects that he "had only one experience with the mental health community" in "1988 [when] he was ordered to participate in family counseling for three sessions following divorce proceedings." *Ibid.*

Significantly, the Medical Report documents Luder's "Initiating Incident" as the incident surrounding the September 15, 2007, flight, receipt of the 18-month termination warning letter, and the events surrounding the October 2007 simulator training. Medical Report at 2-3. Following these incidents, Luder met with his primary care physician, Dr.

Yolanda Gomez, and reported various symptoms including “a racing heart, diarrhea, and a ‘flipping out’ feeling.” *Id.* at 4. Dr. Gomez placed him on a heart monitor for 4 to 7 days. *Id.* at 4. Luder underwent a physical examination on the advice of an Employee Assistance Program representative, and the Report reflects that the examination was normal. *Ibid.* The EAP representative then referred Luder to a psychiatrist, and at that time Luder went on sick leave. While on sick leave, Luder was informed that the 18-month termination letter was being placed in his personnel file. *Ibid.* Around that same time, in January 2008, Luder was examined by Dr. Shaulov, to whom he had been referred by the EAP representative. *Ibid.* Dr. Shaulov put Luder on Zoloft and diagnosed Luder as displaying “difficulties with concentration and attention, paranoia, manifested by fear to be physically destroyed and fear of facing any Continental Airlines’ officials, accompanied by panic attacks with the body’s autonomic response, [and] fear to leave his house.” See CX-4: Letter of Dr. Vitaliy Shaulov (dated Mar. 23, 2008); see also CX-4: Elliott Medical Report at 4. Dr. Shaulov continued to examine Luder and in a letter dated March 2008, Dr. Shaulov advised that Luder’s “prognosis is guarded” and that he “needs to be excused from traveling until his mental condition * * * sufficiently improve[s].” CX-4: Dr. Shaulov Letter at 1.

The Medical Report documents Luder’s current conditions as including various physical ailments, such as trouble sleeping, tachycardia (racing heart beat), and diarrhea; and various psychological symptoms, including lack of self confidence, fear of his financial standing, worries about his short-term future, daily panic attacks, depression, feelings of hopelessness, and occasional suicidal thoughts. CX-4: Medical Report at 5. While the ALJ found that Luder suffered from “Post Traumatic Stress Disorder,” which the majority decision points out, the Medical Report actually belies that finding, stating that “the test results, while noting trauma and stress, are not consistent with PTSD.” Medical Report at 9.

Since the evidence in the record reflects that Luder was functioning as a responsible pilot *before* the adverse action, but whose mental condition deteriorated *after* the adverse action, the fact that his deteriorating symptoms closely followed the retaliation would be an important consideration in determining causation. See, e.g., *Kannankeril v. Terminix Int’l*, 128 F.3d 802, 805, 809 (3rd Cir. 1997) (affirming the admissibility of expert evidence where “conclusion was based [in part] on the temporal relationship between the overdose and the start of disease.”). The majority acknowledges the undisputed evidence that Luder suffers depression. However the majority decision determined that the causation evidence is insufficient because it lacks medical evidence from a qualified expert that expressly ties the retaliation to Luder’s depression. It stands to reason that the majority finds this evidence necessary to ensure that Luder’s depression was not triggered by an unrelated event. Federal courts assessing the validity of medical causation testimony under Fed. R. Evid. 702 can look, for example, at whether “medical causation experts must have considered and excluded other possible causes of injury.” *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 423 (5th Cir. 1987); *Turner v. Iowa Fire Equipment*, 229 F.3d 1202, 1208 (8th Cir. 2000) (“a medical opinion about causation,

based upon a proper differential diagnosis is sufficiently reliable to satisfy *Daubert* [*v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).]”). A “differential diagnosis [is] a technique that identifies the cause of a medical condition by eliminating the likely causes until the most probable cause is isolated.” *Turner*, 229 F.2d at 1208, citing *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999). However, the majority decision does not necessarily impose in this AIR 21 case the requirement that medical evidence proffered by Luder demonstrate that other possibilities for his depression are excluded, *e.g.*, a differential diagnosis. Instead, for Luder to succeed in establishing causation in addition to the ample evidence already in the record, he need only solidify his assertion with medical evidence (either verbal or documentary evidence from an individual “qualified as an expert by knowledge, skill, experience, training, or education,” 29 C.F.R. 18.702) that the retaliation he suffered caused his subsequent depression that precluded him from being reinstated to his piloting duties.

LISA WILSON EDWARDS
Administrative Appeals Judge