In the Matter of:

SCOTT SHACTMAN,

COMPLAINANT,

v.

HELICOPTERS, INC.,

RESPONDENT.

ARB CASE NO. 11-049

ALJ CASE NO. 2010-AIR-004

DATE: January 25, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Jeffrey C. McLucas, Esq., *McLucas & West, P.C.*, Boston, Massachusetts

For the Respondent:
Alexandra D. Thaler, Esq., *Bello, Black & Welsh LLP*, Boston, Massachusetts

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

FINAL DECISION AND ORDER

This case arises under the employee whistleblower protection provisions of the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007), and its implementing regulations at 29 C.F.R. Part 1980 (2012). Complainant Scott Shactman filed a complaint alleging that Helicopters, Inc. retaliated against him in violation of AIR 21's whistleblower protection provisions for raising air transportation safety concerns. Shactman appeals from a Decision and Order (D. & O.) issued by a Department

of Labor Administrative Law Judge (ALJ) on April 12, 2011, dismissing Shactman's complaint after a hearing on the merits. We summarily affirm.

DISCUSSION

Stated succinctly, the ALJ determined that: (1) all of Shactman's protected activity ended on March 18, 2008; (2) his protected activity did not contribute to any unfavorable employment action; and that (3) Shactman's unreasonable conduct and employment misconduct caused his employment to end. D. & O. at 47-49, 54. The ALJ specifically described the protected whistleblower concerns Shactman raised through March 18, 2008, all related to pilot David Adams. D. & O. at 42-46. She found that, as of March 19, 2008, Helicopters sufficiently addressed all of Shactman's concerns. D. & O. at 5, 46-49. In addition, it is undisputed that Helicopters arranged for Shactman to fly with another pilot for a few weeks after March 18, 2008, to allow for further monitoring of Adams. D. & O. at 48; Complainant's Brief in Support of Petition for Review (Comp. Br.) at 6-7. It is undisputed that, on April 7, 2008, Helicopters informed Shactman that his assignment rotation would again include flying with Adams. D. & O. at 48; Comp. Br. at 7. Shactman refused to fly with Adams and never again flew with him. D. & O. at 49. *See also* Comp. Br. at 6-7. Shactman's refusal rested entirely on the same complaints he raised before March 18, 2008. D. & O. at 48-49. Consequently, given Helicopters's previous communications with Shactman, the ALJ found that Shactman's refusal was unreasonable and not protected whistleblower activity. *Id.* Shactman produced no evidence of any safety incidents involving Adams between March 18, 2008, and the date of Shactman's termination on May 12, 2008. The ALJ found that Shactman's FAA complaint on April 9, 2008, was objectively unreasonable and not protected activity because it merely repeated the complaints Shactman raised before March 18, 2008, a fact that is self-evident from the FAA Complaint. See Complainant's Exhibit 20. The ALJ believed Helicopters's reasons for terminating Shactman's employment, including the claims of misconduct and a "confrontational attitude and poor working relationship with co-workers." D. & O. at 54.[1] The ALJ specifically found that it was "not Shactman's safety complaints that factored into the decision to terminate his employment," and that Shactman "failed to establish . . . that any protected activity was a contributing factor in his discharge." *Id.* at 54, 54 n.45.

Substantial evidence supports the ALJ's essential factual findings.[2] Shactman failed to demonstrate that the ALJ committed reversible error. We affirm the ALJ's dismissal of

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[1] The ALJ found that Shactman's "confrontational attitude and poor working relationship with co-workers" was directly related to Shactman's refusal to believe Helicopters's explanations clearing Adams to fly and Shactman's steadfast refusal "to fly with Adams even after his complaints were adequately addressed." D. & O. at 54.

[2] Rather than providing a separate "Findings of Fact" section, it appears that the ALJ included findings of fact in her "Conclusions of Law." As support for the findings the ALJ made in her "Conclusions of Law," we infer that she credited consistent evidence and rejected inconsistent evidence summarized in the "Summary of the Testimony." *See, e.g., Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (the Fifth Circuit Court of Appeals expressly relied on the reasonable

Shactman's whistleblower complaint.[3] We also summarily reject Shactman's appeal of the ALJ's evidentiary rulings, which are reviewed under an abuse of discretion standard. *See Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 19 (ARB Sept. 30, 2011). None of his arguments demonstrate that the ALJ abused her discretion or that any alleged erroneous rulings would alter our decision to affirm the ALJ's dismissal.

CONCLUSION

The ALJ's Decision and Order dismissing Shactman's complaint is **AFFIRMED.**

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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inferences it drew from the district court judge's fact findings) (citations omitted). For example, we infer that the ALJ credited Nick Christakos's testimony summarized on pages 33 through 38 of the ALJ's decision.

[3] While we affirm the ALJ's dismissal of Shactman's claim, we do not endorse every collateral legal issue in the ALJ's legal analysis. For example, the ALJ cited four elements for a whistleblower claim, tracking the elements necessary to raise an inference for an OSHA investigation. 49 C.F.R. § 1982.104(e)(3)(2012). However, we are reviewing the ALJ's decision on the merits, not OSHA's investigation decisions. *Cf. Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987) (citing three elements for a whistleblower claim under the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (2011)). For further discussion on this point, see *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018 at 2, n.3 (ARB Dec. 21, 2012). On another issue, it is unclear whether the ALJ required that Shactman prove "pretext" to prove that his protected activity was a contributory factor. D. & O. at 54. We recognize that pretext evidence may form part of a circumstantial evidence case on the issue of causation. But an AIR 21complainant need only prove that his protected activity was a *contributing* factor in adverse action taken against him – not that an employer's non-discriminatory reasons for discharge were pretext. 29 C.F.R. § 1980. Under AIR 21, protected activity and non-discriminatory reasons can co-exist in unlawful whistleblower discrimination. In the end, we find that the ALJ completely ruled out protected activity as a contributory factor.