



In the Matter of:

**ROGER BENNINGER,**  
  
**COMPLAINANT,**

v.

**FLIGHT SAFETY INTERNATIONAL,**  
  
**RESPONDENT.**

**ARB CASE NO. 11-064**

**ALJ CASE NO. 2009-AIR-022**

**DATE: February 26, 2013**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Roger Benninger, *pro se*, Tucson, Arizona**

*For the Respondent:*

**Paul E. Hash, Esq., *Jackson Lewis LLP*, Dallas, Texas**

**Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge***

### **FINAL DECISION AND ORDER**

This case arises under the employee whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007), and its implementing regulations at 29 C.F.R. Part 1980 (2012). Roger Benninger filed a complaint alleging that Flight Safety International (FlightSafety)<sup>1</sup> retaliated against him in violation of AIR 21's whistleblower protection provisions. Benninger appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative

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<sup>1</sup> Respondent's Brief refers to the Respondent as "FlightSafety International" and "FlightSafety."

Law Judge (ALJ) on June 30, 2011, dismissing Benninger's complaint after a hearing on the merits. We summarily affirm the ALJ's D. & O.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in AIR 21 cases. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

AIR 21's implementing regulations provide, "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 1979.110(b). The Board reviews the ALJ's legal conclusions de novo. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (citing *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 Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

### DISCUSSION

In her exhaustive D. & O., the ALJ thoroughly considered the evidence of record and the contentions of the parties regarding the essential elements of an AIR 21 claim: protected activity, adverse action and a causal link.<sup>2</sup> We adopt and affirm the ALJ's findings on the element of causation and add limited discussion.<sup>3</sup>

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<sup>2</sup> We note that the ALJ concluded that the events of November 26 to 29, 2007, were "intervening events" that "sever[ed] the temporal connection between the protected activity and the termination." D. & O. at 59. The basis for this conclusion is unclear. We note that an "intervening event" does not necessarily break a causal connection between protected activity and adverse action simply because the intervening event occurred after the protected activity. *See, e.g., Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9, 11 (ARB Sept. 26, 2012)(protected activity can be a contributing factor even if the employer also had a legitimate reason for the unfavorable employment action against the employee). Nevertheless, we find that the ALJ's conclusion on this point does not affect our decision because the ALJ's opinion, as a whole, considered all of Benninger's evidence and concluded that there was no causal link between his protected activity and the adverse actions.

<sup>3</sup> Because we affirm dismissal of the claim due to the Complainant's failure to prove the element of causation, we do not address the ALJ's ruling regarding the Respondent's affirmative defense.

FlightSafety is an aviation training company that trains aircraft pilots. It conducts ground school training and flight simulator training under regulations enforced by the Federal Aviation Administration (FAA). FlightSafety hired Benninger as a flight instructor on July 21, 1998. During his employment, he developed an excellent reputation as an instructor. He also provided FlightSafety managers with his opinions regarding the company's methods for scheduling and documenting training. In a meeting on August 23, 2007, he accused another FlightSafety instructor of violating the FAA "8 in 24" rule, which prohibits instructors from providing more than eight hours of certain types of flight training in a twenty-four hour period.<sup>4</sup> FlightSafety investigated Benninger's claims and concluded that no violation had occurred.

In late November 2007, Benninger was scheduled to train Edward Gore and Erik Roodman, employees of Air Orange, for renewal of their air taxi licenses. FlightSafety had some trouble scheduling the training, but Benninger and other FlightSafety employees rescheduled training sessions and made changes to the computerized training schedule to ensure that the training would be completed by Thursday, November 29, 2007. But on that date, FlightSafety reviewed Benninger's training records and concluded that he had not provided Gore and Roodman with the training their curriculum mandated. FlightSafety discharged Benninger from employment that same day for falsification of FAA documents and failing to provide all the training required.

Benninger filed a timely AIR 21claim. In his complaint, he alleged that FlightSafety denied him a promotion in October 2007 and discharged him from employment in November 2007 because of his "8 in 24" allegation. The ALJ conducted a hearing on Benninger's complaint and issued a D. & O. in which she concluded that Benninger engaged in protected activity but failed to prove that his protected activity contributed to his discharge or denial of a promotion. Benninger appealed the ALJ's ruling to the Board, and both parties have filed briefs.<sup>5</sup>

Substantial evidence supports the ALJ's essential factual findings and her ultimate conclusion that there was no causal link between Benninger's protected activity and the denial of his promotion or termination of his employment. The ALJ thoroughly examined all of Benninger's evidence and explained why it failed to establish that his protected activity

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<sup>4</sup> 14 C.F.R. § 142.49(c)(1).

<sup>5</sup> In his brief before the Board, counsel for FlightSafety presented several disparaging comments directed at the Complainant's arguments or the Complainant himself, a person with laudable credentials. *See, e.g.*, Respondent's Brief at 13 ("Benninger believes he can talk his way out of anything."), 14 ("the ALJ did not buy Benninger's line of bull . . ."), 19 ("This argument is asinine."), and 22 ("This assertion is as false as Benninger's training paperwork."). Such language has no place in a legal brief filed with the Board, especially when directed at a pro se complainant, and can only serve to undermine otherwise adequate legal arguments. As the Fourth Circuit has admonished, "A brief in no case can be used as a vehicle for the conveyance of . . . insult, disrespect or professional discourtesy of any nature . . . invectives are not argument, and have no place in legal discussion." *U.S. v. Venable*, 666 F.3d 893, 904 (4th Cir. 2012).

contributed to any unfavorable employment action. In addition, FlightSafety presented evidence that Benninger's failure to provide Gore and Roodman with mandated training, and his falsification of documents, were serious violations of the company's policies. FlightSafety also presented evidence that other instructors were either discharged or given the option of resigning after falsifying records. The record also supports the ALJ's thorough, well-reasoned legal conclusions. None of the arguments Benninger presented on appeal have persuaded us to disturb the ALJ's ruling on his complaint.

#### **CONCLUSION**

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

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**