In the Matter of:

MICHAEL LEON,	**ARB CASE NO. 11-069**
COMPLAINANT,	**ALJ CASE NO. 2008-AIR-012**
v.	**DATE: April 15, 2013**

SECURAPLANE TECHNOLOGIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael Leon, *pro se*, Tucson, Arizona

For the Respondent:
Brent I. Clark, Esq., James L. Curtis, Esq., and Meagan Newman, Esq.; *Seyfarth Shaw LLP,* Chicago, Illinois

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge.*

FINAL DECISION AND ORDER

The Complainant, Michael Leon, filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that the Respondent, Securaplane Technologies, Inc., violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] and its

[1] 49 U.S.C.A. § 42121 (West 2007) (AIR 21).

implementing regulations,[2] when it terminated his employment. Leon alleged that Securaplane, a Boeing Aviation subcontractor, terminated his employment in retaliation for his reporting of design flaws in an electrical component that Securaplane was developing to eventually become part of a newly designed passenger aircraft, the Boeing 787.

On July 15, 2011, a Department of Labor Administrative Law Judge issued a Decision and Order in which he found that Leon failed to establish by a preponderance of the evidence that Securaplane retaliated against him in violation of the AIR 21 employee protection provisions.[3] Leon petitioned the Administrative Review Board to review the ALJ's D. & O.[4]

The Board reviews an ALJ's factual findings to determine whether they are supported by substantial evidence.[5] The ALJ's legal conclusions are reviewed de novo.[6] The Board generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."[7]

To prevail under AIR 21, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor to the alleged adverse action.[8] In this case, after a 5-day hearing, the ALJ issued a decision in which he found

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[2] 29 C.F.R. Part 1979 (2012).

[3] *Leon v. Securaplane Techs., Inc.*, 2008-AIR-012 (D. & O.).

[4] 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.

[5] 29 C.F.R. § 1979.110(b). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[6] *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)).

[7] *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

[8] *See* 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a). A complainant's failure to prove by a preponderance of the evidence any one of the above listed elements of his complaint warrants dismissal. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

that although Leon established that he engaged in protected activity and suffered an adverse action when Securaplane terminated his employment, Leon failed to establish by a preponderance of the evidence that Securaplane retaliated against him because he engaged in protected activity. The ALJ concluded that not only did Leon's protected activity not contribute to Securaplane's termination of his employment, but that even if it had, Securaplane established by clear and convincing evidence that it would have terminated Leon's employment in any event because of behavioral issues in the workplace.[9]

We find the ALJ's Decision and Order to be most detailed, thorough, and replete with numerous supportive citations to the hearing transcript and to applicable legal precedent. Having reviewed the evidentiary record as a whole, and upon consideration of the parties' briefs on appeal, we find the ALJ's findings of fact with respect to the issue of causation to be supported by substantial evidence of record. We also find the ALJ's legal conclusions to be in accordance with applicable law. Accordingly, for the reasons stated by the ALJ,[10] we conclude that Leon has failed to prove that his protected activity contributed to Securaplane's termination of his employment.

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[9] The Respondent also argued before the ALJ that **if** he found that Securaplane violated AIR 21, its damages should be limited because subsequent to terminating Leon's employment, Securaplane learned of information that would have caused it to fire him in any event. As indicated above, the ALJ did not find that Securaplane violated AIR 21, but he discussed Securaplane's after-acquired evidence argument, even though it was moot given his finding that Securaplane was not liable under AIR 21. Ultimately, the ALJ rejected the argument, finding that the after-acquired evidence rule was inapplicable to the facts of this case. D. & O. at 45-51. Securaplane did not appeal this adverse ruling, and it is not before the Board on appeal.

[10] We adopt the ALJ's legal analysis with two minor exceptions. First, we note that the ALJ improperly cited four elements for a whistleblower claim, tracking the elements necessary to raise an inference for an OSHA investigation. 49 C.F.R. § 1979.104(b)(1)(i)-(iv). But 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). Second, it is unclear whether the ALJ required that Leon prove "pretext" to prove that his protected activity was a contributory factor. We recognize that pretext evidence may form part of a circumstantial evidence case on the issue of causation. But an AIR 21 complainant 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. 49 U.S.C.A. § 42121(b)(2)(B)(iii) . Under AIR 21, protected activity and non-discriminatory reasons can co-exist in unlawful whistleblower discrimination. In the end, we find that the ALJ sufficiently ruled out protected activity as a contributory factor and in any case properly supported his finding with respect to the Respondent's affirmative defense. Most importantly, the ALJ ultimately cited the correct law and applied the proper burdens of proof.

Leon raises three arguments in opposition to the ALJ's D. & O.; none of which provides a basis for overturning the ALJ's denial of his complaint.[11] First, Leon argues that Securaplane withheld evidence, specifically a 42-page pre-screening report, that was prepared when Securaplane hired Leon. Leon avers that this report would belie Securaplane's argument that, even in the absence of protected activity, it would have terminated his employment. Leon's argument fails for two reasons. First, although he questioned Securaplane's witnesses about the report at the hearing and there was testimony that this report was likely lost or misplaced in the fire that destroyed personnel records, none of Leon's three requests for production requested Securaplane to produce the report.[12]

Further, while this report would have been relevant in rebutting Securaplane's after-acquired evidence argument, i.e., that its damages should be limited because it learned, after it had hired Leon, that he had a criminal record,[13] the ALJ rejected Securaplane's argument even in the absence of the report.[14] Furthermore, this argument was moot once the ALJ determined that Leon failed to establish by a preponderance of evidence that Securaplane retaliated against him because he engaged in protected activity. Leon apparently misunderstood the basis for the ALJ's alternative finding that Securaplane showed by clear and convincing evidence that it would have fired Leon, even in the absence of protected activity. He mistakenly seems to believe that the ALJ based this finding on the alleged after-acquired evidence of incarceration, rather than on the actual basis – "[Leon's] unprofessional and antagonistic behavior,"[15] which occurred subsequent to his employment, rather than prior to his hiring.

Leon next alleged that Securaplane engaged in "EEOC violations during trial/tampering with witnesses during trial."[16] The ALJ noted that Leon raised the argument that Securaplane discriminated against him on racial and ethnic grounds in a post-hearing letter.[17] The ALJ correctly determined that these allegations are outside of

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11 Complainant's Informal Opening Brief (O. B.) at 17-25.

12 Respondent's Appendix at C. Securaplane did produce the report in later litigation.

13 Although the report is not in the record, Leon states in his brief that he "had a criminal record and had been incarcerated in 2008". O. B. at 17.

14 D. & O. at 7 n.27, 45-51.

15 *Id.* at 52.

16 O. B. at 7.

17 D. & O. at 7.

his jurisdiction.[18] Similarly, the Secretary's delegation of authority to the ARB does not include acting upon alleged EEOC violations.[19]

As for Leon's allegation that Securaplane engaged in witness tampering, this seems to be based on a picture of Leon that Securaplane apparently circulated to its employees just prior to the hearing, including some employees who were listed as potential witnesses.[20] Leon apparently believes that the picture, which was obtained from Leon's MySpace page, might be intimidating to witnesses. But other than his supposition, the record reflects no support for this allegation. The ALJ evaluated the credibility of the witnesses. In particular, the ALJ determined that the testimony of Lorrie Guzeman, Securaplane's Human Resources Manager, was credible.[21] Guzeman made the final decision to terminate Leon's employment.[22] She was no longer employed by Securaplane when the picture was allegedly distributed, and there is no evidence that she ever received a copy of it from Securaplane. Further, Guzeman's recollection of the complaints she received from Leon's co-workers concerning his conduct before she terminated his employment, was consistent with the concerns to which his co-workers testified at his hearing.[23] Accordingly, Leon has failed to support his argument of witness tampering.

Finally, Leon argues that the ALJ was biased against him "as evidenced in his decision and conduct during the trial."[24] He points to the ALJ's alleged flawed reasoning concerning the basis for the Respondent's termination of his employment and disputes the ALJ's statement that he asked Leon whether he wished to testify. He also relies on the length of time that it took the ALJ to issue the decision and the inquiries he made, and had others make on his behalf, regarding the issuance of the decision.

The ARB generally "'presume[s] that an ALJ is unbiased unless a party alleging bias can support that allegation; and bias generally cannot be shown without proof of an

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18 *Id.*

19 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).

20 O. B. at Appendix 1 & 2.

21 *See, e.g.,* D. & O. at 42.

22 D. & O. at 42.

23 *See id.* at 32-33, 35-37.

24 O. B. at 21.

extra-judicial source of bias.'"[25] "'Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias.'"[26] Contrary to Leon's allegation of bias, our review of the record, the hearing transcript, and the D. & O. reveal that the ALJ most carefully and patiently dealt with Leon as a pro se litigant – advising him on proper procedure and the potential disadvantage of failing to testify, while maintaining the impartiality that was required of him as the decision maker.[27] He crafted a thoughtful, thorough, 55-page decision with extensive citations to the transcript of a 5-day hearing and to the relevant law. As we indicated above his decision is well-supported by the facts and relevant legal precedent. Therefore, we find that Leon has failed to demonstrate that the ALJ was in any way biased against him.

Accordingly, finding no reason to depart from the ALJ's comprehensive and well-reasoned opinion, we **AFFIRM** the ALJ's Decision and Order dismissing Leon's complaint.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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[25] *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-026, slip op. at 5 (ARB May 31, 2012)(quoting *Matter of Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-002, slip op. at 15-18 (ARB Apr. 29, 2005); *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-028, slip op. at 8 (ARB Dec. 31, 2002)).

[26] *Matthews*, ARB No. 11-036, slip op. at 5 (quoting *Powers v. Paper, Allied-Indust., Chem. & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004-AIR-019 (ARB Aug. 31, 2007)).

[27] *See, e.g.*, D. & O. at 5 n.17.