In the Matter of:

VERNON T. JONES, **ARB CASE NO. 12-055**

COMPLAINANT, **ALJ CASE NO. 2011-AIR-007**

v. **DATE: July 24, 2013**

UNITED AIR LINES, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
Vernon T. Jones, *pro se*, Elk Grove Village, Illinois

For the Respondents:
Marc R. Jacobs, Esq., *Seyfarth Shaw LLP*, Chicago, Illinois

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 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 1979 (2012). Complainant Vernon T. Jones filed a complaint alleging that Respondent United Airlines, Incorporated (United) retaliated against him in violation of AIR 21's whistleblower protection provisions. Jones appeals from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) denying his complaint, following 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 the Administrative Review 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). The Board reviews an ALJ's factual determinations 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)).

BACKGROUND

Jones was employed by United as a flight attendant since 1995. United presented uncontroverted evidence that Jones had a history of disciplinary infractions during his period of employment, receiving disciplinary suspensions of three, ten, and thirty days in 1999, 2006, and 2007, respectively. In addition, he received a formal warning letter in 1995 for a continually unacceptable dependability record. In March 2009, Jones received a Letter of Warning-Performance Level Four, after settlement of a dispute involving his misuse of a Japanese immigration permit. Jones conceded that the level four warning was put into effect for a period of twenty-four months. Emp. Ex. 6; H. Tr. at 102-104.

Two weeks prior to July 1, 2010, United notified its flight attendants, including Jones, that they would be receiving an update for their Flight Attendant Operations Manuals (FAOM), and that they were required to insert these updates into their FAOMs prior to July 1. Jones failed to insert the July 1, 2010 revision into his FAOM as instructed, and subsequently flew on multiple occasions in July and August 2010 without the correct revision in violation of Federal Aviation Administration (FAA) regulations and United's policy. Hearing Transcript (H. Tr.) at 76.

On August 17, 2010, Jones requested a copy of the FAOM revision at O'Hare Airport in Chicago, Illinois, while in training. H. Tr. at 107-108. This request triggered an inquiry by United's Chicago office regarding his failure to have inserted the required FAOM revision and resulted in notification of his supervisor in Tokyo. Jones's supervisor was instructed to meet Jones upon his return to Tokyo and obtain his out-of-date FAOM. On August 23, an audit confirmed that Jones's FAOM manual did not contain the July 1 revision and Jones does not contest this fact. On September 15, 2010, Jones made a query through the Flight Attendant Safety Reporting Program, the actual subject of which is not clear from the record. The ALJ found that this query regarded pursuing a personal claim against the passenger involved with an incident on Flight 881.[1] In addition, sometime before October 7, 2010, Jones filed a report with

[1] On August 18-19, 2010, Jones travelled on Flight 881 as a passenger from the training in Chicago to his home base in Tokyo, during which an inebriated passenger directed profanities and racial epithets at Jones and other crew members, which led to an internal investigation by the airline.

the FAA claiming that the NRT base staff failed to deliver manual updates to NRT-based flight attendants in a deliberate attempt to target flight attendants. A second complaint was filed with the FAA before December 7, 2010, which alleged that an investigation of the incident on Flight 881 was "swept under the rug." A disciplinary hearing was held on October 21, 2010, after which United terminated Jones's employment by decision dated October 29, 2010.

DISCUSSION

AIR 21's whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsection (a):

> No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

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. *See Nagle v. Unified Turbines, Inc.*, ARB No. 13-019, ALJ No. 2009-AIR-024 (ARB May 31, 2013). If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.[2]

On appeal, Jones appears to contend that the ALJ erred in finding that his complaints to the FAA and the Flight Attendant Safety Reporting System (FASRA) were not protected activity as he concluded they were not related to an objectively reasonable perceived violation of federal laws or standards. Jones also contends that the ALJ erred in finding that United did not make the decision to terminate his employment due at least in part to these complaints.

The ALJ dismissed Jones's complaint for failing to meet his burden of proof. While the ALJ found that United terminated Jones's employment by letter dated October 29, 2010, thus constituting an adverse employment action under AIR 21, the ALJ nevertheless concluded that Jones failed to establish by a preponderance of the evidence that he had engaged in AIR 21 protected activity. Specifically, the ALJ found that Jones's complaint filed with the FAA prior

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[2] 49 U.S.C.A. § 42121(b)(2)(B)(i), (ii); 29 C.F.R. § 1979.109(a). *See Van v. Portneuf Med. Ctr.*, ARB No. 11-028, 2007-AIR-002, slip op. at 6-7 (ARB Jan. 31, 2013); *Zurcher v. Southern Air, Inc.*, ARB No. 11-002, 2009-AIR-007, slip op. at 4-5 (ARB June 27, 2012).

to October 7, 2010, was not based on an objectively reasonable belief that the conduct complained of in that complaint constituted a violation of federal laws or standards. In addition, he found that Jones presented no evidence that he reported safety concerns through the FASRA, and thus rejected Jones's second contention of having engaged in protected activity. Even had Jones's complaints constituted protected activity, the ALJ held that Jones failed to prove that United actually or constructively knew of Jones's complaints.

Having found that Jones failed to prove that he engaged in AIR 21 protected activity or that the actions that he claimed constituted protected activity were a contributing factor in the termination of his employment, the ALJ found that United ultimately established by clear and convincing evidence that it would have terminated Jones's employment irrespective of his having engaged in protected activity.

Jones contends on appeal that the ALJ erred in finding that he had not engaged in protected activity and that he failed to meet his burden of proving that his protected activity was a contributing factor in United's decision to terminate his employment. While Jones challenges the various elements of the ALJ's ruling, we do not find it necessary to rule on all aspects of the ALJ's decision because substantial evidence of record supports the ALJ's finding that United proved by clear and convincing evidence that it would have terminated Jones regardless of any alleged protected activity. United demonstrated that its decision to terminate Jones's employment was based on his failure to update his FAOM on July 1, as required by FAA regulations. This failure was a serious violation of the company's policies, particularly given that Jones flew twelve flights without the proper FAOM updates and that he was on a performance warning status during that time. Given the ALJ's determination that United established by clear and convincing evidence that it would have terminated Jones's employment regardless of any AIR 21 protected activity, which is indeed supported by substantial evidence in the record, the Board affirms the ALJ's decision dismissing Jones's complaint.

CONCLUSION

Accordingly, for the foregoing reasons, the Board **AFFIRMS** the ALJ's decision and **DISMISSES** Jones's complaint.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge