



In the Matter of:

DAWN SEWADE,

ARB CASE NO. 13-098

COMPLAINANT,

ALJ CASE NO. 2013-AIR-009

v.

DATE: February 13, 2015

HALO-FLIGHT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jane Legler Byrne, Esq.; Neill & Byrne, PLLC; Dallas, Texas

For the Respondent:

Lamar Clemons, Esq.; English & Clemons; Corpus Christi, Texas, and Audrey Mullert Vicknair, Esq.; Law Office of Audrey Mullert Vicknair; Corpus Christi, Texas

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge

DECISION AND ORDER OF REMAND

Dawn Sewade filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that her former employer, Halo-Flight, Inc., retaliated against her in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century¹

¹ 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21).

and its implementing regulations.² On September 11, 2013, after an evidentiary hearing, an Administrative Law Judge (ALJ) issued a Decision and Order denying relief on the grounds that Sewade failed to establish that she engaged in AIR-21 protected activity or that Halo-Flight took adverse action against her.³ We reverse some of the ALJ's findings discussed fully below, vacate the denial of relief, and remand for further findings consistent with this opinion.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under AIR 21 and its implementing regulations.⁴ The ARB reviews an ALJ's findings of fact under the substantial evidence standard but reviews the ALJ's legal conclusions de novo.⁵

BACKGROUND⁶

Sewade began working as a helicopter pilot for Halo-Flight on January 12 or 13, 2012. D. & O. at 3. Halo-Flight is an air and ground ambulance service with bases in Corpus Christi, and Alice, Texas. *Id.* Halo-Flight hired Sewade's husband Chris Sewade at the same time it hired her. *Id.* During Sewade's employment with Halo-Flight, Tom Klassen was Halo-Flight's Executive Director and Director of Operations, Curt Snodgrass was Halo-Flight's Chief Pilot,

² 29 C.F.R. Part 1979 (2014).

³ *Sewade v. Halo-Flight, Inc.*, ALJ No. 2013-AIR-009 (ALJ Sept. 11, 2013) (D. & O.).

⁴ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

⁵ 29 C.F.R. § 1979.110(b). *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 2 (ARB Nov. 5, 2013) (citing *Williams v. Am. Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 6 (ARB Dec. 29, 2010)).

⁶ The ALJ indicated that he made "findings of fact, conclusions of law, and order" but he did so by intermingling them throughout his opinion rather than providing a separate section where he identified the findings of fact. D. & O. at 2. Consequently, we accepted the ALJ's factual statements as findings of fact except where there was an unresolved inconsistency or where the ALJ used words like "according to," "allegedly," and "testified" in discussing hearing testimony. Additionally, it appears that many background facts are undisputed, and we include those in our background section as necessary to complete the relevant factual background. *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (reasonable inferences may be drawn by an appellate body reviewing a trial or hearing court's findings of fact); *see also Jackson v. Comm'r*, 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted).

Ben Yelle was Halo-Flight's Director of Maintenance, and Bryan Bowen was a mechanic with the company. *Id.*

At Halo-Flight, the pilot of an aircraft was the responsible party and final authority for the safe operation of his or her aircraft. *Id.* Mechanics worked at the Corpus Christi base and "worked closely with the pilots on a daily basis to ensure safe aircraft operation." *Id.* In late February 2012, Halo-Flight paired Bowen with Sewade. *Id.*

In "either late February or early March 2012," Sewade observed problems with her aircraft fuel system left and right transfer lights. *Id.* at 4. The aircraft fuel system had four lights designed to light up briefly "when the aircraft was powered up indicating fuel could be transferred from the forward to the aft tanks." *Id.* On the day that she was experiencing problems, the lights turned on inconsistently when she powered up her aircraft on three different attempts. *Id.* Because the lights responded inconsistently, Sewade believed there was a malfunction in the fuel signal that "could potentially lead to fuel starvation and an engine flame out requiring a forced landing."⁷ *Id.* Sewade called Bowen to have him fix the issue. *Id.* After five to ten attempts to power up the vehicle, the lights came on, but Bowen could not determine what was wrong with the lights, and why they were working sporadically. *Id.* Bowen told Sewade that he was going to go to Corpus Christi for some tools and then return. *Id.* Before he left, Bowen asked Sewade if she felt comfortable flying the helicopter back to Corpus Christi and Sewade said she was not comfortable with that. *Id.* Sewade contacted Klassen and told him about the lights problem, and Klassen told her that they needed her to fly the aircraft back to Corpus Christi. *Id.* at 4, 10. Sewade "was shocked by Klassen's suggestion" because she felt she either had to fly an unworthy aircraft (and put her certificate at risk) or defy Klassen. *Id.* at 4. Sewade refused to fly the aircraft. *Id.* After Klassen pressured Sewade to fly, he apologized for pressuring her. *Id.* at 10. Klassen then provided Sewade with some steps to take with the battery and told her to try again to get the fuel transfer lights to go on. *Id.* at 4. Sewade followed Klassen's instructions, with Bowen's assistance, and after three hours the lights came on again. *Id.* At that point, Sewade flew the aircraft back to Corpus Christi. *Id.* During the three hours in which Sewade and Bowen were trying to get the lights back on, Bowen encouraged Sewade to fly the aircraft with the lights off and told her that any other pilot would have flown it that way. *Id.*

In March 2012, another pilot, Mark Ritter, approached Sewade and asked her to check an aircraft to see if she observed a problem that he had observed—aircraft pitching. *Id.* at 4-5. Sewade twice experienced the aircraft's "violent pitching."⁸ *Id.* at 5. Bowen asked Sewade to

⁷ Chris Sewade testified that a flame out is "[f]uel starvation to the engine causing it to no longer produce power." Hearing Transcript (Tr.) at 139. If a pilot is in flight during a flame out, "[t]hen there would be no more powered flight. An aircraft would be in what's called an outer rotation with forced landing at that point and the results could very potentially be catastrophic." *Id.*

⁸ Sewade testified that while she was flying, she took her hand "off the cyclic and the aircraft would pitch up on its own which is highly unusual and should not be that way." Tr. at 38.

fly the aircraft back to Corpus Christi and she refused. *Id.* She informed Bowen about the pitching, who said to her that it was impossible for the aircraft to be pitching. *Id.* Bowen told Sewade that he would have Ritter verify whether the aircraft was pitching. *Id.* Sewade told Ritter and Snodgrass about the pitching and that Bowen had said it was impossible; so, Snodgrass tested the aircraft and “verified extreme pitching.” *Id.*

After this incident, Bowen intentionally forced Sewade and her crew into overtime on two occasions over a span of three days. *Id.* The forced overtime took place after Sewade had flown most of the night when she and her crew were all extremely tired. *Id.* Sewade called Klassen and reported to him about the forced overtime. *Id.* Klassen told Sewade that he thought she had a communication problem with Bowen and should try to talk to him. *Id.* Later, Klassen acknowledged that Bowen was making Sewade stay overtime to wash her aircraft and that Bowen was unreasonable for doing this. *Id.* at 11. Klassen told Bowen that his actions were not reasonable, Bowen agreed, and Bowen stopped unreasonably forcing Sewade to work overtime. *Id.*

Ten minutes after Sewade told Klassen about the forced overtime, Bowen called Sewade to tell her repeatedly for approximately thirty minutes that he was extremely angry with her for going to Klassen about the situation. *Id.* at 5. Bowen instructed Sewade that she was not to communicate with Klassen about any concerns that she had with Bowen. *Id.* at 5.

Later that month, Bowen delayed for three hours in providing Sewade with a lock combination she needed to move her aircraft from an unprotected hospital pad into the airport hangar in inclement weather. *Id.* On another occasion, in April 2012, Sewade reported to Snodgrass that Bowen withheld information from her and delayed fixing a door handle on her aircraft. *Id.* at 5-6. While the door handle was broken, Sewade flew with one crew that was willing to fly with the faulty door latch, but she did not fly the next day because that crew refused to fly until the door latch was repaired. *Id.*

On May 15, 2012, during a personnel meeting, Klassen asked the group if the Alice pilots were taking fuel samples, and Sewade disclosed that they were not. *Id.* at 6. When Klassen asked why they were not, Martin responded that they did not have the necessary equipment to take fuel samples. *Id.* Klassen then sent the necessary equipment to Bowen and told Bowen to train the Alice pilots on how to take fuel samples. *Id.* When Bowen attempted to train Sewade, she disagreed with Bowen’s instructions. *Id.* Sewade argued that Bowen’s method would allow air into a pressurized system and result in a possible flame out. *Id.* at 7. Sewade also objected that Bowen tried to put extra maintenance oil in a pilot’s bedroom closet. *Id.*

After Sewade argued with Bowen about fuel sampling, she called Yelle and reported her concern about a possible flame out under Bowen’s fuel sampling method. *Id.* A short time later, Bowen called Sewade and for 34 minutes told her he was angry with her for calling Yelle. *Id.* Bowen allegedly threatened her by stating that Klassen was on his side, that “things were not going to be good for” her, and that she “was not in a good place.” *Id.* After this call, Sewade told her husband and other employees that she was concerned about her safety. *Id.* The next

day, Sewade called Yelle and told him about Bowen's call to her. *Id.* Yelle told Sewade that Bowen's call was against his express instructions to Bowen not to call Sewade. *Id.* Sewade then called Klassen to tell him about Bowen's conduct. *Id.* Klassen initially dismissed Bowen's conduct, but then called Sewade back fifteen minutes later and told her to write up the incident in a Safety Management Report (known as an SMS report).⁹ *Id.* Klassen gave Bowen a verbal warning for calling Sewade when Yelle ordered him not to. *Id.* at 12.

Sewade followed Klassen's instructions to fill out an SMS report on May 17, 2012. *Id.* at 7. Included in that report were Sewade's prior complaints about inoperable fuel transfer lights, aircraft pitching, locked aircraft wheels, the broken door latch, forced overtime, and Bowen's calls and complaints about Sewade going over his head to supervision. *Id.*

On May 23, 2013, Sewade had a meeting with Klassen, Ann Clements (HR manager), Yelle, and Bowen. *Id.* The purpose of the meeting was to discuss Sewade's concerns for her job and personal safety due to Bowen's conduct and to verify whether Bowen threatened Sewade. *Id.* at 7, 11. Before the meeting, Sewade had heard that Bowen had been in a fight with another mechanic and that Bowen had said that he was not taking his anti-psychotic medication. *Id.* at 7. During the meeting, Bowen admitted being angry and frustrated with Sewade, but did not admit to threatening her. *Id.* at 7, 11. Sewade stated that she felt that Bowen was trying to isolate her. *Id.* Klassen asked Clements if she would have felt threatened by what Bowen had said to Sewade and Clements answered "no." *Id.* at 11. During their discussion, Sewade "could not come up with examples of how she considered threatened [sic]." *Id.*

At this point, Yelle and Bowen left the meeting and Klassen went over the complaints on Sewade's SMS report. *Id.* at 7-8. After discussing several issues, Klassen asked Sewade what she thought would resolve the situation. *Id.* at 8. Sewade replied that she would like a shift change so that she would not be working with Bowen. *Id.* Klassen told Sewade that he would allow her to switch schedules with her husband "so as to make the transition as easy as possible." *Id.* at 11.

After going through Sewade's SMS report and deciding on a shift change, Klassen engaged in a counseling session with Sewade and gave her a verbal warning (memorialized in writing) dated May 23, 2012, in which he counseled Sewade about (1) a negative and complaining attitude, (2) inconsistent behavior regarding regulatory items,¹⁰ (3) not following instructions to communicate with Bowen, and (4) failure to meet a 10-minute lift-off time for 911 flights and not taking fuel samples because she did not have the necessary equipment. *Id.* at

⁹ SMS reports were used by Halo-Flight for individuals to write-up safety incidents. D. & O. at 4.

¹⁰ About Item 2, inconsistent behavior toward regulatory items, Klassen told Sewade at the meeting that "[w]e talked about the discrepancy on the light but yet the door's okay. . . . So, we have to be consistent in our nature." JX 13 at 49.

8, 11; see JX 1. Klassen placed the written, verbal warning in Sewade's personnel "file because she threatened to get a lawyer and bring a claim against" Halo-Flight.¹¹ *Id.* at 11.

After the meeting, Sewade did not feel that any of her concerns about Bowen were resolved, so she sent an e-mail to Klassen at 4:44 p.m. on May 23, 2012, stating:

I can no longer continue to work for Halo Flight under these conditions. In my opinion, the verbal reprimand I received today was discriminatory and retaliatory. I am being singled out and I am the only one being made accountable for the items listed. As a point of fact, all of the infractions that were listed in my warning are attributable to all other pilots at the Alice base as well.

Id. at 8-9; see JX 5. Sewade did not think that the schedule change with Bowen would help the situation because Bowen would still have access to work on her helicopter. *Id.* at 9. Sewade thought that her e-mail to Klassen would cause him to "reconsider his position and even see to it that Bowen would not work on her aircraft." *Id.* When Klassen learned that Sewade had quit, he was shocked, and he told Sewade's husband that if Sewade wanted to rescind her resignation, he would consider it. *Id.* at 11. Klassen never heard from Sewade about returning to work. *Id.*

On May 24, 2012, Sewade e-mailed the Board of Directors telling the Board that she had initiated litigation against Halo-Flight for creating a hostile work environment in which Klassen discriminated and retaliated against her, and forced her to quit. *Id.* Sewade never again worked for Halo-Flight and on August 15, 2012, she filed an AIR 21 complaint with the Department of Labor. *Id.* at 1.

DISCUSSION

To prevail on her whistleblower complaint Sewade must prove by a preponderance of the evidence that (1) she engaged in activity protected by AIR 21, (2) that an unfavorable personnel action was taken against her, and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against her.¹²

1. Protected Activity

The ALJ concluded that Sewade did not engage in protected activity. He found that none of the issues that Sewade raised involved any safety issues or Halo-Flight "condoning" safety

¹¹ Klassen admitted at the hearing that Halo-Flight ultimately gave the warning to Sewade's subsequent employer who was her employer at the time of the hearing. Tr. at 268-69.

¹² 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

issues in violation of FAA rules or regulations. *Id.* at 14. Regarding the transfer light issue, the ALJ found that the aircraft’s safe operation was not at issue and that Klassen “cured any alleged improper conduct” when he admitted wrongdoing and apologized for pressuring her to fly when she was not comfortable doing so. *Id.* at 13. Regarding the aircraft pitching, the ALJ found that the problem did not involve an FAA violation. *Id.*

Sewade argues on appeal that she engaged in protected activity when she (1) reported the problem about the fuel system transfer lights and refused to fly, (2) reported the aircraft pitching problem, (3) reported that Bowen’s method of doing fuel sampling was dangerous, and (4) filed the SMS report about the prior three protected activities and other issues. Comp. Br. at 17-23, 28, 29-30.

Under AIR 21,¹³ a complainant engaged in protected activity when he or she:

(1) 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 or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding 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;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

As a matter law, an employee engages in protected activity any time she provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, where the employee’s belief of a violation is subjectively and objectively reasonable.¹⁴ The federal aviation regulations governing air safety give the pilot in command “final authority and responsibility for the operation and safety of the

¹³ 49 U.S.C.A. § 42121(a).

¹⁴ 49 U.S.C.A. § 42121(a)(1).

flight.”¹⁵ Further, the FAA regulations indicate that “[n]o person may operate a civil aircraft unless it is in an airworthy condition,” and “[t]he pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.”¹⁶ The regulations also indicate that “[e]xcept as provided in paragraph (d) of this section, no person may take off an aircraft with inoperative instruments or equipment installed unless” certain conditions are met.¹⁷

The ALJ incorrectly analyzed the issue whether Sewade engaged in protected activity. First, an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement where (1) the employee’s report or attempted report is “related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, and (2) the employee’s belief of a violation is subjectively and objectively reasonable.”¹⁸ Second, an employer cannot “cure” protected activity or erase that it occurred by admitting to wrongdoing, by apologizing, or by agreeing with the employee about a safety concern. When an employee makes a protected complaint, the employer’s response (positive or negative) does not change that AIR 21 protected activity has occurred.¹⁹ Third, finding protected activity does not depend on whether an employer “condoned” safety problems or FAA violations as the ALJ seems to have required.²⁰ Finally, the AIR 21 whistleblower statute does not require that protected activity relate “definitely and specifically” to a safety issue.

On appeal, Sewade explains that her first allegation of protected activity concerns transfer lights that were not working. These lights were designed to indicate that the aircraft was

¹⁵ 14 C.F.R. § 91.3(a) (2013).

¹⁶ 14 C.F.R. § 91.7(a), (b).

¹⁷ 14 C.F.R. § 91.213(a).

¹⁸ 49 U.S.C.A. § 42121(a)(1); *Benjamin*, ARB No. 12-029, slip op. at 4. See *Van v. Portneuf Med. Ctr.*, ARB Nos. 11-028, 12-043, ALJ No. 2007-AIR-002, slip op. at 4 (ARB Jan. 31, 2013) (A “complainant need not prove an actual violation” to prove that she engaged in AIR 21 protected activity. She needs only to “establish a reasonable belief that [] her safety concern was valid.”).

¹⁹ That “management agrees with an employee’s assessment and communication of a safety concern does not alter the status of the communication as protected activity under the Act, but rather is evidence that the employee’s disclosure was objectively reasonable.”¹⁹ *Benjamin*, ARB No. 12-029, slip op. at 5-6.

²⁰ The ALJ concluded in regards to protected activity that the issues that Sewade raised “did not involve Respondent’s condoning safety issues in violations of FAA rules or regulations.” D. & O. at 14.

ready to fly, but they were not turning on consistently. Sewade, the pilot in command, did not feel that the helicopter was safe to fly and reported this concern to Klassen. Pursuant to the provisions at 14 C.F.R. § 91.213, “[e]xcept as provided in paragraph (d) of this section, no person may take off an aircraft with inoperative instruments or equipment installed unless” certain conditions are met. It is undisputed that the air transfer lights were not working and that Sewade reported about them because she subjectively believed there was a safety violation. Klassen acknowledged that there was a problem with the aircraft and even apologized for pressuring Sewade to fly the aircraft in its condition. Further, the ALJ found that “according to Klassen there was no violations [sic] of FAA rules or regulations for Complainant to fly her aircraft from the Alice to Corpus base once the fuel transfer lights [turned] on and off as expected,” which suggests that there may have been a violation before the lights worked as expected. D. & O. at 10. The ALJ’s findings establish that Sewade’s report and refusal to fly were each protected activity under AIR 21, even if Klassen agreed with Sewade’s concern and her decision not to fly unless the lights came on. Klassen’s apology is additional evidence of the objective reasonableness of Sewade’s belief about the safety issue.

Sewade’s second allegation of protected activity concerns her report that her aircraft was violently pitching, a fact Snodgrass, the Chief Pilot, verified. Halo-Flight has not argued that the aircraft pitching did not occur. Without further explanation from the ALJ, it seems that an aircraft’s violent pitching touches on safety concerns and that Sewade had an objectively and subjectively reasonable belief that flying with violent pitching for an unknown reason would violate the FAA rules or regulations or other federal laws relating to air safety. On remand, the ALJ will reconsider whether Sewade’s report about pitching also constitutes protected activity and provide reasons and bases for his conclusion.

The third allegation of protected activity was Sewade’s disagreement with Bowen about proper fuel sampling procedures and her report to Yelle that Bowen’s method was unsafe. FAA regulations required a pre-flight check that involved checking the fuel on the aircraft. D. & O. at 11.²¹ We understand Sewade’s safety concern to be that the FAA-required fuel checks must be done safely to be considered completed and to satisfy the requirements of the regulations. The ALJ did not determine whether Sewade reasonably believed that improper fuel sampling related to an FAA violation and/or a safety issue. This is a factual issue we remand to the ALJ. If proper fuel sampling involves an FAA law or a safety issue, then Sewade’s report about fuel samples taken in an unsafe manner is protected activity under AIR 21 as a matter of law because it relates to a violation of an FAA rule or regulation.

Finally, Sewade’s SMS report contained Sewade’s reports about malfunctioning air transfer lights, aircraft pitching, and improper fuel sampling, as well as other safety issues.²²

²¹ Further, Klassen testified at the hearing that fuel sampling is an important issue and that it “absolutely” violated the FAA if fuel sampling was not completed. Tr. at 240.

²² Klassen testified that Sewade “brought up some serious safety concerns in her SMS” and he “wanted to start the investigation into all of these concerns.” Tr. at 258. Klassen testified that while

The filing of this report constitutes protected activity under the statute because it expressly raised at least one specific safety concern as discussed above. Thus, we reverse the ALJ's determination that Sewade engaged in no protected activity and remand for additional findings on the issue of protected activity.

2. Adverse Action

The ALJ found that Sewade failed to establish that she suffered any adverse employment action. D. & O. at 15. The ALJ found that the warning Halo-Flight gave Sewade “did not affect the terms, condition[s], or privileges of employment” and “were not accompanied by words which would lead her to believe that this conduct was part of progressive discipline that would lead to her discharge.” *Id.* The ALJ also found that Halo-Flight did not constructively discharge Sewade because “there [wa]s no evidence of abusive treatment, a reduction in pay, badgering, harassment or humiliation.” *Id.* at 16. Sewade appeals the ALJ's findings and argues that Halo-Flight took three adverse actions against her: 1) the shift change that would have cost her a week's worth of pay, 2) the warning letter, and 3) constructive discharge.

Both the statute and regulations guide us in determining which employment actions may fall within the coverage of the AIR 21 whistleblower statute. Under the AIR 21 statute, no employer “may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment.” The regulations make it “a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against any employee because the employee” has engaged in protected activity.²³ The ARB regards “the list of prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline.”²⁴

A. Shift Change and Warning

Although the ALJ did not discuss whether the shift change was an employment action covered by the whistleblower statute, Sewade raised this issue before the ALJ and on appeal.²⁵

he felt that Sewade's purpose in filing the report was to try to get Bowen fired, the SMS report contained “quite a few safety issues that [they] were having that [he] didn't know of.” Tr. at 262.

²³ 29 C.F.R. § 1979.102(b).

²⁴ *Williams*, ARB No. 09-018, slip op. at 10-11.

²⁵ Sewade made this argument to the ALJ in her brief filed on August 16, 2013. Sewade's Brief in Support of AIR 21 Retaliation Claim at 17, 18. She also made the argument to the Board on appeal. Comp. Br. at 24.

Consequently, we remand this issue for the ALJ to determine whether the shift change was employment action that affected the terms and conditions of employment, or constituted a threat, intimidation, coercion, or otherwise met the standard set out above.

As to the verbal warning (memorialized in writing), we refrain from drawing factual conclusions about the seemingly self-evident coercion in the verbal warning and prefer to remand this issue to the ALJ for further consideration.²⁶ Sewade received a verbal reprimand (memorialized in writing) and had a counseling session to discuss it. The ALJ found that the warning was “not accompanied by words which would lead her to believe that this conduct was part of progressive discipline that would lead to her discharge.” D. & O. at 15. This finding is unsupported by substantial evidence as the undisputed evidence of record directly contradicts it. Contrary to the ALJ’s finding, reference to future potential discipline was made during the counseling session discussing the warning when Klassen clarified that she was not “going to get fired,” but did say that “if things don’t change, of course we might go to a different level”²⁷ JX 13 at 54. The recording of these statements and the meaning of “things” and “different level” are unclear; the ALJ is entrusted with the role of making fact findings as to what was meant by these statements. If the ALJ finds that these statements constituted coercion, threats or intimidation, then these statements would constitute a sufficient unfavorable employment action falling within the whistleblower statute as a matter of law. The ALJ would then need to decide whether protected activity contributed to these unfavorable employment actions.

B. Constructive Discharge

Sewade also claims that Halo-Flight constructively discharged her because of her allegedly protected activity. There is no question that the Board recognizes constructive discharge as an adverse action. The Board has repeatedly found that constructive discharge

²⁶ See *Williams*, ARB No. 09-018.

²⁷ Klassen told Sewade:

I just brought this for you to look over. It says employee warning. It’s—I’d rather it be (inaudible) but I just want you to feel comfortable with this process, that document what we—what we talked about. There is no—with this, there is no—if you don’t—if you don’t change, you are going to get fired. I am going to be very clear about that. This is you and I and Ann talking about some issues that we see or I see that you could improve on to be more successful here so if things don’t change, of course we might go to a different level but I think that this information and identifying these challenges, I think that you can be more than—more than successful

JX 13 at 54.

occurs when “working conditions were so difficult or unpleasant that a reasonable person in the employee’s shoes would have found continued employment intolerable and would have been compelled to resign.”²⁸ We have found whistleblower violations for constructive discharge under whistleblower laws governed by AIR 21 standards if protected activity contributed to the constructive discharge.²⁹

In a summary fashion, the ALJ concluded that there was no constructive discharge because the record contained “no evidence of abusive treatment, a reduction in pay, badgering, harassment or humiliation.” D. & O. at 16. If Sewade’s constructive discharge claim rested solely on the direct conduct of the Halo-Flight managers, we would understand the basis for the ALJ’s ruling. But Sewade’s constructive discharge claim includes the way that Bowen, her co-worker, allegedly mistreated her, as well as how Klassen handled Bowen’s actions and treated Sewade. Sewade was concerned whether the aircraft she flew would be safe given the apprehensions she had about Bowen—she feared for her personal safety because of his actions and statements to her and because he had access to her aircraft. D. & O. at 7, 9, 10. Thus, the question becomes whether co-worker harassment linked to whistleblowing activity can support a finding of constructive discharge under AIR 21. We see insufficient guidance under ARB precedent to decide this matter now, especially where the parties have not had sufficient opportunity to address this issue.

Under Title VII, the EEOC and courts have repeatedly accepted retaliatory co-worker harassment as part of the Title VII constructive discharge claim.³⁰ These cases suggest that the employer’s knowledge or constructive knowledge of retaliatory conduct and culpable failure to stop the retaliatory conduct could result in employer liability under Title VII’s anti-discrimination and anti-retaliation laws.³¹ Employer liability for co-worker harassment derives

²⁸ *Brown v. Lockheed Martin, Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011) (quotations omitted).

²⁹ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 6 (ARB Dec. 30, 2004) (affirming “the ALJ’s determination that the adverse actions [including a finding of constructive discharge] imposed by VAL were in retaliation for Negron’s protected activity”), *aff’d*, 437 F.3d 102 (1st Cir. 2006).

³⁰ An employer is vicariously liable for harassment under Title VII when an employee “uses apparent authority (the apparent authority standard), or who was ‘aided in accomplishing the tort by the existence of the agency relation’ (the aided in the agency standard).” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 744 (1998) (citing the Restatement (Second) of Agency § 219(2)(d)).

³¹ An employer could be liable “if it knew or should have known about . . . harassment [due to protected status] and failed to stop it.” *Burlington Indus.*, 524 U.S. at 744 (citing the Restatement (Second) of Agency § 219(2)(b)). See also *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002); *Williams v. Gen. Motors, Corp.*, 187 F.3d 553, 561 (6th Cir. 1999); *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63 (2d

from Title VII's statutory language, which prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."³² Under this body of law, employer liability for co-worker harassment "is established upon proof that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"³³ Similarly, AIR 21 prohibits employers from discharging or otherwise discriminating "against an employee with respect to compensation, terms, conditions, or privileges of employment because" she engaged in protected activity.³⁴ Therefore, we remand this matter to the ALJ to allow the parties to address: (1) whether AIR 21 permits Sewade's whistleblower harassment claim given that her claim arises from co-worker harassment; (2) if so, what level of knowledge and culpability is required to impose liability; and (3) whether sufficient evidence exists to find Halo-Flight liable for whistleblower retaliation in this case.

In remanding this matter, we must expressly reject as unsupported by substantial evidence the ALJ's finding that Bowen did not mistreat Sewade because of her expressed safety concerns. The ALJ stated that "[w]hile Klassen did not support Complainant's assertions of misconduct by Bowen, he had every reason to discount her unsupported allegations of misconduct by Bowen realizing that they stemmed from a dislike of Bowen and attempt by her to have him fired." *Id.* These ALJ conclusions, framed as fact-findings, are not supported by substantial evidence and they are inconsistent with other findings the ALJ made. The ALJ stated that after the pitching aircraft situation, Bowen unreasonably forced Sewade and her crew into overtime and called her on two separate occasions to tell her for approximately thirty minutes each time that he was extremely angry with her for reporting to Klassen and Yelle about him. D. & O. at 5, 7. Additionally, the ALJ found that Bowen allegedly "began to withhold information from [Sewade], [and] delay[ed] in coming to check out her aircraft," but did not make any findings about whether these allegations were true. *Id.* at 5. The ALJ stated that Bowen's conduct caused Sewade to fear for her personal safety because Bowen had access to her aircraft. *Id.* at 7, 9, 10. It is unclear whether this was an ALJ fact finding. However, if Sewade's work environment was pervaded by fear for her life related to the safety of her aircraft, it could constitute evidence in support of her constructive discharge claim.

Cir. 1998); *Davis v. USPS*, 142 F.3d 1334, 1342 (10th Cir. 1998); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1420 (7th Cir. 1986).

³² 42 U.S.C. § 2000e-2(a)(1).

³³ *Miller*, 277 F.3d at 1275 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

³⁴ 49 U.S.C.A. § 42121(a).

Management's response to Sewade's reports about Bowen also undermine the ALJ's finding that there was no evidence of harassment. First, there is evidence that Halo-Flight and Klassen specifically knew about all of Sewade's reports about Bowen and about Bowen's angry calls to her. Second, after Sewade filed her SMS report with her concerns, including her concerns about Bowen, Klassen gave *her* a disciplinary warning. Third, Klassen's solution to the problems Sewade had with Bowen was that Sewade's rather than Bowen's shift was scheduled to be moved, resulting in one week's lost pay to Sewade. The ALJ did not discuss how Halo-Flight's knowledge, and these and other actions by Klassen, were to be resolved with respect to Sewade's constructive discharge claim. Further, Chris Sewade testified that after the May 23 meeting, Sewade "was visibly shaken, upset, distraught, and on the way home" with her husband, she cried. Tr. at 160. The ALJ did not discuss this evidence, which relates to whether Sewade subjectively "found continued employment intolerable and [was] compelled to resign."³⁵

The evidence discussed above directly contradicts the ALJ finding that there was no evidence of any harassment. It also raises many unanswered factual questions that relate to Sewade's constructive discharge claim. On remand, as we explained more fully above, we need further findings from the ALJ as to whether the conduct by Bowen and Klassen were connected to protected activity and, if so, whether it led to a constructive discharge, i.e., "working conditions [that] were so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign."³⁶

3. Contributing Factor Causation

Because the ALJ did not find protected activity or adverse action, he did not consider whether any protected activity was a contributing factor to any adverse actions alleged in this case. On remand the ALJ shall determine whether Sewade's protected activity contributed to any adverse action taken against her and, if so, address any asserted affirmative defense and appropriate remedies.

CONCLUSION

We reverse the ALJ's findings that Sewade did not engage in protected activity when she complained about malfunctioning transfer lights and made her SMS report. We vacate the ALJ's findings that Sewade suffered no adverse actions and that she was not constructively discharged and remand this issue for further findings consistent with our decision.

We return this case to the ALJ for additional findings as to whether: 1) Sewade's report about her aircraft pitching was protected activity, 2) Sewade's report about improper fuel

³⁵ *Brown*, ARB No. 10-050, slip op. at 10.

³⁶ *Id.* (quotations omitted).

sampling involved a safety issue (and was therefore, protected activity), 3) the verbal warning (memorialized in writing) and/or shift change were adverse actions under AIR 21, 4) Sewade was constructively discharged, and 5) any of Sewade's protected activity was a contributing factor in any adverse action Halo-Flight took against her. If the ALJ finds contributing factor causation, he must then determine whether Halo-Flight established by clear and convincing evidence that it would have taken the same action absent any protected activity.

Accordingly, we **REVERSE** in part the ALJ's Decision and Order issued September 11, 2013, and **REMAND** for further proceedings consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge