



In the Matter of:

ROBERT BENJAMIN,

ARB CASE NO. 14-039

COMPLAINANT,

ALJ CASE NO. 2010-AIR-001

v.

DATE: July 28, 2014

**CITATIONSHARES MANAGEMENT, L.L.C.,
N/K/A CITATIONAIR,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Daniel M. Young, Esq.; Wofsey, Rosen, Kweskin & Kuriansky, LLP; Stamford, Connecticut

For the Respondents:

Conrad S. Kee, Esq. and Tal Kadar, Esq.; Jackson Lewis LLP, Stamford, Connecticut

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

FINAL DECISION AND ORDER

This case, which is before the Board for a second time, 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 (2013). Robert Benjamin filed a complaint with the Occupational Safety and Health Administration (OSHA) claiming that CitationShares Management, L.L.C n/k/a CitationAir (CitationAir) terminated his employment in violation of the AIR 21 whistleblower provisions. In its previous decision, this Board reversed the Administrative Law Judge's (ALJ) decision on the issue of protected activity, found that the

ALJ's findings settled the issues of causation, and remanded the case to allow the ALJ to determine damages, after permitting CitationAir to present clear and convincing evidence, if any, to avoid damages. CitationAir appeals the ALJ's decision on remand (D. & O.) finding that it did not establish by clear and convincing evidence that it would have terminated Benjamin's employment absent the protected activity.¹ We 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.² 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.³

DISCUSSION

In our prior decision, we thoroughly reviewed the facts, evidence, and burdens of proof in this case and thus incorporate our remand order into this decision. Moreover, we refer to our discussion of the burden of proof under the "clear and convincing" evidence standard in *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014). In *Speegle*, for the employer to prove it would have made the same decision, we held that the clear and convincing standard required a balancing of three statutory factors on a case-by-case basis:

The plain meaning of the phrase "clear and convincing" means that the evidence must be "clear" as well as "convincing." "Clear" evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." The burden of proof under the "clear and convincing" standard is more rigorous than the "preponderance of the evidence" standard and

¹ On remand, the ALJ found that the parties stipulated to economic losses of \$450,000 for the period ending February 2014 and \$1,893.75 per month from February 2014 until his reinstatement becomes effective. In addition, the ALJ awarded compensatory damages in the amount of \$50,000. On appeal, CitationAir concedes that the amount of damages have been stipulated and are no longer contested.

² 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).

³ *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010).

denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.

Speegle, ARB No. 13-074, slip op. at 6 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)). As we explained in *Speegle*, the third part of the statutory “same decision” defense requires that the employer prove it would have made the same decision “in the absence of protected activity.” We further explained “[t]o properly decide what would have happened in the ‘absence of’ protected activity, one must also consider the facts that would have changed in the absence of the protected activity.” *Id.* at 12. More specifically, if the employer raises the “same decision” defense, we mean that the factfinder must determine as best as possible, which material facts necessarily would have changed in the absence of protected activity, meaning facts directly connected to the protected activity, not every fact that hypothetically might change or facts tangentially connected to the protected activity.

In reviewing the evidence, the ALJ found that CitationAir had repeatedly stated that the attempted recording was a reason for the adverse employment actions. CitationAir’s repeated references to the recording constitute substantial evidence. But Kurt Sexauer, the company’s Chief Pilot, testified that the decision to terminate Benjamin’s employment was his, and that it was based on Benjamin’s attempt to record a conversation without his consent and that he had subsequently lied about it when confronted.⁴ The ALJ found that the protected activity of attempting to record the meeting and the subsequent lie about the attempt are inextricably intertwined under the facts of this case. We understand the ALJ’s ruling to mean that the subject of the lie and the timing makes the recording and the lie inseparable. We find this to be a reasonable conclusion. It is certainly undisputable that the recording and the lie occurred in immediate succession and thus we reject CitationAir’s reliance on temporal proximity to show that the ALJ erred by failing to find that CitationAir acted solely because of the lie. Moreover, as reasoned by the ALJ, “the falsehood about the recording could not have happened without the protected act of recording having happened first.”⁵ We agree and affirm the ALJ’s finding as it is rational and supported by substantial evidence.

Moreover, we are not persuaded by CitationAir’s contention on appeal that Benjamin can point to no evidence to suggest any other motive for his termination, but that is not his burden. The cases CitationAir cites apply the *McDonnell Douglas* standard⁶ rather than burdens

⁴ D. & O. at 3-4.

⁵ *Id.* at 4.

⁶ The case law upon which CitationAir relies articulates the parties’ respective burdens of proof under Title VII and the burden shifting paradigm by which each party presents its evidence to meet their respective burdens, as first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). In *McDonnell Douglas*, the Supreme Court set forth the basic allocation of burdens of proof and, secondly, the order of presentation of such proof in Title VII cases alleging discriminatory treatment.

established by AIR 21.⁷ Thus, Benjamin does not have to prove pretext. Under a “contributory factor” standard, unlawful and lawful reasons can co-exist.⁸ CitationAir also mischaracterizes the evidence when arguing that Sexauer terminated Benjamin’s employment only after he had lied. The full testimony regarding “deceitfulness” refers to the act of attempting to record the meeting because he adds that “then when I asked them about it they lie right to my face.” Hearing Transcript (H. Tr.) at 894. As CitationAir has not pointed to any clear and convincing evidence that it would have terminated Benjamin’s employment based on the “lie” alone, we affirm the ALJ’s finding that it has failed to establish by clear and convincing evidence that it would have fired Benjamin absent the protected activity.⁹

CitationAir also contends on appeal that the ALJ erred in finding that it did not establish by clear and convincing evidence that it would have denied a peer review absent the protected activity, arguing that Karena Kefalas, CitationAir’s Senior Vice-President of Human Resources, based her decision on the mistaken belief that the recording was illegal. Although this issue is superfluous at this point, we disagree. Kefalas testified that she had the ultimate authority to grant a peer review hearing, H. Tr. at 1519, 1521; and that she based her denial on the fact that Benjamin attempted to record the meeting and then lied about it. H. Tr. at 1525, 1544. For the foregoing reasons, we affirm the ALJ’s finding that CitationAir did not show by clear and convincing evidence that it would have denied the peer review in the absence of the protected activity.

⁷ Under the AIR 21 standard, the burden of proof framework is established in which the complainant is initially required to show by a preponderance of the evidence that protected activity was a “contributing factor” in the alleged adverse personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(iii). Should the complainant meet the “contributing factor” burden of proof, the burden shifts to the employer who is required, in order to overcome the complainant’s showing, to prove by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected conduct. 49 U.S.C.A. § 42121(b)(2)(B)(iv); *see also* 75 Fed. Reg. 53,545; 53,550. In discussing the contributory factor/clear and convincing standard, the Eleventh Circuit Court of Appeals explained that this standard was not the same as the *McDonnell Douglas* standard but a “free standing evidentiary framework” and a “tough standard.” *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

⁸ *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 10, n.48 (ARB May 18, 2010).

⁹ We also reject CitationAir’s contention that Benjamin had grounded dozens of airplanes without receiving any discipline, which is allegedly proof that Benjamin’s safety report did not play a role here. Although raised before the ALJ, the ALJ focused his analysis on whether Respondent established by clear and convincing evidence that it would have terminated Benjamin’s employment absent the protected activity of attempting to record the meeting, and did not reach the issue of the effect of Benjamin’s decision to ground the airplane on March 21, 2009. More importantly, we see no evidence in the record that Benjamin grounded “dozens” of planes, but there is evidence that he was disciplined for a previous grounding. *Benjamin v. CitationShares Mgmt., L.L.C n/k/a CitationAir*, ALJ No. 2010-AIR-001, slip op. at 4-6 (Dec. 22, 2011).

Finally, CitationAir also contends that it should have been granted a hearing to present evidence relevant to the issues on remand. Under 29 C.F.R. § 18.54(c), once the ALJ closes the record, “no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.” An ALJ’s evidentiary rulings are reviewed for abuse of discretion.¹⁰ The ALJ found that “evidence was taken at great length in the hearing concerning the circumstances of Mr. Benjamin’s termination. Every decision maker in the process testified at length, and a wealth of documentary evidence was submitted.”¹¹ The ALJ did allow the parties to submit additional documentary evidence, and to respond to evidence offered by the opposing party. CitationAir did not raise any specific abuse of discretion in failing to hold a new hearing. Therefore, we find no abuse of discretion and affirm the ALJ’s decision to review the case on remand based on the existing record as supplemented.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ’s decision finding that CitationAir failed to establish the affirmative defense that it would have terminated Benjamin’s employment absent his protected activity. Consequently, we also **AFFIRM** the ALJ’s order of reinstatement; the award of \$450,000 for lost wages, benefits and interest through February 2014; the award of \$1,893.75 per month from March 1, 2014, until his reinstatement becomes effective; and the award of \$50,000 for emotional distress.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹⁰ *Baiju v. Fifth Ave. Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 5 (ARB Mar. 30, 2012).

¹¹ Post Remand Brief Scheduling Order (Jan. 9, 2014).