



In the Matter of:

ALEX BURDETTE,

ARB CASE NO. 14-059

COMPLAINANT,

ALJ CASE NO. 2013-AIR-016

v.

DATE: January 21, 2016

**EXPRESSJET AIRLINES, INC.
(formerly ATLANTIC
SOUTHEAST AIRLINES, INC.),**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kevin S. Little, Esq.; KSL Law Firm; Augusta, Georgia

For the Respondent:

Ellen C. Ham, Esq.; Ford Harrison, LLP; Atlanta, Georgia

BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge

FINAL DECISION AND ORDER

Alex Burdette filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his former employer, Atlantic Southeast Airlines, Inc. (ASA)

(now ExpressJet Airlines, Inc.), retaliated against him in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century¹ and its implementing regulations.² On May 5, 2014, after an evidentiary hearing, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing Burdette's claims. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under AIR 21 and its implementing regulations.³ The ARB reviews an ALJ's findings of fact under the substantial evidence standard but reviews the ALJ's legal conclusions de novo.⁴

BACKGROUND

Burdette began working as a pilot for ASA in 1987, and became a captain in 1989.⁵ A captain has full responsibility for the safe operation of the aircraft. A captain is the pilot in command and must operate aircraft in accordance with applicable Federal Aviation Regulations (FARs); the Flight Operations Manual (FOM); directives; and memoranda of the vice president of flight operations, except in emergency situations.

Following the September 11, 2001 terrorist attacks, Congress passed the Arming Pilots against Terrorism Act (APATA) that included a Federal Flight Deck Officer (FFDO) program authorizing pilots and other flight crew members to carry firearms in aircraft cockpits to defend

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

² 29 C.F.R. Part 1979 (2015).

³ 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).

⁴ 29 C.F.R. § 1979.110(b); *Benjamin v. Citationshares Mgmt., L.L.C.*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 2 (ARB Nov. 5, 2013) (citation omitted).

⁵ The references in this paragraph are to D. & O. at 4, 5.

against acts of criminal violence or air piracy (after undergoing training).⁶ APATA prevents air carriers from discriminating or retaliating against FFDOs.⁷

Shortly after APATA was implemented, Burdette began to criticize the FFDO program because he believed that allowing firearms in the cockpit presented a safety issue.⁸ In the years following, Burdette engaged in acts related to FFDOs including 1) refusing to fly with an FFDO on June 3, 2005, and September 3, 2005; 2) sending eight to ten e-mails to flight officers with whom he was scheduled to fly to inquire whether they were FFDOs and if so, asking them to leave their weapons at home; 3) denying jump seat privileges to FFDOs of other airlines in 2006 and 2010; 4) sending a form letter to approximately sixty prominent public figures complaining that FFDOs in the cockpit called flight safety into question, and 5) instructing his co-pilots (Eric and Chris respectively) to fly all legs of multi-leg trips on October 20-22, 2010, and January 4-6, 2011.

After Burdette refused to fly with FFDOs in 2005, ASA required Burdette to sign a “Last Chance Agreement,” to continue employment with ASA.⁹ In this agreement, Burdette agreed not to refuse future assignments because of the presence of an FFDO or any other person authorized to possess a firearm.

In 2010, after ASA learned that Burdette had been e-mailing flight officers to inquire whether they were FFDOs and denied FFDOs jump seat privileges, ASA contacted the Department of Homeland Security and confirmed that Burdette’s actions could constitute an interference with FFDO duties.¹⁰ ASA issued Burdette a final warning letter informing him not to prohibit, harass, or question an FFDO’s authority to carry out his or her duties or he would be subject to immediate termination. The warning letter instructed that Burdette must immediately cease sending e-mails to potential FFDOs, requiring FFDOs to perform non-standard job activities, and denying FFDOs jump seats. Burdette signed the warning letter under protest.

⁶ The references in this paragraph are to D. & O. at 2, 5.

⁷ When referring to FFDOs, we are referring to pilots who carry firearms in the cockpit under the FFDO program.

⁸ The references in this paragraph are to D. & O. at 5-9.

⁹ The references in this paragraph are to D. & O. at 6.

¹⁰ The references in this paragraph are to D. & O. at 7, 8.

On April 19, 2011, Burdette learned that he was to serve as pilot with an FFDO named Steve on a multi-leg trip beginning on that day.¹¹ Burdette told the FFDO that he was extremely apprehensive about flying with an FFDO and asked him to leave his firearm off of the aircraft for the duration of their trip. After the FFDO refused, Burdette contacted ASA's chief pilot and requested that Burdette be removed from the trip. The chief pilot told Burdette that he could not remove him because he could not find a pilot to replace him. Burdette did not tell the chief pilot that he was unfit to fly with Steve, the FFDO. After this conversation, Burdette again asked Steve to store his firearm, and Steve again refused. Burdette then designated Steve to be the flying pilot for each flight leg of the multi-day trip, involving approximately twenty-six takeoffs and landings. Burdette told Steve that this assignment was necessary for Burdette to safely manage the cockpit in the FFDO's presence. Steve told Burdette that Burdette might have to reevaluate the assignment if Steve became fatigued. Burdette told Steve that there would be no reevaluation. After completing two legs of the trip in this way, Steve contacted his union representative, Ken Armstrong, who contacted the on-call chief pilot, Randall Cash, and both were advised about Burdette's actions in ordering Steve to fly all legs of the trip because he was an FFDO. Cash told Steve to have Burdette call him, Burdette called Cash, and Burdette confirmed that he had designated Steve to be the flying pilot for all legs of the trip. Cash told Burdette that he could not do this, that he had to treat the FFDO as a regular pilot and cease his harassment, and that he had to alternate legs as required by the FOM. Cash told Burdette that if he refused to alternate flight legs then Cash would consider it insubordination and would recommend termination. Cash then ordered Burdette to alternate legs and asked Burdette if he would, to which Burdette replied that he would not. Cash then suspended Burdette pending an investigation.

On April 29, 2011, Burdette, his union representatives, and ASA met for a disciplinary meeting about the incident.¹² Burdette and his representatives did not provide any information except that he was apprehensive about safety concerns over the FFDO program. That same day, ASA terminated Burdette's employment. Burdette filed an AIR 21 complaint with the Department of Labor on July 18, 2011, alleging that he was fired in violation of AIR 21 because he engaged in protected activity on April 19, 2011.

DISCUSSION

To prevail on his whistleblower complaint, Burdette must prove by a preponderance of the evidence that (1) he engaged in activity protected by AIR 21, (2) that an unfavorable personnel action was taken against him, and (3) that the protected activity was a contributing

¹¹ The references in this paragraph are to D. & O. at 9, 10.

¹² The references in this paragraph are to D. & O. at 1, 11, 12.

factor in the unfavorable personnel action taken against him.¹³ For activity to be protected, a complainant must prove that he reasonably believed in the existence of a violation—this reasonable belief has both objective and subjective components.¹⁴ To prove subjective belief, a complainant must prove that he held the belief in good faith.¹⁵ To determine whether a subjective belief is objectively reasonable, one assesses a complainant’s belief taking into account “the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.”¹⁶

The ALJ based his findings of fact and conclusions upon the evidence and his observation of the witnesses’ demeanor and arguments presented.¹⁷ Regarding Burdette’s credibility, the ALJ found it to be lacking, finding that Burdette “had a tendency to deliberately misunderstand directives he did not agree with”¹⁸ Regarding protected activity, the ALJ found that Burdette did not have a good faith subjective belief that his flying with an FFDO would distract him such that he could not safely fly the aircraft, that Burdette did not prove that his alleged belief was objectively reasonable (that a pilot with similar training and experience would have believed as he allegedly did), and that the condition Burdette reported was not related to a violation (“not addressed by federal air safety regulations”).¹⁹ The ALJ further found that Burdette failed to prove that his alleged protected activity contributed to ASA’s decision to terminate Burdette’s employment and that ASA proved by clear and convincing evidence that it

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

¹⁴ *Benjamin*, ARB No. 12-029, slip op. at 5-6 (“an employee engages in protected activity any time he or 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, so long as the employee’s belief of a violation is subjectively and objectively reasonable”) (citing 49 U.S.C.A. § 42121(a)(1); *Blount v. Nw. Airlines*, ARB No. 09-120, ALJ No. 2007-AIR-009, slip op. at 6 (ARB Oct. 24, 2011)).

¹⁵ *See Ass’t Sec’y & Bailey v. Koch Foods, L.L.C.*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sept. 30, 2011) (citations omitted).

¹⁶ *Sylvester v. Parexel Int’l, L.L.C.*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 15 (ARB May 25, 2011) (quoting *Harp v. Charter Commc’ns*, 558 F.3d 722, 723 (7th Cir. 2009)).

¹⁷ D. & O. at 4.

¹⁸ *Id.* at 16-17.

¹⁹ *Id.* at 19.

would have terminated his employment absent protected activity. While we do not express an opinion on every part of the decision, we affirm and add limited discussion.²⁰

Substantial evidence in the record supports the ALJ finding that Burdette failed to prove that he engaged in AIR 21-protected activity. Specifically, Burdette failed to prove that he reasonably believed that it would have been a violation if he had alternated legs with the FFDO with whom he was flying on April 19, 2011.

First, the ALJ found that Burdette did not have a good faith belief that flying with an FFDO would be too great a distraction for him to fly safely. Substantial evidence supports this finding because while it is clear from the record and ALJ findings that Burdette opposed the FFDO program, and called its safety into question, Burdette consistently testified that 1) when he flew with FFDOs as the monitoring pilot, the flights were always conducted safely,²¹ 2) he was not distracted as a flying pilot flying with FFDOs when he was not the pilot in command,²² and 3) even if he had had to be the flying pilot with an FFDO in an emergency situation, he believed that he could have safely flown an aircraft.²³ This evidence supports the ALJ's finding, implying that circumstances were such that while Burdette opposed the FFDO program and thought it unsafe, he believed that he could safely fly but professed (or feigned) fear, in bad faith, to get the result that he wanted—not to fly with FFDOs.

The ALJ also found that a belief that flying with an FFDO would be too great a distraction for safe flying is not objectively reasonable considering the beliefs of a reasonable person with Burdette's experience and training. Burdette put forth no evidence that people with his training and experience would share his belief that safety would have been at risk if he had

²⁰ While the ALJ applied the proper standards of “contributing factor” and “clear and convincing,” we note that the ALJ set forth some inapplicable standards, which we are not endorsing by affirming the ALJ's D. & O. (for example the ALJ at some points stated Burdette was required to prove his case by a motivating factor when the proof required is that of a contributing factor, and at another point stated that an employer can escape liability by proving that it had a legitimate purpose or motive for the personnel action, which the complainant would then have the burden to prove was pretext. See D. & O. at 18). The law simply requires a complainant to prove contributing factor causation and if he does, the burden shifts to the employer to prove that it would have taken the same action absent protected activity by clear and convincing evidence. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv).

²¹ Hearing Transcript at 306, 315, 330.

²² *Id.* at 299.

²³ *Id.* at 549-50.

alternated legs and acted as flying pilot.²⁴ The ALJ found and the record shows that Burdette's managers and others explained to Burdette that the FFDO program was safe and was implemented to promote safety.²⁵ Bolstering the objective unreasonableness of Burdette's belief is the fact that Burdette's alleged fears were later resolved through counseling, evidencing that if there had been a subjective belief, that it would have been Burdette's uniquely.²⁶

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order dismissing Burdette's complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

²⁴ D. & O. at 19.

²⁵ *Id.* at 17, 20.

²⁶ *Id.* at 20.