



In the Matter of:

JEREMIAS ZAVALETA,

ARB CASE NO. 15-080

COMPLAINANT,

ALJ CASE NO. 2015-AIR-016

v.

DATE: MAY - 8 2017

ALASKA AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jeremias Zavaleta, *pro se*, Elk Grove, California

For the Respondent:

Harry Korrell, Esq.; *Davis Wright Tremaine LLP*, Seattle, Washington and Melissa K. Mordy, Esq.; *Davis Wright Tremaine LLP*, Bellevue, Washington

Before: E. Cooper Brown, *Administrative Appeals Judge*; Tanya L. Goldman, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Jeremias Zavaleta filed a complaint alleging that his employer, Respondent Alaska Airlines, Inc., violated the employee whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), and its implementing regulations.¹ Zavaleta claimed that Alaska Airlines subjected him to adverse employment actions, including an investigation, demotion, and failing to consider him for promotion to a management position, in retaliation for engaging in protected activity when he reported

¹ 49 U.S.C. A. § 42121 (Thomson/West 2007) (AIR 21). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2016).

improperly installed landing gear on one of Alaska Airlines' aircraft. A Department of Labor (DOL) Administrative Law Judge (ALJ) granted Alaska Airlines' motion for summary decision and dismissed Zavaleta's complaint as he found that he has not shown a genuine issue of material fact that he was subject to any adverse action.

Zavaleta, appearing *pro se*, petitioned the Administrative Review Board (ARB or Board) for review, challenging the ALJ's dismissal of his claim. On review, the Board holds that Zavaleta did raise genuine issues of material fact that he was subject to adverse action and, therefore, that summary judgment should not have been granted. Thus, for the following reasons, the Board vacates the ALJ's Order Granting Summary Decision and remands the case for further consideration.

BACKGROUND

*A. Factual Background*²

Alaska Airlines, an air carrier covered by AIR 21, has employed Zavaleta since October 1998, in various locations.³ It initially employed Zavaleta as an Aircraft Technician. In 2004 he became an Inspector with Alaska Airlines, a position Zavaleta held until 2012 when he successfully bid for a Lead Line Aircraft Technician position in San Francisco. Shortly after Zavaleta assumed his position in San Francisco, Alaska Airlines was forced to conduct layoffs in San Francisco, and Zavaleta assumed an Inspector position⁴ in Oklahoma City, Oklahoma, commuting from his home in San Francisco.⁵

On August 27, 2013, while working his scheduled 10:30 a.m. to 8:30 p.m. shift as an Inspector in Oklahoma City, Zavaleta e-mailed his manager, Kelly Robinson, his supervisor, Abdul Kahn, and other Alaska Airlines employees regarding his discovery the day before of an

² We note that the factual background is taken from the "Statement of Facts" contained in the ALJ's Order Granting Summary Decision (ALJ Order) at 1-2, except where indicated. The ALJ stated that "[a]ll facts are taken from the parties' filings in this case and from the attached exhibits, which are admitted into evidence for the purposes of this ruling only." ALJ Order at 2.

³ According to Alaska Airlines' Response to Zavaleta's Petition for Review (filed with the ARB on November 24, 2015), Zavaleta is a current employee of Alaska Airlines, with no discipline on his current record.

⁴ As an Inspector, Zavaleta's duties included ensuring that aircraft were airworthy, performing inspections of maintenance actions, and ensuring vendor compliance with Alaska Airlines' safety policies. Alaska Airlines represents that Zavaleta was a good Inspector and that he is considered a "valued member of the Alaska team." Alaska Airlines' Response to Zavaleta's Petition for Review, at 4.

⁵ Zavaleta continued to live in San Francisco, even after accepting the job in Oklahoma City, as he cared for his ill father who also lived in San Francisco.

improperly installed landing gear on an aircraft that he had inspected. Later that same day, at 4:50 p.m., Alaska Airlines' Manager of Vendor Maintenance, Tim Bunnell, noticed that Zavaleta was not in the office and notified Zavaleta's manager, Robinson, of his absence. A few days later, Robinson informed Labor Services Manager Sonia Alvarado about Zavaleta's absence, who in turn initiated an investigation of Zavaleta's timekeeping practices and records.

On September 3, 2013, Zavaleta was granted a temporary 60-day hardship posting to San Francisco effective September 9th, which allowed him to work as a Line Aircraft Technician (a lower paid position) while still being paid as an Inspector.⁶ On September 4th and again on September 12th, Zavaleta met with Alvarado and Robinson as part of Alaska Airlines' investigation of Zavaleta's timekeeping practices.

On September 30, 2013, Zavaleta e-mailed Tammy Young, Alaska Airlines' Vice-President, Human Resources Administration, alleging that Alvarado's investigation had been initiated in retaliation for his reporting his concern regarding the improperly installed landing gear. He also asserted that Alvarado had harassed him during the investigation. As a result, Alaska Airlines reassigned the investigation to Scott Lautman, Manager of Human Resources, and the Airlines retained independent legal counsel to investigate Zavaleta's harassment and retaliation allegations.

After learning that Alaska Airlines had not notified the Federal Aviation Administration (FAA) about the improperly installed landing gear, Zavaleta filed a complaint about the landing gear with the FAA alleging air carrier safety violations.⁷ On October 10, 2013, Zavaleta again raised his concern about the landing gear installation, as well as other safety concerns, with Alaska Airlines' Chief Operations Officer.⁸ John Stevens, Director of Maintenance and Safety for Alaska Airlines, internally addressed Zavaleta's concerns in a confidential memorandum to Greg Mays, Alaska Airlines' "VP for Maintenance & Safety," and Tom Nunn, "VP for AAG

⁶ ALJ Order at 2; Declaration of Sonia Alvarado, ¶ 8, Exhibit (Ex.) D.

⁷ The evidentiary record does not indicate exactly when the FAA complaint was filed. However, in his Occupational Safety and Health Administration [OSHA] complaint and in subsequent correspondence with OSHA, Zavaleta stated that he filed the FAA complaint after the investigation of his timekeeping had commenced and after learning that Alaska Airlines had not notified the FAA of the aircraft landing gear problem. See October 22, 2013 OSHA Complaint, and January 8, 2014 correspondence to OSHA, both attached as exhibits to Zavaleta's brief opposing summary decision filed with the ALJ.

⁸ The concerns that Zavaleta raised on October 10, 2013, which were repeated to management in a follow-up phone call on October 14th, included: (1) repeating the safety concern that he had raised on August 27th with his supervisor and manager about the improperly installed aircraft landing gear; (2) advising that in June of 2013 he had informed Alaska Airlines of another improperly installed landing gear component; and (3) providing information about an aircraft nose landing gear change that had not been properly lubricated after installation. See Declaration of Scott Lautman, Ex. B.

Safety, dated October 18, 2013.”⁹ Stevens advised that while the Alaska Airlines Safety Department investigation into Zavaleta’s concerns revealed that the aircraft in question “did operate with an incorrectly installed spring support shaft and cap, it posed no safety hazard [and that] in all three events, [Zavaleta’s] safety allegations were found to be without merit.”¹⁰

Apparently unaware of the October 18th internal memorandum, on October 22, 2013, Zavaleta filed his AIR 21 retaliation complaint with OSHA.¹¹

In an e-mail dated October 25, 2013, Kevin Jurasinski, an Alaska Airlines official, advised Zavaleta that the improperly installed landing gear Zavaleta complained about had been “corrected” but the matter was “not self-disclosed to the FAA [Federal Aviation Administration].”¹²

By certified mail dated October 31, 2013, which Alaska Airlines received on November 4th, the FAA notified Mays, “VP for Maintenance & Engineering,” that the FAA was conducting an investigation regarding the improperly installed aircraft landing gear.¹³

On November 8, 2013, Alaska Airlines officials informed Zavaleta of the results of the company’s investigation into his safety complaints and the investigation into his attendance and

⁹ See Declaration of Scott Lautman, ¶ 11, Ex. B.

¹⁰ *Id.*

¹¹ Under the Department of Labor’s regulations governing AIR 21 complaints, upon receipt of Zavaleta’s complaint, OSHA was required to notify Alaska Airlines. See 29 C.F.R. § 1979.104(a). The evidentiary record does not indicate when OSHA notified Alaska Airlines, although the February 9, 2015 OSHA Determination Letter indicates that Alaska Airlines appeared and participated before OSHA.

¹² See exhibit attached to Zavaleta’s “Complainant’s Written Opposition” to Alaska Airlines’ motion for summary decision. We interpret Jurasinski’s statement to mean that Alaska Airlines did not report the landing gear issue to the FAA, which is consistent with Zavaleta’s assertions that Alaska Airlines never reported the problem to the FAA.

¹³ See October 31, 2013 correspondence from FAA to Alaska Airlines, attached as exhibit to Zavaleta’s “Complainant’s Written Opposition” to Alaska Airlines’ motion for summary decision. The FAA’s notice of its investigation did not indicate who, if anyone, had requested the FAA investigation. There nevertheless exists an evidentiary dispute in the record as to whether Alaska Airlines was already aware of the FAA’s investigation before receiving the FAA’s notice. Zavaleta asserted in his OSHA complaint that on October 10, 2013, Mays contacted him inquiring as to why he had contacted the FAA and advising Zavaleta to “not contact the FAA or any other Federal agencies before contacting him first.” Mays admits to having called Zavaleta on October 10th, but suggested that the discussion focused on Zavaleta’s October 10th safety complaint to the Chief Operating Officer. See October 29, 2013 memo from Mays to Ben Minicucci and Tom Nunn, and accompanying memo of October 14, 2013, both attached as exhibits to Zavaleta’s legal memorandum filed with the ALJ.

timekeeping practices. The officials informed Zavaleta that none of the safety concerns that he had raised, including his concern about the improperly installed landing gear, had posed any safety risks.¹⁴ Concerning the investigation into his attendance and timekeeping, they advised Zavaleta that Alaska Airlines would not discipline him as it had determined that there was a systemic timekeeping problem with all of the Oklahoma City inspectors.¹⁵ In addition, they informed Zavaleta that the investigation of his charges against Alvarado and Brunell had not found any evidence of harassment or retaliation against Zavaleta by either individual.

At the conclusion of the meeting on November 8th, Zavaleta asked if Alaska Airlines would agree to extending him another temporary hardship posting in San Francisco, as his current posting was about to end. Alaska Airlines denied his request.¹⁶

Zavaleta's temporary hardship posting to San Francisco ended on November 10, 2013, and he returned to work as an Inspector in Oklahoma City. On December 4th, Zavaleta was notified of a recall award under the Collective Bargaining Agreement to San Francisco as a Line Aircraft Technician, a lower position with less pay than the Inspector position that he then held.¹⁷ Zavaleta accepted the position on December 6th, after being given assurance that his seniority would not be reduced.¹⁸ He began work in San Francisco on December 13, 2013.

On December 10, 2013, the FAA sent Alaska Airlines a "letter of correction" in regard to the FAA's investigation of the improperly installed landing gear, confirming that Alaska Airlines "implemented . . . corrective actions to prevent future non-compliance" and that the FAA "concluded that this matter does not warrant legal enforcement action."¹⁹ Subsequently, in a letter dated April 14, 2014, from the FAA to Zavaleta, the FAA indicated that it had "completed their investigation of [Zavaleta's] air carrier safety allegations" and indicated that the

¹⁴ Declaration of Scott Lautman, ¶ 16; Declaration of Kelly Robinson, ¶ 18.

¹⁵ Declaration of Scott Lautman, ¶ 16. The Investigation Report of Zavaleta's attendance and timekeeping, dated September 9, 2013, identified "discipline up to and including discharge" as well as the possibility in certain instances of "prosecution under the law" as among the potential ramifications if Alaska Airlines had found Zavaleta in violation of company rules of conduct pertaining to, among other things, attendance, use of company time, and proper maintenance of timecards and other personnel records. The report listed "Discharge" under the heading "If known, list similar cases and action taken." See Alaska Airlines September 9, 2013 "Investigation Report," attached as exhibit to Zavaleta's brief in opposition to Alaska Airlines' motion to dismiss.

¹⁶ Declaration of Scott Lautman, ¶ 17.

¹⁷ During 2014, Zavaleta received two pay raises which, according to Alaska Airlines, have resulted in Zavaleta making \$0.55 per hour less as of May 28, 2015, than he made as an Inspector in Oklahoma. Declaration of Sonia Alvarado, ¶ 22, 23.

¹⁸ Declaration of Sonia Alvarado, ¶ 18-20, Ex. G and H.

¹⁹ Declaration of Scott Lautman, ¶ 12, Ex. D.

“investigation substantiated that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred. Accordingly, the FAA is taking appropriate corrective and/or enforcement action.”²⁰

Finally, in late 2014 and early 2015, while still stationed in San Francisco, Zavaleta applied for two management positions with Alaska Airlines. After Zavaleta applied in October of 2014 for one open position, a line maintenance management position, a hiring decision was delayed and the position was re-posted in January of 2014. Upon its re-posting, an Alaska Airlines human resources employee e-mailed Zavaleta instructing him to respond to the e-mail if he still wished to be considered for the position. Zavaleta did not respond, and has not provided any explanation for not doing so. Concerning Zavaleta’s application for the other management position, as an Airframe Vendor Maintenance Representative, the hiring manager for the position determined that Zavaleta did not have the necessary qualifications for the position, in contrast to the individual ultimately selected for the position.

By correspondence dated February 14, 2014, the FAA informed Zavaleta that they had “completed their investigation of [his] air carrier safety allegations.” The FAA advised that the investigation “substantiated that a violation of an order, regulation or standard of the FAA related to air carrier safety occurred [and that] “the FAA is taking appropriate corrective and/or enforcement action.”

B. ALJ’s Decision and Order

Following OSHA’s issuance on February 9, 2015, of a Determination Letter rejecting his complaint, Zavaleta requested a hearing before a DOL ALJ. Before the ALJ, Alaska Airlines filed a Motion for Summary Decision arguing that Zavaleta could not establish that he engaged in protected activity, that he suffered any adverse actions, or that there was a causal connection between his alleged protected activity and the alleged adverse actions.

The ALJ focused exclusively on the issue of whether Zavaleta was subjected to an adverse employment action and determined “the evidence here fails to establish a genuine issue of material fact as to whether Complainant was subject to any adverse action.”²¹ Initially, the ALJ rejected Zavaleta’s contention that Alaska Airlines’ investigation into his timekeeping practices constituted adverse action or that he was verbally abused and treated with contempt in a

²⁰ See exhibit attached to Zavaleta’s “Complainant’s Written Opposition” to Alaska Airlines’ motion for summary decision. Alaska Airlines asserts in its response brief on appeal that “the FAA concurred with Alaska’s findings” regarding Zavaleta’s safety concern as to the improperly installed landing gear in concluding “that this matter does not warrant legal enforcement action.” See Response Brief at 7, n.5. We note, however, that while the FAA did not take any “legal enforcement action” regarding Zavaleta’s safety complaint, it did conclude that there was “non-compliance” and a “violation” regarding “air carrier safety” that required “correction” and, therefore, contradicts the conclusion that Alaska Airlines made that Zavaleta’s safety concern was without merit. See Declaration of Scott Lautmann, ¶ 12, Ex. D; exhibit attached to Zavaleta’s “Complainant’s Written Opposition” to Alaska Airlines’ motion for summary decision.

²¹ ALJ Order at 4.

hostile manner throughout the investigation, as Zavaleta did not provide any evidence “apart from his own statements,” or suggest that anyone was willing to testify, specifying how he was “retaliated against and harassed” or threatened, or that Alaska Airlines had attempted or threatened to fire him.²² In contrast, the ALJ noted that Alaska Airlines’ investigation of Zavaleta’s timekeeping practices “ended with no disciplinary action and nothing was added” to Zavaleta’s personnel file.²³

Next, the ALJ rejected Zavaleta’s contention that his return to work in San Francisco as a Line Aircraft Technician in December 2013, pursuant to his recall bid, constituted adverse action because Alaska Airlines wanted him to lose his Inspector and seniority rights. The ALJ noted that the evidence both parties submitted indicated that Zavaleta did not lose his seniority rights and, furthermore, Zavaleta did not offer any evidence that a better position was open in San Francisco that he should have been offered instead of the position that he accepted.²⁴

Finally, the ALJ rejected Zavaleta’s contention that Alaska Airlines’ refusal to consider him for either of two managerial positions he applied for constituted adverse action. Concerning Zavaleta’s application for a position as a Line Maintenance Manager, the ALJ cited Alaska Airlines’ unchallenged evidence indicating that while he initially applied for the position, Zavaleta did not respond to a recruiter’s follow up e-mail asking whether he still wished to be considered for the position nor did he otherwise reapply when the position was reopened for bid.²⁵ The ALJ also rejected Zavaleta’s contention that his failure to be selected for the other management position, as an Airframe Vendor Maintenance Representative, constituted adverse action, because Zavaleta “did not offer anything more than his own allegations to refute” the evidence Alaska Airlines submitted indicating that he was not selected for the position “because he did not have experience overseeing vendor workflow or managing vendor relationships, while the individual ultimately selected had experience as a liaison between an airline and vendors.”²⁶

Holding that Zavaleta “has not shown a genuine dispute of material fact that he was subject to any adverse action,” the ALJ granted Alaska Airlines’ motion for summary decision, and dismissed Zavaleta’s complaint.²⁷

²² *Id.* at 4-5.

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 2, 6.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter to the ARB.²⁸ The ARB reviews de novo an ALJ's grant of a motion for summary decision, and is governed by the same standard that governs the ALJ in deciding a motion for summary decision.²⁹ That standard is found at 29 C.F.R. § 18.40 (2015) and, consistent with Rule 56 of the Federal Rules of Civil Procedure, permits an ALJ to enter summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, when viewed in the light most favorable to the nonmoving party, show that there is no genuine dispute as to any material fact and that the movant is entitled to summary decision as a matter of law.³⁰

DISCUSSION

In holding that Zavaleta “has not shown a genuine dispute of material fact that he was subject to any adverse action,”³¹ the ALJ relied upon an ARB decision³² embracing the “materially adverse” standard for adverse personnel action articulated in *Burlington Northern &*

²⁸ Secretary's Order 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.

²⁹ *Alexander v. Atlas Air, Inc.*, ARB No. 12-030, ALJ No. 2011-AIR-003, slip op. at 3 (ARB Sept. 27, 2012); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 2 (ARB Nov. 30, 1999).

³⁰ See 20 C.F.R. § 18.40(d) (2015); *Vinayagam v. Cronous Solutions, Inc.*, ARB No. 15-045, ALJ No. 2013-LCA-029, slip op. at 2-3 (ARB Feb. 14, 2017). See also 29 C.F.R. § 18.72(a) (2016) (in new, post-2015 rule, noting that the ALJ “shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law”). The post-2015 rule at 29 C.F.R. § 18.72(a) does not apply to this case as the investigation conducted by DOL in this case commenced before publication of the new rule. See 29 C.F.R. § 18.1104; 55 Fed Reg. 13,218-13,219, 13,229 (Apr. 9, 1990).

³¹ To prove illegal retaliation under AIR 21, a complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). If the Secretary determines that protected activity contributed to an adverse action, the employer can escape liability only if it shows by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). See, e.g., *Berroa v. Spectrum Health Hosp.*, ARB No. 15-061, ALJ No. 2013-AIR-021, slip op. at 3 (ARB Mar. 9, 2017).

³² *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 12 (ARB Aug. 31, 2007).

Santa Fe Ry. Co. v. White,³³ a case decided under Title VII of the Civil Rights Act of 1964.³⁴ *Burlington Northern* held that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in the protected activity].”³⁵ The Supreme Court explained that the “materially adverse” test would apply only to those unfavorable employment actions that were more than “trivial harms.”³⁶

We do not necessarily reject the ALJ’s reliance upon the *Burlington Northern* test. However, when properly applied within the context of the AIR 21’s whistleblower protection provision and its implementing regulations, a different result is reached.

As the Board noted in *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010), basic fundamentals of statutory construction dictate that, in determining whether the employment action at issue constitutes adverse action within the meaning of AIR 21, “the starting point is the language of the statute itself and the implementing regulations construing the relevant statutory text.”³⁷ AIR 21 provides that “[n]o air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to [the employee’s] compensation, terms, conditions, or privileges of employment” because the employee has engaged in certain protected activities, including providing information to the employer or the Federal government about a violation, or alleged violation of any Federal law relating to air carrier safety.³⁸ While the term “discriminate” is not defined in the statute, AIR 21’s implementing regulations interpret the statute’s prohibition against discrimination to include efforts “to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee” because the employee has engaged in protected activity.³⁹ This list of prohibited activities is viewed “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.”⁴⁰ Accordingly, the Board in *Williams* noted, a written warning or counseling session will be considered “presumptively adverse where: (a) it is considered

³³ 548 U.S. 53 (2006).

³⁴ 42 U.S.C.A. § 2000e (West 2003) (Title VII). *See* Order at 4.

³⁵ *Burlington Northern*, 548 U.S. at 68.

³⁶ *Id.*

³⁷ *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10 (ARB Dec. 29, 2010).

³⁸ 49 U.S.C.A. § 42121(a).

³⁹ 29 C.F.R. § 1979.102(b).

⁴⁰ *Williams*, ARB No. 09-018, slip op. at 10-11.

discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.”⁴¹

On appeal, Zavaleta reiterates his contentions that the investigation into his timekeeping practices, that his recall to work in San Francisco as a line aircraft technician, and that Alaska Airlines’ rejection of his application for a management position constitute adverse actions.

Regarding the investigation into Zavaleta’s timekeeping practices, Alaska Airlines’ “System Regulations 2.120” (which Alaska Airlines submitted into the record) requires as a condition for the administration of corrective or disciplinary action an “Investigation Report.”⁴² As part of his response to the motion for summary decision, Zavaleta submitted as an exhibit the September 9, 2013 “Investigation Report” produced in conjunction with the investigation of his timekeeping practices, which in relevant part identifies “discipline up to and including discharge” and the possibility of “prosecution under the law” among potential ramifications for violations of company rules of conduct pertaining to timekeeping practices. Given the conditional nature of disciplinary action against Zavaleta along with the requirement of an Investigation Report, we see no distinction between the investigation of Zavaleta and the written warning or counseling session the Board viewed in *Williams* as “presumptively adverse” when constituting a necessary step in a progressive discipline policy or where potential discipline is implicitly or expressly referenced.⁴³

Given the broad scope of Section 1979.102(b)’s coverage, it is no more necessary in this case than it was in *Williams* to turn to Title VII cases like *Burlington Northern*. Nevertheless, just as in *Williams*, resort in this case to *Burlington Northern*’s “materially adverse” test does not change the result. If anything, it lends support for the conclusion that the investigation of Zavaleta constituted adverse employment action under AIR 21. Under *Burlington Northern*, we view the Investigation Report threatening potential discharge as more than “trivial harm,” for it “well might have dissuaded a reasonable worker” from engaging in protected activity.⁴⁴

Thus, notwithstanding that Zavaleta was not disciplined as a result of the investigation, and notwithstanding that he did not provide any evidence specifying how he was threatened by or as a result of the investigation, we find that Zavaleta demonstrated a genuine issue of material fact that the investigation to which he was subjected constituted adverse employment action within the meaning of AIR 21. Consequently, the ALJ’s ruling to the contrary is reversed.

⁴¹ *Id.* at 11.

⁴² See Declaration of Sonia Alvarado, Ex. A at 5.

⁴³ *Williams*, ARB No. 09-018, slip op. at 10-12.

⁴⁴ *Burlington Northern*, 548 U.S. at 68. See *Williams*, ARB No. 09-018, slip op. at 14 (“We simply doubt that the Court intended to consider . . . threatened discipline as ‘trivial.’ To the contrary, we are of the opinion that they are patently not trivial and, therefore, presumptively ‘material’ under *Burlington Northern*.”).

In addressing the ALJ's further holdings that Zavaleta did not demonstrate a genuine dispute of material fact that he was subject to adverse actions when he was recalled to work in San Francisco as a Line Aircraft Technician and when later his application for a management position was rejected, we are mindful of our duty to remain impartial and refrain from becoming an advocate for a *pro se* litigant. The Board is equally mindful, however, of our obligation in the review of summary decisions to "construe complaints and papers filed by *pro se* litigants liberally in deference to their lack of training in the law and with a degree of adjudicative latitude."⁴⁵ Accordingly, the Board, like the ALJ, has a responsibility to assist *pro se* litigants by liberally interpreting their complaints and holding them to lesser standards than legal counsel in procedural matters.⁴⁶ In the review of summary decisions, the Board has adopted federal precedent requiring notice to a *pro se* litigant of the requirements for opposing a motion for summary judgment, in a form sufficiently understandable to apprise the *pro se* litigant of what is required, along with the text of the rule governing summary decisions.⁴⁷

The foregoing is relevant because our review of the record as a whole suggests that there could be evidence within Alaska Airlines' exclusive possession that would support a finding that Zavaleta's return to San Francisco in December of 2013 as a Line Maintenance Technician, at a lesser pay scale than the rate he was earning as an Inspector, and the rejection of his subsequent applications for management positions, constitute adverse personnel actions.

It is clear from the record that as early as October 18, 2013, prior to Alaska Airlines considering Zavaleta's recall right to return to work in San Francisco as a Line Maintenance Technician and prior to considering his application for the two management positions, Alaska Airlines had concluded that the safety concerns that Zavaleta raised, including his concerns about the improperly installed landing gear, "posed no safety hazard" and were "without merit."⁴⁸

⁴⁵ *Wallum v Bell Helicopter Textron*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 7 (ARB Sept. 2, 2011) (citations omitted). *Accord Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 4 (ARB Jan. 31, 2011); *Menefee v. Tandem Transport Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 7 (ARB Apr. 30, 2010).

⁴⁶ *See, e.g., Ingram v. Shelly & Sands, Inc.*, ARB No. 04-090, ALJ No. 2002-ERA-027, slip op. at 3 (ARB Mar. 31, 2005); *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 10 (ARB Feb. 28, 2003).

⁴⁷ *Motarjemi v. Metro. Council Metro Transit Div.*, ARB No. 08-135, ALJ No. 2008-NTS-002, slip op. at 4 (ARB Sept. 17, 2010); *Hooker v. Washington Savannah River Co.*, ARB No. 03-036, ALJ No. 2001-ERA-016, slip op. at 8 (ARB Aug. 26, 2004). *See, e.g., Irby v. New York City*, 262 F.3d 412, 414 (2d Cir. 2001) (requiring notice to *pro se* litigants of the requirements of Rule 56 of the Federal Rules of Civil Procedure); *Timms v. Frank*, 953 F.2d 281, 281 (7th Cir. 1992) ("all *pro se* litigants, not just prisoners, are entitled to notice of the consequences of failing to respond to a summary judgment motion [including] both the text of Rule 56(e) and a short and plain statement in ordinary English that any factual assertion in the movant's affidavits will be taken as true by the district court unless the non-movant contradicts the movant with counter-affidavits or other documentary evidence").

⁴⁸ *See Declaration of Scott Lautman*, ¶ 11, Ex. B.

But in contrast to Alaska Airlines' characterization of Zavaleta's safety concern as to the improperly installed landing gear, Alaska Airlines was at the same time aware that the FAA was investigating Zavaleta's safety complaint, which resulted in the FAA ultimately concluding that, while it did not take any "legal enforcement action" regarding Zavaleta's safety complaint, there was "non-compliance" and a "violation" regarding "air carrier safety" that required "correction."⁴⁹

On November 4, 2013, the FAA notified Alaska Airlines that it was investigating the improperly installed landing gear that Zavaleta had identified for "alleged non-compliance." Notwithstanding, on November 8th, Alaska Airlines advised Zavaleta that his concerns about the improperly installed landing gear had not posed a safety risk. A month later, on December 4, 2013, Zavaleta was offered recall to San Francisco as a Line Aircraft Technician, which he accepted on December 6. On December 10, before Zavaleta began work in San Francisco, the FAA sent Alaska Airlines a notice of the corrective action to the aircraft landing gear that had been taken and confirmed that Alaska Airlines had also taken "corrective actions to prevent future non-compliance."⁵⁰

Based on a reading of the record as a whole, we note potential concerns and issues are raised when considering the context of the timeline surrounding the apparent contradictions between the conclusions reached by Alaska Airlines and the FAA. The contradictions between the conclusions reached by Alaska Airlines about the aircraft landing gear installation and those reported by the FAA raise concerns as to whether Zavaleta's recall right to work in San Francisco as a Line Maintenance Technician or his subsequent applications for promotion to either or both of the management position were negatively influenced by the conflicting reports. If so, this could transform seemingly legitimate business decisions into adverse personnel action, and would be consistent with Zavaleta's allegation that his report of improperly installed landing gear damaged his reputation.

When Alaska Airlines filed its motion for summary decision with the ALJ (May 29, 2015), and when the ALJ issued an Order (June 1, 2015) informing Zavaleta of Alaska Airlines' motion, 29 C.F.R. § 18.40 governing summary decisions was in effect. In the ALJ's June 1st Order, the ALJ provided Zavaleta with the text of Section 18.40 and advised him of his rights and obligations thereunder with one critical exception. The ALJ did not explain to Zavaleta the significance of Subsection 18.40(d), which essentially affords the nonmoving party the opportunity to conduct discovery to respond to a summary decision motion by providing that the presiding ALJ "may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion." Discovery by Zavaleta could have proven highly relevant to the unique contextual setting in which the determination of whether Zavaleta's

⁴⁹ *Id.*, ¶ 12, Ex. C and D. See exhibits attached to Zavaleta's "Complainant's Written Opposition" to Alaska Airlines' motion for summary decision.

⁵⁰ Declaration of Scott Lautmann, ¶ 12, Ex. D. In the FAA's April 1, 2014 correspondence to Zavaleta, the FAA was more explicit, advising that "[t]he investigation substantiated that a violation . . . related to air carrier safety occurred" and that "appropriate corrective and/or enforcement action" was being taken. See exhibit attached to Zavaleta's written memorandum filed with the ALJ.

December 2013 recall to San Francisco and the subsequent rejections of his applications for management positions constituted adverse action.

Effective June 18, 2015, Section 18.40 was replaced by 20 C.F.R. § 18.72. Section 18.72(d) expanded upon 29 C.F.R. § 18.40(d) to provide that when facts necessary to respond to a motion for summary decision are unavailable to the nonmoving party, and the nonmovant “shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the judge may: (1) Defer considering the motion or deny it; (2) Allow time to obtain affidavits or declarations or to take discovery; or (3) Issue any other appropriate order.” Because the Board’s review of an ALJ’s grant of a motion for summary decision is *de novo* and thus effectively places the Board in the same “shoes” as the ALJ, the Board is governed by the same standard that governs the ALJ in deciding a motion for summary decision.⁵¹

Regardless whether our review of the ALJ’s decision in this case is governed by 29 C.F.R. § 18.72(d), Rule 56(d) of the Federal Rules of Civil Procedure, which contains identical language to that found in Section 18.72(d), was in effect when the ALJ issued his summary decision. As previously noted, the Board has consistently looked to federal precedent construing Rule 56 in determining the extent of notice and information to which *pro se* litigants are entitled for opposing a motion for summary judgment. Accordingly, the Board holds that the ALJ should have advised Zavaleta, as a *pro se* litigant, of his right to conduct discovery and should have afforded him the opportunity to do so if Zavaleta found that he was unable, in the absence of discovery, to present facts justifying his opposition to Alaska Airlines’ motion for summary decision. The failure of the ALJ to so advise Zavaleta constitutes reversible error in the same manner that we have previously held that an ALJ is obligated to advise *pro se* litigants in a sufficiently understandable form of the requirements for opposing a motion for summary decision.⁵²

Finally, separate and apart from the foregoing, the ALJ’s determination of no adverse action with respect to Zavaleta’s application for the Airframe Vendor Maintenance Representative management position is vacated, and the issue remanded to the ALJ. In ruling that the rejection of Zavaleta’s application did not present an issue of material fact pertaining to adverse personnel action, the ALJ essentially weighed Zavaleta’s qualifications for the position against the qualifications of the individual that Alaska Airlines ultimately selected for that position.⁵³ In doing so, the ALJ committed reversible error.⁵⁴ For this additional reason, we

⁵¹ *Vinayagam*, ARB No. 15-045, slip op. at 2-3; *Bondurant v. Southwest Airlines, Inc.*, ARB No. 14-049, ALJ No. 2013-AIR-007, slip op. at 2 (ARB Feb. 29, 2016); *Alexander*, ARB No. 12-030, slip op. at 3.

⁵² *See, e.g., Motarjemi*, ARB No. 08-135; *Hooker*, ARB No. 03-036.

⁵³ *See* Declaration of Bruce David, Ex. A (job description for the Airframe Vendor Maintenance Representative position), B (Zavaleta’s resume), and C (resume of the applicant selected for the position).

⁵⁴ *Ciofani v. Roadway Express*, ARB No. 05-020, ALJ No. 2004-STA-046 (ARB Sept. 29, 2006) (“[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or

vacate the ALJ's holding that Zavaleta did not demonstrate a genuine dispute of material fact that he was subject to an adverse action when his application for the Airframe Vendor Maintenance Representative management position was rejected.

CONCLUSION

For the above-stated reasons, the ALJ's Order Granting Summary Decision, issued August 4, 2015, is **VACATED**, and this case is **REMANDED** for further consideration consistent with this Decision and Order of Remand.

SO ORDERED.

[REDACTED]

E. COOPER BROWN
Administrative Appeals Judge

[REDACTED]

TANYA L. GOLDMAN
Administrative Appeals Judge

[REDACTED]

LEONARD J. HOWIE III
Administrative Appeals Judge

determine the truth of the matters asserted"); *Stauffer v. Wal-Mart Stores*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 6-7 (ARB Nov. 30, 1999).