



**In the Matter of:**

**MARK ESTABROOK,**

**ARB CASE NO. 2017-0047**

**COMPLAINANT,**

**ALJ CASE NO. 2014-AIR-00022**

**v.**

**DATE: AUG - 8 2019**

**FEDERAL EXPRESS CORPORATION,**

**RESPONDENT.**

**Appearances:**

*For the Complainant:*

Lee Seham, Esq.; *Seham, Seham, Meltz & Petersen, LLP*; White Plains, New York

*For the Respondent:*

Daniel Riederer, Esq., and Phillip Tadlock, Esq., *Federal Express Corporation*; Memphis, Tennessee

**Before:** William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*.

**FINAL DECISION AND ORDER**

PER CURIAM. This case arises under the employee whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121 (2000); 29 C.F.R. Part 1979 (2014). Complainant Mark Estabrook filed a complaint alleging that Respondent Federal

Express Corporation (FedEx) retaliated against him in violation of AIR 21's whistleblower protection provisions for raising air transportation safety concerns. A Department of Labor Administrative Law Judge (ALJ) concluded on May 16, 2017, that FedEx did not violate the Act. We affirm.

## BACKGROUND

Mark Estabrook is a pilot at FedEx. At the time in question, Captain Rob Fisher, the Assistant Chief Pilot, supervised Estabrook. Captain William McDonald, the Managing Director of Flight Operations, was Fisher's supervisor. Todd Ondra was FedEx's Managing Director of Aviation and Regulatory Security and Rob Tice was a FedEx Labor Relations Attorney.

### 1. Flight from Laredo, Texas, to Memphis, Tennessee

On April 10, 2013, Estabrook was scheduled to fly from Laredo, Texas, to Memphis, Tennessee. While still at a Laredo hotel, Estabrook learned of a line of thunderstorms between the two locations.

From his hotel, Estabrook watched the weather and called the FedEx Global Operations Center (GOC) dispatcher, who recommended another route around the storm. According to Estabrook, after further discussion, the consensus reached between the two was that Estabrook was not going to fly according to the original flight time, but was to wait the storm out. Decision and Order Denying Relief (D. & O.) at 4. Estabrook understood this to mean that he was authorized to stay at the hotel.<sup>1</sup>

The Dispatch Duty Officer received a call from FedEx personnel at the Laredo airport that a FedEx flight crew assigned to a flight scheduled to depart soon was not there. The Dispatch Duty Officer called Estabrook, the pilot assigned to the flight, and discussed the weather and the flight. During the evening, Estabrook spoke with the Dispatch Duty Officer on the phone multiple times. Some of their conversations were recorded and some were not. According to Estabrook, he felt "pilot pushed" to fly through the storm to Memphis. The Dispatch Duty Officer denies pushing Estabrook to fly despite the weather, but he did tell Estabrook that he needed to be at the Laredo airport and not at his hotel. D. & O. at 17.

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<sup>1</sup> See D. & O. at 20; Hearing Transcript (Tr.) at 350.

Later, Memphis Air Traffic Control placed a weather hold on Estabrook's flight, and it could not depart Laredo until the hold was lifted later that evening. D. & O. at 5.

On April 10, 2013, the Dispatch Duty Officer sent an e-mail to both Captain Fisher, Estabrook's supervisor, and Chief Pilot McDonald, Fisher's supervisor, detailing the events of the prior evening. The e-mail accused Estabrook of unilaterally delaying a flight without reaching an agreement with the GOC dispatcher. Respondent's Exhibit (RX) 8.

On April 23, 2013, Estabrook was asked to attend a "19D" investigation interview meeting concerning his late arrival at the Laredo airport for the scheduled April 10th flight. D. & O. at 6. At FedEx, a "19D" investigation hearing differs from a "19E" investigation hearing in that the latter is a disciplinary hearing, whereas the former merely is to obtain the subject of the hearing's side of the story.

After being notified of the meeting, Estabrook filed an AIR 21 complaint with the Occupational Safety and Health Administration (OSHA). On May 1, 2013, Estabrook attended the 19D meeting with Captain Fisher. After listening to the three audio recordings of Estabrook's phone conversations with dispatch, Fisher believed that Estabrook may have had a good faith belief that he had permission to stay at his hotel. D. & O. at 20. Fisher informed Estabrook that FedEx was not going to take disciplinary action against him. Because no disciplinary action occurred, Estabrook withdrew his OSHA complaint. Complainant's Exhibit (CX) 9.

## **2. August 4 E-Mail and Estabrook's NOQ Status**

After reading on the internet about terrorist activity involving cargo airlines, including FedEx, Estabrook became concerned with the misuse of FedEx's tracking data that is available on internet websites. D. & O. at 7. Estabrook was concerned that terrorist organizations might use tracking data that couriers, including FedEx, provided on the internet to coordinate an explosive detonation on a FedEx airplane over a populated area.<sup>2</sup> Estabrook sent an e-mail to Captain McDonald asking him

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<sup>2</sup> FedEx publishes general package tracking data on its internet website. But the tracking data does not list specific vehicles or planes. FedEx and other carriers send flight

to have FedEx CEO Fred Smith call him about “something related to 9-11.” Estabrook’s e-mail stated:

I need to talk to Fred. It has nothing to do with Flight Ops or you. It deals with something related to 9-11. I did my best to protect the company and reported as much as I could through [FedEx Corporate Security] when I was the Security Chairman at ALPA. Ask Fred to call me on my cell but realize I turn it off when I sleep. I am about to close my eyes and call it a day.

D. & O. at 31-32; RX-13.

On August 5, 2013, Estabrook received an e-mail from Captain McDonald putting him on Not Operationally Qualified (NOQ) status in order to facilitate scheduling a meeting regarding Estabrook’s concerns. D. & O. at 7, 23, 32. FedEx claims that the NOQ is used for several purposes, from scheduling to disciplinary reasons. When there are security or fitness-for-duty concerns present, the pilot will not have jumpseat privileges as a cautionary measure. D. & O. at 19, 21, 23.

### **3. August 9 Meeting, 15D Examination, and Renewed NOQ Status**

Captain McDonald instructed Estabrook to attend a meeting on August 9, 2013. Before the meeting, Captain Fisher, Captain McDonald, Ondra, the Managing Director of Aviation and Regulatory Security, and FedEx Labor Relations Attorney Tice met to discuss online postings on a pilot group internet forum from a person calling himself “Mayday Mark.” CX-21. “Mayday Mark’s July 28-August 5, 2013 discussion thread covered a sleep survey, pilot fatigue, and airline management. Because some of the posts specifically mentioned FedEx management, Captain McDonald instructed Tice to ask Estabrook if he were “Mayday Mark.”

Captain Fisher, Ondra, and Tice met with Estabrook on August 9, 2013, but Captain McDonald did not attend. During the meeting, Estabrook discussed his security concerns with tracking data being available to the public. Estabrook explained that he e-mailed Captain McDonald and wanted him to bring the matter up the chain of command to Fred Smith, FedEx’s CEO. Estabrook recommended that FedEx stop publishing tracking information. Previously in 2001 and 2002,

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information to the Federal Aviation Administration which is not made public. D. & O. at 6-7, 19, 25.

Estabrook and others had contacted FedEx's Vice President of Corporate Security concerning posting tracking information on the internet. But FedEx indicated that the Federal Aviation Administration (FAA) took no action on Estabrook's concerns.

During the August 9 meeting, Estabrook mentioned a rumor that Auburn Calloway, a former FedEx pilot, had converted to Islam and might be communicating with Al Qaeda. D. & O. at 26. Calloway had attempted to hijack a FedEx flight in 1994 and had been imprisoned since then. Estabrook had known Calloway personally because they were hired together and had been study partners. At the meeting, Estabrook suggested that FedEx work with the Justice Department to bug Calloway's prison cell.

During the meeting, Tice asked Estabrook whether he was "Mayday Mark" and Estabrook denied it. Moreover, Estabrook displayed his flight service information, which did not match that of "Mayday Mark" as indicated on the pilot's forum. Ondra left the meeting early before the discussion on "Mayday Mark." D. & O. at 23.

At the close of the meeting, Captain Fisher took Estabrook off of his NOQ status. D. & O. at 19. But later that day, Captain Fisher placed Estabrook back on NOQ status at the recommendation of Ondra and McDonald. Ondra expressed concern with Estabrook's behavior. Ondra believed it odd that Estabrook would contact his manager and ask to speak to the CEO of FedEx when there were several other means available to report suspicious activity. D. & O. at 25. Ondra was concerned about Estabrook's mental health and recommended further evaluation of Estabrook. At the behest of Ondra, Tice passed Ondra's recommendation to Fisher who, after consulting with McDonald, informed Estabrook on August 9 that an aeromedical advisor would conduct a "15D" evaluation of him. D. & O. at 19-20. On August 13, Estabrook's attorney sent a demand letter to FedEx requesting that FedEx retract its directive that Estabrook receive a 15D evaluation. On August 16, Fisher issued a formal letter to Estabrook directing him to go to the aeromedical advisor for the evaluation. D. & O. at 21, 32, 57.

As part of his 15D evaluation, Estabrook was sent to three doctors. One doctor recommended counseling and another doctor found that Estabrook was fit for duty. The third doctor, a "tie breaker," also concluded that Estabrook was fit to fly. With the positive evaluation, the aeromedical advisor informed Estabrook that he would be returned to flight duty. D. & O. at 13. Estabrook returned to flight duty status with no change in pay or job status. But Estabrook claims that he also had to

then participate in some required training to recertify for full flight duty status because his NOQ status extended past the dates for his annual training requirements. D. & O. at 8.

On October 3, 2013, Estabrook filed a second complaint with OSHA, which dismissed the complaint on July 15, 2014. Estabrook filed objections with the Office of Administrative Law Judges. The ALJ assigned to the case held a hearing and denied Estabrook's complaint on May 16, 2017.

### **JURISDICTION AND STANDARD OF REVIEW**

The ARB has jurisdiction to review the ALJ's AIR 21 decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. § 1979.110. The ARB reviews the ALJ's factual determinations under the substantial evidence standard and conclusions of law de novo. 29 C.F.R. § 1979.110(b); *Berroa v. Spectrum Health Hosps.*, ARB No. 15-061, ALJ No. 2013-AIR-021, slip op. at 2 (ARB Mar. 9, 2017).

### **DISCUSSION**

To prevail on his whistleblower complaint, Estabrook must prove by a preponderance of the evidence that (1) he engaged in activity protected under AIR 21; (2) that an unfavorable personnel action was taken against him; and (3) that the protected activity was a contributing factor in the unfavorable personnel action taken against him. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). If the complainant proves that protected activity was a contributing factor in the unfavorable personnel action, the respondent may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same unfavorable personnel or adverse action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

#### **1. Protected Activity**

Protected activity under AIR 21 has two elements:<sup>3</sup> (1) the information that the complainant provides must involve a purported violation of a regulation, order,

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<sup>3</sup> Under AIR 21, a complainant engages in protected activity when he or she does one or more of the following actions:

or standard of the FAA or federal law relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's belief that a violation occurred must be subjectively held and objectively reasonable. "The information provided to the employer or federal government must be specific in relation to a given practice, condition, directive, or event that affects aircraft safety." *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013, slip op. at 5 (ARB June 30, 2010).

A. Estabrook's Refusal to Fly on April 10 in Bad Weather is Protected Activity.

Estabrook claims that the Flight Operations Manual provides that flying through thunderstorms constitutes a violation of an FAA standard. The FAA recommends maintaining a 20-mile buffer between a storm and the aircraft. In a preliminary partial summary judgment order, the ALJ found that Estabrook's refusal to fly out of Laredo constituted protected activity and that finding was incorporated into his Decision and Order. D. & O. at 46, 51. As FedEx has not

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(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.

challenged the ALJ's findings that Estabrook's refusal to fly was protected activity, it is affirmed.<sup>4</sup>

B. Estabrook's Complaint filed with OSHA in April 2013 is Protected Activity.

The filing of complaints with OSHA claiming retaliation itself constitutes protected activity. 49 U.S.C. § 42121(a)(4) (protecting complainants who participate in a proceeding under the Act); 29 C.F.R. § 1979.102(b)(2).

C. Estabrook's discussion of his Air Carrier Security Concerns during an August 9 Meeting Regarding Publishing Tracking Information is not Protected Activity.

Estabrook also asserts that his expressed concerns about air carrier security also constitute protected activity although AIR 21's whistleblower provisions do not specifically include that providing information about "security" as a protected activity. The ALJ analyzed AIR 21's broader statutory and regulatory framework to conclude that providing information about "air carrier safety" includes expressing concerns about security. D. & O. at 48-49. To summarize, AIR 21 protects an employee who has a reasonable belief that a violation of an FAA standard or regulation or any other federal law related to air carrier safety has occurred. Significantly, AIR 21's implementing regulations extend protection to an employee who reasonably believes a violation of air carrier statutes under subtitle VII of title 49 has occurred. *See* 29 C.F.R. § 1979.102(b)(1) ("or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States"). Among the various air carrier safety statutes under subtitle VII of Title 49 is a "security" subpart that covers screening, inspecting, and ensuring the security of cargo. Because the incorporated statutory air carrier safety laws are broad and "safety" encompasses some measure of "security," the ALJ correctly concluded that "security" is covered as part of air carrier safety protected under the Act.

Although security concerns can be covered under AIR 21, FedEx argues that the security concerns Estabrook expressed on August 9 are not protected under AIR 21 because publishing tracking data is not a violation of FAA standards or any federal law related to air carrier safety or security. The ALJ agreed and found that the security concerns Estabrook expressed during the meeting were not protected

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<sup>4</sup> *Leiva v. Union Pacific R.R. Co., Inc.*, ARB Nos. 14-016, -017; ALJ No. 2013-FRS-019, slip op. at 8 (ARB May 29, 2015).



activity. Specifically, Estabrook's concerns were not related to a reasonable belief of a violation of federal laws related to air carrier safety or security. D. & O. at 49-50. Publishing tracking data is not a violation of regulations covering incendiary or explosive devices. Furthermore, Estabrook was merely reiterating his concern about publishing tracking data that he had raised in earlier complaint she had made to FedEx and the FAA in 2001 and 2002, but the FAA did not take any action on his complaint. D. & O. at 8. In fact, the parties do not dispute that the FAA requires that FedEx transmit tracking information to the FAA and the FAA releases some of that information to third parties.

Estabrook challenges the ALJ's determination that the concern he raised about publishing tracking information did not constitute protected activity, claiming the ALJ failed to consider regulatory provisions aimed at deterring or preventing incidents.<sup>5</sup> He asserts that a complainant need not point to a specific violation but need only relate to violations of FAA orders, regulations, and standards. Estabrook also argues that even if his concerns did not amount to a reasonable belief of a violation, FedEx's and the FAA's tracking policy was not effective given terrorists' attempt in 2010 to use a FedEx aircraft to carry and detonate explosives.

In response, FedEx notes that sharing tracking information is an industry-wide standard and contends that Estabrook's concern is not an objectively or subjectively reasonable belief of a violation of relevant federal laws. Specifically, given Estabrook's extensive experience and twenty years as a pilot with FedEx, it was not reasonable for him to conclude that he was engaging in activity protected under AIR 21. FedEx also points out that while expressing concern about the publication of tracking information, Estabrook never mentioned FedEx's screening procedures or other procedures in place to detect explosive devices and thereby fulfill its regulatory obligations.

We conclude that the ALJ's findings of fact on these points are supported by substantial evidence and his conclusions of law are correct. As noted above, AIR 21 protects complainants reporting a violation of a standard, rule, or regulation of the FAA or federal law related to air carrier safety. In *Hindsman*, ARB 09-023, the ARB

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<sup>5</sup> 49 C.F.R. § 1544.103(a)(1) (safety of persons from criminal violence and piracy, explosives, weapons); §§ 1544.205(a), (c)(1) (cargo control policy prevents incendiary devices, explosives).

held that a complainant did not engage in protected activity when the complainant knew that the FAA permitted the complained of activity:

We agree with the ALJ's conclusion that while Hindsman was aggressively carrying out her duties as lead flight attendant to ensure safety, once she discovered that the [personal oxygen container] POC was FAA-permitted, she could not have had a reasonable belief that flying with it on board violated air safety regulations. Therefore, she did not engage in protected activity on the October 1 flight. Because Hindsman failed to establish a required element of her complaint, the ALJ properly dismissed her complaint as a matter of law.

*Hindsman*, ARB 09-023, slip op. at 5. Here, too, Estabrook could not have had a reasonable belief that publishing low-level flight or tracking information constituted a *violation* of federal air carrier safety or security laws. Publishing some level of tracking data is an industry-wide practice and not prohibited. D. & O. at 49-50. The FAA and other related entities had received complaints from Estabrook and others expressing concern about this practice in 2001 and 2002, but did not prohibit the activity.<sup>6</sup> Estabrook was only suggesting a policy change for FedEx to voluntarily or proactively withdraw publishing data to make its safety or security procedures more effective.

## 2. Estabrook Suffered an Adverse Action

The three adverse actions at issue in this case are the August 5 and August 9, 2013, NOQs grounding Estabrook from flight duty and the directive that Estabrook undergo a 15D examination. Captain McDonald was the decision-maker for the August 5 NOQ. McDonald and Ondra were the decision-makers for the August 9 NOQ and 15D examination. The ALJ concluded that the NOQs and the

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<sup>6</sup> A complainant's whistleblowing becomes unreasonable if raised again after an employer has already addressed the employee's concern. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009) (“[O]nce an employee’s concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity”).

directive to comply with the 15D examination were adverse actions. D. & O. at 51. As FedEx does not dispute the ALJ's findings on appeal, they are affirmed.<sup>7</sup>

### **3. Estabrook's Refusal to Fly and OSHA Complaint were not Contributing Factors to either his August 5th and 9th NOQs nor his 15D Examination**

To prevail, a complainant must demonstrate "that [the protected activity] was a contributing factor in the unfavorable personnel action . . ." 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). "A contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" *Coates v. Grand Trunk W. R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 3 (ARB July 17, 2015). The complainant must then prove by a preponderance of the evidence that protected activity played some role and was a proximate cause in the adverse personnel action. *Koziara v. BNSF Ry.*

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<sup>7</sup> *Leiva*, ARB Nos. 14-016, -017, slip op. at 8. When FedEx implemented the August 9 NOQ, Estabrook was removed from his flight duties. D. & O. at 19. Estabrook claims that the currency of his flight duty status expired during his grounding. D. & O. at 8. So when he returned to flight duty following the 15D evaluation, Estabrook had to repeat some required training to recertify for full flight duty status. In his D. & O., the ALJ incorporated his conclusions that the NOQs and the 15D examination directive were adverse actions. Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision and Denying Respondent's Motion for Summary Decision (ALJ May 9, 2016).

While we do not disturb the ALJ's findings and conclusions, we note that an employer's directive to a pilot to undergo a psychological evaluation, in and of itself, is not an adverse action. *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 11 (ARB May 8, 2017) (an adverse action is "more than trivial" when it is "materially adverse" so as to "dissuad[e] a reasonable worker" from protected activity). FedEx's 15D evaluation is part of an air carrier's safety responsibility for employing a pilot. A requirement of periodic and "for cause" psychological assessments for aircraft pilots is beneficial to the airline community and to the public. For example, it is not an adverse action to require a pilot to undergo physicals and vision and hearing tests to ensure the pilot's physical competency to operate an aircraft. Second, a psychological assessment may benefit a pilot who actually needs counseling. The 15D evaluation is a desirable tool to protect the public and the employer from the foreseeable danger of an accident. Estabrook knew of the 15D process and it was part of the collective bargaining agreement with FedEx. The parties do not dispute that Estabrook continued to be paid during his grounding.

We do not suggest that a directive to undergo a 15D examination, in itself, could never be an adverse action. If selectively implemented or utilized in a retaliatory fashion, subjecting an employee to a 15D evaluation might be actionable as an adverse action.

Co., 840 F.3d 873, 877 (7th Cir. 2016) (distinguishing between causation and proximate causation).

The ALJ found that FedEx management was not concerned with Estabrook's refusal to fly. Rather, FedEx investigated Estabrook's breach of protocol when he unilaterally stayed at the hotel and did not report to the airport an hour before his flight. D. & O. at 53.

The ALJ's findings are supported by substantial evidence. Estabrook's late arrival for his flight was listed as the subject matter of the 19D hearing in Fisher's April 23, 2013 letter notifying Estabrook of the hearing. Joint Exhibit (JX) 2. Fisher was concerned with Estabrook's delayed arrival. The May 1, 2013 meeting focused entirely on the requirement that Estabrook report to duty on time. RX 9 (May 1 e-mail from Fisher to McDonald, and others, relaying the topic of the May 1 meeting). Although McDonald was involved with the April event in Laredo as a supervisor in the chain of command, the ALJ failed to find a causal link between McDonald's role in the August adverse actions and any potential protected activity in April at Laredo as it was alternatively unsupported and subsequently overwhelmed by Estabrook's unusual behavior in August. D. & O. at 53. Estabrook conceded that FedEx requires its pilots to arrive at the airport one hour before a flight's departure. D. & O. at 12, 18.

Estabrook claims that FedEx's treatment of the "Mayday Mark" postings provide a "Laredo-related" connection from his protected activity in April to the events in August. The ALJ did not find a causal connection between the "Mayday Mark" postings and the adverse actions in August. We affirm the ALJ's findings as supported by substantial evidence. Though the "Mayday Mark" postings were brought up in the meeting in August, FedEx accepted Estabrook's denial when he stated and verified that he was not Mayday Mark.

The ALJ also found that the August NOQs and 15D examination stemmed from the August 4, 2013 e-mail and August 9, 2013 meeting. We conclude that the ALJ's findings are again supported by substantial evidence. The August 5, 2013 NOQ followed directly after the August 4 e-mail. The August 9 NOQ and 15D examination directive followed immediately after the August 9 meeting and the strange behavior Estabrook exhibited. *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010) (identifying strong temporal proximity as support for causation).

Estabrook further claims that FedEx did not, or could not, provide reasonable grounds for its 15D directive until the OSHA investigation. In the first instance, FedEx disputes that it was required to provide Estabrook's counsel with a reason for its referral of Estabrook for the 15D evaluation. We conclude that even if a reasonable basis were required for the referral, FedEx's omission does not undermine the substantial evidence supporting the ALJ's findings that the NOQs and the 15D examination stemmed from the behavior Estabrook exhibited in August and not from his refusal to fly in Laredo or his April OSHA complaint.

Finally, Estabrook claims that the ALJ erred in affirming FedEx's assertion of attorney-client privilege concerning e-mails connected with Tice's testimony as to who recommended that Estabrook be removed from jumpseat privileges. But Estabrook fails to convince us that the ALJ abused his discretion. *United States v. Mejia*, 655 F.3d 126, 131 (2d Cir. 2011) (findings of attorney-client privilege are reviewed for an abuse of discretion). The cases Estabrook cites to stand for the proposition that a party who uses a privileged document waives privilege to the extent it is used and cannot deny the opposing party access to the document to evaluate how it was used. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010) (fairness principle requires that voluntary partial disclosure of privileged information waives privilege with respect to the disclosure); *United States v. Nobles*, 422 U.S. 225, 239-40 (1975) (defense's use of investigator's testimony on the contents and credibility of the testimony waives privilege with respect to the investigator's report relevant to such testimony). FedEx did not voluntarily waive its claim of privilege. The ALJ overruled FedEx's assertion of privilege on two separate occasions during Tice's testimony. Tr. at 457-74.

### CONCLUSION

We **AFFIRM** the ALJ's findings that Estabrook engaged in protected activity when he refused to fly and filed a complaint with OSHA. We **AFFIRM** the ALJ's findings that Estabrook suffered an adverse action when FedEx grounded him and directed him to undergo a 15D evaluation. We further **AFFIRM** the ALJ's findings that FedEx did not retaliate against Estabrook for engaging in protected activity when it grounded him and directed him to undergo a 15D evaluation. Accordingly, Estabrook's complaint is **DENIED**.

**SO ORDERED.**