



In the Matter of:

JIRI CERNY,

ARB CASE NO. 2019-0025

COMPLAINANT,

ALJ CASE NO. 2016-AIR-00003

v.

DATE: OCT 31 2019

TRIUMPH AEROSTRUCTURES-
VOUGHT AIRCRAFT DIVISION,

RESPONDENT.

Appearances:

For the Complainant:

Christine Neill, Esq.; Jane Legler Byrne, Esq.; *Neill & Bryne Law,*
PLLC, Dallas, Texas

For the Respondent:

W. Chris Harrison, Esq.; Audrey M. Calkins, Esq.; *Ogletree, Deakins,*
Nash, Smoak & Stewart, P.C., Memphis, Tennessee

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A.
Haynes and Thomas H. Burrell, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

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 (2016). Complainant Jiri Cerny filed a complaint alleging that Respondent Triumph Aerostructures (Triumph) 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 January 15, 2019, that Triumph did not violate the Act. We affirm.

BACKGROUND

Jiri Cerny (Complainant or Cerny) began working for Triumph in 2011 as a contract stress engineer. During the time in question, Triumph built E-2 fuselages for Embraer, a Brazilian airline company. Cerny reported to Michael Hoffmann and Todd Mostrog who were "stress leads." The stress leads reported to Greg Whittaker, manager of the project. Byron Mueller supervised Whittaker. D. & O. at 5.

1. Cerny's activity from October 2013 through the fall of 2014

In October 2013, Hoffmann directed Cerny to develop an alternate stress analysis for the E-2 fuselage frames. Cerny consulted a stress-analysis book which characterized one of the plane's features, a "mouse hole," as unacceptable and unsafe. *Id.* at 8-12. Cerny conveyed his concerns to Hoffmann who disagreed with the applicability of Cerny's source and his conclusion that the mouse-hole design was unsafe. *Id.* at 10, 47.

In mid-January 2014, Whittaker distributed a report (MAZ report) from Embraer which contained load data on joints and fasteners. Hoffmann and Mostrog directed the engineers to examine the MAZ report for missing values. *Id.* at 12. Reviewing the MAZ report, Cerny identified discrepancies and believed that they could result in the failure of a joint. *Id.* at 12-13. Cerny notified Hoffmann of these problems in January and February 2014. *Id.* at 13.

Cerny was assigned work on a circumferential splice joint in April 2014. Cerny claims that Embraer's design calls for an inter-rivet buckling margin of safety of fifteen percent, which Cerny believed would result in a splice being too heavy and could lead to joint failure. *Id.* at 15. Cerny notified Hoffmann of his perception of the splice and margin of safety. *Id.* at 15-16.

2. Cerny's APU tail cone report and checklist

In November 2013, Hoffmann directed Cerny to begin working on the alternative power unit (APU) and tail cone attachment. Cerny turned in a draft APU tail cone report in July 2014 without a fittings analysis. Mostrog asked why the fittings were not included and then directed him to perform a fittings analysis. D. & O. at 17. Mostrog told Cerny to use CATIA modelling software in the analysis. Cerny submitted the supplemental fittings analysis on July 11, 2014.

In the fall of 2014, Hoffmann directed his team to turn their preparation work toward a rough draft for the project. Cerny submitted his draft of the final APU tail cone report in December 2014. Hoffmann accepted Cerny's report when he submitted it, but Hoffmann then left work for an extended period. When Hoffmann returned in late February, he had another engineer review Cerny's work for consistency and calculations. Hoffmann received negative feedback from the engineer. *Id.* at 18-19. One of the problems concerned Cerny's inability to use the CATIA modelling software; Cerny's geometry and pictures were off. When Hoffmann reviewed the report and saw an incorrect picture, he concluded that he could not trust anything else in the report. Hoffmann testified that there were issues throughout the report. *Id.* at 19.

On March 6, 2015, Hoffmann returned Cerny's draft with heavy redline markup and directed Cerny to incorporate the changes. *Id.* at 18. Taking issue with some of the changes, Cerny went through the redlined document and created a "checklist" of all the changes that he did not make because they conflicted with engineering science and Triumph's manual. *Id.* at 19-20. Cerny felt that the plane should be safe and light and that proper bolts and joints should be used. Cerny submitted his report and his checklist of non-incorporated edits on April 2, 2015. After submitting his checklist, Cerny testified that Hoffmann instructed him to work on electrical trays for his next project. *Id.* at 32.

3. Cerny's performance problems

In mid-2014, Hoffmann and Mostrog provided Whittaker with negative performance feedback concerning Cerny. *Id.* at 25-27. Whittaker had a meeting with Cerny in mid-July 2014. Whittaker discussed Cerny's being away from his desk often, excessive personal telephone use, and watching sports on his iPad while at work. *Id.* at 27. Whittaker also spoke with Cerny about his missing fittings analysis on his APU tail cone assignment.

Hoffmann and Mostrog were unsatisfied with Cerny's written submissions including his lack of competency using computer analytical tools. *Id.* at 8, 29. Hoffmann had others work with Cerny to assist him in pulling material from the computer software and to double check Cerny's work. *Id.* at 16-17, 22, 24. When Hoffmann returned from his extended absence, he had another engineer review Cerny's work on the APU tail cone report submitted in December 2014 for consistency and calculations. Hoffmann received feedback that Cerny's work was below average. *Id.* at 19.

Continuing to experience difficulties with Cerny's work product and having to redo Cerny's analysis, Hoffmann and Mostrog recommended in the February-March 2015 time frame that Whittaker remove Cerny. Whittaker spoke to Mueller about terminating Cerny in late February 2015. *Id.* at 29. Further meetings were held in mid-March and a final termination decision was reached on March 27, 2015, after Mueller and Whittaker exchanged a draft termination document by e-mail. RX-9; D. & O. at 31. Mueller was the decision-maker, but Whittaker participated in the decision. D. & O. at 6, 29. On April 1, 2015, Mueller and Whittaker decided to effect the termination the next day, April 2, 2015. CX-110; D. & O. at 31.

Cerny filed a retaliation complaint with the Occupational Safety and Health Administration (OSHA). OSHA dismissed Cerny's claim on October 5, 2015. Cerny then filed objections with the Office of Administrative Law Judges and requested a hearing. The ALJ assigned to the case held a hearing and found in favor of Respondent Triumph. The ALJ found that Cerny subjectively believed that the mouse-hole design was a violation of federal law related to air carrier safety but that his belief was not objectively reasonable because the mouse-hole design was common on modern planes. D. & O. at 46. The ALJ found that Cerny's report of discrepancies in the MAZ report and objections to the inter-rivet joints were neither subjectively nor objectively reasonable. *Id.* at 49-53. The ALJ also found that Cerny subjectively believed that his APU tail cone checklist of safety concerns revealed a violation of federal law related to air carrier safety but that his belief was not objectively reasonable because the errors in his work and the redline modifications to his report were confirmed by multiple qualified persons. *Id.* at 54. Even if the checklist had constituted protected activity, the ALJ found that Triumph decided to terminate Cerny before he submitted his APU tail cone checklist so that it could not have been a contributing factor in the decision to terminate him. Cerny filed this appeal with the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's AIR 21 decision by order of the Secretary of Labor. 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 for substantial evidence and conclusions of law de novo. 29 C.F.R. § 1979.110(b). As the United States Supreme Court has recently noted, "[t]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence is "more than a mere scintilla." It means—and means only —"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing and quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable." *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

DISCUSSION

To prevail on his whistleblower complaint, Cerny must prove by a preponderance of the evidence that (1) he engaged in activity protected by AIR 21; (2) an unfavorable personnel action was taken against him; and (3) 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). If Cerny proves that protected activity was a contributing factor in the personnel action, Triumph may nevertheless avoid liability if it proves by "clear and convincing evidence" that it would have taken the same 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. Cerny did not engage in protected activity

AIR 21 protects employees who blow the whistle by providing information on matters related to air carrier safety.¹ Protected activity under AIR 21 has two

¹ Under AIR 21, a complainant engages in protected activity when he or she does the following:

- (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

elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order, 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. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, ALJ No. 2013-AIR-016 (ARB Jan. 21, 2016); *Hindsman v. Delta Air Lines, Inc.*, ARB No. 09-023, ALJ No. 2008-AIR-013 (ARB June 30, 2010).

In analogous settings, we have held that a belief is objectively reasonable when a reasonable person, with the same training and experience as the employee, would believe that the conduct implicated in the employee's communication could rise to the level of a violation of one of the provisions of Federal law enumerated in the whistleblower protection statute at issue. See *Occhione v. PSA Airlines*, ARB No. 13-061, ALJ No. 2011-AIR-012 (ARB Nov. 26, 2014); *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 14-15 (ARB May 25, 2011); *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013). Courts have held that an "objectively reasonable belief can be established as a matter of law unless there is a genuine issue of material fact." *Allen v. Admin. Rev. Board*, 514 F.3d 468, 477 (5th Cir. 2008). If reasonable minds could disagree on "objective reasonableness," the ALJ's finding is reviewed under the substantial evidence standard. A complainant's belief that an employer's act violates a statute or regulation goes to his subjective belief. *Sylvester*, ARB No. 07-123, slip op. at 14-15.

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.

The ALJ found that none of Cerny's four claims of protected activity were protected under AIR 21. On appeal, Cerny limited his brief to discussing why the APU tail cone checklist of refused corrections was protected. Otherwise, Cerny summarily objected to the ALJ's findings on the other three classes of alleged protected activities. Cerny Br. at n.1. We conclude that Cerny has thereby waived objections to three categories of protected activity not briefed.²

As for the issue before us, we note that Cerny submitted his draft of the APU tail cone report in the fall of 2014 as part of an assigned task. Hoffmann returned Cerny's APU tail cone report in early March with heavy redline markup and directions to make changes. Cerny disagreed with the corrections and declined to make them because he believed that they conflicted with engineering science and Triumph's manual, citing to 14 C.F.R. § 25.307, which identifies reliable methods in proof of structure. D. & O. at 19-20. Cerny claimed that compiling his checklist and his refusal to make changes were protected activities; the ALJ found that Cerny had a subjective belief but not an objectively reasonable belief that his checklist was protected activity. *Id.* at 53-55.

On appeal, Cerny claims that he need not show that a law was actually violated, but need only prove that he had a reasonable belief that his violation report relates to air carrier safety. Cerny further argues that another person

² Cerny wrote the following in his opening brief:

While, Cerny strenuously disagrees with the determination that these acts did not constitute protected conduct under AIR 21, due to space constraints on briefing on appeal, this brief's arguments are limited to the issue of whether the ALJ erred in not finding that Cerny's refusal to make requested changes on his APU / Tailcone report constituted protected conduct.

Br. 2 n.1. Other than this general claim, Cerny's brief did not argue that the ALJ erred in finding that the other three categories did not meet the definition of protected activity. Further, Cerny did not assert and argue that those categories of alleged protected activity contributed to his termination. An appellant is required to develop argument with citation to law and authority to avoid waiver or forfeiture. *See Dev. Res., Inc.*, ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) *citing Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (noting that in the Federal Courts of Appeals, it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"); *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995) ("It is not our function to craft an appellant's arguments."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim [for appellate review].").

reviewed his APU tail cone report after his termination but did not have any objections to Cerny's work, and contends that this fact bolsters his claims that the checklist was protected activity under AIR 21. Cerny also challenges the ALJ's credibility findings concerning Hoffmann, because Hoffmann's testimony contained significant discrepancies. According to Cerny, Hoffmann inconsistently accepted his previous draft notes on the APU tail cone without comment but later objected to the draft. Cerny also challenges Hoffmann's testimony concerning whether he reviewed or merely glanced through the APU tail cone checklist before terminating Cerny. Cerny claims that his work did not contain technical error and his belief of a violation was reasonable for an engineer with his training and experience.

Having fully considered Cerny's arguments, we nevertheless affirm the ALJ's findings as supported by substantial evidence and his conclusions as legally correct. Cerny is correct that he need not prove an actual violation to engage in activity protected under AIR 21, but only a reasonable belief that a violation of a federal rule or regulation related to air safety occurred or was about to occur. *Furland v. Am. Airlines*, ARB Nos. 09-102, 10-130, ALJ No. 2008-AIR-011 (ARB July 27, 2011). But an employee's reasonable belief is comprised of both a subjective and an objective component, and we affirm the ALJ's findings that Cerny's belief that his observations in the checklist were protected activity was not objectively reasonable. When Hoffmann returned in late February, he had another engineer review Cerny's work for consistency and calculations, and that engineer provided negative feedback concerning the checklist. D. & O. at 18. One of the problems identified concerned Cerny's inability to proficiently use analytical software, but Hoffmann testified that there were also issues throughout the report. The ALJ credited the testimony of Hoffmann and the other engineer in support of his finding that Cerny's checklist was not an objectively reasonable protected activity because the redline corrections made to the checklist by Hoffman were accurate and needed. *Id.* at 54.

2. Triumph did not retaliate against Cerny when it terminated his employment

The ALJ found that Triumph fired Cerny for his inability or unwillingness to use computer programs and his inability to produce useful work. D. & O. at 57. The ALJ did not find that Cerny's checklist, even if it were protected under AIR 21,

contributed to his termination.³ Rather, the ALJ found that Triumph decided to terminate Cerny before he filed his tail cone checklist. *Id.* at 60-61.

Cerny argues on appeal that Triumph decided to terminate him within hours of receiving the APU tail cone checklist on April 2 and that Triumph's claim to have decided to terminate him before that day was pretext for several reasons. Cerny argues that documentation shows that Triumph extended his contract in March and viewed Cerny as a "vital member" who was "needed for his Embracer work during this crucial phase of engineering release." CX-10. Further, Cerny received a job assignment involving electrical trays on April 2 that Cerny states would take two to three weeks to complete. Cerny claims that another engineer reviewed and completed the APU tail cone report without comment on his checklist. Cerny points to post-termination statements made by Whittaker and Triumph's President which Cerny argues support his claim of pretext. Cerny further claims that the ALJ erred in finding that Triumph decided to fire him before April 2 because Whittaker answered in an interrogatory response in 2016 that the decision was made on or about April 2. Finally, Cerny offers evidence and argument that his work and performance were not deficient.

Notwithstanding these assertions, we conclude that substantial evidence supports the ALJ's finding that Triumph decided to terminate Cerny for performance reasons before he submitted his APU tail cone checklist report on April 2. Hoffmann, Mostrog, and Whittaker first discussed Cerny's termination with Mueller in a February 2015 meeting. D. & O. at 29-30. In March 2015, Whittaker met with stress leads Hoffmann and Mostrog who indicated that they could perform their duties without Cerny. *Id.* at 30. Having received negative feedback, Mueller and Whittaker decided to terminate Cerny in late March for performance related reasons. Whittaker and Mueller exchanged a draft March 27 termination report⁴ for

³ Parties do not dispute the ALJ's finding that a termination is an adverse action under ATR 21. D. & O. at 43.

⁴ Cerny's brief to the ARB suggests that the March 27 e-mail and draft termination document, which indicates that Mueller and Whittaker were preparing Cerny's termination on that date, is a forgery because it contains irregularities including the fact that Mueller's signature is not on the e-mail though his e-mails usually contain signatures. In further support of this claim, Cerny points out that Mueller and Whittaker testified that they intended to fire Cerny in the "a.m." but the document circulated in the March 27 e-mail stated that he will be fired in the "p.m." The ALJ did not find these arguments compelling. D. & O. at 61. We conclude that the ALJ did not err and that his findings are supported by substantial evidence for the reasons discussed above. Even if the March 27 e-mail and draft termination document were called into question, the ALJ's finding that Triumph decided

comments. D. & O. at 31; RX-9, RX-10. On April 1, Whittaker and Mueller exchanged e-mails on Cerny's pending termination and decided that his last day would be April 2. D. & O. at 31; CX-110. Because the decision was made before April 2, Cerny's APU tail cone checklist submitted on April 2 could not have been a contributing factor in his termination.

Cerny's assertions on appeal do not undermine the substantial evidence supporting the ALJ's findings. Mueller explained that Triumph needed to renew and extend Cerny's job in March if he were to be on-site for even a few days as his badge would not work without current credentials. D. & O. at 30. Finally, Mueller excused the high praise in Cerny's March extension letter as boilerplate used in many letters of contract extension. *Id.* On appeal, Cerny points to other evidence that the ALJ could have given more probative weight but chose not to. The ALJ, having examined both parties' arguments, found that Triumph decided to fire Cerny for performance reasons before he submitted the checklist. This finding is supported by substantial evidence.

CONCLUSION

We **AFFIRM** the ALJ's findings that Cerny did not engage in protected activity when he provided a checklist of revisions that he believed violated a federal law or regulation related to air safety. We further **AFFIRM** the ALJ's findings that Triumph did not retaliate against Cerny when it terminated his employment. Accordingly, Cerny's complaint is hereby **DENIED**.

SO ORDERED.

before April 2 to fire Cerny is supported independently by Mueller and Whittaker's April 1 e-mail confirming that they planned to terminate Cerny the next day. D. & O. at 31.