U.S. Department of Labor

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Issue Date: 21 February 2019

Case No.: 2018-AIR-00041

In the Matter of

KARLENE PETITT
Complainant

v.

DELTA AIR LINES, INC.
Respondent

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21") which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979.

I. SUMMARY OF FACTS[1]

On January 28, 2016, Complainant meet with Respondent's Senior Vice President of Flight Operations, Mr. Dickson, and its Vice President of Flying Operations, Mr. Graham. Pettit Decl. ¶ 3 and Ex. B (bates stamp pp. DA 00007 – DA 00052).[2] During this meeting Complainant presented them with a written safety report (hereafter "Safety Report") describing violations of federal aviation standards. *Id.* Copies of this document were later provided to other managers of Respondent, including its CEO. Pettit Decl. at ¶ 4.

In March 2016, Mr. Graham referred Complainant's Safety Report to its Human Resources depart, and Ms. Nabors was assigned to interview Complainant. Nabors Dep. at 59-60.[3] Ms. Nabors read the report prior to interviewing Complainant on March 8, 2016. Nabors

[1] Attachment A sets forth facts established from the pleadings.

[2] *See also* Seham Decl. at Ex A

[3] Unless otherwise noted, the depositions cited are contained included as Exhibits to Ms. Feuer's declaration filed by Complainant in support of this motion or Mr. Horn Declaration submitted in Respondent's Opposition to the Motion for Summary Decision.

The extracts of the depositions cited in Ms. Feuer's declaration are follows:

Exhibit A: Capt. Davis' deposition
Exhibit B: Capt. Dickson's deposition
Exhibit C: Dr. Faulkner's deposition

Dep. at 59-60. According to Ms. Nabors, during the interview Complainant became emotional, began crying and explained that she was frightened of Respondent. Nabors Depo. at 170-71. Ms. Nabors became deeply concerned about Complainant's mental health because of aircraft operations issues and Complainant's fear of being impacted or harmed by somebody at Respondent. *Id.* at 86-87, 177. Following this meeting a meeting occurred between Ms. Nabors, Chris Puckett (a Labor Relations representative for Respondent), and Dr. Faulkner (Respondent's Director of Health Services). Nabors Depo. at 110-111. Dr. Faulkner testified that it was solely Ms. Nabor's report of Complainant's behavior and her comments during their meeting that triggered him to evaluation whether a Section 15 evaluation was needed. Faulkner Depo. at 19-21, 28-30.

On March 11, 2016, Chris Puckett, invited a psychiatrist, Dr. Altman, to participate in a teleconference scheduled for March 16, 2016 concerning Complainant, and forwarded to him a copy of Complainant's Safety Report. Seham Decl. at Ex. A. Dr. Altman was later appointed as the psychiatrist who would evaluate Complainant as Respondent's Medical Examiner (CME). Faulkner Depo. at 55-56. By the close of that teleconference, Mr. Graham had decided to ground Complainant and subject her to a medical examination. Graham Depo. at 68-69.

In a letter by Captain Davis dated March 17, 2016, but not hand delivered to Complainant until March 22, 2016, he directed Complainant undergo a Section 15 evaluation. The letter notifies Complainant that she had been removed from service with pay pending the results of the mental health evaluation. Petitt Decl., Ex. D.

On April 27, 2016, Dr. Faulkner, a qualified Aeromedical Examiner (AME), interviewed Complainant and referred her for a psychiatric examination without prior review of her aeromedical records. Faulkner Depo. at 64-65. Dr. Faulkner referred Complainant for a psychiatric evaluation based exclusively on information provided by Ms. Nabors. *Id.* at 31; deposition Ex 5.[4] As mentioned earlier, Dr. Faulkner, who is Respondent's DHS, chose Dr. Altman to be the CME. Faulkner Depo at 71-72.

On June 6, 2016, Complainant filed her AIR 21 complaint with OSHA. Petitt Depo. at 70-71.[5]

Exhibit D: Capt. Graham's deposition
Exhibit E: Ms. Nabor's deposition.

The extracts of the depositions cited are contained in Mr. Horn's declaration are follows:

Tab 1: Capt. Davis' deposition
Tab 2: Capt. Dickson's deposition
Tab 3: Dr. Faulkner's deposition
Tab 4: Capt. Graham's deposition
Tab 5: Ms. Nabor's deposition
Tab 6: Complainant's deposition

[4] A copy is contained in Mr. Horn's decl. at Tab 3 (Bates stamp DA 00071).

[5] Complainant, per the Tribunal's Notice of Assignment, provided the Tribunal with a copy of her June 6, 2016 filing with OSHA.

On July 6, July 15 and September 14, 2016, Dr. Altman interviewed Complainant and produced a 366-page psychiatric evaluation diagnosing Complainant as having a bipolar disorder and thereby not meeting the standards for a First Class Medical certificate.[6] Faulkner Depo. at 128.

On September 8, 2016, the FAA notified Respondent that, after conducting an investigation, it substantiated violations contained in Complainant's Safety Report. Pettit Decl. at Ex. C.

On February 22, 2017, a panel of physicians from the Mayo clinic submitted a report with the unanimous opinion that Complainant does not have and has not had a bipolar disorder or a personality disorder, essentially rejecting Dr. Altman's report. Petitt Decl. at Ex E.

On August 22, 2017, the FAA Medical Appeals Board deemed Complainant eligible to retain her First Class Medical certificate and reinstated her. *See* Complainant's Pleading Complaint ("PC") ¶127; Respondent's corresponding answer.

Because of this, Dr. Huff was selected as a neutral physician with the authority to issue a final and binding decision. Faulkner Depo at 60, 143. On September 2, 2017, Dr. Huff submitted a report to Dr. Faulkner, in which he opined that Complainant was medically fit to fly. Pettit Decl. at ¶ 8 and Ex. F. Thereafter Respondent restored Complainant to the line with full back pay as well as all rights and privileges. Resp. Opp. at 5 (citing Petitt Depo. at 324-326).[7]

On July 13, 2018, the Secretary issued his findings. OSHA, acting on behalf of the Secretary, found that the parties are covered under the Act, but there was insufficient evidence to establish reasonable cause that a violation occurred. On August 1, 2018, Complainant filed an appeal to the Secretary's findings

On August 28, 2018, the undersigned issued a Notice of Assignment and Conference Call. On September 27, 2018, the Tribunal issued a Notice of Hearing and Pre-hearing Order. As part of this Order, the Tribunal required Complainant to file a Pleading Complaint. On October 17, 2018 Complaint filed her Pleading Complaint ("PC").[8] In her complaint, as amended, Complainant alleges the adverse actions taken against her occurred were:

1) Being subjected to a March 8, 2016 interview by Ms. Nabors, a Manager of Equal Opportunity. PC ¶¶ 54-71.
2) Issuance of a letter dated March 17, 2016 removing her from service on alleged concerns regarding her mental health and the process associated with Section 15

[6] A copy of this report is contained in an earlier submitted motion for partial summary decision, which this Tribunal deferred ruling on, and is located in those documents at Pettit Decl., Ex. F (Bates stamp pages C-00260 – C-00626). See reference to same in Resp. Opp. at 4 n.19.

[7] The Tribunal cites in this fashion because a copy of those portions of Complainant's deposition were not included in the excerpts provided to it.

[8] On December 5, 2018, Complainant requested leave, which Respondent opposed, and was granted permission to amend her complaint. *See* Order Granting Complainant's Motion to Amend Her Pleading Complaint (Jan. 17, 2019).

evaluation. PC ¶¶ 72, 77-129. The letter resulted in her removal from duty for 22 months and resulted in suspension of jump seat and travel privileges, loss of overtime, paid vacation and associated profit sharing. PC ¶¶ 73-74.

3) Respondent's designation of the complainant-authored safety report as "Confidential Information" pursuant to a protective order issued by this Tribunal, combined with a threat of legal "consequences" if she failed to adhere to Respondent's designation. Amended PC ¶ 131.

On November 19, 2018 Respondent provided its response to the complaint and included 15 affirmative defenses.[9]

On January 16, 2019, Complainant filed her Motion for Summary Decision asserting that every element she must establish is undisputed and that Respondent cannot establish by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of her protected behavior.[10] Complainant asserts that it is undisputed that Complainant provided a written safety report to Respondent's Senior Vice President of Flight Operations, Mr. Dickson, and its Vice President of Flying Operations, Mr. Graham, on January 28, 2016. On March 16, 2016, Mr. Graham grounded Complainant and issued a Section 15 letter compelling her to submit to a compulsory medical evaluation. Complainant claims the causal link between her protected activity and the adverse action is established by their temporal proximity, Respondent's withheld contemporaneous rationales for its adverse action, and its shifting rationales since then. Complainant further asserts that Respondent's proffered non-discriminatory rationale for its adverse action is pretextual. Compl. Mot. at 2-3.

On February 6, 2019, Respondent filed its Opposition to Complainant's Motion for Summary Decision. Respondent asserts that the motion is premature because discovery is not complete and the Tribunal has not had a chance to take evidence or observes witnesses. Respondent maintains that genuine issues of material fact remain on both causation and Respondent's affirmative defensive. Respondent posits that the temporal proximity of events is not dispositive, particular where there is an intervening event.

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[9] Respondent's defenses boil down to the following:

1. Complainant has failed to establish each element required for a successful AIR-21 complaint and even if she has, Complainant can establish by clear and convincing standards it would have taken the same action in the absence of the protected activity.
2. The Tribunal lacks jurisdiction to resolve the matter because the CBA vests jurisdiction exclusively in the Delta-ALPA System Board.
3. Complaint has failed to mitigate damages.

[10] Complainant includes as attachments to her motion the following:

1. Declaration of Lee Seham in Support of Complainant's Motion for Summary Decision executed January 15, 2019, with 6 attached exhibits (A-E).
2. Declaration of Complainant in Support of Complainant's Motion for Summary Decision executed January 15, 2019 with 7 attached exhibits (A-G).
3. Declaration of Diane Feuer in Support of Complainant's Motion for Summary Decision executed January 15, 2019 with 6 attached exhibits (A-F).

On February 14, 2019, the parties submitted a joint stipulation on the issue of protected activity. Respondent agreed that certain of Complainant's actions constituted protected activity.[11]

II. Standard for Summary Decision

An administrative law judge may grant summary decision in favor of a party where there is no genuine dispute as to any material fact.[12] 29 C.F.R. § 18.72(a). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Administrative Review Board ("the Board" or "ARB") has explained, "Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense." *Lee v. Parker-Hannifin Corp.*, ARB No.10-021, ALJ No. 2009-SWD-3, slip op. at 4 (ARB Feb. 29, 2012). Thus, the factfinder "must not judge witness credibility or weigh evidence." *Daniels v. United Parcal Serv., Inc.*, 701 F.3d 620, 627 (10th Cir. 2012).

The Board has directed, "The first step is to determine whether there is any genuine issue of a material fact," but that "[d]etermining whether there is an issue of material fact requires several steps." *Lee*, ARB No. 10-021 at 4 (citing *Anderson*, 477 U.S. at 248). After examining the elements of the complainant's claims, the factfinder must "sift the material facts from the immaterial." *Id.* After assessing materiality, the factfinder examines the parties' arguments and evidence to determine whether a genuine dispute exists as to the material facts. *Id.* The parties may submit evidence (such as documents or affidavits) in support of their positions. *See* 29 C.F.R. § 18.72(c)(4). The procedural regulations provide that the factfinder "need consider only the cited materials, but the judge may also consider other materials in the record." 29 C.F.R. § 18.72(c)(3).

The moving party bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving

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[11] Specifically, the parties agree to the following:

> Delta stipulates that Complainant's January 28, 2016 report (Complainant's "report")—that raised issues concerning: pilot fatigue, pilot training, pilot training records, and Delta's Safety Management Systems (SMS) programs—qualifies as protected conduct under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). Delta further stipulates that it will not challenge that Complainant engaged in protected conduct when she submitted her report to Delta on January 28, 2016, when she offered to forward her report and eventually did forward it to other Delta executives including Ed Bastian, when she discussed her report with Steven Dickson and Jim Graham on January 28, 2016 and thereafter, and when she gave a presentation to Delta executives on April 27, 2016 concerning her report. Delta by this stipulation does not waive any defenses to the Complaint filed by Complainant in this or any forum other than as described herein.

[12] Summary decision in proceedings before the office of administrative law judges is derived from Rule 56 of the Federal Rules of Civil Procedure. *Lee v. Parker-Hannifin Corp., Advanced Prod. Business Unit*, ARB No. 10-021, slip op. at 5 n.8 (Feb. 29, 2012).

party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The movant must support its assertions that a fact cannot be genuinely disputed by: citing to particular parts of materials in the record, including, *inter alia*, depositions, documents, affidavits or declarations, admissions, interrogatory answers, or other materials; or, showing that the materials cited do not establish the presence of a genuine dispute. 29 C.F.R. § 18.72(c)(1). "The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim." *Lee*, ARB No. 10-021 at 5 (citing *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 07-013, slip op. at 1 (Oct. 31, 2008)). In opposing summary decision, the non-moving party must similarly follow the procedure set forth at § 18.72(c)(1) to support its assertions that a fact is genuinely disputed. The non-moving party may also show, by affidavit or declaration, that, for specified reasons, it cannot present facts essential to justify its opposition. 29 C.F.R. § 18.72(d).

In adjudicating a motion for summary decision, the factfinder must view all facts and inferences in the light most favorable to the non-moving party. *See Celotex Corp.*, 477 U.S. at 323; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (1986); *Jaramillo v. Colo. Judicial Dep't.*, 427 F.3d 1303, 1307 (10th Cir. 2005) (en banc) (per curiam). All ambiguities are resolved, and all reasonable inferences are drawn, in favor of the nonmovant. *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n*, 182 F.3d 157, 160 (2d Cir. 1999). If a party fails to properly support an assertion of fact or address another party's assertion of fact as required by § 18.72(c), the factfinder may grant an opportunity to properly address the fact, consider the fact undisputed for purposes of the motion, grant summary decision if the movant is entitled to it, or issue any other appropriate order. 29 C.F.R. § 18.72(e).

III. Discussion

To prevail on his whistleblower complaint under AIR-21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) she engaged in protected activity; (2) Respondent took unfavorable personnel action against her; 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); *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ No. 2011-AIR-012, slip op. at 6 (ARB Nov. 26, 2014). If Complainant establishes this prima facie case, the burden then shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013).

A. Are the parties subject to the Act?

Respondent is an air carrier[13] that conducts its operations under 14 C.F.R. Part 121[14] and Complainant is employed[15] by the Respondent at all times germane to these proceedings as a pilot. Accordingly, this Tribunal finds the parties are subject to the Act.

[13] 49 U.S.C. § 40102(a)(2); *see also* 29 C.F.R. § 1979.101.

[14] For a list of Part 121 air carriers *see* https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/3185/certificated-list102017.pdf. Respondent has not disputed this fact.

[15] Complainant meets the definition of an employee in 29 C.F.R. § 1979.101 as she was at the time, and

B. Did Complainant engage in protected activity?

The Tribunal accepts the parties' stipulation that Claimant engaged in protected activity under AIR 21. Accordingly, for purposes of Complainant's Motion for Summary Decision, the element of protected activity is satisfied.[16]

C. Was Respondent's referral of Complainant to a Section 15 evaluation and the subsequent Section 15 evaluation process an adverse action?[17]

An adverse action is simply an unfavorable employment action, not necessarily retaliatory or illegal. "Motive or contributing factor is irrelevant at the adverse action stage of the analysis." *Durham v. Tennessee Valley Authority*, ARB No. 11-044, slip op. at 13-14 (Sept. 28, 2011); *see also Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, slip op. at 14 (Sept. 13, 2011) (explaining that use of the "tangible consequences standard," rather than the standard articulated by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), was error). However, the Board clarified, "that Burlington's adverse action standard, while persuasive, is not controlling in AIR 21 cases," but that it is "a particularly helpful interpretive tool." *Menendez*, ARB Nos. 09-002, 09-003 at 15. "The term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Menendez*, slip op. at 17 (internal quotation marks omitted).

Ultimately, an employment action is adverse if it "would deter a reasonable employee from engaging in protected activity." *Id.* at 20.[18] Accordingly, the Board views "the list of

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is currently, employed by Respondent and that employment could be affected by Respondent.

[16] Even if the parties had not so stipulated, the Tribunal would find that Complainant's submittal of her Safety Report to Respondent's management constituted protected activity. Her report details issues with Respondent's Safety Management System (SMS), a FAA mandated program. *See* 14 C.F.R. Part 5. Complainant's report contains specific alleged incidents of Respondent's management's effort to suppress employee reports of safety related incidents and concerns. Complainant also reported issues with Respondent's implementation of flight and duty limitations and rest, and Complainant provided accounts of Respondent pressuring its pilots to fly while fatigued. Safety Report at 13-15; *see also* 14 C.F.R. Part 117. Even Mr. Graham acknowledged that there is "constant operational pressure" on its pilots. Graham Depo. at 140-41. Complainant also raised issues about inadequate training and proficiency among Respondent's pilots. Safety Report at 7, 16-23; *see also* 14 C.F.R. §§ 121.400-419, 121.431-445. These are the types of safety matters protected under the Act. *See Benjamin v. Citationshares Mgt, LLC,* ARB Case No. 12-029, ALJ Case No. 2010-AIR-001 (Nov. 5, 2013), slip op. at 5-6; *Sylvester v. Parexel Int'l LLC,* ARB Case No. 07-023, ALJ Case Nos. 2007-SOX-039, -042 (May 25, 2011), slip op. at 40.

[17] During the evaluation process, Complainant alleges Respondent interfered with her subsequent examinations, provided false information to participating examiners, violated contractual safeguards related to the examination process, and obstructed the examination process. Respondent thereafter delayed and obstructed Complainant's return to flight duty even after her satisfaction of fitness for duty requirements.

[18] *See also Williams,* ARB No. 09-018, slip op. at 15 (definitively clarifying the adverse action standard in AIR 21 cases: "To settle any lingering confusion in AIR 21 cases, we now clarify that the term "adverse actions" refers to unfavorable employment actions that are more than trivial, either as a single

prohibited activities in Section 1979.102(b) as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline." *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10-11 (Dec. 29, 2010)). The Board further observed that "even *paid* administrative leave may be considered an adverse action under certain circumstances." *Id.* at 14 (emphasis in original) (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that "although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)). In addition, with regard to an employer's decision to compel a complainant to undergo a psychiatric examination, the Board has upheld the ALJ's determination that this constitutes adverse action that changes the conditions of a complainant's employment. *See Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, slip op. at 3, 6 (Nov. 30, 2005) (explaining that because respondent took complainant "out of service as a pilot and placed him on paid status pending the results of the examination" in accordance with the collective bargaining agreement, these "were adverse actions that changed the conditions of his employment").

There is no genuine dispute that Complainant was placed in a paid leave status involuntarily and was removed from service as a pilot. Imposition of a paid leave status coupled with an order to submit to a mental health evaluation, as in *Robinson*, essentially amounts to "[e]mployer warnings about performance issues," which could be construed as "manifestly more serious employment actions than the trivial actions the Court listed in *Burlington Northern*." *See Williams*, ARB No. 09-018 at 14 (explaining, "Even under *Burlington Northern*, we believe that the supervisor's warning and threatening counseling session in this case constitutes a materially adverse action (more than trivial). . . . Such warnings are usually the first concrete step in most progressive discipline employment policies, regardless of how the employer might characterize them"). Thus, no genuine dispute of material fact exists regarding the Section 15 evaluation and the process therein as an adverse employment action.

D. Did Complainant's protected activity contribute to Respondent's decision to take adverse action against her?

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). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, slip op. at 5 (Jan. 31, 2011). The complainant "need not show that protected

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event or in combination with other deliberate employer actions alleged. Unlike the Court in *Burlington Northern*, we do not believe that the term "discriminate" is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation without any expressed limitation to those actions that might dissuade the reasonable employee. Ultimately, we believe our ruling implements the strong protection expressly called for by Congress").

activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, slip op. at 8 (May 31, 2013).

In support of their respective arguments regarding this element, both Complainant and Respondent heavily rely on the deposition testimony of the witnesses involved in this matter, and the various interpretations of these witnesses' statements and opinions. Complainant cites to Respondent's interrogatory response that the decision to refer Complainant for a Section 15 evaluation was a result of Complainant's behavior during her meeting with Ms. Nabors on March 8, 2016. Complainant asserts that since Ms. Nabors' sole purpose of her meeting with Complainant was to investigate issues with the Safety Report, the two are inextricably intertwined.

Here, Complainant misses the bar. Assessing the credibility of witnesses is not appropriate when adjudicating a motion for summary decision. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630-31 (9th Cir. 1987). To find in Complainant's favor here would be to accept the testimony of its witnesses regarding the reasons that Respondent issued the Section 15 letter. The Tribunal must view in the light most favorable to the Respondent and under this standard the Tribunal must accept as fact that the sole purpose for directing the Section 15 evaluation was due to her statements and conduct during her interview with Ms. Nabors.[19] Further, the Tribunal must assume that her interview with Ms. Nabors was the reason for the Section 15 evaluation.

It is well-established that the adjudicator cannot weigh evidence or make credibility determinations at the summary decision stage, and thus, the parties' primary reliance on conflicting testimony regarding causation necessarily renders analysis of this element inappropriate at this stage of the proceedings. Moreover, in *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021 (Dec. 30, 2004), the Board underscored the importance of weighing the testimony of witnesses in evaluating a complaint arising under the Act:

> In weighing the testimony of witnesses, the ALJ as fact finder has had an opportunity to consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. The ARB gives great deference to an ALJ's credibility findings that rest explicitly on an evaluation of the demeanor of witnesses.

[19] However, the standard that Complainant has to meet once a hearing is held is fairly low. To satisfy his initial burden, Complainant need only show that protected activity was **a** contributing factor in the unfavorable personnel action. *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 14-15, 51-55 (ARB Sept. 30, 2016). Any amount of causation will satisfy this standard. *Id.*

Negron, ARB No. 04-021 at 5 (internal citations omitted) (internal quotation marks omitted). For these reasons, and in light of the type of evidence primarily relied upon by both parties, a determination as to the causation element cannot be reached on summary decision, as the parties ask this Tribunal to make credibility determinations and weigh of evidence.

Thus, under that standard, Complainant cannot establish that the protected activity was a contributing factor to the adverse action as there remain genuine issues of material fact. As Complainant cannot meet its initial burden under the standard this Tribunal must apply at this stage of the proceedings, the undersigned need not address the remaining arguments.

For the foregoing reasons, Complainant's Motion to Dismiss is hereby **DENIED.**

SO ORDERED.

Digitally signed by Scott R. Morris
DN: CN=Scott R. Morris, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

Attachment A

1. Complainant was employed in various capacities as an airline pilot prior to being employed by Respondent.
2. Northwest Airlines, Inc. ("NWA") employed Complainant effective January 17, 1997
3. On October 29, 2008, NWA and Respondent merged.
4. Complainant is employed by Respondent and currently holds the title of First Officer.
5. Complainant is subject to a collective bargaining agreement ("CBA")—the Pilot Working Agreement ("PWA")—between Delta and the Air Line Pilots Association ("ALPA"), which was negotiated pursuant to the Railway Labor Act, ("RLA" or the "Act"), 45 U.S. Code Chapter 8.
6. Delta and ALPA are parties to the PWA.
7. Complainant complained about Captain Thomas Albain's simulator training on or around March 2011.
8. On or about January 28, 2016, Complainant met with Capt. Dickson and Capt.Graham.
9. During the January 28 meeting, the Complainant provided the Respondent with a 43-page written safety report entitled "Assessment of Delta Air Lines 'Flight Operations' Safety Culture." (hereinafter referred to as Safety Report).
10. A meeting was held at Complainant's request on or about January 28, 2016, where Complainant was provided the opportunity to speak with Capt. Dickson and Capt. Graham about her various concerns on a multitude of topics.
11. Complainant was invited by Respondent to give a presentation on or about April 27, 2016, to discuss ideas as part of its goal of continuous improvement.
12. In an email on February 10, 2016, Complainant congratulated Ed Bastian on becoming CEO.
13. On February 10, Ed Bastian responded to Complainant's email "Thanks Karlene. Good to hear from you. Looking forward to many great chapters for us to write. Best. Ed".
14. Complainant emailed Ed Bastian on March 5, 2016.
15. Ed Bastian responded to Complainant's March 5, 2016 email, stating only: "Thanks Karlene. I would appreciate seeing the report and will be sure to follow up."
16. On March 15, 2016, the Complainant had a meeting with Capt. Davis, and discussed the subject of "green slips."
17. Complainant filed an AIR 21 complaint on June 6, 2016.
18. Complainant met with Kelley Nabors ("Nabors") on March 8, 2016 to discuss Complainant's equal opportunity ("EO") complaints.
19. Complainant and Nabors met at Nabors' hotel and that interview lasted approximately three hours.
20. Following Ms. Nabors' meeting with Complainant on March 8, 2016, Ms. Nabors contacted Respondent's Legal Department and eventually spoke with Mr. Puckett and Dr. Faulkner regarding her meeting with Complainant.
21. On March 22, 2016, Capt. Davis presented Complainant with a letter dated March 17, 2016, which advised her that she was removed from service pursuant to Section 15.B of the pilots' collective bargaining agreement based on alleged concerns regarding Complainant's mental health and whether she still met the standards required for a First Class Medical Certificate.

22. The Pilot Work Agreement, at Section 15, sets forth a mandatory procedure by which Respondent may evaluate whether a pilot meets the standards established by the Federal Aviation Administration ("FAA") for issuance of an FAA First Class Medical Certificate.
23. PWA Section 15.B.4 requires Respondent's Director of health Services (DHS) to confer with the ALPA Medical Advisor prior to sending the pilot for the evaluation, provided the pilot releases per pertinent medical information to the ALPA Aeromedical Advisor.
24. PWA Section 15.B.5 Evaluations are performed by a Company Medical Examiner ("CME") selected by the DHS.
25. PWA 15.B.6 requires that "Medical information provided by the DHS to the CME must be limited to medically relevant information provided by doctors and treating facilities."
26. Dr. Faulkner recommended that Complainant undergo a psychiatric examination pursuant to the terms of the PWA.
27. Prior to Dr. Faulkner's determination, he engaged in no meaningful review or otherwise of Complainant's medical records as provided for by CBA Section 15 B.1 and 2.
28. Complainant agreed to meet with Dr. Faulkner on April 27, 2016.
29. Complainant underwent neuropsychological testing.
30. Dr. Faulkner referred Complainant to Dr. David B. Altman.
31. Respondent provided Dr. Altman with documents pursuant to his requests.
32. Dr. Altman issued a report which deemed Complainant medically non-qualified.
33. Mayo Clinic served as Complainant's pilot medical examiner ("PME").
34. The PME determined that Complainant was fit to work as a pilot and Dr. Broyhill emailed Respondent on June 19, 2017.
35. The CME and PME engaged in multiple communications seeking to choose a Neutral Medical Examiner ("NME").
36. Dr. Huff issued a determination that Complainant was fit to work as a pilot.
37. On August 22, 2017, the FAA Medical Appeals Board deemed Complainant eligible to retain her First Class Medical certificate and reinstated her.

In addition, per Complainant's Requests for Admissions, the following facts are established:[20]

1. Respondent's placement of Complainant in Section 15 status pursuant to the directive dated March 17, 2016, resulted in the Complainants' loss of jump seat privileges.
2. Dr. Faulkner communicated with Dr. Altman regarding the selection of an NME with respect to Complainant's fitness for duty review process.
3. Respondent contacted the FAA to advise them of the existence of the CME's report, and requested that the FAA obtain a copy of that report prior to resolution of the Section 15 medical review evaluation process.

[20] *See Respondent's Objections and Responses to Complainant's First Combined Discovery Interrogatories, Requests for Documents, and Requests for Admissions,* dated Oct. 12, 2018, located at Seham Mot. for Summary Dec. Decl. Ex. C.