U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

KARLENE PETITT

COMPLAINANT,

v.

DELTA AIRLINES, INC.,

RESPONDENT.

ARB CASE NO. 2021-0014

ALJ CASE NO. 2018-AIR-00041

DATE: March 29, 2022

Appearances:

For the Complainant:

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

For the Respondent:

Paul D. Clement, Esq. and George W. Hicks, Jr., Esq.; *Kirkland & Ellis LLP*; Washington, District of Columbia

Matthew D. Klayman, Esq.; *Morgan, Lewis & Bockius LLP*; Philadelphia, Pennsylvania

Ira G. Rosenstein, Esq. and Lincoln O. Bisbee, Esq.; *Morgan, Lewis & Bockius LLP*; New York, New York

Bryan M. Killian, Esq.; *Morgan, Lewis & Bockius LLP*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

ORDER OF REMAND

PER CURIAM. Karlene Petitt (Complainant) filed a complaint under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century[1] (AIR 21), and its implementing regulations,[2] alleging that her employer, Delta Airlines (Respondent), had unlawfully discriminated against her under the AIR 21's whistleblower protection provisions. After a formal hearing, an Administrative Law Judge (ALJ) granted the claim and awarded damages against Respondent. Respondent appealed the ALJ's decision to the Administrative Review Board (ARB or Board). For the reasons discussed below, we affirm the ALJ's decision in part and remand to the ALJ for further proceedings consistent with this opinion.

BACKGROUND[3]

Complainant has worked for Respondent since it merged with Northwest Airlines in 2008. Respondent employs Complainant as a First Officer.

To fly transport category aircraft, a pilot must hold an airline transport pilot (ATP) certificate and a Federal Aviation Administration (FAA) airman medical certificate. A pilot may only use the ATP certificate to fly transport planes when in possession of a current and valid FAA airman medical certificate.

Respondent has a collective bargaining agreement (CBA) with Air Line Pilots Association (union), which covers Complainant's employment. In Section 15 of the Pilot Working Agreement (PWA), Respondent's Director of Health Services (DHS) "may require a medical evaluation of a pilot holding a valid First Class Medical Certification. This medical evaluation will be limited to the nature of the First Class Medical physical standard(s) in question."[4]

If Respondent utilizes the Section 15 process against a pilot, that process involves several steps. First, Respondent chooses a Company Medical Examiner (CME) to conduct a medical examination.[5] After the CME's medical evaluation is complete, a pilot may hire his or her own medical examiner to serve as the Pilot

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1 49 U.S.C. § 42121 (2020).

2 29 C.F.R. Part 1979 (2021).

3 In this background, we make no findings of fact.

4 JX-A at 1.

5 Decision and Order (D. & O.) at 11.

Medical Examiner (PME) to counter the CME's report. If the reports conflict, the CME and PME jointly choose the tie-breaking Neutral Medical Examiner (NME). All parties are required to accept the NME's determination as "fact and binding."[6] The CME is not to report the results to the FAA until completion of the Section 15 process.[7]

On November 3, 2015, Complainant emailed her direct supervisor, Chief Pilot Phil Davis, regarding several matters including safety concerns. At the end of the email, Complainant requested a meeting with Captains James Graham and Stephen Dickson.[8]

On November 9, 2015, Captain Graham forwarded Complainant's November 3, 2015 email to Captain O.C. Miller and added that it was "[p]robably good to engage HR again at this point given this latest email to Phil as I believe we could find ourselves being accused of inappropriate wrongdoing by her and we need to start the tracking for this phase. I also think we should consider whether a section 15 is appropriate."[9] Captain Graham's November 9, 2015 email is the first recorded statement regarding the possibility of referring Complainant for the Section 15 process. Captain Miller forwarded this email to Chris Puckett, one of Respondent's labor relations attorneys. Also on November 9, 2015, Complainant directly emailed Captain Graham to ask for a meeting with him and Captain Dickson.

On November 16, 2015, an email exchange occurred between Captains Graham and Dickson and Complainant. At one point during the exchange, Captain Graham forwarded an email from Complainant to Captain Dickson, adding "just FYI I will brief HR and handle this with kid gloves. She could be a candidate for a section 15 after this goes through."[10]

On January 28, 2016, Complainant met with Captains Graham and Dickson and provided a 45-page report that she titled "Assessment of Delta Air Lines 'Flight Operations' Safety Culture" (Assessment Report). Captain Graham divided Complainant's Assessment Report into three categories: operational issues, safety concerns, and unequal treatment. Respondent's Equal Opportunity ("EO") department began investigating Complainant's claim. Ms. Kelley Nabors, a manager of equal opportunity and pass travel protection in Respondent's Human Resources department, was chosen to lead the investigation.

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6 JX-A at 2.

7 *Id.* at 1.

8 D. & O. at 24.

9 *Id.* at 26; CX-11 at 2.

10 D. & O. at 27; CX-7 at 1.

On March 8, 2016, Complainant and Ms. Nabors met in a hotel lobby (Nabors-Petitt meeting).[11] The focus of the meeting was on safety-culture allegations Complainant had made in her Assessment Report.[12] During the meeting, Complainant expressed to Ms. Nabors that she feared for her safety and the safety of Respondent's operations.[13] After the meeting, Ms. Nabors was concerned about Complainant's mental well-being.[14] On March 9, 2016, Ms. Nabors called and talked to Ms. Meg Taylor, an employment lawyer for Respondent, to discuss the Nabors-Petitt meeting.

On March 10, 2016, Ms. Nabors met in person with Mr. Puckett, Ms. Taylor, and Ms. Nabors' immediate supervisor to discuss the details of the Nabors-Petitt meeting. During the meeting, Mr. Puckett decided he wanted to have a discussion with Ms. Nabors and the DHS physician, Dr. Faulkner.[15] After this meeting, Mr. Puckett went to his office with Ms. Nabors and called Dr. Faulkner. Mr. Puckett stepped out of his office and left Ms. Nabors to speak to Dr. Faulkner alone. As Ms. Nabors described the Nabors-Petitt meeting, Dr. Faulkner grew concerned over the allegation that Complainant was fearful of physical harm. Dr. Faulkner requested that Ms. Nabors create a written statement. On the same day, Mr. Puckett had a phone conversation with Ms. Taylor and Dr. Faulkner to "talk[] to [Dr. Faulkner] about perhaps consulting a specialist in the area, somebody with a psychiatric background."[16] Under the PWA's Section 15 process, the DHS is responsible for designating a CME to evaluate the referred pilot. Mr. Puckett emailed Dr. David Altman, a psychiatrist, inquiring about his availability to serve as the CME, and explaining that a "pilot has made a few statements that have raised some mental fitness concerns but as with most things I want to ensure we do not overreact."[17] Mr. Puckett copied Ms. Taylor on this email but not Dr. Faulkner.

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[11] D. & O. at 34.

[12] *Id.*

[13] *Id.* at 35.

[14] During the Nabors-Petitt meeting, Ms. Nabors felt that Complainant was difficult to follow, frazzled, tearful, and very emotional. Ms. Nabors recalled Complainant being fearful that someone was out to get her. Ms. Nabors took Complainant's statements to infer that she was concerned for her physical safety. Complainant made two statements during their meeting that Ms. Nabors emphasized, one being that Complainant had given documents to her mother for safekeeping, and the other was her concern over the possibility of an aviation accident. Ms. Nabors recalled that Complainant had told her she had given documents, including her Safety Assessment Report, to her mother with instructions that if anything should happen to her, that her mother should take the documents to news outlets. *Id.* at 34-35.

[15] *Id.* at 37.

[16] *Id.* at 89; Tr. at 1755-56.

[17] RX-40 at 2.

On March 15, 2016, Mr. Puckett emailed Dr. Altman a copy of Complainant's Assessment Report and specified that the Nabors-Petitt meeting "raised concerns that we would like to discuss with you tomorrow."[18]

On March 16, 2016, a telephone conference occurred between Dr. Altman, Mr. Puckett, Ms. Nabors, and Dr. Faulkner, during which Dr. Altman was told Complainant had memory issues and about Complainant's concern that Respondent would in some way harm her.[19] Dr. Altman was asked for his medical opinion and he recommended a psychiatric evaluation including neuro-psychological testing because of the concern about Complainant's alleged memory issues.[20]

On March 17, 2016, an in-person conference occurred between Captain Graham, Ms. Nabors, Mr. Puckett, Ms. Taylor, and Mr. Peter Carter, a Respondent-employed attorney.[21] Dr. Altman participated telephonically. Ms. Nabors recapped the events of the Nabors-Petitt meeting, and Dr. Faulkner and Dr. Altman discussed whether a Section 15 assessment would be appropriate. Ten minutes after Ms. Nabors made her report, Dr. Faulkner made his recommendation to initiate the Section 15 process and Captain Graham accepted Dr. Faulkner's recommendation. Immediately after the meeting, Mr. Puckett called Captain Davis to inform him that Complainant was being placed into the Section 15 process and that he would be given the appropriate paperwork to provide to Complainant to start the process.

On March 22, 2016, Captain Davis met with Complainant and delivered the Section 15 letter. A union representative was present.

On April 27, 2016, Complainant gave a presentation about her Assessment Report to divisional leaders. Immediately after the presentation, Complainant met with Dr. Faulkner in person to discuss the Nabors-Petitt meeting. On April 28, 2016, Dr. Faulkner called Complainant and advised that he was going to refer her to Dr. Altman for a Section 15 evaluation.[22]

In a letter dated May 4, 2016, Dr. Faulkner formally referred Complainant to Dr. Altman "for evaluation of her current status and fitness for duty in relationship to the [FAA] – Office of Aerospace Medicine (FAA – OAM) medical standards."[23]

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18 CX-3 at 5-6.

19 D. & O. at 38.

20 *Id.*

21 *Id.* at 41.

22 *Id.* at 45.

23 JX-H at 1-2.

Dr. Faulkner notified Complainant that she would be required to undergo neuro-psychological testing on May 11 with a neuropsychologist prior to her psychological and psychiatric evaluation with Dr. Altman in Chicago. Dr. Altman met with Complainant three times, twice in July of 2016 and once in September of 2016.

On or about December 7, 2016, Dr. Faulkner received Dr. Altman's report. Dr. Altman determined Complainant suffered from bi-polar disorder and was unfit to fly. On December 24, 2016, Complainant received Dr. Altman's report in the mail. Once Dr. Altman's report was finalized, Complainant requested to be placed on sick leave status so that she would be paid her normal earnings. After exhausting her sick leave allowance, she transitioned to disability pay (the normal pay when a pilot is undergoing the Section 15 process), which amounted to 50% of her normal earnings.

Complainant hired a panel of nine doctors from the Mayo Clinic's Aviation Medical Department (consisting of a Human Intervention Motivation Study (HIMS) Aviation Medical Examiner, a HIMS psychologist, two psychiatrists, and occupational medicine specialists) to serve as the PME.[24] On February 16, 2017, the Mayo Clinic published a report stating that it was the unanimous opinion of the panel that Complainant did not have bi-polar disorder and that she did not have a personality disorder. Further, they also determined that she did not have, nor had she ever had, any other psychiatric disorder.

On or about February 22, 2017, Complainant obtained a recertification of her first-class airman medical certificate after previously filing for recertification.[25] Prior to February 2017, Complainant disclosed on her application for her first-class airman medical certificate the identities of the mental health doctors she met with during this process.[26] Complainant emailed Dr. Faulkner a copy of the certificate. Dr. Faulkner was concerned because he did not believe that the FAA knew about the conflicting diagnoses from Dr. Altman and the Mayo Clinic. Further, Complainant had not yet finished the Section 15 process.[27] After asking and receiving guidance from Mr. Puckett if he could inform the FAA of the CME's findings, Dr. Faulkner contacted one of the FAA's regional flight surgeons and advised that Respondent had information regarding a pilot with a permanently disqualifying condition. Afterwards, the FAA contacted Complainant directly and requested additional information. On August 21, 2017, the FAA's Northwest

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[24] D. & O. at 58.

[25] *Id.* at 60.

[26] *Id.* at 60 n.179.

[27] *Id.* at 60.

Regional Flight Surgeon sent Complainant a letter informing her that she was still eligible for a first-class medical certificate.[28]

In July of 2017, the CME and PME approved Dr. Andrew Huff as the NME. On September 2, 2017, Dr. Huff produced a report clearing Complainant to fly, the Section 15 process concluded, and Respondent returned Complainant to flight status.

PROCEDURAL HISTORY AND ALJ DECISION

On June 6, 2016, Complainant filed the current AIR 21 complaint against Respondent with the Occupational Safety and Health Administration (OSHA). The Secretary of Labor found there was insufficient evidence to establish that Respondent violated AIR 21. Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ). The ALJ assigned to the case held a formal hearing from March 25, 2019, to March 29, 2019, on April 25, 2019, and from May 3 to May 5, 2019.

The ALJ issued a D. & O. on December 21, 2020, and Respondent timely appealed to the Board on January 4, 2021.

The ALJ found in Complainant's favor. First, the ALJ noted the parties stipulated that Complainant engaged in protected activity when she provided her Assessment Report to Captains Graham and Dickson.[29] The ALJ also found that Complainant's November 3, 2015 email to Captain Davis was protected activity, and that her concerns in the email were subjectively and objectively reasonable. The ALJ focused on Complainant's references to the FAA-regulated Safety Management Systems (SMS) program and her allegation that Respondent failed to meet SMS-safety culture standards.[30] Complainant finished the email by requesting to meet with Captains Graham and Dickson. The ALJ stated that he could infer from Complainant's email that her request for a meeting was to discuss the same concerns described in the email.[31]

The ALJ then discussed whether the Section 15 process constituted an adverse action and concluded that "*any* referral to a Section 15 mental health evaluation constitutes an adverse employment action."[32] The ALJ stated that in this case Complainant was subjected to the Section 15 process for 21 months and that

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28 *Id.* at 60; CX-153 at 1.

29 D. & O. at 8.

30 *Id.* at 74-75.

31 *Id.*

32 *Id.* at 78.

the possibly career-ending process was "anything but trivial".[33] The ALJ noted the "severe emotional toll placed" on Complainant's well-being, and the impact of any future employment in the aviation community. The ALJ also noted that not flying for 21 months can degrade a pilot's proficiency to operate an aircraft and to maintain instrument flying skills.[34]

The ALJ then considered whether Complainant's protected activity was a contributing factor in Respondent's unfavorable personnel action. The ALJ found that temporal proximity existed between Complainant's November 3, 2015 email and Captain Graham's November 9, 2015 email, and between Complainant's November 3, 2015 email and the Nabors-Petitt meeting.[35] The ALJ stated that "Captain Graham first contemplated the Section 15 process after reading the November 3, 2015 email" but before the Nabors-Petitt meeting.[36] Given the temporal proximity, the ALJ gave little weight to Captain Graham's statements that the November 3, 2015 email and the subsequent Assessment Report had no bearing on his decision to refer Complainant for a Section 15 evaluation.[37] The ALJ stated this "sequence of events left the Tribunal with the impression that Captain Graham harbored little if any tolerance for criticism of the organization he ran, especially criticism from a line pilot like Complainant."[38] The ALJ "question[ed] the candor of Captain Graham's testimony at various points, and occasionally found his testimony to be incredible."[39] The ALJ found that Captain Graham had "a more outsized role in the Section 15 process than what he had testified to and what Respondent has argued."[40]

The ALJ found Mr. Puckett also played an outsized role. Mr. Puckett's duty during the Section 15 process as Respondent's in-house lawyer is to provide advice and counsel on compliance.[41] The ALJ found Mr. Puckett was over-involved in his role as counsel during the process. The ALJ then described the different ways Mr.

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33 *Id.* at 79.

34 *Id.* at 80.

35 *Id.* at 83-84.

36 *Id.* at 85.

37 *Id* at 71.

38 *Id.*

39 *Id.* The Board will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable." *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, *slip op.* at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (quotations omitted).

40 D. & O. at 85.

41 *Id.* at 87.

Puckett was involved prior to and after the Nabors-Petitt meeting.[42] For example, the ALJ noted that Mr. Puckett was the one who initially contacted Dr. Altman to inquire about his availability and that Mr. Puckett was the person in charge of setting up the March 16 meeting.[43] The ALJ noted that Captain Miller had forwarded Captain Graham's November 9, 2015 email to Mr. Puckett on the same day, and thus, Mr. Puckett was aware of Captain Graham's views about Complainant while he played this outsized role in the Section 15 process.[44] The ALJ therefore found Complainant's protected activity contributed to the adverse action.

Finally, the ALJ found that Respondent failed to prove by clear and convincing evidence that it would have taken the same adverse action in the absence of Complainant's protected activity. The ALJ based his finding on "Captain Graham's knee-jerk reaction to Complainant's November 3, 2015 email where she discussed protected activity."[45] The ALJ also noted that Captain Graham provided shifting rationales as to why he accepted Dr. Faulkner's recommendation.[46] The ALJ found the actions of Captain Graham and Mr. Puckett suggested a "manipulation of a process to achieve a desired outcome."[47] Additionally, the ALJ noted that Respondent chose Dr. Altman as the CME despite the union's previous warnings against him as a physician.[48]

In summary, the ALJ found that: 1) Complainant's November 3, 2015 email constituted protected activity; 2) Respondent subjected Complainant to adverse action by initiating and proceeding with a Section 15 medical evaluation; 3) Complainant's protected activity contributed to the adverse action; and 4) Respondent did not prove that it would have taken the same action even in the absence of Complainant's protected activity. Accordingly, the ALJ ruled that Respondent violated the AIR 21, and awarded Complainant relief, including back and front pay, publication of the D. & O., and non-economic compensatory damages.

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42 *Id.* at 87-95.

43 *Id.* at 89-90.

44 *Id.* at 88.

45 *Id.* at 99.

46 *Id.* at 100-01.

47 *Id.* at 99.

48 "The Tribunal is struck that Mr. Puckett would again select Dr. Altman, even after the pilots' union's expressed concerns to him about Dr. Altman's [prior] reporting of his findings to the FAA prior to completion of the Section 15 process." *Id.* at 89. The ALJ also noted that Respondent chose a psychiatrist in Chicago, and not Seattle, where Complainant resides. As a result of this choice, Complainant had to travel to Chicago three times during the Section 15 process to be evaluated by Dr. Altman. *Id.* at 90 n.231.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.[49] In AIR 21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence.[50] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[51]

DISCUSSION

Section 42121 of the AIR 21 provides that an air carrier "may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided . . . to the employer or Federal Government information relating to any violations or alleged violations of any order, regulations, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety."[52]

To prevail in a retaliation case under AIR 21, the complainant must prove, by a preponderance of the evidence, that she engaged in protected activity that was a contributing factor in the adverse employment action taken against her.[53] If the complainant meets her burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[54]

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[49] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

[50] 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter, LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

[51] *Hoffman v. NetJets Aviation, Inc.*, ARB No. 2009-0021, ALJ No. 2007-AIR-00007, slip op. at 4 (ARB Mar. 24, 2011) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

[52] 49 U.S.C. § 42121(a)(1).

[53] *Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021); 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

[54] *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4-5; 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

In the current matter, Respondent asks the Board to reverse the ALJ's decision. We address each of Respondent's arguments below.

1. Jurisdiction

We begin with Respondent's argument that the Railway Labor Act (RLA) precludes jurisdiction over this matter because there is a dispute over the PWA's meaning. RLA preemption occurs when there is an "active dispute over the 'meaning of contract terms.'"[55] Specifically, Respondent argues that the "reason to believe" standard[56] in the PWA that addresses the basis for initiating the Section 15 process or limits the discretion of the DHS when requiring a medical evaluation of a pilot creates a genuine dispute warranting RLA mediation.

The relevant portion of the PWA's Section 15 states that "[t]he DHS may require a medical evaluation of a pilot holding a valid First Class Medical Certification. This medical evaluation will be limited to the nature of the First Class Medical physical standard(s) in question."[57]

Upon review of the PWA, the only "reason to believe" language is found in a different part of Section 15:

> Regardless of whether a pilot has a current First Class Medical Certificate, the Director – Health Services (DHS) may review the medical records of a pilot: a. who receives an FAA special issuance medical certificate; b. who seeks the return to flight duty after being absent for at least four months for medical reasons; or c. when there is *reason to believe* that he may not meet the physical standards.[58]

The plain language of the relevant portion of Section 15 does not contain a "reason to believe" standard or any other stated standard to which the DHS must abide when deciding whether to initiate and proceed with a medical examination under the Section 15 process. Accordingly, as there is no need to resolve a disputed interpretation over the PWA's meaning, the RLA does not preclude the Board's jurisdiction in this case.

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55 *Alaska Airlines, Inc. v. Schurke*, 898 F.3d 904, 921 (9th Cir. 2018) (*quoting Livades v. Bradshaw*, 512 U.S. 107, 124 (1994)).

56 Respondent contends that the PWA contains a mandated "reason to believe" standard that the DHS must abide by when requiring a pilot to undergo a medical evaluation.

57 JX-A at 1.

58 *Id.* (emphasis added).

2. Protected Activity

AIR 21 protects employees who "blow the whistle" and provide information on matters relating to air carrier safety. Under AIR 21, a complainant engages in protected activity if he or she:

> (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 [49 USCS §§ 40101 et seq.] or any other law of the United States;
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> (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 [49 USCS §§ 40101 et seq.] or any other law of the United States;
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> (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.[59]

Protected activity under AIR 21 has two 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.[60] In analogous settings, the Administrative Review Board has 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.[61]

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[59] 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102.

[60] *Occhione v. PSA Airlines*, ARB No. 2013-0061, ALJ No. 2011-AIR-00012, slip op. at 9 (ARB Nov. 26, 2014); *Dick v. Tango Transp.*, ARB No. 2014-0054, ALJ No. 2013-STA-00060, slip op. at 8 (ARB Aug. 30, 2016).

[61] *See Sylvester v. Parexel Int'l, LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 14-15 (ARB May 25, 2011); *Wiest v. Lynch*, 710 F.3d 121, 132 (3d Cir. 2013).

The Board has held that "the AIR 21 whistleblower statute does not require that protected activity relate 'definitively and specifically' to a safety issue."[62] "The ARB has noted that a respondent's knowledge of the protected activity need not be specific, and a complainant need not prove that a respondent knew that the complaint involved an express violation."[63]

In this case, Respondent concedes that the Assessment Report constitutes protected activity and that Complainant engaged in protected activity when she provided her Assessment Report. But Respondent appeals the ALJ's finding that Complainant's November 3, 2015 email to Captain Davis was protected activity. Respondent argues the email cannot constitute protected activity because it did not provide any information or raise any concerns relating to airline-safety violations, but instead focused on Complainant's interpersonal conflicts.

The Board concludes that the ALJ's finding is supported by substantial evidence. In the November 3, 2015 email, Complainant noted she recently attended a convention at which Respondent's then-CEO, Richard Anderson, gave a speech discussing Delta's compliance with the FAA-regulated SMS program. Complainant wrote that Mr. Anderson emphasized an open-door policy for all employees relating to safety issues but that her personal experiences were inconsistent with the SMS-safety culture described in his speech.[64] Specifically, Complainant indicated that Respondent's inappropriate behavior and fear-based tactics were inconsistent with SMS and a culture of safety.[65] After raising allegations that Respondent engaged in activities that "are not part of SMS, or any safety culture," less than two months later Complainant requested a meeting with supervisors to discuss information relating to a purported violation of a regulation, order, or standard of the FAA or federal law relating to air carrier safety.[66] A complainant engages in protected activity whenever she "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 [FAA]."[67] After the November 3, 2015 email, Complainant and Captain Graham

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62 *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 8 (ARB Feb. 13, 2015). *See also Occhione*, ARB No. 2013-0061, slip op. at 8 ("more recent ARB precedent as well as Fourth Circuit law leads us to conclude that this specificity standard is inappropriate and inconsistent with the AIR 21 whistleblower statute.").

63 *Newell v. Airgas, Inc.*, ARB No. 2016-0007, ALJ No. 2015-STA-00006, slip op. at 14 (ARB Jan. 10, 2018).

64 D. & O. at 23-24.

65 *Id.* at 24.

66 *Id.*

67 49 U.S.C. § 42121(a)(1) (emphasis added).

agreed to meet, and approximately a month and a half later, Complainant met with Captains Graham and Dickson on January 28, 2016. At this meeting, Complainant provided and presented her Assessment Report. Respondent does not dispute that the Assessment Report, containing safety violation allegations, is protected activity. Accordingly, we affirm the ALJ's finding that Complainant's November 3, 2015 email is protected activity.[68]

3. Adverse Action

AIR 21 prohibits an employer from discharging or otherwise discriminating "against an employee with respect to compensation, terms, conditions, or privileges of employment" for engaging in protected conduct.[69] It is illegal "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" who engages in protected activity.[70] The Board has said that an adverse action may also include firing, failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[71] "An adverse action is simply something unfavorable to an employee, not necessarily unfair, retaliatory or illegal."[72] An adverse action is "more than trivial" when it is "materially adverse" so as to "dissuad[e] a reasonable worker" from protected activity.[73]

In describing the injury or harm alleged as retaliation, the Supreme Court has 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 making or supporting a charge of

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[68] *See Occhione*, ARB No. 2013-0061, slip op. at 10 ("[a]lthough [the complainant] did not communicate the details of why he intended to go to the FAA on October 12 and 13, when he informed his supervisors of his intent, it is logical to assume that it was for the same reasons as specified in his protected communication sent a month later.").

[69] 49 U.S.C. § 42121(a)(1).

[70] 29 C.F.R. § 1979.102(b).

[71] *Hirst v. Se. Airlines, Inc.*, ARB Nos. 2004-0116, -0160, ALJ No. 2003-AIR-00047, slip op. at 9 (ARB Jan. 31, 2007) (citations omitted).

[72] *Beatty v. Celadon Trucking Servs., Inc.*, ARB Nos. 2015-0085, -0086, ALJ No. 2015-STA-00010, slip op. at 7 (ARB Dec. 8, 2017).

[73] *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 2015-0080, ALJ No. 2015-AIR-00016, slip op. at 11 (ARB May 8, 2017). *See Powers v. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, ARB No. 2004-0111, ALJ No. 2004-AIR-00019, slip op. at 13 (ARB Aug. 31, 2007) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)) (The question is whether the action(s) is "materially adverse," or "that is, 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'").

discrimination.'"[74] Moreover, the Court held that the significance of any given act of retaliation will often depend upon the particular circumstances and context.[75] Any alleged adverse action must be considered in context, including internal investigations and hearings which may result in the imposition of discipline.[76]

For reasons explained below, we affirm the ALJ's finding that Respondent took an adverse action against Complainant, but conclude that the ALJ made a legal error in concluding "that *any* referral to a Section 15 mental health evaluation constitutes an adverse employment action."[77]

The Board has previously held that not all investigations or evaluations are automatically considered adverse actions.[78] Whether an investigation or evaluation is an adverse action is a case-by-case factual determination. "[T]he analysis of whether an action is adverse must be contextual and include a discussion of the circumstances in each case."[79] "[B]ringing a disciplinary charge alone, in and of itself, does not automatically constitute an adverse action, although it can constitute one if such action 'would dissuade a reasonable employee' from engaging in the protected conduct."[80] The determination of whether an investigation or evaluation is an adverse action is not based on the subsequent results or whether an employee is eventually cleared of any allegations.[81]

In the context of AIR 21's implementing regulations, an employer's investigation or initiation of a compulsory medical evaluation under negotiated procedures mandated by a CBA is not necessarily, in and of itself, a threat or form

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74 *Burlington N.*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (quoting *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).

75 *Id.* at 69.

76 *See Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 7 (ARB Nov. 25, 2019), *rev'd on other grounds*, *Thorstenson v. U.S. Dep't of Labor*, 831 F. App'x 842 (9th Cir. 2020) (unpublished) (any alleged adverse action must be considered in context, including internal investigations and hearings which may result in the imposition of discipline).

77 D. & O. at 78.

78 *Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043, slip op. at 7 (ARB Sept. 24, 2020).

79 *Id.*

80 *Petronio v. Nat'l R.R. Pas. Corp.*, 2019 WL 4857579, at *6 (S.D.N.Y. 2019); *Thorstenson*, ARB Nos. 2018-0059, -0060, slip op. at 7.

81 *See Perez*, ARB Nos. 2017-0014, -0040, slip op. at 7-9.

of intimidation.[82] However, an investigation or compulsory medical evaluation can constitute an adverse action if "it is retaliatory, a pretext, performed in bad faith, or otherwise constitutes harassment."[83] An investigation or a compulsory medical evaluation might accompany other material consequences that affect the employee's terms, conditions, and privileges of employment or otherwise dissuade a reasonable employee from engaging in protected activity.[84]

Again, whether an employer's investigation or evaluation is an adverse action is a case-by-case factual determination. Factors that may be considered include, but are not limited to, the length of investigation,[85] whether the investigation is used as a form of harassment (bad faith investigation), whether it was a routine investigation (good faith investigation), or whether the employee was treated differently than similarly situated employees who did not engage in protected activity.

On appeal, Respondent argues that ensuring a pilot is fit to fly cannot inherently constitute an adverse action as a matter of law.[86] We are mindful of the paramount importance of Respondent's Section 15 process to achieve safety in the skies. However, to hold that the initiation and application of an investigation or

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[82] It is illegal "to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" who engages in protected activity. 29 C.F.R. § 1979.102(b). *See also Perez*, ARB Nos. 2017-0014, -0040, slip op. at 8 (quoting *Brisbois v. Soo Line R.R. Co.*, 124 F. Supp. 3d 891, 903 (D. Minn. 2015) ("To hold that a rail worker suffers an adverse employment action any time a rail carrier attempts to determine whether she has violated a rule—typically by following an investigatory process mandated under a CBA—would have major implications for labor relations in the rail industry.").

[83] *Perez*, ARB Nos. 2017-0014, -0040, slip op. at 9.

[84] *Renzi v. Union Pac. R.R. Co.*, 2018 WL 3970149, at *4-5 (N.D. Ill. Aug. 20, 2018) (citing *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 2012-0003, ALJ No. 2010-FRS-00018, slip op. at 2 (ARB Dec. 21, 2012), for the point that investigations can constitute adverse actions but that "context matters" when making this assessment).

[85] *See Vernace*, ARB No. 2012-00003, slip op. at 3 (an investigation extending over a year constituted prohibited retaliation under the FRSA).

[86] For support of its argument that the Section 15 process cannot constitute an adverse action, Respondent relies on *Estabrook v. Fed. Express Corp.*, ARB 2017-0047, ALJ 2014-AIR-00022, slip op. at 11-12 n.7 (ARB Aug. 8, 2019). In *Estabrook*, the Board stated in a footnote that "[w]hile we do not disturb the ALJ's findings and conclusions, we note that an employer's directive to a pilot to undergo a psychological examination, in and out of itself, is not an adverse action" because it "is part of an air carrier's safety responsibility for employing a pilot." *Id.* However, the employer in *Estabrook* did not appeal to the Board the ALJ's finding that the employer's directive to comply with a medical examination was an adverse action. Accordingly, Respondent's reliance on *Estabrook* is erroneous because the footnote constitutes dicta.

evaluation could never be an adverse action under the law could insulate the employer from liability when the employer's investigation or evaluation is motivated by an employee's protected activity. That possibility alone would deter employees from engaging in protected activity because of fear of misuse of the Section 15 process and its potentially negative impact on their careers. This would obviously undermine the utility of Section 15.

On the other hand, to provide that "any" application of the Section 15 process is an adverse action could open up employers to lawsuits virtually any time the process is used—in turn deterring the willingness of employers to initiate a Section 15 referral even when cautionary signs arise. Hence, a balance must be struck between these competing goals, which effectively must be done on a case-by-case basis. We believe we have done so here in concluding, that on the facts of this case, the initiation and application of the section 15 process was indeed an adverse action, as explained below.

In his adverse action analysis, the ALJ found "that Complainant was subjected to the Section 15 process for 21 months where her very career h[ung] in the balance."[87] The ALJ noted that during this period Complainant's FAA airman medical certificate was placed in jeopardy. The ALJ also considered the emotional toll such a process would have on a pilot who depends on having a valid medical certificate to perform her profession. Additionally, Captain Graham's November 2015 emails demonstrate that he had a "knee jerk" reaction to Complainant's protected activity and was quick to suggest referring Complainant to the Section 15 process even before the alleged troubling behavior during the Nabors-Petitt meeting had occurred.[88]

Whether an employer's investigation will constitute an adverse action depends on the factual circumstances. In the current case, the ALJ's finding that the Section 15 process against Complainant was adverse, and a bad faith investigation is supported by substantial evidence. Accordingly, we affirm the ALJ's finding that Complainant suffered an adverse action when Respondent referred her for a Section 15 evaluation.

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87 D. & O. at 80.

88 After engaging in protected activity, but prior to the Nabors-Pettit meeting, Captain Graham referenced initiating the Section 15 process against Complainant on two separate occasions. On November 9, 2015, Captain Graham emailed Captain Miller: "Probably good to engage HR again at this point given this latest email to Phil as I believe we could find ourselves being accused of inappropriate wrongdoing by her and we need to start the tracking for this phase. I also think we should consider whether a section 15 is appropriate." CX-11 at 2; D. & O. at 85. On November 16, 2015, Captain Graham emailed Captain Dickson: "just FYI I will brief HR and handle this with kid gloves. She could be a candidate for a Section 15 after this goes through." CX-7 at 1; D. & O. at 85.

4. Contributing Factor

Complainant has the burden to prove, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action. A "'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'"[89] While an inference of discrimination may arise when an adverse action closely follows a particular activity, an intervening event diminishes the inference.[90]

Respondent first argues that the ALJ made a legal error by applying legally flawed theories of chain-of-events causation and therefore, reversal is required. In his contributing factor analysis, the ALJ stated Complainant could meet her burden by proving that her protected activity was a contributing factor to the adverse employment decision, and that proof of actual discriminatory or retaliatory intent was not required.[91] The ALJ discussed recent Board precedent, and properly stated that ALJs are no longer required to apply the chain-of-events or inextricably intertwined theories, but must explain how protected activity is a contributing factor to the adverse action.[92] We find the ALJ applied the correct legal standard in his analysis.

Alternatively, Respondent argues the Nabors-Petitt meeting was an intervening factor that broke any causal chain from Complainant's protected activity to the adverse employment action. Once there is an intervening event that independently could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.[93]

The ALJ's finding that Complainant's protected activity was a contributing factor in the adverse action is supported by substantial evidence. Respondent's argument of an intervening event is unpersuasive. As discussed above, the record shows that Captain Graham was quick to propose that Complainant was a

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89 *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461-62 (9th Cir. 2018) (quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017)).

90 *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 6-12 (ARB Jan. 22, 2020) (analyzing temporal proximity, inference of retaliation, intervening events, and proof by a preponderance of the evidence).

91 D. & O. at 83 n.222, 97. Our affirmance of the ALJ's D. & O. is not necessarily an endorsement of each point of the ALJ's reasoning.

92 *Id.* at 83.

93 *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 1998-0168, ALJ No. 1997-WPC-00001, slip op. at 8 (ARB July 31, 2001).

candidate for the Section 15 process after the November 3, 2015 email, but months before the Nabors-Petitt meeting.[94]

Therefore, the Board finds that the ALJ applied the correct legal standard, and that his finding that Complainant's protected activity was a contributing factor in the adverse employment action taken against her is supported by substantial evidence and is consistent with the law.

5. Affirmative Defense

After Complainant establishes her case, the Act provides, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."[95] "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain."[96]

Respondent argues that remand is necessary in this matter because the ALJ erroneously applied the wrong legal standard. We recognize that the ALJ erred in stating that "Respondent must prove clearly and convincingly that it, in no way, considered her protected activity when instituting the Section 15."[97] An ALJ's analysis only proceeds to the same-action defense if the complainant's protected activity was a contributing factor. By imposing upon the employer this requirement that it in "no way considered" the Complainant's protected activity, the ALJ double credits the contributing factor standard and deprives the Respondent of the affirmative defense.[98] However, this statement appears to be a harmless error by the ALJ as he also cited and accurately applied the correct legal standard.[99]

The Board has held that an ALJ's factual findings will be upheld when they are supported by substantial evidence, even if there is also substantial evidence for

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94 Captain Graham proposed referring Complainant to the Section 15 process on November 9, 2015, and November 16, 2015. D. & O. at 86; CX-11 at 2; CX-7 at 1.

95 49 U.S.C. § 42121(b)(2)(B)(iv).

96 *Clemmons v. Ameristar Airways, Inc.*, ARB No. 2008-0067, ALJ No. 2004-AIR-00011, slip op. at 11 (ARB May 26, 2010).

97 D. & O. at 99.

98 *Clem v. Comput. Sci. Corps.*, ARB No. 2016-0096, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 15 (ARB Sept. 17, 2019).

99 D. & O. at 98-99.

the other party.[100] Our role is not to determine whether or not we might have reached a different result based on the record, but rather to determine if the ALJ's findings, which we have closely examined, are supported by substantial evidence, consistent with the law. Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[101]

The ALJ concluded that Respondent shifted rationales for conducting the Section 15 process, and that these "proffered reasons for Respondent's actions do not clearly and convincingly establish that Respondent would have taken the adverse employment actions suffered by Complainant even in the absence of her protected activity."[102] The conclusion that Respondent's shifting rationales undermine the required "clear and convincing" standard is supported by substantial evidence. The ALJ also noted Captain Graham's "knee-jerk reaction to Complainant's November 3, 2015 email where she discussed protected activity," and that this "knee-jerk reaction" occurred again after the Nabors-Petitt meeting when he "went forward with the Section 15 without even speaking to Complainant's direct supervisor, Captain Davis, or even giving Complainant the opportunity to see or address Ms. Nabors' version of events."[103] Accordingly, because the ALJ's finding is supported by substantial evidence, and is consistent with the law, we affirm.

6. Damages

Having concluded that substantial evidence supports the ALJ's findings that Respondent violated AIR 21 and is unable to avoid liability through a same-action defense, we address each of Respondent's arguments as to damages below.[104]

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100 *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 8 (ARB June 29, 2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

101 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citing and quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

102 D. & O. at 101.

103 *Id.* at 99, 101.

104 Respondent did not challenge the ALJ's order to publish the D. & O. to pilots and managers in the flight operations department as well as to post copies of the decisions at various locations. *See Yates*, ARB No. 2017-0061, slip op. at 10 (reversing ALJ's order for Respondent to email decision to various individuals).

A. Front Pay Damages

Victims of discrimination are presumptively entitled to reinstatement.[105] An award of damages in the form of "front pay" is "money awarded for lost compensation during the period between judgement and reinstatement or in lieu of reinstatement."[106] Front pay is the "monetary equivalent" of reinstatement."[107] Front pay is appropriate where reinstatement is not possible.[108] "Reinstatement and front pay are alternative remedies, which cannot be awarded for the same period of time."[109] Front pay may be awarded in lieu of reinstatement in circumstances where reinstatement is impossible or impractical, and alternative remedies are necessary. Examples of impossibility or impracticability include job unavailability, and whether the parties have demonstrated "the impossibility of a productive and amicable working relationship."[110]

The awards of front pay and lost future earnings serve different goals and compensate the complainant for different injuries.[111] Front pay compensates a complainant for the "immediate effects" of an unlawful termination or a loss of position or seniority,[112] and is designed to place the complainant "in the identical financial position that he [or she] would have occupied had he been reinstated."[113] Comparatively, an award for lost future earnings compensates a complainant "for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of [an employer's] discrimination."[114]

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105 *See Ass't Sec'y of Lab. for Occupational Safety and Health & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-0014, ALJ No. 2003-STA-00036, slip op. at 7 (ARB June 30, 2005) (citing *Thurman v. Yellow Freight Sys.*, Inc., 90 F.3d 1160, 1171 (6th Cir. 1996)).

106 *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001).

107 *Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 1012 (9th Cir. 2010) (quoting *Pollard*, 532 U.S. at 853 n.3).

108 *Berkman v. U.S. Coast Guard Acad.*, ARB No. 1998-0056, ALJ Nos. 1997-CAA-00002, -00009, slip op. at 27 (ARB Feb. 29, 2000) (citation omitted); *see also Luder v. Cont'l Airlines, Inc.*, ARB No. 2010-0026, ALJ No. 2008-AIR-00009, slip op. at 15 (ARB Jan. 31, 2012).

109 *Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016).

110 *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, No. 1993-ERA-00024, slip op. at 10 (Sec'y Feb. 14, 1996).

111 *Williams v. Pharmacia Ophthalmics, Inc.*, 137 F.3d 944, 953 (7th Cir. 1998).

112 *Id.*

113 *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995).

114 *Williams*, 137 F.3d at 953; *see id.* at 954 ("Whereas front pay compensates the plaintiff for the lost earnings from her old job for as long as she may have been expected to

It is undisputed that Complainant's employment was not terminated, and that she did not suffer, for example, a loss of position or seniority. Instead, Respondent placed Complainant on disability status when the Section 15 process started, and once the process concluded, Respondent returned her to flight status and she resumed her position as First Officer with the same pay and same terms and conditions of employment. Consequently, the ALJ was unable to reinstate Complainant to her position as First Officer as an award.[115] Thus, the ALJ awarded front pay in the form of increasing Complainant's salary.[116] Specifically, the ALJ ordered that "Respondent must compensate Complainant at a wage no lower than the highest salary provided for any other Respondent-First Officer. That wage must remain in effect until, if, and when Complainant obtains a position that commands a greater salary."[117]

We conclude that the ALJ erred in this award. A front pay award is meant to "approximate[]" the consequences of an unlawful termination, or a loss of position or seniority.[118] The ALJ's award of front pay in the form of presumably increasing Complainant's salary does not remedy the effects an unlawful termination or loss of position or seniority, nor does the award put Complainant back to the identical financial position that she was in prior to the AIR 21 violation. Rather, if this front pay award were executed, Complainant would be in a better position than she was prior to the violation because of a salary increase. Accordingly, the Board vacates the ALJ's award of front pay damages.

However, "[w]hen reputational injury caused by an employer's unlawful discrimination diminishes a plaintiff's future earnings capacity, she cannot be made whole without compensation for the lost future earnings she would have received absent the employer's unlawful activity."[119] Though under the heading of "front

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hold it, a lost future earnings award compensates the plaintiff for the diminution in expected earnings in all of her future jobs for as long as the reputational or other injury may be expected to affect her prospects.").

115 *See Pollard*, 532 U.S. at 846 (defining "front pay" as "money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement").

116 The record does not conclusively indicate that the ALJ's award was an increase in her salary, but we assume that is the case.

117 D. & O. at 106.

118 *Williams*, 137 F.3d at 952 ("front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the plaintiff the same benefit (or as close an approximation as possible) as the plaintiff would have received had she been reinstated.").

119 *Hite v. Vermeer Mfg. Co.*, 361 F.Supp.2d 935, 946 (S.D. Iowa 2005).

pay," the ALJ described his award as an award of future lost earnings.[120] In his analysis, the ALJ considered how Respondent's violation of AIR 21 would significantly damage Complainant's reputation and her future career in the aviation industry, and as a result, her lost future earnings.[121] However, the ALJ's extensive analysis is not based on evidence, but rather, is based on mere speculation. Complainant did not put forward evidence of damage to reputation supporting an award of future loss of earnings. On remand, the ALJ may reopen the record to determine whether Complainant can prove that Respondent's violation of AIR 21 caused lost future earnings.[122]

B. Compensatory Damages

Compensatory damages are to be awarded in addition to other remedies designed to restore the complainant's financial losses.[123] The relief must be "proportionate to the harm inflicted."[124] Compensatory damages are available for emotional pain and suffering, mental anguish, embarrassment, and humiliation.[125] To recover compensatory damages under the Act, a complainant must show by a preponderance of the evidence that she experienced mental suffering or emotional anguish, and that the unfavorable personnel action caused the harm.[126] The Board has held that while the testimony of medical or psychiatric experts "may strengthen the case for entitlement to compensatory damages," it is not required.[127] The ARB

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120 "The question becomes how does this Tribunal evaluate the loss of future earnings?" D. & O. at 106.

121 "Respondent has permanently damaged Complainant's reputation within the aviation community and the likelihood of her being able to obtain promotion in the ranks is practically non-existent. The likelihood of her seeking other employment until retirement is remote, let alone being hired, because of her disclosures about safety issues." *Id.*

122 "An award of lost future earnings is a common-law tort remedy." *Williams*, 137 F.3d at 952 (finding that complainants may recover lost future earnings under Title VII as a nonpecuniary injury and explaining "lost future earnings [is] an 'injury to professional standing' and [an] 'injury to character and reputation.") (internal citations omitted).

123 *Blackburn v. Martin*, 982 F.2d 125, 132 (4th Cir. 1992).

124 *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 2009-0081, ALJ No. 2009-AIR-00006, slip op. at 3 (ARB Sept. 2, 2011).

125 *See Rooks v. Planet Airways, Inc.,* ARB No. 2004-0092, ALJ No. 2003-AIR-00035, slip op. at 10 (ARB June 29, 2006).

126 *Evans v. Miami Valley Hosp.*, ARB Nos. 2007-0118, -0121, ALJ No. 2006-AIR-00022, slip op. at 20 (ARB June 30, 2009) (citation omitted).

127 *Jones v. EG&G Def. Materials*, ARB No. 1997-0129, ALJ No. 1995-CAA-00003, slip op. at 23 (ARB Sept. 29, 1998) (citations omitted). *See also Smith v. ESICORP*, ARB No. 1997-0065, ALJ No. 1993- ERA-00016, slip op. at 4 (ARB Aug. 27, 1998) (the ARB awarded

has confirmed compensatory damage awards for emotional distress, even absent medical evidence, where the witness statements are "credible" and "unrefuted."[128] The absence of objective evidence supporting a claim of remedies may, however, affect the amount of the award.[129]

In this case, the ALJ awarded $500,000 in non-economic compensatory damages as an award for emotional distress, humiliation, and loss of reputation. In awarding $500,000, the ALJ relied on Complainant's testimony, finding that she "credibly described the sleepless nights she experienced associated with enduring the events."[130] In addition to Respondent's direct actions, the ALJ noted the "cruelty of receiving Dr. Altman's findings on Christmas Eve wherein [Complainant] was summarily notified that her flying career was potentially over" and that Complainant "note[d] the drama associated with her psychological testing which she had to endure several times."[131] Lastly, the ALJ found that "[d]uring this entire ordeal, Complainant had every reason to fear the loss of her professional flying career if not her very ability to fly" and that "[t]he evidence establishes Complainant's lifelong passion for aviation and it is not hard to understand the mental anguish she felt in the potential of wrongly losing something so dear and something she worked so hard to obtain."[132]

Previously the Board upheld an ALJ's award of compensatory damages of $250,000 for emotional distress, humiliation, and loss of reputation based solely on

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compensatory damages of $20,000 based on the severity of the retaliation the complainant experienced, and the testimony of the complainant and his wife as to the mental and emotional injury suffered).

[128] *Hobson v. Combined Transp., Inc.*, ARB Nos. 2006-0016, -0053, ALJ No. 2005-STA-00035, slip op. at 8 (ARB Jan. 31, 2008) (ARB affirmed award for emotional distress based on complainant's testimony alone where it was "unrefuted and, according to the ALJ, credible."). *See also Ferguson v. New Prime, Inc.*, ARB No. 2010-0075, ALJ No. 2009-STA-00047, slip op. at 7-8 (ARB Aug. 31, 2011); *Shields v. James E. Owen Trucking, Inc.*, ARB No. 2008-0021, ALJ No. 2007-STA-00022, slip op. at 13 (ARB Nov. 30, 2009).

[129] *Thomas v. Arizona Pub. Serv. Co.*, No. 1989-ERA-00019, slip op. at 14 (Sec'y Sept. 17, 1993) (in which the Secretary held that "While [he found] that Thomas' testimony was sufficient to establish entitlement to compensatory damages, the demonstrated humiliation concerning the withdrawal of her test certifications does not justify the full amount of damages she seeks for it, $5,000."); *Lederhaus v. Paschen & Midwest Inspection Servs., Ltd.*, No. 1991-ERA-00013, slip op. at 7-8 (Sec'y Oct. 26, 1992) (reducing the ALJ's award to $10,000 for compensatory damages for depression, behavior changes, and monetary difficulties resulting from discriminatory discharge).

[130] D. & O. at 108.

[131] *Id.*

[132] *Id.*

an employee's testimony.[133] In *Hobby*, although there was no expert medical or psychiatric testimony, the ALJ relied on the employee's testimony as to the detrimental effect that the loss of his employment, underemployment for over eight years, inability to find other work in his chosen profession or comparable employment, and the loss of the chance for future promotion and/or salary increases had on him and his mental state. The Board found the award reasonable because the ALJ noted the employee's descriptions of the "emotional distress tied to his depleted finances, repeated requests of friends and family for money, and the obligation to inform those responsible for his professional development that he [had] been fired" from his employment.[134] The ALJ in *Hobby* cited that prior to the discrimination, Complainant had been offered a VP position with a different company.[135] After the discrimination, his resume did not circulate for a subordinate position reporting to the VP. Testimony indicated that Complainant was on track for a position as CEO. Ultimately, he had to accept a job as file clerk to pay basic living expenses.

> In light of Complainant's high level position, his unemployment and underemployment for over eight years, his inability to find any work within the nuclear community, and the detrimental effect his protected activity has had on any chances of future promotion and future salary increases, and in light of the emotional stress Complainant endured due to his termination and inability to find comparable employment, I find that an order of compensatory damages in the amount of $250,00.00 is reasonable.[136]

Similarly, in *Evans*, the Board affirmed an award of compensatory damages supported by an employee's testimony that he "suffered damages to his reputation and marriage as well as mental anguish and depression."[137] Complainant was

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133 *Hobby v. Georgia Power Co.*, ARB Case Nos. 1998-0166, -0169, ALJ Case No. 1990-ERA-00030, slip op. at 31-33 (ARB Feb. 9, 2001).

134 *Id.* at 26.

135 *Hobby v. Georgia Power Co.*, ALJ No. 1990-ERA-00030, slip op. at 68 (ALJ Sept. 17, 1998).

136 *Id.* at 69.

137 *Evans*, ARB Nos. 2007-0118, -0121, slip op. at 21 ("Evans testified that he waited for a few months after his August 2006 termination to start looking for a pilot's job because he and his wife had a newborn child, and he was trying to sell real estate after obtaining his license. The market fell apart, however. Evans testified that he contacted other companies and found a position in January 2006, but the job offer was rescinded after the company contacted CJ. Not until the following November was Evans able to begin work for Air Methods, but he had to travel from Dayton to Portsmouth, Ohio and stay overnight at motels during the week.").

unemployed for 62 weeks.[138] Complainant sought therapy and was under prescription medication for depression and anxiety.[139] In *Evans*, the Complainant's testimony was also supported by testimony of his wife who described how his termination affected him both physically and emotionally, and affected their family life. Complainant's wife had intended to be a stay-at-home mom, but had to take a job after Complainant's termination. Complainant also suffered damage to reputation. He was unable to find work at places he had previously worked. He was offered a position, but once they found out who his previous employer was, he was fired the very same day.[140] These facts constituted substantial evidence to support the ALJ's award of $100,000 in non-economic compensatory damages relating to emotional distress, humiliation, and loss of reputation.[141]

Although the ALJ cited these cases and others in his analysis, we conclude that the ALJ did not accurately compare them to the facts and evidence in this case. In comparison to the above-cited examples, the record in this case is insufficient to support the ALJ's award of $500,000 in non-economic compensatory damages. The evidence of record consists of damages that normally accompany a retaliatory discharge.[142] As currently stated, Complainant's testimony lacks sufficient support to prove that her emotional distress was severe, and that her humiliation, and loss of reputation supports an award in the amount of $500,000.

Importantly, the record does not reflect that Complainant lost income and suffered the consequences of lost income as demonstrated in other cases where a large award was affirmed. Complainant did not support her claim with supporting medical or professional evidence, or testimony from her family supporting her claim that Respondent's unfavorable personnel action caused severe mental suffering or emotional anguish. Although expert medical or psychiatric testimony is not required, the ALJ's analysis solely relied on Complainant's testimony that she suffered sleepless nights but otherwise speculated to the loss of reputation that she might have endured.[143] There is no other evidence in the record indicating that any mental or psychological condition was attributable to the retaliation she suffered.

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138 *Id.* at 21.

139 *Id.* at 22.

140 *Evans v. Miami Valley Hosp.*, ALJ No. 2006-AIR-00022, slip op. at 53 (ALJ Aug. 31, 2007).

141 *Evans*, ARB Nos. 2007-0118, -0121, slip op. at 22.

142 *Quinby v. Westlb AG*, No. 04 Civ. 7406, 2008 WL 3826695, at *4 (S.D.N.Y. Aug. 15, 2008) (citing *Lynch v. Town of Southampton*, 492 F.Supp.2d 197, 207 (E.D.N.Y. 2007) (collecting cases reducing awards as excessive).

143 The ALJ found Complainant "will be subject to flight line gossip and there will be a lingering question of her true flying abilities" and that there will be "permanent damage to

Accordingly, we vacate the award of compensatory damages and instruct the ALJ on remand to reconsider this award in light of other cases with similar characteristics as Complainant's. On remand, the ALJ may reopen the record to take additional evidence on Complainant's emotional distress, humiliation, and loss of reputation as a result of Respondent's adverse action taken against her after engaging in protected activity.

C. Back Pay Damages

An award of back pay should be awarded to restore the complainant to the position she would have been in absent the unlawful retaliation.[144] In this case, the ALJ found "but for the retaliatory acts that occurred . . . [Complainant] would not have had to exhaust her vacation to avoid being placed on disability-pay" and ordered Respondent "to reimburse her either the vacation days she used to avoid being placed on disability, or pay her the $52,522.03 calculated by Complainant."[145]

The ALJ's decision to award back pay damages is warranted and in accordance with the law. More specifically, the facts supporting the decision to award such relief are supported by substantial evidence. As addressed above, Respondent used the Section 15 process in a retaliatory fashion in this case. Complainant, to avoid being paid half of her normal earnings via disability status for as long as possible, depleted her accrued vacation leave while waiting for the Section 15 process to conclude. We affirm the ALJ's award of back pay damages because it restores Complainant to the position she would have been in the absence of Respondent's unlawful retaliation.

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her reputation within the aviation community regardless of this Tribunal's ruling." D. & O. at 108.

144 *Blackburn*, 982 F.2d at 129.

145 D. & O. at 104.

CONCLUSION

We **AFFIRM** the ALJ's conclusion that Respondent violated AIR 21's employee protection provision and that it could not meet its same-action defense because substantial evidence in the record as a whole supports the findings underlying his conclusions.[146] We also **AFFIRM** the ALJ's award of back pay damages. We **VACATE** the ALJ's front pay award as legal error and **VACATE** the award of compensatory damages for lack of evidentiary support. As a result, we **REMAND** the case for further proceedings consistent with this opinion.

SO ORDERED.

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[146] All pending motions before the Board in this case, including a request for oral argument, are therefore moot.