



In the Matter of:

WILLIAM H. PECK,

ARB CASE NO. 02-028

COMPLAINANT,

ALJ CASE NO. 2001-AIR-3

v.

DATE: January 30, 2004

**SAFE AIR INTERNATIONAL, INC.
d/b/a ISLAND EXPRESS,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William H. Peck, Ft. Lauderdale, Florida

For the Respondent:

**Brian R. Kopelowitz, Esq., Gelch, Taylor, Giuliani, Kopelowitz & Ostrow, P.A.,
Fort Lauderdale, Florida**

FINAL DECISION AND ORDER

This case arises under section 519 (employee protection provision) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C.A. § 42121 (West 2003). Regulations implementing section 519 appear at 29 C.F.R. Part 1979 (2003).

Complainant William H. Peck filed a complaint of unlawful discrimination against Respondent Safe Air International, Inc. d/b/a Island Express (Island Express), which after investigation the Occupational Safety and Health Administration (OSHA) found to be without merit. Following timely objection, an Administrative Law Judge (ALJ) heard the complaint and ultimately issued a Recommended Decision and Order (R. D. & O.) denying the complaint. Peck petitioned for review of the R. D. & O. and filed a

letter in opposition. Island Express filed a reply brief in response. We affirm the ALJ's decision as described below.

BACKGROUND

1. Statement of facts

The ALJ's R. D. & O. contains a comprehensive summary of the testimony and documentary evidence (R. D. & O. at 6-19) and factual findings that are supported by substantial evidence (*id.* at 20-25). We briefly summarize the facts relevant to Peck's discharge.

Peck, a licensed aircraft mechanic, served as Director of Maintenance¹ for Island Express, a scheduled passenger and cargo commuter air carrier, from August 1999 until Island Express terminated his services on May 15, 2000. During this period Island Express operated a single aircraft, a Cessna 402C aircraft identified as N108GP, which it leased from another licensed aircraft mechanic. As Director of Maintenance, Peck performed emergency repairs and routine and preventive maintenance on the Cessna. Peck also owned and operated a business denominated Allaeroteck, Inc., which engaged in servicing and maintaining about a dozen aircraft for other air carriers. *See* Complainant's Exhibit (CX) 3.

Between 1999 and February 2000, Peck received a salary of one thousand dollars a week for serving as Director of Maintenance for Island Express. Island Express made appropriate withholdings from Peck's salary, issued him a W-2 form at the end of each year, and paid Peck's son, who also provided maintenance services for the aircraft, directly. Hearing Transcript (T.) 276-279; CX 3. In October 1999, faced with eviction from facilities at Fort Lauderdale International Airport (International Airport), Island Express began sharing hanger space with Peck at Fort Lauderdale Executive Airport (Executive Airport). Peck loaned Island Express five thousand dollars to assist with the down payment on the hangar. CX 14. Island Express used the hangar for its headquarters and maintenance department, while Peck occupied a part of the hangar and

¹ Federal Aviation Administration (FAA) regulations (49 C.F.R. Parts 119 and 135 (2003)) require air carrier certificate holders to have sufficient qualified management and technical personnel to ensure the safety of their operations, including qualified personnel "serving in" the position of Director of Maintenance. 14 C.F.R. § 119.69(a). These personnel, including the Director of Maintenance, must meet certain general criteria. 14 C.F.R. § 119.69(d). The certificate holder must list the duties, responsibilities, and authority of the personnel, identify the personnel, and notify the certificate-holding FAA district office of any change in personnel. 14 C.F.R. § 119.69(e)(1)-(3). A certificate holder may request a deviation to employ a person who does not meet the appropriate airmen experience, managerial, or supervisory requirements if the person meets comparable requirements. 14 C.F.R. § 119.71(f).

operated Allaerotech on the premises. Peck paid a percentage of the revenue Allaerotech generated to Island Express as his share of the hangar rent. CXX 3, 9; T. 258, 277.

This relationship changed in February 2000. Peck agreed to forego the weekly salary. CX 8. In exchange Island Express paid rent for the combined hangar space. Allaerotech billed Island Express for parts as an independent contractor. Allaerotech compensated Peck's son and its other employees. *See* T. 276-282.

Melvin Gordon, Island Express' Director of Operations, was responsible for scheduling flights, for ensuring that inspections were performed and maintenance was up to standard, and for preparing mandated regulatory reports. T. 91-97. Gordon was not happy with Peck's performance because he felt Peck failed to keep him informed and locked him out of the hangar where Peck kept the maintenance logs. T. 106. Luciano Horna, the chief pilot, had become unreliable in delivering copies of the daily aircraft flight logs to Peck. The aircraft was due for a 60-hour phase inspection in mid-May. Peck complained to Gordon about failure to receive the logs, but was unable to secure information about the current mileage that would determine the time of inspection.

In early May, Peck recommended that several cylinders on the aircraft be replaced. Mayra Horna, Island Express' Secretary-Treasurer and Administrative Officer, became suspicious about the necessity for replacement since eight of the 12 cylinders had been replaced in March. T. 249-252. Luciano Horna requested that he be permitted to witness compression tests on all cylinders. Peck performed the tests late on the evening of May 14. The cylinders tested normally. T. 195-196. On the morning of May 15, after hearing about the test results, Mayra Horna instructed Gordon to terminate Peck as Director of Maintenance effective immediately because she no longer trusted him. Ms. Horna, Gordon, and Peck were present at the Executive Airport offices and maintenance facilities on May 15. Because Peck locked the door to his portion of the hangar, Ms. Horna could not deliver the termination letter to Peck at the hangar. Instead, she gave the letter to Gordon to deliver to Peck. T. 257, 261-262.

At about 9:00 a.m. on May 15 Peck telephoned the Federal Aviation Administration (FAA) to complain that the Island Express aircraft likely had overflowed, or was about to overflow, the required inspection. He also complained that the Hobbs meter, a device that records mileage, may have been subject to tampering. FAA inspector Jean Ferrara conducted an unannounced ramp inspection late on the morning of May 15. The ramp inspection occurred at International Airport, from and to which Island Express transported passengers. Although Ferrara found no evidence of tampering, she identified safety deficiencies that required correction.² Ferrara concluded the inspection at about 11:30 a.m., at which time she telephoned Peck from the Island Express ticket

² Ferrara determined that Island Express later overflowed the inspection by several hours between her inspection on May 15 and May 19, and she completed an enforcement report because Island Express had violated FAA regulations. T. 70-75. In particular, Ferrara found that Island Express "operated three flights under Part 135 with an inspection overdue" in violation of 49 C.F.R. §§ 135.25(a)(2), 135.143(a), 135.413(a)(2), and 135.419(g). CX 13.

counter “to inform [him] of the current hour meter reading and the condition of the aircraft.” CX 3. Luciano Horna was present at the ticket counter during the telephone conversation and spoke to Peck by telephone. Ferrara also telephoned Gordon to inform him of the deficiencies. She did not tell Gordon why she had conducted the inspection. *See* T. 57-63.

Also on May 15, Ms. Horna and Gordon decided to take the aircraft in the late afternoon to Terrence McHugh, an independent mechanic, rather than to Peck, for inspection and repair because they were dissatisfied with Peck’s performance. McHugh was located at Opa-Locka Airport. Island Express had sent maintenance records to Terrence McHugh, on May 14. T. 213. Gordon requested McHugh to perform compression checks, cylinder checks, and an evaluation of an Airworthiness Directive (AD) note on the exhaust. McHugh found that the aircraft exhaust was not in compliance with the AD note. T. 219-220. McHugh also found frayed hoses, clamping or ductwork that chafed improperly on other components, and a frayed stainless steel woven control cable. T. 221. McHugh presented Luciano Horna with a list of 27 deficiencies requiring correction, some of which mandated that the aircraft be grounded. T. 224; CX 16. When Horna mentioned that cylinder replacement had been recommended, McHugh responded “somebody is scamming you . . . he’s not telling you the truth.” T. 227.

Gordon confirmed that Peck’s services should be terminated after McHugh found the extensive deficiencies in addition to those identified by Ferrara. McHugh also found that the cylinders met the manufacturer’s specifications. All of the cylinders operated adequately until scheduled engine overhaul. T. 227. By the time that Ms. Horna and Gordon terminated Peck’s services, the relationship between Island Express and Peck had deteriorated significantly. T. 84-85, 106-107, 280-281.

Dated May 15, addressed to Bill Peck from Mayra Horna, and appearing on Island Express letterhead, the notification of termination stated: “This letter will serve to formally notify you that as of May 15, 2000 we no longer require your services as Director of Maintenance.” CX 15. Peck received the letter on May 17. *Id.* Ms. Horna testified that she directed Gordon to deliver the letter to Peck because she had an agreement for services “with Bill Peck, not with Allaeroteck.” T. 262.

2. Procedural history

On June 28, 2000, Peck filed a complaint of unlawful discrimination under AIR21 section 519 alleging that Island Express discharged him because he had filed a protected air carrier safety complaint. After conducting an investigation, OSHA found no reasonable cause to believe that the discrimination complaint had merit. Peck objected to the finding and requested a hearing. An ALJ heard the complaint on September 20, 2001. Peck proceeded pro se, Island Express was represented by counsel.

Prior to the hearing Peck requested the ALJ to issue subpoenas, including subpoenas mandating appearances by FAA inspector Ferrara and the OSHA investigator,

Clarence Kugler. Both the FAA and OSHA moved to quash the subpoenas. The ALJ denied the FAA's motion, and inspector Ferrara ultimately testified. The ALJ declined to rule on OSHA's motion. No representative from OSHA appeared at the hearing, and investigator Kugler did not testify subsequently.

On December 19, 2001, the ALJ issued his R. D. & O. denying Peck's complaint on several grounds. First, the ALJ found that at the time that Island Express terminated Peck's services, Peck was not an employee of Island Express and thus was not covered under AIR21 section 519. R. D. & O. at 25-27. Second, the ALJ found that although an aspect of Peck's complaint was protected under section 519 (*id.* at 29-32), Peck failed to show that Island Express was aware of that complaint when it made the decision to discharge him. *Id.* at 32-34. Peck thus failed to make a prima facie case of unlawful discrimination. Finally, the ALJ found that because it had failed to demonstrate that Peck's discrimination complaint was frivolous or brought in bad faith, Island Express was not entitled to an award of attorney's fees under section 519(b)(3)(C). *Id.* at 35.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision under AIR21 section 519(b)(3), 49 U.S.C.A. § 42121(b)(3) (final order of Secretary) and 29 C.F.R. § 1979.110 (ARB review). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, AIR21 section 519).

Pursuant to 29 C.F.R. § 1979.110(b), "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 1979.110(b). *See* 68 Fed. Reg. 14,106 (Mar. 21, 2003) (the Board "shall accept as conclusive ALJ findings of fact that are supported by substantial evidence").³

In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996), *quoted in Goldstein v. Ebasco Constructors, Inc.*, No. 86-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992) (applying analogous employee protection provision of Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C.A. § 5851 (West 1995)); *see* 29 C.F.R. § 1979.110. The Board accordingly reviews questions of law de novo. *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir.1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same). *See generally Mattes v. United States Dep't of Agric.*, 721 F.2d 1125,

³ The preamble to the regulations notes that "the substantial evidence standard" also is applied under the employee protection provision of the Surface Transportation Assistance Act (STAA). The STAA regulations state: "The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive." 29 C.F.R. § 1978.109(c)(3) (2003).

1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano*, 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body).

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. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988). The ARB gives great deference to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). *Accord Lockert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989)(court will uphold ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."").

ISSUES

The principal issues are: (1) whether under AIR21 section 519 Peck was a covered airline employee, who engaged in protected activity and suffered an unfavorable personnel action; (2) whether Peck failed to demonstrate that Island Express had knowledge of his complaint to the FAA and therefore could not have taken adverse action because of it; and (3) whether Peck did not succeed in establishing that his FAA complaint was a factor in his discharge, because it was based upon legitimate, non-discriminatory reasons alone. We also consider the issues whether Peck was accorded an opportunity to testify at the hearing on his discrimination complaint, and whether Island Express is entitled to an award of attorney's fees because Peck's discrimination complaint was frivolous or brought in bad faith.

DISCUSSION

1. Scope of coverage, procedures, and burdens of proof under AIR21

In general, a complainant under AIR21 section 519, which protects airline employees providing air safety information, must prove that he is an employee covered under the statute, that he engaged in activity protected by the statute, and that an air carrier or contractor or subcontractor of an air carrier subjected him to unfavorable personnel action because he engaged in protected activity. The requirement that protected activity must have contributed to a respondent's decision to take unfavorable action assumes that the respondent knew about a complainant's protected activity. Upon

finding that a respondent has violated section 519, the Secretary may not order relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.

With regard to coverage and protected activity, section 519(a) states:

(a) Discrimination against airline employees. – No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of an employee) –

- (1) provided, caused to be provided, or is about to provide with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
- (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
- (3) testified or is about to testify in such a proceeding; or
- (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C.A. § 42121(a). Relevant to the instant matter is section 519(a)(1), Peck's complaint to the FAA that Island Express' Cessna 402C may have overflowed a required FAA 60-hour phase inspection and that the Hobbs meter may have been tampered with.

Any person who believes that he or she has suffered unlawful discrimination in violation of section 519(a) may file a complaint not later than 90 days of the date on which the violation occurred. 49 U.S.C.A. § 42121(b)(1). Section 519(b)(2) charges the Secretary of Labor with conducting an investigation of any complaint to determine whether there is reasonable cause to believe that it has merit. The Secretary shall notify the complainant and the person alleged to have committed the violation of the Secretary's findings. If reasonable cause exists to believe that a violation occurred, the Secretary shall accompany the findings with a preliminary order providing relief. 49 U.S.C.A. § 42121(b)(2)(A).

AIR21 section 519(b)(2)(B) contains evidentiary standards, including a “gatekeeper test” and legal criteria:

- (i) **Required showing by complainant.** – The Secretary of Labor *shall dismiss a complaint*, filed under this subsection and *shall not conduct an investigation* otherwise required under subparagraph (A) unless the complainant makes a *prima facie showing* that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
- (ii) **Showing by employer.** – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), *no investigation* otherwise required under subparagraph (A) *shall be conducted* 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.
- (iii) **Criteria for determination by Secretary.** – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant *demonstrates* that any behavior described in paragraphs (1) through (4) of subsection (a) was a *contributing factor* in the unfavorable personnel action alleged in the complaint.
- (iv) **Prohibition.** – Relief may not be ordered under subparagraph (A) 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.

49 U.S.C.A. § 42121(b)(2)(B) (emphasis added).

A “gatekeeper” standard is used prior to hearing during the preliminary investigatory stage of the proceeding. There, OSHA will decline to conduct an investigation of a complaint unless the complainant “makes a prima facie showing” that protected activity was a contributing factor in a respondent’s adverse action. 49 U.S.C.A. § 42121(b)(2)(B)(i). A prima facie case is defined as “[t]he establishment of a legally required rebuttable presumption” or “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor.” BLACK’S LAW DICTIONARY 1209 (7th ed. 1999). To meet this standard for purposes of AIR21 section 519, a complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and “either direct or circumstantial evidence” showing that the employee engaged in protected activity, that the employer “knew or suspected,

actually or constructively, that the employee engaged in protected activity,” that “[t]he employee suffered unfavorable personnel action,” and that “[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.” 29 C.F.R. § 1979.104(b)(1) and (2). Temporal proximity between protected activity and adverse personnel action “normally” will satisfy the burden of making a prima facie showing of knowledge and causation. 29 C.F.R. § 1979.104(b)(2). A respondent may avoid investigation, however, notwithstanding a prima facie showing, if it “demonstrates, by clear and convincing evidence” that it would have taken adverse action in the absence of protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(ii). Although OSHA’s determination controls whether there is an investigation and preliminary relief, either party may object to OSHA’s action and proceed to obtain a hearing to adjudicate the complaint. 29 C.F.R. § 1979.106.

The standard that ALJs apply at hearing (29 C.F.R. § 1979.109(a)) and that we apply on review of ALJ decisions follows: If a complainant “demonstrates,” i.e., proves by a preponderance of the evidence, that protected activity was a “contributing factor” that motivated a respondent to take adverse action against him, then the complainant has established a violation of AIR21 section 519(a). 49 U.S.C.A. § 42121(b)(2)(B)(iii). *Cf. Dysert v. United States Sec’y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) (conclusion that the term “demonstrate” means to prove by a preponderance of the evidence is reasonable). Preponderance of the evidence is “[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW DICTIONARY 1201 (7th ed. 1999). Assuming a complainant establishes a violation of the Act, he nonetheless may not be entitled to relief if the respondent “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” BLACK’S LAW DICTIONARY at 577.

The distinction, then, between standards applied for purposes of investigation and adjudication of a complaint concerns the complainant’s burden: To secure investigation a complainant merely must raise an inference of unlawful discrimination; to prevail in an adjudication a complainant must prove unlawful discrimination.

Congress modeled AIR21 section 519(b)(2)(B) on section 211 of the ERA, 42 U.S.C.A. § 5851. The ERA was amended in 1992 (Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776) to incorporate, inter alia, the same gatekeeper test, a criterion permitting a complainant to prevail upon demonstrating that protected activity was a contributing factor in an unfavorable personnel action, and a provision permitting the employer to avoid liability by demonstrating by clear and convincing evidence that it would have taken the same action absent the protected activity. In the course of discussing those evidentiary burdens in *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003), we decided that the ERA amendments did not foreclose use, as appropriate, of “established

and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof.” *Id.* at 5-6 n.12. “[T]he Title VII burden shifting pretext framework [is] warranted in [the] typical [ERA] whistleblower case where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence.” *Id.* at 7 n.17. The ARB may thus examine the legitimacy of the employer’s articulated reasons for the adverse personnel action in the course of concluding whether a complainant in an ERA case has proved by a preponderance of the evidence that protected activity contributed to the dismissal. *Id.* See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Unless a complainant proves that the employer fired him in part because of his protected activity, it is unnecessary to proceed to determine whether the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Kester*, slip op. at 8. We adopt the same approach under AIR21 section 519. See 49 U.S.C.A. § 42121(b)(2)(B)(iii)-(iv).

We proceed to review the evidence bearing on whether Peck was entitled to employee protection under AIR21 section 519; whether Peck proved that Island Express had knowledge of his protected activity; and whether Peck proved that his complaint to the FAA was a factor in his discharge, notwithstanding Island Express’ contention that his poor performance as Director of Maintenance was the sole reason.

2. Employee coverage, protected activity and adverse action

Employee Coverage

An issue in the instant case is whether AIR21 section 519 affords protection for a safety complaint filed when Island Express no longer “employed” Peck in a conventional sense but arguably had engaged him as an independent contractor. See *R. D. & O.* at 27.

AIR21 section 519 prohibits discrimination by any “air carrier or contractor or subcontractor of an air carrier” against any “employee” for providing air safety information. 49 U.S.C.A. § 42121(a). It prohibits employment discrimination, i.e., “with respect to compensation, terms, conditions, or privileges of employment” (*id.*), refers to the employee alternatively as the “person who believes that he or she has been discharged or otherwise discriminated against” or “the complainant,” and refers to any respondent as “the person named in the complaint” and “the employer.” 49 U.S.C.A. § 42121(b). Section 519 also expressly requires knowledge by “the employer” of certain protected activity. 49 U.S.C.A. § 42121(a)(1) and (2). Coverage under section 519 consequently provides protection to employees from discrimination by employers.

“Employee” is not defined in section 519. In delineating employment relationships under analogous environmental whistleblower provisions, the Secretary of Labor has applied the common-law definition of an employee articulated in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), for use under the Employee Retirement Income Security Act of 1974 (ERISA). *Reid v. Methodist Med. Ctr. of Oak Ridge*, 93-

CAA-4, slip op. at 8-19 (Sec’y Apr. 3, 1995). Courts may presume that Congress intended this definition unless it indicates otherwise.⁴ The *Darden* and *Reid* cases involved individuals who had contracted with commercial entities to provide services as an insurance agent and medical practitioner, respectively. In each instance the statutory term “employee” was held to incorporate traditional agency law criteria for identifying master-servant relationships. The multifactor common-law test adopted contained no “shorthand formula” for determining who was an employee; rather “all of the incidents of the relationship [were] assessed and weighed with no one factor being decisive.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 324, quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). At issue is “the hiring party’s right to control the manner and means by which the product is accomplished.” *Darden*, 503 U.S. at 323. Relevant considerations include the skill required, the source of instrumentalities and tools, the location of the work, the duration of the parties’ relationship, whether the hiring party may assign additional projects to the hired party, the extent of the hired party’s discretion over work performance, the method of payment, the hired party’s role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is a business, provision of employee benefits, and the tax treatment of the hired party. *Id.* at 323-324.

The record in the instant case contains contradictory evidence of the precise relationship as among Peck, his company Allaeroteck, and Island Express after mid-February 2000. Peck considered himself an employee of Island Express for the duration of his tenure if only because he remained listed with the FAA as the Director of Maintenance. *See, e.g.*, CX 8. Peck stated: “I was terminated as Director of Maintenance by letter dated May 15, 2000. The letter of termination names me only and not my company. Proof that I was still an employee to that point.” *Id.* The letter formally notified “Bill Peck” that Island Express “no longer require[d] [his] services as Director of Maintenance.” CX 15.

With respect to post-February 10 employment (the date that he received his last paycheck), Peck stated:

[T]here was an understanding that I would be compensated in the future for what I personally and from my company provided to subsidize Island Express’ maintenance until such time as one of two groups that were courting Island Express for the purpose of a potential financial bail out

⁴ Compare *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). In construing the term “employee” expansively under the Fair Labor Standards Act, the Court relied on the statutory definition of the term employee as including “any individual employed by an employer” and the statutory definition of the term “employ” as meaning “suffer or permit to work.” 29 U.S.C.A. § 203(e) and (g). In *Darden*, the Court commented: “This latter definition [of the term employ], whose striking breadth we have previously noted, stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency principles.” 503 U.S. at 326 (citation omitted).

came to fruition. Bearing this in mind, I continued to act as Director of Maintenance in the same employee status that I was originally hired for.

CX 8.

Other evidence contradicts Peck's understanding. Joe Fascigilione, financial consultant, testified that prior to February 2000 Peck was on the Island Express payroll and afterwards he was not, but that "he was always operating as Allaeroteck with his clients in the hangar there." T. 277. Fascigilione renegotiated the financial arrangement between Peck and Island Express. Whereas previously he received a salary and paid a portion of the hangar rental, he agreed to perform labor if Island Express paid the hangar rental. T. 279. Fascigilione added that after February 2000 Peck paid for labor and ordered parts under his company name, Allaeroteck, and that Island Express agreed to reimburse Peck for the parts. T. 282.

Mayra Horna also testified about the financial relationship to the effect that prior to February 2000 Peck agreed to pay rent for half of a shared hangar with 30 percent of his income. T. 258. After February 2000 Peck agreed to forego his salary and pay the mechanics. He said his income would pay for his share of the hangar. T. 259. Peck agreed to become a "contractor outside." *Id.* "Everything was verbal." T. 263. Pursuant to the new arrangement, Allaeroteck submitted two invoices to Island Express for aircraft parts. T. 260. *See* CX 9 (as of November 1, 1999, Peck and Island Express shared hangar space at Executive Airport and Peck paid Island Express one-third of his earnings from outside business; on February 10, 2000, Peck received a reduced paycheck of \$500 and remained on FAA record books as Director of Maintenance for Island Express). It bears noting that on August 15, 2000, Peck filed a claim of lien against Island Express for parts and labor provided by Allaeroteck during the period March 22 and May 8, 2000, which is inconsistent with his contention that he was an employee, not an independent contractor at the time of his discharge. CXX 5, 9.

Before February 2000 Peck and his son received monetary compensation from Island Express; afterwards Peck compensated his son and continued to pay Allaeroteck employees and performed labor in exchange for hangar space. *Id.* at 27. Under both arrangements, however, Peck engaged in specialized work, controlled the manner, methods, and means of maintenance, and serviced aircraft other than that leased by Island Express. Island Express was not authorized to assign Peck other maintenance work and "engaged in the business of flying and not maintenance." *Id.* Substantial evidence supports the ALJ's conclusion that the pre-February 2000 arrangement between Island Express and Peck more nearly approached an employee-employer relationship in terms of compensation, record keeping, and tax treatment; whereas alterations under the subsequent arrangement rendered it less so. *See* R. D. & O. at 26-27 (by May 2000 "the preponderance of the elements supporting independent contractor status sufficiently outweigh the remaining vestiges of employee status").

However, between the time that Peck filed his complaint on June 28, 2000, and the time that the ALJ issued his recommended decision on December 19, 2001, OSHA had not yet promulgated section 519 regulations. Both OSHA's interim final rule (67 Fed. Reg. 15,454, 15,457 (Apr. 1, 2002)) and final rule (68 Fed. Reg. 14,100, 14,107 (Mar. 21, 2003)), define the term employee to mean "an individual presently or formerly working for an air carrier or contractor or subcontractor of an air carrier, an individual applying to work for an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier." 29 C.F.R. § 1979.101. Also indicating expansive construction is use of the phrase "could be affected." Coverage accordingly could extend, depending on the surrounding factual circumstances, to former and current employees of air carriers and their contractors and subcontractors, applicants for employment by these entities, and individuals whose employment could be affected by these entities. For example, the term "employee" under some circumstances may extend to a former employee who is subjected to post-employment blacklisting by his former employer, a damaging form of discrimination. *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994).

The multiple, complex circumstances of Peck's relationship with Island Express are not amenable to ready demarcation. Due to the uncertainty of 29 C.F.R. § 1979.101 as applied in this case, we will therefore assume, without holding, that at the time Island Express terminated its business relationship with Peck, Peck was covered by the "employee" protection provisions of AIR21 section 519.

Protected Activity

Air carriers are prohibited under AIR21 section 519 from discharging or otherwise discriminating against any employee because the employee, inter alia, provided the employer or Federal Government with information "relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety" 49 U.S.C.A. § 42121(a). While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Env'tl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Leach v. Basin 3Western, Inc.*, ALJ No. 02-STA-5, ARB No. 02-089, slip op. at 3 (ARB July 21, 2003).

By providing the FAA with information that Island Express had overflowed, or was about to overflow, an FAA-mandated 60-hour phase inspection and that the Hobbs meter may have been tampered with, Peck engaged in the protected activity of providing the Federal Government with information relating to a violation or alleged violation of FAA regulations.⁵

⁵ The ALJ found that the complaint about the possibility of overflying an inspection was protected because it was objectively reasonable and that the complaint about the Hobbs meter was unprotected because Peck failed to demonstrate its objective reasonableness. R.

Adverse employment action

Under AIR21 section 519 employers are prohibited from taking unfavorable personnel action against employees because they have engaged in protected activity. Such actions include discharge or other discrimination “with respect to compensation, terms, conditions, or privileges of employment.” 49 U.S.C.A. § 42121(a). The AIR21 regulations specify that it is a violation of the Act for a covered employer to “intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has [engaged in protected activity].” 29 C.F.R. § 1979.102(b). If, as we have assumed, Peck was entitled to the employee protection provisions of AIR21 section 519, defined in the implementing regulations, 29 C.F.R. § 1979.101, then by terminating his services as Director of Maintenance Island Express effectively discharged Peck. We rule that the termination of services constituted unfavorable personnel action.

3. Whether employer knew of protected activity

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec’y Apr. 7, 1993), *aff’d*, 73 F.3d 100 (6th Cir. 1996) (ERA employee protection provision). This element derives from the language of the statutory prohibitions, in this case that no air carrier, contractor, or subcontractor may discriminate in employment “because” the employee has engaged in protected activity. 49 U.S.C.A. § 42121 (a). Section 519 provides expressly that the element of employer knowledge applies even to circumstances in which an employee “is about to” provide, or cause to be provided, information about air carrier safety or “is about to” file, or cause to be filed, such proceedings. 49 U.S.C.A. § 42121(a)(1) and (2); H.R. Conf. Rep. No. 106-513, at 216-217 (2000), *reprinted in* 2000 U.S.C.C.A.N. 80, 153-154 (prohibition against taking adverse action against an employee who provided or is about to provide (with any knowledge of the employer) any safety information).

The ALJ acknowledged elements of a circumstantial case of unlawful discrimination under AIR21 section 519:

D. & O. AT at 31-32. We include both as protected activity. Overflying the mandated inspection could occur either because Island Express refused to provide Peck with flight times on a daily basis as required by FAA regulation or because Island Express falsified the flight times by deactivating the Hobbs meter. Peck knew that an inspection was imminent due to the Cessna’s flight schedule. Peck also knew about timekeeping discrepancies in the logs, possibly indicating tampering, due to his efforts to assist David Bettencourt, the owner of the Cessna, in obtaining records. The May 15 complaint to the FAA was in reality a single substantive complaint about the air carrier safety violation of overflying an inspection, which constitutes protected activity under AIR21 section 519.

Initially, just based on the simple timing of events, Mr. Peck is able to develop a circumstantial case that Ms. Horna and Mr. Gordon were aware of his protected [sic] prior to his termination as the Director of Maintenance. In [sic] the morning of May 15, 2000, Mr. Peck at Executive Airport calls Ms. Ferrara, an FAA inspector, with his complaint. In response, Ms. Ferrara conducts a no-notice ramp inspection of the Island Express aircraft at International Airport. After her inspection, and in the presence of the Island Express chief pilot, Mr. Horna, Ms. Ferrara, while still at International Airport, talks with Mr. Peck over the phone and gives him the Hobbs meter reading. Two days later, on May 17, 2000, Mr. Peck receives a letter dated the same day he made his complaint to the FAA, May 15, 2000, informing him that Island Express no longer needs his maintenance service. Absent any other evidence, this sequence of events, in particular the nearly contemporaneous adverse action in relation [sic] Mr. Peck's FAA complaint, would provide strong circumstantial evidence of [sic] that Island Express was aware of his complaint.

R. D. & O. at 32.

The ALJ then cited other evidence that he considered contravening, including that FAA ramp inspections were not “out of the ordinary,” that Ms. Horna was concerned about the cylinder issue rather than the ramp inspection, and that “[c]oncerning the [telephone] discussion about the Hobbs meter, *Ms. Ferrara merely affirmatively responded that the meter had been inspected* and then stated that other maintenance issues had been identified.” *Id.* at 33 (emphasis added).⁶ The ALJ attached significance to the fact that Island Express was concerned primarily with the cylinder issue and Peck's trustworthiness. R. D. & O. at 33-34. But these concerns would not prevent Peck's safety complaints also from “contributing” in some measure to the discharge decision. Island Express subsequently overflew the inspection. The ALJ reasoned that if Gordon and the Hornas knew about Peck's complaint, they would not proceed to validate it. *Id.* at 34. This reasoning does not allow for independent mechanic McHugh's mistaken belief that the aircraft was permitted a ten percent tolerance. Finally, the ALJ attributed significance to Ferrara's testimony that she “informed no one at Island Express during the course of investigation that Mr. Peck had made a complaint.” *Id.*

Our examination of the record establishes that Mayra Horna and Melvin Gordon were the managers who decided to terminate Peck's services. The ALJ found ultimately that neither manager knew about Peck's complaint to the FAA (R. D. & O. at 34), and

⁶ Ferrara also testified that *she did not recall* if she gave Peck the Hobbs time during the telephone conversation. T. 58.

substantial evidence supports this finding. Ferrara, whom the ALJ found particularly credible, testified without contravention that she spoke to Gordon by telephone about discrepancies she had discovered on the aircraft but did not tell him why she had conducted the inspection. T. 62. Unannounced ramp inspections occurred routinely. During the period of August 1999 and May 2000 Ferrara conducted “[p]ossibly a half dozen” ramp inspections of Island Express aircraft. T. 86. Following these inspections she documented any discrepancies and discussed them with the directors of maintenance and operations. T. 62, 85-87.

Mayra Horna’s testimony is uncontroverted that she reached her decision to terminate Peck on the morning of May 15 without knowledge of Peck’s complaint to the FAA. T. 250, 254-256. Gordon, who decided to terminate Peck later, after receiving the results of McHugh’s inspection of the aircraft, testified similarly that at the time of his decision he was unaware that Peck had telephoned the FAA. In fact, he became aware of the complaint only days before the hearing. T. 109-110, 118-119, 265-266. Although Gordon ultimately agreed with her decision, Mayra Horna was the predominant decision maker. She testified to being Gordon’s “boss” (T. 256), and Gordon’s attitude toward her was deferential. *See* T. 264-266 (if according to McHugh the condition of the aircraft was satisfactory, Gordon would have “gone back to Mayra and talked to her, and then if she wanted that decision to stand, [he] would have delivered the letter [of termination]”).

The burden of proving employer knowledge of protected activity rests with the complainant. Here, Peck’s “proof” consists merely of coincident timing, the presence at the Island Express ticket counter of Luciano Horna, who did not participate in the decision to terminate Peck’s services, and the inference that Ferrara’s nondisclosure would not have prevented Gordon from suspecting that Peck had initiated the FAA inspection since Peck previously had requested that Island Express produce the flight logs. These considerations do not detract significantly from the testimony of Mayra Horna and Gordon establishing lack of employer knowledge. We agree with the ALJ (R. D. & O. at 34) that Peck failed to establish by a preponderance of the evidence that these decision makers knew about his FAA complaint.

4. Whether Complainant proved protected activity was a factor in discharge

Even assuming Peck demonstrated that Island Express knew about his complaint to Ferrara prior to the decision to discharge him, he failed to demonstrate by a preponderance of the evidence that this call to Ferrara was a contributing factor in his discharge. Although temporal proximity between the contact and the termination circumstantially creates an inference of a violation of the Act, it is insufficient to prove it in this case. Since under *Kester* the Title VII methodology for analyzing and discussing evidentiary burdens of proof is appropriate, we determine that Peck does not succeed under section 519(b)(2)(B)(iii), because we conclude that Island Express terminated the Complainant’s services for legitimate, nondiscriminatory reasons alone. As we now discuss, the reasons were distrust and dissatisfaction with Peck’s maintenance services.

Mayra Horna was unequivocal in her reasons for terminating Peck's services. She no longer trusted Peck to maintain the aircraft due to what she perceived as an unfounded cylinder replacement recommendation and due to the discrepancies identified by McHugh. When asked whether she became suspicious when Peck recommended the purchase of eight new cylinders in May of 2000, Ms. Horna responded:

Yes. Because . . . two months prior in March . . . we bought eight cylinder, and we supposed to put eight cylinder. Then two months after eight cylinder change, he [Peck] was telling that again we need to change another eight cylinder. That's when I decide to say – well, something wrong here, and I don't trust Mr. Bill Peck.

T. 249. Luciano Horna previously had requested Peck to perform compression tests on each cylinder. He testified: "And I recall very exactly that none of the cylinder was bad." T. 203-204. *See* R. D. & O. at 20 (ALJ accepted this testimony as "credible and corroborated by another witness"). The results of the compression tests influenced Mayra Horna directly. She testified: "Luciano told me at night, that the cylinders, they do a check and the cylinder – and the cylinder doesn't have anything. And then I said, Mel [Gordon], I don't trust this guy. . . . And so then we decide and they take the airplane to Opa-Locka." T. 257.

Mayra Horna also testified about the impact of the deficiencies found by McHugh on her decision:

Q Is that [the cylinders] what led to the decision to send the aircraft to Opa-Locka for an inspection from an independent mechanic?

A Yes.

Q Okay. And what did you learn from Mr. McHugh's inspection?

A Really the truth, I was surprised, all that stuff that they found in the airplane, because I don't know how he flew this airplane before in the way that we found the plane that was. . . . I don't want to put our passengers in the life – in his, in Bill Peck's hands.

T. 249-250. Ms. Horna began to "have a problem" with Peck in February, but at that time she continued to trust him. She informed him that she was unhappy with his work and his temper in May. T. 252-253. She testified, "I told Mr. Peck I don't trust you at all. I don't trust you." *Id.* Horna stated that she directed Gordon to fire Peck on the morning of May 15 because she believed the cylinders were adequate and she did not trust Peck. T. 257. She testified, "during this time Mr. Peck already locked the door and

don't let me to go inside my hangar. During this time he tried to shoot me. He treat me like – nothing.” *Id.*

Gordon's testimony is consistent. Ms. Horna advised him that she was discharging Peck because she did not trust him as the result of the cylinder recommendation. T. 264. As director of operations Gordon wanted the benefit of knowing whether the maintenance problems with the aircraft “went one way or the other.” T. 265. Upon transporting the aircraft to McHugh, Gordon remained at the Opa-Locka Airport for a portion of the compression testing on the cylinders. He understood that the cylinders tested did not require replacement. T. 273-274. Gordon testified that he requested referral to McHugh because of the cylinders, “all this comes back to the cylinders.” T. 269. *See* T. 106-110, 119-123. Gordon also complained that Peck excluded him from the maintenance operation and routinely locked him out of the maintenance hangar. T. 93-98.

Joe Fasciglione, a financial consultant who operated as a bookkeeper-accountant for Island Express, testified that a “very rocky” situation developed between Peck and Island Express because of a lack of trust that certain repairs in fact were required and that the required maintenance was being performed. T. 280-281. McHugh, the independent mechanic, testified that the records that accompanied the Cessna aircraft did not reflect acceptable maintenance and that, in his opinion, Island Express' Director of Maintenance “may have been attempting to do his job in a proper manner, but the job wasn't being done.” T. 223. David Bettencourt, an aircraft mechanic and the owner of the Cessna, testified that in February 2000 the owners of Island Express communicated concerns about the quality of Peck's maintenance. T. 168-169. Other witnesses testified that they detected friction between Peck and the owners of Island Express. T. 130, 144-145.

The above-referenced testimony of Mayra Horna and Gordon, the decision makers, which is uncontroverted and corroborated by other testimony, establishes a markedly deteriorating relationship with Peck preceding the May 15 termination. We accordingly find that the motives for terminating Peck's services were distrust and dissatisfaction with his maintenance services and not unlawful discrimination. Peck has not established that these legitimate reasons proffered by Island Express were not the true reasons for its action, but rather were a pretext for discrimination in violation of AIR21. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-508 (1993). Thus, Peck failed to show that his protected activity was a contributing factor in the termination of his employment relationship. 49 U.S.C.A. § 42121(b)(2)(B)(iii). We therefore find it unnecessary to proceed to the next stage of proof, whether Island Express demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Peck's protected activity. § 42121(b)(2)(B)(iv).⁷

⁷ The ALJ also found that the Complainant had not met his ultimate burden of proof. However, we clarify one point. It is not necessary for the Respondent to produce clear and convincing evidence of a legitimate non-discriminatory reason to rebut the Complainant's prima facie case. *See* R. D. & O. at 28-29. That heightened burden of proof does not come into play until the Complainant has demonstrated that protected activity was a contributing

5. Claim that Complainant was not given an opportunity to testify

On review, Peck complains that “the judge’s oversight in granting the complainant in this matter the opportunity of testifying in this case, leaves the recommendation made by the judge and his staff lacking. A check of the transcripts . . . shows William H. Peck agreed to be called to testify but never was.” Complainant’s ARB Brief at 1 (unpaginated).

Peck appeared as a pro se complainant. We construe complaints and papers filed by pro se complainants “liberally in deference to their lack of training in the law” and with a degree of adjudicative latitude. *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), *citing Hughes v. Rowe*, 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must “refrain from becoming an advocate for the pro se litigant.” *Id.* We recognize that while adjudicators must accord a pro se complainant “fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance.” *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. *See Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9, *citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law and Excuse?*, 90 KY. L. J. 701 (2002). We accordingly have scrutinized the ALJ’s treatment of the parties, mindful of the balance properly maintained between accommodation and evenhanded administration. The ultimate question is whether the ALJ provided Peck with a meaningful opportunity to testify and otherwise to present his complaint.

Prior to the hearing Peck and Island Express filed witness lists pursuant to the ALJ’s pre-hearing order. While listing eight potential witnesses, Peck declined to include himself as a witness. Peck similarly did not appear on Island Express’ witness list.

In his opening remarks, the ALJ explained that Peck had the option of representation by counsel. He also explained applicable hearing procedures and burdens of proof. T. 8-12, 34. Peck affirmed that he understood the ALJ’s explanations and that he chose to proceed without an attorney. During Peck’s presentation of his case, the ALJ repeatedly stated that Peck would be accorded an opportunity to testify. For example, during opening statements the ALJ addressed Peck: “You, yourself, will be able to testify in that regard. I’ll do a little bit of direct examination. I’ll generally allow you to make a statement under oath, and then you’ll be subject to cross-examination by [opposing counsel].” T. 30. The ALJ alluded to Peck’s opportunity to testify on six

factor in the termination, see 49 U.S.C.A. § 42121(b)(2)(B)(iii)-(iv), which we have determined was not the case here.

other occasions. *See* T. 36, 45, 53, 70, 123, 194. In making these remarks, the ALJ predominantly directed Peck to question the witnesses that he had called for examination, rather than to argue or comment. *E.g.*, T. 194 (the ALJ states that Peck must ask the witness a question, “[y]ou don’t get to testify now”).

The ALJ admitted Peck’s numerous exhibits into the record, including a lengthy written statement by Peck explaining his version of the facts. CX 3; T. 46. The ALJ consistently assisted Peck in examining witnesses by asking questions that clarified their testimony. *E.g.*, T. 59-60, 71-72, 97-99, 252-259.

After examination of all but one of Peck’s witnesses, the ALJ and Peck engaged in two colloquies about the manner in which Peck intended to proceed. T. 181-184. The first colloquy was as follows:

Judge Stansell-Gamm: Any other witnesses, Mr. Peck?

Mr. Peck: Well, actually, the only other witness that I really have is one we share in common, so –

Judge Stansell-Gamm: Well, who is it?

Mr. Peck: Joe Fascigilione. I butcher his name every time I –

Judge Stansell-Gamm: Say again.

Mr. Peck: Fascigilione.

Judge Stansell-Gamm: Are you going to call this gentleman?

Mr. Kopelowitz: Yes, Judge.

Judge Stansell-Gamm: Okay. All right. So, you have nothing further to present on your side, then, other than that one witness, is that correct?

Mr. Peck: That’s it, sir.

Judge Stansell-Gamm: Okay. Well, then, technically you rest.

Mr. Peck: Yes, sir.

T. 181-182.

Following a thirty-minute break, the ALJ and Peck engaged in a second colloquy:

Judge Stansell-Gamm: All right. The hearing will come to order. All parties present when we recessed are again present. Mr. Peck, maybe I misled you a little bit in saying that your side would rest. You certainly have submitted documents concerning your complaint.

Mr. Peck: Yes, sir.

Judge Stansell-Gamm: But if you intend to have anything from your perspective that you want on the record as evidence, you would have to testify. Do you understand that?

Mr. Peck: Oh, yes, sir, I have no problem with that.

Judge Stansell-Gamm: Okay. Did you want to testify, or are you just going to rest on the documents presented?

Mr. Peck: No, sir. I'd be more than happy to rest.

Judge Stansell-Gamm: It's your decision. I'm just telling you that you have that option.

Mr. Peck: Yes, sir. Outside of a closing statement, which I'm sure is part of this.

Judge Stansell-Gamm: It is.

Mr. Peck: Okay. Yes, I will testify. If the parties would like to question me, they would be more –

Judge Stansell-Gamm: No, no. It has to do with the presentation of your case.

Mr. Peck: Oh, okay. No, other than the closing statement, no.

Judge Stansell-Gamm: All right. Closing statement is not evidence. It certainly is argument and I can listen to it. The only evidence I'm going to look at is the witness testimony and the documents you've given me for your case. Do you understand that?

Mr. Peck: Yes, sir.

T. 183-184.

At the conclusion of the Respondent's case, the ALJ stated: "Okay. Mr. Peck, as the Complainant, you have an opportunity to present rebuttal and rebuttal evidence that you may wish to present, or you could just go ahead and close. It's your choice." T. 288. Peck responded, "Well, the only thing that – I'd like to make, just kind of make a closing statement." *Id.* Peck then proceeded to do so. T. 289-294.

After the closing arguments of the Complainant and the Respondent there was discussion of leaving the record open for submission of a deposition of Mr. Kugler, the OSHA investigator. The ALJ then inquired whether there was "anything further we need to take up then?" Peck replied, "No, sir. Thank you for your time, your Honor." T. 300.

We find that the ALJ conducted the proceedings appropriately, and that Peck was accorded adequate opportunity to testify on his own behalf. After being specifically advised that his closing statement would not constitute testimony, he chose only to make a closing statement. He did not request to offer rebuttal testimony when afforded the opportunity to do so, and did not raise his not having provided testimony as an issue until this appeal. In short, the record shows that Peck was given the opportunity to testify but did not exercise it. Whether the ALJ's recommendation would have been better informed had Peck testified is not at issue. Peck did not testify despite having had the opportunity to do so, and the record for consideration is the one before us.

6. Respondent's request for attorney's fees

If a complaint brought under AIR21 section 519 is found to be frivolous or brought in bad faith, we "may award to the prevailing employer a reasonable attorney's fee not exceeding \$1,000." 49 U.S.C.A. § 42121(b)(3)(C). *See* 29 C.F.R. § 1979.109(b) (ALJ award); 29 C.F.R. § 1979.110(e) (ARB award). The ALJ found that Peck maintained "a firm and sincere belief that he had been the victim of a retaliatory termination" thereby precluding a finding of bad faith, that Peck's conclusion as to coverage "was understandable and not frivolous," and that the circumstances surrounding the discrimination complaint, including the temporal proximity between protected activity and unfavorable personnel action, prevented it from being characterized as frivolous. R. D. & O. at 35. We agree with the ALJ and decline to award attorney's fees to Island Express.

CONCLUSION

We assume, without deciding, that William Peck was an employee covered under AIR21 section 519.

While Peck's complaint to the FAA about air carrier safety constituted activity protected under section 519 and while Island Express took adverse action by terminating Peck's services, Mayra Horna and Melvin Gordon, the managers who decided to terminate Peck's services, were unaware of the FAA complaint at the time that they made the decision. Peck consequently has failed to prove employer knowledge of protected activity, which is requisite to a finding of unlawful discrimination.

Alternatively, assuming that Island Express had knowledge of his complaint to Ferrara, Peck failed to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in his discharge.

The complaint is **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge