U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 June 2006

CASE NO.: 2005-AIR-00023

In the matter of:

LUIS PATINO
Complainant

v.

BIRKEN MANUFACTURING COMPANY
Respondent

Appearances:

James Talbert-Slagle, Esq., and Lynn M. Mahoney, Esq., Law Offices of Leon Rosenblatt, West Hartford, Connecticut, for the Complainant

Robert Hirtle, Esq., Rogin, Nassau, Caplan, Lassman & Hirtle, Hartford, Connecticut, for the Respondent

RECOMMENDED DECISION AND ORDER

I. Statement of the Case

This case arises from a claim for whistleblower protection filed by Luis Patino ("Complainant") against his employer, Birken Manufacturing Company ("Birken" or "Employer"), under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21" or "Act"). 49 U.S.C. § 42121. After the Occupational Safety and Health Administration ("OSHA") found no violation of these provisions, the Complainant appealed to the Office of Administrative Law Judges ("OALJ") for a formal hearing. That hearing was held before the undersigned Administrative Law Judge in Hartford, Connecticut on November 3 and 4, 2005, at which time all parties were given the opportunity to present evidence and oral argument. The Complainant appeared at the hearing represented by counsel and an appearance was made by counsel on behalf of Birken. Hearing Transcript ("TR") 4-5. The Complainant and Gary Greenberg, the President of Birken, testified at the hearing. Documentary evidence was admitted as Complainant's Exhibits ("CX") 1-10, Respondent's Exhibits ("RX") 1-4, and the parties offered a confidentiality agreement,

which was marked and admitted as Joint Exhibit ("JX") 1. The official documents from the OALJ case file were admitted as Administrative Law Judge Exhibits ("ALJX") 1-7. TR 15-16. Birken and the Complainant have both filed briefs and the record is now closed.

II. Stipulations and Issues Presented

The parties have stipulated to the following: (1) Birken makes original aircraft parts for Federal Aviation Administration ("FAA") regulated businesses; (2) Birken is licensed by the FAA as a repair parts station.

The issues in dispute are as follows: (1) whether the Complainant engaged in protected activity as defined by AIR21; (2) whether the Complainant suffered an adverse employment action; (3) whether the Complainant's protected activity was a contributing factor in the adverse employment action; (4) whether the Employer presented a legitimate nondiscriminatory reason for the termination; (5) whether the Complainant has proven by a preponderance of the evidence that the Employer's stated reason for the termination was pretext; and (6) whether the Employer is entitled to an award of attorney's fees from the Complainant.

III. Findings of Fact and Conclusions of Law

A. Complainant's Testimony

The Complainant, Luis Patino, was born in 1939 in Columbia. TR 30. He trained in machining at a trade school, and started working for Birken in June of 1977 as a machinist. TR 30, 32-33. The Respondent acknowledges that the Complainant was "one of the best machinists in the machine shop. His quality of work was excellent. His attendance was timely, and he performed as an employee as you would want an employee to perform." TR 21. The Complainant made parts for airplane engines at Birken. TR 33. However, the Complainant testified that "I didn't know exactly what the job [of the parts] was in the engine. I knew that they were part of the engine of the aircraft, but I have no idea as to what was the function of the part." *Id.* The Complainant testified that, starting in 1996, he worked in a cell, or working group, which consisted of approximately eight or ten machinists, with a cell leader and a foreman. TR 35. The Complainant testified that the cell leader was not a machinist, and would oversee issues such as scheduling and benefits, while the foreman's job was to address technical issues and to give assignments to the cell members. TR 36. The Complainant stated that another person, called the expediter, took the parts from department to department so that each successive operation could be performed on the specific part. TR 37.

The Complainant testified that whenever he worked on a piece, he would receive a package of papers called the documentation, which contained instructions, blueprints and Birken sketches, which were directions for manufacturing the engine part. TR 37-38. The Complainant operated a manual machine in performing his machining duties. TR 40. The Complainant testified that he did not make whole parts himself, but rather performed one operation on each piece. TR 38. Thus, the Complainant could work on a part that someone else had already

worked on, and someone else could work on a piece after the Complainant had finished with it. *Id.* Different parts could require a different number of operations to be performed, with some requiring as few as ten, and some requiring as many as one hundred operations before the part was complete. TR 39. The Complainant testified that each operation on a part was numbered, and that he understood each operation had to be performed in the order specified by the Engineering Department. TR 38-39. The Complainant explained that once he was finished with an operation on a part, he would have to sign or stamp his identification number on the paperwork accompanying the part indicating he had worked on the part. TR 45-47.

If an engine part was out of compliance with the documentation or blueprints, the Complainant testified that he would inform the foreman who would sometimes consult with the Engineering Department and then his foreman would tell him whether or not to proceed with the part. TR 36, 41. If the foreman was not present, the Complainant stated that he would ask the cell leader for advice on technical issues, and the cell leader would communicate those concerns to the Engineering Department and relay the information back to the Complainant. TR 36. The Complainant testified that when he found a non-conforming part, he was to fill out a Non-Conforming Material Report which recorded the date, the customer name, the vendor, a description of the non-conformance, the dimensions of the part, the cause of the non-conformance, and the resolution of the problem. TR 43. The Complainant testified that after the paperwork was filled out, the part would be set aside for evaluation. *Id*.

The Complainant testified that in the spring of 1998, after an audit by the FAA, the employees were called to a meeting with Glen Toro, the manager of production, and Sidney Greenberg, the president of Birken at that time. TR 47. During this meeting, the Complainant testified, the cell members were told that some paperwork was found to be "intentionally deceptive" and that each employee must "go by the rules" and "strictly go by the book." TR 47-48. The Complainant testified that a few weeks later, in April 1998, Sidney Greenberg held a meeting with the employees in which the employees were told again that they must "go by the book," follow the instructions, go in the specified sequence, and immediately report any problems to the supervisor, the cell leader or to Mr. Greenberg. TR 48. The Complainant testified that these instructions were his "Bible from thereon." *Id.* The Complainant also acknowledged that Birken had a policy requiring employees to report concerns to management. TR 148.

After these meetings, the Complainant testified that he started keeping notes on parts he felt were non-conforming, after he told his supervisor about his concerns. TR 48-50; CX 1. He kept these notes on small pieces of paper at the job site, and then rewrote the notes at home, including more detail from his memory. TR 61. The Complainant testified that he rewrote these notes approximately once per week. *Id*. On cross-examination, the Complainant testified that he kept the notes "to make myself sure of what I did on that particular part if I was asked by somebody in the shop and if inspection or somebody is to ask what happened with this part so I could explain because the memory you just cannot do that." TR 130. The Complainant also testified that he saved the notes in part "to help the FAA" because he mistrusted both Birken and Pratt & Whitney, Birken's auditor and customer. TR 131-134. The Complainant stated that he always followed the directions of his supervisor, even if his supervisor instructed him to perform an operation that the Complainant believed would take the part out of compliance with the

blueprint, because "I didn't want to be charged with insubordination. So I just followed his orders." TR 126.

The Complainant testified about the information contained in the logs he kept related to parts he felt were non-conforming. One such part was a horse collar made in 1998, which the Complainant testified had too little material to comply with the dimensions supplied by the blueprint. TR 64-65. He reported this discrepancy to his foreman and the cell leader, who instructed him to make the part differently from the blueprint specifications, telling the Complainant that the part could be as much as forty-thousandths thicker than the blueprint dimensions. TR 65-66. The Complainant testified that this seemed "fishy" because in his experience, a part could only be "one or two-thousandths [of an inch] over or under the size" or he would have to report the piece as non-conforming. TR 66. The Complainant followed the directions of his supervisors and finished the part, but he did not sign his number because the part was not made according to the specifications. TR 66-68.

In March 1999, the Complainant noticed that his number was being used by other people to sign for parts which the Complainant never worked on. TR 71. The Complainant testified that this indicated to him that "parts were not going through inspection because inspection should have caught that non-conformance." *Id.*

On April 2, 1999, the Complainant wrote a letter to Mr. Gary Greenberg, Sidney Greenberg's son, who was then the Vice-President and General Counsel of Birken, informing him of alleged sexual harassment and also discussing some parts he perceived to be out of compliance with the blueprints. CX 3. The letter alleged that some parts were defective and "not in compliance to customer measures," and that the parts did not go through inspection, and questioned whether there was a violation of FAA rules. *Id.*

In May 2000, the Complainant noticed several parts with tool marks. TR 77-78. The Complainant testified that upon speaking with his cell leader and foreman, they consulted with the Inspection Department and the Complainant was then instructed to tool the area until the marks disappeared. *Id.* The Complainant followed the directions, but he stated this caused the parts to be oversized and caused an area of the parts to have sharper angles than were called for in the blueprints. *Id.*

In January 2001, the Complainant noticed that a part was manufactured defectively from the numerical control machine, which is a tool that machines parts automatically. TR 80-81. The Complainant testified that he had to manually fix all of the defects. TR 81. The Complainant stated that he informed his foreman of the problem as well as Mike Caruso in the Inspection Department, but that Mr. Caruso assured him that the parts were fine. TR 83-84. The Complainant testified that he was concerned because "[i]t seemed like the foreman didn't pay too much attention" to the perceived defective parts, and so he asked the phone company for the phone number for the FAA in Washington, D.C. TR 85-86. The Complainant reported that he called the number several times, but never reached anyone. TR 86.

Sometime after the January 2001 incident, the Complainant testified that he noticed a defect in a guide breather pressuring valve. TR 87; CX 5. The Complainant felt that the valve

did not meet specifications because it was too thick, the radius of a corner was wrong, and some parts had cracks in the end. TR 88-89. The Complainant testified that he told his foreman about the problem, but that the foreman directed the Complainant to cut the part until the cracks disappeared. TR 89-90. The Complainant testified that cutting the cracks off made the parts too small. TR 90. The Complainant testified that he informed his foreman of this problem, and put the perceived defective parts in a separate box with a note to inform the next person to work on the parts that the parts were not in compliance with the blueprints, and that they should not be used. TR 91. He then gave the box to his foreman. *Id.*

The Complainant testified that in November 2002, he had a discussion with Walter La Pointe, an auditor at Birken, about castings that had skipped an operation. TR 95; CX 1 at 64. The Complainant testified that the parts had not been inspected or had serial numbers put on them, but had nonetheless been sent to the Complainant for machining. TR 95. The Complainant testified that Mr. La Pointe told the Complainant to set up his machine, but not to work on the parts, because the paperwork problem had to be resolved first. TR 96. The Complainant testified that his foreman came to his work station and he told the foreman that the auditor had instructed him not to work on the part. TR 96-97. The foreman, however, gave the Complainant instructions to continue working on the pieces. TR 97. The Complainant testified that after he began working on the pieces, as instructed by his foreman, Mr. La Pointe returned to his work station. *Id.* The Complainant testified that Mr. La Pointe instructed the Complainant to inform him every time the Complainant discovered an operation that was not signed. *Id.*

In May 2003, the Complainant stated he experienced a similar incident with perceived defects in guide breather pressuring valves as he had encountered in 2001. TR 97-98. The Complainant testified that no matter how many times he complained, the Employer "never did anything to improve the condition of that part." TR 98.

The Complainant testified that in November 2003, the master gauge, which is an instrument used to inspect parts, was missing from the shop. TR 99. The Complainant testified that he machined the part regardless of the missing master gauge because his supervisors told him that the part had been checked on a digital machine by an inspector. *Id.* The Complainant testified that there were similar situations again in both March and May of 2004, in which the master gauge was missing. TR 100. As a result, the Complainant again refused to sign off on the operation he performed on those parts. *Id.*

In January 2004, the Complainant experienced a problem with the same defects in the same guide breather pressuring valve parts which had occurred in 2001 and in May 2003. TR 100. As a result, the Complainant testified, he refused to sign for the operation. TR 101. The Complainant testified that in April 2004, he was informed by a co-worker that there was a problem with some gear boxes, but that instead of fixing the problem, the worker was going to cover the mistake with paint. TR 101. The Complainant did not work on the parts himself, but inspected all of the parts and found a groove or a channel around the boxes. TR 101-102. The Complainant testified that the person who painted over the non-conforming parts was fired later that year, but that the company continued to work on the part. TR 102.

The Complainant reported that in early 2004, he accidentally found an FAA building while looking for the post office in Windsor Locks, Connecticut. TR 103. After seeing the building, he looked up the phone number for the FAA in Windsor Locks, called that office, and explained that he wanted to speak to someone about concerns he had about Birken. TR 103-104. The Complainant testified that the person he spoke to told him to write to Eric Sibilitz, and the Complainant did so. TR 104. On April 28, 2004, the Complainant wrote a letter to the FAA, informing the agency of some of the discrepancies he had found with the parts at Birken, and requesting a meeting. CX 6; TR 103-104. Soon after sending the letter, the Complainant testified that he received a phone message from Kenneth McGrath at the FAA who wanted to arrange a meeting to talk about the Complainant's concerns. TR 104-105.

The Complainant met with Mr. McGrath and Carmen Quiles, another FAA inspector, on May 4, 2004. TR 105. The Complainant testified that he took his notes of perceived defective parts to the meeting and told the inspectors about all of the incidents he had noticed in the past few years regarding parts he felt were defective. *Id.* The Complainant testified that the inspectors told him that his report could initiate an investigation into the company. TR 106. The Complainant did not leave his notes with the FAA, because the inspectors did not want to see them. *Id.*; TR 136. The Complainant never spoke to the investigators again, but testified that he wrote several more letters to them.[1] *Id.* The Complainant received a letter from Gene Kirkendall, the Manager of the Whistleblower Protection Program of the FAA, on June 8, 2005, indicating that the FAA "investigation has not established a violation of an order, regulation, or standard relating to air carrier safety."[2] RX 1.

In August 2004, the Complainant and the other employees were informed that Pratt & Whitney was going to audit the company, and were instructed to "spruce up the shop" and "keep the paperwork in mint condition." TR 107. The Complainant testified that he believed the audit was in response to his complaint to the FAA. TR 107. When the audit was in progress, the Complainant testified that he spoke to an auditor with Pratt & Whitney, and told her that he had "some information to pass along to Pratt & Whitney about something I have been involved with and something I have on my chest." *Id.* That woman referred the Complainant to Alan Gilman, with whom the Complainant spoke a few days later and "spilled the beans." TR 108-109. Mr. Gilman took seven sample pages of the Complainant's notes at this meeting, and returned them to the Complainant the next day. TR 111. The Complainant testified that his motivation for reporting to Mr. Gilman was not retaliation, but that he just wanted to follow the rules and procedures. TR 153-154. He also testified that "[m]y concern is that these parts they could go into some critical areas. I'm not engineer so I don't know what the job is…you hear some day that something happened with an engine in an airplane and this was flying and there was so many people killed, and I hear that there was about, apart from Birken, already been sick, or might have had a heart attack." TR 146-147. The Complainant testified that the next day, the employees were called for a meeting, and told that a few minor things were found during the audit, and that the employees "have to go again by the book like six years before." TR 111.

[1] These letters are not in evidence.

[2] This is the only evidence submitted that suggests that the FAA initiated an investigation into the Complainant's allegations.

The Complainant testified that he was called to meet with Gary Greenberg on September 22, 2004. TR 111. The Complainant stated that during the meeting he admitted that he was the person who spoke with the Pratt & Whitney auditors. TR 112. He also recalled that Mr. Greenberg wanted to see the rest of his notes on allegedly improperly machined parts. TR 112, 114.

The Complainant stated that on September 29, 2004, Mr. Greenberg hand-delivered a letter to him dated September 24, 2004, which memorialized the meeting of September 22, 2004. TR 113-114; CX 7. The letter expressed concern that the Complainant did not talk to someone internally at Birken before speaking to the auditors. CX 7. The letter claimed that as a result of the Complainant's report to the auditors, the company was forced to shut down operations for several days, thus causing unnecessary overtime and late deliveries. CX 7. The letter also required that in the future, the Complainant present his concerns to Birken management first, and assured the Complainant that no adverse action would be taken against him for any "good faith expression of concern." CX 7. The letter instructed the Complainant not to sign-off on any operations that he felt were incorrect, and instructed the Complainant to report to Mr. Greenberg or Mr. Greenwald if the Complainant's supervisor made him feel uncomfortable about signing off on an operation. CX 7. The Complainant testified that Mr. Greenberg had asked at the September 22 meeting for the other pages of notes regarding any perceived defective parts, and the letter made the same request of the Complainant. TR 114; CX 7.

The Complainant reported that he delivered the remainder of the notes regarding the alleged defective parts through an attorney to Birken and Pratt & Whitney on October 6, 2004.[3] TR 115. The Complainant testified that he did not meet with Mr. Greenberg after that. TR 116.

The Complainant testified that on November 8, 2004, he was assigned a casting job. CX 118. He stated that there had been no inspection of the castings, nor had serial numbers been assigned to the castings. *Id.* These were the two operations immediately preceding the Complainant's operation. *Id.* The Complainant testified that he informed the foreman, who stamped number thirty for the inspection and then took the castings back to have serial numbers put on. TR 118-119. The Complainant represented that he believed the foreman informed Mr. Greenberg of the Complainant's complaint. TR 119. Later in the day, the expediter brought the castings back to the Complainant. *Id.*

Late in the day on November 8, 2004, the Complainant received a letter from and met with Mr. Greenberg. TR 117; CX 8. During this meeting, the Complainant's employment was terminated. TR 118. The Complainant testified that Mr. Greenberg told him that the reason for his dismissal was the Complainant's failure to notify Birken of the perceived quality defects. *Id.* The letter details "[s]ince defective or substandard aircraft parts can obviously create serious safety hazards, your failure to have communicated your concerns in a timely fashion is incomprehensible and totally inexcusable." CX 8. The letter also stated that after investigating

[3] Although the Employer did not receive the full set of notes until October of 2004, the only investigation associated with the Complainant's notes which resulted in a hiatus in delivery seems to be the investigation in August or early September, during which the Employer did not deliver parts pending the investigation into the allegedly defective parts contained in the seven pages of sample notes provided to Pratt & Whitney by the Complainant.

the complaints, the company had found that there was no merit to any of the complaints. CX 8. Thus, the letter concluded, "[b]ased upon the above conduct and substantial damage you have caused this company in terms of reputation, loss of business and the costs of auditing your unfounded claims, we feel it is appropriate to terminate our employment relationship." CX 8.

The Complainant testified that after he was terminated from his employment at Birken, he looked for work, but decided that he could no longer work in a machine shop because he was "sort of traumatized." TR 120. The Complainant did not follow a lead for a welding job in Bradley, near Windsor Locks, because he felt that it would only be a matter of time before he was subjected to harassment and "somebody was screaming the same nonsense that I heard at Birken." TR 121. The Complainant testified that he applied for positions as a dishwasher at the Cracker Barrel and the Hometown Buffet, and the Crown Hotel. TR 122. He searched for a new position until April 2005, when he decided to retire. *Id.*

During the years 1996 through 2004, the Complainant filed numerous complaints of harassment and discrimination based on his perceived sexual orientation with the State of Connecticut Commission on Human Rights and Opportunities. *See* RX 4-10. Mr. Greenberg testified that Birken never retaliated against the Complainant for these complaints. TR 191.

B. Testimony of Gary Greenberg

The Respondent, Birken Manufacturing Company, provides "[p]recision machining and metal forming of components and assemblies for the aerospace and industrial marketplace," and does manufacturing, assembling and testing for commercial, military, industrial engines and missiles. RX 2. Gary Greenberg, who assumed the position of company president upon the retirement of his father, testified and described the company's products and the general structure of the company. TR 163. Mr. Greenberg stated that Birken is "ISO certified which is an international quality standard which is required by our customers…. [and is] part of another standard which is called AS9100." TR 171. Mr. Greenberg also testified that in its almost sixty years of existence, Birken has never been cited by the Federal Aviation Administration ("FAA") for producing a defective part involved in an aircraft accident. TR 229.

Mr. Greenberg explained that most engine parts made by Birken start out as metal castings, which are large parts that are bought from another vendor. TR 166. Birken's job is to "machine the holes…. put the rings in…. put the nuts and bolts, and put the threads in that you see, and create a finished product." *Id.* Mr. Greenberg described the process the company uses to machine a part. He explained that each part receives a traveler, which is a set of papers that allows small components of a larger part to be tracked by the company, and lists where the raw material was bought, the purchase order number of the raw material, and the operations that were conducted on the part by Birken. TR 166-167. Each operation is designed by an engineer in Birken's Engineering Department and approved by the Quality Control Department. TR 166. He also testified that there are "at least four levels of quality review of each part before the part will leave the factory." TR 171. Mr. Greenberg testified that the blueprints provide for "some leeway" because the machining process, especially if the machines are manually run, "is not an exact science." TR 173. Mr. Greenberg explained that the operations are performed by employees, and after each operation, the employee responsible must "sign-off" on the work he

has performed on the part. TR 172. However, if the machinist believes that the paperwork is incomplete or the part is inconsistent with the blueprints, he is not required to sign for the part. TR 169. If the machinist decides not to sign, the supervisor can sign for the part, and the supervisor may ask for guidance from the Engineering and/or Quality Departments. *Id.* If the machinist feels there is a problem with a part, he can complete a Non-Conforming Material Report ticket, which indicates the specific issue, and allows the Operations, Quality, and Engineering Departments the opportunity to designate a corrective action for the part. TR 169-170; *see* RX 3. Mr. Greenberg also testified that an employee could simply talk to his foreman in the event that he perceived a problem with a part. TR 235. Additionally, Mr. Greenberg testified that Birken policy required employees to report any concerns they might have over any part. TR 232. He acknowledged, however, that this policy was never written down, but was expressed to employees orally during meetings. *Id.*

Mr. Greenberg explained the normal process after a machinist reports a non-conforming part to his supervisor. TR 174-175. Mr. Greenberg stated that generally the foreman will tell the Engineering Department about the discrepancy, and the Engineering Department can then fix any paperwork problems, or can approve or disapprove the discrepancy. TR 175. Mr. Greenberg testified that because the Complainant was at the beginning stage of any machining operations, a part might be deemed acceptable, even though it had too much material, because subsequently there would be a "finishing operation which will bring the part into size." TR 175. Likewise, a part may have less material than what is called for in the first stages of machining a part, but the part may still be acceptable because the later stages of operation can simply cut less material off the part. TR 213. In both cases, the finished product would be as specified in the blueprints. TR 216. On some occasions, even if the part does not conform to the blueprints, the Engineering Department may believe that the part is still good, and it may ask for customer permission to continue with the part as is. TR 178. Mr. Greenberg stated that the Complainant would not be involved in the communications between the foreman and the Engineering Department or the Quality Control Department. TR 177-178. A complaining employee might not be informed of the reason why a part is acceptable despite the fact that it was out of compliance with the blueprints. TR 235-236. Mr. Greenberg testified that "as an owner, I would hope [the supervisor] would explain it so that it doesn't come up next time," but that "I just can't testify myself that that's what happened." TR 235, 237. Mr. Greenberg also testified that he would not usually be involved in this process, because it is the job of the foreman, the Engineering Department and the Quality Control Department to determine whether the parts are in compliance, and because the Quality Department has the authority to ship parts without informing Mr. Greenberg. TR 194.

Mr. Greenberg stated that the August 2004 audit of Birken by Pratt & Whitney was an "annual audit by Pratt & Whitney on the quality side to basically check our parts, cradle to grave, and [make] sure the documentation…went back right from raw material to the finished product to make sure that we were following our quality manual." TR 196. Mr. Greenberg stated that Mr. Gilman, the Pratt & Whitney auditor, told the Birken management that the audit had revealed "claims of defective parts leaving the facility." TR 197. Pratt & Whitney did not disclose the name of the whistleblower to Birken, but Pratt & Whitney gave Birken officials the Complainant's handwritten notes detailing the perceived defective parts. *Id.* As a result, Mr. Greenberg reported that Birken stopped deliveries to all customers and searched all allegedly

defective parts mentioned in the portion of Complainant's notes Mr. Gilman provided to Birken. *Id.* Birken made a full report of the alleged defective parts. Mr. Greenberg testified that after Birken's investigation, all seven of the items alleged to be improper were approved, both by Birken and by Pratt & Whitney. TR 198-199. Mr. Greenberg testified that the shut-down lasted for approximately four weeks and cost Birken between $300,000.00 and $400,000.00. TR 198, 224.

Mr. Greenberg reported that by examining the notes given to Birken by Pratt & Whitney, the Employer was able to determine that the claims were made by a machinist "who was on an initial phase of production that did not understand the quality controls that came afterward." TR 198. By approximately September 3, after examining all of the paperwork, Mr. Greenberg acknowledged that Birken management was "pretty sure Luis Patino was the person who was the whistleblower." TR 199, 227-228.

Mr. Greenberg and Michael Greenwall called a meeting with the Complainant on September 22. TR 199, 224. Mr. Greenberg acknowledged that as a result of this meeting his suspicion that the Complainant was the whistleblower was confirmed. TR 199-200. Mr. Greenberg stated that he asked the Complainant for the additional pages of his notes containing allegedly defective parts and that the Complainant provided copies to both Birken and to Pratt & Whitney through his counsel. *Id*. After Birken received the remaining 68 pages of Complainant's notes, management reviewed "every note we could understand," Mr. Greenberg testified. TR 200. Mr. Greenberg stated that the Complainant's allegations "happened to be wrong… the things that he looked up or thought were wrong weren't." TR 201.

Mr. Greenberg testified that the Complainant was not dismissed because he filed a complaint with the FAA, but rather because the Complainant "breached what I believed was a key element of our business and professional ethics, and that is to make management aware or even make the government aware, or make the customer aware, within a reasonable period of time, any product defect that he knew about or thought about." TR 202-203. Mr. Greenberg stated that Birken decided to fire the Complainant "after Pratt & Whitney was satisfied that none of the sixty-eight pages were real deviations or problems that were not explainable by our Quality Department." TR 223. Mr. Greenberg further explained, "[o]bviously, if he had made a correct statement of improper conduct by our people, he would not have been let go. He was let go because he kept these documents to himself, and refused to let management know his concerns." *Id.*

Mr. Greenberg admitted that he received a letter from the Complainant dated April 2, 1999. CX 3; TR 218. The letter alleged the Complainant had experienced sexual harassment from other employees and raised a concern regarding machine parts. CX 3. Mr. Greenberg testified that he received letters such as this alleging harassment at least once a year, and that he investigated all such complaints. TR 218. Mr. Greenberg testified that he investigated the Complainant's April 1999 sexual harassment complaint by speaking to the witnesses, and found that there had been no harassment, but that the complaint was based on a misunderstanding.[4] TR

[4] The Employer disciplined the Complainant "for accosting the woman [who the Complainant believed to have shouted a derogatory term at him] and scaring her." TR 193.

192-193. He conceded that he never spoke directly with the Complainant regarding the allegations or questions as to whether the deficiencies the Complainant's letter raised with the parts constituted FAA violations. TR 218-219. Rather, Greenberg stated that he asked the Complainant's foreman, George Kemzura, whether "we have an FAA violation anywhere and he said no." TR 219. Mr. Greenberg testified that the Complainant never informed him of the complaints he made to the FAA in 2004, but had threatened in several letters related to the Complainant's harassment complaints, based upon perceived sexual orientation, that "I'm a whistleblower…. I know where to go…. I heard whistleblowers take companies down."[5] TR 195.

C. Elements of an AIR21 Whistleblower Complaint

AIR21 prohibits an air carrier or its contractors or subcontractors "from discharging or otherwise discriminating against employees who inform their employers or the federal government, or who file proceedings, about violations or alleged violations of any order, regulation, or standard of the Federal Aviation Administration or of any other federal law concerning air safety." *Brune v. Horizon Air Indus.*, ARB No. 04-037, OALJ No. 2002-AIR-8, slip op. at 1 (ARB Jan. 31, 2006); 49 U.S.C. § 42121(a).

To establish a violation of the employee protection provisions of AIR21, a complainant must demonstrate by a preponderance of the evidence that an activity protected under AIR21 was a contributing factor in the adverse employment action taken against him. 49 U.S.C. § 42121(b); 29 C.F.R. § 1979.109; *see also Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, OALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). "Preponderance of the evidence" means "the 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 incline a fair and impartial mind to one side of the issue rather than the other." *Brune*, ARB No. 04-037, slip op. at 13. Thus, to establish a violation of AIR21, a complainant must prove: 1) that he engaged in protected activity; 2) that the Employer was aware of the protected activity; (3) that he suffered an adverse employment action; and 4) that the protected activity was a contributing factor in the adverse action.

The Department of Labor's Administrative Review Board ("ARB") has approved the Title VII burden shifting framework for use in AIR21 cases "where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence." *Brune*, ARB No. 04-037, slip op. at 14. When this is the case, after the complainant shows evidence that protected activity was a contributing factor in an adverse employment action, the ALJ may then "examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action." *Id.*

If the complainant succeeds in proving that the respondent has violated AIR21, the complainant is entitled to relief, unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.104(d); *Peck*, ARB No. 02-028, slip op. at 10; *Brune*, ARB No. 04-037, slip op. at 14.

[5] These letters are not in evidence.

D. AIR21 Coverage

AIR21 extends whistleblower protection to employees of air carriers, contractors and subcontractor of air carriers. 49 U.S.C. § 42121(a); 29 C.F.R. § 1973.101. The Employer, a manufacturer of airplane engine parts, does not dispute that the Complainant is an employee covered by the Act. Resp't Br. at 20. Thus, I find that the Complainant is an employee covered by AIR21.

E. Protected Activity

AIR21 protects employees of air carriers who:

(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. § 42121(a), s*ee also*, 29 C.F.R. § 1979.102(b)(1-4). The complainant need not report an actual violation, but the complainant must reasonably believe that a violation has occurred. *Peck*, ARB No. 02-028, slip op. at 13, *citing Clean Harbors Envtl. Serv. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998) and *Leach v. Basin 3Western, Inc.*, ARB No. 02-089, OALJ No. 2002-STA-5, slip op. at 3 (ARB Jul. 21, 2003); *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

In this case, the Complainant wrote a letter to the FAA on April 28, 2004, alleging that Birken was making airline parts that did not conform to customer requirements and the parts were used as part of an assembly in airplanes. CX 6. Following the letter, the Complainant met with two FAA personnel on May 4, 2004. The Employer does not dispute that the Complainant's April 28, 2004 letter to the FAA or the Complainant's May 4, 2004 meeting with FAA inspectors constitute protected activity. Resp't Br. at 20. Therefore, I find that the Complainant engaged in protected activity when he wrote the April 28, 2004 letter to the FAA, and when he met with the FAA inspectors on May 4, 2004. However, there is no evidence establishing that Birken knew of the Complainant's letters or meeting with the FAA before it terminated his employment. Mr. Greenberg's statement that the Complainant never informed him of complaints to the FAA, but had threatened in several letters, "I'm a whistleblower…. I know where to go…. I heard whistleblowers take companies down," (TR 195) cannot be

considered knowledge of any report to the FAA, because the statement alone does not show that the Employer had any knowledge of the April letter to the FAA or the May meeting with FAA officials. I find that Birken was not aware of either the Complainant's letter to the FAA or his meeting with the FAA investigators.

The Complainant also spoke with an auditor from Pratt & Whitney, who was conducting an audit at the Birken facility sometime in August 2004, about his concerns related to the non-conforming parts. He gave the auditor some of his written notes detailing the allegedly improper parts. A few weeks later the Complainant gave the rest of his notes to both Pratt & Whitney and to Birken officials. The Employer's brief makes contradictory and inconsistent statements with regard to whether the Complainant engaged in protected activity when he spoke with Pratt & Whitney and provided his written notes to both Pratt & Whitney and Birken. For example, the Employer "makes no claims" regarding the delivery of the Complainant's notes of perceived safety violations to Mr. Gilman of Pratt & Whitney and to the Employer, "because under the company policy an employee may do so without fear of retaliation." Resp't Br. at 21. However, the Employer also states that "[i]f this information had been reported to Birken in a timely fashion, it would have been protected activity and would have been within the policy of the Birken Manufacturing Company." Resp't Br. at 21.

By delivering his notes to Pratt & Whitney, and later to Birken, the Complainant "provided…to the employer…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," as required by 49 U.S.C. § 42121(a)(1). Thus, these actions are protected under the statute. It is clear that the Employer knew of the Complainant's delivery of his notes to Pratt & Whitney and Birken, as Mr. Greenberg acknowledged this fact. Accordingly, I find that the Complainant engaged in protected activity when he provided his notes or diary of allegedly non-conforming parts to the Pratt & Whitney auditor and later to Birken.

F. Adverse Personnel Action

The Complainant's employment with Birken was terminated as of November 8, 2004. Termination of employment is an adverse action under AIR21. 49 U.S.C. § 42121(a).

G. Whether the Protected Activity was a Contributing Factor in the Complainant's Termination

The Complainant next must prove by a preponderance of the evidence that his protected activity was a "contributing factor" which motivated the Employer to take the adverse employment action against him. 49 U.S.C.A. § 42121(b)(2)(B)(iii), 29 C.F.R. § 1979.102; *Brune*, ARB No. 04-037, slip op. at 13. Once the Complainant has demonstrated that the protected activity was a contributing factor in the adverse employment action, the employer can rebut this showing by articulating a legitimate non-discriminatory reason for the employment action. *Brune*, ARB No. 04-037, slip op. at 14. At this point, the ALJ must "examine the legitimacy of the employer's articulated reasons for the adverse personnel action" to determine whether the Complainant has proved a violation of AIR21 by a preponderance of the evidence.

Id. The Complainant retains the burden of proof throughout, and must prove a violation of AIR21 by a preponderance of the evidence. *Brune*, ARB No. 04-037, slip op. at 13, *Peck*, ARB No. 02-028, slip op. at 9.

The Complainant may prove that his protected activity was a contributing factor in his termination in any way that gives "rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action." 29 C.F.R. § 1979.104(b)(2). Temporal proximity between the two creates an inference of an illegal motivation, but "is not always dispositive." *Robinson v. NW Airlines, Inc.*, ARB No. 04-041, OALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005), *citing Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, OALJ Nos. 1996-ERA-34, 38, slip op. at 6-7 (ARB Mar. 30 2001) and *Svendsen v. Air Methods, Inc.*, ARB No. 903-074, OALJ No. 2002-AIR-16, slip op. at 8 (ARB Aug. 26, 2004); *see also*; *Peck*, ARB No. 02-028, OALJ No. 2001-AIR-3 slip op. at 16; *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, 437 F.3d 102, 109 (1st Cir. 2006).

In this case, the Employer learned for certain on or about September 22, 2004 that it was the Complainant who reported perceived deficiencies in products to Pratt & Whitney. Birken terminated the Complainant on November 8, 2004. The Complainant argues that the fact that he was dismissed less than two months after the Employer learned of the protected activity gives rise to a strong inference of illegal motive. Cmp. Br. at 11. The Employer claims that this argument has little merit, because if the motivation for the Complainant's dismissal was his protected activity, the Employer had the opportunity to terminate the Complainant's employment when Birken management first suspected in late August or early September 2004 that the Complainant was the machinist providing Pratt & Whitney with information concerning alleged defective parts. Resp't Br. at 22.

As a general matter, the ARB has concluded that an adverse action occurring within one year from the date of protected activity provides sufficient temporal proximity to infer that the adverse action was motivated by the protected activity. *See, e.g. Thomas v. Arizona Pub. Serv. Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993) (finding, under the Energy Reorganization Act, 42 U.S.C. § 5831 *et seq.*, that an inference of causation arose where about one year elapsed between the Complainant's protected activity and the adverse personnel action).[6] As little more than two months passed between the time of the Complainant's protected activity and the Employer's knowledge of the activity to the date of his termination, I find that the temporal proximity of these two events give rise to an inference of illegal motivation. I reject the Employer's argument that no inference of causation should arise since it could have terminated the Complainant's employment as early as September 22, 2004, the date it first suspected that the Complainant had provided the notes to Pratt & Whitney, because Birken was still interested in obtaining the remainder of the Complainant's notes and dismissing the Complainant before the company had obtained all of the notes would not have served Birken's interest. Moreover, this argument does not establish that the dismissal approximately two months later was not motivated by the protected activity.

[6] AIR21 was modeled on the Energy Reorganization Act, 42 U.S.C. § 5851 *et seq*. *See Peck*, ARB No. 02-028, slip op. at 9).

In addition to proximity in time between the protected activity and the termination, the Complainant also relies upon the termination letter to support his claim that his protected activity was a factor in his dismissal. The termination letter states that the Complainant was fired because of the negative consequences Birken experienced as a result of the Complainant's providing his notes to Pratt & Whitney and to Birken as the letter explicitly notes the "substantial damage [the Complainant] caused this company in terms of reputation, loss of business, and the costs of auditing [his] unfounded claims." Cmp. Br. at 11. Finally, the Complainant asserts that "Greenberg himself admitted that Patino would not have been terminated had the complaints been substantiated, thereby admitting that THE reason for Patino's termination was because of his protected activity." Cmp. Br. at 11 (emphasis in original).

The timing of the termination coming just a few months after the protected activity, the reasons articulated in the termination letter for the Complainant's dismissal, and Mr. Birken's statement that the Complainant would not have been fired had his complaints been substantiated, are sufficient to establish that the Complainant's protected activity in turning the diary of allegedly defective parts over to Pratt and Whitney played a role in his termination.

1. Birken's Showing of a Legitimate Nondiscriminatory Reason for the Complainant's Termination

Birken can rebut the Complainant's showing that the protected activity was a contributing factor in his termination by producing evidence that the termination was motivated by a legitimate, nondiscriminatory reason. In the present case, Birken argues that it "expressly terminated Mr. Patino because he concealed manufacturing information in his diary for a period [of] six years without turning it over to the company, Pratt & Whitney, or the Federal Aviation Administration." Resp't Br. at 22. The Employer terms this concealment an "integrity violation," which it claims is a proper reason for termination. Resp't Br. at 24. The Employer maintains that the termination was not due to the report to the FAA, but for failing to report information that potentially impacted on air carrier safety and allegedly violated company ethics. Resp't Br. at 25. As the Employer asserts, the delay in reporting the allegedly defective or non-conforming parts "could have put the flying public and government employees in jeopardy." EX 8.

As a manufacturer of airplane engine parts, it is critical to Birken's business that its customers and the flying public understand that parts made by Birken are consistent with blueprints and the customer's specifications. The Complainant's delay of almost six years in reporting what he perceived as ongoing violations in the manufacturing of engine parts by permitting allegedly non-conforming parts to be installed in commercial and military aircraft is a serious matter. Had the Complainant been correct in his concerns, his delay of several years in reporting his concern of ongoing violations placed the safety of the flying public at substantial risk.

The Complainant stated that he kept the notes of non-conforming parts to assist himself in remembering what happened with a particular part and to help the FAA, which he stated he hoped to one day be able to discuss the allegedly non-conforming parts with. TR 130-131. I find the Complainant's testimony that he maintained his notes of non-conforming parts from

1998 to 2004 and did not report his concerns regarding the parts to the FAA, Pratt & Whitney or Birken until 2004, troubling. The Claimant's testimony that he did not make a report to the FAA until 2004 because he could not reach the FAA National Office in Washington, DC by phone and he could not locate the FAA's local office is unpersuasive. If the Complainant's safety concerns were serious enough for him to maintain a detailed diary of specific parts over a period of several years, he had a responsibility to ensure that his concerns were raised with the proper authorities at the FAA or with some entity outside of Birken. Although he reported he called the FAA in Washington and received no response, the Complainant did not make any other efforts to bring his concerns to the FAA until 2004 when, by chance, he happened upon the FAA location near the local airport while looking for a post office.

Moreover, the Complainant's explanation for why he did not make any effort to take his concerns regarding allegedly non-conforming airplane engine parts to any entity outside Birken, such as Pratt & Whitney, Birken's auditor, customer and the manufacturer of airplane engines, is simply not credible. The Complainant explained his failure to raise his concerns with Pratt & Whitney by stating that he believed someone at Pratt & Whitney was on the take and he did not trust them. TR 131-132, 134. The Complainant provided no evidence to support this view and, in fact, admitted that he reached this conclusion on the basis of rumors. TR 131. Thus, the Complainant fails to provide a reasoned explanation for his failure to raise his concerns with Pratt & Whitney at any point during the six years he maintained the diary and prior to August 2004, when Pratt & Whitney was performing a routine audit at the Birken facility. The Complainant's failure to take affirmative action during this period is disturbing and calls into question the sincerity of his concerns.

It is also noteworthy that in the period of 1998-2004, during which he was compiling the diary of non-conforming airplane engine parts, the Complainant filed complaints with the Connecticut Commission on Human Rights & Opportunities.[7] In filing complaints with the Human Rights and Opportunities Commission, the Complainant demonstrated that he was capable of contacting the proper government organizations and invoking the appropriate investigatory processes. In addition, the Complainant was represented by counsel in some of his complaints to the Connecticut Commission on Human Rights & Opportunities and he certainly could have sought their assistance in contacting the FAA with his concerns regarding non-conforming airplane engine parts. This is especially so in light of the potentially catastrophic effect the purportedly non-conforming parts could have had on the flying public.

In addition to placing the public at substantial risk by failing to disclose the notes of the non-conforming parts for almost six years, the Complainant's delay cost the Employer several hundred thousand dollars in loss, which could have been avoided had the diary of non-conforming parts been disclosed earlier. I accept the Employer's assertion that the delay caused damages to its reputation and loss of business. Accordingly, I find that the Employer's articulated reason, the Complainant's almost six year delay in reporting suspected non-conforming parts, which could have contributed to safety hazards, placing the flying public at risk, and which resulted in substantial financial loss to Birken, is a legitimate nondiscriminatory reason for the Complainant's termination.

[7] The Complainant filed several complaints with the Connecticut Commission on Human Rights & Opportunities, some of which appear to have been attorney assisted. *See* EX 3-10.

The Employer further argues that the Complainant's motivation in keeping the diary was "to get even with the company" for what he perceived to be unsatisfactory responses to his complaints of discrimination against Birken with the Connecticut Commission on Human Rights & Opportunities.[8] Resp't Br. at 22. The Complainant points out that the "respondent's claim that Patino's motive for the protected activity was somehow connected to his anger at Birken's mishandling of his complaints of discrimination at the Connecticut Commission on Human Rights and Opportunities…was not supported by the evidence." Cmp. Br. at 12. I reject the Employer's argument regarding the Complainant's alleged retaliatory motive because the Employer's argument on this point is purely speculative.[9]

2. Whether the Respondent's Articulated Reasons Are Pretext for a Discriminatory Motive

Since Birken has articulated a legitimate nondiscriminatory reason for the Complainant's termination, I must determine whether the articulated reason is a legitimate reason for his termination or whether, as the Complainant asserts, the stated reason is a mere pretext for a discriminatory motive. In my view, this is a close question.

The Complainant argues that the Employer's "so-called legitimate, non-discriminatory reasons for terminating Patino should be discredited as pretextual," for several reasons. Cmp. Br. at 11. First, the Complainant argues that although the Employer contends that the reason for the Complainant's termination was lack of timely report, the Employer never disputed the fact that the Complainant "regularly informed his foreman of his concerns in a timely fashion on an ongoing basis." *Id*. The Complainant also points out that he properly refused to sign off on parts he felt were non-compliant with the blueprints or otherwise defective. Cmp. Br. at 12. The Complainant also calls attention to the fact that he wrote a letter to Mr. Greenberg in April 1999, which, among other things, warned him of what the Complainant perceived as non-conforming parts and paperwork. *Id.* Mr. Greenberg never followed up with these issues, and the Complainant claims that this compelled him to think that Birken "did not care about these issues." *Id.*

I credit the Complainant's statement that he informed his immediate supervisor when he believed a part was non-conforming. The Complainant testified that if he found a non-conforming part, he would talk with supervisor or cell leader. The evidence shows that the supervisor or cell leader would look at the part and would then consult with the Engineering Department. As Mr. Greenberg explained, if necessary, the Engineering or Quality Departments might go back to the customer to request a deviation from the blueprint or some other

[8] The Employer also claims that it would be illogical for it to have fired the Complainant due to his reports to the FAA when it took no adverse action against him for six complaints to the Connecticut Commission on Human Rights & Opportunities. In light of the fact that the Complainant failed to establish that the Employer knew of his report to the FAA, I will not address this argument.

[9] *But see Szpyrka v. American Airlines, Inc.*, ALJ No. 2002-AIR-9 (ALJ Jul. 8, 2002) (holding on a motion for summary decision, that "an employee is protected when his actions address the public policy concerns embodied in the Act. In contrast, actions premised upon personal pecuniary interests, employee convenience, or irritation with management, however, may not rise to the level of an activity Congress intended to protect.").

modification. The Complainant acknowledges that the machining process in manufacturing engine parts allowed for some deviation from the blueprints. TR 41-43, 69. Following the necessary consultations, the Complainant's supervisor or cell leader would then inform him as to whether he could continue working on the part. TR 41-43, 50, 52, 53, 66. If the Complainant still believed the part was non-conforming then he was to complete a Non-Conforming Material Report and the part would be set aside for further evaluation. The Complainant stated that he completed approximately ten Non-Conforming Material Reports in the years he worked at the facility. In addition, the Complainant could refuse to sign off on parts he believed were non-conforming. Nevertheless, the Complainant stated that he did not believe his supervisor when the supervisor told him that Pratt &Whitney approved a part he considered non-conforming, so he did not sign for the part. The Complainant's own testimony establishes that his supervisor did not simply ignore his concerns but rather checked with Engineering or the Inspection Departments about the specific parts and then informed the Complainant as to whether or not he could continue working on the part. I find that Birken did not ignore the concerns the Complainant raised with his supervisor or cell leader. Birken reasonably believed that it had adequately addressed the concerns with the Complainant when they arose. To the extent the Complainant continued to have concerns over specific parts, he had a responsibility to raise the issue with higher management or an outside entity.

The Complainant argues that he wrote a letter to Mr. Greenberg in April 1999, which, among other things, warned him of what the Complainant perceived as non-conforming parts and paperwork. CX 3. The April 1999 letter reiterated claims of sexual harassment by other employees, and in passing mentioned a part not being in compliance and suggested a violation of FAA rules. Mr. Greenberg addressed the harassment issue with the Complainant. Although he did not talk with the Complainant about the vague suggestion of a possible FAA violation, Mr. Greenberg did ask the Complainant's supervisor and was told there were no FAA violations. In addition, the Complainant has testified that he did not trust either Mr. Greenberg or Birken, and therefore it is unlikely the Complainant would have accepted Mr. Greenberg's explanation as to why the parts were in fact conforming any more than he accepted assurances from his supervisor or from the Engineering or Inspection Department personnel. Thus, the evidence does not support the Claimant's assertion that the Employer or Gary Greenberg never followed up on the Complainant's concerns regarding allegedly non-conforming parts or that the Company's stated reason for the termination was pretext.

In its effort to establish pretext, the Complainant contends that Mr. Greenberg's statement that had the Complainant reported "a correct statement of improper conduct by our people, he would not have been let go," establishes that the Employer's stated reason for the termination was not the real reason. TR 223. Mr. Greenberg's statement is troubling as it suggests that the Complainant's failure to inform the Company or an outside entity of the notes would not have lead to his termination had any of the parts been found to be non-conforming. AIR21 does not require a complainant to report an actual violation of law; it merely requires that the complainant have a reasonable belief that a violation has occurred. However, this statement was made in the context of explaining that the decision to fire the Complainant was made after Pratt & Whitney determined that none of the sixty-eight pages of notes involved real deviations that were not explainable by the Quality Department and immediately following the statement, Mr. Greenberg stated the Complainant was "let go because he kept these documents to himself, and refused to let management know his concerns." TR 223. On balance, I can not find that this one statement,

considering its context, establishes that Birken's stated reason for terminating the Complainant was pretext.

In keeping the diary of non-conforming parts for a six year period, without informing the company, or an outside entity, the Complainant risked the safety of the public and exposed the company to significant expense, both of which could have been avoided by a timely disclosure of the diary. After carefully considering the evidence, I conclude that the Complainant has failed to establish that Birken's legitimate business reason for terminating his employment with the company was a pretext. Accordingly, the Complainant failed to establish by a preponderance of the evidence that he was terminated for reporting allegedly non-conforming parts to his employer, Pratt & Whitney or to the FAA. Therefore, the complaint is dismissed.

H. Attorney's Fees

If a complaint "is frivolous or has been brought in bad faith," a prevailing employer may be awarded a reasonable attorney's fee not exceeding $1,000. 49 U.S.C. § 42121(b)(3)(c); 29 C.F.R. § 1979.109(b). The Employer argues that the Complainant acted in bad faith by keeping his notes regarding perceived defective parts concealed for six years, and that his claim was frivolous. Resp't Br. at 25. Additionally, the Employer argues that the Complainant "failed to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in his discharge." *Id.*

I do not agree. First, the Act states that a prevailing employer may be entitled to attorney's fees if the *complaint* is brought in bad faith, not if some underlying activity is done in bad faith. Furthermore, even if the Act did refer to the Complainant's actions underlying his complaint, I find that the Complainant acted in good faith in keeping the log, as he credibly testified that he kept the notes "to make myself sure of what I did on that particular part if I was asked by somebody in the shop and if inspection or somebody is to ask what happened with this part so I could explain," and "to help the FAA." TR 130-131.

Secondly, the Complainant's failure "to demonstrate by a preponderance of the evidence that his protected activity was a contributing factor in his discharge," does not mean that his complaint was frivolous or was brought in bad faith. Therefore, based upon all of the above, I find that an award of attorney's fees is not appropriate.

IV. ORDER

The Complainant's complaint of unlawful discrimination in violation of the AIR21 is dismissed.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).