IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	**Chapter 11**
	)	
UAL Corporation, et al.,	)	**Case No. 02-B-48191**
	)	
Debtors.	)	
	)	
	)	

MEMORANDUM OPINION

These Chapter 11 cases are before the court on the debtors' objection to Claim No. 35445, filed by Mark S. Sassman, Sr. in the amount of $1,130,225.50. (Debtor's Forty-Eighth Omnibus Objection to Claim(s), Bankruptcy Docket No. 16591.) Sassman's claim arises from termination of his employment, which he asserts was in retaliation for safety complaints. It is thus actionable under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (49 U.S.C. § 42121 (2000); "AIR21") and implementing regulations (29 C.F.R. Part 1979), which protect employees of air carriers from retaliation for providing air safety information to their employers or to the Federal Aviation Administration. The debtors oppose the claim, on the basis that the United Air Lines officials who decided to terminate Sassman's employment were unaware of the safety-related complaints and that, even if they did know about the complaints, the officials had good cause to terminate Mr. Sassman and would have done so regardless of his complaints. For the reasons set out below, the record supports United's objection. Accordingly, Sassman's claim will be disallowed.

Jurisdiction

Under 28 U.S.C. § 1334(a), the federal district courts have "original and exclusive jurisdiction of all cases under Title 11," but they may refer such cases to the bankruptcy judges for their districts under 28 U.S.C. § 157(a). These cases were referred to this court pursuant to Internal Operating Procedure 15(a) of the District Court for the Northern District of Illinois.

Pursuant to the reference, the bankruptcy court has jurisdiction under 28 U.S.C. § 157(b)(1) to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." The resolution of claims against a debtor's estate is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

Procedural Background

The parties agree that the evidence relevant to Sassman's claim is contained in the record established at proceedings before the Department of Labor ("DOL") at which Sassman sought relief under AIR21.[1] (*See* Scheduling Order, Bankruptcy Docket No. 16819.) AIR21 whistleblower complaints must be filed with the Occupational Safety and Health Administration ("OSHA"), a DOL agency. OSHA then conducts an initial review and investigation to determine whether preliminary relief and adjudication on the merits are warranted.[2] *See* 29 C.F.R. §§ 1979.103, 104, and 105 (setting forth procedures for a case under AIR21). Sassman's AIR21 complaint was filed with OSHA, its personnel investigated his claims, and the complaint was

[1] The DOL case is *Sassman v. United Airlines*, No. 2001-AIR-7. The record from that proceeding includes the Trial Transcript, (Complainant) Sassman's Exhibits, (Respondent) United's Exhibits, and the deposition transcript of FAA inspector Jeffrey Barnett.

[2] This two-step process of initial review and then formal adjudication operates in much the same way as cases under Title VII of the Civil Rights Act, which first proceed before the Equal Employment Opportunity Commission and then to district court upon the issuance of a right-to-sue letter.

dismissed.[3] However, the statute permits either party to object to OSHA's determination and request a formal hearing at the DOL to adjudicate the complaint. 29 C.F.R. § 1979.106. *See also Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 11 (ARB Jan. 31, 2006). Sassman timely filed an objection and a hearing was held on December 4 through 6, 2002 before Department of Labor Administrative Law Judge Robert L. Hillyard. On December 9, 2002, prior to Judge Hillyard's final ruling on the matter, United Air Lines, Inc. and twenty-seven of its affiliates (collectively, "United") filed the Chapter 11 cases now before this court. Proceedings before the DOL were stayed and the task of reviewing the record and ruling on the merits of the claim has fallen to this court.[4]

Factual Background

Sassman was an aircraft mechanic employed by United for approximately 14 years. Sassman was suspended on November 2, 2000 and ultimately discharged for a violation of United's Rule of Conduct No. 2. (*See* Notice of Disciplinary Action, Sassman Ex. 34.) This Rule is titled "Falsification of Company Records or Reports" and extends to the falsification of employee time cards and payroll records. (*See* Trial Tr. Dec. 4, 2002 at 35:2-5; United Airlines Rules of Conduct for IAMAW Represented Employees, Sassman Ex. 12.) Violation of Rule 2 "will result in discharge unless mitigating factors are considered applicable." (Trial Tr. Dec. 4, 2002 at 35:15-18; Sassman Ex. 12.)

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[3] OSHA's investigative finding plays no role in this decision and was not admitted into evidence at trial.

[4] The DOL declined Sassman's request to complete its adjudication of his claim, by an order dated November 7, 2007, stating it no longer had jurisdiction because the case had been dismissed on United's motion on June 12, 2006. (*See* Sassman's Notice of Order, Bankruptcy Docket No. 16912.)

The proposed discharge. At the time that Sassman worked at United's Indianapolis Maintenance Center ("IMC") facility, payroll was based on an honor system: employees were automatically paid for their full shifts unless they submitted a "payroll exception form" to account for any time they did not actually work during the scheduled shift. (Trial Tr. Dec. 4, 2002 at 20:8-17, 21:5-6, 77:22-24; IMCOP Operating Procedure 5.13.3, Sassman Ex. 13; EPS Procedures, United Ex. 6 at 1.) United "typically relied on the good faith of its employees," and only verified payroll records if alerted by a "triggering event" that suggested an employee might be accepting pay for time he did not work. Because the IMC was a "clockless facility," there were no employee time cards to check. However, supervisors could review records from the security card swipe at the IMC's main entrance gate to determine when an employee entered and exited the facility. (*See* Trial Tr. Dec. 5, 2002 at 354:22-25, 355:1-2; United's Opening Brief in Support of Claim Objection, Bankruptcy Docket No. 16848.)

In Sassman's case, a "triggering event" occurred in the fall of 2000. At the beginning of each shift, facility supervisors conducted mandatory briefings to inform the employees of the status of aircraft being repaired and to make announcements. (Trial Tr. Dec. 4, 2002 at 114:7-19.) Employees were expected to be in the briefing room, ready to go to work at their shift start time. (*See* IMC Employee Expectations, United Ex. 6 at 2.) Sassman's tardiness in attending these briefings prompted his supervisors, Gary Strelow and Bob DeMaine, to reproach him verbally on at least two occasions. (Trial Tr. Dec. 4, 2002 at 118:15-25; Trial Tr. Dec. 6, 2002 at 480:16-23, 481:2-7.) On the first instance, Sassman brought an exception form to Bob DeMaine for signature. DeMaine signed the form as an "unapproved" absence rather than "approved." When Sassman protested, DeMaine responded that Sassman "needed to come to work on time." (Trial Tr. Dec. 4, 2002 at 118:15-23.) On the second instance, Strelow noticed that Sassman had

come to a briefing late. Following the meeting, Strelow told Sassman that he "needed to watch his start and stop times." (Trial Tr. Dec. 4, 2002 at 119:7-12; Trial Tr. Dec. 6, 2002 at 480:16-23.)

When Strelow and DeMaine learned that they had independently spoken to Sassman about tardiness, they decided to ask their manager, Tom Cornacchini, to allow them to review Sassman's gate swipe records for a sample period. (Trial Tr. Dec. 6, 2002 at 481:2-18.) The sample of 20 to 25 days confirmed that Sassman had frequently arrived at the IMC late for his shift. (Trial Tr. Dec. 6, 2002 at 483:4.) Strelow then requested records from several additional months and checked Sassman's entry time on each day. (Trial Tr. Dec. 6, 2002 at 483:7-13.) Strelow and Cornacchini reviewed the larger sample together and noticed a "repetitive infraction" of Sassman's 6:00 a.m. start time. (Trial Tr. Dec. 5, 2002 at 370:4-6.)

This finding prompted the first step in the disciplinary process: Strelow called a fact-finding meeting with Sassman on November 2, 2000 to discuss his investigation and seek an explanation that might mitigate the infractions. (Trial Tr. Dec. 5, 2002 at 371:9-16; Dec. 6, 2002 at 484:13-20.) Also present at the meeting were two other United team leaders and Sassman's union shop steward. As this was Strelow's first disciplinary investigation, he read questions from a scripted form. (*See* Sassman Ex. 28.) When Strelow concluded that Sassman was not being cooperative in his answers, he cut the meeting short and ordered Sassman suspended without pay. (Trial Tr. Dec. 6, 2002 at 485:17-19, 487:2-6.) Strelow told Sassman that he would propose termination, pending further review. (Trial Tr. Dec. 4, 2002 at 120:25, 121:1-3; Dec. 6, 2002 at 487:6-10.)

Strelow and Cornacchini then commenced a detailed investigation to determine whether there were grounds to support Sassman's termination. They reviewed all of Sassman's shifts be-

tween January and the end of October and found that he had arrived to the IMC late on 137 occasions. (Trial Tr. Dec. 6, 2002 at 492:4.) Next, they compared the time Sassman swiped his security badge at the main entrance gate with all of his exception forms and found a total of 3 hours and 26 minutes unaccounted for. (Trial Tr. Dec. 6, 2002 at 492:4-10; Report of Non-Punitive Disciplinary Action, United Ex. 9.) Strelow and Cornacchini concluded from their review that Sassman had habitually disregarded his start time and had accepted pay for time he had not worked. Consequently, Cornacchini authorized and instructed Strelow to discharge Sassman for violating Rule 2. (Trial Tr. Dec. 5, 2002 at 375:10-20.) On November 29, 2000, United mailed Sassman a copy of the Disciplinary Action Report proposing discharge and a Notice of an Investigative Review Hearing. (Sassman Ex. 33; United Ex. 9.)

The review proceedings. Sassman's discharge was subject to multiple levels of review before it became effective. United's operating procedures require any proposed discharge be reviewed by a senior manager at an Investigative Review Hearing, after which the employee has an automatic right to appeal to a grievance hearing and from there to formal arbitration. (Trial Tr. Dec. 5, 2002 at 356:16-21, 376:9-19; Dec. 6, 2002 at 574:2-10.) These procedures were followed.

i. *The Investigative Review Hearing*. The hearing on Sassman's proposed discharge was held on December 12, 2000 before Wayne Davis, Manager of Aircraft Inspection. (Trial Tr. Dec. 6, 2002 at 547:11-12.) Davis' role as the hearing officer was to "maintain a neutral position", "to learn the truth and the facts", and to determine if the preponderance of the evidence substantiated the charge brought by the company. (Trial Tr. Dec. 6, 2002 at 547:19-24.) Davis was not involved in the initial investigation in any way. (Trial Tr. Dec. 6, 2002 at 547:14-17.) At the hearing, Strelow presented United's position and supporting evidence with the assis-

tance of two other team leaders. (Trial Tr. Dec. 6, 2002 at 550:16-18; Trial Tr. Dec. 4, 2002 at 127:16-19, 21-23; Report of Non-Punitive Disciplinary Action, United Ex. 9; Mark Sassman Shortfall, United Ex. 10.) Three union representatives attended the Investigative Review Hearing in support of Sassman and offered at least eight exhibits on his behalf to challenge the basis for discharge. (Trial Tr. Dec. 4, 2002 at 127:24-25, 128:11-13. *See also* IRH Amended Decision, United Ex. 11 at 2.)

Davis allowed United to amend its initial charges with respect to the total time it claimed was unaccounted for, from 3 hours 26 minutes to 1 hour 34 minutes and 45 seconds. (Mark Sassman Shortfall, United Ex. 10; IRH Amended Decision, United Ex. 11 at 2.) This represented a concession to the union's contention that Sassman should be credited with time on days that he arrived late but also left late. (Trial Tr. Dec. 6, 2002 at 498:1-24.) The reduction was contrary to United's stated policy that any "flex time" must be pre-approved and documented with an exception slip. (Trial Tr. Dec. 5, 2002 at 432:23-25; IMC Employee Expectations, United Ex. 6 at 2.) Cornacchini explained at trial why Sassman was not initially credited with the time he swiped out of the IMC past the end of the shift: "The team leader would have to be made aware of it. The employees do not work past end of shift. In most cases, we don't want employees working alone. . . . It would have been an unusual occurrence to have an employee on the bay past the time the bay was vacated by that shift." (Trial Tr. Dec. 5, 2002 at 410:4-9.) Nonetheless, Strelow believed that there were "so many days [Sassman] was late" with time unaccounted for; there remained a sufficient basis to support discharge. (Trial Tr. Dec. 6, 2002 at 398:15-19.)

Davis testified at the DOL trial that in his opinion, the aggregate time shortfall was not material; "the amount of time being charged, in terms of the number of minutes or hours," did

not have a bearing on his decision. (Trial Tr. Dec. 6, 2002 at 551:3-7.) Rather, Davis explained that "if [a hearing officer] determine[s] an employee is late, the minutes would be the technical side of it. The [Rule 2] charge itself would stand… whether it's an hour or two hours." (Trial Tr. Dec. 6, 2002 at 551:19-22.)

Davis issued his final written decision on February 4, 2001. (IRH Amended Decision, United Ex. 11.) In it, Davis noted that "the payroll exception samples demonstrate [Sassman was] aware of [his] responsibility to submit exception cards for exceptions to [his] normal scheduled workdays, yet the access report shows selectivity." (IRH Amended Decision, United Ex. 11 at 3.) On this basis, together with the fact that Sassman did not account at all for 97 of the 137 occasions he was late between January and November 2000, Davis found that the charge of the Rule 2 violation was substantiated. (Trial Tr. Dec. 6, 2002 at 550: 23-25, 551:1-2; IRH Amended Decision, United Ex. 11 at 3.) Sassman was discharged with an effective date of November 2, 2000.

ii. *The grievance hearing*. The grievance hearing was held before Scott Perry, Senior Staff Representative, Labor Relations, on July 27, 2001. (Trial Tr. Dec. 6, 2002 at 573:1-13; *see also* Grievance Hearing Transcript, Sassman Ex. 51.) Once again, Strelow presented on behalf of United, with assistance from manager Terry Doppler. (Trial Tr. Dec. 4, 2002 at 131:4-6.) Ray Horgan, the Assistant General Chairman of the union, represented Sassman. (Trial Tr. Dec. 4, 2002 at 130:4-11; Trial Tr. Dec. 6, 2002 at 582:13-15.) Horgan argued that Sassman should not have been discharged for a Rule 2 violation because United's own gate swipe records showed that Sassman swiped out of the IMC facility well past his shift ending time on many occasions. (Trial Tr. Dec 4, 20002 at 133:8-17.) Indeed, Horgan's calculations of the gate swipe records suggested that Sassman was actually entitled to 14 hours 33 minutes and 16 seconds of

overtime. (Trial Tr. Dec. 4, 2002 at 133:24-25, 134:1-2; Dec. 6, 2002 at 596:17-25, 597:1-6; Sassman's Ex. 47.)

Perry rejected this argument. His decision to uphold termination focused on United's policy that unless employees are in the work area ready to work at the start of the shift, they are late and must file an exception form. (Third Step Decision, United Ex.12 at 4.) Perry did not consider Sassman's late exit time to be relevant to the shortfall calculation. (Trial Tr. Dec. 6, 2002 at 629:20-23.) Perry's position is consistent with that of other United management employees throughout the record, explained more fully in the following exchange:

> Q [by Mr. Darst]: Late to work is not a shortfall, is it?
> A [by Mr. Cornacchini]: It absolutely is.
> Q: You're talking about shortfall for the day, that's the term you used. Correct?
> A: And the shift was 6:00 a.m. to 4:15. And if you weren't there in the briefing at start of shift, your day was short.

(Trial Tr. Dec. 5, 2002 at 411:11-17. *See also* Trial Tr. Dec. 5, 2002 at 428:21-23: [by Judge Hillyard]: "I understand it. Okay, United wants them to be there at six for briefing and they leave at 4:15.") According to Cornacchini, United had no reason to credit Sassman for time he was in the building after the shift ended unless there was a documented request for overtime work. (Trial Tr. Dec 5, 2002 at 411:21-25.) The IMC featured a "Main Street" with a cafeteria, credit union, administrative offices, and other facilities. (Trial Tr. Dec. 4, 2002 at 60:12-18.) Thus, Sassman could have remained on the premises after his shift end for reasons other than performing work.

Perry testified at trial that he found the arguments and objections over the competing time calculations of United and the union "difficult to follow" and "tedious." (Trial Tr. Dec. 6, 2002 at 600:3-7.) To clarify the information for his decision, Perry distilled all the exhibits offered at

the hearing into an Excel spreadsheet so that he could analyze the data himself; he calculated that Sassman's shortfall totaled 8 hours 17 minutes and 53 seconds. (Trial Tr. Dec. 6, 2002 at 600:16-23). At the DOL trial, Perry testified that he did this "for my own peace of mind, because I take discipline hearings, discharges, you know, I take them all seriously. And I wasn't comfortable with either side's presentation. And I wanted to be sure for myself." (*Id.*) Perry found that, consistent with United's charge, Sassman had accepted pay for time he had not worked. (Third Step Decision, United Ex.12 at 5.) Accordingly, the discharge was upheld.[5]

Sassman's safety complaints. In the AIR21 complaint filed with OSHA, Sassman contends that United actually terminated his employment in retaliation for an accumulation of complaints he had made about safety issues at the IMC to his supervisors and to the FAA.[6] (Trial Tr. Dec. 4, 2002 at 25:16-18; Sassman Complaint, United Ex. 1). Sassman's affidavit to his AIR21 complaint identifies five safety complaints as the basis for his cause of action against United: (1) a complaint to the FAA about missing tail rudder balance tags; (2) a complaint to the FAA and local environmental authorities about a C-check inspection of an aircraft that was improperly conducted outside of a hangar; (3) a complaint to the FAA about fellow mechanic John Ward's in-flight repair of a sound system; (4) a complaint to the FAA about improper sequence numbers on aircraft paperwork; and (5) a complaint to the FAA about United's "Illegal Job Action" form letter. (*See* Sassman Complaint, United Ex. 1.) Out of these five, Sassman identified the complaint regarding John Ward's in-flight repair as "the one that I believe is the cause of my dis-

[5] The final step in the review process, formal arbitration, was not part of the record submitted to this court. However, counsel have represented that the discharge was upheld on substantially the same grounds as the Investigative Review Hearing and grievance hearing and that no retaliation allegations were raised.

[6] The details of Sassman's AIR21 complaint are set out in the Affidavit of Mark S. Sassman Sr. dated January 3, 2001 ("Sassman Complaint"), United Ex. 1.

charge from United Airlines." (Sassman Complaint, United Ex. 1 at 1.) Sassman "add[ed] the others because of their relevance to any investigation [OSHA] may hold." (*Id.*)

Discussion

A. *AIR21 and applicable jurisprudence*

AIR21 was enacted in April 2000 to extend whistleblower protections to air transportation employees, consistent with protections previously afforded to employees of the nuclear, energy, environmental, and other industries. *See* H.R. Rep. No. 105-639, at 51 (1998) (noting that "private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory action by over a dozen federal laws," but that "there are no laws specifically designed to protect airline employee whistleblowers"). AIR21 prohibits air carriers, contractors, and their subcontractors from "discharg[ing]" or "otherwise discriminat[ing] against any employee" because the employee engaged in any air carrier safety-related activities the statute covers. 49 U.S.C. § 42121(a)(1). AIR21 empowers the DOL to investigate and reach a final determination of retaliatory discharge complaints filed by airline employees based on whistle-blowing activities and prescribes the procedural and evidentiary requirements that must be satisfied at each phase of a case.

In AIR21, Congress adopted the substantive provisions and the decisional framework provided in the Energy Reorganization Act of 1974, as amended in 1992 ("ERA"); the Whistleblower Protection Act ("WPA"); and several other federal statutes. These whistleblower statutes share the broad remedial purpose of prohibiting discrimination against employees who raise concerns about their employer's compliance with applicable law. The cases filed under these statutes arise in virtually identical contexts, no matter the industry. Accordingly, the DOL and reviewing courts have applied the jurisprudence developed under existing whistleblower statutes to

cases arising under AIR21.[7] *See Davis v. United Airlines, Inc.*, No. 2001-AIR-5, slip op. at 7-8 (ALJ July 25, 2002). *See also Hirst v. Southeast Airlines, Inc*., 2007 WL 352447 (ARB Jan. 31, 2007) (relying on cases decided under the ERA, Surface Transportation Assistance Act, Water Pollution Control Act, Solid Waste Disposal Act, and Clean Air Act).

In turn, the DOL-enforced whistleblower statutes were modeled on the National Labor Relations Act ("NLRA") and the Mine Safety and Health Act ("MSHA"). *See Mackowiak v. Univ. Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (citing S. Rep. No. 95-848, at 29 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 7303 (the whistleblower amendment to the ERA was derived from the Clean Air Act and Water Pollution Control Act, which were derived from the NLRA and MSHA)).

The DOL has also sought guidance from retaliatory discharge cases arising under Title VII of the Civil Rights Act to interpret federal whistleblower statutes. "Title VII's anti-retaliation provision, like AIR21's whistleblower protection provision, prohibits an employer from retaliating because of protected activity." *Hirst*, 2007 WL 352447 at *5. Decisions under Title VII articulate how circumstantial evidence may be used to substantiate a discrimination claim where there is no direct evidence of discrimination. This precedent applies to Sassman's AIR21 claim, as reflected in the Seventh Circuit's application of its extensive Title VII jurisprudence to whistleblower cases. *See Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995) (applying Title VII retaliation standards to ERA claim); *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001 (7th Cir. 2005) (same).

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[7] Initial review of an Administrative Law Judge's determination is made by the DOL Administrative Review Board. Judicial review of the DOL's final decision may be taken in the Circuit Court of Appeal in the circuit where the alleged violation occurred. *See* 49 U.S.C. § 42121 (b)(4)(A); 42 U.S.C. § 5851(c)(1). Sassman's termination occurred in Indiana; Seventh Circuit precedent therefore controls.

B. *Elements of Sassman's claim and burden of proof*

Evaluating a claim under AIR21 involves burden-shifting process. *First*, Sassman must prove that he engaged in protected activity and that the protected activity was a contributing factor in United's decision to discharge him. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). *Second*, there can be no relief to Sassman if United can prove by clear and convincing evidence that it would have discharged him in the absence of his protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

The ultimate question in this case is whether Sassman has proven that United intentionally discriminated against him because of his whistleblower complaints. DOL cases provide that once an AIR21 case proceeds to formal adjudication, the complainant must prove by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in the employer's unfavorable personnel decision. *Davis*, No. 2001-AIR-5, slip op. at 8 (citing *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101-1102 (10th Cir. 1999)). In *Burdine* and *St. Mary's Honor*, the Supreme Court explained that once a defendant employer produces a nondiscriminatory reason for its adverse employment decision in response to a retaliation complaint, "[t]he plaintiff then has the full and fair opportunity to demonstrate, through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision." *St. Mary's Honor v. Hicks*, 509 U.S. 502, 507-508 (1993) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). At this stage of the case, "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255.

Only if Sassman proves that there was a "dual motive" at work—that United's "proffered reason for the action is not legitimate, *and* that the discharge was motivated at least in part by

retaliation for protected activity"—must United then respond with clear and convincing evidence that it would have taken the same adverse employment action in the absence of protected activity. *Davis*, No. 2001-AIR-5, slip op. at 10 (emphasis added) (citing *Mount Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (employer may rebut by preponderance of the evidence in Title VII). Thus, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor*, 509 U.S. at 507 (citing *Burdine*, 450 U.S. at 253).

Sassman thus had the burden of establishing four elements of his case at trial: (1) that he engaged in protected activity; (2) that United knew that he engaged in protected activity; (3) that he suffered an unfavorable personnel action, such as discharge; and (4) that the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. § 1979.104(b)(1)(i)-(iv). Each of these elements is discussed in Part C, below, concluding with the determination that Sassman failed to meet his burden. However, even if Sassman had shown that his safety complaints were a contributing factor to his termination, United has presented clear and convincing evidence that it would have terminated his employment in the absence of any safety complaints. This rebuttal evidence is discussed in Part D.

C. *Sassman's evidence of retaliatory termination*

1. *Sassman's protected activity*

Among other activities, an employee is protected by AIR21 if he:

> (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 [FAA] or any other provision of Federal law relating to air carrier safety… or any other law of the United States.

49 U.S.C. § 42121(a)(1). Each of the five safety complaints that form the substance of Sassman's cause of action fall under the statute's protection:

> *Complaint 1*. On August 14, 2000 Sassman called the FAA Flight Safety Hotline to complain about improperly balanced tail rudders and missing tail rudder balance tags.
>
> *Complaint 2*. On September 8, 2000 Sassman called the FAA Flight Safety Hotline and local environmental authorities to complain about a C-check inspection of an aircraft being conducted outside of the hangar.
>
> *Complaint 3*. On September 22, 2000 Sassman called the FAA Flight Safety Hotline and the local FAA safety office to complain about mechanic John Ward's in-flight repair of a sound system.
>
> *Complaint 4*. On October 18, 2000 Sassman called the FAA and spoke in person to an FAA inspector to complain about improper sequence numbers on aircraft paperwork.
>
> *Complaint 5*. On October 19, 2000 Sassman complained in person to FAA inspector Jeffrey Barnett about United's "Illegal Job Action" form letter, which proposed discipline for "excessive" safety write-ups by mechanics.

(Sassman Complaint, United Ex. 1).

The AIR21 statute does not require that an actual violation of federal law or regulation exist; an allegation is sufficient. The trial testimony established in detail that Sassman acted in good faith when he raised safety concerns in his complaints to the FAA and United. United has not challenged that any of Sassman's complaints to the FAA are not protected activities.

2. *United's knowledge of Sassman's safety complaints*

An employer obviously cannot "retaliate" if it is unaware of any complaints. *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997, 1008 (7th Cir. 2000). The question of whether the United managers responsible for terminating Sassman knew of his safety complaints is a major issue in dispute. (*See* United Opening Brief, Bankruptcy Docket No. 16848 at 13-16 *and* Sassman Reply Brief, Bankruptcy Docket No. 16887 at 10-13.) To satisfy this element, Sassman had

to show that an employee of United with authority to take the adverse employment action, or an employee with heavy or substantial input in that decision, had knowledge of the protected activity. *See, e.g.*, *Davis*, No. 2001-AIR-5, slip op. at 12 (citing *Bartlik v. TVA*, No. 88-ERA-15, slip op. at 7 (ALJ Dec. 6, 1991) *aff'd*, 73 F.3d 100 (6th Cir. 1996). The United employees with authority or substantial input in the decision to terminate Sassman are Strelow, DeMaine, Cornacchini, Davis, and Perry. Knowledge of protected activity may not be imputed to a supervisor without proof. *Id*. (citing *Bartlik*, No. 88-ERA-15, slip op. at 7 n. 7).

a. *Sassman's complaints to the FAA*

Sassman's AIR21 complaint alleges that he was wrongfully discharged for providing safety information to the FAA on the five specific occasions outlined above. Yet there is extensive evidence in the record to support United's assertion that the managers who contributed to the decision to terminate Sassman had no knowledge of these FAA complaints.

FAA inspector Jeffrey Barnett testified in his deposition (admitted into evidence in lieu of live testimony) as to the emphasis the FAA places on whistleblower anonymity. Barnett confirmed that Sassman's complaints about the tail rudder balance tags, the in-flight repair by John Ward, and the 'illegal job action' form letter were either received anonymously or maintained in confidence. (*See* Barnett Dep. 52:20-23: Q: "You kept Mr. Sassman's name confidential?" A: "Yes, sir.") Barnett did not recall the complaints about the aircraft C-check being performed outside the hangar or the improper sequence numbers. However, Barnett explained that whenever safety complaints are routed to him from the FAA Flight Safety Hotline or received directly in his office, "[t]he name stays out of it." (Barnett Dep. 52:19.) There is no evidence in the record to refute this testimony.

As to each of the five complaints, Sassman acknowledged that he had no direct evidence as to whether anyone at the FAA talked to his team leaders, Strelow and DeMaine, about the complaints or whether any other United management employee knew that he had made the FAA complaints. (*See* Trial Tr. Dec 4, 2002 at 139:15-25 (tail rudder balance tag complaint); Trial Tr. Dec 4, 2002 at 140:22-25 (improper C-check complaint); Trial Tr. Dec 4, 2002 at 144:1-4 (John Ward repair complaint); Trial Tr. Dec 4, 2002 at 145:3-9 (improper sequence number complaint); Trial Tr. Dec 4, 2002 at 148:9-22 ('illegal job action' form letter complaint).) Sassman also acknowledged that he did not know whether anyone at the Indianapolis airfield environmental office ever told anyone at United that he had made the complaint about the C-check performed outside the hangar, which he believed to violate local environmental regulations in addition to federal aviation regulations. (Trial Tr. Dec. 4, 2002 at 141:9-16.)

Sassman argues that circumstantial evidence proves that United knew of his FAA complaints about the John Ward repair and the 'illegal job action' form letter because he took actions in public places where he could have been observed by management. Yet the Seventh Circuit holds that "it is not sufficient that [the defendant] *could* or even *should* have known about [the plaintiff's] complaints; [defendant] must have actual knowledge of the complaints for [its] decisions to be retaliatory." *Luckie v. Ameritech Corp.*, 389 F.3d 708, 715 (7th Cir. 2004). Here, there is no such evidence.

As part of the complaint about John Ward's in-flight repair, Sassman photographed a poster, located in the "Main Street" area of the IMC, which commended Ward for assisting a flight crew when an aircraft audio system failed on a commercial flight. (Trial Tr. Dec. 4, 2002 at 60:2-6; Sassman Ex. 21.) Sassman believed that the impromptu repair, accomplished without a manual and while the aircraft was in flight, violated federal aviation regulations. (Trial Tr.

Dec. 4, 2002 at 58:19-24, 59:4-11.) Thus, he objected when management held Ward out as a positive example for other employees. (*Id*.) Sassman testified that between 30 and 50 people were in the area at the time he took the photographs, but acknowledged that he knew of no management employees that observed him. (Trial Tr. Dec. 4, 2002 at 144:9-15.) He recounted that two employees, Dominic Gulley and Terry Friend, had seen him and that he was told Friend called corporate security to report him, for fear the photos would be posted to the Internet. (Trial Tr. Dec. 4, 2002 at 144:9-15; 166:12-15.) Sassman stated in his complaint that he was told "Terry Friend had people in management watching me." (Sassman Complaint, United Ex. 1 at 6.) However, that claim was not raised, much less substantiated, at trial. Indeed, Sassman had no knowledge that any of the decision-makers in his termination or anyone else at United knew he had made a complaint:

> Q [by Mr. McGuire]: And… you don't know whether the FAA ever told anybody at United that you were the one who called them, correct?
> A [by Mr. Sassman]: I don't know that, no.
> Q: And you didn't tell any United management employee that you had called the FAA, did you?
> A: No.
> Q: And you didn't complain to any United management employees about that picture, that easel involving John Ward, did you?
> A: No.
> …
> Q: You don't have any first hand knowledge that anybody in United management knew you had called the FAA about this issue, do you?
> A: No.

(Trial Tr. Dec. 4, 2002 at 143:11-25, 144:1-4.)

The same analysis applies to the 'illegal job action' form letter, which Sassman personally provided to FAA inspector Jeffrey Barnett at the IMC. (Sassman Ex. 22). Sassman makes much of the fact that he handed a copy of the letter to Barnett in a wide-open space. Another mechanic, Troy Grover, testified that he saw Cornacchini watching from a distance as Sassman

spoke to Barnett. (Trial Tr. Dec. 5, 2002 at 218:18-25, 219:1-3.) Grover was certain that Cornacchini observed Sassman handing a piece of paper to Barnett. (Trial Tr. Dec. 5, 2002 at 223:5-10.) Yet neither Sassman nor Barnett were aware that anyone was watching them. Sassman never personally saw Cornacchini or anyone else watching the conversation. (Trial Tr. Dec. 4, 2002 at 147:19-21.) Cornacchini testified that he had no recollection of seeing Sassman hand any document to the FAA inspector. (Trial Tr. Dec. 5, 2002 at 395:24-25, 396: 1-11.) Even if he did, Sassman could offer no credible argument that Cornacchini could have known that Sassman was making a safety complaint or known the contents of the paper from more than 40 feet away. In fact, Cornacchini testified that he had no knowledge that Sassman had made safety complaints whatsoever at the time he authorized discharge. (Trial Tr. Dec. 5, 2002 at 352:22-25, 353:1-4.)

Sassman has not carried his burden of proving by the preponderance of the evidence that any of the United managers with decision-making authority over his termination knew that he had complained to the FAA. As a matter of law, the complaints to the FAA could not have contributed to their decision to investigate Sassman's gate swipe records, propose the Rule 2 discharge, or ultimately discharge him.

b. *Sassman's internal complaints to Strelow and DeMaine*

AIR21 specifically provides that internal complaints regarding safety violations constitute protected activity. *See Davis*, No. 2001-AIR-5, slip op. at 11 (collecting cases); *Kahn*, 64 F.3d at 274 n. 3 (defining an internal complaint as one lodged with a supervisor of the company itself). Even informal complaints to a supervisor have been found to be protected activity. *Davis*, No. 2001-AIR-5, slip op. at 12. Sassman established at trial that he first made his com-

plaints with respect to the missing tail rudder balance tags and the illegal job action form letter to his supervisors, before contacting the FAA.

Sassman raised his concern about a missing tail rudder balance tag directly with Bob DeMaine before he filed his complaint with the FAA about missing tags on other aircraft. (Trial Tr. Dec 4, 2002 at 52:15-18.) Sassman testified that DeMaine instructed him to go to the records room to confirm whether the tail rudder had been balanced. When Sassman found the records, they created a new tag and affixed it to the rudder. (Trial Tr. Dec 4, 2002 at 52:23-25, 53:1-5.) Sassman does not allege that he complained to DeMaine or another team leader about any other missing balance tags. Therefore, the record establishes that DeMaine was aware that Sassman had complained internally about a single missing balance tag and that the safety issue was resolved.

Sassman had raised an objection to United's 'illegal job action' form letter at a briefing at which Strelow and DeMaine were present. (Trial Tr. Dec. 4, 2002 at 61:13-14, 62:4-7.) At the time, United and its union were engaged in a very contentious round of collective bargaining contract negotiations. (Trial Tr. Dec. 5, 2002 at 387:10-25, 388:1-10.) The form letter was circulated to the union to put mechanics on notice that they could be disciplined for various actions that United believed contravened the collective bargaining agreement, including "excessive write-ups." (Sassman Ex. 22.) United linked a sudden doubling of write-ups, which caused a slow down in mechanic productivity, to the contract negotiations. (*Id.*, Trial Tr. Dec. 5, 2002 at 389:4-6.) Since mechanics are required to "write-up" any defects that require further repair on an aircraft, Sassman worried that the threat of discipline might compromise safety. (Trial Tr. Dec. 4, 2002 at 61:19-25, 62:1-3.) However, there is no evidence that Sassman actually articulated this concern when he objected to the form letter. (Trial Tr. Dec. 4, 2002 at 61:7-16.) Addi-

tionally, Sassman's objections to the proposed discipline in the letter were by no means unique. Cornacchini testified that "when they handed the letter out there was quite a bit of discussion. Obviously [] all the employees would be concerned with a letter like this." (Trial Tr. Dec. 5, 2002 at 398:1-3.) Thus, while Strelow and DeMaine were aware that Sassman objected to the proposed disciplinary language in the letter, there is no evidence that they knew he considered it to present safety-related problems as opposed to being a harsh response by United's management to union-sponsored "slow down" tactics.

In sum, the evidence shows that the United employees who made the initial decision to investigate Sassman had only limited knowledge of the safety complaints that Sassman alleged caused his discharge. Sassman established no knowledge on the part of Cornacchini, who authorized the gate swipe records to be pulled for review. Sassman established that Strelow and DeMaine were only aware of the internal safety-related complaints that Sassman made to them. The impact of these complaints on their decision to initiate discipline will be considered below on the issue of causation.

c. *Knowledge of Sassman's AIR21 action during the review proceedings*

Sassman filed his AIR21 complaint in the intervening time between the Investigative Review Hearing and hearing officer Wayne Davis' written decision to effectuate the proposed discharge. The complaint had been pending for several months by the time the grievance hearing occurred and Scott Perry issued the company's final decision to uphold Sassman's termination. During this time, United's legal counsel would have been served with Sassman's complaint and investigated the allegations that Sassman had been retaliated against for whistle-blowing activities. The question is whether Davis or Perry ever became aware of them.

Sassman concedes that he never raised any of his safety complaints during either of the review proceedings. Nor did he ask his union representatives to challenge his dismissal on the basis of retaliation. The evidence and argument presented by each side at those proceedings focused entirely on whether United had substantiated a shortfall in time between what Sassman was paid and what he worked. Sassman's rationale for not raising a retaliation defense was that the scope of the review proceedings was limited to whether United had cause to terminate him under the terms of the collective bargaining contract. That may be, but by failing to even mention his safety complaints during the review proceedings, Sassman can offer no direct proof that either Davis or Perry had actual knowledge that he was engaged in protected activities.

Davis testified that he knew "absolutely nothing" about Sassman's safety complaints at the time of the Investigative Review Hearing or any time prior to the decision to uphold discharge. (Trial Tr. Dec. 6, 2002 at 546:22-25, 547:1-2.) Davis' involvement in the termination proceedings ceased once his opinion was issued. (Trial Tr. Dec. 6, 2002 at 552:3-4.) There was no evidence offered to refute this testimony.

Perry testified that he was unaware of the specifics of Sassman's safety complaints until after the grievance proceedings: "it's been raised that [the grievance and the filing of the AIR21 complaint] overlapped, but I didn't have knowledge of them at the point that those proceedings were taking place." (Trial Tr. Dec. 6, 2002 at 626:6-8.) However, Perry did acknowledge that he was aware Sassman filed a complaint with the DOL alleging wrongful termination. Perry received a letter from OSHA in February 2001, nearly five months before the grievance hearing, requesting information as to Perry's involvement in the termination process. (*See* OSHA letter dated Feb. 9, 2001, United Ex. 25.) On its face, this letter does not contain any reference to Sassman's safety complaints or even state that OSHA was investigating a claim under AIR21,

which would have put Perry on notice that the 'wrongful termination' claim was in fact based on allegations of whistleblower retaliation for safety complaints. (*See id*.) Perry admitted on cross-examination at trial that he knew "by default" that Sassman had made safety complaints, based on this letter. (Trial Tr. Dec. 6, 2002 at 627:10-15.) It is possible to infer knowledge that the investigation was based on a safety issue because the letter was on OSHA letterhead and signed by Roy Cooper, an OHSA "Investigator / Safety Specialist". Furthermore, the underlying purpose of OSHA is to regulate employment conditions relating to health and safety. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. § 651. Yet Sassman offered no evidence to rebut Perry's testimony that he had no specific knowledge of Sassman's safety complaints when he held the grievance hearing and made his decision. (See Trial Tr. Dec. 6, 2002 at 645:2-6.) Perry responded to the letter on March 16, 2001 (*see* Sassman Ex. 61), disclosing that he had advised Strelow on the proposed discipline and that he had received Sassman's appeal and scheduled the grievance hearing. (*Id*.) No evidence was offered to suggest Perry had any further contact with OSHA prior to the grievance hearing or that he learned of the specifics of Sassman's protected activities from any other source.

Sassman also filed a complaint directly with the FAA in 2001 alleging numerous violations of federal aviation regulations at the IMC. United's response to the FAA details its investigation and resolution of all safety issues that Sassman reported in his complaint (which is not itself part of the record). (*See* United Letter to FAA dated Aug. 29, 2001, Sassman Ex. 46.) United called upon two investigators from its Quality Assurance department who were not based at the IMC and who had no prior knowledge of the alleged safety violations. (*Id*.) The investigation took place between August 20 and 23, 2001, after the grievance hearing occurred. (*Id*.)

There is no evidence that Perry became aware of the substance of this complaint during the course of United's investigation and response to the FAA.

In sum, the evidence is sufficient to raise an inference that Perry was, at the time of the grievance hearing, aware that Sassman had made a formal complaint to OSHA challenging his termination. There was no evidence offered or substantiated to show that Perry was aware that Sassman had engaged in specific protected activities that could have influenced the outcome of the grievance hearing. Indeed, the OSHA letter alerting Perry to Sassman's wrongful termination claim did not provide any information beyond what Perry already knew: Sassman contested his discharge from United.

3. *United's adverse employment action*

It is established and uncontested that Sassman suffered an adverse employment action when he was held out of service from November 2, 2000 to January 30, 2001 and ultimately discharged from United, effective November 2, 2000.

4. *Safety complaints as a contributing factor to the discharge*

The AIR21 statute does not define the extent of a causal nexus required by its "contributing factor" standard. DOL cases have adopted the Federal Circuit's interpretation of the same language in the Whistleblower Protection Act that in order to constitute a "contributing factor" to the discharge, the protected activity must only "tend to affect in any way the outcome of the decision." *Davis*, No. 2001-AIR-5, slip op. at 9, 32 (citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The Federal Circuit explained that this language "is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action." *Marano*, 2 F.3d at 1140 (citations omitted). A claimant

must prove this causal connection by a preponderance of the evidence. "The Act was passed to shield employees reporting air carrier safety information, but not to permit employees to attempt to use its protections as a 'sword' to justify inappropriate job actions." *Davis*, No. 2001-AIR-5, slip op. at 36. *See also Kahn*, 64 F.3d at 279 (citing *Corriveau & Routhier Cement Block, Inc.* v. NLRB, 410 F.2d 347, 350 (1st Cir. 1969)).

Generally in this Circuit, a retaliatory discharge claimant need not produce direct evidence that the employer discriminated on the basis of protected activity to succeed in his claim. *Kahn*, 64 F.3d at 278 (citing *Bechtel Constr. Co., v. U.S. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995)). Direct evidence "essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." *Rogers v. City of Chicago*, 320 F.3d 748, 755 (7th Cir. 2003) (citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000)). Such admissions are rarely forthcoming, and Sassman has no direct evidence to offer.

Rather, the "presence or absence of a retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such retaliatory motive." *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 536, 566 (8th Cir. 1980) (citing *The Struggle*, 13 U.S. (9 Cranch) 71 (1918)). Circumstantial evidence is evidence that allows the trier of fact to infer intentional discrimination by the decision-maker. *Rogers*, 320 F.3d at 753-754 (citing *Gorence v. Eagle Food Ctr., Inc.*, 242 F.3d 759, 762 (7th Cir. 2001); *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 396 (7th Cir. 1997)).

The evaluation of circumstantial evidence is particularly appropriate in this case, since all of United's witnesses testified that Sassman's termination was based *solely* on the sheer number of times Sassman arrived late at the IMC and failed to file an exception form. Sassman has the

burden of proving that United's proffered legitimate reasons are "incredible and constitute pretext for discrimination." *Davis*, No. 2001-AIR-5, slip op. at 9 (citing *Overall v. Tenn. Valley Authority*, No. 1997-ERA-53, slip op. at 12 (ARB Apr. 30, 2001). The pretext analysis seeks to uncover the true intent of the defendant, not the belief of the plaintiff as to whether the termination process was fair or adequate. *See Sanchez v. Henderson*, 188 F.3d 740, 746 (7th Cir. 1999) (citing *O'Connor v. DePaul Univ.*, 123 F.3d 665, 670 (7th Cir. 1997); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)). Sassman may satisfy his burden "by establishing either that the unlawful reason, the protected activity, more likely motivated [the employer] or that the employer's proffered reason is not credible and that the employer discriminated against him." *Kahn*, 64 F.3d at 278 (citing *Bechtel*, 50 F.3d at 934).

a. *Discriminatory intent based on temporal proximity*

To support his claim of discriminatory intent, Sassman argues that United falsified the triggering event to prompt an investigation shortly after he had made safety complaints. (*See* Sassman Reply Brief at 2, Bankruptcy Docket No. 16887.) Close proximity in time between protected activity and an adverse action may raise suspicion that the two events are causally connected. *See, e.g.*, *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994). However, "speculation based on suspicious timing alone… does not support a reasonable inference of retaliation; instead, plaintiffs must produce facts which somehow tie the adverse decision to the plaintiffs' protected actions." *Stagman v. Ryan*, 176 F.3d 986, 1001 (7th Cir. 1999); *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir. 1998) ("Timing may be an important clue to causation, but does not eliminate the need to show causation[.]"). The proximity between the safety complaints and the commencement of the disciplinary investigation must not be viewed in isolation, but in conjunction with the evidence presented by United. *Dey*, 28 F.3d at 1457.

Sassman introduced a note written by Strelow, purportedly documenting that he had talked to Sassman about arriving late to a briefing at 6:20 a.m. on October 11, 2000. (*See* Sassman Ex. 58.) Sassman then offered Strelow's own gate swipe records to prove that Strelow did not arrive at the facility until 6:27 a.m. on that day. (Sassman Ex. 59 at 3.) However, the exact timing of Strelow's discussion with Sassman is not material because in reality, the "triggering event" in this case occurred when Strelow and DeMaine discovered they had each spoken to Sassman about being late to briefing, which prompted Strelow to seek permission from Cornacchini to pull the gate swipe records. Sassman admitted that he had been late for morning briefings on multiple occasions:

> Q [by Judge Hillyard]: Were there occasions where you missed the morning briefings?
> A [by Mr. Sassman]: There were.
> Q: How many?
> A: I couldn't tell you an exact number.
> Q: Five, 10, 20, 40?
> A: Maybe ten.

(Trial Tr. Dec. 4, 2002 at 184:9-15.) Sassman has not substantiated a claim that the temporal proximity between his complaints and the investigation into his time records are causally connected. Rather, the evidence shows that it was his habitual tardiness that caught the attention of his supervisors Strelow and DeMaine.

b. *Discriminatory intent based on trumped up shortfall charges*

The record does not support Sassman's argument that United "trumped up" the charges against him to accomplish his termination. In fact, the record reflects that United made concessions in the Investigative Review Hearing to reduce the shortfall charge to 1 hour and 34 minutes. (*See* Mark Sassman Shortfall, United Ex. 10.) Sassman argues that the evidence he presented at the review proceedings showed he actually worked 14 hours more than he was paid.

(Sassman Reply Brief at 1, Bankruptcy Docket No. 16887; Sassman Ex. 47.) But this argument is based upon the false premise that leaving work late meant that Sassman was working overtime. United made clear that overtime, like flex time and short time, had to be documented and pre-approved with an exception form. (*See* IMC Mechanic Guidelines, United Ex. 6 at 4.) Sassman cannot excuse a failure to file an exception form for his short time by failing to file an exception form for overtime. United proceeded with disciplinary action based on the forms in its possession; it was Sassman's responsibility to ensure his time was documented. It was not. Thus, United properly based its calculation of overpayment on the end of Sassman's shift, not on his exit times.

c. *Discriminatory intent based on a trumped up discipline level*

Sassman also failed to establish that Rule 2 is inapplicable to his conduct and therefore United's reason for terminating him is pretextual. In his brief to this court, Sassman argues that "United's repeated statements that Sassman was tardy or late coming to work are evidence that United's motive was to get rid of Sassman who was complaining about safety concerns, not to give him appropriate discipline for tardiness." (Sassman Reply Brief at 7, Bankruptcy Docket No. 16887.) Sassman points out that he was not charged with being late, which would have warranted progressive discipline, but rather he was charged with a Rule 2 violation, which carries presumptive discharge. (*Id.*) When viewed as a whole, the evidence shows that it was Sassman's repeated tardiness for morning briefings that first prompted the investigation into his time records. The Rule 2 charge itself was based upon the later comparison with his exception forms, which showed that he had not documented the late arrival time to properly reconcile his pay with his hours worked.

Additionally, Sassman argues that Rule 2 is inapplicable because "Sassman was not charged with knowingly accepting pay that he did not earn. He was charged with falsifying company records or reports." (Sassman Reply Brief at 5, Bankruptcy Docket No. 16887.) Since the IMC was a clockless facility, United concedes there were no records to "falsify" as there would be if the employees punched time cards. Cornacchini testified "because of our pay system being an honor system, if an employee receives pay for time not worked, then it's considered a falsification." (Trial Tr. Dec. 5, 2002 at 358:12-14.) United's argument is ultimately the more persuasive. The effect of manipulating a punch card and not filing an exception form is the same; the employee is paid for time that was not worked. According to United, Rule 2 applies to both situations to deter and to punish employees who abuse payroll.

An honor system demands that employees be more diligent to keep track of their time and file exception forms for time not worked. The unfortunate side effect is that relatively minor violations may accumulate over time with no meaningful way for supervisors to know of them or to take progressive corrective action for each occurrence. As in Sassman's case, such violations thus become magnified when a "triggering event" does occur. It is reasonable that United would take significant action to deter employees from taking advantage of the company's trust, up to and including dismissing employees who do not properly account for their time. The use of Rule 2 in this case is not evidence of a discriminatory intent based on safety complaints, but rather a permissible application of the company's code of conduct.

d. *Discriminatory intent based on an accumulation of complaints*

At trial and in his briefings to this court, Sassman offered evidence of numerous additional safety complaints he had made during his employment at the IMC. Judge Hillyard allowed testimony as to these complaints over United's objections, for the limited purpose of es-

tablishing background. (Trial Tr. Dec. 4, 2002 at 25:12-25, 26:1-2; Dec. 6, 2002 at 655:23-25, 656:1-5.) Since Sassman did not request that the additional safety complaints be treated as if raised in his pleadings, they are considered here to the same extent as they were offered at trial. Thus, these additional complaints are not treated as "protected activities" that contributed to United's decision to terminate Sassman. Rather, they are considered for whatever support they might lend to Sassman's contention that United held a retaliatory motive based on an accumulation of complaints. However, these additional complaints do not bolster Sassman's case.

Three of the additional complaints date to 1996: (1) in early May, Sassman filed 68 'lost tool reports' to his supervisors (Trial Tr. Dec. 4, 2002 at 27:24-25; 28:1-8); (2) on May 18, Sassman forwarded to the FAA a United letter that "threatened disciplinary action for excessive safety write-ups" (Trial Tr. Dec. 4, 2002 at 29:2-3; Sassman Ex. 1); and (3) in July, Sassman sent a letter to the FAA regarding 'lost tool reports' that had not been filed (Trial Tr. Dec. 4, 2002 at 30:6-7, 30:12-13; Sassman Ex. 5). United supervisor Terry Doppler, who assisted Strelow in calculating Sassman's shortfall, held Sassman out of service for a Rule 2 violation in 1996. Those charges were not substantiated in the review process and Sassman was reinstated with full back pay and benefits. Sassman alleges that his 1996 suspension was retaliatory, and that Doppler has "had a long-standing motive to discharge Sassman because of his safety complaints." (Sassman Opening Brief, Bankruptcy Docket No. 16861 at 17.) The idea that Doppler would harbor a retaliatory motive for over four years and that this motive influenced the decision to terminate Sassman is not credible. Furthermore, Doppler was not a decision-maker in this case; he merely assisted Strelow in making the calculations and presenting the case at the review proceedings, because Strelow had never conducted an investigation or hearing before. Strelow suspected Sassman had been arriving late to the IMC, which prompted the investigation, well before

Doppler's involvement. The evidence suggests that Strelow sought authorization from Cornacchini, not Doppler, at each step in the disciplinary process. Indeed, Sassman's reinstatement in 1996 supports United's position that neutral personnel diligently review proposed terminations to ensure they are substantiated.

Sassman also identified two internal 'Safety Concern' forms that he filed with his supervisors in 2000. The first, dated March 3, 2000, concerned an inoperative dock communication system. (Trial Tr. Dec. 4, 2002 at 40:1-22, 42:22-25, 43:1-14; Sassman Ex. 14). The other, dated October 19, 2000, (the same date as the 'illegal job action' form letter complaint) concerned an engine stand that was blocking employees' safe access in and out of the hangar. (Trial Tr. Dec. 4, 2002 at 65:15-18, 66:12-13, 66:21-24; Sassman Ex. 24.) Sassman's direct supervisors Strelow and DeMaine clearly knew of these 'Safety Concerns' since they received the forms and documented that the issues had been resolved.

These complaints are similar in nature to Sassman's internal complaint to DeMaine about the missing tail rudder balance tag. These single incidents of reporting and correcting safety issues are distinct from the complaints he filed with the FAA, which were made from a broader concern that United was engaged in practices that violated federal aircraft laws and regulations. There was no evidence offered at the trial that the 'Safety Concerns' or the informal safety complaints were anything but a commonplace part of every mechanic's and supervisor's job to ensure a safe workplace and work performance.

Even if all the complaints are viewed in the aggregate, Sassman introduced no evidence to suggest that United thought he was making false reports to impugn the company, or unnecessary reports to delay aircraft maintenance schedules, or for any other reason which might have brought about its ire. Instead, United's letter to the FAA in response to Sassman's 2001 com-

plaint documents how United investigated and responded to each of the safety issues that were brought to its attention by the FAA. (Sassman Ex. 46.)

e. *Review proceedings breaking the causal connection*

Even if the circumstantial evidence supported a finding that Strelow and DeMaine's decision to investigate Sassman's time records and Cornacchini's authorization to propose his discharge was motivated in part by Sassman's safety-related complaints, that motive cannot be imputed to the ultimate decision making authorities, Davis and Perry. Thus, any causal connection is broken and Sassman cannot carry his burden of proof by a preponderance of the evidence.

The Seventh Circuit has established as a general rule that the "prejudices of non-decision-maker may be imputed to the decision-maker with formal authority over the plaintiff's job where the non-decision-maker conceals relevant information or feeds false information to the decision-maker, and thus influences the decision." *Lust v. Sealy, Inc.*, 383 F.3d 580, 585 (7th Cir. 2004). That is not the case here. Alternatively, "if the employer simply rubber-stamps a recommendation tainted with illegal bias, the employer is liable for the harm caused." *Byrd v. Ill. Dept. of Pub. Health*, 423 F.3d 696, 708 (7th Cir. 2005).

However, "when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant." *Id.* (citing *Willis v. Marion County Auditor's Office*, 118 F. 542, 547 (7th Cir. 1997)). It is well settled in this Circuit and others that an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer's reason is not proscribed by statute. *Kahn*, 64 F.3d at 279 (citing *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 954 (7th Cir. 1976)). "[T]he real reasons behind an employer's action may be shameful or foolish but unrelated… to discrimina-

tion, in which event there is no liability." *Rudin v. Lincolnland Community College*, 420 F.3d 712, 726 n. 9 (7th Cir. 2005).

United's extensive review process interposed several officials who were (1) ultimately responsible for approving or denying the proposed discharge; and (2) had no knowledge of Sassman's protected activities when they made their decisions. At each stage, the reviewing official found that United had established cause to discharge Sassman. The review process benefits the employer and the employee by ensuring that the proposed termination will not have final effect unless sufficiently grounded in fact and consistent with the company's policies. In this case, Strelow merely presented the company's factual findings based on the gate swipe records and Sassman's payroll exception forms, which showed that Sassman had not filed exception forms for 97 of the 137 times he was absent from the IMC premises during his shift. It was on this basis that his termination was upheld under Rule 2.

Sassman seizes upon Perry's candid admission at the DOL trial that he did not consider himself to be neutral in the grievance proceedings: "it's ridiculous to think me being a member of management and being in Labor Relations and consulting, that I am completely neutral. I am not neutral." (Trial Tr. Dec. 6, 2002 at 612:22-24.) In addition, Perry advised Strelow and Cornacchini on the conduct that constituted a Rule 2 violation during the initial investigation. (Trial Tr. Dec. 6, 2002 at 575:15-20.) The record nonetheless supports a finding that Perry conducted a fair hearing and upheld the discharge based on the evidence presented, and not based on retaliation for safety complaints. *First*, it is clear from the grievance hearing record and the testimony at trial that Perry offered each side a full and fair opportunity to present their cases and rebuttals with supporting evidence. *Second*, Sassman has not supported his burden to show that Perry knew of his protected activities, but only that Perry was aware Sassman was contesting his dis-

charge with the DOL. Perry's awareness of Sassman's wrongful termination complaint would more likely deter any decision based on retaliation than encourage it, since OSHA would be certain to scrutinize his decision as part of its investigation into Sassman's claim. In fact, the evidence supports a finding that Perry did everything he could to ensure that United had adequately made out its case, including performing a shortfall calculation of his own.

Therefore, because a retaliatory motive cannot be established or imputed to the ultimate decision-makers at United, Sassman fails to establish his case under AIR21.

D. *United's evidence that it would have terminated Sassman in the absence of protected activity*

Sassman's AIR21 claim would fail even if he could show that discriminatory motive was a contributing factor in the decision to discharge him, because United has come forward with clear and convincing evidence that it would have terminated Sassman in the absence of his protected activity. The courts do no sit as a 'super-personnel department' to question the wisdom or business judgment of employers. *See Giannopolous v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997) (it is not the province of the court to decide whether the employer's reason was wise, fair, or correct, so long as it was really the reason). The Supreme Court held in *St. Mary's Honor* that an employer's reason for terminating an employee "cannot be proved a pretext for discrimination unless it is shown *both* that the reason was false *and* that discrimination was the real reason." 509 U.S. at 515. The Seventh Circuit is clear that "it is not the court's concern that an employer may be wrong about its employee's performance, or be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie." *Imeichen v. Ameritech*, 410 F.3d 956, 961 (7th Cir. 2005); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 696 (7th Cir. 2006) (pretext inquiry must focus on whether the employer's stated reason is honest, not well-reasoned, wise, or accurate).

United contends that Sassman's consistent failure to arrive for work on time and failure to properly file payroll exception forms for each time he was late to work or absent formed the sole basis for its decision to terminate him. (United Opening Brief, Bankruptcy Docket No. 16848 at 2.) United maintains that this decision was consistent with company policy that any Rule 2 violation is grounds for discharge, no matter the extent of the time discrepancy.

Sassman acknowledged that he was familiar with the payroll procedures in the clockless IMC facility, including the requirement to file an exception form. (Trial Tr. Dec. 4, 2002 at 110:1-9.) He also acknowledged being briefed by his supervisors that he was supposed to be in his work area at the start of his 6:00 a.m. shift. (Trial Tr. Dec. 4, 2002 at 112:11-14.) Sassman further acknowledged that he knew United construed Rule 2 to apply to situations where exception forms did not accurately account for time an employee was off the premises during a shift. For example, in August 1999, United management circulated a "Special Briefing" letter to employees to clarify the policy. (*See* Special Briefing, United Ex. 6 at 6.) The letter states: "employees have been held out of service for falsification of company records by essentially not working the time for which they received pay." (*Id.*) Sassman testified that he was aware that the company used the security gate swipe records to verify employees' time on the property and that they could be terminated under Rule 2 on the basis of those records. (Trial Tr. Dec. 4, 2002 at 116:13-24.)

United has presented clear and convincing evidence that its decision was consistent with its policy, that Sassman was aware of this policy, and that it would have discharged Sassman for his failure to properly account for his time off the IMC premises even in the absence of any safety complaints. Sassman arrived late to the IMC on 137 occasions between January and November 2000. He failed to properly account for 97 of those instances. Given the extent of Sass-

man's tardiness and failure to account for his time, United was given cause to believe it had paid Sassman for more hours than he had earned. Consequently, United has satisfied its burden in the AIR21 case and is not liable for Sassman's discharge under the statute's provisions.

Conclusion

Mr. Sassman may have reason to complain about his termination after 14 years at United; however that termination cannot be remedied under the whistleblower provisions of Air21. Sassman simply has not proven that his safety complaints contributed to the decision to terminate his employment. United, on the other hand, has demonstrated that it had a legitimate business reason for terminating Sassman consistent with its stated policies and procedures. Accordingly, United's objection to Claim No. 35445 is sustained.

Dated: February 15, 2008