In the Matter of:

FRANK L. BRUNE, **ARB CASE NO. 04-037**

COMPLAINANT, **ALJ CASE NO. 2002-AIR-8**

v. **DATE: January 31, 2006**

HORIZON AIR INDUSTRIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Frank L. Brune*, pro se, Vancouver, Washington*

For the Respondent:
Joseph B. Genster, Esq., Timothy B. Benedict, Esq., *Hillis, Clark, Martin & Peterson, Seattle, Washington*

DECISION AND ORDER OF REMAND

Frank L. Brune alleges that Horizon Air Industries, Inc. violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act) when it disciplined him because he had engaged in various activities that the Act protects. The Act prohibits air carriers 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.[1] After a hearing, a United States Department of Labor

[1] 49 U.S.C.A. § 42121(a) (West 2005 Supp.).

Administrative Law Judge (ALJ) concluded that Horizon violated the Act. But because the ALJ committed legal error, we vacate and remand.

BACKGROUND

The background facts are not contested.

Horizon offers commercial air service in several western states and Canada. Federal Aviation Administration (FAA) air safety regulations govern its operations. Brune started flying for Horizon in 1991, primarily as captain of a commuter aircraft known as the deHavilland Dash-8, a twin-engine, turbo-prop plane which carries 37 passengers and a crew of three.

On July 6, 1999, Brune refused to fly because he believed that he would have violated an FAA regulation that limited crew members' flying hours.[2] He filed a flight irregularity report with Horizon, and Horizon reduced his pay for not accepting the flight. CX 33, 36-37, 40.[3]

Then, on a July 30, 1999 flight originating in Walla Walla, Washington, Brune recorded in the aircraft maintenance logbook that an exterior placard on the aircraft was damaged. CX 17. Placards are informational signs, such as "Emergency Exit," affixed to a plane's interior and exterior. Subsequently, the flight was cancelled, Horizon lost passengers to another airline, and Horizon's Chief Pilot, LaMar Haugaard, issued Brune a letter of warning on August 27, 1999. CX 17. It indicated that pilots were not required to look for or check any external placards on aircraft and warned:

> Frank, you must be knowledgeable as a Horizon Air Captain on all normal procedures of the Dash-8. This includes pre-flight and post-flight inspections. You must also exercise judgment in all maintenance write-ups. Furthermore, you must understand that the issue of operational control is a most serious matter. It is your responsibility to communicate all delays, including those

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[2] Federal Aviation Regulation (FAR) 121.471, 14 C.F.R. § 121.471 (2006), provides for flight time limitations and rest requirements. Subsection (d) states that an airline employer shall "relieve each flight crewmember engaged in scheduled air transportation from all further duty for at least 24 consecutive hours during any 7 consecutive days."

[3] The following abbreviations shall be used: Complainant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR.

> for maintenance reasons, with dispatch. It is a dispatch supervisor who will normally cancel a flight if need be.
>
> A continued lack of acceptable performance in these areas will result in discipline up to, and including, termination.

Brune refused another flight on September 22, 1999, because of the FAA crew member hours of service rule. Like the July 6 incident, he filed a flight irregularity report with Horizon, and Horizon again docked his pay, on October 8, 1999. CX 38, 39.

During 2000 additional significant events occurred. On August 4, 2000, while taxiing to the runway, Brune was uncertain about whether a take-off warning system was operating properly. When he tested the system a second time, the warning horn failed to sound. He notified maintenance personnel. After some discussion and further checks, Brune reported that the system was operational and took off. The delay resulted in a loss of revenue for Horizon. CX 57.

Ten days later, on the 14th, Brune expected turbulence during the flight. So he ordered the ground crew to tie down a 400-pound ground power unit that had been loaded on his aircraft. When the crew was unable to secure the unit, which Horizon needed transported to Portland, Brune ordered the crew to remove it from the cargo bay. Horizon then had to pay fees for the use of another airline's power unit at the Portland terminal. CX 57.

Shortly thereafter, Brune met with Chief Pilot Haugaard and his assistant, T.W. (Spike) McKinsey, to discuss the two August incidents. Brune explained that he was suspicious about the takeoff warning system and induced a failure to test it further. Following the meeting, Haugaard issued a second warning letter on September 8, which chastised Brune for the warning horn incident.[4] It stated in part:

> Frank, I do appreciate the manner in which you approach your job. You are a careful and consummate professional. It is to that professionalism that I implore you to follow the procedures in all situations. When ad hoc procedures are introduced, they can lead to confusion within the flight crew dynamics, and do not in themselves provide an accurate or legal check of any system.
>
> Failure to adhere to our company's approved procedures, and continued use of procedures on the Dash 8 that are not

[4] The letter addressed only the warning horn incident. Haugaard agreed with Brune's decision to have the unsecured power unit removed as a safety concern. TR at 65-66.

> approved by the manufacturer, FAA, or Horizon Air could lead to discipline up to and including termination.

CX 57.

On February 21, 2001, Brune delayed his flight from Redmond, Oregon, because of a problem with the crew escape hatch and a malfunctioning temperature indicator. Then snow began, and the required de-icing further delayed the flight. While waiting to take off, Brune overhead the station manager tell an incoming pilot that it was not snowing and de-icing would not be needed. RX 9. Brune filed a flight irregularity report about the manager's false information. Assistant Chief Pilot Todd Henion later confirmed that the manager had wrongly informed the incoming pilot. TR at 71-72, 151-53; CX 57.

Several months later, on May 6, ground personnel asked Brune to delay his flight and make an entry in the maintenance log to permit them to replace a damaged interior emergency exit placard. Brune hesitated to do so because of the warning letter he had received in 1999 about writing up placard deficiencies. He called the duty officer, McKinsey, who told him to make the entry and have the placard replaced. Subsequently, Brune asked McKinsey to confirm in writing his instruction, which McKinsey did in a memorandum dated May 7, 2001. CX 24. That memorandum stated:

> In this particular situation, the aircraft was at a primary maintenance base, maintenance was consulted and prepared to make speedy repairs, and the discrepancy, in this case, was clearly neither frivolous nor illogical. The same cannot be said of some of your previous aircraft write-ups, which resulted in the Chief Pilot's guidance that you alluded to.
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> Therefore, all previous counseling and guidance provided to you remains in effect. In this case, however, clearly the proper course of action was to get the placard written-up and repaired as soon as possible.

Brune filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on May 22, 2001. He alleged that Horizon had retaliated against and harassed him ever since he first refused to accept the July 6, 1999 flight. OSHA found that Horizon had violated AIR 21. Horizon requested a hearing. After a two-day hearing in November 2001, the ALJ issued a Decision and Order (D. & O.) concluding that Horizon had violated AIR 21. Horizon appealed to the Administrative Review Board (ARB), and both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision under AIR 21.[5] We review the ALJ's factual determinations under the substantial evidence standard.[6] We review conclusions of law de novo.[7]

DISCUSSION

The ALJ found that Brune engaged in protected activity under AIR 21 when he reported the two occasions on which he refused to fly because of insufficient rest, when he twice reported the defective placards, when he reported the takeoff warning system problem, and when he reported the ground power unit incident and the false weather report. The ALJ found that all of these reports related to passenger and aircraft safety. D. & O. at 16-17.

He went on to find that Horizon took adverse actions against Brune when it: (1) reduced his pay for refusing to fly in July and September, 1999; (2) sent the August 27, 1999 "intimidating memo"; (3) investigated and "required Captain Brune to defend" his reports about the takeoff warning system, the ground power unit, the false weather advice, and his decision to de-ice his plane when it had snowed; (4) wanted to "hammer" Brune at the August 22, 2000 meeting; (5) sent Brune another "intimidating memo" on September 8, 2000; and (6) sent the May 7, 2001 memo which reiterated earlier threats. Moreover, in addition to and "in conjunction with" these adverse actions, the ALJ concluded that "the facts show" that Horizon created a hostile work environment. D. & O. at 18-19.

Finding that Brune's protected activity contributed to Horizon's taking the adverse actions and creating the hostile work environment, the ALJ therefore concluded that Horizon violated AIR 21's employee protection provisions. D. & O. at 19-20.

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[5] 49 U.S.C.A. § 42121(b)(3); 29 C.F.R. § 1979.110 (2005). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121).

[6] 29 C.F.R. § 1979.110(b).

[7] *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-4, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 03-AIR-10, slip op. at 4 (ARB Dec. 30, 2004).

We express no opinion today whether substantial evidence supports the ALJ's findings and conclusion because: (1) the ALJ erred as a matter of law in concluding that certain claims are actionable; (2) he erred in not identifying and then applying the legal standard for determining a hostile work environment; (3) he erred in not applying the correct burden of proof in assessing Brune's evidence; and (4), he misapplied Horizon's burden of proof.

Actionable Claims

An employee who believes that his employer has discriminated or retaliated against him in violation of AIR 21 must file a complaint within 90 days after the alleged violation occurs.[8] Brune filed his May 22, 2001 complaint within 90 days of the May 7, 2001 memorandum from Horizon, which he alleges was an adverse employment action. Thus, Brune timely filed his complaint. Therefore, the question becomes which of Brune's alleged adverse actions are actionable[9]

The ALJ employed three theories in concluding that all of the alleged adverse actions from 1999-2001 were actionable. First, the ALJ found that because the May 7, 2001 memo incorporated all "previous counseling," all of the alleged adverse actions were actionable. D. & O. at 13. Second, the ALJ determined that all of Brune's claims were actionable under the "continuing violation" theory. D. & O. at 14. Third, the ALJ found that all of the claims were actionable because Horizon had created a hostile work environment. D. & O. at 15.

1. AIR 21 is not retroactive.

Brune's May 22, 2001 complaint alleged adverse actions that occurred before and after AIR 21 became law on April 5, 2000. The ALJ found that Horizon adversely affected Brune's compensation and terms and conditions of employment from July 1999 until May 2001 by docking his pay, issuing warning letters, and requiring him to justify his actions. As noted, the ALJ concluded that because Brune's complaint mentioned the May 7, 2001 memo, and that memo incorporated "all previous counseling," Horizon's

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[8] 49 U.S.C.A. § 42121(b)(1).

[9] The ALJ correctly found Brune's complaint to be timely filed. D. & O. at 14. But he also wrote that Brune's "claims" were "timely." *Id.* at 13, 15. Brune's "claims" are the adverse actions he alleges. Thus, unless the ALJ means that Brune's claims are not time barred, his referring to "claims" as being "timely" creates confusion. Complaints are or are not "timely filed." Claims, *i.e.* adverse actions, are or are not "actionable." And even if not actionable, they may be used as background evidence to support actionable claims. *See National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002).

alleged adverse employment practices in 1999, before the effective date of AIR 21, were actionable. D. & O. at 13.

Leaving aside the fact question of whether the May 7, 2001 memo actually incorporates all previous discipline and whether, as a matter of law, incorporation by reference makes the prior adverse acts actionable, we hold that the ALJ erred because AIR 21 is not entirely retroactive.

A "traditional presumption" against retroactive legislation exists because of "the unfairness of imposing new burdens on persons after the fact."[10] The U.S. Supreme Court warned that retroactivity is not favored "unless such construction is required by explicit language or by necessary implication."[11] The Court instructed how to determine whether to apply a statute retroactively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[12]

The plain language of AIR 21's employee protection section, entitled "Protection of Employees Providing Air Safety Information," does not prescribe an effective date.[13] That section, however, is part of the 2000 amendments to the Aircraft Safety Act, Public Law 106-181. Section 3 of that law states that "except as otherwise specifically provided, this Act and the amendments made by this Act shall apply only to fiscal years

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[10] *R.E. Goodson Const. Co., Inc., v. International Paper Co*., 2005WL 2614927 (D.C. Cir. Oct. 13, 2005).

[11] *Landgraf v. USI Film Products*. 511 U.S. 244, 270 (1994).

[12] *Id.* at 280.

[13] *See* 49 U.S.C.A. § 42121.

beginning after September 30, 1999."[14] Thus, Congress expressly prescribed the statute's "reach."

The fiscal year beginning after September 30, 1999, was fiscal year 2000 that began on October 1, 1999. Two of the alleged adverse actions in 1999—the July 16, 1999 docking of pay, CX 36, and the August 27, 1999 warning letter, CX 17—occurred prior to October 1, 1999. These actions are outside of the statute's reach and are therefore not actionable. The October 8, 1999 pay reduction is within the statute's reach. CX 39.

2. *Morgan* rejected the continuing violation theory.

The ALJ appears to apply the "continuing violation doctrine" as an additional rationale in finding that all of the alleged adverse actions are actionable. We say "appears to apply" because the ALJ's language is less than precise.

At the outset of the "Continuing Violation" subsection of his Decision and Order, the ALJ writes, "The complaint also is timely under a continuing violation theory." D. & O. at 14. (We think that the ALJ means that the adverse actions are actionable under the continuing violation theory. A *complaint* is timely according to the applicable statute of limitations, not the continuing violation theory.). He supports this statement by citing a 1983 Fifth Circuit Court of Appeals case, an ARB decision, and a Secretary of Labor decision.[15] These cases did indeed approve of the continuing violation theory whereby certain adverse actions, though occurring outside of the statute of limitations, could nevertheless constitute a "course of discriminatory conduct" and thus be actionable.

Yet the ALJ then cites *National R.R. Passenger Corp. v. Morgan* in which the Supreme Court distinguished discrete acts such as termination or failure to promote from hostile work environment claims that are "different in kind from discrete acts. Their very nature involves repeated conduct."[16] The Court expressly rejected the continuing violation doctrine that the Ninth Circuit Court of Appeals had applied to Title VII cases. The Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."[17] But all of the acts

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[14] 49 U.S.C.A. § 106.

[15] *Berry v. Board of Sup'rs of L.S.U.*, 715 F.2d 971; *Webb v. Carolina Power & Light Co.*, ARB No. 96-176, ALJ No. 93-ERA-42, slip op. at 6-7 (Aug. 26, 1997); *Thomas v. Ariz. Pub. Serv. Co.*, 88-ERA-212, slip op. at 13 (Sept. 25, 1993).

[16] 536 U.S. at 114-115.

[17] *Id.* at 113.

comprising a hostile work environment claim, even those occurring outside the limitation period, were actionable if one of the acts fell within the Title VII filing period.[18]

The ALJ concluded the "Continuing Violation" subsection by writing, "Management's actions should be viewed as one unlawful employment practice. Seen in this way, under the Secretary's decisions Captain Brune's claims are also timely [actionable] under the hostile work environment theory." D. & O. at 15. Thus, on the one hand, the ALJ recognizes *Morgan*, which rejected the continuing violation theory at least with respect to Title VII. On the other hand, he appears to think that the "Secretary's decisions" pertaining to the continuing violation theory apply to AIR 21.

We have held that *Morgan* applies to the environmental whistleblower statutes.[19] We find no reason why *Morgan* should not apply to AIR 21 and hold that it does apply to AIR 21.[20] Therefore, if the ALJ has in fact concluded that the alleged adverse actions that occurred more than ninety days before Brune filed his complaint are actionable under the continuing violation theory, he erred.

3. The ALJ did not apply the law that governs hostile work environment claims.

In contrast to his discussion about the continuing violation theory, the ALJ clearly concluded that all of the alleged adverse actions were actionable under the hostile work environment theory. He found that the adverse actions demonstrated that Horizon managers constrained, threatened, and singled out Brune. According to the ALJ, these constraints, threats, and singling out collectively created a hostile work environment. Therefore, under the *Morgan* holding, since the May 7, 2001 memo fell within the limitations period, all of the adverse actions were actionable. D. & O. at 14-15, 18-19.

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[18] *Id.* at 117.

[19] *See, e.g., Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 8 (ARB Apr. 30, 2004) (applying *Morgan* to 30-day limitation period for filing whistleblower complaints under Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(b) (West 2005); Clean Air Act (CAA), 42 U.S.C.A. § 7622(b) (West 2003); and Toxic Substances Control Act, 15 U.S.C.A. § 2622(b)(1) (West 1998)); *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-7, slip op. at 8-10 (ARB Jan. 30, 2004) (applying *Morgan* to the 30-day limitation period for filing whistleblower complaints under Federal Water Pollution Prevention Control Act, 33 U.S.C.A. § 1367(b)(West 2001); CAA; and Solid Waste Disposal Act, 42 U.S.C.A. § 6971(b) (West 2003)) *aff'd sub nom Sasse v. United States Dep't of Labor*, 409 F. 3d 773 (6th Cir. 2005).

[20] *See Sasse*, 409 F.3d at 782 (refusing to restrict *Morgan* to Title VII cases).

We pause here to note that the six adverse actions that Horizon allegedly took against Brune could be characterized as "discrete" acts. "Discrete acts such as termination, failure to promote, denial of transfer, or failure to hire are easy to identify."[21] Furthermore, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."[22] Nevertheless, because we are remanding this matter, we make no findings whether the six adverse acts were discrete or even whether they were adverse.

But even if these acts are not discrete and are in fact adverse, the ALJ erred because, in concluding that Horizon created a hostile work environment, he did not identify the legal standard for or make findings that Brune had proven the elements of a hostile work environment claim. Recently, we thoroughly addressed the whistleblower's burden when alleging a hostile work environment:

> To prevail on a hostile work environment claim, the complainant must establish that the conduct complained of was extremely serious or serious and pervasive.[23] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Discourtesy or rudeness should not be confused with harassment, nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing actionable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). Under this theory of recovery, a complainant is required to prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did

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[21] *Morgan*, 536 U.S. at 114.

[22] *Id.* at 113.

[23] As the Sixth Circuit Court of Appeals recently noted in *Belt v. United States Dep't of Labor*, 2006 WL 197385 (Jan. 25, 2006), *aff'g sub nom. Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-19 (ARB Feb. 26, 2004), the more precise articulation of the standard is whether the objectionable conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, rather than whether the conduct was "extremely serious or serious and pervasive." 2006 WL 199735 *6.

> detrimentally affect the complainant. *Jenkins* [v. *U.S. Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2] elec. op. at 42 [ARB Feb. 28, 2003]; *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 *et al*., elec. op. at 13 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, elec. op. at 16-17, 21-22 (ARB Feb. 29, 2000); *Freels v. Lockheed Martin Energy Systems*, ARB No. 95-110, ALJ Nos. 94-ERA-6, 95-CAA-2, elec. op. at 13 (Sec'y Dec. 4, 1996); *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, -5; 93-CAA-1, elec. op. at 90-101 (Sec'y Jan. 26, 1996). Circumstances germane to gauging a work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Berkman*, slip op. at 16. A respondent is liable for the harassing conduct of a complainant's coworkers or supervisors if the employer knew, or in the exercise of reasonable care should have known of the harassment and failed to take prompt remedial action. *Williams*, slip op. at 55; *Varnadore*, slip op. at 75-78.[24]

The ALJ did not apply these criteria. He merely asserted that Horizon constrained, threatened, and singled Brune out. He made no finding as to whether Horizon intentionally harassed Brune, nor did he make a finding as to the extent of the harassment. He did not address whether the alleged harassment was severe or pervasive enough to change the conditions of Brune's employment and create an abusive working environment. He did not determine whether the harassment would have had any detrimental effect on a reasonable person and whether it did have such an effect on Brune. These shortcomings constitute error.

Burdens of Proof in an AIR 21 Whistleblower Complaint

In *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-18 (ARB Jan. 30, 2004) we clarified AIR 21's procedures and burdens of proof. We do so again here.

AIR 21 contains evidentiary standards, including a "gatekeeper test:"

> (i) **Required showing by complainant.** – The Secretary of Labor *shall dismiss a complaint*, filed

[24] *Sasse*, slip op. at 34-35.

under this subsection and *shall not conduct an investigation* otherwise required under subparagraph (A) unless the complainant makes a *prima facie showing* that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) **Showing by employer.** – Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), *no investigation* otherwise required under subparagraph (A) *shall be conducted* if the employer *demonstrates, by clear and convincing evidence,* that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) **Criteria for determination by Secretary.** – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant *demonstrates* that any behavior described in paragraphs (1) through (4) of subsection (a) was a *contributing factor* in the unfavorable personnel action alleged in the complaint.

(iv) **Prohibition.** – Relief may not be ordered under subparagraph (A) if the employer *demonstrates by clear and convincing evidence* that the employer would have taken the same unfavorable personnel action in the absence of that behavior.[25]

OSHA employs the "gatekeeper" standard that is used during the preliminary investigatory stage of the proceeding, prior to hearing.[26] At this point, *OSHA* will not *investigate a complaint* unless the complainant "makes a prima facie showing" that protected activity was a contributing factor in a respondent's adverse action.[27] A prima facie case is defined as "[t]he establishment of a legally required rebuttable presumption"

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[25] 49 U.S.C.A. § 42121(b)(2)(B) (emphasis added).

[26] The "Assistant Secretary" investigates AIR 21 complaints. 29 C.F.R. § 1979.104(a). "*Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act." 29 C.F.R. § 1979.101.

[27] 49 U.S.C.A. § 42121(b)(2)(B)(i).

or "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor."[28]

To meet this standard for purposes of an AIR 21 *investigation*, the complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and "either direct or circumstantial evidence" showing that the employee engaged in protected activity, that the employer "knew or suspected, actually or constructively, that the employee engaged in protected activity," that "[t]he employee suffered unfavorable personnel action," and that "[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action."[29] Temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation.[30]

A respondent *may avoid investigation*, however, notwithstanding a prima facie showing, if it "demonstrates, by clear and convincing evidence" that it would have taken adverse action in the absence of protected activity.[31] Although OSHA's determination controls whether there is an investigation and preliminary relief, either party may object to OSHA's action and proceed to obtain a hearing to adjudicate the complaint.[32]

At the *hearing stage* of the litigation, ALJs (and the ARB on review) must apply a different standard. If the complainant "demonstrates," *i.e.*, proves by a preponderance of the evidence, that protected activity was a "contributing factor" that motivated a respondent to take adverse action against him, then the complainant has established a violation of AIR 21.[33] Preponderance of the evidence is "[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[34]

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[28] BLACK'S LAW DICTIONARY at 1209 (7th ed. 1999).

[29] 29 C.F.R. § 1979.104(b)(1) and (2).

[30] 29 C.F.R. § 1979.104(b)(2).

[31] 49 U.S.C.A. § 42121(b)(2)(B)(ii).

[32] 29 C.F.R. § 1979.106.

[33] 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). *Cf. Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 609-610 (11th Cir. 1997) ("demonstrate" means to prove by a preponderance of the evidence).

[34] BLACK'S LAW DICTIONARY at 1201.

The distinction, then, between standards applied for purposes of investigation and adjudication of a complaint concerns the complainant's burden. To secure an investigation, a complainant merely must raise an inference of unlawful discrimination, *i.e.*, establish a prima facie case. To prevail in an adjudication, a complainant must prove unlawful discrimination.

This is not to say, however, that the ALJ (or the ARB) should not employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases.[35] The Title VII burden shifting pretext framework is warranted where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence. The ALJ (and ARB) 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.[36]

Thereafter, and only if the complainant has proven discrimination by a preponderance of evidence and not merely established a prima facie case, does the employer face a burden of proof. That is, the employer may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event.[37]

Here, the ALJ wrote that the AIR 21 complainant has the "initial burden" to prove protected activity, adverse action, and an inference that the protected activity contributed to the adverse action. We cannot determine what the ALJ means by "initial burden" because as authority for this statement, he cites AIR 21's provisions concerning the complainant's burden of proof under both the investigative (prima facie case) and adjudicatory (preponderance of evidence) phases of the litigation.[38] He also cites the regulations dealing with the investigation phase.[39] D. & O. at 12.

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[35] *Peck*, slip op. at 7-10 citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003).

[36] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[37] 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY at 577.

[38] 49 U.S.C.A. § 42121(b)(2)(B)(i); 49 U.S.C.A. § 42121(b)(2)(B)(iii).

[39] 29 C.F.R. § 1979.104.

Later in the opinion, however, the ALJ is clearer as to what Brune's burden of proof is. He entitles subsection B of his "Conclusions of Law" section, "Captain Brune's Prima Facie Case." D. & O. at 15. Further on, after examining the activity Brune contends is protected, the ALJ concludes: "Captain Brune has satisfied the initial burden of proving that he engaged in protected activity." D. & O. at 18. Then he ends his analysis of "Captain Brune's Prima Facie Case" by concluding that "Captain Brune has adequately proven a prima facie case under AIR 21." D. & O. at 20.

We find, therefore, that the ALJ required Brune to prove his case according to the prima facie case standard, rather than the preponderance of the evidence standard. This was prejudicial error because, as we have just painstakingly explained, by the time an AIR 21 complainant like Brune reaches the hearing phase of the litigation, he must prove protected activity, adverse action, and causation by a preponderance of evidence, not merely establish a rebuttable presumption that the employer discriminated.

And the ALJ also erred when he assigned a burden of proof to Horizon. He wrote that after an AIR 21 complainant has met his "initial burden," by which the ALJ meant "prima facie case," the employer "then must demonstrate by clear and convincing evidence that it would have taken the unfavorable personnel action in the absence of the employee's protected activity." D. & O. at 12. Then, again, immediately after concluding that Brune had adequately proven a prima facie case, the ALJ wrote, "Horizon must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of the protected activities." D. & O. at 20.

Thus, the ALJ assigned Horizon the burden of proving by clear and convincing evidence that it would have made the same decision even though Brune had only made a prima facie showing of discrimination. But the employer's burden after the complainant establishes a prima facie case is one of *production*, not proof. The employer need only "articulate some legitimate, nondiscriminatory reason" for its actions.[40] At this point, Horizon's burden was only to rebut the presumption of discrimination by producing evidence why it reduced Brune's pay, warned him and sent the memos.[41] Its burden of *proof* arises if, and only if, Brune has proven discrimination by a preponderance of the evidence.[42] Therefore, the ALJ erred because he saddled Horizon with the clear and convincing burden of proof when, in the ALJ's own words, Brune had merely established a prima facie case.

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[40] *McDonnell Douglass,* 411 U.S. at 802.

[41] *See Texas Dep't of Comm. Affairs v. Burdine,* 450 U.S. 248, 254 (1981).

[42] 49 U.S.C.A. § 42121(b)(2)(B)(iv).

CONCLUSION

The ALJ erred as a matter of law when he concluded that the alleged adverse actions that occurred before October 1, 1999 were actionable. AIR 21 is retroactive only to October 1, 1999. The ALJ also erred in concluding that all of the alleged adverse actions are actionable under the continuing violation theory because the *Morgan* decision, which rejected the continuing violation doctrine, applies to AIR 21. Furthermore, the ALJ erred because he did not apply the four factor test for determining whether a hostile work environment existed. Finally, the ALJ erred because he did not apply the proper burden of proof to determine whether Brune proved the elements of his AIR 21 case and also misapplied Horizon's burden of proof. Therefore, without expressing any opinion as to whether substantial evidence supports his findings of fact concerning protected activity, adverse action, and causation, we **VACATE** the ALJ's December 16, 2003 Decision and Order and **REMAND** this matter for proceedings consistent with this opinion.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge