In the Matter of:

RICHARD HIRST, **ARB CASE NO. 04-116, 04-160**

COMPLAINANT, **ALJ CASE NO. 03-AIR-47**

v. **DATE: January 31, 2007**

SOUTHEAST AIRLINES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Gary Linn Evans, Esq., *Coats & Evans, P.C.*, The Woodlands, Texas

For the Respondent:
Michael V. Abcarian, Esq., *Epstein Becker Green Wickliff & Hall, P.C.*, Dallas, Texas

FINAL DECISION AND ORDER

Richard V. Hirst filed a complaint alleging that when his former employer, Southeast Airlines, Inc. (SEAL), discharged him on September 29, 2002, it retaliated against him in violation of the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act).[1] After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that SEAL had violated the Act and awarded Hirst damages, attorney's fees, and costs. SEAL appealed. We reverse.

[1] 49 U.S.C.A. § 42121 (West Supp. 2005). The regulations implementing AIR 21 are found at 29 C.F.R. Part 1979 (2006).

BACKGROUND

SEAL is a charter airline company that transports passengers and cargo. Hirst is a Federal Aviation Administration (FAA) certified pilot. SEAL hired Hirst in July 2002 to pilot DC-9 aircraft for SEAL's charter air service operation.

On Sunday, September 29, 2002, Hirst was scheduled to pilot SEAL's Flight 556 from Fort Lauderdale, Florida to Newark, New Jersey. As Hirst was about to board the airplane, the captain of the inbound flight crew informed him that SEAL had changed the maximum gross flying weight of the airplane from 105,000 pounds to 108,000 pounds. Hirst had not seen a bulletin documenting the increase in the maximum gross weight, nor had he been issued a temporary revision for his flight manual that reflected the increase.

Hirst used his company cell phone to call Leif Harding, SEAL's dispatcher, to ask if federal aviation regulations permitted him to fly the plane at the increased weight. Hirst also used his cell phone to call Jack O'Brien, SEAL's Director of Safety. After listening to Hirst, O'Brien opined that he should not fly a plane that weighed more than 105,000 pounds.

Hirst then went to SEAL's flight operations office, where he attached a tape recorder to the office telephone and called Frank Newman at SEAL's main operations office. Newman informed Hirst that someone would call him back. Hirst then received a call from Harding, who told him that Steve Malone, SEAL's Director of Operations, would call him momentarily.

Malone called Hirst and told him that the plane was capable of flying at 108,000 pounds. Malone also contended that the increased weight had been properly documented and that the FAA had certified the paperwork two days earlier. Hirst asked Malone to send him a copy of the documentation verifying the increase. Malone, at his home at the time, said he could not get Hirst a copy. Malone then told Hirst to fly the airplane or Malone would have him "replaced." When Hirst told Malone that he would only fly the plane at 105,000 pounds, Malone told Hirst to "go ahead and pack up, I'll get another Captain over there, and be in my office at 11 o'clock with your ids [sic] and your manuals when you show up. That's it." Complainant's Exhibit (CX) 27.[2]

Thirty minutes later, as Flight 556 passengers were boarding the airplane, Hirst called Malone and told him that he had retained legal counsel. Hirst said that he did not want to meet with Malone until Wednesday, October 2, 2002, when his counsel would be available. Malone ended the call by stating that Hirst should give him a call on Monday, but three minutes later, according to Hirst, Malone called back and told him that he was "off the payroll." Transcript (Tr.) 401-403. After another 10 minutes, Malone called Hirst and told him to be in Malone's office at 11:30 a.m. on Monday to turn in his

[2] CX 27 is SEAL's transcript of conversations that Hirst taped on September 29, 2002.

manuals and company identification. Tr. 402-403. Hirst asked Malone if SEAL would provide him with transportation back to St. Petersburg, his home base. Hirst testified that Malone told him to arrange his own transportation and again said that he was "off the payroll." Tr. 403. Meanwhile, the crew that had flown the airplane to Fort Lauderdale returned to the airport and manned Flight 556. Hirst flew back to St. Petersburg on another airline's jump seat.

On Monday, September 30, 2002, Hirst went to Malone's office and met with David Lusk, SEAL's Chief Pilot. Lusk testified that the purpose of the meeting was to allow him to gather information about the conversations that had taken place the previous day:

> He indicated to me that – that he felt like he had been fired, and I indicated to him that I – I was not privy to their conversation, but that my instructions were that I was simply carrying through a look-see into what happened, that he was still an employee there and that was the purpose of – of this meeting, was to add information to what we already had to see what kind of decision should be made in the future.

Tr. 230. At the end of the meeting Lusk told Hirst to turn in his manuals and company identification. Tr. 289-290. According to Hirst, Lusk also gave him a paycheck for the pay period ending September 30th and told him to leave SEAL's property. Tr. 418-19. Lusk testified that he may have handed Hirst a paycheck on that day but did so because it was a payday. And, according to Lusk, he did not tell Hirst to leave the premises. Tr. 291. Lusk also testified that he advised Hirst that he would call him the next day at a given time. Tr. 229-230.

Lusk testified that after discussing the Hirst incident with SEAL President Thomas Kaolfenbach and Malone, he called Hirst on Tuesday, October 1st, and told him that he still had his pilot job at SEAL. Tr. 235-236. Hirst testified:

> Mr. Lusk told me during that conversation that the company had decided not to fire me, and I told him that, "Well, that's funny, because they had already fired me", and I said, "Sir, you're the one that collected my manuals, my ID. I've been in this business for nearly 20 years, and I've never heard, never in this business heard of a person being called in and being asked to drop off their manuals, their ID and their company property and they weren't terminated," regardless of the rest of the things that had transpired. He said, "Well, we'll offer you your job back," and I said, "I mean, am I still operating under the same brutality that I've been operating under?" He said, "I don't know what you mean." I said, "Am I going to be subject to

> the same thing?" He said, "Well, I don't know exactly what you mean," and I said, "Well, I mean, I've been fired. I've been terminated, and it was out of brutality and, I mean, I don't know how I can continue to live in this atmosphere of, you know, what's going on."

Tr. 420-21.

Lusk drafted a letter to Hirst on October 3, 2002:

> The purpose of this letter is to inform you that as a result of the meeting that we had, the decision was made to continue your employment. However, we have not heard from you since October 2, 2002. Our concern is that, at this point, you have refused your bid line award and been a "no show" for a bid trip.
>
> Due to the above, the company has to believe that you have chosen to abandon Southeast Airlines and your position. Please respond within three (3) days of the receipt of this letter with your intentions.

Respondent's Exhibit (RX) 2. Lusk sent the letter to an incorrect address so Hirst did not receive a copy of it until October 11, 2002. RX 3. On October 14, 2002, Hirst sent Lusk a reply in which he contended that he did not abandon his employment with SEAL:

> Please consider this correspondence in response to the letter you wrote to me dated October 3rd . . . .
>
> There is no circumstance under which any reasonable interpretation of the events leading up to my discharge from Southeast Airlines, Inc. ("Southeast") could lead to the conclusion that I remained employed by Southeast. As you are certainly aware, I was explicitly 'removed from payroll' by Southeast and actually and constructively terminated on at least three occasions telephonically, and personally while in attendance at Southeast's corporate offices on September 29th and 30th 2002.
>
> . . .
>
> At no time did I resign, abandon, or in any other manner terminate my employment as a Captain with Southeast.
>
> . . .
>
> Southeast's transparently obvious attempt at escaping the liability it has incurred for my wrongful

> discharge under the pertinent provisions of Air21 law will ultimately be revealed to be the ruse that it is. Any suggestion that I remain employed by Southeast is beyond ludicrous.
>
> Please let me know if I may provide you with any additional information. Thank you.

RX 3; CX 6.

After sending Hirst a check for his full salary for the pay period October 1-15, SEAL removed Hirst from its payroll on or about October 16, 2002. Tr. 438, 479; CX 13.

Hirst filed an AIR 21 whistleblower complaint with the Department of Labor's Occupational Health and Safety Administration (OSHA) on October 24, 2002.[3] He alleged that his "employment with Southeast Airlines was terminated solely due to [his] refusal to fly an aircraft for Southeast Airlines that was not in compliance with Federal Aviation regulations and aircraft airworthiness standards and requirements." RX 4. OSHA investigated his complaint and concluded that SEAL did not violate AIR 21 because Hirst had voluntarily resigned from employment. RX 5. Hirst requested a hearing before an ALJ.[4] The hearing took place on December 1 and 2, 2003.

On May 26, 2004, the ALJ issued a Decision and Order Granting Relief (D. & O.). The ALJ concluded that (1) Hirst engaged in protected activity when he refused to fly Flight 556; (2) SEAL subjected Hirst to an unfavorable personnel action by terminating his employment; (3) the protected activity contributed to the unfavorable personnel action; and (4) SEAL did not present Hirst with a "bona fide offer of reinstatement," and therefore Hirst was entitled to back pay plus lost per diem from the date of his firing until he obtained new employment in May of 2003. D. & O. at 10-12, 14. The ALJ allowed Hirst to submit an application for attorney's fees and costs and permitted SEAL to file a response to the application. On July 29, 2004, the ALJ issued a Supplemental Decision and Order (S. D. & O.) awarding Hirst $29,435.85 in attorney's fees and costs. SEAL appealed both the D. & O. and the S. D. & O. to this Board.

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[3] AIR 21 whistleblowers file complaints with OSHA. OSHA then investigates the complaint. If it concludes that reasonable cause exists that the employer violated the Act, it will issue a preliminary order providing relief to the complainant. If OSHA concludes that no violation has occurred, it so notifies the parties. 29 C.F.R. §§ 1979.103, 104, 105.

[4] *See* 29 C.F.R. § 1979.106.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board.[5] In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.[6] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] We must uphold an ALJ's finding of fact that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice" had the matter been before us de novo.[8] The Board, however, exercises de novo review with respect to the ALJ's legal conclusions.[9]

DISCUSSION

The AIR 21 Legal Standard

AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. The statute prohibits air carriers, contractors, and their subcontractors from "discharg[ing]" or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)" engaged in the air carrier safety-related activities the statute covers.[10] The employee is protected 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,

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[5] *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

[6] 29 C.F.R. § 1979.110(b).

[7] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[8] *Universal Camera*, 340 U.S. at 488.

[9] *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35, slip op. at 4 (ARB June 29, 2006).

[10] 49 U.S.C.A. § 42121(a).

> regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States . . . .[11]

To prevail in an AIR 21 case, a complainant like Hirst must demonstrate that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable ("adverse") personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action.[12] If Hirst proves that SEAL violated AIR 21, he is entitled to relief unless SEAL demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.[13]

Protected Activity

The ALJ found that Hirst raised safety concerns with Malone on September 29, 2002, when he questioned the legality of flying the airplane at the increased weight of 108,000 pounds. He found that Hirst reasonably believed that piloting Flight 566 would violate an FAA regulation.[14] Therefore, he found that Hirst engaged in activity that AIR 21 protects. D. & O. at 8. Substantial evidence supports this finding. Thus, we accept it. Moreover, SEAL does not contest this finding.

Adverse Action

The ALJ found that SEAL discharged ("terminated") Hirst on September 29, 2002, when Malone told him to turn in his manuals and identification, repeatedly told him that he was off the payroll, and denied him transportation back to his home base in St. Petersburg. D. & O. at 10-11.[15] SEAL argues that the record demonstrates that it did

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[11] *Id.* An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b). But Hirst claimed, argued, and sought to prove only that SEAL discharged him.

[12] *See* 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *Clark v. Pace Airlines, Inc.,* ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov. 30, 2006).

[13] *See* 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

[14] 14 C.F.R. § 121.189 (2006) reads: "No person operating a turbine engine powered airplane may take off that airplane at a weight greater than that listed in the Airplane Flight Manual for the elevation of the airport and for the ambient temperature existing at takeoff." This regulation appears in the record as CX 23.

not discharge Hirst and that he suffered no adversity. It points to evidence that neither Malone nor Lusk had authority to fire Hirst and that neither ever used words such as "terminate" or "discharge." Moreover, SEAL contends that the record contains substantial evidence that it did not discharge Hirst; namely, that Lusk told Hirst on September 30 and October 1 that he was still an employee, that Lusk memorialized the October 1st conversation in his October 3rd letter to Hirst, and that the company paid Hirst through October 15.[16] But substantial evidence also supports the ALJ's finding that Malone discharged Hirst. Therefore, we are bound to accept that finding.

The ALJ also found that, in the aftermath of the firing, Lusk's verbal and written assurances to Hirst that he had not been discharged and that his position was still available were not "bona fide" because they were "only asserted to circumvent liability."[17] According to the ALJ, this "purported offer of reinstatement" was not "voluntary" because Lusk made it "only after realizing Captain Malone's action of terminating Mr. Hirst violated the Act and implementing regulations." "Had SEAL voluntarily made a bona fide offer of reinstatement, Mr. Hirst's rejection of the offer would have terminated back pay." Thus, the ALJ found that Hirst reasonably rejected the offer and was entitled to back pay from the date he was discharged until he regained full employment as a pilot.[18]

Here the ALJ erred. He applied the wrong standard to determine whether Lusk properly offered to reinstate Hirst. Lusk's motive in offering reinstatement to Hirst is not relevant. Instead, an employer makes a bona fide offer of reinstatement when it unconditionally offers the same or a comparable position as the one held before an unlawful discharge.[19] Lusk made a bona fide offer to Hirst because he told Hirst, and later confirmed in writing, that SEAL had decided to continue his employment as a pilot.

But the ALJ's error pertains only to the back pay and reinstatement remedies that AIR 21 authorizes in the event an employer violates the Act.[20] And since we conclude

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[15] Malone actually told Hirst, "Bring your ID and manuals when you show up [for the meeting on the next day]." Tr. 392.

[16] Reply Brief at 5-7.

[17] D. & O. at 11.

[18] *Id.* at 14.

[19] *See Ford Motor Co. v EEOC*, 458 U.S. 219, 241 (1982); *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 13 (ARB Feb. 9, 2001); *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4, slip op. at 13 (Sec'y Oct. 30, 1991).

[20] *See* 49 U.S.C.A. § 42121(b)(3)(B)(ii).

that SEAL did not violate AIR 21 because Hirst did not prove that it took adverse action against him, the ALJ's error is harmless.

What Constitutes Adverse Action?

Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action.[21] Our jurisprudence requires that a whistleblower prove by a preponderance of the evidence that the employer's action was a "tangible employment action" that resulted in a significant change in employment status. Examples would be firing, failure to hire or promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[22]

In deciding whistleblower cases that the Secretary of Labor is authorized to adjudicate, the Secretary and this Board often have relied upon cases arising under Title VII of The Civil Rights Act of 1964.[23] Title VII's anti-retaliation provision, like AIR

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[21] *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 12 (ARB Feb. 29, 2000) (approving *Smart* and other cases that "make the unexceptionable point that personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on compensation, terms, conditions or privileges of employment"); *cf. Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) (the American with Disabilities Act, like Title VII, is neither a "general civility code" nor a statute making actionable ordinary tribulations of the workplace).

[22] *See Jenkins v. United States Envtl Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 20 (ARB Feb. 28, 2003); *see also, e.g., Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002) (holding that a supervisor's criticism does not constitute an adverse action); *Ilgenfritz v. United States Coast Guard*, ARB No. 99-066, ALJ No. 1999-WPC-3, slip op. at 8 (ARB Aug. 28, 2001) (holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action); *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001) (holding that in the absence of a tangible job consequence, a verbal reprimand and accompanying disciplinary memo are not adverse actions).

But a whistleblower bringing a hostile work environment claim is not required to prove an "economic" or "tangible" job detriment such as that resulting from discharge, failure to hire, or reassignment to an inferior position. A hostile work environment complainant is required to prove: 1) protected activity; 2) intentional harassment related to that activity; 3) harassment sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) harassment that would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Jenkins*, slip op. at 43 (citing *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 et al., slip op. at 13 (ARB Nov. 13, 2002)).

[23] 42 U.S.C.A. § 2000e, *et seq. See Shelton*, slip op. at 10.

21's whistleblower protection provision, prohibits an employer from retaliating because of protected activity.[24] In *Burlington Northern & Santa Fe Ry. Co. v. White*,[25] the United States Supreme Court recently resolved a split among the Courts of Appeals concerning the scope of Title VII's anti-retaliation provision. The Court first concluded that the anti-retaliation section "extends beyond workplace-related or employment-related retaliatory acts and harm."[26] And more relevant for purposes of this case, the Court also held that a

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[24] "It shall be an unlawful employment practice for an employer to discriminate against" an employee or job applicant because that person "opposed any practice" that Title VII forbids or "made a charge, testified, assisted, or participated in any manner" in a Title VII investigation, proceeding, or hearing. 42 U.S.C.A. § 2000e-3(a).

[25] --- U.S. ----, 126 S. Ct. 2405 (June 22, 2006).

[26] In doing so, the Court rejected arguments that the anti-retaliation provision should be construed together (*in pari materia*) with the Title VII's substantive anti-discrimination provision. That provision makes it unlawful for an employer, because of an individual's race, color, religion, sex, or national origin, to "*fail or refuse to hire or to discharge*" or otherwise discriminate against any individual with respect to that person's "*compensation, terms, conditions, or privileges of employment*" or "deprive or tend to deprive any individual of *employment opportunities* or otherwise adversely affect his *status as an employee*" because of race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a). (emphasis added). The Court held, therefore, that because the language of the anti-retaliation section does not contain the substantive section's limiting words, italicized above, the former is not limited to workplace-related or employment-related retaliatory acts or harm. 126 S. Ct. at 2411-2414.

The AIR 21 whistleblower protection provision, however, does contain language limiting its scope to employment related retaliation. "No air carrier or contractor or subcontractor of an air carrier may **discharge** an employee or otherwise discriminate against an employee with respect to **compensation, terms, conditions, or privileges of employment** . . . ." 49 U.S.C.A. § 42121(a) (emphasis added). And most of the other whistleblower protection provisions that the Secretary of Labor adjudicates contain similar limitations. *See, e.g.,* Clean Air Act, 42 U.S.C.A. § 7622(a) (West 2003) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment . . . ."); Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851(a)(1)(West 1995) ("No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment . . . ."); Surface Transportation Assistance Act, 49 U.S.C.A. § 31105(a)(1)(West 1997) ("A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment . . . ."). Three whistleblower protection provisions that the Secretary adjudicates do not contain the "compensation, terms, conditions, and privileges" language. *See* Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C.A. § 9610(a)(West 2005) ("No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee . . . ."); Solid Waste Disposal Act, 42 U.S.C.A. §

Title VII plaintiff bringing a retaliation claim must show that a reasonable employee or job applicant would find the employer's action "materially adverse." That is to say, "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[27] We will apply this standard to the facts herein.[28]

SEAL Did Not Take Adverse Action Against Hirst.

As we discussed above, then Director of Operations Malone discharged Hirst on Sunday, September 29, 2002. Nevertheless, on either Monday, September 30, or Tuesday, October 1, Chief Pilot Lusk met with SEAL President Thomas Kaolfenbach and Malone to discuss what had happened. Lusk testified that he explained to Kaolfenbach and Malone that Hirst had a "perfect right" to question whether the FAA had approved the new weight limit. Furthermore, they agreed that the company had not suffered any harm in having to bring in another pilot when Hirst refused to fly. And, according to Lusk, they understood how there could have been confusion about the weight limit. As a result, they decided that SEAL would retain Hirst as a pilot. Tr. 231-232. Lusk then called Hirst on Tuesday, the 1st, and left a message for Hirst to call back. When Hirst returned the call, Lusk told him that "we've kind of put our heads together and we understand that there was a lot of confusion about the issue" but "I just need you to come down and pick up your ID and your manuals and get back on the schedule and let's –you know, let's get this thing over." Tr. 235. Lusk testified that Hirst informed him that he could not return to SEAL because he had another job. Lusk replied that he wanted Hirst to keep his job at SEAL and that all he had to do was "pick up your stuff and get back on schedule." But Hirst again said that he could not do that. Tr. 235-236.

6971(a)(West 2003) (same); Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a) (West 2001)(same). Even so, the regulations that implement those statutes limit their scope to "compensation, terms, conditions, or privileges of employment." *See* 29 C.F.R. § 24.2(a).

[27] 126 S. Ct. at 2409. Cases from the Fifth and Ninth Circuits demonstrate the extreme ends of the circuit split as to how harmful the adverse action must be to fall within the anti-retaliation provision. *Compare, e.g., Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir. 1997) (holding that Title VII addresses only "ultimate employment decisions" such as hiring, granting leave, discharging, promoting and compensating), *with Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (holding that adverse action is one "reasonably likely to deter employees from engaging in protected activity").

[28] Even though the events herein occurred before the Court decided *White*, when the United States Supreme Court decides a case and applies a new rule of law to the parties before it, other courts, and this Board, must apply the new rule retroactively to parties before them. *See Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 97 (1993).

Hirst's version of this October 1st phone conversation is essentially the same as Lusk's. Tr. 420-422. Nor does Hirst contest the fact that he received Lusk's October 3rd letter (RX2), albeit on October 11, confirming that SEAL had decided to continue his employment. Hirst also acknowledges that SEAL paid him through October 15. Tr. 422-425; CX 13.

These facts demonstrate that SEAL rescinded Malone's decision to discharge Hirst and that SEAL reinstated him as a pilot. They also demonstrate that Malone's decision did not constitute an adverse action. When Lusk, Malone, and Kaolfenbach met to discuss what had happened on September 29, they quickly agreed that Hirst had justifiably challenged whether the FAA had approved the increased weight limit. They immediately decided to rescind Malone's decision, and Lusk promptly called Hirst to inform him that he was still a SEAL pilot. Lusk then confirmed that fact in writing though he mailed the October 3rd letter to a wrong address. Moreover, Hirst suffered no economic loss as a result of Malone's decision. And Hirst presented no evidence that would entitle him to compensatory damages.

Under these circumstances, we find that a reasonable SEAL employee would necessarily conclude that though Malone acted hastily and retaliated against Hirst for refusing to pilot Flight 556, SEAL officials, including Malone, quickly recognized this mistake, promptly corrected it, immediately informed Hirst that he was still employed, confirmed that fact in writing, and made sure that Hirst suffered no economic loss. A reasonable worker would see that SEAL corrected its mistake within two days and that Hirst, at most, suffered only temporary unhappiness. In the wake of Malone's decision to discharge Hirst, SEAL's actions certainly sent a message that management will respect and protect employees who are concerned with safety. That, of course, is the right message. Therefore, based solely on these particular facts, we find that a reasonable SEAL employee would not be afraid to make management aware of safety concerns, or, in *White* terminology, would not be "dissuaded" from engaging in protected activity.

CONCLUSION

Thus, though Malone discharged Hirst because he engaged in activity that AIR 21 protects, that action was not materially adverse. Absent proof by a preponderance of the evidence that SEAL took adverse action against him, Hirst's claim must fail. Therefore, we reverse the ALJ's recommended decisions and orders and **DENY** Hirst's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge