



In the Matter of:

LEONARD OLE MALMANGER,

ARB CASE NO. 08-071

COMPLAINANT,

ALJ CASE NO. 2007-AIR-008

v.

DATE: July 2, 2009

**AIR EVAC EMS, INC.,
d/b/a AIR EVAC LIFETEAM,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

James A. Devine, Esq., Springfield, Illinois

For the Respondent:

Stephanie Seay Kelly, Esq., Veronica Li, Esq., Syeda H. Maghrabi, Esq., Littler Mendelson, Chicago, Illinois, Patrick Martin, Esq., Littler Mendelson, Miami, Florida

FINAL DECISION AND ORDER

Leonard Ole Malmanger complained that Air Evac EMS, Inc., d/b/a Air Evac Lifeteam (Air Evac) violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) and its implementing regulations¹ when it terminated his employment after he raised concerns about air safety issues. After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) dismissed Malmanger's complaint. We affirm.

¹ 49 U.S.C.A. § 42121 (West 2008). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2006).

BACKGROUND

Air Evac offers rotary helicopter ambulance services to patients in rural areas of Illinois. Malmanger worked for Air Evac as a regional mechanic from June 2002 until his termination on October 3, 2006.² Malmanger's duties included performing helicopter inspections and maintenance services at Air Evac's Springfield, Illinois, air base.³

On October 20, 2002, Dr. Joel Schneider, a friend of Air Evac's Chief Executive Officer, Colin Collins, flew an aircraft at the Springfield base and failed to report to anyone that the engine was "overtemped," i.e., that the engine's temperature was elevated too much upon its start.⁴ During a subsequent pre-flight inspection of the helicopter, Air Evac's lead pilot, Sam Cain, discovered that Schneider had overtemped the aircraft; he reported the problem to Malmanger. After conferring with Steve Thomas, Air Evac's Director of Maintenance, Malmanger took the helicopter out of service and performed a "hot-end" inspection. He found no defects with the aircraft.⁵

Malmanger was nevertheless concerned that Schneider had not informed anyone at the base that he had "hot-started" or "overtemped" the helicopter engine.⁶ He also was not sure that Schneider was authorized to fly the aircraft.⁷ Malmanger discussed Schneider's failure to inform anyone about the overtemped engine with his supervisor, Lendon Kok, and with several other base employees. He did not, however, report the incident on Air Evac's safety hotline or complete an incident report.⁸

On February 23, 2006, Kok gave Malmanger a disciplinary action report. He had observed a decline in Malmanger's work performance, and issued the report to encourage Malmanger to return to "the level of maintenance that he had . . . once been."⁹ On the same day, Kok met with Malmanger to discuss the report with him. During the meeting

² RX-1.

³ Tr. at 15; RX-1.

⁴ Tr. at 21-22; Recommended Decision and Order (R. D. & O.) at 2 (Stipulations).

⁵ Tr. at 58-59, 188.

⁶ Tr. at 59.

⁷ Tr. at 60.

⁸ Tr. at 64-65.

⁹ Tr. at 121-122, 124-125, 132.

Malmanger did not deny that he needed to improve in the areas listed on the report, and he again raised the issue of Schneider's helicopter flight.¹⁰

In April 2006 Alex Wacks, a base mechanic in Iowa, called Malmanger about a tail rotor that did not meet the limits prescribed in the appropriate maintenance manual. Malmanger offered to bring Wacks a spare tail rotor assembly from the Springfield base. When Malmanger delivered the assembly, a discussion ensued concerning whether the tail rotor was in fact out of limits. Kok, who had become involved in the discussion by telephone, insisted that the rotor was not out of limits and should not be replaced. Kok based his opinion on a different helicopter maintenance manual from the one Malmanger was using. Despite Kok's objection, Malmanger replaced the rotor.¹¹

In May 2006, while attending a party at Kok's home, Malmanger overheard Kok speaking on the telephone with Leland Sutter, a base mechanic, about an oil tank leak. He heard Kok tell Sutter that the oil tank leak was within limits. He also overheard Kok order a replacement oil tank on that same night.¹² Malmanger later found out that there were no leak limits for oil tanks and that the aircraft had been flown even though it was supposed to have been kept out of service pending delivery of the new oil tank.¹³

On August 27, 2006, Malmanger sent the following e-mail to Air Evac CEO Colin Collins and the Air Evac Board of Directors:

Colin, remember me, Ole? I'm a company mechanic in Springfield, Ill. I understand you are the new membership boss. And as you recall, when the company was bought out, the new owners wanted a new "corporate image" and proceeded to put a new paint scheme and new flight suits in service? Remember? And now as new membership boss, you will probably want to "change" the membership brochure, right? Well, as a reminder, in the new brochure, under "terms and Conditions" you would want to be honest, right? #9 services may not be available, in addition to, remember? Because a friend of the presi-dent" has taken the helicopter for a JOYRIDE. Remember, colin? Remember? You used company resources to deliver a message to me to "keep my mouth shut: Remember? Shame on you, colin! you should have delivered that

¹⁰ Tr. at 129-130.

¹¹ Tr. at 31-37.

¹² Tr. at 28-30; CX-5.

¹³ Tr. at 51.

message in person. Remember what the Bell check airman said, about your friend's pilot skills? Remember? Do I need to remind you? Did you threaten a company check airman's job to "sign off" your friend? Remember? Just a side note to the audience, your friend returned the helicopter in an unairworthy condition, and didn't know it, and didn't tell anyone what happened. Remember? Remember, Colin? Then as a post flight inspection I performed, we missed a patient flight. Remember? Colin? Tell me, Colin, where is the SAFETY in this incident? I just recently found out why you want me to keep my mouth shut. I am scheduled to be in West Plains Nov 10-15 for maintenance training. I expect we can talk about this then? The reason I'm telling the investors is because of respect. If the presi-dent of my company talked to my employees like that, I would like to know. Sleep well, Colin. Ole¹⁴

In his Complainant Statement to the Department of Labor's Occupational Safety and Health Administration (OSHA), Malmanger explained why he sent the e-mail: "On 8-27-06, I composed an e-mail to Collins because I thought that Colin and Lendon, and John Landis were going to use the evaluation process to get rid of me."¹⁵

After hearing about the e-mail from Collins, James Loftin, Air Evac's vice president of aviation, asked Thomas and Drew Buckingham, director of operations, to look into Malmanger's allegations.¹⁶ Thomas and Buckingham reported to Loftin that there was nothing unusual in the maintenance records regarding the allegations. Loftin and Thomas next discussed the situation with their human resources office. On August 30, 2006, Loftin decided to place Malmanger on administrative leave.¹⁷ Loftin testified that he placed him on leave because he was concerned about Malmanger's upset state of mind, and he "wanted to disconnect everybody from the emotions of the moment." Loftin further stated that it was a safety concern to have an upset individual working on an aircraft.¹⁸

On September 6, 2006, while he was still on administrative leave, Malmanger met with Kok; Thomas; Carla Neff, a corporate compliance officer; and Debra Williams, a

¹⁴ Tr. at 9; RX-10.

¹⁵ RX-3, Tr. at 87

¹⁶ Tr. at 156-157.

¹⁷ *Id.*; Tr. at 24.

¹⁸ Tr. at 157-158.

human resources manager, to discuss the allegations in his e-mail. Malmanger stated at the meeting that he wrote the e-mail to influence an upcoming employee evaluation, which he feared might be negative.¹⁹ At the meeting Malmanger also brought up Kok's handling of the out-of-limits tail rotor and the oil tank leak, which he considered to be safety issues.²⁰

On October 3, 2006, Thomas and Loftin terminated Malmanger's employment during a meeting at Air Evac headquarters in West Plains, Missouri.²¹ Thomas told Malmanger that he was firing him because Malmanger had tried to influence the performance appraisal system.²²

On December 22, 2006, Malmanger timely filed a whistleblower complaint with OSHA, alleging that Air Evac fired him because he raised air safety concerns. OSHA found that the complaint had no merit and dismissed it. Malmanger objected to OSHA's determination and timely requested a hearing.

After a two-day hearing in Springfield, Illinois, the ALJ issued a decision in March 2008, finding no AIR 21 violation. The ALJ found that Malmanger's complaints were not protected under AIR 21 and that, assuming that Malmanger had engaged in protected activity, he failed to establish that the protected activity was a contributing factor in Air Evac's decision to terminate him. Malmanger timely filed a petition for review with the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board (ARB).²³ In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.²⁴ Substantial evidence

¹⁹ Tr. at 187.

²⁰ Tr. at 189.

²¹ Tr. at 8-9.

²² Tr. at 196.

²³ See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

²⁴ 29 C.F.R. § 1979.110(b) ("The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.") The Complainant incorrectly sets forth the Board's standard of review for an ALJ's factual determinations under AIR 21 as de novo. See Complainant's Reply Brief at 6. The Complainant relies on *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052 (ARB Feb. 29,

means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁵ Thus, if substantial evidence in the record supports the ALJ’s findings of fact, they shall be conclusive.²⁶ The ARB reviews the ALJ’s legal conclusions de novo.²⁷

DISCUSSION

We consider whether Malmanger’s electronic mail concerning Schmidt’s alleged “joyride” in 2003, and his complaints about a tail rotor and a leaky oil tank were protected activity under AIR 21.

I. Elements of an AIR 21 Whistleblower Complaint

AIR 21 prohibits an air carrier, or contractor or subcontractor of an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided an employer or the federal government information relating to any violation or alleged violation of any Federal Aviation Agency order, regulation, or standard or any other provision of federal law related to air carrier safety.²⁸

To prevail in his AIR 21 case, Malmanger must prove by a preponderance of the evidence that Air Evac is subject to the employee protection provisions of AIR 21,

2000), an Energy Reorganization Act case. In 2000, when we decided *Griffith*, we reviewed questions of fact under the ERA de novo. A new regulation, however, calls for substantial evidence review of findings of fact under the ERA, the same standard of review we apply under AIR 21. 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b).

²⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

²⁶ *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

²⁷ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

²⁸ 49 U.S.C.A. § 42121(a). The FAA defines an air carrier as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” 49 U.S.C.A. § 40102(a)(2); *see also* 29 C.F.R. § 1979.101. Air transportation means “foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.” 49 U.S.C.A. § 40102 (a) (5). Interstate air transportation means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft between states and territories when any part of the transportation is by aircraft. 49 U.S.C.A. § 40102 (a) (25).

namely, that it is an air carrier or contractor or subcontractor of an air carrier.²⁹ Malmanger must also show that (1) he engaged in protected activity; (2) his covered employer knew that he engaged in the protected activity; (3) he suffered an adverse personnel action; and (4) the protected activity was a contributing factor in the adverse action. Malmanger's failure to demonstrate any of these essential elements must result in the dismissal of his complaints.³⁰

Here, it is undisputed that Malmanger was an employee of Air Evac, and that Air Evac was an employer subject to AIR 21. We turn to whether Malmanger engaged in protected activity.

II. Protected Activity

Protected activity under AIR 21 includes providing to the employer or the Federal Government information relating to a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation.³¹ While protected complaints may be oral or in writing, the information provided to the employer or federal government must be specific in relation to a given practice, condition, directive or event that affects aircraft safety.³² A complainant must reasonably believe in the existence of a violation.³³

Malmanger alleges that he engaged in protected activity when he expressed concerns in his e-mail to Collins about Schneider's overtemping of an aircraft and when he complained during a meeting with Air Evac management about Kok's handling of incidents involving a leaky oil tank and an out-of-limits tail rotor. The ALJ found that Malmanger did not make any of his allegations in good faith and that he did not have a reasonable belief that Air Evac violated an order, regulation, or standard of the Federal

²⁹ See 49 U.S.C.A. § 42121(a), (b); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining "scope of coverage, procedures, and burdens of proof under AIR 21").

³⁰ *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 11 (ARB Feb. 29, 2008).

³¹ 49 U.S.C.A. § 42121(a)(1). See also 29 C.F.R. § 1979.102; *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

³² *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008); *Rougas v. Southwest Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-003, slip op. at 9 (ARB July 31, 2006).

³³ *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Peck*, slip op. at 13.

Aviation Administration or any other provision of Federal law relating to air carrier safety:

[T]he record reveals that there was no reasonable basis to objectively believe the company violated an order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety. The Complainant's testimony indicates that his complaints were insincere at the time he actually made them. The alleged issues regarding the "hot start," the oil tank, and the tail rotor limits were raised by the Complainant months or years after they occurred; by the time the Complainant raised those issues, they had been resolved by the company. Additionally, he made the complaints to forestall what he believed would be an adverse performance evaluation.^[34]

Substantial evidence supports the ALJ's conclusion that Malmanger's concerns were not based on a "reasonable belief" that Air Evac had violated any provision of Federal law relating to air safety.

Air Evac does not dispute that Malmanger complained to his supervisor and others about Schneider's flight. Air Evac argues, however, that Malmanger's complaint about the flight was not based on a reasonable belief because his concerns were resolved years before Malmanger complained in the e-mail. Whether a complainant's belief is reasonable depends on the knowledge available to a reasonable person in the circumstances with the employee's training and experience.³⁵ Moreover, once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity.³⁶ When Malmanger sent his e-mail to Collins and the Board of Directors, he knew that his concerns about the Schneider flight had been

³⁴ R. D. & O. at 16.

³⁵ *Stockdill v. Catalytic Indus. Maint. Co., Inc.*, No. 1990-ERA-043 (Sec'y Jan. 24, 1996).

³⁶ *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-063, slip op. at 9 (ARB June 30, 2008) (employee's complaints about previously resolved motor vehicle safety issues not protected). *See also Williams v. U.S. Dep't of Labor*, 157 Fed. Appx. 564, 570 (4th Cir. 2005) (teacher's whistleblowing activities initially protected but lost their protected status after resolution of her safety complaints); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-020, slip op. at 1 (ARB Nov. 12, 1996) (finding that when employer fully responded to his safety concerns, employee's continued complaints about them not protected).

resolved. He knew that the aircraft was safe to fly after the overtemping because he signed off on the safety of the helicopter after inspecting it himself before Air Evac put it back into service. Malmanger also never raised any concerns that Schneider or anyone else was flying or overtemping aircraft during the three years that elapsed before he sent his e-mail. Malmanger therefore did not demonstrate a reasonable belief that the Schneider flight violated an air safety regulation or order. In fact, Malmanger did not pinpoint a violation of any FAA order, regulation, or standard or any other law relating to air carrier safety. Although Malmanger need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety).

We also agree with the ALJ that Malmanger did not reasonably believe that Kok violated an air safety rule when the two disagreed about which maintenance manual was applicable to determining whether a tail rotor assembly was out of limits. Malmanger immediately resolved his disagreement with Kok by ignoring Kok's advice and changing the tail rotor assembly. He suffered no repercussions for disregarding Kok's opinion. Again, Malmanger did not pinpoint an air safety violation. As noted earlier, to be protected, the statute requires that the employee provide information to the employer or Federal Government that relates "to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety" Malmanger failed to demonstrate that his complaint about his disagreement with Kok was protected activity.

Finally, we agree with the ALJ that Malmanger did not reasonably believe that Kok violated an air safety rule when he allowed Sutter to keep a helicopter in service pending delivery of a new oil tank. Malmanger heard one side of a telephone conversation, during which Kok referred to leak limits for oil tanks. He then discussed the oil leak with Kok, who told him that he was replacing the tank as soon as possible.³⁷ At the time that Malmanger complained to Air Evac management during the September 6 meeting, he knew that Air Evac had successfully resolved the issue by replacing the tank, and it was no longer reasonable for Malmanger to continue claiming a safety violation. Therefore, we find that Malmanger did not engage in protected activity by reporting the oil tank incident to management.

Malmanger argues that the ALJ improperly relied on Malmanger's motivation for his complaints. Specifically, the ALJ concluded that Malmanger "made the complaints to forestall what he believed would be an adverse performance evaluation."³⁸ There is no requirement that a whistleblower's actions be motivated by safety concerns.³⁹ All that is

³⁷ Tr. at 28.

³⁸ R. D. & O. at 16.

³⁹ *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-001, slip op. at 12 (ARB Oct. 31, 2008); *Smith v. Western Sales & Testing*, ARB No. 02-080, ALJ No. 2001-CAA-017, slip op. at 12 (ARB Mar. 31, 2004).

required is that the whistleblower have a reasonable belief that that the respondent is violating the law. Other motives he may have for engaging in protected activity are irrelevant. Here, however, the ALJ also found that Malmanger's "testimony indicates that his complaints were insincere at the time he actually made them." His finding that Malmanger was insincere is a finding that Malmanger did not actually believe that violations existed at the time he made his complaints.⁴⁰ Substantial evidence supports the ALJ's determination that Malmanger did not reasonably believe that safety violations existed at the time he made his complaints.

Malmanger argues that the ALJ erred in not making specific credibility determinations, but he does not explain how the absence of specific credibility findings affected the outcome of the case. While it is preferable that the ALJ delineate the specific credibility determinations for each witness, an "arguable deficiency in opinion-writing technique" does not require us to set aside an administrative finding if that deficiency had no bearing on the outcome.⁴¹ Here, we accept the ALJ's finding that Malmanger did not engage in protected activity because substantial evidence supports that finding.⁴²

Since Malmanger failed to prove that he engaged in protected activity, a requisite element of his case, his entire claim must fail.⁴³

⁴⁰ See, e.g., *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 15 (ARB Mar. 30, 2007).

⁴¹ See *Robinson v. Sullivan*, 956 F.2d 836, 841 (8th Cir.1992).

⁴² *Johnson v. Econo Steel, LLC*, ARB No. 07-111, ALJ No. 2007-STA-012, slip op. at 7 (ARB Feb. 23, 2009) (while the ALJ made no specific credibility determinations, substantial evidence supports his findings); *Baughman v. J. P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-005, slip op. at 5 (ARB Oct. 31, 2007) (same).

⁴³ *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005).

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's finding that Malmanger did not prove by a preponderance of the evidence that he engaged in protected activity. For this reason we accept the ALJ's recommended decision and **DISMISS** Malmanger's complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge