



In the Matter of:

DON DOUGLAS,

COMPLAINANT,

ARB CASE NOS. 08-070
08-074

ALJ CASE NO. 2006-AIR-014

v.

DATE: September 30, 2009

SKYWEST AIRLINES, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Erik Stringberg, Esq., Kathryn K. Harstad, Esq., *Strindberg & Scholnick, LLC,*
Salt Lake City, Utah

For the Respondents:

Peter J. Petesch, Esq., Douglas W. Hall, Esq., *Ford & Harrison, LLP,*
Washington, District of Columbia; Scott M. Petersen, Esq., Joan M. Andrews,
Esq., *Fabian & Clendinin,* Salt Lake City, Utah

FINAL DECISION AND ORDER

Don Douglas filed a complaint with the United States Department of Labor alleging that his employer, SkyWest Airlines, 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)¹ when it fired him after he declared himself and his crew unfit to fly. A Labor Department Administrative Law Judge (ALJ) concluded that SkyWest violated AIR 21 and awarded Douglas reinstatement, back pay, and attorney's fees. Both parties appealed. We affirm.

BACKGROUND

The ALJ provided a comprehensive description of the background facts. We summarize the facts relevant to our decision.

Douglas, a 16-year veteran pilot for SkyWest, had a surgical procedure on Friday, March 18, 2005, after finishing a week of overnight "stand-up" duty.² This assignment involved five continuous 12-hour shifts flying roundtrip between Salt Lake City, Utah, and Jackson Hole, Wyoming.³ Douglas took painkilling medication on Friday and Saturday and went back to work on Monday, March 21.⁴

At the start of his shift on Wednesday, March 23, 2005, Douglas met with First Officer Troy Brewer, who told him that he was tired because of lack of sleep, and Flight Attendant Brandee Black, who said she had strep throat and had to stop taking her arthritis medication because of the antibiotics she was taking.⁵ The normal departure time for Jackson Hole was delayed for one hour or so, and snow storms were blanketing the area. Nearing Jackson Hole, the plane could not land because of the inclement weather, was forced to circle for an hour, and then had to return to Salt Lake City, arriving around midnight.⁶

There, Douglas was told that he and his crew were scheduled for a 4:00 a.m. flight back to Jackson Hole and then a return.⁷ Douglas testified that he unexpectedly found himself feeling unwell, "just physically and mentally drained" from the previous three hours, and concluded that he and his crew would be physically incapable of attempting

¹ 49 U.S.C.A. § 42121 (West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2008).

² Joint Exhibit (JX) 2; Hearing Transcript (TR) at 61-64, 331, 546-48.

³ TR at 71-73, 874-75; JX 34 at 28-29.

⁴ *Id.* at 71, 341.

⁵ *Id.* at 74-76, 368-70, 541-44, 552.

⁶ *Id.* at 71-73, 367-68, 543-45.

⁷ *Id.* at 78-79; JX 2, 37.

another flight to Jackson Hole after just a few hours' rest.⁸ He called the crew scheduling office to report that he and his crew were unfit and told System Chief Jim Breeze that they would not be able to complete the later flight safely. The 4:00 a.m. flight was canceled.

Breeze informed Tony Fizer about this fact. Fizer was SkyWest's Regional Chief Pilot in Salt Lake City. Fizer called Douglas, who explained that he had made the safest decision in declaring himself and the crew unfit.⁹ Fizer asked Douglas to complete an Irregular Operations Report and meet with him the next day. In the report, Douglas mentioned his recent surgery and his surgeon's post-surgery recommendations.¹⁰ Fizer imposed discipline—a week's suspension without pay and a counseling statement in his record—because Douglas showed up to work “not fit for duty” and released his crew members during the shift.¹¹

Douglas appealed this decision to SkyWest's internal review board, which held a hearing on May 13, 2005.¹² After hearing both sides, the board reversed the one-week suspension and reduced the counseling statement to an “important conversation,” i.e. a verbal warning.¹³ The board's moderator, Kelly Jasmin, told Douglas afterwards, “Congratulations. They did decide to give you what you asked for.”¹⁴

On May 16, 2005, in downgrading the counseling statement to an “important conversation,” Fizer noted that each crew member was required to make a separate determination of fitness, that Douglas had violated two company policies, and that in the future Douglas would perform his duties “in a manner that will not delay, cancel or cause loss in revenue.”¹⁵ Fizer did not speak with Douglas but informed the personnel department on June 17, 2005, that he had replaced the counseling statement.¹⁶

⁸ TR at 74, 333-34, 368-72, JX 37 at 1.

⁹ TR at 87-93.

¹⁰ JX 2; TR at 92-93.

¹¹ JX 4; TR at 740-42, 862.

¹² JX 5, 6; TR at 276.

¹³ JX 8; TR at 228-229, 383.

¹⁴ JX 47 at 67; TR at 1000-01.

¹⁵ The two policies are found at JX 10. They concern failure to perform duties that could result in a delayed or cancelled flight, or potential or actual loss of revenue and crew member fitness and reliability.

¹⁶ JX 12, TR at 280.

In early July, graffiti with the words “FUCK FIZER” in block printing appeared on a cork board in the crew lounge.¹⁷ The board was removed a week or two later, but someone wrote, “YOU CAN STILL FUCK FIZER,” on the wall of the lounge.¹⁸ This graffiti remained for several months until a new cork board was put up to cover it.¹⁹

In mid-July, Fizer learned that a SkyWest employee had made the “flipping off” finger gesture to Delta Airlines ramp agents while his plane was taxiing near the ramp. Fizer asked his assistant to pull the manifest for that flight and determined that Douglas and Brewer were the crew members.²⁰

Fizer met with them on July 19, 2005, and confronted Brewer, who denied making any gestures and asked Fizer for proof of this accusation. Fizer responded that he did not need proof, that the Delta ramp agents’ statements would be placed in Brewer’s file, and that if Brewer did it again, he would be disciplined.²¹ When Douglas asked Fizer why he, Douglas, had to be present while Fizer questioned Brewer about the incident, Fizer informed him that pilots were responsible for what their crewmembers did but did not indicate that he would discipline Douglas for what Brewer had done.²²

After dismissing Brewer, Fizer discussed the May review board’s findings with Douglas, who was recording the meeting without Fizer’s knowledge.²³ Fizer demanded that Douglas admit that his actions on March 23 in declaring the crew unfit were wrong and that he, Douglas, had not prevailed at the board. Douglas disagreed, but Fizer was adamant that Douglas was wrong and should not do the same thing again. Fizer reiterated his demands that Douglas “understand” that his actions in March were wrong.²⁴

¹⁷ JX 18, 28, 34 at 36, 47 at 3; TR at 309, 644-46, 899-00.

¹⁸ JX 19, 24.

¹⁹ JX 34 at 37; TR at 898-901.

²⁰ TR at 754-58, 500.

²¹ JX 33 at 1-7. This exhibit is a transcript of Douglas’s audio recording of the meeting, JX 41. Both exhibits were admitted into evidence without objection. TR at 82.

²² JX 33 at 5-6.

²³ *Id.* at 7-11; TR at 758-59.

²⁴ JX 33 at 10.

Fizer also accused Douglas of “bad-mouthing” him, claiming that he had learned this from David Bechtold and Jim Black, both representatives of the SkyWest Airline Pilots Association (SAPA).²⁵ Fizer added that Douglas should not be bad-mouthing him because at the May review board, he, Fizer, told the members that he, Douglas, had been a good employee for 16 years, a “16-year good guy,” and therefore the board had reduced the discipline.²⁶

After this meeting, Fizer was out of the office for business and vacation for nearly a month.²⁷ When he returned he noticed a similarity between the handwriting on the cork board, which had been removed to his office, and the letters on the manifest that had been pulled for the ramp incident the previous month. The similarity was a Z with a slash through it on both the manifest and the board.²⁸ Fizer engaged a handwriting expert, Marilynn Gillette, who looked at the graffiti on the cork board and the wall and the letters on the manifest. She concluded that, because of the crossed Z and similar strokes on the Ks, the person who wrote the manifest also wrote the graffiti.²⁹

Fizer met with Brewer and Douglas on August 16 and determined that Douglas completed his own manifests, not the first officer, Brewer, as he had thought. Fizer confronted Douglas, who denied writing the graffiti.³⁰ Fizer then called in Kelly Jasmin of the human resources department, who agreed with Fizer that if Douglas admitted writing the graffiti, the situation would be remedied.³¹ Douglas continued to deny writing the graffiti, and Fizer told him that if he did not admit it and was later found to have done it, he would be fired.³² Fizer then suspended Douglas from flying while he investigated.³³

Fizer engaged a second analyst, Linda Cropp, who asked for 25 handwriting samples of any individual who might have written the graffiti. But Fizer sent her only

²⁵ *Id.* at 12.

²⁶ *Id.* at 7-9.

²⁷ TR at 767-69.

²⁸ *Id.* at 769-71.

²⁹ JX 15 at 61.

³⁰ TR at 312-13, 602, 779, 1011.

³¹ *Id.* at 1014, JX 17 at 85.

³² JX 17 at 85, TR at 315.

³³ TR at 314.

samples of Douglas's handwriting.³⁴ Cropp concluded that it was highly probable that the handwriting on the Douglas samples was the same as that on the cork board and the wall.³⁵ Douglas also retained a handwriting expert, David Moore, who reviewed the same documents provided to Cropp. Moore concluded that the author of the graffiti was probably not Douglas.³⁶

Fizer fired Douglas on August 31, 2005, for "Dishonesty," noting that the termination was involuntary and that Douglas was not eligible for rehire.³⁷ The termination letter stated that the decision was based on the results of the graffiti investigation in which two handwriting experts opined that the printing and handwriting on the samples, the cork board, and the wall were by the same person, Douglas. Fizer reminded Douglas that he had been told that he would be fired if he did not accept responsibility for writing the graffiti. The letter added: "Your actions violate company policy. . . Dishonest and/or inaccurate reports to the company are intolerable. . . Your decision to provide false information to the company and take no responsibility for your actions shows no respect, responsibility, trust or dignity for the company. . . ."³⁸ Douglas appealed his firing to SkyWest's internal review board, which met on September 27, 2005. After hearing from Fizer and Douglas, the board upheld the termination.³⁹

Douglas filed the instant complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on December 12, 2005.⁴⁰ OSHA dismissed the complaint on April 17, 2006, and Douglas requested an ALJ hearing. Following the hearing on November 15-16, 2006, and January 16-18, 2007, the ALJ concluded in a Decision and Order Granting Relief (D. & O.) that SkyWest had violated the employee protection provision of AIR 21 in firing Douglas. The ALJ recommended that Douglas be reinstated to his former position and restored to the terms, conditions, and privileges of his employment, including seniority. SkyWest filed a motion requesting the ALJ to clarify its appeal rights. It argued that the ALJ's decision was not final and therefore

³⁴ JX 47 at 49, 62.

³⁵ JX 15 at 64; JX 22 at 95.

³⁶ JX 14, JX 39 at 3; TR at 171-86, 217-18.

³⁷ JX 16 at 83.

³⁸ *Id.* at 82.

³⁹ JX 47, JX 41: 4.

⁴⁰ Douglas first filed with the Federal Aviation Administration (FAA), which informed him that he had to file with OSHA. The ALJ denied SkyWest's motion to dismiss Douglas's claim as untimely. SkyWest did not address this issue in its brief and has therefore waived it.

appealable because the ALJ had not awarded attorney's fees.⁴¹ Therefore, on October 17, 2007, the ALJ issued an Order Granting Request for Clarification and Amending Decision and Order Granting Relief. On March 21, 2008, the ALJ issued an Order recommending an award of back pay, other expenses, and attorney's fees. As already noted, both parties filed appeals.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Administrative Review Board (ARB).⁴² In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.⁴³ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁴ Thus, if substantial evidence supports the ALJ's findings of fact, they shall be conclusive.⁴⁵ The ARB reviews the ALJ's legal conclusions de novo.⁴⁶ The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."⁴⁷

DISCUSSION

AIR 21 provides: "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 because the employee . . . provided . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation

⁴¹ Respondent's Request for Clarification Regarding Appeal Rights.

⁴² See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110.

⁴³ 29 C.F.R. § 1979.110(b).

⁴⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

⁴⁵ *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).

⁴⁶ *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

⁴⁷ *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.”⁴⁸

To prevail against SkyWest, Douglas must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) SkyWest knew that he engaged in the protected activity; (3) SkyWest took an adverse personnel action against him; and (4) the protected activity was a contributing factor in the adverse action.⁴⁹ Douglas will not be entitled to relief if SkyWest demonstrates by clear and convincing evidence that it would have fired him in the absence of the protected activity.⁵⁰

Douglas Engaged in Protected Activity

As noted above, when an employee provides an employer or the federal government information relating to any violation or alleged violation of any FAA order, regulation, or standard, or any other provision of federal law related to air carrier safety, he or she engages in AIR 21-protected activity. Protected activity under AIR 21 has two elements: (1) the information that the complainant provides must involve a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant’s belief that a violation occurred must be objectively reasonable.⁵¹ 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.⁵²

The ALJ concluded that Douglas engaged in protected activity when he declared himself and his crew unfit to fly on March 23, 2005, and informed his supervisors. The ALJ credited Douglas’s testimony that he had been trained to declare himself unfit during the course of a shift if he believed that he could not complete the shift safely, and if he had flown the 4:00 a.m. make-up flight while unfit, he would have violated federal

⁴⁸ 49 U.S.C.A. § 42121(a).

⁴⁹ 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).

⁵⁰ See 49 U.S.C.A. § 42121(b)(2)(B)(iv). *Cf.* 29 C.F.R. § 1979.104(d). See, e.g., *Negron*, slip op. at 6; *Peck*, slip op. at 9.

⁵¹ *Rooks*, slip op. at 6.

⁵² *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).

regulations.⁵³ The ALJ also credited Douglas’s testimony that neither Brewer nor Black was fit to fly despite their statements to Fizer the next day that they could have taken the flight.⁵⁴ The ALJ cited federal aviation regulations that give the pilot “full control and authority in the operation of the aircraft, without limitation, over other crewmembers and their duties”⁵⁵

SkyWest argues that the ALJ erred in holding that Douglas engaged in protected activity because Douglas’s alleged fatigue was not actual but only projected, and AIR 21 does not protect projected future unfitness to fly.⁵⁶ SkyWest reasons that the ALJ’s contrary conclusion “opens the door to crewmembers refusing assignments to take place hours later based on the speculation that they will not get sufficient rest and might be unfit later, when the flying is to take place.”⁵⁷

Substantial evidence supports the ALJ’s findings that Douglas genuinely believed that he would be violating air safety regulations if he flew on March 23, that his belief was objectively reasonable given the impact of his fatigue on air safety, and that he specifically reported his concerns to his supervisor.⁵⁸ Douglas testified credibly that he had had some discomfort from his operation on the previous Friday, but was not taking any medication and felt fit to fly when he came on duty on March 23, 2005, just as he had for the two previous shifts.⁵⁹ However, after an arduous, three-hour flight in inclement weather, he experienced unexpected exhaustion and pain upon his return to Salt Lake City. Douglas declared himself unfit at that time. Thus, he was not anticipating his unfitness to fly—he was unfit.

Further, Douglas testified that he did not believe that four hours of rest would relieve his condition, and that, by reporting his unfitness for duty at that time, SkyWest would have had more opportunity to assign a relief crew to the 4:00 a.m. make-up flight. Douglas added that he had never before declared himself unfit, but that he had been trained to do so if he believed that he could not safely pilot a plane.⁶⁰ Inasmuch as

⁵³ D. & O. at 24.

⁵⁴ *Id.* at 26.

⁵⁵ *Id.* at 27, 14 C.F.R. § 121.533(e).

⁵⁶ Respondent’s Brief at 9-14.

⁵⁷ *Id.* at 10.

⁵⁸ D. & O. at 25.

⁵⁹ JX 6.

⁶⁰ *See* 14 C.F.R. § 1.1(1) (pilot in command has final authority and responsibility for the operation and safety of the flight). *See also* 14 C.F.R. § 121.533(d)-(e) (pilot in command is

substantial evidence supports the ALJ's findings, we affirm his conclusion that Douglas engaged in protected activity.

The record also fully supports the ALJ's conclusion that Douglas engaged in protected activity when he declared his crew unfit for the 4:00 a.m. flight.⁶¹ The ALJ credited Douglas's testimony that Brewer had complained about inadequate sleep at the start of the shift, and that Black had informed him of her strep throat and stiffness from rheumatoid arthritis.⁶² While both crew members told Fizer the next day that they could have flown,⁶³ and SkyWest's Macias testified that the captain should tell crew members that they should call the crew scheduling office if unfit,⁶⁴ the ALJ credited Assistant Chief Pilot Lou Bodkin's testimony that the captain is responsible for determining whether crew members on a particular flight are fit to fly and that he should notify the crew scheduling manager.⁶⁵

The ALJ pointed to federal regulations that confer "final authority and responsibility" on the pilot in command of the aircraft, who has full control over other crew members during flight time.⁶⁶ Furthermore, Douglas testified credibly that he had been "trained numerous times that if you ever found yourself or your crew unfit, you should call them off."⁶⁷ He added that his training and understanding were that the captain was the final authority on whether the flight took place and whether the captain and crew were fit.⁶⁸

The ALJ credited Douglas's statement that he had observed the physical condition of Brewer and Black upon arrival at Salt Lake City after three hours in the air and determined that it would be unsafe for him and his crew to rest for a few hours and then

responsible for the safety of the passengers and crew members and has full control and authority "in the operation of the aircraft, without limitation, over other crew members and their duties during flight time . . .").

⁶¹ D. & O. at 27.

⁶² TR at 363-70, 546-48, 551-55.

⁶³ *Id.* at 553-55, 66-71.

⁶⁴ *Id.* at 247.

⁶⁵ *Id.* at 890-91, D. & O. at 26 n.15.

⁶⁶ D. & O. at 27. *See* 14 C.F.R. §§ 1.1, 91.3, 121.533 (d)(e).

⁶⁷ TR at 85.

⁶⁸ *Id.* at 86.

take the 4:00 a.m. flight.⁶⁹ Douglas added that when he told systems chief Breeze that the crew was unfit to do the flight, Breeze responded that, “I’d said the magic words.”⁷⁰ Thus, the record supports the ALJ’s conclusion that Douglas engaged in protected activity when he reported that his crew members were unfit to make the 4:00 a.m. flight.⁷¹

Douglas’s Protected Activity Contributed to His Discharge

Termination of employment is an adverse action. Douglas’s burden, therefore, is to prove by a preponderance of the evidence that his March 23, 2005 report to his supervisors that he and his crew could not safely complete the 4:00 a.m. flight was a contributing factor in his firing.⁷² A contributing factor is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the [adverse] decision.”⁷³ Douglas need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of such intent.⁷⁴

The ALJ concluded that Fizer’s actions during July and August established that his decision to fire Douglas was motivated at least in part by animus stemming from Douglas’s decision in March to declare himself and his crew unfit to fly.⁷⁵ He found that Fizer lacked credibility when he claimed that he was responsible for the May review board’s decision to reduce Douglas’s discipline.⁷⁶ The ALJ also found that Fizer’s insistence at the July 19 meeting that Douglas admit that he was wrong for engaging in

⁶⁹ *Id.* at 73-76, *see* JX 42:2.

⁷⁰ TR at 83-84, 440.

⁷¹ In its Petition for Review, SkyWest stated that the ALJ erred in finding that Douglas’s subsequent discussions with his supervisors and the review boards after March 23, 2005 were protected activity. SkyWest made no argument concerning this issue in its brief on appeal and has therefore waived it. *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 7 (ARB Mar. 30, 2007). *See* Respondent’s Brief at 9 n.3.

⁷² 49 U.S.C.A. § 42121 (b)(2)(B)(iii); *Rooks*, slip op. at 5.

⁷³ *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (interpreting the Whistleblower Protection Act, 5 U.S.C.A. § 1221(e)(1)(West 1996)).

⁷⁴ *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006).

⁷⁵ D. & O. at 42.

⁷⁶ *Id.* at 38.

protected activity reflected retaliatory animus.⁷⁷ As more evidence of animus, the ALJ found that Fizer’s accusations that Douglas had “bad-mouthed” him in the crew lounge were “baseless” and that his denial that the results of the May review board bothered him were “disingenuous.” Furthermore, the ALJ found that Fizer singled out Douglas as responsible for the graffiti.⁷⁸

SkyWest argues that substantial evidence does not support the ALJ’s findings.⁷⁹ SkyWest also contends that the ALJ violated the business judgment rule by second-guessing SkyWest’s actions in investigating the graffiti and then firing Douglas.⁸⁰ Further, SkyWest argues that since Douglas did not prove pretext, he could not have proved by a preponderance of the evidence that protected activity contributed to his discharge.⁸¹ Finally, the company asserts that the ALJ erred in requiring it to prove by clear and convincing evidence that it would have fired Douglas absent his protected activity before Douglas proved that protected activity was a contributing factor.⁸²

⁷⁷ *Id.* at 37.

⁷⁸ *Id.* at 37-40.

⁷⁹ Respondent’s Brief at 15-18.

⁸⁰ *Id.* at 18-22. SkyWest’s second-guessing argument rests on the assumption that the ALJ found that its reliance on the handwriting experts was unreasonable and therefore that Fizer targeted Douglas. The ALJ, however, found that Fizer’s singling out Douglas was based on the sequence of events leading up to Douglas’s firing, including the fact that Fizer provided Cropp with no other handwriting examples except Douglas’s. The ALJ did not decide whether the experts were right or wrong or whether SkyWest reasonably relied on their opinions. D. & O. at 41. Accordingly, we reject SkyWest’s argument. *See Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 1997-SWD-002, slip op. at 10 (ARB Dec. 1, 1998) (ALJ’s conclusion that protected activity contributed to the termination decision was based on several other factors and did not run afoul of the prohibition against supplanting the employer’s business judgment).

⁸¹ *Id.* at 22. SkyWest cites to *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) for this argument. But we did not hold that a complainant had to prove pretext to show that protected activity was a contributing factor. Rather, we stated that an ALJ may employ, if appropriate, the established and familiar Title VII methodology for analyzing and discussing evidentiary burdens of proof in AIR 21 cases. 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 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.

⁸² Respondent’s Brief at 22-25. But, as we discuss later, before the ALJ discussed whether SkyWest proved by clear and convincing evidence that it would have fired Douglas

Substantial evidence supports the ALJ's findings.⁸³ First, the transcripts of the Douglas-Fizer July 19 meeting and the September review board reveal that Fizer claimed that he had advocated Douglas's exemplary record to the May review board and that the board's "exact words" to him afterwards were that the only reason they downgraded the discipline was because Fizer told them that Douglas was a "16-year good guy."⁸⁴ But the record shows that this was not true. A review board member, Michael Macias, testified that Fizer did not ask the board to overturn or reduce Douglas's discipline. To the contrary, Macias stated that Fizer told the board that the decision to discipline Douglas was **not** about him being a good employee.⁸⁵ Macias added that the review board did not speak to Fizer afterwards about the reason for its decision but simply asked Jasmin, the review board moderator, to pass on its recommendations.⁸⁶

Second, Fizer testified that he was not bothered, angry, or annoyed about the May review board's decision and merely wanted to pass on its recommendations to Douglas when they met on July.⁸⁷ The ALJ found this testimony to be "disingenuous."⁸⁸ We have listened to Douglas's recording of the July meeting, and it supports the ALJ's finding. Fizer did not tell Douglas about the review board's recommendations.⁸⁹ Instead, he directly confronted Douglas and insisted that he admit that he was wrong for engaging

despite his protected activity, he did conclude that Douglas had met the contributing factor requirement.

⁸³ We note that the ALJ made detailed credibility findings regarding the testimony of Douglas and Fizer. D. & O. at 20-21. The ALJ rejected all of SkyWest's arguments impugning Douglas's credibility and accorded his testimony "significant weight." *Id.* The ALJ found Fizer "to be less than credible" in his account of events concerning Douglas and added that "Fizer's credibility [was] lacking at certain points in his testimony concerning the decisions he made regarding" Douglas. *Id.* at 17 n.10, 21 n.12. SkyWest did not specifically contest these findings and thus has waived these issues. *Walker*, slip op. at 10.

⁸⁴ JX 34 at 28; JX 41:4.

⁸⁵ TR at 242-43.

⁸⁶ Macias testified that the review board recommended that Fizer tell Douglas that (1) he should consult a flight surgeon about any future medical concerns, and (2) that individual crew members should call SkyWest schedulers with any concerns about fitness. TR at 229-32, 243-45.

⁸⁷ TR at 812-24, D. & O. at 37.

⁸⁸ *Id.*

⁸⁹ TR at 436.

in protected activity on March 23, 2005.⁹⁰ The recording reveals that Fizer told Douglas seven times that his actions in declaring himself unfit were wrong, and “if you don’t think you were, then we need to take a time-out here and re-evaluate the whole damn thing, until you understand that you were wrong, because I don’t want you to do that again.”⁹¹

Douglas protested, saying that Jasmin told him that he had “won” the appeal. But Fizer insisted that the board “found in favor of what I did,” and that after the hearing the board told him that under the same circumstances he, Fizer, should do the same thing again.⁹² Douglas retorted that Fizer was wrong to put a letter in his file stating that he was unfit to fly, “pretty much screwing my career.” Douglas added that flying while unfit was an FAA violation, and that he had not flown while he was not fit.⁹³

Third, this same July 19 recording reveals that Fizer accused Douglas several times of bad-mouthing him and the company to other pilots in the crew lounge. Douglas denied doing so, but Fizer said he had proof from two other pilots, James Black and David Bechtold. Douglas pointed out that these pilots were SAPA representatives and that he had vented to them about the discipline Fizer had imposed.⁹⁴ And since both pilots flatly contradicted, in writing and at the hearing, Fizer’s statement that they had told him that Douglas had been bad-mouthing him, substantial evidence supports the ALJ’s finding that Fizer’s accusations about bad-mouthing were baseless and thus further evidence of animus.⁹⁵

Fourth, substantial evidence supports the ALJ’s finding that Fizer targeted Douglas in the graffiti investigation. Fizer told the September review board that Douglas was motivated to write the graffiti that appeared in early July because he was unhappy about the May review board decision and was bad-mouthing Fizer to other employees.⁹⁶ The record, however, shows that Douglas was not at all unhappy about the May

⁹⁰ JX 33 at 7-12, TR at 641-43, 827-28.

⁹¹ JX 33 at 10; JX 41:2.

⁹² JX 33 at 7.

⁹³ *Id.* at 13-14.

⁹⁴ JX 47 at 27, 34.

⁹⁵ JX 31-32; TR at 508, 512-13, 870.

⁹⁶ JX 47 at 49, 62.

decision—he testified that he felt he had “won” his appeal.⁹⁷ Even Fizer testified that he and Douglas had left the May review board “on pretty good terms.”⁹⁸

Also, the graffiti appeared in early July, well before Fizer’s July 19 meeting with Douglas and Brewer.⁹⁹ Douglas had no contact with Fizer between the review board in May and the July 19 meeting.¹⁰⁰ Fizer did not speak with him as the May board had recommended but simply modified his written discipline.¹⁰¹ As Douglas told the September review board, he “just wanted to not be noticed . . . to do a good job, go home, take care of my family.”¹⁰² The fact that Douglas and Fizer did not clash between the May review board and July 19 further supports the ALJ’s finding that Douglas was not motivated to write the graffiti.

Fifth, substantial evidence supports the ALJ’s finding that Fizer’s statements to the September 27, 2005 review board demonstrated retaliatory animus against Douglas. Just as he told the May review board, Fizer told this board that Douglas was wrong for declaring himself and his crew unfit. Fizer emphasized that the May review board downgraded the discipline he imposed because he told them that Douglas was “a 16-year good guy,” but, as we just noted, Macias told a very different version of what was said at the May review board. Fizer added that he had never “lost” a review board hearing and that the May board’s decision was a compromise, not a loss, even though Jasmin told Douglas that he had won.¹⁰³ And, though Douglas had no reason to be unhappy about the May board’s decision, Fizer again insisted that Douglas was motivated to write the graffiti because of the outcome of the May review board.

The record fully supports the ALJ’s findings that Fizer’s testimony about what he said concerning Douglas after the March 23 protected activity was not credible and that what he actually said and did evinced an animus that could be traced to the protected activity. Thus, like the ALJ, we conclude that Douglas’s protected activity contributed to Fizer’s decision to fire him.

⁹⁷ TR at 550, 573.

⁹⁸ *Id.* at 642.

⁹⁹ *Id.* at 309, 643-46.

¹⁰⁰ *Id.* at 280.

¹⁰¹ JX 10. *See* JX 8.

¹⁰² JX 47 at 66.

¹⁰³ TR at 278.

SkyWest Would Not Have Fired Douglas Absent His Protected Activity

Douglas has proven discrimination and is entitled to relief unless SkyWest demonstrates by clear and convincing evidence that it would have terminated him absent his protected activity.¹⁰⁴ The ALJ found that since SkyWest offered shifting explanations for terminating Douglas and, for similar conduct, treated Douglas more harshly than Brewer, its stated reason for firing Douglas was a pretext. Therefore, he found that SkyWest did not produce clear and convincing evidence that it would have fired Douglas regardless of protected activity.¹⁰⁵

SkyWest contends that Douglas's dishonesty about the graffiti was a terminable offense and was justified and reasonable. SkyWest argues that the ALJ erred because he did not "engage in the analysis of whether Douglas proved . . . pretext," but instead "prematurely saddled SkyWest" with the clear and convincing evidence burden. Furthermore, according to SkyWest, substantial evidence does not exist for the ALJ's pretext findings.¹⁰⁶ Neither argument has merit.

An employer's shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason.¹⁰⁷ In the letter explaining why it terminated Douglas, SkyWest stated that the reason was his dishonesty about not admitting that he had written the graffiti. Because the record did not support it, the ALJ dismissed SkyWest's argument that it would have fired Douglas even absent his protected activity because it proved that both the graffiti incident and the Delta ramp incident "led to a loss of trust in Douglas by SkyWest, at several levels on the chain of command, and constituted a legitimate basis for SkyWest's decision to terminate Douglas

¹⁰⁴ See 49 U.S.C.A. § 42121(b)(2)(B)(iv).

¹⁰⁵ D. & O. at 42-46.

¹⁰⁶ Respondent's Brief at 21-25.

¹⁰⁷ *Speegle v. Stone & Webster Const., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Sept. 24, 2009); *Vieques Air Link v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006), *aff'g Negron v. Vieques Air Link*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004); *James v. Ketchikan Pulp Co.*, 1994-WPC-004, slip op. at 2 (Sec'y Mar. 15, 1996) (employer's shifting explanations about the reason for taking an adverse action often reveal that the real motive was unlawful retaliation); *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op. at 9 (ARB Feb. 9, 2001). (contradictions in employer's explanation are persuasive evidence of pretext), citing *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 935 (11th Cir. 1995) (the pretextual nature of the employer's termination of an employee's employment is further demonstrated by the employer's shifting explanations for its actions).

regardless of any prior protected activity.”¹⁰⁸ The ALJ went on to note that the record indicates that Douglas did not participate in the Delta ramp incident, that Fizer never suspected or accused him of participating, and that Fizer did not discuss this matter when testifying about the termination at the September review board. Thus, substantial evidence supports the ALJ’s finding that SkyWest offered differing explanations for terminating Douglas.

Disparate treatment of similarly situated employees may also provide evidence of pretext.¹⁰⁹ “Similarly situated” employees are those involved in or accused of the same or similar conduct but disciplined in different ways.¹¹⁰ The ALJ found that Brewer and Douglas were similarly situated because the Delta ramp “flipping off” incident was an obscene gesture that had the same meaning as the obscenity written on the cork board and wall. “The graffiti contained a phrase that is commonly regarded as an offensive gesture equivalent to the obscene gesture made to the Delta ramp agents.”¹¹¹ SkyWest argued that the graffiti was different because it created a “sexual harassment issue” and a “hostile work environment.” The ALJ rejected that argument, primarily because the record showed that SkyWest allowed the offensive graffiti to remain in its workplace for at least two months.¹¹²

¹⁰⁸ D. & O. at 43, citing SkyWest’s [Proposed] Findings of Fact and Conclusions of Law at 54. SkyWest argues to us it had merely advanced an “alternative *argument*” to the ALJ that it “could have” discharged Douglas for allowing Brewer to “flip off” the Delta ramp worker, and that, therefore, the ALJ erred in finding pretext based on its argument. Brief at 24-25. But, as the ALJ correctly notes, SkyWest made its “alternative argument” not in the context of its clear and convincing burden to prove dual motive, but to rebut any inference of causation because of the temporal proximity between Douglas’s March 23 protected activity and his August 31 termination. Thus, SkyWest argued that where an intervening event “could have” caused the adverse action and that “[t]hese intervening events [i.e., the Delta ramp and the graffiti incidents] are more than sufficient to break any inference of causation . . . Douglas has not satisfied his burden of proof to demonstrate that his protected activity was a contributing factor in SkyWest’s adverse employment action against him.” [Proposed] Findings of Fact and Conclusions of Law at 49, 51. Moreover, if SkyWest is arguing that clear and convincing evidence exists that it “could have” terminated Douglas for the Delta ramp incident, and thus it avoids liability, that argument must fail because its burden is to prove by clear and convincing evidence that it “would have,” not “might have” or “could have” terminated Douglas for the Delta ramp incident. *See Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 12-13 (ARB Sept. 30, 2003).

¹⁰⁹ *Speegle*, slip op. at 13.

¹¹⁰ *Id.*

¹¹¹ D. & O. at 44.

¹¹² *Id.* at 44-45, *see* TR at 715-20.

The ALJ also found that though Fizer decided that both Brewer and Douglas were dishonest about their respective incidents, he imposed very different discipline. The record fully supports this finding. In Brewer's case, Fizer merely asked his assistant to find the flight manifest. After reading it, he confronted Brewer, who demanded proof that he had made the gesture. Fizer told him that the agents' report of the incident was proof enough, placed the report in Brewer's file, and warned him not to do it again.¹¹³ For Douglas's misconduct, Fizer conducted an extensive investigation, which included hiring handwriting experts, recommending termination to other managers, and then firing Douglas.¹¹⁴

Therefore, since substantial evidence exists that SkyWest offered shifting explanations for terminating Douglas and that, for similar conduct, it treated him differently than Brewer, we concur with the ALJ that SkyWest's reason for terminating Douglas is a pretext. As a result, SkyWest could not, and did not, prove that it would have terminated Douglas even if he had not engaged in protected activity.¹¹⁵

Remedies and Damages

AIR 21 provides that if a violation of the employee protection provisions has occurred, the ALJ shall order the person who committed such violation to (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages.¹¹⁶ The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him; calculations of the amount due must be reasonable and supported by the evidence.¹¹⁷

Having found that SkyWest violated AIR 21's whistleblower protection provision, the ALJ's October 3, 2007 Decision and Order properly ordered reinstatement, and SkyWest does not dispute this action.¹¹⁸ In his later March 21 2008 Order, the ALJ found that Douglas's gross income for 2005 would have been \$93,939.35 or \$3,613.05

¹¹³ JX 33 at 5.

¹¹⁴ D. & O. at 45-46.

¹¹⁵ See *Speegle*, slip op. at 16.

¹¹⁶ 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b).

¹¹⁷ *Rooks*, slip op. at 10.

¹¹⁸ D. & O. at 47.

per bi-monthly pay period. He therefore recommended that SkyWest be ordered to use this figure to calculate the back pay owed to Douglas.¹¹⁹ He found that Douglas was entitled to \$144.92 per pay period in overtime, but denied any bonus pay, per diem awards, or annual pay increases.¹²⁰ The ALJ also recommended that reimbursement of medical expenses, accidental death insurance, child care costs, and 401k contributions be denied.¹²¹ He recommended that SkyWest be ordered to restore Douglas's accrued leave, compensate him for the required period of retraining, and provide him with lost stock options and travel benefits.¹²²

SkyWest argues that Douglas is not entitled to back pay or any other damages because he did not present evidence of damages at the hearing.¹²³ The company contends that the ALJ erred in re-opening the record for Douglas to present such evidence, and, alternatively, in concluding that Douglas mitigated his damages.¹²⁴

We reject SkyWest's argument that the ALJ erred in reopening the record in violation of the regulation governing the closing of a hearing.¹²⁵ While it is true that the ALJ closed the record at the end of the hearing, he ordered that the record be reopened for the parties to submit evidence concerning back pay and damages before SkyWest objected to reopening the record and before Douglas offered evidence pertaining to back pay and damages.¹²⁶ Granting leave to reopen the record is committed to the sound discretion of the trial judge.¹²⁷ Therefore, the ALJ did not abuse his discretion in reopening the record.

¹¹⁹ March 21, 2008 Order (Order) at 3. The ALJ ordered back pay from November 1, 2005, but Douglas was fired on August 31, 2005. *See* discussion, *infra*.

¹²⁰ *Id.* at 6.

¹²¹ *Id.* at 6-7.

¹²² *Id.* at 8-9.

¹²³ Respondent's Brief at 25-26.

¹²⁴ *Id.* at 26-30.

¹²⁵ 29 C.F.R. § 18.54(c) (Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available, which was not readily available prior to the closing of the record.).

¹²⁶ TR at 1199; October 17, 2007 Order at 3-4.

¹²⁷ *See Zenith Radio Corp. v. Hazeltine Res.*, 401 U.S. 321, 330-331 (1971) (equating discretion to reopen record with discretion to permit amendment of pleadings).

We also reject SkyWest's argument that Douglas is not entitled to back pay because he failed to mitigate his damages. While a complainant must show reasonable diligence in attempting to mitigate damages,¹²⁸ the employer bears the burden of proving that the employee failed to mitigate.¹²⁹ The employer meets this burden by establishing that comparable jobs were available and that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment.¹³⁰

Substantial evidence supports the ALJ's finding that SkyWest did not show that comparable employment alternatives were available during the time that Douglas was unemployed.¹³¹ As the ALJ noted, the evidence that SkyWest submitted to prove that comparable positions existed concerned a pilot position and a firefighter position. But these jobs were available in November 2007, which was after SkyWest reinstated Douglas pursuant to the ALJ's order, not when Douglas was fired in 2005. Furthermore, Douglas testified that his 16 years of seniority at SkyWest enabled him to schedule night shifts so that he could care for his non-school-age children during the day while his wife worked.¹³² The positions that SkyWest submitted did not provide for these preferred shifts. Therefore, they were not substantially equivalent to Douglas's job at SkyWest.¹³³

SkyWest argues that because Douglas opted to stay at home with his children instead of looking for work, it did not have to show that substantially equivalent positions were available.¹³⁴ Douglas testified that since the termination letter had labeled him as dishonest and untrustworthy, finding pilot work was practically impossible.¹³⁵ Furthermore, he did not have a college degree and only limited skills. Thus, after looking at day care costs, he decided to stay at home and care for the children.¹³⁶ But, as noted, the ALJ found that because of his seniority, Douglas had earned the benefit of being able

¹²⁸ *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095, ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004).

¹²⁹ *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005).

¹³⁰ *Hobby*, slip op. at 50.

¹³¹ Order at 4.

¹³² TR at 326.

¹³³ See Exhibit C to Respondent's Objections to Complainant's Motion.

¹³⁴ Respondent's Brief at 26-30.

¹³⁵ TR at 415, JX 16 at 2.

¹³⁶ TR at 283, 326.

to take care of his children during the day. Therefore, SkyWest's argument that Douglas's decision to stay at home absolves it from proving that substantially equivalent positions were available fails. Accordingly, since it did not prove the first prong of its burden, it did not prove that Douglas did not mitigate damages.

Douglas argues that the ALJ erred in failing to award back pay for September and October 2005, and to reimburse him for bonuses, pay raises, per diems, and 401k contributions. Upon reviewing the record, we conclude that the ALJ's finding of back pay starting in November 2005 is a typographical error. Thus, we agree with Douglas's argument that he is entitled to back pay in September and October 2005. Furthermore, substantial evidence supports the ALJ's calculation as to the monthly amount of back pay to which Douglas is entitled.

Substantial evidence supports the ALJ's finding that awarding bonuses, pay raises, and per diems would be "far too speculative" because Douglas did not submit records that substantiated any predictable pattern or rate at which Douglas received such amounts.¹³⁷ In support of these amounts, Douglas offered the expert opinion of Gary Couillard who testified that he relied on actual pay stubs and records of compensation. But his report contained only two such documents; all other calculations were in the form of spreadsheets, upon which the ALJ declined to rely because they were not adequately supported by Douglas's financial and employment records.¹³⁸

Douglas also contends that in denying reimbursement for his 401k losses, the ALJ ignored evidence about SkyWest's contributions to his 401k account.¹³⁹ The ALJ found that the spreadsheets and a printout from a website that Douglas submitted on this issue were inadequate to prove the losses Douglas was claiming.¹⁴⁰ While the record contains a paystub that shows contributions to the 401k, it contains no evidence showing how this one contribution was calculated. Therefore, we agree with the ALJ that Douglas did not prove how much he should be reimbursed for losses to his 401k plan.

¹³⁷ Order at 6.

¹³⁸ *Id.* at 2. See November 6, 2007 Economic Loss Appraisal, submitted with Complainant's Motion for Attorney's Fee and Costs, Back Pay, and Other Expenses. This report claimed a total loss of \$446,009 but contained only one final pay stub dated August 31, 2005.

¹³⁹ Complainant's Brief (unpaginated). See Schedule 4 of Economic Loss Appraisal.

¹⁴⁰ Order at 7.

Attorney's Fees

A successful AIR 21 complainant is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint.¹⁴¹ Thus, a prevailing party is entitled to reimbursement for attorney's fees and legal expenses and costs, including expert witness fees.¹⁴²

The ARB has endorsed the lodestar method to calculate attorney's fees.¹⁴³ This requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.¹⁴⁴ An attorney seeking a fee award must submit evidence documenting the hours worked and the rates claimed, as well as records identifying the date, time, and duration necessary to accomplish each specific activity and all claimed costs. If the documentation of hours is inadequate, the award may be reduced accordingly.¹⁴⁵

The ALJ found that the time-and-task entries detailed in the attorney's fee petition were adequately documented to justify the \$104,811.00 that he awarded. Substantial

¹⁴¹ 49 U.S.C.A. § 42121(b)(3)(B). When an AIR 21 complainant establishes that his employer retaliated against him, the Secretary of Labor shall

order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

29 C.F.R. § 1979.110(d).

¹⁴² *Florek v. Eastern Air Central, Inc.* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12 (ARB May 21, 2009).

¹⁴³ *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064, ALJ No. 2000-STA-047, slip op. at 7 (ARB June 27, 2003).

¹⁴⁴ *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-026, slip op. at 10 (ARB Aug. 31, 2004).

¹⁴⁵ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 2 (ARB Mar. 7, 2006).

evidence supports the ALJ's finding that there was no reason to grant SkyWest's request that the requested attorney's fee be reduced by 25 percent.¹⁴⁶

Douglas's petition requested \$30,244.99 in costs. Included in this amount was an entry entitled, "Reinstatement of fees previously credited (\$7,500 on 2.21.07 & \$10,000 on 5/31/07)."¹⁴⁷ The ALJ deducted the total of these amounts, \$17,500, from the costs requested. He found that under the legal fee portion of the petition, there was no information concerning these charges on the dates noted and concluded that Douglas's attorneys had failed to justify these amounts adequately.¹⁴⁸ The ALJ also deducted \$73.63 charged for food on July 3, 2007, and awarded \$12,672.36 in costs.¹⁴⁹

Douglas's attorney argues that the ALJ erred in deducting \$17,500.00 from the amount of costs claimed because these amounts were simply reinstatement of fees previously credited to Douglas on February 21 and May 31, 2007. He stated that these amounts showed up as costs "only because of inadequacies" with the firm's billing system.¹⁵⁰ The attorney explained that, during the litigation, his firm "temporarily reduced" its fees to Douglas by deducting a total of \$17,500.00 from various bills for services, but it was "always understood" that arrangements for payment could be made at the end of the case.¹⁵¹

Substantial evidence supports the ALJ's finding that Douglas's fee petition contained no information about these charges. Under the February 21 and May 31, 2007 dates in the fee petition, there are no entries. Nowhere in the fee petition is there any information on what hours were spent or what tasks were performed to incur these two sums. The only explanation for the total amount is: "Reinstatement of fees previously credited."¹⁵²

Douglas's attorneys have provided no documentation identifying the date, time, and duration necessary to accomplish the specific activities covered by this amount. Thus, regardless of the shortcomings of the firm's billing system or the firm's

¹⁴⁶ Order at 12.

¹⁴⁷ See Schedule 9 of Economic Loss Appraisal at 15, Complainant's Motion for Attorney's Fees and Costs, Back Pay, and Other Expenses.

¹⁴⁸ Order at 12.

¹⁴⁹ *Id.* at 13-14.

¹⁵⁰ Complainant's Brief (unpaginated).

¹⁵¹ *Id.*

¹⁵² Schedule 9 of Economic Loss Appraisal at 15.

“understanding” with Douglas, his attorneys have failed to meet their burden of proof. Therefore, we affirm the ALJ’s finding.

CONCLUSION

Substantial evidence supports the ALJ’s finding that Douglas’s protected activity was a contributing factor in Fizer’s decision to discharge him and that, therefore, SkyWest violated AIR 21. Further, the record also supports ALJ’s findings regarding reinstatement, back pay, and attorney’s fees, and those remedies are in accordance with law. Therefore, as corrected to include Douglas’s back pay entitlement for September and October 2005, we **AFFIRM** the ALJ’s recommended decision. Douglas’s attorney has 30 days in which to submit a petition for additional attorneys’ fees and other litigation expenses. He is to serve any such petition on SkyWest, which will have 30 days in which to file objections to the petition.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge