



In the Matter of:

THEODORE FURLAND,

COMPLAINANT,

v.

AMERICAN AIRLINES, INC.,

RESPONDENT.

ARB CASE NOS. 09-102
10-130

ALJ CASE NO. 2008-AIR-011

DATE: July 27, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Darin M. Dalmat, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia

For the Respondent:

Donn C. Meindertsma, Esq., *Conner & Winters, LLP*, Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Theodore Furland filed a complaint alleging that his employer, American Airlines, Inc., retaliated against him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2007) and its implementing regulations, 29 C.F.R. Part 1979 (2010). On May 21, 2009, a Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that American Airlines violated AIR 21 when it changed Furland's paid sick leave to unpaid sick leave and docked his pay. The ALJ awarded Furland \$915.64 plus

interest. The ALJ subsequently awarded costs and attorney's fees. For the following reasons, we affirm the ALJ's R. D. & O. and order the recommended relief.

BACKGROUND¹

A. *Events Leading to Furland's Reduction in Pay for Use of Sick Leave*

American Airlines hired Furland as a pilot in 1985 and promoted him to captain in 1992. R. D. & O. at 8, *see also* Resp. Exh. 4 ¶ 2. Prior to 2007, American had never provided him with any formal written discipline, nor had it ever fined him or docked his pay. R. D. & O. at 8.

1. *May 18, 2007 meeting between Furland and Hynes*

On April 16, 2007, Chief Pilot Hynes sent a letter to Furland requesting a meeting to discuss Furland's sick leave use. R. D. & O. at 4; JX 4. Hynes and Furland met on May 18, 2007, and during the meeting Hynes warned Furland that his sick leave use had been excessive. R. D. & O. at 4. Furland testified that while Hynes told him that he needed Furland to "come to work" because the company needed all its pilots, Furland stated that Hynes did not inform him that future sick leave requests would require "written medical documentation from Furland in order to substantiate the occasions of paid sick leave at issue." *Id.*; *see also* Hearing Transcript (Tr.) at 28, 32 (Furland). Hynes testified that he "d[id] not recall" telling Furland at the May 18 meeting that future sick leave requests required medical documentation. Tr. at 312 (Hynes).

2. *Furland's sick leave on June 27, 2007*

On June 27, 2007, Furland was scheduled to fly from New York, to Miami, to San Juan, and then back to Miami. R. D. & O. at 1. He suffered gastrointestinal effects from airline food during the flight from New York to Miami. *Id.* He reported that he would not be able to fly on to San Juan and back to Miami. *Id.* The crew scheduling staff at Dallas/Ft. Worth rescheduled Furland's scheduled sequences with another pilot and told Furland that he was free to go home. *Id.* at 4-5. After recuperating at home that evening, Furland felt well enough to report to work the following morning. *Id.* at 1. Furland took sick leave for the missed time on June 27, 2007, and received full pay for the time. *Id.*

3. *June 28, 2007 letter from American Airlines to Furland*

On June 28, 2007, Hynes wrote a letter to Furland referencing a May 18, 2007 meeting that Furland had attended, at Hynes' request, at which Hynes had warned Furland that his use of sick leave had been excessive. R. D. & O. at 4; JX 7. Prior to this meeting American Airlines had never asked Furland for medical documentation or any explanation for his use of sick leave. Nor had any company official ever questioned his use of sick leave. R. D. & O. at 4. The letter

¹ The Background Statement summarizes the ALJ's findings of fact. For a more detailed discussion of the facts of this case see the ALJ's R. D. & O. at pages 3-9.

stated that during the meeting Furland was notified that American Airlines would be observing his attendance, and that he should expect that it would require him to provide medical verification to substantiate future absences attributed to illness or injury. JX 7. The letter requested a medical note supporting the June 27th sick leave and advised Furland that if he did not provide a doctor's note, he could be subjected to corrective action including reversal of his paid sick leave to unpaid. *Id.*

Although Hynes' letter stated that Furland had been informed at the meeting in May that he would be expected to provide medical verification in the future should he wish to take sick leave, the ALJ found that in fact Hynes did not inform Furland of this requirement at the May meeting. R. D. & O. at 7. Nor did Hynes instruct Furland at the meeting that he could receive paid sick leave only if he provided medical documentation. *Id.* at 4. Furthermore, the ALJ found that American Airlines did not give Furland any indication prior to his receipt of the June 28th letter that he would be required in the future to see a doctor when and if he became sick. *Id.* at 7; *see also supra* at 2.

4. July 9, 2007 Union Letter regarding Furland

On July 9, 2007, a representative of Furland's union sent a letter to American Airlines on Furland's behalf protesting the request for a medical note for taking sick leave on June 27, 2007. R. D. & O. at 5; JX 8. The letter asserted that the request for documentation was harassment and constituted unlawful "pilot pushing," i.e., pressuring a pilot to fly when unfit in violation of the Federal Aviation Regulations (FARs). *Id.* The letter further stated that American had not told Furland that he would be under observation or that he would be required to provide medical documentation for sick leave use. JX 8.

5. Furland's August 27, 2007 meeting with Union and Company

On August 27, 2007, Furland and his union representatives met with Captain Brian Fields, representing American Airlines, to discuss Furland's sick leave use on June 27, 2007, and Furland's failure to provide medical documentation for the sick leave taken on that date. R. D. & O. at 5; *see* JX 10. Fields stressed that Furland called in sick after American Airlines warned him against calling in sick. R. D. & O. at 5. Furland's union representative argued that American Airlines' demand for medical documentation pressured Furland to fly when he was sick, in violation of his legal obligations under the FARs. *Id.* After the meeting, American Airlines informed Furland that it would dock his pay \$915.64, representing the amount that it had previously paid him as sick leave compensation. *Id.* at 2, 5.

American Airlines deducted the amount it had paid Furland for the June 27th sick leave from his September 25, 2007 paycheck. *Id.* at 2.

B. *Administrative Proceedings*

Furland filed his AIR 21 complaint with the Occupational Safety and Health Administration (OSHA) on November 19, 2007, challenging American Airlines' decision to

deduct sick pay. Upon OSHA's denial of the complaint, Furland requested an ALJ hearing. After the hearing, the ALJ issued the R. D. & O. ordering American Airlines to pay Furland \$915.64, the amount of salary that had been withheld, plus interest. The ALJ denied Furland's request to have his personnel file expunged.

On July 23, 2010, the ALJ issued a supplemental Recommended Decision and Order awarding Furland's attorney fees in the amount of \$38,711.25.

Respondent American Airlines has timely appealed both of the ALJ's Recommended Decisions and Orders to the Administrative Review Board (ARB or the Board).

CONSOLIDATION OF ARB CASE NOS. 09-102 AND 10-130

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, American Airlines' appeals are hereby consolidated for the purpose of review and decision. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108, 2007-SOX-055; slip op. at 6 (ARB Apr. 30, 2008); *Harvey v. Home Depot*, ARB Nos. 04-114, -115; ALJ Nos. 2004-SOX-020, -036; slip op. at 8 (ARB June 2, 2006); *Agosto v. Consol. Edison Co. Inc.*, ARB Nos. 98-007, -152; ALJ Nos. 1996-ERA-002, 1997-ERA-054; slip op. at 2 (ARB July 27, 1999).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in AIR 21 cases. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110(a).

AIR 21's implementing regulations provide, "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard." 29 C.F.R. § 1979.110(b). The Board reviews the ALJ's legal conclusions de novo. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006) (citing *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 Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4 (ARB Dec. 30, 2004)).

DISCUSSION

1. AIR 21 Whistleblower Provision

AIR 21's whistleblower protection provision, 49 U.S.C.A. § 42121, provides at subsection (a):

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

To prevail under AIR 21, a complainant must prove by a preponderance of the evidence that his protected activity was a contributing factor to the alleged adverse action. *See* 49 U.S.C.A. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a).² If the complainant proves that the respondent violated AIR 21, the complainant is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. *See* 49 U.S.C.A. § 42121(b)(2)(B)(ii); 29 C.F.R. § 1979.109(a).

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. *Rooks v. Planet Airways*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 6 (ARB June 29, 2006).

ARB case law under analogous whistleblower statutes governing transportation and the environment holds that protection for activities that further the purposes of the statutes depends on whether the complainant reasonably believed that the employer was violating or would violate the pertinent act and its implementing regulations. *See Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-006 (ARB July 14, 2000), and cases cited therein. Thus, a complainant need not prove an actual violation, but need only establish a

² A complainant's failure to prove by a preponderance of the evidence any one of the above listed elements of his complaint warrants dismissal. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 7 (ARB Nov. 30, 2005).

reasonable belief that his or her safety concern was valid. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 1995-CAA-012, slip op. at 4-5 (ARB Apr. 8, 1997).

2. ALJ Findings of Fact and Conclusions of Law

The ALJ found that Furland engaged in protected activity: (1) when the union sent the July 9, 2007 letter to American Airlines on his behalf protesting that American Airlines asked for a doctor's note to justify his sick leave, and (2) on August 27, 2007, at the meeting between Furland, the union, and American Airlines when Furland argued that the demand for medical documentation pressured Furland to fly when sick in violation of his legal obligations under the FARs. R. D. & O. at 5. The ALJ stated that "it is axiomatic that a pilot should not fly when impaired," and noted that Furland referred to such pressure as "pilot pushing." *Id.* The ALJ found that the union's July 9, 2007 letter, and Furland's representations at the August 27th meeting constituted effective complaints about FAR safety violations and thus constituted, in each instance, protected activity. *Id.*

Regarding Furland's claims of retaliatory adverse action, the ALJ found that the deduction of \$915.64 from Furland's paycheck was materially adverse to Furland and that it thus constituted adverse employment action. *Id.* at 6.³ The ALJ determined "that the preponderant evidence shows that the loss of use of the money was occasioned by the fact that the Complainant protested that he was required to provide a medical note," and thus concluded that Furland's "protected activity was a contributing factor in the unfavorable personnel action." *Id.*⁴

Turning to the question of whether American Airlines nevertheless avoided liability by establishing that it would have deducted Furland's pay in any event, the ALJ found that American Airlines failed to prove by clear and convincing evidence that it would have docked his pay absent Furland's protected activity. *Id.* at 10. American Airlines asserted that its sole reason for docking Furland's pay was his failure to provide a medical note substantiating the basis for his sick leave on June 27th. The ALJ found American Airlines' assertions nevertheless failed to meet the heightened burden imposed by the "clear and convincing" standard of proof, noting company policy to the contrary, the fact that none of American Airlines' witnesses testified that pilots had to provide medical notes, and that no one at American Airlines asked Furland the reason for his illness on June 27, 2007, prior to sending him the June 28th letter from Hynes. *Id.* at 8.

³ The ALJ further found that Furland had to borrow money from a line of credit as a result of the reduced pay. R. D. & O. at 6. Because his pay was docked, Furland was hesitant to call in sick because he cannot afford to not get paid. *Id.*

⁴ The ALJ also found that Furland failed to prove that he was adversely affected by the Hynes' June 28, 2007 letter (JX 7), and therefore held that the letter did not constitute adverse action. R. D. & O. at 6.

3. Analysis

Before turning to the merits, we address American Airlines' argument on appeal that the ALJ should not have allowed Furland to amend his complaint to conform to the evidence. 29 C.F.R. § 1979.107(a) states that: "Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, of 29 C.F.R. Part 18." 29 C.F.R. § 18.5(e)(2010) provides the ALJ with discretionary authority to allow "appropriate amendments to complaints . . . upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties." Finding no abuse of that authority, we reject American Airlines' argument challenging the ALJ's order allowing Furland to amend his complaint.

A. Furland engaged in protected activity

The Federal Aviation Regulations give pilots of commercial aircraft such as Furland, broad authority for ensuring the safe operation of an aircraft. *See, e.g.*, 14 C.F.R. § 1.1 (2011) (giving the "pilot in command" the "final authority and responsibility for the operation and safety of the flight"); 14 C.F.R. § 91.3 ("The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft."). During flight time, the pilot in command is "responsible for the safety of the passengers, crewmembers, cargo, and airplane." 14 C.F.R. § 121.533(d). *See also* 14 C.F.R. § 121.663 ("The pilot in command and an authorized aircraft dispatcher shall sign the release only if they both believe that the flight can be made with safety."). A pilot's broad regulatory authority for ensuring the safety of air travel includes a pilot's obligation to refrain from flying when the pilot himself is unfit. *See* 14 C.F.R. § 61.53 ("no person . . . may act as pilot in command or in any other capacity as a required pilot flight crew member while that person knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation"). *See Douglas v. Skywest Airlines*, ARB Nos. 08-070, -074; ALJ No. 2006-AIR-014, slip op. at 9 (ARB Sept. 30, 2009), (a pilot has the authority to declare himself and his crew "unfit for flight" due to fatigue under 14 C.F.R. §§ 91.3, 121.533, which afford the pilot "full control and authority in the operation of aircraft."); *see also Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 6-9 (ARB June 29, 2006) (pilot's authority to refuse to fly due to fatigue stems from 14 C.F.R. § 121.533).

Substantial evidence fully supports the ALJ's finding that Furland engaged in protected activity when he complained through the July 9, 2007 union letter and at the August 27, 2008 meeting that American Airlines' actions pressuring him to fly even when sick contravened the FARs. In light of the foregoing, we also conclude that American Airlines' insistence on medical documentation *after* Furland had already called in sick on June 27, 2007, constitutes unlawful retaliation in violation of AIR 21. On each occasion Furland presented his sick leave decision of June 27, 2007, whereby he effectively deemed himself unfit for flight on that day, as a legitimate safety concern within his authority to raise, to which the protection against retaliation under AIR 21 is to be afforded.

The ALJ implicitly found that Furland did not engage in protected activity when he called in sick on June 27, 2007, and refused to complete his assigned flight schedule. R. D. & O. at 7. However, Furland's refusal to fly based on illness is not unlike the pilot's refusal to fly in *Douglas*, ARB Nos. 08-070, -074, that the ARB upheld as protected activity. In this case, the ALJ found that on June 27, 2007, Furland informed his co-pilot that he was "suffering from food poisoning and felt ill," and directed his co-pilot to "send a message to crew scheduling" so that he could be replaced with another pilot. R. D. & O. at 4 (citing Tr. at 33, 84). Like the complainant in *Douglas*, Furland reasonably exercised his authority under the FARs in deeming himself unfit for flight based on his medical condition at the time of flight operations on June 27. Indeed, the ALJ noted that after Furland was released from further flight obligations, he became more ill and did not feel normal until the next morning. R. D. & O. at 5, 9 (citing Tr. at 34-35 (Furland)). Thus, consistent with the Board's holding in *Douglas*, Furland's decision to call in sick on June 27, 2007, and refrain from further flight operations during his illness was protected activity under AIR 21.⁵

Furthermore, the substantial evidence of record fully supports the conclusion that American Airlines knew of the protected activity described above, *e.g.*, Furland's unfitness to fly because of his illness, the union letter protesting the late-request for medical documentation, and the protest of medical documentation at the August 27, 2007 hearing. R. D. & O. at 5.

B. Furland's protected activity was a contributing factor in American Airlines' decision to dock Furland's pay

The ALJ's determination that American Airlines' decision to dock Furland's pay constituted adverse action is supported by substantial evidence of record and is in accordance with prior ARB decisions in which the Board has held that a reduction in pay can constitute an adverse action. *See Walkewicz v. L.W. Stone*, ARB No. 07-001, ALJ No. 2006-STA-030, slip op. at 4-5 (ARB Mar. 30, 2008) (reduced pay can constitute an adverse action); *Brune v. Horizon Air*, ARB No. 04-037, ALJ 2002-AIR-008 (ARB Jan. 31, 2006).

⁵ We reach this conclusion notwithstanding American Airlines' argument that Furland waived this issue on appeal because he did not raise it pursuant to a petition for review, but in his responsive pleadings. 29 C.F.R. § 1979.110(a) provides that any exception not raised in a petition for review "ordinarily shall be deemed to have been waived by the parties." The plain language of the regulations provides for exceptions to the general rule. Therefore because Furland prevailed before the ALJ and has been diligent in arguing that his refusal to fly by calling in sick was protected activity throughout this litigation, including in his initial complaint, his objections to OSHA's findings, his post-hearing brief to the ALJ, and his reply brief on appeal to the Board, we do not consider Furland to have waived the issue. Moreover, the Board is not bound by an ALJ's conclusions of law but reviews them *de novo*. *Sitts v. COMAIR, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-007, slip op. at 8 (ARB May 31, 2011) (citing *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006)).

The ALJ's conclusion that Furland proved by a preponderance of the evidence that his protected activity was a contributing factor in his termination is also supported by the substantial evidence of record and is in accordance with applicable law. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Klopfenstein v. PCC Flow Techs. Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006), quoting *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) (Thomson Reuters 2011)).⁶ It is abundantly clear from the record before us that Furland met his burden of proving by a preponderance of the evidence that his protected activities, which included calling in sick on June 27, contributed to American Airlines' decision to dock his pay.

C. *American Airlines failed to prove by clear and convincing evidence that it would have docked Furland's pay absent his protected activity*

Based on the substantial evidence in the record, we also affirm the ALJ's conclusion that American Airlines failed to prove by clear and convincing evidence that it would have deducted the paid sick leave amount from Furland's pay absent protected activity.⁷ The ALJ noted that the Respondent failed to present evidence of a company-wide policy requiring pilots to present medical documentation to support requests for sick leave. *See* R. D. & O. at 5 n.4. Moreover, substantial evidence supports the ALJ's determination that Furland was *not* informed at the May 18, 2007 meeting with Hynes that Furland's future sick leave requests would require medical documentation and prior approval. *See* R. D. & O. at 4 ("Complainant argues that Captain Hynes never instructed complainant that he could receive paid sick leave only if he provided medical documentation. . . . This is substantiated by Captain Hynes."); *see also supra* at 2. Therefore, we conclude that the ALJ's determination that American Airlines failed to prove by clear and convincing evidence that it would have docked Furland's pay notwithstanding his protected activity is in accordance with law.

We agree with the ALJ that employers have a compelling business interest in requiring proof that their employees' absences based on illness are legitimate. *See* R. D. & O. at 7. However, without pilots having *prior* notice of such a requirement – whether through company policy requiring such proof or advance notice that such proof will be required – such a requirement can prove retaliatory in violation of AIR 21. Indeed, had Furland had prior notice

⁶ As *Marano* explains, the contributing factor standard was "intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

⁷ American Airlines contends that the ALJ erred by requiring it to prove "certain facts by clear and convincing evidence or disprove causation." (Pet. for Rev. at 2; Resp. Br. at 25). However, AIR 21 expressly states that once a complainant has proven his/her case by a preponderance of the evidence, a respondent must prove by "clear and convincing evidence" that it "would have taken the same unfavorable action in the absence of the protected activity." 49 U.S.C.A. § 42121(b)(2)(B)(ii). Thus, the ALJ applied the proper standard. *See* 29 C.F.R. § 1979.109(a).

that medical documentation was required to support a request for sick leave, then the contributing factor behind the decision to dock his pay might have been a failure to supply medical documentation and the results in this case might be different. However, in light of the ALJ's findings that Furland had no such prior notice, we find that the ALJ's conclusion that American Airlines failed to prove by clear and convincing evidence that it would have docked Furland's pay notwithstanding his protected activity is fully supported by the substantial evidence of record and in accordance with applicable law. Accordingly, we affirm the ALJ's ruling that American Airlines' docking of Furland's pay constituted retaliation in violation of AIR 21's whistleblower protection provision.

4. Remedies

Having ruled that American Airlines violated AIR 21, we turn to remedies. The ALJ ordered American Airlines to repay to Furland \$914.64, the amount American Airlines deducted from Furland's September 25, 2007 paycheck, plus interest. On appeal, neither Furland nor American Airlines has contested the award, and thus we could deem that both parties have waived any exception. *See* 29 C.F.R. § 1979.110(a). Nevertheless, we review the propriety of the ALJ's award.

When an AIR 21 complainant establishes that his employer retaliated against him for whistleblowing activities, the Secretary of Labor shall order the employer to: "(i) take affirmative action to abate the violation; (ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and (iii) provide compensatory damages." 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). A prevailing complainant is entitled to back pay from the time of the adverse action until he is reinstated to employment plus interest at the rate specified in 26 U.S.C.A. § 6621 (West 2002), computed until the date of payment. *Agbe v. Texas Southern Univ.*, ARB No. 98-072, ALJ No. 1997-ERA-013, slip op. at 21 (ARB July 27, 1999) (citations omitted); *Wells v. Kansas Gas & Elec. Co.*, 1985-ERA-022, slip op. at 7 n.6 (Sec'y Mar. 21, 1991). *See also Assistant Sec'y of Labor for OSHA & Nidy v. Benton Enters.*, 1990-STA-011, slip op. at 7 (Sec'y Nov. 19, 1991); *Wells v. Kansas Gas & Elec. Co.*, 1985-ERA-022, slip op. at 1 (Sec'y June 28, 1991). The purpose of back pay is to make an employee whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination. *Id.* (citations omitted). The employee discriminated against should recover damages for the period of time he would have worked in the absence of the unlawful discrimination. *Id.*

Consistent with the foregoing, and having found that the factual basis for the ALJ's award is supported by the substantial evidence of record, we affirm the ALJ's award of \$914.64, plus interest from September 25, 2007, the date American Airlines docked Furland's pay.

5. Attorney's fees

Furland petitioned for \$38,711.25 in fees and costs. Before the ALJ and on appeal, American Airlines has not objected to the amount of legal time for which Furland's attorney

seeks payment, to the billing rate charged for that time, or to the amount or types of costs and expenses sought. Nevertheless, American Airlines argues before the Board, as it did before the ALJ, that Furland should not recover any fees because his petition did not establish that he incurred any fees since Furland's union funded Furland's action. American Airlines also argued that if there is an award of attorney's fees, that it should be cut in half because Furland only won on half of his claims, and further that the requested fee is disproportionate to Furland's success in the litigation because the requested fee is so much larger than the damage award that Furland recovered in the proceeding.

The ALJ issued a Decision and Order on Attorney Fees on July 23, 2010. The ALJ found the attorney's \$185.00 an hour rate to be reasonable. Finding that Furland's attorney's application for the award of fees was reasonable, and having rejected American Airlines' arguments in opposition to the award, the ALJ awarded \$38,711.25 for 209.25 hours of representation. The ALJ held that whether Furland or the union on his behalf incurred the fees was no basis for granting fee shifting or reduction of the fee award as American Airlines argued. R. D. & O. at 1. The ALJ also ruled that while he did not order that Furland's personnel record be cleared of written discipline, Furland nevertheless prevailed in his case in chief, noting that American Airlines could have chosen to settle early in the litigation, as Furland argued, but chose not to do so and engaged in many objections, some of them redundant. *Id.* at 2.

As the prevailing party in this case, Furland is entitled to an award of all costs and expenses (including attorney's fees) reasonably incurred. 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). We thus agree with the ALJ that American Airlines' argument about fees incurred in the litigation of Furland's case fails and is not a legitimate basis for shifting the fee obligation. Regardless of whether Furland or the union on his behalf funded this action, American Airlines is responsible for the fees reasonably incurred by Furland in prosecuting his AIR 21 administrative complaint in order to make him whole.⁸

Concerning American Airlines' argument in opposition to the amount of the ALJ's fee award, the Board has declined to reduce attorney's fee awards solely because the amount is larger than the damages recovered. *See Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB Jan. 5, 2011); *see also Hoffman v. Boss Insulation & Roofing, Inc.*, ARB Nos. 96-091, 97-128; ALJ No. 1994-CAA-004, slip op. at 5 (ARB Jan. 22, 1997) (policy against chilling attorneys from taking moderately complicated cases where the complainant earned modest wages and hence the back pay sought would be small in relation to the attorney time expended; standard that degree of a plaintiff's success is crucial factor). In this case, Furland's attorneys achieved essentially complete relief under AIR 21. We agree with the ALJ that his rejection of Furland's request for modification of his personnel file does not mean that Furland did not prevail. We also note that we have found that Furland also prevailed on his

⁸ This is not to say that Furland's counsel is entitled to double-payment for his legal services as a result of the Board's affirmation of the ALJ's order awarding fees against American Airlines. As Furland has represented, "an award of fees in this case will be used to reimburse the APA for its expenditure on [his] behalf." Complainant's Reply Brief In Support of His Petition for Attorney Fees, Exhibit 1 "Declaration of Theodore R. Furland" at 2 (July 2, 2009).

claim that that his refusal to fly constituted protected activity. We therefore deny American Airlines' request to reduce the attorney fee award based on its disproportionate size or because he only prevailed on part of his claims.

As the prevailing party in this case, Furland is entitled to all costs and expenses including attorney's fees reasonably incurred in bringing his complaint. 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. §1979.109(b). Upon our review of the record and the request, we find that the ALJ's award of fees and costs is reasonable, supported by the substantial evidence of record, and in accord with applicable law. We thus affirm the ALJ's order regarding attorney's fees.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's findings of fact, and he correctly applied the pertinent law with one exception as discussed above. We **AFFIRM** the ALJ's conclusion that Furland's protected activity was a contributing factor to American Airlines' termination of his employment, and that American Airlines therefore violated AIR 21. We also **AFFIRM** the ALJ's award of damages. Finally, we **AFFIRM** the ALJ's July 23, 2010 supplemental decision awarding attorney's fees and costs.

Furland's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, American Airlines shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge