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Issue Date: 15 July 2011

CASE №: 2008-AIR-00012

In the matter of:

MICHAEL LEON,
Complainant,

v.

SECURAPLANE TECHNOLOGIES, INC.,
Respondent.

Decision and Order

This whistleblower protection claim arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] The Complainant, Michael Leon, says he was fired in retaliation for pointing out dangerous shortcomings in the design of an electrical component his employer, Securaplane Technologies, Inc., was developing as a subcontractor for Boeing, to become part of a newly designed passenger aircraft. Securaplane proved he was fired for repeated misconduct, not for any safety complaints. The claim is dismissed.

I. Summary of Findings and Background

A. Summary of Findings

Securaplane provides products for civilian commercial aviation, and its products go into commercial aircraft.[2] Its customers include "Boeing, Airbus, Delta, American Airlines, [and] Southwest," as well as many business-jet companies like Gulfstream and Bombardier.[3] It designs and manufactures smoke detection systems, camera systems,

[1] 49 U.S.C. § 42121.

[2] Tr. at 851. This Decision and Order refers to the record this way: citations to the August 10 through 14, 2009, trial transcript are abbreviated as Tr. at [page number]; citations to the Complainant Leon's exhibits are abbreviated as CX [exhibit number] at [page number]; citations to Respondent Securaplane's exhibits are abbreviated as RX [exhibit number] at [page number].

[3] Tr. at 851–52.

and battery chargers.[4] Among these products, Securaplane was awarded the contract to design the Battery Charger Unit, or BCU, for the Boeing 787 in approximately 2004.[5] The design and evolution of the BCU became the central focus of this case. Securaplane is a contractor or sub-contractor of an air carrier and is subject to the whistleblower protection provisions of AIR 21.[6]

In late 2006 and early 2007, Securaplane experienced a trifecta of conditions that created a period of tumult for the company and its employees. Securaplane had expanded and grown rapidly. At the same time its founders and owners (including the company's longtime president) left and new ownership and management began. In November 2006, during this transition and growth, Securaplane experienced a devastating fire that destroyed its labs and production building. The fire destroyed records (including many personnel records), upset projects and production, rattled the workforce, and sparked a multi-party root cause analysis investigation that spanned the next two years. The fire ignited when the battery Leon was using to conduct tests on the BCU exploded. Leon was a key witness to the fire and now suffers numerous health problems he attributes to it.

Leon sees himself as a dedicated employee who performed his job with unparalleled dedication who also was a stickler for safety. He complained to Securaplane about the battery that later exploded, claiming it had been damaged and was unsafe. He also complained about the electronic load he was given for later tests on the BCU, which he also believed was unsafe. These complaints are not air-safety related, but relate to a workplace safety complaint Leon made to the Occupational Safety and Health Administration (OSHA) under § 11(c) of the OSH Act. OSHA declined to prosecute that claim and Leon has no private right of action, but he believes this shows Securaplane operated with a general disregard for safety.

Following the fire, beginning in approximately January 2007, Leon claims he began making complaints to his Securaplane supervisors that there were discrepancies between the schematics and assembly documents used in the manufacture of the BCUs and the BCUs themselves. He knew they were shipping the BCUs to customers and the BCUs eventually would go into airplanes. He believed Securaplane would be violating FAA regulations or other federal laws if it shipped what he thought were nonconforming units. He says he

[4] Tr. at 851–52.

[5] Tr. at 853.

[6] 49 U.S.C. § 42121(a).

was pressured to sign off on Acceptance Test Procedures (ATPs)[7] for noncompliant units and ship them to customers. He says he gave in to pressure to run the ATPs, knowing they would be re-run after he fixed the units, but balked at actually shipping noncompliant units. On March 1, 2007, he left work without shipping what he thought were noncompliant BCUs, and when he returned to work on March 5, 2007, he received a formal written disciplinary warning. Leon says he continued to raise the nonconformance issues and the discrepancy, but no one fixed it. Eventually he filed an FAA complaint. Meanwhile he was subject to additional discipline including a Performance Improvement Plan (PIP). He was later suspended, and eventually fired. Leon believes the timing of his termination proves Securaplane was motivated by retaliatory animus towards Leon's protected safety activities.

Securaplane paints a contrasting picture of Leon as an employee skilled in troubleshooting electronics problems and dedicated to his work, but who always had deficiencies in his interpersonal skills and professionalism. He occasionally had some problems with his soldering abilities and tended to fail to document procedures properly, but his strengths outshined his deficiencies. After the fire, Leon's behavior started to go downhill. One of the possible causes of the fire was Leon's misuse of the battery during BCU testing. Securaplane tried to help Leon by working with him to relieve the stresses of the investigation. But Leon soon became uncooperative, and his always-troublesome interpersonal skills took a turn for the worse. He began refusing to do work, throwing things, fighting with his supervisors and calling them names to other employees and Securaplane customers. His managers were also concerned about his productivity and extensive, unsupervised overtime hours. Securaplane invoked its progressive discipline policy in the hope of rehabilitating Leon and helping him to improve his behavior. Leon refused to cooperate at every step of the way, causing more problems when he walked out of a fire recreation test that was part of the root cause analysis of the November 2006 fire. Eventually several of Leon's co-workers approached Lorrie Guzeman, Securaplane's Human Resources (HR) Manager, telling her they found

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[7] An ATP is actually a series of tests run on a unit to determine functionality and quality. Tr. at 250. Securaplane's Quality Assurance FAA Compliance Manager explained a ATP involves:

> Various things, depending on the unit, but it is basically a test that the unit is put through using, you know, various tools and—and machines to hopefully determine whether or not there are any defects, failures, to—to finally clear the product to ship.

Tr. at 250.

Leon disruptive, intimidating, and frightening, some of them refusing to continue working with him. Seeing no other option, Securaplane fired Leon effective May 14, 2007.

A procedural review follows next. Then in Section II of this Decision, I discuss Securaplane's Motion for a Negative Inference, which addresses the evidentiary value and credibility of clandestine recordings Leon made of several meetings on which Leon relies for proof. Section III provides a brief overview of Securaplane and Leon's role in the company.[8] Section IV reviews the legal standard that governs a whistleblower discrimination complaint under AIR 21, before Section V discusses Leon's *prima facie* case of discrimination. Finding Leon has established a *prima facie* case, I discuss Securaplane's rebuttal in Section VI and conclude Leon's protected activity was not a factor in Securaplane's decision to fire him, and even if it had been, Securaplane has shown with clear and convincing evidence that Leon's intemperance far exceeded the leeway the law affords to whistleblowers, and provided independent grounds for his termination. Section 0 summarizes my decision.

B. Procedural History

As trial first convened in Tucson, Arizona, on March 24, 2009, it was adjourned because the parties announced they had settled.[9] But it proved impossible to finalize settlement documents, so I heard the case at a reconvened trial in Tucson, Arizona, from August 10 through 14, 2009.[10]

The proceedings were acrimonious and unusual because the three witnesses most involved in the events didn't testify. Leon never took the witness stand. Nor did two managers who had left Securaplane:[11] Blane Boynton, the project manager with whom Leon worked closely and to whom Leon says he raised many protected safety complaints, and Janice Williams, Leon's direct supervisor during much of the time he was engaged in activities he regards as protected. Leon

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[8] *See* discussion Tr. at 16; *see also* Tr. at 15, 17.

[9] March 24, 2009, Transcript at 5.

[10] *See* Tr. at 1.

[11] Boynton left Securaplane before trial. *See* Tr. at 201. Williams was apparently laid off from Securaplane not long after Leon was fired. Tr. at 407. Leon tried to subpoena Williams to testify, but failed to serve the entire subpoena and failed to pay Williams required mileage and witness fees in advance as 29 C.F.R. § 18.24(a) requires. Tentative Ruling Quashing Subpoena for Janice Williams, 1–2 (Mar. 20, 2009). The Tentative Ruling gave Leon the opportunity to prove he had indeed properly served the subpoena and prepaid Williams' fees, but he failed to do so, and the subpoena was quashed.

claims retaliatory disciplinary actions culminated in his termination. The litigation was so acrimonious that Leon recorded the trial himself. His posttrial brief cites a transcription made from his audio recording.[12] All citations in this Decision and Order are to the official transcript the court reporter prepared.

Several of Leon's exhibits that Securaplane believes aren't relevant were conditionally admitted on the first day of trial.[13] Securaplane's motion in limine that challenged their admission is denied, because those exhibits help set the context for Leon's arguments.[14] Securaplane's Exhibits 1 through 17[15] were admitted, as were its Exhibits 21 and 22 that later were offered at my request.[16]

The many witnesses who did testify were current or former employees of Securaplane. Prominent among them was Laurie Guzeman, the local Human Resources Director when Leon was fired. Leon, who represented himself, argued extensively at trial in the course of his questions to witnesses. None of his assertions were sworn testimony subject to cross examination, so they can't serve as a record basis for findings.[17] These findings of fact are based on testimony and the documentary evidence in admitted exhibits (which do contain some of the Complainant's statements in the form of contemporaneous

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[12] *See* Complainant's Closing Brief.

[13] Tr. at 13.

[14] Tr. at 18.

[15] Tr. at 22. Exhibits 1 through 16 were included on Securaplane's Pretrial Statement submitted in advance of the aborted March 24, 2009, trial. Respondent's Pre-trial Statement, 20 (Mar. 17, 2009). Exhibits 1 through 17 were included in its July 31, 2009, amended pretrial statement and exhibit list. Respondent's Amended Pre-trial Statement, 21 (July 31, 2009). I excluded exhibits 18 through 20 as Securaplane didn't disclose or produce them until August 7, 2009, just three days before trial, and couldn't provide adequate justification why I should excuse their untimeliness. Tr. at 499; *see also* Tr. at 491–99 (discussing the proposed exhibits 18 through 20 and the reason for their lateness).

[16] Tr. at 889, 999. Exhibit 21 outlined changes in the schematics and assembly documents for the BCU circuit board central to Leon's alleged protected activity. Exhibit 22 contained the actual assembly documents for the relevant revisions of the circuit board.

[17] *See* 29 C.F.R. § 18.603 (requiring witnesses to declare they will testify truthfully prior to testifying). In his Closing Brief, Leon routinely cited to his own argument at trial to support his allegations. Complainant's Closing Brief, *passim*. At trial, I repeatedly cautioned Leon that his argument was not testimony. *See, e.g.*, Tr. at 378, 381, 411, 552, 562, and 923 (discussing information Leon would need to bring in with his own testimony), 227, 279, 410, 538, 554, 557, 580 (explaining argument wasn't the same as proof or questioning witnesses), and 989–90 (asking Leon if he wishes to testify). Despite these repeat warnings, Leon appears to have confused argument with testimony.

emails and other documents). Leon did offer recordings of several key meetings and conversations, but for the reasons I will explain in the next section, they were edited in ways that leave them largely unpersuasive. Thus, many of the Complainant's allegations remain unsupported; his argument isn't evidence, and he has adduced no other proof to support his contentions. What motivated Boynton and Williams also remains opaque.

Leon's behavior at trial was boisterous, argumentative, and occasionally belligerent. He asked few questions that adduced facts. He appeared more interested in informing witnesses of information he believed they ought to have known while he was still employed at Securaplane or in trying to convince them to agree with his recollection of events or point of view than he does in proving Securaplane fired him in retaliation for bringing air safety matters to its attention. At one point he even debated with a witness that a particular ethnic slur he had used in the workplace was an accurate and appropriate term.[18] Leon's demeanor at trial corroborated Securaplane's criticisms of his behavior and interpersonal skills as an employee. Leon's demeanor at trial corroborated Securaplane's criticisms of his behavior and interpersonal skills as an employee.

Since the trial, Leon has continued to be prolific in his communications. He filed his posttrial brief on October 29, 2009,[19] followed by an objection to Securaplane's motion for a three-week extension of the deadline for its reply brief.[20] I granted the extension,[21] and Securaplane filed its posttrial brief on December 18, 2009.[22]

He submitted letters to the OALJ on June 19, 2010; November 10, 2010; November 20, 2010; December 31, 2010 (received January 6, 2011); April 11, 2011 (received April 14, 2011); and May 19, 2011 (received May 31, 2011). Securaplane's counsel responded to two of these letters (the November 10 and 20, 2010, letters) on November 22,

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[18] Tr. at 558–59. Leon had used the term "rag head" in the presence of a co-worker of Middle Eastern descent. *Id.* at 558. When the witness testified the term was "inappropriate" for the workplace, the following exchange took place:

> Q: Well, when these people are running around hiding their heads in rags and carrying grenade launchers, you know, what are you going to call them? That's right. We don't use the word "terrorist" anymore, right?
>
> A: We don't use rag head either.

Id. at 559.

[19] Complainant's Closing Brief.

[20] Objection to Respondent's Request for an Extension Until December 21, 2009 For the Submission of its Post-Hearing Brief.

[21] Order Granting Extension for Submission of Brief (Nov. 6, 2009).

[22] Respondent's Post-Hearing Brief.

2010, and December 12, 2010 (received December 13, 2010), respectively. On April 27, 2011, I responded to Leon regarding the letters he had submitted at that time explaining I had not responded to previous letters because neither Leon nor Securaplane had requested relief from me or actions on my part.[23] Leon's most recent letter requests actions and raises allegations that are outside the OALJ's jurisdiction. Specifically, Leon wishes to see several witnesses prosecuted for perjury and Securaplane's attorneys disciplined for actions in a state court case.[24] He also alleges Securaplane discriminated against him on racial and ethnic grounds.[25] This is not the first time Leon has raised arguments that are outside the scope of the OALJ's jurisdiction.[26] While Leon might find relief for some of these issues in a court of general jurisdiction, they are beyond the authority of this forum, and I will not address them further.[27]

II. Securaplane's Motion for Negative Inference

Leon made several audio recordings of meetings between himself and others at Securaplane during the first half of 2007 while still a Securaplane employee. At the time, Leon told no one he made the recordings.[28] In its requests for production, Securaplane requested "[a]ll photograph(s), videotape(s) and audiotape(s) of Respondent's

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[23] Letter from the Honorable William Dorsey to Michael Leon, Apr. 27, 2011, at 1.

[24] *See* Letter from Michael A. Leon to the Honorable William Dorsey, May 19, 2011, at 1–13.

[25] *See id.* at 13–14.

[26] Respondent's Motion in Limine to Exclude Evidence and Testimony Related to Claims Not Properly Part of These Proceedings (July 31, 2009), 1–2 (showing Leon was raising alleged violations of the "FAA SUP Program," the Americans with Disabilities Act, Title VII, the OSH Act, and privacy torts).

[27] Leon also alleged that the 42-page pre-employment investigation that was apparently missing from his personnel file, presumed lost, has since resurfaced in a state court case. Letter from Michael A. Leon to the Honorable William Dorsey, May 19, 2011, at 1–3, 5–7; *see also* Tr. at 325, 468. If the case hinged on Securaplane's assertion that it could have fired him had he still been an employee when it allegedly learned he had omitted a two-year period of incarceration from his pre-employment screening, I might have responded to this allegation. But as the case stands, I am unconvinced Securaplane would have fired the Claimant for this omission if it occurred, and I find Securaplane's proffered reasons for terminating the Claimant's employment are genuine, not pretextual, and it would have fired him in the absence of protected activity. As a result, the 42-page pre-employment screening is of little consequence to this case. I find no reason to disbelieve Securaplane's witnesses that the document had been misplaced in the cleanup after the fire, and will not reopen the record for further evidence on this document.

[28] *See e.g.*, Tr. at 967–68 (Chief Technology Officer Michael Boost, Ph.D., testifying he didn't know Leon was recording any conversations).

equipment, work site and/or Respondent's current or former employees."[29] Leon produced some recordings in advance of trial in compliance with this discovery request and discovery orders. However, at trial he revealed there were additional recordings he hadn't disclosed, including recordings made on April 5, 2007, the last day Leon physically worked at Securaplane,[30] and he admitted he'd altered the recordings, omitting portions. Securaplane moved for a negative inference at trial, and renewed its motion in its posthearing brief.

Leon's editing of the tapes, late notice on admitting the tapes were edited, and failure to produce all the tapes when requested, together damage Leon's credibility and lead me to believe he has something to hide. Since the tapes are unreliable, and by Leon's own admission, incomplete, I have not used them in this decision nor relied upon them as proof. The other evidence is adequate to demonstrate Securaplane had legitimate, nondiscriminatory reasons for terminating Leon's employment, and it has met its burden with clear and convincing evidence and proved it would have fired Leon regardless of his protected activity. There is no reason to gild the lily with a negative inference when the other evidence is adequate for Securaplane to prevail. I therefore decline to rule on Securaplane's motion, as it is unnecessary.

III. An Overview of Securaplane and Leon's Early Employment

As I explained at the opening of the Decision and Order, Securaplane designs and manufactures a number of component products for commercial aircraft.[31] Its customers include numerous aircraft manufacturers and airlines.[32]

Product development can take a significant amount of time, depending on the platform.[33] Some of Securaplane's projects take as little as three years.[34] The Battery Charger Unit, or BCU, the project on which Leon worked in the months leading up to his termination, was designed for the Boeing 787; it had a roughly seven-year design plan, with final qualification tests occurring in the sixth or seventh

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[29] Respondent's Post-Hearing Brief at Ex. A, p. 5, no.3.

[30] Dr. Boost later gave Leon a laptop so he could try to work from home. Tr. at 954. The parties don't dispute that Leon never returned to work in Securaplane's labs or offices.

[31] Tr. at 851–52.

[32] Tr. at 851–52.

[33] Tr. at 852.

[34] Tr. at 853.

years before certification of the product would be complete.[35] Only then can the product or equipment go on passenger aircraft.[36]

Securaplane was awarded the contract for the BCU in approximately 2004.[37] At the time of trial, the BCU and most of the 787's equipment still had a red label status, meaning products were "still under design evolution."[38] The BCU had "Safety of Flight Testing," which meant it had "only been cleared to get on the aircraft for certain tests."[39] It wasn't cleared for passenger flight at any point up to and including trial.[40] At the time of Leon's termination and the events leading up to it, the BCU didn't yet have safety of flight certification and had only completed a fraction of the testing.[41] The red label units were shipped to "production houses" that put together "sub-assemblies" that would "eventually get to Boeing product lines, but the product [would] be black" label at that time.[42] Black label products are those for which "the design is essentially frozen . . . . All the documentation is released. All the testing has been completed, test reports generated, safety analysis generated, and . . . that is submitted to the FAA[,] and there's a conformity done of the unit for airworthiness determination."[43] Most of the units went to labs, specifically, but some went to other companies running their own prototypes to integrate with their products for testing.[44] The BCUs were not being put into passenger aircraft for flight, but into aircraft for tests.[45]

Turnover and job-shuffling at Securaplane was usually low, but during the period of Leon's employment and subsequent termination, several factors combined to create a lot of "shuffling" and turnover.[46] Securaplane experienced a period of rapid growth at the same time the owners of the company left and the fire happened.[47] Michael Boost,

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[35] Tr. at 852–53.

[36] Tr. at 853.

[37] Tr. at 853.

[38] Tr. at 853.

[39] Tr. at 853–54.

[40] Tr. at 854.

[41] Tr. at 854.

[42] Tr. at 855–56.

[43] Tr. at 246.

[44] Tr. at 856.

[45] Tr. at 856.

[46] Tr. at 757–58.

[47] Tr. at 757.

Ph.D., currently Securaplane's Chief Technology Officer,[48] explained "certain people changed and moved positions, and as we were growing, we were feeling that some people were put into positions, we were doing some internal promotions and some external bring-ins . . . ."[49]

Dick Lusko, the original president of Securaplane, was president when Leon started.[50] After Joe Stucky's brief interim presidency, Dave Daniels took over as president.[51] Daniels' presidency began prior to the fire.[52] The person responsible for supervising Leon's position also changed multiple times, with Janice Williams eventually holding the position of Power Group Manager.[53] Williams was Leon's direct supervisor for most of the events relevant to this complaint.

Leon was hired as a contractor in 2004,[54] and then accepted Securaplane's offer of permanent employment as an Electronics Technician III.[55] Leon underwent a lengthy background investigation in order for Securaplane to hire him.[56] Leon was a Senior Engineering Technician at the time of the events leading up to his termination.[57] As a Senior Engineering Technician, Leon worked on the BCU program.[58] He had a reputation as a "very good troubleshooter."[59]

Two groups at Securaplane were assigned to use a specially made lithium ion battery, the Starting Power Use (SPU) group and the BCU group with which Leon worked.[60] The battery weighed about 50 pounds, was approximately twice the size of a car battery, and was "considered the Ferrari of batteries" because it was lightweight and

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[48] Tr. at 24.

[49] Tr. at 757.

[50] Tr. at 758.

[51] Tr. at 759.

[52] Tr. at 760. Dr. Boost testified to this, but couldn't recall specific dates. Tr. at 759–60.

[53] Tr. at 764.

[54] Tr. at 748–49.

[55] RX 4.

[56] Tr. at 762. Securaplane kept the voluminous results of this investigation in Leon's personnel file. *Id.*

[57] Tr. at 4. Leon's posttrial brief alleges he was promoted to this position and given a raise approximately a year before he was fired, following his April 2006 performance evaluation. Complainant's Closing Brief 1. The record contains no discussion of his promotion, but it is undisputed this was his title at the time of the events relevant to this claim.

[58] Tr. at 34.

[59] Tr. at 825.

[60] Tr. at 34.

powerful.[61] It had a signal connector made to connect with the BCU with "roughly 20 to 30 interface signals that go between the two."[62] The BCU was designed to recharge the battery once it had been drained.[63]

In June 2006, the SPU group had an accident with the lithium ion battery.[64]

> When the technician removed the ground power supply connections, he accidentally connected the connections on the battery harness to the capacitor bank rather than the input contactor and the SPU power return directly. Then when he tried to connect the power plug into the power receptacle on the Li-Ion battery the terminals saw a temporary short circuit into the cap bank and arced to each other.
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> The power plug was immediately removed and the damage assessed. The technician opened up the battery to replace the power connector with a new connector. During the change out, the bus bars were moved to a position that shorted the battery cells to the case. This happened very quickly and they were moved to remove the short.[65]

Securaplane manager Curtis Brown documented the accident, including photographs of the damage and reported it to GS Yuasa, the Japanese company that built the battery, and Thales, the French company for which Securaplane was designing and manufacturing the BCU,[66] which would eventually be used in the Boeing 787.[67] GS Yuasa and Thales employees exchanged several emails with Securaplane discussing the damage, testing cell voltages, and determining if the battery was safe to use.[68] Brown explained he wished to continue using the battery for SPU testing and BCU charging.[69] GS Yuasa concluded there should be no problem with the battery, instructed Securaplane to monitor the battery temperature and appearance during testing and

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[61] Tr. at 847.

[62] Tr. at 847–48.

[63] Tr. at 34.

[64] CX 5 at R-7104.

[65] CX 5 at R-7104.

[66] Tr. at 138.

[67] Tr. at 137; RX 4; CX 5 at R-7101–03.

[68] CX 5.

[69] CX 5 at R-7103.

not use it in an unmanned lab.[70] GS Yuasa sent an email explaining they'd analyzed the battery data and didn't think it posed a problem.[71]

However, Leon wasn't satisfied the battery was actually safe. He notified Securaplane he thought the battery was defective and was worried about continuing to use it.[72] Leon also claimed he was forced to use the battery in an ATP procedure for the BCU, an issue that remained unproven and was one of the subjects of Leon's § 11(c) complaint to OSHA.[73]

On November 7, 2006, while Leon was working with the lithium ion battery and testing the BCU, the battery caught fire, exploded,[74] and Securaplane's entire administrative building burned to the ground.[75] The fire cost Securaplane millions of dollars in losses.[76] Numerous records were also destroyed.[77]

Dr. Boost was present the day of the fire[78] and recalled running to the lab where Leon was working as soon as he received a call from Securaplane's document control department telling him there was a fire in the lab.[79] Leon and Lorrie Guzeman, Securaplane's HR manager at the time, were both already there armed with fire extinguishers.[80] Dr. Boost told the front desk to have everyone evacuate the building.[81] Following the fire Leon and Dr. Boost discussed whether they might have saved the lab had they been able to remove the battery.[82] Dr. Boost recalled Leon "being very remorseful that [he] couldn't find a way to get the battery out."[83] Guzeman confirmed Leon was anxious,

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[70] CX 5 at R-7101 ("If this happen [sic] in another company but securaplane [sic], we would like to ask to return the battery to double check. However, since we think that Securaplane has adequate ability to handle the tests with the battery, we permit to go next test at securplane [sic] with following special attention.")

[71] Tr. at 138; CX 4. Thales representatives were copied on this email and were aware of GS Yuasa's determination. CX 4 at R-7101.

[72] Tr. at 315.

[73] *See, e.g.*, Complainant's Closing Brief 7; Tr. at 16.

[74] Tr. at 71, 425.

[75] Tr. at 606.

[76] Tr. at 425.

[77] Tr. at 468.

[78] Tr. at 824.

[79] Tr. at 824.

[80] Tr. at 824.

[81] Tr. at 825.

[82] Tr. at 825.

[83] Tr. at 825.

fearful "that he was to blame or that other people might think he was to blame."[84]

Leon remained convinced the prior battery damage caused the fire and inferred from Securaplane's decision to keep using the battery that Securaplane didn't care about safety.[85]

Following the fire, a conglomeration of companies, investigators, and agencies worked together in a root-cause analysis to determine the cause of the fire. As part of this fire investigation and shortly after the fire, Leon was presented with written questions about the fire.[86] Leon expressed concern he didn't want to be put in the spotlight, cross-examined, or otherwise subjected to a "free-for-all" or "cross-fire [sic] of questions from multiple sources all at the same time."[87] Securaplane's legal team recommended "a day of explanation" in which Leon could explain exactly what happened and any of the people involved in the investigation could submit written questions for him to answer following the meeting.[88] In the first week or weeks after the fire, investigators submitted questions to Dr. Boost and Securaplane's legal team; Dr. Boost then passed the questions to Leon for answers, and then passed them back to the legal team and investigators when completed.[89] Some additional questions followed, and Leon remained concerned about questions from multiple sources throughout the course of the investigation.[90]

Leon also began complaining to Guzeman that he was constantly tired and his supervisor Williams and Blane Boynton, another manager with whom he worked closely, were picking on him.[91]

The battery's logic circuitry was intact; the investigation team x-rayed the circuit boards and performed other tests and was able to determine "the chips looked operational at the time."[92] Securaplane also hosted a series of fire recreation tests to try to determine the conditions and factors that may have led to the fire.[93] Leon's presence was critical to the fire recreation study because he "was the individual that was closest and directly involved with the actual fire. He was in

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[84] Tr. at 348.

[85] *See* Complainant's Closing Brief 7; Tr. at 10–11.

[86] Tr. at 798.

[87] Tr. at 839.

[88] Tr. at 839.

[89] Tr. at 799, 801.

[90] Tr. at 840.

[91] Tr. at 426.

[92] Tr. at 843.

[93] Tr. at 837.

the lab. He was operating the equipment at the time and he had the best knowledge of the procedures he followed, the steps he followed for the equipment he used."[94] No one else could provide that information for the fire recreation tests.[95]

In addition to Securaplane, representatives from Boeing (the aircraft manufacturer),[96] Thales, GS Yuasa, and possibly FAA investigators were all involved.[97] Legal representatives and reps from the fire departments also participated, as did representatives from Exponent, a California-based company specializing in understanding lithium battery fires.[98] At least 25 different individuals were involved.[99] A large portion of those individuals from around the globe were present for the fire recreation testing on April 4 and 5, 2007.[100]

During that fire recreation testing, Leon was "fidgety," "appeared to be in a . . . bad mood," and "was upset."[101] The investigators had to ask Leon to slow down because they "couldn't record what he was doing," which was one of the primary purposes of the test.[102]

At some point shortly after the conclusion of the fire recreation tests a Securaplane attorney approached Dr. Boost.[103] The attorney told Dr. Boost Leon had spoken with GS Yuasa's counsel and expressed "thoughts of not telling the truth or lying for management."[104] GS Yuasa's counsel relayed this message to Securaplane's counsel who then told Dr. Boost.[105]

The root cause study ultimately took about two years to complete, and narrowed the cause down to three possibilities.[106] One of the three causes was a "minority possibility" because only one party endorsed it, and none of the three were related to the prior battery

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[94] Tr. at 840.

[95] Tr. at 841.

[96] Tr. at 837.

[97] Tr. at 837.

[98] Tr. at 837, 842.

[99] Tr. at 838.

[100] Tr. at 838.

[101] Tr. at 849.

[102] Tr. at 849–50. Dr. Boost repeatedly told Leon to slow down and complained no one could see what was happening. *Id.* at 849. He thought Leon wasn't interested in determining the fire's cause. *Id.* at 850.

[103] Tr. at 851.

[104] Tr. at 851.

[105] Tr. at 851.

[106] Tr. at 842–43.

damage about which Leon had been concerned.[107] The test showed there could have been prior damage to the battery, but it was unrelated to the type of damage Leon asserted occurred.[108] One of the possible causes was "a defect in a small corner of a cell," which was unrelated to the damage Leon discussed.[109] "[T]he pitting on the connector, the pinning on the connector was not—was shown not to be part of any of the three possible outcomes."[110] Specifically, the root cause analysis showed the incident described in Complainant's Exhibit 4 "did not play a role" in the fire.[111]

The root cause study also showed failure to use the signal harness was one of the possible causes of the fire.[112] Various types of signals transmit between the battery and BCU, and "[t]hey operate almost together."[113] As Leon used the battery in the test, he didn't have the signal harness connected; thus, he couldn't monitor the internal workings of the battery.[114]

Securaplane's fire, corporate upheaval, and the root cause analysis form the background against which Leon's protected activity were set and through which Leon's behavior and interpersonal skills began to deteriorate. After describing the legal standard Leon must meet to prove a claim of whistleblower retaliation under AIR 21, I will discuss Leon's protected activity and Securaplane's growing concern over his erratic and hostile behavior.

IV. Elements of a Complaint Under Air 21

The Secretary's regulation that implements the anti-discrimination provision found in § 519 of AIR 21[115] makes it:

> a violation of the [AIR 21] Act for any air carrier . . . to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:

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[107] Tr. at 843.

[108] Tr. at 844.

[109] Tr. at 844.

[110] Tr. at 844. From context, it's clear Dr. Boost's reference to "outcomes" actually meant the outcomes of the root cause analysis, i.e., the three possible *causes* of the fire.

[111] Tr. at 846.

[112] Tr. at 848.

[113] Tr. at 848.

[114] Tr. at 848.

[115] Codified as 49 U.S.C. § 42121(a).

> Provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the 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 subtitle VII of title 49 of the United States Code or under any other law of the United States.[116]

The proof of employment discrimination is analyzed using a pattern the Energy Reorganization Act[117] pioneered. The Administrative Review Board applies a two part test to determine when a remedy is available. Leon succeeds at the first step if he "demonstrates"[118] that speaking up about things he reasonably believed violated an order, regulation or standard of the FAA or any provision of federal law relating to air safety was a "contributing factor"[119] in Securaplane's decision to fire him.[120] A complainant is required to establish each of these elements by a preponderance of the evidence.[121] At the second step Securaplane avoids liability if it "demonstrates by clear and convincing evidence" that it "would have" done the same thing "in the absence of any protected behavior."[122] Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain."[123] Disbelieving

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[116] 29 C.F.R. § 1979.102(b)(1) (2009).

[117] 42 U.S.C. § 5851(b)(1); *see also Peck v. Safe Air Int'l Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004) (recognizing the source of the burdens of proof in AIR 21 cases was the Energy Reorganization Act).

[118] 29 C.F.R. § 1979.109(a).

[119] The "contributing factor" test is this: if the employer were asked at the moment of the decision what its reasons were for the firing, and if it answered truthfully, one of its reasons would be that the Complainant raised matters related to air safety. *Cf.* Price Waterhouse, 490 U.S. 228, 250 (1989) (where the Court phrases the test in terms of sex discrimination rather than whistleblower discrimination).

[120] 49 U.S.C. § 42121(b)(2)(B)(iii).

[121] *Patino v. Birken Manufacturing Co.,* ARB No. 06-125, slip op. at 5 (ARB July 7, 2008); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, slip op. at 4 (ARB Jan. 30, 2008).

[122] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *see also Williams v. American Airlines, Inc.,* ARB No. 09-018, OALJ No. 2007-AIR-0004, slip op. at 8 (ARB Dec. 29, 2010); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 6 (ARB Dec. 30, 2004);

[123] *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 9 (ARB Jan. 30, 2004); BLACK'S LAW DICTIONARY at 577.

the reasons a respondent has given as its explanation for the firing justifies an inference that it intentionally retaliated against a complainant for two reasons. Under general principles of evidence, a party's dishonesty about a material fact can be treated as affirmative evidence of guilt.[124] Additionally, once the employer's justification has been eliminated, intentional discrimination can become the most likely alternative explanation, especially since the employer is in the best position to offer the actual reason for its decision.[125] Here, however, I find no reason to disbelieve Securaplane's proffered reason for firing Leon, and Securaplane has proved by clear and convincing evidence even if protected activity had been a contributing factor in its decision, it would have fired Leon anyway.

Leon must establish the following four elements to prevail at the first step:

1. He engaged in protected activity, as the statute and regulations define it;
2. Securaplane knew of the protected activity;
3. Securaplane subjected him to an adverse action (which termination certainly is); and
4. His protected activity was a contributing factor to his termination.[126]

Leon has established each of these elements, as the next section discusses.

V. Leon's *Prima Facie* Case

A. Protected Activity

Leon contends he engaged in a series of protected activity relating to air safety concerns that he brought to the attention of both Securaplane management and the FAA.

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[124] *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 146–48 (2000).

[125] *Reeves,* 530 U.S. at 146–48; *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004).

[126] *Clark v. Pace Airlines, Inc.*, ARB Case No. 04-150, slip op. at 11 (ARB Nov. 30, 2006); *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 5 (ARB Dec. 31, 2007). A complainant is required to establish each of these elements by a preponderance of the evidence. *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, slip op. at 5 (ARB July 7, 2008); *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, slip op. at 4 (ARB Jan. 30, 2008).

1. Complaints about Shorts, Nonconformance, and Refusal to Ship Units

In March and April 2007 Leon complained to Boynton, Williams, and Dr. Boost that three of the design documents used to make the BCUs didn't match. There was definitely a discrepancy between the intended design and the design as represented on the schematic; at some point while Leon was still employed, the schematic also may have depicted a short in the BCR (battery charger relay) circuit board.[127]

Securaplane used three different documents in the design, construction, and assembly of the BCU. The 110 document is a "schematic" or an "electrical representation of the circuit."[128] The 130 document represents "a printed circuit board, a part . . . . [that] would be . . . used in the assembly."[129] The 140 document is "an assembly document" line employees (assemblers) use "to actually put the parts together."[130] All three numbers are Securaplane's designations.[131] As products are created, the three documents are not necessarily all created at the same time and "evolve" throughout the design.[132]

The documents should all "coincide."[133] Typically, design starts when an electrical engineer creates a schematic, the 110.[134] Software eventually renders the schematic to become a "representati[on] of a printed circuit board[,] which becomes a part," and this representation of the part is the 130.[135] The 110 schematic also is transferred through software into assembly instructions, the 140.[136] When the three documents are initially created, they should align.[137]

Engineering Change Orders or ECOs are used to change the schematic or other product documents,[138] and can be issued to change

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[127] A BCR comprises two high-powered Metal Oxidized Semiconductor Field Effect Transistors, or MOFSETs, in a parallel topography. Tr. at 86. It's a type of high-current switch, or rather two switches side-by-side enabling the user to double the current. Tr. at 86–87. It is a safety mechanism between the power converter and the battery. Tr. at 87. Dr. Chen's intended design changes for the BCR can be found in Complainant's Exhibit 45.

[128] Tr. at 859.

[129] Tr. at 859.

[130] Tr. at 859.

[131] Tr. at 860.

[132] Tr. at 860.

[133] Tr. at 860.

[134] Tr. at 860–61.

[135] Tr. at 861. In other words, a 110 is used to create a 130. *Id.*

[136] Tr. at 861.

[137] Tr. at 861.

[138] Tr. at 861–62.

just *one* of the three documents.[139] For example, someone might use an ECO to add a note to an assembly document to clarify something an assembler previously misinterpreted; this would result in a revision to the 140 assembly document, but not to the 110 schematic, and that 140 would then be in a different revision than the 110 (and presumably the 130).[140]

At some point an ECO was improperly implemented and a discrepancy resulted between the 140 assembly document and the 110 schematic, with the schematic showing an erroneous design.[141] Leon alleged he complained about discrepancy between the BCUs and their associated documents before he refused to ship them on March 1, 2007.[142] But he failed to prove this.[143]

Leon did raise the discrepancy at the March 26, 2007, meeting to discuss the Performance Improvement Plan he received, in part, for walking off the job without finishing his critical job duties on March 1, 2007.[144] Guzeman recalled Leon discussing at that meeting the issue of shipping BCUs to airplanes that didn't match the schematic and so were "nonconforming."[145] He was talking to Boynton; Williams and Guzeman were also present at the meeting.[146] Boynton may have acknowledged Leon had previously mentioned needing an ECO to fix a problem, but Guzeman wasn't entirely sure.[147] Boynton's May 14, 2007, email suggests Leon had previously indicated there was some sort of discrepancy that needed to be corrected with an ECO, but had never explained the specifics of what he thought was wrong until he was suspended and had already called the FAA; this doesn't contradict

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[139] Tr. at 862.

[140] Tr. at 862–63.

[141] *See* RX 21; RX 22; *see also, e.g.*, Tr. at 784.

[142] Tr. at 177 (claiming in argument Boynton refused to work on an ECO).

[143] Leon alleged he left work without shipping units because they were nonconforming. *E.g.*, Tr. at 210–12. No evidence in the record indicates Leon ever raised this on March 1, the day he was disciplined for leaving work without completing critical tasks.

[144] *See* RX 7 (Associate Warning Notice); RX 9 (PIP).

[145] Tr. at 319, 371, 380.

[146] Tr. at 370–71. Guzeman made it very clear she didn't really understand what Leon and Boynton were talking about and expected if there were technical quality or safety issues they would handle it; it wasn't her area of expertise. Tr. at 319, 370–72.

[147] Tr. at 371. Leon was using his unreliable clandestine recordings to try to refresh Guzeman's memory, but she still wasn't sure whether Boynton had mentioned a previous discussion about an ECO. *Id.*

Guzeman's recollection.[148] From Guzeman's testimony and Boynton's email, I infer that at some time before March 26, Leon had mentioned a discrepancy to Boynton, and did so again at the March 26 disciplinary meeting.

Leon raised the document discrepancy and nonconformity issue again on April 30, 2007. Leon had been out of work since he was suspended on April 5, 2007, for violating his Performance Improvement Plan during a fire recreation test that was part of Securaplane's root cause investigation. On April 30, Dr. Boost met with Leon at Securaplane and gave Leon a laptop so he could work from home.[149] Leon told Dr. Boost there was a discrepancy between the design documents.[150] They also discussed what Leon believed were shipments of nonconforming units.[151] Dr. Boost immediately assigned Tony Bleak (a Securaplane engineering technician), Jung-Hui Cheng, Ph.D. (an electrical engineer in the BCU program), and Boynton to investigate whether there were discrepancies.[152] Dr. Boost passed on his understanding of the discrepancy Leon had mentioned and requested "data, a conclusion, [and] a status," on any discrepancy.[153] The investigation team's conclusion is found in Respondent's Exhibit 14.[154] Dr. Boost learned that Dr. Cheng discovered a discrepancy between the 110 schematic and the 140 assembly documents and the assembly documents had the better, desirable implementation, so they completed another ECO to update the schematic.[155]

Dr. Cheng confirmed the schematic, specifically the power converter revisions, didn't match his intended design.[156] He explained the investigation team didn't have the Acceptance Test Protocol (ATP),

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[148] CX 43 at R-7216. On May 14, 2007, Boynton wrote that Leon "informed [him] during his time here that 'there was another ECO necessary' but never managed to accurately specify what that specific change was until after he had left and called the FAA." *Id.* He also noted Leon had run units through ATPs knowing of this discrepancy, but hadn't made a big deal out of it until he was suspended. *Id.* Dr. Cheng explained normally Leon would complete the ECO and give it to Boynton. Dr. Cheng confirmed Boynton was submitting the ECOs. Tr. at 122. If Leon filed an ECO it would go to Boynton and he would consult with Dr. Cheng. *Id.*

[149] RX 11; Tr. at 837, 865. Complainant's Exhibit 85 suggests Leon remained off work on short-term disability after his suspension. CX 85.

[150] Tr. at 865.

[151] Tr. at 783.

[152] Tr. at 866. Bleak was either a senior or regular technician. *Id.*

[153] Tr. at 866.

[154] Tr. at 866; *see also* RX 14.

[155] Tr. at 868.

[156] Tr. at 120, 121.

so after investigation, he determined they needed to change the BCR design to comply with the ATP.[157] The intended change from Revision C to Revision D shows how Dr. Cheng intended to implement the BCR modification.[158] The actual ECO is exhibit 25.[159]

The discrepancy also may have included a potential short depicted on the schematic, but not found in any units.[160] After Leon's complaints and before trial, Securaplane researched the evolution of the schematic and the assembly documents to try to determine what changed when.[161] Sometime around February 1, 2007, the 110 schematic and 140 assembly document were identical; an ECO updated both moving them from revision C to revision D.[162] However, this resulted in an error, despite Securaplane's quality systems, and the assembly document and schematic didn't match.[163] At the time of trial there were no remaining BCUs from that time period to validate exactly which design was implemented in the BCU.[164] Sometime near May 11, 2007, the schematic was updated, while the assembly document remained unchanged; Securaplane was able to verify the design of one of the BCUs from that time period, and it did match the assembly documents.[165] Around that time another ECO changed the schematic in an attempt to match it to Dr. Cheng's correct design as represented in the assembly document, but due to an error, a short (or potential short) now appeared in the schematic.[166] This also didn't match the actual assemblies.[167] Dr. Boost confirmed that the short could damage the chip, but the unit from that time period was tested and had no connectivity between the two points the short on the schematic represented—in other words the error in the schematic wasn't incorporated into the units.[168] Based on the paperwork and

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[157] Tr. at 87.

[158] Tr. at 89; *see also* CX 47 (Revision C); CX 49 (Revision D).

[159] Tr. at 92.

[160] *See* Tr. at 83–87 (Leon and Dr. Cheng discussing the short at trial).

[161] Tr. at 894; *see also* RX 22 at B.

[162] Tr. at 894.

[163] Tr. at 895.

[164] Tr. at 895–96.

[165] Tr. at 896.

[166] Tr. at 896–97; *see also* RX 22 at A–B; *compare* CX 45–57 (representing 110 Schematic revisions C through N).

[167] Tr. at 897.

[168] Tr. at 897. The short and discrepancy between the Schematic and the Assembly Document during this time period is represented by the absence of an asterisk in the Schematic as seen in Respondent's Exhibit 22 page B. RX 22 at B.

assembly documents Securaplane was able to gather, the short itself may not have appeared before May 2007, which would have presumably been *after* Leon brought the discrepancy to Dr. Boost's attention on May 30.[169] However, the investigation report and fix instructions Dr. Cheng issued as a result of the investigation that Leon's April 30 complaint prompted mentioned the short.[170] Eventually the short was resolved as well.[171]

Whether the short was present or not, the parties agree Leon identified and brought to Securaplane's attention a discrepancy between the top-level schematic and both the intended design for the BCUs and the actual design of the BCUs that were shipping.

Securaplane, through its witness Dr. Boost, tried to argue Leon's protected activity wasn't really protected because the nonconformities he perceived weren't really nonconformities, and discrepancies between the 110, 130, and 140 design documents was routine. Dr. Boost explained conformity is a special procedure; in the case of the BCU, Boeing would "provide a request for conformity . . . which would get approved by the FAA on a BCU product."[172] By definition that involved comparing a physical product to a set of documents, "includ[ing] the ATP, deviations[,] and the outline drawing."[173] Dr. Boost wasn't usually involved in conformities and wasn't sure if schematics were included.[174] He also disagreed with the characterization that Securaplane ever required Leon to ship defective products. Instead, Dr. Boost claimed "[t]he schematic was in error."[175]

This may be true, but it does nothing to negate Leon's protected activity. If Dr. Cheng, who held a Ph.D. in electrical engineering,[176] was concerned about the error in the schematic, it was reasonable for Leon, a Senior Engineering Technician with less technical expertise than Dr. Cheng, to believe the short could pose a dangerous problem. Similarly, while the discrepancy (which may have included a short) only appeared in the schematic, not the production document, the

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[169] Tr. at 898; CX 43 at R-7126 (email from Boynton to Dr. Boost and Stucky noting Leon had mentioned the discrepancy to Boynton earlier in the year and had told Boynton another ECO was necessary, but never told Boynton what, precisely, the error was).

[170] RX 14 ("Investigation of Modified BCR Latched Function" at no. 5).

[171] RX 14.

[172] Tr. at 865.

[173] Tr. at 865.

[174] Tr. at 865.

[175] Tr. at 865.

[176] Tr. at 27, 121.

schematic was the top-level document.[177] Securaplane Quality Assurance FAA Compliance Manager Kari Stucky acknowledged there was some merit to Leon's argument the error in the schematic itself could pose a safety risk. She explained instead of modifying circuit boards in perpetuity, once an initial supply of boards was exhausted, Securaplane ordered new boards from the manufacturer with the changes and specifications already incorporated.[178] Those boards could be modeled after *either* the 110 schematic or the 140 assembly documents.[179] All the documents should match and be based on one another, but it was possible for there to be a discrepancy, as there was here.[180] It is reasonable to fear that unchecked, the schematic's error could have been incorporated into other documents and eventually into physical BCUs. While it's true those units were not going into passenger aircraft then (the BCU was still in the development stage), Leon's concerns were clearly related to air safety as required by the Act. His concerns were serious enough Securaplane investigated them.[181]

Furthermore, while the BCUs may have not technically been "nonconforming" in the sense Dr. Boost described, Leon has pointed to at least one proposed federal regulation[182] from which a nonlawyer—or

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[177] Tr. at 860–61.

[178] Tr. at 281.

[179] Tr. at 281, 290.

[180] Tr. at 281.

[181] The author of the related Sarbanes-Oxley whistleblower protection provision, Sen. Leahy, identified two key hallmarks of protected activity in the legislative history. He stated:

> Certainly, although not exclusively, any type of corporate or agency action taken based on the [employee's] information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support a reasonable belief. The threshold is intended to include [as protected activity] all good faith and reasonable reporting.

148 Cong. Rec., at S7420, col. 3 (daily ed. July 26, 2002). The first sentence of this quoted language also appears in the Senate Report on the whistleblower protection provision of the Sarbanes-Oxley Act. See, S. REP. NO. 146, 107th Cong. 2nd Sess., at 19 (Judiciary Committee May 6, 2002) (commenting on what then had been the "Corporate and Criminal Fraud Accountability Act of 2002"), *available at* 2002 WL 32054437 (A&PSAROX), at *13. While these statements and analysis directly address the Sarbanes-Oxley whistleblower protections, the same reasoning logically holds for AIR 21. Leon's complaint was serious enough that Securaplane investigated it. This supports Leon's reasonable belief he had identified a problem that implicated air safety.

[182] Tr. at 185; CX 87 (notice of proposed rulemaking addressing proposed changes to 14 C.F.R. §§ 21 and 43 and also discussing potential criminal sanctions under 18 U.S.C. § 38).

someone with Leon's level of expertise—could reasonably believe Securaplane might be in violation of FAA regulations and thus be subject to fines and sanctions for shipping units—even "red-label"[183] units going into test planes—when the units didn't "conform," i.e., match all the documents from which they supposedly were constructed. Leon need not have been right, nor need he have articulated specific laws he thought Securaplane was violating, he just needed to communicate a concern about air safety to someone at Securaplane or the FAA that was subjectively and objectively reasonable.[184] An employee need not wait until an actual violation of air safety law has occurred, but need only have a reasonable belief a violation is about to occur.[185] Likewise, "an employee's whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer's conduct constitutes a violation" of air safety laws.[186] As I explained in the last paragraph, Leon's concerns were objectively reasonable. They were the type of air safety concerns Congress intended to protect whistleblowers for raising.[187] While the record

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[183] A term for a developmental product or component still in the design stages that has not completed safety testing and is not yet deployed in commercial aircraft. *See* Tr. at 853.

[184] *Sylvester v. Parexel Int'l, Inc.*, ARB No. 07-123, ALJ Nos. 2007-SOX-00039, 2007-SOX-00042, slip op. at 16 (ARB May 25, 2011) ("A whistleblower complaint concerning a violation about to be committed is protected as long as the employee reasonably believes that the violation is likely to happen. Such a *belief must be grounded in facts known to the employee*, but the employee need not wait until a law has actually been broken to safely register his or her concern.") (emphasis added) (citing *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-00006, slip op. at 21 (ARB July 14, 2000); *Crosby v. Hughes Aircraft Co.*, 1985-TSC-00002, slip op. at 14 (Sec'y Aug. 17, 1993)).

[185] *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 16 (ARB May 25, 2011) (citing various whistleblower cases brought under Sarbanes-Oxley, the Toxic Substances Control Act, and the Surface Transportation Assistance Act) ("A whistleblower complaint concerning a violation about to be committed is protected as long as the employee reasonably believes that the violation is likely to happen. Such a belief must be grounded in facts known to the employee, but the employee need not wait until a law has actually been broken to safely register his or her concern."). Sarbanes-Oxley applies the same framework as AIR 21 (*see* 18 U.S.C. § 1514A), so Sarbanes-Oxley decisions are particularly instructive in AIR 21 cases.

[186] *Sitts v. Comair, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-007, slip op. at 9 (ARB May 31, 2011) (citing *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 6 (ARB June 29, 2006)) ("A complainant need not prove an actual violation, but only establish a reasonable belief that his or her safety concern was valid."); *see also Sylvester*, ARB No. 07-123, slip op. at 16 (citing *Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-00007, slip op. at 6 (ARB Jan. 31, 2006)).

[187] An employee needn't wait until a violation has been committed to make a protected complaint. *Sitts v. Comair, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-007,

includes no sworn testimony from Leon, the lack of evidence to the contrary and the fervency with which he related his air safety concerns both to co-workers and superiors when working at Securaplane in early 2007 and at trial leaves me in no doubt that he subjectively believed the schematic error and related problems were safety threats.

2. FAA Complaint

Finally, at some time in April 2007 (the precise date is unclear), Leon filed a complaint with the FAA that the FAA investigated on May 8, 2007.[188] While Leon was working from home,[189] he called Stucky and told her he had called the FAA and they would be coming to do an inspection.[190] He gave her a heads up and apologized for the late notice.[191] Stucky didn't recall Leon ever approaching her with safety concerns before that call.[192]

Stucky confirmed that FAA officials did visit; they called in advance to tell Stucky they were coming.[193] The FAA investigators primarily met with Stucky, but did "talk to a few production assemblers."[194] During the site visit, investigators didn't ask questions about the schematic error, their focus was more on getting a "feel" for the company and how comfortable workers were with approaching Stucky about safety issues.[195]

3. Leon Hasn't Proved Protected Activity Regarding Thermistor Problems

Leon also alleged he engaged in protected activity when he told Boynton that there was a problem with the thermistor wires in some BCUs and claimed Boynton forced him to run an Acceptance Test Protocol (ATP) on these units despite the thermistor problem, knowing all the units would have to be opened later to inspect the problem.[196]

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slip op. at 9 (ARB May 31, 2011). In the same vein, it makes no difference that Leon's complaints concerned products earlier in the development cycle and further removed from passenger aircraft. His complaints concerned air safety, and if correct, could have saved test aircraft from damage or even disaster.

[188] CX 85.

[189] Tr. at 194–95.

[190] Tr. at 195; *see also* CX 85 (suggesting Leon called Stucky on May 9, 2007, the day after the FAA visited).

[191] Tr. at 195 (describing Leon as "very apologetic").

[192] Tr. at 265.

[193] Tr. at 253.

[194] Tr. at 253.

[195] Tr. at 254.

[196] *See* Tr. at 210 (Leon's argument).

Leon hasn't proved this activity. Dr. Cheng confirmed if the BCUs were opened "to look for broken thermistor [sic] wires" you would need to run an ATP upon closing them.[197] Leon did produce a copy of an ATP dated February 28, 2007, that was completed and partially filled out in Leon's handwriting, but bears the date, ATP revision, part number, and serial number filled out in another individual's handwriting.[198] Boynton and Leon also exchanged emails on February 28 and March 1 (Leon's reply) discussing Leon staying late and completing an ATP, which went "a long way in satisfying [Securaplane's] customer."[199] This corroborates Leon's assertions there was a customer for whom he was asked to perform an ATP, and he left parts of an ATP report blank.[200] However, there is no proof Leon communicated his concerns about the thermistor wires to Boynton or explained he was not completing the ATP paperwork in order to avoid shipping a potentially defective BCU, nor that Boynton pressured him to perform an ATP on a unit with a potential thermistor problem.

B. Notice

As explained above, Leon discussed the design document discrepancy and what he perceived as a shipment of nonconforming BCUs with Williams, Boynton, Guzeman, and Dr. Boost at the March 26 and April 30, 2007, meetings. Dr. Boost's investigation alerted Dr. Cheng and another Securaplane employee to Leon's protected activity. Leon also called Stucky and discussed his FAA complaint with her in early May 2007, before his termination. Therefore, Securaplane had notice of Leon's protected activity prior to his termination.

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[197] Tr. at 123.

[198] CX 76 at 438.

[199] CX 41 (email from Boynton to Leon at 8:25 p.m. on February 28, 2007). Boynton's email's tone could be perceived as somewhat passive aggressive as he makes comments about napping in his office. *Id.* Leon sent a snide and hostile reply on March 1 that implied he didn't think Boynton's gratitude was legitimate. CX 42 ("Let's see how fleeting glory is come Job [sic] performance reviews in April. I'll make my assessment then whether or not my contributions are appreciated.").

[200] *See* Tr. at 213–14, 218 (Leon's argument and discussion with Stucky). Leon's recording of the March 26, 2007, meeting suggests he talked about the thermistor and ATP problem at that meeting, but as previously discussed the recording is unreliable, and the nature of Leon's conversation with Boynton isn't clear.

C. Adverse Employment Action

The parties do not dispute that Leon's employment at Securaplane was terminated effective May 14, 2007,[201] which undoubtedly qualifies as an adverse employment action under AIR 21.

However, Leon alleges Securaplane also subjected him to a hostile work environment, which was another instance of adverse employment action. Leon has not proven this claim.

1. Leon has Not Proved Hostile Work Environment

Leon believed Securaplane released his birthday or birth date to co-workers by sending him a birthday card over his express objections; this disclosure, in his view, allowed co-workers a way to research his overturned felony conviction, which made them afraid of Leon and subjected Leon to discrimination and hostility at work.[202] He argued (and apparently believed) this was a form of retaliation for his whistle blowing.[203] But Securaplane's CEO sent the birthday card on or about February 18, 2007; Leon engaged in his first AIR 21 protected activity on March 26, 2007,[204] when he reported the discrepancy between the BCU boards and the schematics during the disciplinary meeting to discuss his PIP.[205]

Intentionally releasing damaging personal information about a complainant to co-workers in response to the complainant's protected activity may constitute retaliation under the Act,[206] but I need not reach that question here. What Leon sees as a retaliatory disclosure took place before Leon engaged in any AIR 21 protected activity;

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[201] RX 9 (second document, May 11, 2007, termination letter from Guzeman to Leon).

[202] Tr. at 327–31.

[203] *Id.*

[204] From Guzeman's testimony about the March 26, PIP meeting I infer Leon had mentioned nonconforming units or a document discrepancy to Boynton at some point before that meeting, but the date is uncertain. *See supra* discussion following note 148. Leon's has argued, but not proved, he raised the issue on March 1, 2007, but no earlier. Even if Leon did discuss the document discrepancy with Boynton on March 1, this would still be two weeks after he received the birthday card, and the same analysis stands.

[205] *See* Tr. at 328.

[206] A hostile work environment may qualify as an adverse employment action for AIR 21 purposes. *See Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 10–11 (ARB Jan. 31, 2006) (quoting *Sasse v. U.S. Office of the United States Att'y*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 1998-CAA-00007, slip op. at 34–35 (ARB Jan. 30, 2004), *aff'd sub nom Sasse v. United States Dept. of Labor*, 409 F.3d 773 (6th Cir. 2005) and quoting *Belt v. U.S. Dep't of Labor*, 163 Fed. App'x 382, 389 (6th Cir. 2006)).

sending the birthday card can't have been retaliation for any protected disclosure. It is theoretically possible Securaplane disclosed personal information about Leon in retaliation for complaints or activities protected under § 11(c) of the OSH Act, but as I explained to Leon at trial that claim is not before me.[207] OSHA investigated Leon's complaint and declined to prosecute it in U.S. District Court. He has no private right of action under § 11(c), and the OALJ has no jurisdiction to act on it.[208] Therefore, any disclosure of personal information Securaplane made was not retaliation for purposes of this AIR 21 claim.

D. Contributing Factor

Circumstantial evidence can prove that an employer retaliated against a whistleblower. Taking an adverse action right on the heels of an employee's protected activity can be seen as evidence of intentional retribution. Although it isn't dispositive,[209] timing in itself can be enough for an adjudicator to infer the causal relationship between a complainant's protected activity and an employer's adverse employment action.[210]

Here, Leon has demonstrated temporal proximity between his protected activity and Securaplane's decision to terminate his employment. On April 15, when Guzeman spoke with Leon on the phone, she told Leon she and Securaplane were working to have him

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[207] Tr. at 18; see also 29 U.S.C. § 660(c); 29 C.F.R. § 1977.

[208] *See Wood v. Dep't of Labor*, 275 F.3d 107 (D.C. Cir. 2001) (Secretary's decision not to proceed under § 11(c) is discretionary and not subject to judicial review); *George v. Aztec Rental Center, Inc.*, 763 F.2d 184 (5th Cir. 1985) (no private right of action); *McCarthy v. The Bark Peking*, 676 F.2d 42 (2d Cir. 1982) (same); *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980) (same); *Fletcher v. United Parcel Serv., Local Union 705*, 155 F. Supp.2d 954, 957 (N.D. Ill. 2001) (examining 29 U.S.C. § 660(c)(1)); *Holmes v. Schneider Power Corp.*, 628 F. Supp. 937 (W.D. Pa. 1986), judgment affirmed, 806 F.2d 252 (3d Cir. 1986); *Powell v. Globe Indus., Inc.*, 431 F. Supp. 1096 (N.D. Ohio 1977).

[209] *Barker v. Ameristar Airlines, Inc.*, ALJ No. 2004-AIR-00012, ARB No. 05-058, slip op. at 7 (ARB Dec. 31, 2007); *see also Keener v. Duke Energy Corp.*, ALJ No. 2003-ERA-00012, ARB No. 04-091, slip op. at 11 (ARB July 31, 2006) (finding the inference of causation less likely where an intervening event itself could have lead to the adverse employment action).

[210] *Vieques Air Link, Inc. v. U.S. Dep't of Labor*, No. 05-01278, 2006 WL 247886 (1st Cir. Feb. 2, 2006) (per curiam), *aff'g Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-00010) (holding the ALJ permissibly treated the temporal proximity between the complainant's protected reports and respondent's suspension of him as sufficient to show the requisite causal relationship to establish that his protected activity was a contributing factor to the air carrier's adverse employment action).

return to work, and she wasn't trying to fire him.[211] Sometime in April, Leon reported his safety concerns to the FAA.[212] He also disclosed his concerns about the design document discrepancy and shipping "nonconforming" units to Dr. Boost on April 30,[213] and called Stucky to discuss his FAA complaint and their investigation in early May.[214] Yet on May 11, 2007, Guzeman notified Leon he would be terminated effective May 14, 2007.[215] Securaplane's decision changed between mid-April and mid-May, the time period in which Leon engaged in several protected activities. That temporal proximity is enough to create the presumption Leon's protected activity was a contributing factor in his termination. Thus, *Leon* has established his *prima facie* case and the burden going forward shifts to Securaplane to articulate a legitimate, nondiscriminatory reason for firing Leon. As the next section shows, it not only articulated but proved it fired him for non-discriminatory reasons, and did so with clear and convincing evidence.

VI. Securaplane's Rebuttal

A. Securaplane Had Adequate Nondiscriminatory Reasons to Fire Leon

The person who decided to fire Leon was Securaplane's local HR Manager,[216] Guzeman. The decision, which was hers alone, was the response to a series of escalating conflicts, incidents of insubordination, and other hostile workplace interactions that began in December 2006 and continued to the day Leon's employment was terminated.[217] Guzeman tried to work with Leon, using Securaplane's progressive discipline policy to obtain his improvement and compliance. It didn't work. The firing wasn't retribution for protected activity.

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[211] Tr. at 351; *see also* RX 11 (April 11, 2007, letter to Leon notifying him of suspension for violating his PIP).

[212] While the exact date is unclear, Leon definitely contacted the FAA before May 8, 2007, and perhaps as early as April 4, 2007. Leon argued, but didn't prove, he had told Dr. Boost about this safety complaint on April 4, 2007. Tr. at 781. The record doesn't contain the exact date of his FAA complaint, but does include the report of the OSHA investigator who investigated Leon's workplace safety complaint, which shows Leon complained to Arizona's OSHA on April 19, 2007, and notes the FAA visited Securaplane on May 8, 2007, to investigate a "Systematic Safety" complaint from an unknown source. CX 85. Stucky recalled Leon contacted her a few days before the FAA investigation. Tr. at 237. The OSHA report puts Leon's phone call to Stucky on May 9, 2007, the day after the FAA's visit. CX 85.

[213] Tr. at 865.

[214] Tr. at 237.

[215] RX 9 (second document).

[216] Tr. at 313.

[217] Tr. at 407, 413–14. Guzeman had previously counseled Leon verbally for

First, Leon stood up in front of everyone at an "all-hands" meeting on December 8, 2006, and called his supervisors and Securaplane management incompetent.[218] Guzeman, Williams, and Boynton found this inappropriate, especially when that meeting had been called to discuss the November 2006 fire and offer support to Securaplane employees.[219] Appalled by his lack of professionalism, Guzeman orally counseled Leon.[220]

In January 2007, Leon repeatedly refused to follow Williams' instructions to move his office to Securaplane's new building.[221] Guzeman, at Williams' request, again orally counseled Leon about this insubordination.[222] Leon finally complied, only to return to Guzeman to complain because he had wound up moving his office contents himself. As he complained to Guzeman, Leon was "very angry."[223] Guzeman explained, "I was told that he made his move after everybody had left, so there was nobody there to help him move and everybody else did get some—some help moving. So he said that they refused to him, but it didn't appear that way to me."[224]

Then, after a day of arguing with his supervisors Williams and Boynton on March 1, 2007, Leon left work without finishing critical tasks.[225] Without his part of the work, other Securaplane employees couldn't do their jobs, and Leon's co-workers became very frustrated and discouraged.[226]

That day, Leon called Guzeman to complain about a phone call he received from Williams that Leon characterized as "hateful."[227] Leon claimed to Guzeman that Williams had called and yelled at him for leaving work after eight hours.[228]

Williams and Boynton explained that Leon had "clocked out and left the facility without finishing his assigned tasks" after being "disruptive and non-cooperative earlier in the day."[229] Guzman then

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[218] Leon "complained about Blane Boynton's and Janice Williams's ability to manage . . . and their ability to be good at their jobs." Tr. at 428.

[219] Tr. at 426–28.

[220] Tr. at 428.

[221] Tr. at 430, 432.

[222] Tr. at 430, 432.

[223] Tr. at 432.

[224] Tr. at 433.

[225] *See* RX 7.

[226] RX 7.

[227] Tr. at 351.

[228] Tr. at 351.

[229] RX 7.

issued Leon a written warning that Securaplane calls an Associate Warning Notice.[230] In the March 5, 2007, meeting convened to discuss that warning, Leon was argumentative, hostile, and rude.[231] Leon insisted he was right and everyone else was wrong; he seemed to think Securaplane was picking on him rather than dealing with the behavior that led to the warning.[232]

That written warning required Leon to keep a specific work schedule (including his break), to work overtime only with approval, "[a]pproach[ ] problems and personnel with a positive and professional attitude [and] resolv[e] issues to the degree required by the customer, either internal or external, and to follow "ALL" company policies regardless of job demands."[233] The warning cautioned him that violations would lead to a "[s]econd written warning with counseling," while a third written warning would result in termination.[234] He refused to sign the Associate Warning Notice.[235] Following the meeting Leon left for medical reasons with Guzeman's approval.[236]

The next day[237] Leon yelled loudly at Williams and Boynton and threw things around, before turning to Guzeman's office where he did the same thing; she found him very intimidating.[238] They argued about Leon's warning and discussed Leon's "verbal and physical behaviors" that had "resulted in the intimidation of co-workers, customers, and [his] supervisor" and were "not acceptable for the work environment.[239]

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[230] RX 7 (signed by Williams and Guzeman). The Warning indicated Leon failed to respond "positively" to the requests of his manager or co-workers, and engaged in unprofessional, disruptive outbursts. *Id.* It also indicated Leon had to be "convinced" to do his job (*id.*), which Leon asserted referred to being ordered to ship noncompliant BCUs. *See* Tr. at 353. Guzeman didn't think the statement about Leon needing to be convinced to do his job had anything to do with his refusal to ship units he believed were noncompliant. *Id.* The "write-up" was for leaving without finishing his critical tasks (which might have included shipping BCUs) without bothering to tell anyone he was leaving. *Id.* at 353–54. Guzeman emphatically and credibly testified that anyone who left without completing "critical functions" would receive a similar write-up. *Id.* at 354.

[231] Tr. at 434, 443.

[232] Tr. at 443.

[233] RX 7.

[234] RX 7

[235] Tr. at 434.

[236] *See* Tr. at 355.

[237] *See* RX 8; Tr. at 444.

[238] Tr. at 443–44.

[239] RX 8.

At the same meeting Leon reported a previously undocumented work-place injury and Guzeman sent him home on medical leave. [240]

On March 9, while Leon was out on medical leave, Guzeman wrote Leon and informed him he was required to attend anger management counseling as a condition of returning to work.[241] She cited the behavior discussed on March 6 as the reason for this requirement.[242]

During the three weeks Leon remained out on medical leave, Guzeman learned about more troubling behavior by Leon. Williams complained that Leon was calling her "dumb" to other employees, and otherwise demeaning her and impugning her competence. [243] Guzeman was called to a meeting on March 15 of several of Leon's co-workers: Lynnette Noyce, Dave Porter, Bob Adams, Ron Schillie, Collin Fitzpatrick, Heidi Lucas, and Humann Fargadmand.[244] Noyce described Leon as "loud."[245] All expressed fears and concerns over his behavior.[246] They found his manner and dress intimidating, [247] were upset by his loud and disruptive behavior, and concerned by his hostile and demeaning comments.[248] The meeting came about because employees "were a little afraid of Leon," uncomfortable about him returning to work, and not sure what to expect.[249]

Understanding that Leon's behavioral problems were more pervasive, Guzeman, Boynton, and Williams implemented a Performance Improvement Plan or PIP on March 23[250] that they discussed with Leon when he returned to work on March 26.[251] The PIP included instructions similar to those in the Associate Warning Notice. Leon had to check in with his supervisors before he left each

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[240] *See* Tr. at 377.

[241] RX 8.

[242] RX 8.

[243] *See* Tr. at 318.

[244] Tr. at 666. She also confirmed the meeting was in Dr. Boost's office, but Dr. Boost wasn't present. *Id.*

[245] Tr. at 667. She believed Lucas was and continued to be afraid of Leon, was unhappy about being called to testify, and was afraid of what Leon would do if he lost the case. Tr. at 667–68.

[246] Tr. at 479–80. Leon's coworkers confirmed they weren't coached or pressured to attend. Tr. at 733.

[247] Tr. at 348–49 (explaining coworkers complained about Leon wearing a leather duster and boots regardless of the weather).

[248] *See* Tr. at 318.

[249] Tr. at 667.

[250] RX 9 (first document).

[251] *See, e.g.*, Tr. at 347.

day with "no exceptions" and keep Williams and Boynton updated on his progress. The PIP also forbade any insubordination and required him to follow all lab rules and procedures including "promptly and properly document[ing]" any "changes or anomalies."[252] At the March 26, 2007, meeting, Guzeman also suggested Leon should reconsider his attire, especially wearing a dark leather duster coat in Arizona's 110-degree weather.[253] She explained his co-workers had come to her concerned about his "mode of dress."[254] They told her he wore a duster and boots all summer long "and it scared them."[255] She suggested if he wanted to get along with his co-workers he should consider wearing different clothes.[256] Leon insubordinately refused to sign his PIP, which in itself was grounds for termination under the PIP, but Guzeman opted not to fire him for this.[257] Dr. Boost informed Leon that day that his presence was required at a fire recreation test scheduled for April 4.[258]

On April 2, two days before the fire recreation test, Leon requested time off to attend a doctor's appointment on the afternoon of April 4.[259] After confirming there was no medical emergency, Guzeman denied Leon's leave.[260] Nevertheless, after a morning of arguing with Dr. Boost about the fire recreation test, Leon left without permission or checking out as his PIP required. Guzeman believed Leon "just got up and clocked out and left;" she was told Boynton said, "'Where are you going? What are you doing?' [Leon] said he didn't care."[261] He wasn't authorized to clock out and leave.[262]

Because he did not return to work that day, a number of investigators who came to watch the fire recreation test were forced to

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[252] RX 9 (first document).

[253] Tr. at 348; *see also* RX 16 (photo).

[254] Tr. at 348.

[255] Tr. at 349.

[256] Tr. at 348.

[257] Tr. at 484–85.

[258] RX 10. Guzeman recalled Leon had originally been informed of the fire recreation test and the necessity of his presence there at least a month in advance. Tr. at 487.

[259] RX 10. When Williams denied his request citing the fire recreation test and asked Leon to reschedule his appointment, Leon appealed to Guzeman who was "trouble[d]" by his request and apparent disregard for "pre-arranged critical business functions." *Id.*; *see also* CX 59.

[260] RX 10.

[261] Tr. at 490–91.

[262] Tr. at 491, 565.

change lodging and travel plans.[263] When Leon finally returned and completed the necessary testing the following day, he was uncooperative, moving too quickly for the investigators to follow despite being told to slow down and explain himself several times.[264] Immediately after the test, Dr. Boost received information suggesting Leon had told a lawyer for one of the entities that attended the recreation–GS Yuasa—he had lied to fire investigators.[265] Dr. Boost and Guzeman immediately met with Leon to discuss these allegations and his many PIP violations; Guzeman sent Leon home pending investigation into the allegations that Leon had lied.[266]

Guzeman was so appalled at Leon's behavior and the blatant violations of his PIP (including directly ignoring her denial of his requested leave), she wanted to fire him, and went so far as to draft a letter of termination that she discussed with Boynton.[267] Boynton had more day-to-day knowledge of Leon's behavior and how it violated the PIP, so he offered suggestions to Guzeman to help her tie Leon's termination to the PIP violations more specifically.[268] Guzeman ultimately decided not to terminate Leon's employment then. She explained, "[t]he attorneys for the ongoing fire investigation felt that if I terminated Michael Leon, that the case there could be hugely at risk."[269] Leon was crucial to the fire investigation as he was the only person present when the fire started, and Securaplane's attorneys feared Leon would stop communicating or cooperating with the investigation if he were let go.[270] Guzeman also considered Leon's well-being in holding off on terminating his employment. At that time Leon had an open workers' compensation claim and someone informed Guzeman when she inquired that firing Leon while the claim was pending would "muddy the waters" for his claim.[271] She was also worried Leon would believe she fired him because of his workers' compensation claim if she fired him then.[272]

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[263] Tr. at 489.

[264] *See* Tr. at 490, 770–73. Guzeman further described his behavior as "uncommunicative. He was angry, agitated, and uncooperative." Tr. at 503.

[265] Tr. at 850–51.

[266] Tr. at 519–20; RX 11.

[267] Tr. at 504.

[268] CX 66; Tr. 504–05.

[269] Tr. at 505.

[270] Tr. at 505–06.

[271] Tr. at 506. Guzeman explicitly stated Leon's workers' comp claim was not a reason she wished to fire him. Tr. at 506.

[272] Tr. at 506.

The investigation into the allegations of lying was inconclusive.[273] Bearing in mind Leon's importance to the fire investigation, Guzeman opted not to fire him and instead imposed a one week (five working-day) unpaid suspension for ten violations of his PIP, which Guzeman enumerated.[274] She again warned Leon other failures to comply with the PIP could result in termination.[275] Guzeman tried repeatedly to contact Leon to come to Securaplane to discuss the findings of Guzeman's investigation, but he didn't respond; Guzeman ultimately sent the letter via Fed Ex, and again, it went unsigned.[276]

Guzeman then spoke to Leon via telephone on April 15. Guzeman didn't know that at roughly the same time Leon complained to the FAA about what he perceived were air safety violations.[277] As of the April 15th phone call, Guzeman was still trying to get Leon to return to work, not to fire him.[278] However, the events of the next two weeks changed Guzeman's mind and convinced her that the only viable option was to terminate Leon's employment.

First, at least six of Leon's co-workers independently approached Guzeman and told her they were concerned and frightened by Leon's behavior, appearance, and demeanor, and feared what he might do at work.[279] Guzeman explained Leon "informed [coworker] Heidi Lucas that [he was] going to come back to work and the employees panicked . . . ."[280] Leon's coworkers contacted Guzeman and met with her individually.

Lucas told Guzeman she feared Leon "was going to come in some day and—and shoot up the building[,] and she was pretty sure it was going to happen[,] and [Securaplane] needed to protect them [Leon's co-workers]."[281]

Humann Fargadmand, an engineer, told Guzeman Leon was antisocial and made racist comments in Fargadmand's presence that offended Fargadmand.[282] Fargadmand confirmed at trial that Leon

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[273] RX 11.

[274] RX 11.

[275] RX 11.

[276] RX 11; RX 12; Tr. at 508, 572–74. Guzeman took this as another refusal on Leon's part to sign the letter. Tr. at 572.

[277] Tr. at 340–41.

[278] Tr. at 340.

[279] *See* Tr. at 510–12.

[280] Tr. at 400.

[281] Tr. at 512.

[282] Tr. at 511–12.

used ethnic slurs against people of Middle Eastern descent in Fargadmand's presence and explained conversations with Leon were very uncomfortable and inappropriate for the workplace.[283]

Karen Steele, the Quality Assurance Team Leader,[284] was also very uncomfortable with Leon's behavior and reported her concerns to Guzeman in a one-on-one meeting.[285] Her interactions with Leon were "unpleasant;" at the time she believed they just had a clash of personalities, but after Leon was fired, learned he had similar "clashes" with a number of Securaplane employees.[286] He would frequently come over and yell at her for not "catching" "defects" when a BCU unit matched the board drawing, but not the schematic;[287] Steel said a discordance between these two documents happened "frequently" because they weren't updated at the same time.[288] When Steele tried to offer constructive criticism to Leon about problems with the quality of his work, he angrily disagreed, making boastful arguments about his superior technique; he also refused to rework or clean circuit boards on which he made mistakes.[289] A typical conversation with Leon turned "into a10-minute shouting match."[290] Leon also shouted at production staff for not doing their jobs correctly and delaying him.[291] After one such shouting incident, Leon approached Steele and told her he wanted to speak with her alone outside, an invitation she refused.[292] She told him she wouldn't speak with him in private or any place without witnesses present.[293]

In addition to her own complaints, Steele knew Mony Chenowitz, the assembly supervisor, had complained to Guzeman regarding Leon yelling at her workers in the morning.[294]

Lynnette Noyce also complained to Guzeman. Every morning at 6:00 a.m., Leon would come over to her work area "ranting and raving"

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[283] Tr. at 731. Fargadmand was present at both the group meeting with Guzeman in March 2007 and at an individual meeting with her in April or May. *Id.* at 731–32.

[284] Tr. at 975.

[285] Tr. at 981–82.

[286] Tr. at 977.

[287] Tr. at 977.

[288] Tr. at 977.

[289] Tr. at 979. Steele also complained about Leon's behavior to Stucky. *Id.* at 980.

[290] Tr. at 980.

[291] Tr. at 981.

[292] Tr. at 981.

[293] Tr. at 981.

[294] Tr. at 982.

in a loud and boisterous voice.[295] He complained about things not working and how he fixed everything and was the only one who could do it because no one else would listen.[296] She wasn't certain he was angry, but found his behavior very annoying.[297] Noyce finally took Leon aside and asked him to stop "holler[ing]" at her and reported him to HR.[298]

Second, on April 30, Leon met with Dr. Boost and brought up a design document discrepancy in the BCU.[299] Guzeman had no knowledge of this meeting, nor did she know that what Leon told Dr. Boost might qualify as a protected activity. When staff looked into the discrepancy they discovered it was an issue Leon had known about for months, but hadn't corrected by making an ECO or reporting it to Dr. Cheng.

Dr. Cheng became very concerned when he learned of the discrepancy. Dr. Cheng had made changes to the circuit designs based on prior discussions with Leon; several months passed before Leon told him there was a discrepancy between the implementation and Dr. Cheng's January 2007 design.[300] Leon's job was to troubleshoot and catch problems in the BCU design or its implementation.[301] Dr. Cheng "got very angry about why [he] didn't get [this] information."[302] He checked the assembly of the relevant circuit board and found one difference; he told Leon the design couldn't go out as shown, it was too dangerous "to [the] product used in aerospace applications."[303] He then had to sit down and figure out what was the difference between his design and the rear PCP board.[304]

At the time, Dr. Cheng believed Leon hadn't followed his instructions because Leon hadn't told him about the discrepancy.[305] The original ECO was issued in January 2007 and Leon's comments at the March 26 PIP meeting (and earlier) show he was aware of the

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[295] Tr. at 669.

[296] Tr. at 671.

[297] Tr. at 669. Noyce didn't personally find his behavior was particularly disruptive because he would leave after 10–15 minutes. *Id.*

[298] Tr. at 660.

[299] *See* Tr. at 819–23.

[300] Tr. at 161. The original ECO that should have addressed this problem was dated initiated January 18, 2007. CX 25.

[301] Tr. at 158.

[302] Tr. at 161.

[303] Tr. at 162.

[304] Tr. at 162.

[305] Tr. at 158–59.

discrepancy for a long time.[306] Dr. Cheng had specifically instructed Leon, as part of his troubleshooting duties, to report to Dr. Cheng any discrepancies or problems in the implementation of the ECO, and Leon hadn't.[307]

He explained that Leon was the only technician he had to work with, and he relied on Leon.[308] Up until that point, if he'd been offered another technician, he would have accepted the work of both; he wouldn't say he would have preferred to work with another technician instead of Leon, but stressed he needed technicians who would follow his directions.[309] Since Leon didn't tell him about the discrepancy and change in the schematic, he felt he couldn't work with Leon any longer.[310] He told Guzeman this via email.[311]

Dr. Cheng had no previous concerns about Leon's performance and never had an argument with Leon.[312] Dr. Cheng confirmed he hadn't talked to Guzeman on other occasions about Leon's job performance; he did, however, express two concerns—the battery wasn't required for the ATP test and the schematic differed from his design.[313] Dr. Cheng also approached Guzeman in person, bringing with him "documentation that he felt proved that [Leon] didn't have to use the battery that caused the fire," he also told Guzeman "he truly felt that [Leon] maybe did it on purpose."[314] Dr. Cheng then told Guzeman he didn't want to work with Leon anymore and felt "uncomfortable" working with Leon because Leon had refused to fulfill his specific instructions regarding a completed ATP and ECO change.[315]

Third, Guzeman spoke with Mr. LeBeau, a representative of French firm Thales, one of Securaplane's largest customers and the

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[306] CX 25 (ECO); RX 14 (Boynton's email discussing Leon's earlier comments about the discrepancy and failure to "accurately specify what . . . specific change was" required).

[307] Dr. Cheng explained: "At that moment, I think there is one difference why I believe he didn't follow. I sent the e-mail. I say you—you—you need report me if there's a difference. So if there's no report [to] me, then I think he didn't follow me." Tr. at 158–59.

[308] Tr. at 159.

[309] Tr. at 159–60.

[310] Tr. at 160–61; *see also* RX 13 (showing the tasks he'd discussed with Leon that Leon didn't complete).

[311] RX 13.

[312] Tr. at 159.

[313] Tr. at 157–58.

[314] Tr. at 516; *see also* Tr. at 158 (Dr. Cheng's testimony).

[315] Tr. at 517; RX 13.

customer for whom Securaplane was making the BCU.[316] LeBeau previously had a good working relationship with Leon,[317] so Guzeman was shocked to hear LeBeau complain that Leon was employed by Securaplane. Leon had complained to LeBeau about Williams and other managers, including questioning her judgment and qualifications, behavior LeBeau found highly inappropriate and unprofessional.[318] Guzeman agreed.

Guzeman also requested information from Dr. Boost, who had been Leon's supervisor before Williams. Dr. Boost confirmed he had orally counseled Leon for near-identical interpersonal problems the year before. He recalled telling Leon

> to make a greater effort to respect the team environment of Securaplane and work towards the non-confrontational[] resolution of issues with team members including another Securaplane associate Bob Adams. Several personnel conflicts were appearing to have . . . Leon involved with other individuals and the conflicts were having a negative impact on the development team.[319]

In light of all this new information and her own concerns about Leon's potential for workplace violence,[320] Guzeman concluded Leon couldn't continue to work at Securaplane. The need to relieve his coworkers' considerable apprehensions outweighed whatever Securaplane might gain from Leon's cooperation in the fire investigation.

Guzeman then began the process to terminate Leon's employment, which took about a week to process through Securaplane's parent company's human resources office. While this was happening, OSHA and FAA investigators visited Securaplane in response to Leon's complaints;[321] Guzeman did not know about Leon's complaints or these visits when she decided to fire Leon.[322] When his

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[316] Tr. at 513.

[317] Tr. at 577.

[318] Tr. at 514–15. Leon's argument at trial strongly suggested he had indeed complained about Williams and her incompetence (and lack of appreciation for him) to LeBeau. *Id.* at 577.

[319] CX 36 at R-7044.

[320] Tr. at 416–18. Prior to working at Securaplane, Guzeman witnessed a workplace shooting and was responsible for arranging counselors for employees. *Id.* Guzeman said this experience influenced her decision making. *Id.*

[321] *See* CX 85.

[322] Tr. at 341 (Guzeman testifying "I knew nothing about the FAA"); *see also* 414, 500, 522, 523, 572.

termination was processed through Securaplane's parent company,[323] Guzeman sent Leon a notice terminating his employment on May 11, 2007.[324] The termination was effective May 14, 2007.[325] Leon's protected activity hadn't influenced in any way Guzeman's decision to terminate his employment.

B. Securaplane's Reason was Non-pretextual

Leon suggests the reasons Securaplane proffered for firing him are pretexts for retaliation, but I find Securaplane's reasons persuasive.

1. Leon Has Not Shown Disparate Treatment

First, Leon insists he performed better than everyone else at Securaplane and that he received harsher discipline for lesser infractions; from this he concludes that Securaplane must have been motivated by discriminatory animus when it fired him. Leon has produced time sheets that show he worked more hours than other employees and frequently didn't leave for lunch.[326] He points out his performance rating in April 2006—a year before he was fired—exceeded expectations.[327] Leon did work many hours and performed well in most aspects of his job a year before he was fired.

Leon's April 5, 2006, performance review says he exceeded performance expectations on three of the "core values" it considers, had performed acceptably on another six, and gave him an overall rating of "exceeds acceptable performance."[328] It also told Leon he "need[ed] improvement" in his "teamwork" skills.[329] Leon presented a redacted 2006 evaluation of someone he regarded as an "equal peer" whose work was rated as "acceptable."[330] Leon proved that a year before he was fired, he performed better than one other Securaplane employee. But he also was informed of his weakness in the area that led Securaplane to eventually terminate his employment.

Leon worked a total of 2,564.19 hours in calendar year 2006.[331] He worked through lunch on at least one occasion, while another

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[323] Tr. at 572.

[324] RX 9 (second document).

[325] RX 9 (second document).

[326] CX 39.

[327] CX 19.

[328] RX 5; CX 19.

[329] RX 5; CX 19.

[330] CX 20.

[331] CX 37 at R-7015.

employee did not.[332] Based on the testimony of Leon's former coworkers, I conclude Leon worked long hours, but that doesn't equate to superior performance. To the contrary, Williams, Boynton, and Guzeman were concerned about what Leon produced during the number of hours he worked.[333] He obtained overtime by coming in so early that it was difficult to supervise him.[334] As a result, both his Associate Warning Notice and Performance Improvement Plan required him to work specific hours with a designated lunch break,[335] and to work overtime only when management approved.[336] The PIP also required him to check in with Williams or Boynton and "communicate work progress" before he left each day.[337] Contrary to what Leon believed, his overtime hours were a source of concern, not an unalloyed performance asset.

Leon's assertion that other employees received lesser discipline for more serious misconduct also is unproven. He points to the behavior of a co-worker, Gerard Durocher, who became involved in a series of loud and contentious altercations and arguments, some of which involved Leon.[338] Durocher received at least one formal verbal warning,[339] and at least one Associate Warning Notice[340] for his behavior. One other former Securaplane employee thought Durocher was a bully.[341] However, as Securaplane points out, Leon never established Durocher was an "equal peer" for disparate treatment purposes[342] because he never demonstrated Durocher had similar job functions, terms of employment, or committed disciplinary violations of the same type as Leon.[343] It appears Durocher got into interpersonal conflicts by bringing political arguments into the workplace.[344] Leon

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[332] CX 39.

[333] Tr. at 436, 438–39; RX 7 (Associate Warning Notice); RX 9 (Performance Improvement Plan).

[334] Tr. at 438–39.

[335] 7:00 a.m. to 4:00 p.m. on the Associate Warning Notice and 8:00 a.m. to 5:00 p.m. on the PIP. RX 7; RX 9.

[336] RX 7; RX 9.

[337] RX 9 at 2.

[338] Tr. at 392, 437, 678, 751.

[339] Tr. at 751; CX 33; *see also* CX 32.

[340] Tr. at 392, 419, 535; CX 34.

[341] Tr. at 675.

[342] *See Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-00014, slip op. at 17 (ARB Sept. 30, 2009)

[343] Respondent's Post-Trial Brief 30.

[344] Tr. at 677.

has not demonstrated Durocher ever impugned, criticized, or called his supervisors names in front of other employees and customers, left work without completing required tasks, or had many fellow employees complain to HR they would no longer work with him. Durocher's disciplinary treatment is not comparable for disparate treatment purposes, and I do not find Leon was disciplined more harshly than Durocher.

Finally, the performance improvement plan for another worker that Leon presented doesn't convince met Leon was disciplined more harshly for lesser violations. That employee was placed on a PIP for failure to use his time productively and complete tasks on schedule,[345] discipline for behavior similar to that led to Leon's Associate Warning Notice and eventually his PIP.[346]

The history of Leon's discipline appears to be in line with actions taken against other Securaplane employees. I do not infer that Leon was treated more harshly due to his protected activity. He failed to show disparate treatment. His protected activity played no role in the way Securaplane applied progressive discipline.

2. Weighing the Evidence on the Whole, his Protected Activity did not Contribute to Securaplane's Decision to Fire him

The other evidence on which Leon relies to prove his protected activity was a "contributing factor" is the temporal proximity between his protected activities and Securaplane's decision to terminate him.[347] But upon closer inspection the causal inference proximity can support crumbles. Guzeman learned of Leon's initial complaints about the design document discrepancy and alleged shipping of nonconforming units at his March 26, 2007, PIP meeting. She testified credibly that she didn't understand these complaints and assumed Leon would work the issues out with Boynton and Williams who knew more than she did about technical matters, and that these protected activities didn't factor into her decision to fire him. Guzeman had no knowledge of Leon's FAA complaint. Similarly, she had no knowledge of Leon's conversations with Dr. Boost or Stucky regarding his protected activity. Since Guzeman was the individual responsible for deciding to terminate Leon, without knowledge of these later protected activities, the inference of retaliation that temporal proximity can support wobbles.

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[345] CX 38.

[346] RX 7; RX 9.

[347] *See supra* Section V.D.

Instead Guzeman pointed to the numerous complaints Leon's co-workers brought to her—including Dr. Cheng's concern that Leon's behavior was unsafe, and Dr. Cheng's and Lucas' refusal to work with Leon—as the pivotal factors that convinced her that Leon couldn't come back to work. These statements from coworkers happened in the time between the protected activity Guzeman knew something about (the March 26 complaints) and Leon's termination, which suggests they, not the protected activity, were the reason for his termination.[348] They were substantial enough to account for the termination decision on their own when viewed objectively, and I credit Guzman's testimony that they were the tipping factors led her to terminate Leon.

In addition to temporal proximity, adjudicators consider a number of other conditions before they infer a protected activity was a factor that contributed to an employee's adverse employment action. These include: absence of warning before termination,[349] pay increase shortly before termination,[350] failure to prove misconduct allegations,[351] contradictions or shifting explanations in an employer's purported reasons for adverse action,[352] proof that the purported explanation is untrue or unbelievable,[353] references to the

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[348] *See Keener v. Duke Energy Corp.*, ALJ No. 2003-ERA-00012, ARB No. 04-091, slip op. at 11 (ARB July 31, 2006). Leon may have also discussed the "nonconformance" issue at his March 26, 2007, PIP meeting (*see* Tr. at 816), at which Guzeman was also present, but similarly, this meeting (and any protected activity that occurred at it) happened before the Leon's PIP violations at the fire recreation test.

[349] *Haney v. North American Car Corp.*, ALJ No. 1981-SWD-00001, slip op. at 17 (ALJ Aug. 10, 1981).

[350] *Murphy v. Consolidation Coal Co.*, ALJ No. 1983-ERA-00004, slip op. at 28 (ALJ Aug. 2, 1983) ("Mere *days* before receiving the Paddock memorandum, Beach processed the E & C to give Murphy his salary increase. Try as they might to demean this raise from a merit increase to a formula pay adjustment, the bold fact remains that one does not process pay increases for an employee when one's mind is just about made up to terminate that employee for unsatisfactory performance.") (emphasis original).

[351] *Lewis Grocer Co. v. Holloway*, 874 F.2d 1008, 1012 (5th Cir. 1989) (upholding inference of discrimination based on unproven allegations in STAA case); *Cram v. Pullman-Higgins Co.*, ALJ No. 1984-ERA-00017, slip op. at 11 (ALJ July 24, 1984).

[352] *Hobby v. Georgia Power Co.*, ALJ No. 1990-ERA-30, 11 (Sec'y Aug. 4, 1995) (citing *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995), *aff'd mem.* 114 F.3d 1203 (11th Cir. 1997).

[353] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.").

whistleblower as a "troublemaker,"[354] antagonism or hostility towards protected conduct,[355] a pattern of such antagonism,[356] and evidence the whistleblower's fears were correct (especially if the magnitude of the problem identified was great).[357] In this case, not only are the majority of these factors absent, the opposite condition is true. Securaplane gave Leon repeated opportunities to improve his hostile, disruptive, insubordinate behavior and continue as a Securaplane employee.

Leon had numerous warnings before he was terminated. Securaplane opted to continue his employment time and time again even though it had grounds to fire him for repeated insubordinate refusals to sign disciplinary documents like his Associate Warning Notice and his PIP, and for his violations of the terms of his PIP.[358] Leon's had received no pay raise shortly before his termination, and his most recent performance evaluation (from the year earlier) indicated his interpersonal skills required improvement. Securaplane's explanation for why it fired Leon didn't shift; in fact Securaplane demonstrated it would have fired Leon over a month earlier but for its desire to keep Leon cooperating in the fire investigation. Leon has not shown Securaplane had any hostility—isolated or in a pattern—towards those who raised air safety issues.

Securaplane's investigation into Leon's alleged lying to fire investigators was inconclusive,[359] but this unproved allegation was only *part* of one of the six reasons Securaplane listed for firing Leon.[360] In fact, it was Leon's statements *about* the allegation—namely his response that he "must have been misunderstood"—that led

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[354] *Stone & Webster v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997).

[355] *Lewis Grocer Co.*, 874 F.2d at 1012.

[356] *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 426–29 (finding pattern of antagonism supported finding of retaliation in case brought under 42 U.S.C. § 1983 alleging retaliation for free speech activities).

[357] *Seater v. Southern Calif. Edison Co.*, ALJ No. 1995-ERA-00013, ARB No. 96-013, slip op. at 5 (ARB Sept. 27, 1996).

[358] RX 9 (document 1 at 1) ("Failure to sign this form, or to follow these rules will result in immediate termination"). Guzeman confirmed she could have fired him for his refusal to sign, but didn't. Tr. at 485–86, 561. Guzeman's April 11 letter giving Leon a 5-day unpaid suspension for violations of his PIP cited eleven separate violations of his PIP and again noted "[f]ailure to comply will lead up to and including termination." RX 11 at 1–2.

[359] *See* Tr. at 336; RX 11. Guzeman's discussion makes it clear the investigation didn't prove the allegations against Leon, but the allegations were not *dis*proven. Tr. at 336, 521. Guzeman testified that because the allegations were unproven, lying itself was not a reason for Leon's termination. *Id.* at 521.

[360] RX 9 (second document).

Securaplane to "question [its] trust in [Leon] and [his] performance."[361] Similarly, there was a discrepancy between the 110 schematic and the 140 assembly document for the BCU's circuit board. This could have perpetuated the error in future designs of the BCU and in products that would be shipped to customers that didn't match specifications, but the record shows the error was never perpetuated. Leon has shown no reason why I should doubt Securaplane's well-documented and supported, nondiscriminatory reasons for firing him, and his protected activity played no part in Guzeman's decision to fire him.

C. Securaplane's Alternate Grounds for Terminating Leon are Unconvincing and it Has Not Established an Affirmative Defense Under *McKennon v. Nashville Banner Publishing Co.*

Securaplane also argues if it is liable under AIR 21, Leon's damages should be reduced under the principles approved in *McKennon v. Nashville Banner Publishing Co.*,[362] a case that arose under the Age Discrimination in Employment Act (ADEA), because of evidence it acquired after Leon's termination. It learned that he had violated several policies on employee use of company equipment, and had misrepresented facts on his employment application. Securaplane claims each was an independent ground for termination. Neither claim persuades me.

The doctrine of after-acquired evidence the Supreme Court addressed in *McKennon v. Nashville Banner Publishing Co.*[363] states that if during the course of employment discrimination litigation an employer discovers proof of the plaintiff's wrongdoing as an employee that *would* (not could) have led it to terminate the plaintiff, that after-acquired evidence will be admitted. It will limit the claim for back pay to what had accrued before it discovered the wrongdoing, and preclude the plaintiff from receiving restitution or front pay.[364] As the doctrine has developed, the employer invokes the after-acquired evidence doctrine as an affirmative defense, with proof by a preponderance of the evidence that the wrongdoing the after-acquired evidence revealed would have led the employer to fire the plaintiff.[365]

Approximately a year after Leon's termination, Securaplane discovered he had used company internet and email for personal

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[361] RX 9 (second document).

[362] Respondent's Post-Hearing Brief 27.

[363] 513 U.S. 352, 361–63 (1995).

[364] *Id.*

[365] *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996).

purposes, including corresponding with other employers regarding prospective employment.[366] These activities allegedly violated Securaplane's computer, internet, and email usage policy, a policy outlined in the Securaplane Associate Handbook, which Securaplane provided to Leon when it took him on as a permanent, full-time employee, and was a possible ground for termination.[367] Securaplane claims in October 2008, while it was reviewing Leon's personnel file in preparation for trial, it discovered Leon had "falsified" his employment history on his employment application.[368] Specifically, his résumé stated he had worked in "Multi-occupations" for Hughes Missile Systems in Tucson, Arizona, from August 1982 to November 1995, when in fact he had been incarcerated for two of those years.[369] This too violated company policy and was grounds for termination.[370]

Leon disputes these allegations and asserts Securaplane has not met its burden of proof. He argues his email use was not unreasonable and either didn't violate Securaplane's policy, or was similar to the behavior of other employees who Securaplane did not fire.[371] Leon also believes he didn't omit information regarding his imprisonment. He pointed out his application shows he was a student at Cochise Community College in Douglas, Arizona, not Tucson, in 1995 and 1996, and plainly discloses he had a felony conviction that was overturned and reduced to a misdemeanor.[372] He also believes Securaplane had a 42-page pre-employment screening report that made clear to Securaplane at the time it hired Leon that he had been incarcerated for two years, so Securaplane was aware of the misstatement on the monster.com résumé when it hired him, and throughout his

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[366] RX 15 (showing personal emails sent and received from Leon's Securaplane email account, including job application–related emails and correspondence from www.monster.com); Tr. at 451–52.

[367] RX 2; RX 3; Tr. at 453.

[368] Tr. at 451–52.

[369] RX 1 (page 3 of 4 of monster.com résumé).

[370] RX 1 ("I understand that if any false information or omissions are discovered, my application may be rejected and, if I am employed, my employment *may* be terminated at any time.") (emphasis added). This statement was included on the last page of the Employment Application Form Leon signed on August 18, 2005. *Id.*; *see also* RX 2 at 6 (*You and Securaplane, An Employee Handbook*, stating "[a]ny falsification or *intentional* omission of requested information *may* result in termination at any time after it is discovered" regarding theft or falsification of employment-related matters and records) (emphasis added). Leon signed an "Associate Handbook Acknowledgment Form" on August 26, 2005. RX 3.

[371] Tr. at 452, 457–59; Complainant's Closing Brief 19.

[372] Tr. at 465–66; RX 1.

employment.[373] Yet Securaplane never showed any inclination to fire Leon for this reason throughout all of his employment.[374]

Securaplane's proof on this affirmative defense comes primarily from the afore-cited exhibits (Respondent's Exhibit 1, Leon's employment application; Respondent's Exhibit 2, Securaplane's Employee Handbook; and Respondent's Exhibit 3, Leon's acknowledgment of the handbook) and the testimony of Tracey McKenzie, the Global Vice-President of Human Resources for Pacific Scientific, Securaplane's parent company.[375] Here Securaplane bears the burden of proof. It must show it would have (not might have) fired Leon had it known about these alleged misdeeds, and it has not met this burden.

1. Leon's Résumé

McKenzie testified Leon submitted a copy of his résumé when he was hired that showed he worked at Hughes Missile Systems from 8/1982 to 11/1995;[376] however, in October 2008, Securaplane's new HR Director, Helen Vilez, found out Leon had actually been incarcerated for two years during that period.[377] McKenzie claimed "that omission on his Employment Application Form would have warranted termination had he still been employed."[378] She went on to characterize the "omission" as a "misrepresentation" that would have been grounds for termination, especially since it omitted "some pretty pertinent information" on a form he had certified as truthful.[379] She stated while Securaplane knew Leon had a felony conviction that was reversed to a misdemeanor, it had no idea he had been in prison for two years.[380]

Leon pointed out there was an internal inconsistency on the résumé in question, showing he was in school in Douglas, California, during the erroneous 1982 to 1995 employment span in Tucson that was listed on the résumé, suggesting the omission was an unintentional typo.[381] His employment application also plainly stated he had a felony conviction that had been reversed and reduced to a

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[373] Tr. at 323–24. This 42-page pre-employment screening report is also the subject of Leon's most recent letter.

[374] *Id.*

[375] Tr. at 446.

[376] Tr. at 451; RX 1.

[377] Tr. at 451.

[378] Tr. at 452.

[379] Tr. at 452.

[380] Tr. at 468.

[381] Tr. at 467; RX 1.

misdemeanor.[382] He further pointed out—and McKenzie confirmed—he wasn't required to submit a résumé as part of the Securaplane application process,[383] and his application, itself, was accurate. He also pointed out the résumé was from monster.com, and asserted (but did not testify) that he had produced a different résumé to Securaplane at the time of employment that bore no such error and was part of a 42-page background investigation that was missing.[384]

Guzeman, who was Securaplane's HR manager for much of his tenure with the company, further undercut McKenzie's testimony. She explained there likely was a 42-page background investigation[385] in Leon's personnel folder, but many documents were destroyed in the November 2006 fire, and the background investigation may well have been among those documents destroyed.[386] Guzeman explained:

> We had a fire that burned to the ground the Administrative Building. We had to recreate every person's tax forms, every person's health benefit forms, every person's application. Some documents were recoverable because they were water damaged and we hired a temp to try to copy everything that was water damaged, if it was readable at all. So some documents survived that fire because they were in a fire-proof cabinet. However, a lot were lost because of the water damage.[387]

McKenzie acknowledged Leon's file might once have contained a 42-page background investigation, but it had "probably been destroyed," and was no longer there.[388]

There are three problems with Securaplane's *McKennon* proof as applying this apparent "omission," or "misrepresentation" on Leon's résumé. First, Securaplane's policy on "Theft and Falsification of Records" states "[a]ny falsification or *intentional* omission of requested information may result in termination at any time after it is discovered."[389] Here, Securaplane hasn't shown Leon's omission was intentional. To the contrary, Leon has pointed out inconsistencies

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[382] Tr. at 465; RX 1.

[383] Tr. at 466–67.

[384] Tr. at 466, 468; *see also supra* note 27 (discussing missing 42-page background investigation documents).

[385] She recalled lengthy documents in Leon's personnel folder that could have approximated 42 pages in length. Tr. at 323.

[386] Tr. at 323–24.

[387] Tr. at 537.

[388] Tr. at 468.

[389] RX 2 at 6.

within the résumé itself and between the résumé and employment application that suggest the omission was indeed unintentional.[390] So, Securaplane hasn't proved Leon's omission was actually of the type that could have merited termination.

Second, Securaplane's witnesses have confirmed numerous personnel records were destroyed in the fire, so there is no way to know if Leon's personnel folder as it appeared in 2008 when Vilez discovered the "omission" may not be how that file appeared when Leon applied and was hired. In fact, several people including Guzeman and Dr. Boost[391] recall Leon's personnel folder containing a very long employment history or background investigation that did not appear in his personnel folder in 2008. While Vilez and McKenzie may have "discovered" Leon's apparent omission about his imprisonment in 2008, there may not have been any omission from the file at the time Leon applied for the job. Thus, Securaplane hasn't proved Leon engaged in any misconduct.

Third, Securaplane's policy says it an employee "may" face termination for an intentional omission, not will, but may. The *McKennon* Court held, "[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[392] The Court went on to add, "[t]he concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims . . . is not an insubstantial one . . . ."[393] The only proof Securaplane has offered that Leon's alleged omission or misrepresentation is of the sort that would have led to his termination is McKenzie's testimony. In contrast to the other witnesses in this case, I don't find McKenzie particularly convincing. Her knowledge and familiarity with the case and with Securaplane's HR department are tangential at best (she works for the parent company), and she offered no explanation for why Securaplane apparently contradicted her predicted behavior—after all, witnesses recalled, and I find, Leon's

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[390] The résumé is definitely open to interpretation as the entry for "Hughes Missile Systems" states Leon had "[m]ulti-occupations" between 8/1982 and 11/1995. RX 1 (page 3 of 4 of résumé). It then goes on to list at least six different job titles and accompanying work descriptions in a long list; there is no association between time spans and individual jobs. *Id.*

[391] *See, e.g.*, Tr. at 762.

[392] *McKennon*, 513 U.S. at 362–63.

[393] *Id.* at 363.

personnel folder once contained a fairly voluminous number of papers with greater detail than the information it contained in 2008. Yet he worked for Securaplane for nearly two years from when he submitted his application and signed the employee handbook and when he was terminated for entirely unrelated grounds. Thus, Securaplane hasn't proved the after acquired evidence of Leon's "omission" entitles it to relief under the *McKennon* standard.

2. Leon's Personal Emails and Internet Use

Securaplane's "Internet and E-mail Usage" policy sates "Securaplane prohibits the use of electronics transmission via the internet and the e-mail system in ways that are disruptive, offensive to others, harmful to morale or for personal use."[394] The policy goes on to provide a nonexclusive list of prohibited email and internet uses such as "sexually explicit images, messages, [and] cartoons," as well as "ethnic slurs, racial comments, off-color jokes, chain letters," and any harassing or disrespectful materials.[395] The policy confirms employees who violate it "will be subject to disciplinary action, up to and including termination of employment."[396] The document then refers to the "Securaplane Internet policy" for more detailed information;[397] however, no copy of this policy is in the record.

Securaplane has produced numerous emails sent to and from Leon's Securaplane account including emails to his son, emails about his son sent to third parties, job applications, and what appear to be automated emails generated by such job search sites as monster.com.[398]

Leon challenged this evidence on several grounds, he pointed out several of the emails appeared to be automated responses that arrived in April and May 2007, after he'd been suspended from Securaplane and was no longer in the office.[399] He also argued Securaplane didn't enforce their policy as written, suggesting it was commonplace for employees to listen to search or listen to the news on their lunch breaks.[400]

McKenzie agreed that Securaplane didn't enforce their policy as an absolute ban on all email and internet use for personal purposes.

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[394] RX 2 at 8.

[395] RX 2 at 8.

[396] RX 2 at 8.

[397] RX 2 at 8.

[398] RX 15.

[399] Tr. at 469–70.

[400] Tr. at 471.

She said instead, it was a matter of "good judgment and reasonableness per the policy."[401] She explained:

> It is reasonable to expect that people may pay a bill online. In my professional judgment, they may get an e-mail from somebody, may look at news online, but I don't believe it's good judgment or reasonableness . . . use your work e-mail address to sign up for job boards . . . .[402]

She also claimed Leon could have prevented much of the purported monster.com junk mail, since it could be "turned off."[403]

Again, Securaplane has failed to prove by a preponderance of the evidence it would have fired Leon based on his internet and email use alone. The record contains no examples or statistics of the parameters Securaplane actually applies to company email and internet use. For further clarification, the employee handbook points to a document not in the record. McKenzie has offered her "professional" opinion about was appropriate under Securaplane's internet policy, but hasn't explained if, in practice, Securaplane—not the parent company she works for—would actually have fired employees for sending and receiving emails and doing some job hunting, like Leon did. Since the portion of the internet and email policy in the record suggests an employee who violated the policy might face other disciplinary actions, not just termination, and provides no insight into under what circumstances termination would be invoked, Securaplane has not met its burden of proof.

D. Securaplane has Shown with Clear and Convincing Evidence it Would Have Fired Leon Even in the Absence of Any Protected Activity

Securaplane's reasons for firing Leon were legitimate and not pretextual. But I must consider the possibility that his protected activity influenced or contributed to its decision in a small way to his firing. When a protected activity plays even a small role in a complainant's termination, AIR 21 requires an employer to prove by clear and convincing evidence it would have taken the same action absent any protected activity.[404] I found Securaplane's decision to

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[401] Tr. at 471.

[402] Tr. at 471.

[403] Tr. at 470–1 (adding she didn't believe the alleged "junk mail" was all "junk").

[404] 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *see also Williams v. American Airlines, Inc.*, ARB No. 09-018, OALJ No. 2007-AIR-0004, slip op. at 8 (ARB Dec. 29, 2010); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 6 (ARB Dec. 30, 2004).

terminate Leon's employment was not motivated, even in part, by Leon's protected activity.[405]

Even if Leon had shown his protected activity contributed to Securaplane's decision to fire him, Securaplane would still prevail because it has shown by clear and convincing evidence it would have fired Leon for other reasons, namely his unprofessional and antagonistic behavior after December 2006. While AIR 21 in particular and whistleblower protection laws in general give complainants significant latitude in bringing their complaints and expressing frustration when an employer retaliates or fails to respond to the whistleblower's concerns, there are limits. Intemperate, hostile, or violent behavior by an employee that happens around the time of a protected activity doesn't prevent an employer from taking disciplinary action against an employee for that behavior. The recent Seventh Circuit case of *Formella v U.S. Dep't of Labor*[406] highlights the distinction.

Formella was a claim brought under the whistleblower protections found in the Surface Transportation Assistance Act (STAA). A trucker claimed he had been fired in retaliation for complaining about the poor condition of the truck he had been assigned to drive, but the administrative law judge, the Board, and the Seventh Circuit all agreed that he was fired for his "provocative, intemperate, volatile, and antagonistic conduct" in expressing his complaint.[407] The court of appeals' opinion is rich with colorful quotes from the administrative law judges' decision and the hearing transcript.

Formella was fired at the end of three encounters with company managers about his assigned truck.[408] He first questioned why he had been assigned a different truck than one he usually drove.[409] It had been returned to the leasing company, unfortunately without anyone detaching the CB radio antenna that Formella had placed on that truck.[410] A few minutes later, he returned to say the Department of Transportation (DOT) permits were missing, which were provided promptly.[411] Fifteen minutes later came the raucous confrontation for which he was fired. He claimed the high beam on the headlights of his

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[405] See *supra* Section VI.B.2 for discussion of Securaplane's reasons for firing Leon.

[406] 628 F.3d 381 (7th Cir. 2010).

[407] *Id.* at 383.

[408] *Id.* at 385–87.

[409] *Id.* at 384.

[410] *Id.* at 384, 386.

[411] *Id.* at 384–85.

assigned truck didn't work, some of its rear reflectors were missing or not working, and its rear tires had mismatched tread patterns (a condition he thought was dangerous).[412] The administrative law judge found that Formella "storm[ed] into the dispatch office, yelling, antagonizing, and provoking his superiors, by questioning their capabilities, and repeatedly asking if he was fired."[413] The testimony showed that as Formella expressed his concerns about the truck's deficiencies (especially the mismatched tires) he was "very, very loud," "very upset," and "almost hostile" in the company office, "so much so that at one point employees in the building's warehouse came running into the office area to see what the commotion was and whether someone needed help."[414] He managed to do all this sitting on the edge of his seat.[415]

Bound by the well-supported findings of the administrative law judge, Formella argued the Administrative Review Board erred in concluding that this intemperate behavior "fell outside the latitude owed to an employee who is making a safety-related complaint."[416] The Seventh Circuit aligned itself with the view that in dealing with the impulsive behavior that may accompany protected complaints, "modest improprieties will be overlooked, [but] 'flagrant,' 'indefensible,' 'abusive,' or 'egregious' misconduct will not be."[417] The court recognized that where a worker believes the condition of an assigned vehicle jeopardizes his safety or that of the public, it is foreseeable that he might lose his composure as he voices his concern to his employer. The Seventh Circuit referred to the Tenth Circuit's observation, in another context, that "'It would be ironic, if not absurd, to hold that one loses the protection of an antidiscrimination statute if one gets visibly (or audibly) upset about discriminatory conduct.'"[418] Looking at all the

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[412] *Id.* at 384–86.

[413] *Id.* at 387.

[414] *Id.* at 385.

[415] *Id.* at 385.

[416] *Id.* at 391.

[417] *Id.* at 391–92 (citing *NLRB v. City Disposal Sys., Inc.,* 465 U.S. 822, 837 (1984) ("abusive"); *Thor Power Tool,* 351 F.2d 584, 587 (7th Cir. 1965) ("flagrant"); *Roadmaster Corp. v. NLRB,* 874 F.2d 448, 452 (7th Cir.1989) ("indefensible or abusive"); *Kenneway,* 1989 DOL Sec. Labor LEXIS 47, at *7–*8 ("indefensible"); *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 242–43 (5th Cir.1999) ("abusive" or "flagrantly insubordinate"); *Precision Window Mfg., Inc. v. NLRB,* 963 F.2d 1105, 1107–08 (8th Cir.1992) ("indefensible" or "wanton"); *YMCA of Pikes Peak Region,* 914 F.2d 1442, 1452 (10th Cir. 1990) ("egregious")).

[418] *Id.* at 392 (quoting *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1022 (10th Cir. 2004)).

facts, the court of appeals could not say that Board was unreasonable to conclude that in shouting so loudly that other employees ran toward [the manager's] office to see what was the matter, for example, Formella exceeded any leeway to which he was entitled in pursuing his statutory rights.[419]

Here, Securaplane has documented Leon's behavior as insubordinate, loud, and offensive. When he was unhappy with Williams or Boynton's work and decisions, whether it was about their response to his protected activities or any other management decision, Leon's reaction was to complain, call Williams and Boynton names, impugn their competence, and insult them to others. He insulted Williams and Boynton to their faces, to other employees, and to Securaplane's customers. Leon was loud, angry, and his co-workers perceived him as looming and intimidating. Guzeman recalled him arguing with Boynton about the apparent nonconformity in the March 26, 2007, PIP meeting. He engaged in protected activity in the same loud, disruptive, and disrespectful manner[420] and six or more of his coworkers were so frightened by his actions they independently approached Guzeman with their concerns, some of them refusing to work with Leon if he was allowed to continue working at Securaplane, others saying they feared for their lives and didn't know what Leon was "capable of doing."[421] He yelled, he slammed things around, and he interrupted other employees' work. Steele complained to HR about his interference with her quality assurance duties and Chenowitz similarly complained that Leon yelled at her production workers.[422] He was even rude and disrespectful to Dr. Boost and others present at the fire investigation.

Leon's individual behaviors were not as dramatic as those *Formella* described. Yet his continued pattern of engaging in antagonistic, demeaning, rude, and intimidating conduct even after

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[419] *Id.* at 393–94.

[420] *See, e.g.*, RX 11 (April 11 Letter detailing Leon's violations of his PIP, describing his "short and disagreeable attitude" with Boynton, "argumentative and rude" attitude to Boynton, "loud and disruptive yawning" around coworkers, complaining about managers' unfairness to coworkers, ignoring greetings, and speaking with increasing volume throughout the day); Tr. at 514 (Mr. LeBeau, a representative of Securaplane's largest customer telling Guzeman his company "would never hire such an individual, let alone allow them to continue to work and behave the way he does" because he was so appalled by Leon's behavior). Leon's argument at trial confirmed he criticized Williams' ability as a manger to Mr. LeBeau). Tr. at 577.

[421] Tr. at 511.

[422] Tr. at 880, 882.

disciplinary interventions, anger management counseling, and being placed on a Performance Improvement Plan, demonstrate his behavior exceeded the leeway afforded to whistleblowers. Leon wasn't a whistleblower who got worked up about his complaint and was understandably upset over his employer's reactions. He was someone who disrupted the workplace; made a significant number of his coworkers, Securaplane managers, and customers uncomfortable; and refused to change his behavior. The evidence clearly and convincingly shows Guzeman, acting on behalf of Securaplane, was motivated by Leon's behavior, not his protected activity. Securaplane diligently addressed and corrected safety concerns Leon raised once Securaplane had enough information to act.[423] Securaplane could lawfully fire him for his behavior, and it did.

VII. Conclusion and Order

Although Leon engaged in protected activity, he has not shown by a preponderance of the evidence that his protected activity was a contributing factor in Securaplane's decision to fire him.[424] Leon's claim is dismissed.

So Ordered.

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William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California

Notice of Appeal Rights

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark,

[423] Tr. at 865–66 (Dr. Boost's investigation of discrepancy reports); CX 42 at R-7126 (Boynton's email explaining he had previously lacked detailed information of what the discrepancy was); CX 13 an CX 15–18 (emails regarding inadequate electronic load for ATP testing); RX 6 (showing solution to inadequate load); CX 4–CX 7 (email chain discussing battery damage and safety and concluding battery was safe for continued use); Tr. at 198–207 (Stucky's testimony that they quickly sought to resolve the documentation discrepancy).

[424] *See* discussion *supra* Section VI.B.2.

facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).
At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).
If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).