



In the Matter of:

RIAD MAJALI,

ARB CASE NO. 04-163

COMPLAINANT,

ALJ CASE NO. 2003-AIR-045

v.

DATE: October 31, 2007

AIRTRAN AIRLINES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward R. Gay, Esq., *Law Firm of Edward R. Gay, P.A.*, Orlando, Florida

For the Respondent:

R. Paul Roecker, Esq., *Greenberg Traurig, P.A.*, Orlando, Florida

FINAL DECISION AND ORDER

Riad Majali complained that AirTran Airlines violated the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2007) when it suspended him without pay in 2002 and ultimately terminated his employment in April 2003. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed the complaint. Majali appeals, and we affirm.

BACKGROUND

For convenience, we briefly restate certain background facts. More details are provided in the ALJ's Recommended Decision and Order (R. D. & O.).

AirTran was a commercial airline company transporting passengers and cargo. Letter from Occupational Safety and Health Administration (OSHA) to Majali, Aug. 18, 2003. Majali began work at AirTran on February 26, 2001 as the Manager of Maintenance Planning. R. D. & O. at 2. He was supervised by Jim Buckalew, Director of Maintenance Planning and Control. *Id.* Christine O’Sullivan and Reuben Wenger were two of Majali’s subordinates. R. D. & O. at 5.

AirTran’s maintenance program was designed to ensure that each aircraft received maintenance in accordance with Federal Aviation Administration (FAA) requirements. R. D. & O. at 4. For example, FAA rules require that a “heavy” maintenance check be performed after a specified number of hours of air flight time, varying by aircraft type. *See* Transcript (T.) at 53-56. An aircraft that has continued to fly without receiving a required maintenance check is considered to be in “overfly” status. *See id.* at 49-50. Once an aircraft enters overfly status, FAA rules permit only ferry flights (flying the plane to its maintenance location) and not revenue flights (flying with paying passengers). R. D. & O. at 10 & n.16.

Majali’s duties included managing the operations planning portion of the maintenance planning department, enforcing FAA safety regulations, and maintaining AirTran’s in-house “overdue report.” R. D. & O. at 4. This report listed for each aircraft the number of hours remaining until a maintenance check was required, or – if required maintenance was overdue – the number of hours of overfly. *See* T. at 50-51, 203-05.

Aircraft 935 was originally scheduled to receive a maintenance check¹ on February 6, 2002. R. D. & O. at 11; *see* Respondent’s Exhibit (RX) 39 (Apr. 13 AirTran internal memo) at 1. The check was rescheduled for February 8 and then, on January 30, rescheduled again for February 15. *Id.* On February 13, O’Sullivan miscalculated the numbers of hours flown and then again rescheduled the check. *Id.* The new scheduled date was February 22. *Id.* Aircraft 935 next flew on February 18, entering overfly status that day. *Id.* Subsequent flights on February 19 and 20 left the aircraft over 14 hours late for its maintenance check. *Id.* Yet on February 22 the check was again rescheduled, this time for February 24. *Id.*

The morning of February 23, O’Sullivan noticed that the aircraft was in overfly status. R. D. & O. at 8. She informed Majali, and he requested that the maintenance check be performed in Atlanta. *Id.* AirTran’s Atlanta department lacked the equipment needed to perform the maintenance check and was unable to borrow any on that day. *Id.* Buckalew then arranged for the check to be performed in Miami. R. D. & O. at 10.

When Majali arrived at work on February 24, he learned that the flight to Miami would be a revenue flight. R. D. & O. at 9-10. Majali did not intervene, and the aircraft

¹ During February Aircraft 935 was scheduled for both a 3L (lubrication) and a “heavy” (comprehensive) maintenance check. R. D. & O. at 11; RX 39 at 1-2. For ease of reference, we refer to both together as “the maintenance check.”

flew the revenue flight as scheduled. *Id.* By the time it arrived in Miami, the aircraft had been in overfly status for over 30 hours. R. D. & O. at 12.

The next day Nick Drivas, AirTran's Director of Quality Assurance, learned of the overfly from AirTran's chief inspector and later from Buckalew. R. D. & O. at 10. Drivas asked Steve Morrison, AirTran's chief regulatory compliance specialist, to head an internal investigation of the overfly. *Id.*

While the investigation was ongoing, Majali on March 15 wrote a memo to Buckalew detailing concerns he had with Buckalew's handling of the maintenance department and the Aircraft 935 overfly situation. In that memo, Majali charged that "[a]llowing the . . . revenue [flight] . . . was illegal and unsafe." RX 19 (Mar. 15 memo from Majali to Buckalew) at 2; *see* R. D. & O. at 15.

Morrison reported that O'Sullivan, by using calculations that admittedly "may have been hasty and inaccurate," had caused Aircraft 935's maintenance to be late; that another subordinate had noticed the overfly yet had not reported it; and that the Planning Department had not placed an order on the aircraft "to prevent further flight until the . . . check was performed." RX 39 at 1-2; R. D. & O. at 11-13. The memo recommended that the Planning Department receive further training in reading the overdue report, and that the Department should assign multiple personnel to review that report "to ensure that an accurate review is performed and items coming due are not overlooked." RX 39 at 2.

After processing its internal review, AirTran on May 13 reported the Aircraft 935 overfly to the FAA. R. D. & O. at 14 (citing RX 20). AirTran's report did not mention the February 24 revenue flight. *Id.*

The next day, Buckalew wrote a "Letter of Reprimand" to Majali. R. D. & O. at 13 (quoting RX 21 (May 14 Letter of Reprimand) at 1). The reprimand criticized Majali for "not . . . maintaining the overdue review which would have avoided [Aircraft 935's overfly]." RX 21 at 1; R. D. & O. at 13. The letter warned Majali that continued failure to "develop, document and implement procedures which maintain compliance" with FAA requirements would result in "immediate and final disciplinary action." *Id.*

Majali responded the following day, blaming O'Sullivan for the miscalculations in recording the overfly hours for Aircraft 935. R. D. & O. at 13-14 (citing RX 24). Majali also detailed problems with inadequate staffing and planning, arguing that "the overflight . . . was not the result of the [overdue] report." RX 24. He again criticized the "most serious violation," the revenue flight, as illegal and unsafe. *Id.* at 1.

On June 11 the FAA informed AirTran that Aircraft 935's overfly had been considered and did not warrant legal enforcement action. R. D. & O. at 14.

On June 18 Majali attempted to extend a vacation to visit his mother in Jordan, originally planned for June 23 to July 7. R. D. & O. at 18. He emailed Buckalew, asking permission to switch with Wenger to cover his July 8 shift and use compensatory time to

cover his July 9 and 10 shifts. *Id.* Buckalew testified that he responded verbally to Majali's June 18 email, as was his practice. *See* T. at 433. Buckalew told Majali that he could "not . . . extend [the vacation] for a longer period of time, especially up to . . . the twenty-some days away from the office, because [Majali] had responsibilities." *Id.* at 434.

On July 1, after Majali had left for his vacation, Buckalew constructed the July Maintenance Planning Schedule. That schedule marked Majali's vacation time from June 23 until July 3 as "V", but left July 8, 9, and 10 as work days. RX 27 at 1. Buckalew also told Wenger in early July that he did not need to cover for Majali. *See* T. at 306, 435.

Majali did not come to work on July 8, 9 or 10. R. D. & O. at 19. On July 9 or 10, Buckalew called Majali for an explanation but did not reach him. *Id.*

Buckalew then sought guidance from Loral Blinde, Vice President of Human Resources. Blinde suggested that he, Buckalew, Majali, and Guy Borowski, Vice President of Maintenance and Engineering, meet on July 15 (Blinde's next day in the office) to discuss the situation. To prepare for the meeting, Blinde asked Buckalew to provide a "performance summary" regarding Majali. R. D. & O. at 19. Buckalew's memo focused upon various incidents supporting Buckalew's view that Majali's job performance had been poor. *Id.* at 19-20 (citing RX 28).

Majali's next scheduled work day was July 14. *See* RX 27 at 1. On July 13, Buckalew contacted Majali and told him to not come to work the next day, but instead to arrive on July 15 for the meeting. R. D. & O. at 19-20. At Majali's request Anne Giles, a human resources manager, attended the meeting and took detailed notes. Blinde stated that these notes were accurate, and Majali – with one exception – agreed. *Id.* at 20 (Blinde), T. at 260-61 (Majali).

According to those notes, at the meeting Buckalew complained about Majali's July 8-10 absence. RX 29 (July 22 memo from Giles to Blinde) at 1. Majali then explained his belief that his extended vacation had been approved, and complained that his relationship with Buckalew had suffered greatly since the Aircraft 935 overfly. R. D. & O. at 20 (citing RX 29). At the end of the meeting Blinde told Majali that he would look into the issues raised, and asked him to remain at home while he did so. *Id.* (We refer to this as the "informal suspension.") According to Giles's notes, Blinde said that he would contact Majali "within the next few days." R. D. & O. at 20 (quoting RX 29 at 1). Majali disagreed with the accuracy of the notes on this point and testified that Blinde had said that he would contact Majali the next day. T. at 95, 260-61; *see* R. D. & O. at 20.

The next day, having not yet heard from Blinde, Majali retained an attorney. R. D. & O. at 20. The attorney wrote a letter, sent July 17 on Majali's behalf, stating that Majali felt his employment with AirTran had been terminated and that he would not accept reinstatement. R. D. & O. at 20-21 (citing RX 30). On July 18, Blinde called

Majali's attorney and told him that there had been no discharge. *Id.* Having attempted but failed to make further telephone contact, Blinde then on July 22 faxed a letter to the attorney, again informing him that Majali was still an employee and further stating that if Majali did not return to work on July 24, then he would be placed on unpaid leave. R. D. & O. at 21 (citing RX 31 (July 22 letter from Blinde to Majali's attorney)); T. at 544.

Majali did not return to work on July 24. R. D. & O. at 24. Blinde then placed Majali on unpaid leave. *Id.* (We refer to this as the "formal suspension.")

On July 29 Majali wrote to Joe Leonard, AirTran's Chief Executive Officer (CEO), asking him to investigate "the corruption in the maintenance department led by Mr. Buckalew." T. at 102-03; R. D. & O. at 33.

On August 5 Majali wrote Blinde stating that he was willing to return to work at AirTran, but he "did not give up [his] right to go to the FAA" and he also "reserve[d] the right to go to the EEOC to complain about the way [he] was constructively terminated." RX 55 (Aug. 5 letter from Majali to Blinde). Blinde replied, informing Majali that so long as Majali was represented by counsel, all correspondence should go through their respective attorneys. R. D. & O. at 22. On August 7, Majali notified Blinde that he was no longer represented by counsel and wanted "to start working the details of any agr[e]ement we may reach." *Id.* (citing RX 32 (Aug. 7 email from Majali to Blinde) at 2). Blinde responded that day and asked Majali to "let [him] know what [Majali was] looking for" in terms of a settlement. *Id.* at 1.

On August 8 Majali emailed a proposed settlement. R. D. & O. at 22. Although he had worked at AirTran for little more than a year, Majali requested three years of pay, one year of medical benefits, six months of flight privileges, and a letter of recommendation. *Id.* Majali stated that if the terms were not acceptable to AirTran, then he would have to "seek justice somewhere else." *Id.* Blinde responded on August 9, declaring Majali's request unacceptable and stating that AirTran's common practice for "transition pay" was "2 weeks of pay for each year of service." RX 54 (Aug. 9 email from Blinde to Majali) at 1.

On August 14, Majali notified Blinde that he planned to pursue legal action regarding AirTran's "retaliation and harassment [that] is covered under Title VII of the Civil Rights Act of 1964." RX 73 (Aug. 14 letter from Majali to Blinde) at 1; R. D. & O. at 22.

On August 16, Majali offered to return to work so long as AirTran did not impose any conditions upon him. *See* RX 35 (Aug. 16 email from Majali to Blinde) at 3 (offering to return so long as Majali was not required to "sign[] any papers or releases"), 2 (second offer to return, sent later the same day). Majali added that he was "also willing to listen to any settlement proposal from your side." RX 35 at 3; *see also* R. D. & O. at 23. Blinde did not respond. *See* R. D. & O. at 23. He explained to the ALJ that he chose not to accept Majali's offer to return because Majali continued to offer settlement as an

alternative, and because “at that point it was fruitless to have him come back because of the demands he continued to make.” R. D. & O. at 23 (quoting T. at 588).

Majali then on August 23 reported to the FAA that Aircraft 935 had flown a revenue flight during its February overfly. *Id.* (citing CX 5 (Majali’s Aug. 23 letter to the FAA)).

On October 11 Majali filed a complaint with DOL’s OSHA, alleging – although he was still receiving medical benefits – that he had been constructively discharged in violation of AIR 21. R. D. & O. at 2.

On October 23, Majali emailed Blinde advising him that he had filed a complaint with OSHA. R. D. & O. at 23 (citing RX 35 (Oct. 23 email from Majali to Blinde)). Majali stated that he was willing to “avoid the fiasco of investigations and court system[s]” and would “stop this immediately before [OSHA] get[s] started” if Blinde would either reinstate him or grant him a settlement package of three months pay, one month “lost wages,” one year of flight benefits, and health benefits for up to one year until he found new employment. RX 35 at 1; *see also* R. D. & O. at 23. Blinde was traveling and did not have access to email, so he did not reply to Majali’s request. R. D. & O. at 23. Majali revoked his settlement offer on October 29, stating that his desire for compensation was not as important as his “maintenance compliance and safety issues.” *Id.* The next day, however, Majali again extended the October 23 offer. *Id.* (citing RX 48). In response, Blinde offered two months of pay as a transition package as well as “[two] months benefits and travel.” *Id.* Majali replied on October 31 that he would not accept less than four months of severance pay. *Id.* (citing RX 47 (Oct. 31 email from Majali to Blinde) at 1.

On November 4, Majali notified Blinde that “may be [sic] the [FAA] is conducting an investigation” into “what happened on [Aircraft] 935.” RX 45 (Nov. 4 email exchange between Majali and Blinde) at 2; *see* R. D. & O. at 23. Majali stated that he “look[ed] forward to [his] meeting with the [FAA]” and he intended to cooperate fully. *Id.*

Blinde replied the same day, telling Majali that his latest offer was still “much higher than is fair or consistent with others,” and that “it appears we are unable to resolve this matter in this way.” RX 45 at 1; *see* R. D. & O. at 23. By this time Blinde had received OSHA’s notification of Majali’s AIR 21 complaint.

Majali initially responded that his previous offer was the last one he would make; but later that day he upped his offer again, stating that he would settle for nothing short of reinstatement and back pay compensation. RX 45 at 1; RX 44 (Nov. 4 email from Majali to Blinde, subsequent to earlier exchange) at 1. Communications between Majali and Blinde then ceased.

On February 24, 2003 an aviation safety inspector for the FAA, Raul Flores, notified AirTran that the FAA would be investigating the overfly. R. D. & O. at 16-17;

see RX 71 (Feb. 24 letter from Flores to AirTran) at 1. The FAA then began interviewing multiple AirTran employees including O’Sullivan. *Id.*

On March 7, Drivas wrote Flores explaining that the February 24, 2002 revenue flight had been omitted from AirTran’s May 13, 2002 disclosure due to an “administrative oversight.” RX 58 (Mar. 7 letter from Drivas to Flores) at 1.

On March 20, the FAA sent AirTran the transcripts of the FAA’s investigative interviews. R. D. & O. at 17. Upon receipt of these transcripts AirTran learned that O’Sullivan had told the FAA that during the week prior to the overfly, Majali had requested that she falsify documents in order to hide the overfly status of Aircraft 935. R. D. & O. at 17, 24. Within a few days – but without investigating O’Sullivan’s allegation or checking with Drivas and Morrison to confirm O’Sullivan’s allegation that she had told them at the time – AirTran decided to take action against Majali based upon the allegation.

On March 31, Drivas wrote Flores highlighting the allegation, stating that “Majali’s actions are inexcusable and will not be tolerated” and promising that Majali would “not be allowed to return to work at AirTran.” RX 18 (Mar. 31 letter from Drivas to Flores) at 1; see R. D. & O. at 17. Drivas also suggested that the FAA “consider instituting appropriate sanctions against Mr. Majali’s certificate(s). While he might not be exercising them in his job at the TSA, there is no telling when and where he might exercise those privileges in the future.” RX 18 at 2.²

On April 1, without responding to Drivas’s letter, Flores notified AirTran that the investigation had been concluded and the report had been forwarded to the Southern Regional Counsel for “appropriate action.” RX 60 (Apr. 1 letter from Flores to AirTran) at 1.

On April 25, AirTran informed Majali by letter that “your employment is terminated effective April 25, 2003 for disregarding your regulatory responsibilities and for ordering a subordinate to falsify a maintenance document.” RX 37 at 1; see also R. D. & O. at 24. Majali then filed another complaint with OSHA, alleging that this discharge had violated AIR 21. R. D. & O. at 2.

On August 18, OSHA dismissed Majali’s first complaint, concluding that he had not been constructively discharged. R. D. & O. at 2. Majali timely requested a hearing before a DOL administrative law judge (ALJ). Before the hearing took place, OSHA – without investigating Majali’s second complaint – forwarded that complaint to the Office of Administrative Law Judges with the recommendation that the two complaints be consolidated. T. at 9; R. D. & O. at 2.

² AirTran does not argue that it terminated Majali’s employment because he had obtained another job.

After a hearing on the now-consolidated complaint, the ALJ recommended that Majali's complaint be dismissed. Majali timely sought our review, and we accepted his case for decision.³

ANALYSIS

In order to prevail under AIR 21, a complainant must prove by a preponderance of the evidence that he was a covered employee, that he engaged in activity protected under AIR 21, and that protected activity contributed to a covered employer's decision to subject him to an unfavorable personnel action.⁴ A complainant who prevails is entitled to relief unless "the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity."⁵

In reviewing the ALJ's decision, we must accept factual determinations that are supported by substantial evidence.⁶ We review conclusions of law de novo.⁷

Coverage is not disputed. Therefore, we proceed to examine the other elements.

³ We have jurisdiction to review the ALJ's recommended decision. *See* 49 U.S.C.A. § 42121(b)(3) (giving Secretary of Labor authority to issue decisions under AIR 21's employee protection provision); Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121); 29 C.F.R. § 1979.110 (2007) (providing for ARB review of ALJ decisions issued under AIR 21).

⁴ *See* 49 U.S.C.A. § 42121(a), (b); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining "scope of coverage, procedures, and burdens of proof under AIR 21").

⁵ *Peck*, slip op. at 8-10; *see* 49 U.S.C.A. § 42121(b)(2)(B)(iv) ("Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior [i.e., the activity protected by AIR 21].").

⁶ *See* 29 C.F.R. § 1979.110(b) (providing that ARB must "review the factual determinations of the [ALJ] under the substantial evidence standard").

⁷ *See Peck*, slip op. at 5-6 (holding that in AIR 21 cases, ARB reviews questions of law de novo).

Protected Activity

The ALJ concluded that Majali engaged in protected activity on three occasions: his March 15, 2002 memo to Buckalew; his July 29, 2002 letter to AirTran's CEO; and his August 23, 2002 letter to the FAA. R. D. & O. at 33-34.

AirTran accepts the ALJ's conclusions that sending the March 15 and July 29 documents constituted protected activity, but argues that the August 23 letter did not constitute protected activity because the FAA already knew about the overfly from AirTran's May 13 report. Respondent's Brief (RB) at 4. As Majali notes, however, his August 23 letter notified the FAA about the February 24 revenue flight, which had been omitted from AirTran's May 13 report. Complainant's Initial Brief (CIB) at 17-18. Therefore we see no reason to take issue with the ALJ's conclusion that Majali's August 23 letter to the FAA was protected activity.⁸

The ALJ did not address whether Majali's May 15, 2002 letter to Buckalew was protected activity. RX 24. Because Majali does not argue that the ALJ erred in omitting discussion of this letter, we assume that the May 15 letter did not constitute protected activity.

Knowledge

The ALJ found that "it is clear that the decision to suspend Complainant was made by agents of the Respondent who were aware of the protected activity." R. D. & O. at 34. The ALJ also found that Loral Blinde, who signed the letter effecting Majali's termination, knew about Majali's August 23 letter to the FAA. *See* R. D. & O. at 35. Neither party contests these findings.

Adverse Action

Neither party contests the ALJ's conclusions that AirTran's formal suspension and termination of Majali's employment were adverse actions.

The ALJ also concluded that the informal suspension with pay was not an adverse action, and Majali does not quarrel with that conclusion in his initial brief. He does argue in his reply that AirTran's "actions to shut off Majali's access to the premises, shut off his computer access, and bring him in for questioning can only be seen for what the actions are, a retaliatory event." Reply at 4-5. But Majali did not raise this argument in his petition for review and thus it is waived.⁹

⁸ We thus have no occasion here to decide whether a communication must include new information in order to be protected.

⁹ *See* 29 C.F.R. § 1979.110(a) (AIR 21 "petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties"); *see also*

In addition, although his brief is not entirely clear, Majali appears to suggest that the ALJ erred in failing to identify as an adverse action AirTran's March 31, 2003 letter to the FAA, "an obvious retaliatory event." CIB at 18-19; *see also* Reply at 9 ("The ALJ . . . make[s] no reference to this obvious retaliatory act against Majali."). Majali did not argue to the ALJ that the March 31 letter was an adverse action, however. Therefore, any argument he may now intend to raise in this regard has been forfeited.¹⁰ It is possible that Majali is merely citing that letter as evidence of AirTran's general retaliatory animus; we discuss the letter's impact as evidence in the causation section.

Causation

The ALJ concluded that protected activity was not a contributing factor to either the formal suspension or the termination.

Formal Suspension

With regard to the formal suspension, AirTran told the ALJ that Blinde converted Majali's temporary suspension with pay into a formal suspension without pay because Majali did not return on July 24 after being specifically instructed to do so. *See, e.g.*, Airtran's Pre-Hearing Brief at 12 ("Majali chose not to return [on July 24] and therefore he was removed from paid status and placed on a leave of absence."); T. at 31, 545. The ALJ concluded that this reason was "nondiscriminatory," R. D. & O. at 41, and found that "the weight of the evidence shows that" this reason was accurate, R. D. & O. at 37

Talukdar v. U.S. Dep't of Veteran Affairs, ARB No. 04-100, ALJ No. 2002-LCA-25, slip op. at 8 (ARB Jan. 31, 2007) (noting in LCA case that "[t]he Board reviews only those aspects of the ALJ decision that are specified in the petition for review and listed in the Board's notice of review."), 14 (holding appellant had forfeited argument that was not raised in petition for review); *Bauer v. U.S. Enrichment Corp.*, ARB No. 01-056, ALJ No. 2001-ERA-9, slip op. at 4 & n.3 (ARB May 30, 2003) (declining to consider argument raised only in rebuttal brief and neither raised to ALJ nor included in petition for review); *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 98-164, ALJ No. 1996-DBA-33, slip op. at 2 n.1 (ARB Oct. 19, 1999) (declining to consider issues raised for first time in rebuttal brief and not raised in petition for review).

¹⁰ *See, e.g., Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 1997-SDW-7, slip op. at 9 (ARB May 29, 2003) (issues raised for first time on appeal are not considered) (citing *Singleton v. Wulff*, 428 U.S. 106, 119 (1976); *see also NLRB v. General Teamsters Union Local 662*, 368 F.3d 741, 746 (7th Cir. 2004) (affirming that argument not made to ALJ cannot be made before NLRB); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116-17 (D.C. Cir. 1996) (same); *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997) ("[M]atters not squarely presented below generally cannot be advanced on appeal."); *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1576 (Fed. Cir. 1991) ("It is well-settled that, absent unusual circumstances, a party cannot raise on appeal issues not raised and considered in the trial forum.")).

(finding that “Respondent suspended [Majali] because he refused to report to work as scheduled on July 24”). We take this finding as equivalent to a finding that Majali failed to prove this reason pretextual.

Majali does not dispute the ALJ’s conclusion that an unauthorized absence constitutes non-discriminatory grounds for a formal suspension, nor does he appear to dispute the ALJ’s finding that his formal suspension on July 24 occurred because he did not return to work on that day.

Majali does spend a good portion of his brief contending that the ALJ’s finding that his absences on July 8-10 were unauthorized “is not supported by the greater weight of evidence.” CIB 12-16. But this issue is not relevant to the formal suspension because regardless whether the July 8-10 absences were authorized, Majali does not dispute that AirTran suspended him on July 24 because he failed to return to work on that date. The July 8-10 absences did constitute some part of AirTran’s reason for the informal suspension on July 15 – but because Majali does not contest the ALJ’s conclusion that the informal suspension did not constitute adverse action (as we discussed in the previous section), we need not determine whether this reason for that suspension was genuine.

Majali also appears to disagree with the ALJ’s finding that the timing sequence from the protected activity to the suspension and eventual termination “does not suggest that Respondent retaliated against Complainant for his protected activity.” R. D. & O. at 36. In Majali’s view, the four-month gap between his March protected activity and his July suspension “falls within the Complainant’s ability to claim retaliatory animus as a contributing factor . . . as a sophisticated employer would not take any action but would delay . . . until the first opportunity presented itself to find a way to take the adverse employment [sic] in an attempt to avoid liability.” CIB at 7-8.

But because Majali does not dispute the ALJ’s finding that he was formally suspended due to his absence on July 24, his argument regarding temporal proximity also cannot succeed. Even if the four-month gap were sufficient to raise an inference of causation, it is not sufficient itself to prove causation in light of the ALJ’s finding that AirTran’s reason – Majali’s absence on July 24 – was accurate and that Majali did not prove it false.

Termination

The ALJ found that Majali did not prove causation by “direct evidence,” R. D. & O. at 35, and Majali does not appear to contest that finding. The ALJ then found that Majali did not prove causation by what the ALJ referred to both as “indirect evidence” and as “circumstantial evidence.”¹¹ Majali argues that the ALJ erred in making this

¹¹ The ALJ appears to have applied an outdated distinction between what she called “direct” and “circumstantial” evidence. R. D. & O. at 35-37. This distinction, which was suggested by a concurrence in a 1989 Supreme Court decision, was later expressly repudiated by that Court, which stated: “the reason for treating circumstantial and direct evidence alike

finding. CIB at 7. Majali further argues that in any case, he successfully attacked AirTran’s articulated reasons for its adverse actions and therefore he should prevail.¹² We discuss these two arguments in turn.

is both clear and deep-rooted: ‘Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.’” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003); *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O’Connor, J., concurring) (suggesting that burden would shift to employer only if plaintiff proved discrimination by “direct evidence”). Therefore, it is not necessary to distinguish between “direct” and “circumstantial” evidence in assessing whether a complainant has proven causation. Indeed, as the Supreme Court has stated, “proof that the defendant’s explanation is unworthy of credence is . . . one form of circumstantial evidence.” *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000).

The ALJ may have been referring to a separate distinction that is sometimes made – that between “direct” proof of causation, and proof by means of the *McDonnell-Douglas* burden shifting framework. A complainant who proves causation directly – i.e., without resort to the *McDonnell-Douglas* burden shifting analysis – is entitled to a mixed-motive analysis. *See, e.g., Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-11, slip op. at 19 (ARB May 31, 2006) (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (noting that mixed motive analysis is applicable when the defendant had at least one valid reason, but “the defendant’s reason, while true, is only one of the reasons for its conduct, and another ‘[contributing] factor’ is the [complainant’s] protected [conduct].”). As we noted earlier, under this mixed-motive analysis the burden of proof shifts to the respondent, who must then prove by “clear and convincing evidence” that it would have taken the adverse action regardless of the complainant’s protected activity.

But a complainant need not prove causation “directly” in order to merit a mixed-motive analysis. Where a respondent articulates more than one reason for its actions and a complainant proves at least one of those reasons false, a factfinder is permitted (though not required) to conclude that the complainant has shown that protected activity was at least a contributing factor to the decision. *See, e.g., Wilson v. AM Gen. Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999) (“Generally the employee has the burden of demonstrating that each proffered nondiscriminatory reason is pretextual,” but “[t]here may be cases in which . . . the pretextual character of one [reason] is so fishy and suspicious[] that the plaintiff may prevail.”).

Because it is not necessary – and may be confusing – for an ALJ to divide an analysis into “direct” and “indirect” sections, it would have been preferable if the ALJ had not done so. Nonetheless, the ALJ’s approach did not affect the substantive outcome of this case.

¹² Because the ALJ in her analysis of causation used the terms “nexus” and “inference,” *see R. D. & O.* at 37, which we generally have used to describe a complainant’s prima facie burden rather than the burden he bears after the respondent has articulated its reasons, it is also possible to read the ALJ’s decision as stating that Majali did not make a prima facie case and thus there was no need to examine AirTran’s reasons. The better reading, however, is that the ALJ did not intend by the use of these terms to indicate that the analysis was still at the prima facie stage. First, the discussion in which the ALJ used the terms “nexus” and

Long Delay and March 2003 letter to FAA

Majali argues that the ALJ overlooked at least two forms of evidence showing that discrimination contributed to his termination: the long delay before his termination, and AirTran's March 2003 letter to the FAA.

Delay before termination

Majali first argues that the ALJ "overlooked . . . the theory that . . . AirTran delayed the termination purposely so [AirTran] could make the argument . . . that there has been a time lapse between the protected activity and termination." CIB at 8-9. But aside from the delay itself, Majali has provided no evidence to support his "theory" that AirTran's delay was a mere ploy to provide immunity from suit. A long delay between protected activity and termination does not prove causation, but rather generally makes causation less likely. Absent any evidence to support Majali's theory, we conclude that the long delay is not itself evidence of causation. Of course, the long delay does not in and of itself prove that there was no causation, so we proceed to Majali's other arguments.

"inference" came only after the ALJ had concluded that Majali had "already *shown by a preponderance of the evidence* [coverage, protected activity, adverse action, and knowledge]." R. D. & O. at 35 (emphasis added); *see also* T. at 355 (denying AirTran's motion for judgment as a matter of law because "I think he has established enough evidence to get him over the threshold for a *prima facie* case"). The ALJ thus indicated that her causation analysis would be applying the preponderance-of-the-evidence burden appropriate at the hearing stage, rather than the *prima facie* burden appropriate at that earlier stage. Second, the ALJ explained that in her analysis of causation she would be examining whether Majali had "establish[ed] . . . discrimination" – that is, whether he had "show[n] . . . that his protected activity was a contributing factor to the adverse action." R. D. & O. at 35. The term "contributing factor" properly describes a complainant's ultimate burden rather than his *prima facie* burden. Finally, when summarizing her analysis, the ALJ stated that AirTran "has *articulated* a nondiscriminatory basis for its action, and Complainant has failed to *demonstrate* that the reasons proffered . . . were a pretext. . . . As Complainant is unable to prove that his protected activity was a contributing factor to the adverse action . . . Complainant has failed to establish an essential element of his claim." R. D. & O. at 41 (emphasis added). Thus the ALJ appears to have understood her analysis to have been an examination of whether AirTran's articulated reasons were true followed by a finding on the ultimate question of discrimination, rather than a discussion about whether Majali had raised an inference of discrimination and thereby required AirTran to articulate its reasons. Therefore, despite the ALJ's use of the terms "nexus" and "inference," we interpret her decision as reaching the ultimate question and finding that Majali did not prove discrimination by a preponderance of the evidence.

Letter to FAA

Majali then contends that the ALJ should have found causation shown by the short time gap between the February 24, 2003 opening of the FAA's investigation, AirTran's March 7 letter to the FAA admitting the revenue flight, and AirTran's subsequent March 31 letter to the FAA promising Majali's termination due to the alleged falsification. CIB at 18-19. In Majali's view that March 31 letter was "an obvious retaliatory event and a [sic] causal relationship between the Complainant's complaints of the illegal revenue flight and his termination." *Id.* at 18.

The ALJ does not appear to have discussed whether AirTran's letter to the FAA constituted some proof of causation. Because the letter cited the alleged falsification as the only reason for the termination, it does provide some support for Majali's argument that the falsification was AirTran's only reason for the termination. The letter cannot itself prove causation, however. It has weight only if Majali succeeds in his arguments attacking AirTran's various articulated reasons. Therefore, we now turn to those arguments.

AirTran's Reasons

AirTran did not distinguish between its reasons for the termination and the suspensions. Rather, AirTran told the ALJ that it "suspended and later terminated Majali for numerous, independent, legitimate reasons, including his (1) continually poor job performance; (2) failure to timely return to work after his July 2002 vacation; and (3) misconduct in connection with the 935 Overfly [i.e., the alleged falsification]." Respondent's Post-Hearing Brief (RPHB) at 58.

Majali argues that the ALJ did not find that performance was a reason for the termination, rejected the falsification reason, inappropriately relied upon a reason AirTran did not offer, and then relied upon a reason that was not supported by substantial evidence. We address these arguments in turn.

Performance

Majali first argues that "[p]erformance as an alternative ground for termination was never raised by AirTran." CIB at 21. AirTran does not appear to respond to this assertion. Indeed, AirTran's entire argument relating to performance consists of a single lengthy quotation from the ALJ's opinion. *See* RB at 16-17 (repeating eight of nine sentences entirely unchanged; deleting part of fourth sentence and replacing it with phrase "It was apparent to [the ALJ]"). It is true that the letter terminating Majali's employment cited only the falsification allegation and gave no other reason for the termination. *See* RX 41 at 2 ("[Y]ou directed a subordinate employee to falsify a maintenance document . . . This is a most serious matter that cannot be overlooked. Consequently, . . . you are no longer welcome back to a position at AirTran Airways."). It also is true that AirTran's March 31 letter to the FAA cited only the alleged falsification as the reason that Majali would "not be allowed to return to work." *See* RX

18 at 1 (“AirTran recently received the transcripts [of the FAA interviews] and offers you the following: . . . Majali[] instructed a subordinate . . . to falsify . . . a document Based upon the facts presented, Mr. Majali will not be allowed to return to work at AirTran.”). Nonetheless, we note that AirTran’s post-hearing brief did specifically articulate Majali’s “poor job performance” as one of the reasons why it “suspended and later terminated” Majali’s employment. *See* RPHB at 58.¹³ Therefore, we conclude – without determining ourselves whether AirTran actually relied upon performance as a reason – that AirTran did *articulate* performance as a reason.

We therefore move on to Majali’s second argument: that “the ALJ notes [Majali] was not terminated because of performance issues.” CIB at 21. While the ALJ did not explicitly make such a finding, the ALJ did state that “Respondent [articulated] *two* additional reasons [beyond Majali’s “refusal to report to work as scheduled on July 24”] for formally terminating Complainant First, . . . information . . . which led [AirTran] to believe that Complainant had asked a subordinate to falsify a document and second, Complainant did not actually attend work for over ten months.” R. D. & O. at 37. Thus the ALJ did not include “performance” in her list summarizing AirTran’s reasons for the *termination*.

In addition, the ALJ did not ever state that performance was the reason for the *termination*. She found that performance “set the stage” for AirTran’s informal and formal suspensions of Majali, and that it was “a factor which colored the negotiations,” R. D. & O. at 39. She also found that Majali’s “job performance *coupled with* his failure to report to work *warranted* [the] suspension and later formal termination,” R. D. & O. at 41 (emphasis added), and that Majali’s “performance . . . was not up to par and in and of itself *would have been* reason enough for [AirTran] to terminate” Majali’s employment, R. D. & O. at 39 (emphasis added). But she did not ever say that performance actually *was* the reason for the termination.¹⁴

Thus, it certainly is plausible to interpret the ALJ’s statements together as a finding that, as Majali asserts, Majali’s termination was not due to Majali’s job performance. Moreover, because as we have noted AirTran’s entire response to Majali’s argument consists of a quotation from the ALJ’s opinion, AirTran appears to concede that Majali’s interpretation is correct. Therefore, we are not inclined to quarrel with Majali’s assertion that the ALJ never found that performance was a reason for the termination.

¹³ Our review of the record in this instance should not be taken as an indication that we generally will review the record in order to determine whether a party has argued a point to the ALJ. Each party has the obligation to support its own argument and counter those of its opponent, with citations to the record. Failing to make such citations justifiably could be construed as waiver of the argument.

¹⁴ Nor did the ALJ find that AirTran *would have* terminated Majali’s employment based upon performance. To find that performance “would have been reason enough” to terminate is not at all the same as finding that termination would have occurred due to performance.

Alleged falsification

The ALJ found that AirTran had articulated the alleged falsification as its “primary” reason for the termination, but the ALJ agreed with Majali that this reason was “deficient.” R. D. & O. at 38. As the ALJ explained, “O’Sullivan’s allegation [was] not credible,” yet AirTran accepted it without taking steps that would have been “reasonable . . . given the seriousness of the allegation.” *Id.* For example, the ALJ noted, AirTran did not ask Majali to give his reaction to O’Sullivan’s allegation, nor did AirTran ask Drivas or Morrison whether either recalled hearing this information from O’Sullivan. *Id.* (noting that O’Sullivan’s report that she told both Drivas and Morrison was inconsistent both with Drivas’s testimony – which expressly contradicted O’Sullivan’s – and with Morrison’s report, which did not include any such allegation but surely would have if the allegation had been made at the time). Based on this analysis, the ALJ found that the alleged falsification was not a “convincing” reason. *Id.*

AirTran does not appear to contest this finding. AirTran does appear to assert that the ALJ “correctly found” that one of AirTran’s reasons for the termination was the alleged falsification. RB at 14. But this assertion is clearly incorrect. Although the ALJ found that AirTran had articulated (proffered) the falsification as a reason, she never found that the falsification was in fact the reason.

AirTran further argues that the ALJ’s entire discussion of the falsification reason was unnecessary because “the burden never shifted to AirTran to . . . pro[ve]” its falsification assertion. CIB at 14 (arguing that the ALJ thus reviewed this assertion only out of “an abundance of caution”). But although it is true that at this stage AirTran did not have to prove the truth of this assertion, AirTran did have to provide a legitimate and nondiscriminatory reason and then Majali had to show that it was false.¹⁵ Thus the ALJ’s

¹⁵ The ALJ’s discussion of this point was somewhat confusing. After the ALJ determined that Majali had not proven causation either “directly” or through “circumstantial evidence,” she “[a]ssume[ed], arguendo, that [Majali] ha[d] established that his protected activity contributed to the adverse employment actions taken against him” and then proceeded to determine that AirTran “ha[d] *established* that management had legitimate business reasons” for its actions. R. D. & O. at 37 (emphasis added). By using the term “established” and by stating that “the weight of the evidence” supported AirTran’s reason for the suspension, the ALJ suggested that, “arguendo,” she had placed the burden of proof upon AirTran to show that its reasons were true. Of course, a respondent does not have to prove its reasons true but merely must articulate them with sufficient specificity to allow a complainant a full and fair opportunity to prove them false. *See, e.g., Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981) (“The defendant must clearly set forth . . . the reasons for the plaintiff’s rejection . . . [and thus] frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.”). Thus the appropriate inquiry in an initial examination of the respondent’s reasons is whether the complainant has proven any of them false or insufficient to explain the challenged action. If the complainant has done so, then the ALJ must determine whether such proof, in combination with the totality of evidence in the record, shows that protected activity was

discussion was necessary. Moreover, although it is not clear whether by finding this reason “deficient” the ALJ intended to convey that it was not legitimate, or that it was false, the ALJ clearly rejected this reason.

AirTran does not otherwise appear to argue that there was a lack of substantial evidence for the ALJ’s finding that the falsification reason “deficient.” In its most pertinent sections, AirTran’s brief argues as follows:

Blinde indicated that statements made about Complainant’s conduct during the course of the FAA revenue flight investigation led to his termination and as [the ALJ] emphatically found, was [sic] through these statements that Respondent learned of Complainant’s direction to a subordinate to falsify records. (Recommended Decision & Order P. 76 [sic – presumably intended to be 36]). *The substantial evidence shows that it was the attempted falsification, rather than any protected activity, which was the justification for Respondent’s termination of Complainant.*

RB at 9 (emphasis added).

Even if the quoted passage represents an attempt by AirTran to contest the ALJ’s finding, the attempt does not succeed. The italicized sentence – the only sentence in AirTran’s brief that could possibly constitute such an attempt – fails to offer any argument whatsoever in support of its assertion. Although it cites Blinde’s testimony, it does not even attempt to address the key evidence relied upon by the ALJ – for example, AirTran’s failure to ask Drivas, Morrison, or Majali about O’Sullivan’s testimony, or to investigate the allegation in any other way. Therefore, AirTran fails to show that the ALJ’s finding was not supported by substantial evidence.

indeed a contributing factor in the adverse action. Only if the ALJ determines that it was a contributing factor must the respondent show (by clear and convincing evidence, in an AIR 21 case) that it would have taken the adverse actions regardless whether the complainant had engaged in protected activity.

Despite the suggestion inherent in the terminology the ALJ used in beginning her analysis, it is not clear that the ALJ ever actually placed the burden of proof upon AirTran to prove this reason. (There is certainly no evidence that she applied a clear and convincing evidence standard.) Because AirTran does not argue that the ALJ erred in any way, let alone by requiring AirTran to prove this reason true rather than by requiring Majali to prove it false, we need not determine how the ALJ actually applied the burden of proof in examining this reason.

Ten-month absence

Majali argues vigorously that the ALJ erred in “[coming] up with an alternative ground for AirTran’s decision,” namely, that “[i]t is valid for an employer to terminate an employee who has not actually reported to work in ten months.” CIB at 3. According to Majali, “AirTran never argued this alternate ground as a basis for termination.” CIB at 4 (citing pages 58-64 of “AirTran’s Trial Brief” [presumably, AirTran’s post-hearing brief rather than its 13-page pre-hearing brief]).

AirTran does not contest Majali’s assertion that an ALJ must not require a complainant to prove pretextual a reason that a respondent did not ever articulate, and because the proposition has some support in federal case law (and does not affect the outcome of this case) we do not take issue with it.¹⁶

¹⁶ See, e.g., *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1429-30 (5th Cir. 1984) (affirming district court’s reversal of magistrate, and explaining that “appellant . . . argues that the record is replete with nondiscriminatory reasons for [the challenged actions.] . . . It is certainly possible that these facts could be legitimate reasons The difficulty here, however, is that [appellant] never articulated to the magistrate that these were *in fact* the reasons It is beyond the province of a trial or reviewing court to determine – after the fact – that certain facts in the record might have served as the basis for an employer’s personnel decision.”) (emphasis in original), *modified on other grounds on reh’g*, 753 F.2d 369 (5th Cir. 1985); *EEOC v. West Bros. Dep’t Store*, 805 F.2d 1171, 1172 (5th Cir. 1986) (reversing district court judgment, based upon alternate reason created by district court, because “[w]e are concerned with what an employer’s actual motive was; hypothetical or *post hoc* theories really have no place in a [discrimination] suit” and to allow them “would mean that the district court [would] assume [defendant employer’s] burden by creating a non-discriminatory reason”); *IMPACT v. Firestone*, 893 F.2d 1189, 1194 (11th Cir. 1990) (holding, relying upon *Uviedo*, that “there must be evidence that asserted reasons for discharge were actually relied on”); *Bell v. A.T.&T.*, 946 F.2d 1507, 1514 (10th Cir. 1991) (remanding because district court had surmised from testimony of a plaintiff’s witness – and then relied upon – an additional reason not presented by the employer, and explaining that “when the trial court relies on what it considers to be a legitimate reason not articulated by the employer . . . a plaintiff does not have a full and fair opportunity to demonstrate pretext or otherwise contradict the rationale of the district court”); *Smith v. Davis*, 248 F.3d 249, 252 (3d Cir. 2001) (reversing district court’s grant of summary judgment to employer after finding, relying upon *IMPACT*, that defendant’s explanation was not legally sufficient because defendant had not presented evidence that it actually relied upon articulated reason); *Neal v. Roche*, 349 F.3d 1246, 1250 (10th Cir. 2003) (reaffirming *Bell*); see also *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1365 (10th Cir. 1994) (affirming district court’s denial of plaintiff’s motion for judgment as a matter of law because, in part, “[p]laintiffs . . . can point to no evidence . . . that the district court . . . crafted its own reason . . . that [the employer] never proffered”). *Compare Miller v. WFLI Radio Inc.*, 687 F.2d 136, 138-40 (6th Cir. 1982) (where magistrate had developed second reason (additional to well-articulated reason) that employer had not clearly raised, majority remanded to give plaintiff chance to show that second reason was pretext while dissent argued that employee had proven well-articulated reason pretext and thus should prevail). Because we affirm the ALJ’s decision to

AirTran also appears to concede that it did not, in fact, articulate this particular reason to the ALJ. Although it contends to us that the decision to terminate Majali's employment was based not only upon O'Sullivan's allegation but also upon the fact that Majali did not return to work for ten months, AirTran does not argue that it did articulate this ground to the ALJ, nor does it reference any testimony, pleading, or other evidence that any such argument was made. RB 14-16.

In its pre-hearing submission, AirTran certainly did not articulate Majali's ten-month absence as a reason for the termination. See AirTran Airways' Pre-Hearing Brief at 9-10 (stating that "[t]he termination . . . was the result of . . . sworn testimony establish[ing] that Majali directed a subordinate to falsify a document.") (emphasis in original), 10 (arguing that Majali "invoked AIR 21 for the purpose of demanding self-enriching severance").

We recognize that in its post-hearing brief AirTran did state that one reason it "suspended and later terminated" Majali's employment was Majali's "failure to timely return to work after his July 2002 vacation." RPHB at 58. But AirTran explained that by this assertion it meant Majali's absence during July 8-10, and did not make any statement that could be interpreted as a reference to Majali's absence during the next ten months. See RPHB at 62-63 (referring only to the "additional three days off," "the extra days off," "those three days," and "the additional days off").

In a subsequent section of its post-hearing brief, AirTran argued that it "would have suspended and subsequently terminated" Majali's employment regardless of any protected activity. RPHB at 64. Again, however, AirTran made no reference to Majali's ten-month absence and instead referred only to the fact that he "did not come back to work on July 24, 2002 after being specifically directed to do so." RPHB at 64.

Because it is clear that AirTran did not ever articulate as a reason for its actions Majali's ten-month absence, we conclude that there is no evidence supporting the ALJ's finding that AirTran terminated Majali's employment because of that absence.

Failed negotiations

The ALJ did not rely solely upon Majali's ten-month absence in finding that AirTran had not discriminated, however. The ALJ also found that AirTran had given another reason for the termination: that the negotiations for Majali's return had "proved to be fruitless." R. D. & O. at 37.

dismiss the complaint, we need not determine the interaction between these cases and the explanation in *Reeves* that "there will be instances where, although the plaintiff . . . set forth sufficient evidence to reject the defendant's explanation, . . . the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Reeves*, 530 U.S. at 148.

Majali does not argue that AirTran did not articulate this reason. Rather, he argues that the evidence does “not support[]” the ALJ’s finding that the negotiations “were complicated by Complainant’s repeated threats and unreasonable demands.” CIB at 10 (quoting R. D. & O. at 39).

First, Majali argues that the ALJ found him a “credible witness” and that “there is no finding that Majali was not credible in regard to the negotiations.” CIB at 10. But the ALJ’s finding that Majali was generally credible does not cast doubt upon either the fact that the negotiations were fruitless, or the finding that Majali’s demands were unreasonable.

Second, Majali argues that the ALJ did not “specif[y] . . . the basis” for her finding that his demands were unreasonable, and notes that he made his offers in response to Blinde’s request that he “suggest[] . . . a ‘separation package.’” CIB at 10. But it was not the making of the settlement offers that the ALJ found unreasonable, but rather the substance of Majali’s offers – which the ALJ did specify, *see* R. D. & O. at 22-24 (noting, for example, that Majali opened negotiations by proposing “three years of pay, one year of medical benefits, six months of flight privileges, and a letter of recommendation” and that in Majali’s final offer he demanded “reinstatement and compensation of back pay”).

Third, Majali argues that the ALJ failed to discuss in her analysis the facts “that on August 16, 2002 [Majali] had offered to accept reinstatement” so long as AirTran did not impose any conditions upon him, and that AirTran had refused the offer. CIB at 10. Although Majali does not specify what conclusion he would have us draw from any such omission, presumably he would have us conclude from his offer to return that his demands were reasonable and that the failure of the negotiations was AirTran’s fault.

But the ALJ specifically found both that Blinde had “construed [Majali’s] offers to return to work as equivocal” and that as of August 16 Blinde already had reached the “opinion” that “reconciliation” was “unlikely.” R. D. & O. at 39; *see also* R. D. & O. at 23 (Blinde testified that he believed that it would be “fruitless” to allow Majali to return to work). The ALJ also noted in her summary of the evidence that Majali’s August 16 offer to return also raised settlement as an equally desirable option. Moreover, as we noted in the background section, Majali’s offer to return was only valid so long as he was not asked to “sign[] any papers or releases.” Therefore, we conclude that substantial evidence supports the ALJ’s finding that Blinde believed Majali’s demands were unreasonable and rejected them on this basis.

CONCLUSION

Although the ALJ did not find that performance was the basis for the termination, rejected AirTran’s falsification reason outright, and relied upon a reason that AirTran did not articulate, the ALJ also found that Majali had failed to demonstrate that AirTran’s alternate reason – Majali’s unreasonable demands and the consequent failed negotiations

– was a pretext for discrimination. The ALJ was aware that Majali had proven AirTran’s primary reason false, and the ALJ might have determined from that falsity that discrimination was at least a contributing factor in the termination.¹⁷ The ALJ was not required to do so, however, and based upon the totality of the evidence she found that discrimination did not play a part in AirTran’s termination decision. Majali has not shown that this finding was not supported by substantial evidence, so we must accept it – and thus we have no reason not to affirm the ALJ’s decision.

Therefore, we **AFFIRM** the ALJ’s decision and **DISMISS** Majali’s complaint.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹⁷ See *Reeves*, 530 U.S. at 146-47 (clarifying that a false explanation by the employer permits, but does not require, a finding that discrimination played a part in the decision); *Wilson*, 167 F.3d at 1120 (noting that the falsity of one explanation may at times justify judgment for the plaintiff, even if the employer’s other reasons are not proven false). Majali does not argue that the ALJ was unaware that if, appropriate, she could find discrimination based upon the falsity of just one of the Respondent’s reasons.