



ISSUE DATE: 02 FEBRUARY 2011

OALJ CASE No: 2007-AIR-00002

In the Matter of:

MARK VAN,
Complainant,

vs.

PORTNEUF MEDICAL CENTER,
Respondent.

Decision and Order

The Complainant, Mark Van, filed this claim for employment protection against the Employer, Portneuf Medical Center (Portneuf), under § 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ He was fired from his job as the chief helicopter mechanic for the Helicopter Emergency Medical Service (HEMS) program at Portneuf known as Life Flight. He contends he was fired in retaliation for raising concerns repeatedly about violations of FAA flight safety standards in that helicopter air ambulance program. Portneuf re-characterizes his concerns as disputes about pilot management issues² somehow divorced from flight safety. They aren't. This decision orders Portneuf to pay back pay and compensatory non-economic damages for emotional distress. The relationship between the parties is so contentious—even poisoned—by pre- and post-termination events (over and above what litigation inherently generates) that a successful relationship after reinstatement isn't possible. Front pay for two years is awarded instead.

The specific incidents during the fall and winter of 2004–2005 that led to Van's termination involved at least one medical flight made with ice, snow, or frost on the rotors of air ambulance around Halloween of 2004, something FAA flight safety regulations unambiguously forbid. Portneuf adopted a cold weather operation

¹ 49 U.S.C. § 42121 (West 2009).

² *See, e.g.*, Portneuf's Post-Hearing Brief, 62.

policy for Life Flight in December 2004 to January 2005, and modified it later, in large measure due to suggestions from Van. In mid-January 2005 Van received a quite good (though not glowing) performance evaluation from the Director of Emergency Services; just days before he was fired he received a merit salary increase based on that evaluation.

Van found the air ambulance had not been deiced well after the chief pilot had come on duty one morning in early February 2005. This led him to question whether all pilots were taking adequate, routine precautions to ensure that the air ambulance would not fly with ice, snow, or frost on its control surfaces. He related the February incident to the one earlier that winter at Halloween, telling those responsible for the Life Flight program at Portneuf that there was an ongoing problem with cold weather operations. Shortly thereafter Van was harassed at the helipad in late February 2005 by the pilot who flew the air ambulance at Halloween with ice on the rotor blades. Van's complaint about that harassment within the Life Flight program went nowhere, so he took the matter to Portneuf's Human Resources department.

In late March 2005 Van expressed his fear during a regular meeting of the senior leaders of the Life Flight program that lax implementation of the recently adopted cold weather policy affected all those who flew, including the medical staff (nurses and emergency medical technicians) on the air ambulance flights. Individual members of a flight team Portneuf assembled were entitled to decline a flight if they were uncomfortable with the flight for any reason. The Director of Emergency Services told him to drop the issue until she set a special safety meeting to address his concern. Based on the Director's instruction, Van sent an email to members of the Life Flight medical and communications staff alerting them of his concerns and urging their feedback at the impending safety meeting. No such safety meeting occurred, however.

On April 1, 2005, the Human Resources senior staff member convened a meeting with Van, the harassing pilot, the Director of the Life Flight program and its Director of Operations (but not the chief pilot) to address the harassment Van had suffered. Bad feelings were engendered when several of those at the meeting disagreed and expressed strong emotions about whether Van was correct that flight safety was not being taken as seriously as it should. The Human Resources staff member who had convened the meeting says she then decided to investigate Van's ability to work with others in the Life Flight program although she opened no similar inquiry against the harassing pilot, or anyone else at the stormy meeting. On April 19, 2005, shortly after Van had completed an exhaustive inspection regimen on the air ambulance, and worked on modifying the air ambulance and having it certified so that the pilots could use night vision goggles, he was fired. Raising air safety issues kindled the rupture that led to Van's termination.

Van sees himself as an employee who focused unrelentingly on safety after the 2001 crash of Portneuf's helicopter air ambulance made an indelible impression on him. He continued to raise safety issues even when it was uncomfortable to deal with unreceptive managers (the nurse who served as Director of Emergency Services; Life Flight's Director of Operations; and its chief pilot), and the line pilot who ultimately harassed him. Portneuf characterizes Van as a malcontent who also happened to be an accomplished helicopter mechanic. It argues he came to distrust the hospital administration (primarily those same three program managers), who he thought covered up safety-related shortcomings and weren't held accountable for them. Portneuf says his deteriorating, antagonistic relationships with these Life Flight colleagues that had built up over years, and an inability to accept solutions to the safety and other issues he raised when they weren't the ones he preferred, ultimately threatened the cohesion of the overall Life Flight staff. This was reason enough, Portneuf says, to let him go. In the main I accept Van's version of the facts, and find the explanation Portneuf offered for terminating Van inconsistent with contemporaneous documents. They paint a different picture that exposes Portneuf's explanation as a pretext for invidious discrimination. Van is entitled to a remedy.

Section I of this decision introduces the parties and the individuals who played pivotal roles in this matter. Section II is a prologue on the dangerous nature of helicopter air ambulance services, shown by recent report of the National Transportation Safety Board, a history of two air ambulance crashes (one without injuries and one only miraculously not fatal), and ongoing serious safety shortcomings at Portneuf. Section III offers an overview of the statute and regulations that set the framework for AIR 21 whistleblower protection claims. These laws give context to the facts set out in Section IV that show the protected activities Van engaged in were well known to Portneuf managers, and contributed to the hospital's decision to fire him. Section V considers and rejects the narrative Portneuf offered as its proof that it would have fired Van even in the absence of any activities AIR 21 protects. Section VI considers the appropriate remedies to redress the employment discrimination. Section VII orders Portneuf to take specific actions.

I. The Parties

Portneuf had been a local entity of Idaho government; it ultimately has become a non-governmental entity.³ This claim arises out of air carrier certificate

³ Portneuf Medical Center came into being in 2002 when Bannock Regional Medical Center and Pocatello Regional Medical Center merged. Tr. 50. Life Flight had been a program at Bannock. For purposes of this decision, all references to the hospital before 2002 will be to Portneuf, although strictly speaking Bannock was the operating entity. Portneuf converted in 2009 from a county-owned facility to a medical center jointly owned and operated by LHP Hospital Group, Inc. and the Portneuf Health Care Foundation. In a November, 2008 general election, voters in Bannock County, Idaho approved placing the assets of Portneuf Medical Center into a joint venture. Portneuf Health Care Foundation, Inc. owns a minority share of the new joint venture, but governance of Portneuf Medical Center is on a 50-50, "block voting" basis.

BRMA591C the FAA issued to the Board of Directors of Portneuf Medical Center under Title 14, Code of Federal Regulations, part 135⁴ for the Life Flight air ambulance program, an activity the FAA regulates.

Within the hospital, all positions in the Life Flight program report to the Director of Emergency Services. For nearly all the times relevant to this complaint, that person has been a senior R.N., Pam Holmes, who for some portion of the time also had been known as Pam Humphrey. The member of Portneuf's Human Resources staff who recommended and handled Van's termination was Audrey Fletcher.

The FAA requires certificate holders under part 135 to designate individuals responsible to fulfill the duties FAA regulations describe for three positions: a Director of Operations, a chief pilot, and Director of Maintenance.⁵ Portneuf designated Gary Alzola as its Director Operations and Ron Fergie as its chief pilot.

An experienced helicopter mechanic who holds an FAA mechanic certificate with airframe and powerplant ratings, Mark Van was first employed by Portneuf in 1985 on a contract basis as its part 135 Director of Maintenance. He became a full time hospital employee in that role in 1986. Until the fall of 2004, he was Portneuf's only full-time mechanic, who supervised other part-time mechanics who worked on the air ambulance. To carry out his role he also received training directly from the manufacturer of the air ambulance, oversaw aspects of maintenance contracts Portneuf negotiated with the manufacturer, arranged to take the aircraft out of service to inspect and maintain the complex systems within it at the required intervals, purchased and replaced parts, and budgeted for maintenance.

II. Safety Incidents in HEMS Services in General and at Portneuf in Particular

HEMS services are inherently dangerous, as a recent National Transportation Safety Board report highlights, and Portneuf's loss of its Life Flight air ambulance in 2001 well exemplifies. That crash led Van to be highly safety conscious. Criticism Van encountered in the local community engendered in part by statements the hospital made about the 2001 crash that the hospital wouldn't correct damaged Van's relationship with Life Flight's Director of Operations, Gary Alzola. Portneuf ultimately seizes on the rocky relationship with Alzola as part of its justification for Van's termination.

A. HEMS Generally

⁴ Ex. 50, pg. 2; see also Tr. 591, 652. Aspects of flights with no passengers are governed by the FAA's less stringent part 91 regulations. Tr. 1502-03, 1540.

⁵ 14 C.F.R. § 119.69.

HEMS are expensive services. The hospital must buy a helicopter; modify it for medical transport as an air ambulance; employ pilots to fly it, medical crew to staff it, mechanics to maintain it; and dispatch staff to coordinate flight requests; train the pilots and other staff continually; and fund associated support costs. These costs can easily reach into millions of dollars per year.⁶

HEMS transport of seriously ill patients and donor organs to emergency care facilities, often from remote areas not served by sophisticated medical facilities, are fraught with danger. Calendar year 2008 was especially deadly. Twelve accidents (8 of them fatal with a total of 29 fatalities) occurred in aircraft dedicated to or configured for air medical operations piloted by an EMS crew. The spike in fatalities prompted the National Transportation Safety Board to investigate and issue a report in September 2009 that recommended several changes to HEMS programs throughout the county. None of those recommendations are directly implicated here, but the report highlights the need for constant vigilance in HEMS programs on the topic of safety. The 2009 NTSB report recognizes that HEMS operations “are unique and complex, mixing highly advanced medical care with the technical challenge of safely operating helicopters 24 hours a day.”⁷ It also concluded that “the pressure to conduct these operations safely and quickly in various environmental conditions (for example, in inclement weather, at night, and at unfamiliar landing sites for helicopter operations) increases the risk of accidents when compared to other types of patient transport methods, including ground ambulances or airplanes.”⁸

B. Incidents at Portneuf

1. The Winter 1993 Landing in Traffic When the Engines Flamed Out After Ingesting Ice

Portneuf’s own program has had two serious HEMS incidents, in 1993 and 2001. The later one figures more prominently in this case. In January 1993 around the lunch hour its air ambulance made an emergency landing on a city street near the hospital just after it had taken off, and slid across four lanes of traffic.⁹ Both the compressors (for the number one and the number two engines) had been damaged. Snow and ice had gone through both engines and flamed out the left engine and damaged the compressor blades on the right engine.¹⁰ The pilot had neglected to turn the continuous ignition on, which caused the engine to flame out when a chunk

⁶ NTSB Safety Recommendation A-09-104 through -107 (Sept. 29, 2009) at 4. http://www.nts.gov/recs/letters/2009/A09_104_107.pdf.

⁷ Id. at 2.

⁸ Id. at 2.

⁹ Tr. 30.

¹⁰ Tr. 31.

of ice that should have been removed from the cabin roof before take off was sucked into the air intake.¹¹

2. Ongoing Problems in Cold Weather Operation

Dealing with ice, snow, and frost on the air ambulance had been an ongoing issue in the Life Flight program. Life Flight's air ambulance had no hanger, and southeast Idaho winter weather can be severe. A failure to remove ice and snow from the air ambulance had contributed to the 1993 landing on the city street when the engines flamed out (along with that pilot's failure to engage the continuous ignition). Gordon Roberts, who directed the Life Flight program until 2002 (when Holmes was the chief flight nurse) testified about Van's ongoing efforts while Roberts was there to have pilots put the covers on the rotor blades before there was rain, snow or ice.¹² Roberts believed "absolutely" this involved a safety issue because "you wouldn't want to go out and fly in a helicopter that was covered with ice, or even chunks of ice that you might miss on the blades."¹³

3. The 2001 Crash Itself and Problems it Engendered Within Life Flight

a. The Crash

On a weekend flight back to Portneuf in mid-November 2001, trouble that developed with the air ambulance's fuel system led the pilot, Tim Brulotte, to telephone Van before he took off from Salmon, Idaho. Later Brulotte had to set the aircraft down in a remote valley near Leadore, Idaho because he hadn't had enough fuel in the spare fuel tank to complete the return leg of the trip.¹⁴ Van and his high school age son then drove to the landing site in Van's truck with fuel and equipment. He removed the fuel from the aircraft, changed both fuel pumps for its main tank, and refueled it.¹⁵ By then it was about midnight, and quite dark in the moonless valley. The pilot by then had been on duty for 17 hours.¹⁶

As Van was pulling away after the pilot took off, he saw in the distance two bright flashes. Two miles away they came upon a fire on a hill. Having lost his horizon, the pilot had flown into the hill.¹⁷ With flashlights he and his son found the mangled wreckage of the air ambulance. They searched, and found Brulotte had

¹¹ Tr. 33-34, 38.

¹² Tr. at 1246.

¹³ Tr. at 1247.

¹⁴ Tr. 41.

¹⁵ Tr. 42.

¹⁶ Tr. 576.

¹⁷ Tr. 46.

managed to unstrap himself from his seat and crawl some distance away although he had been severely hurt (he lost a foot from his severe injuries) because of the fires around the wreckage and down the back of the ridge line. Van located the aircraft's still-clicking ignition system and disconnected the battery to reduce the danger of more explosions or fire. He and his son managed to get the critically injured pilot to the top of the hill in a stretcher. As his son went back down to the road to flag down any traffic, Van located the satellite phone among the wreckage. He used it to call Portneuf's dispatch center for help, which contacted paramedics from Eastern Idaho Regional Medical Center, who arrived at about 3 a.m.¹⁸

Rescuing the pilot and seeing the crash and the wreckage caused Van to become even more safety conscious thereafter.¹⁹

b. Portneuf's Press Releases and Related Statements Cause Some of the Public to Blame Van

A press release and statements the hospital issued after the crash caused Van trouble in the community, and ultimately set up a situation that caused hard feelings between Van and Life Flight's director of operations, Gary Alzola. Portneuf's press release said the air ambulance was "returning" "after experiencing mechanical problems."²⁰ The talking points the hospital prepared for the press conference the next day said "a mechanic was dispatched to assess the extent of the problem and to make repairs. At approximately 1:00 a.m. the dispatch at [Portneuf] was notified that it was believed the helicopter went down . . ." ²¹ A local newspaper then quoted the hospital's spokesperson as saying "the mechanic felt certain the helicopter was OK . . . so (Brulotte) went back up . . . and crashed between 1 and 1:30 in the morning."²² The chronology in these statements from the hospital would invite a reader to infer that mechanical problems preceding the crash caused the crash.

Members of the community made exactly those inferences. An individual at a ski lift asked Van "did they fire you?" and told him "I think they should fire you."²³ Diane Kirse, who briefly directed the Life Flight program after the crash, told him that "a lot of people are saying a lot of horrible things about you."²⁴ His son was told at school, "I heard your dad made the helicopter crash"²⁵ and later he heard

¹⁸ Tr. 41 to 45.

¹⁹ *See, e.g.*, Tr. 53.

²⁰ Ex. 112.

²¹ Ex. 114.

²² Ex. 115.

²³ Tr. 47.

²⁴ Tr. 47.

²⁵ Tr. 428, 435.

someone say to his father when the replacement aircraft arrived at the Avcenter in Pocatello “are you going to make this one crash also?”²⁶ The wife of Portneuf pilot Chad Waller, who worked as a hair stylist, heard 2 or 3 people at her shop ask whether that the crash was the result of maintenance.²⁷ This community feeling distressed Van.

Van asked the hospital to make an additional release, not to blame the pilot, but to clarify the hospital’s own earlier releases, so it would be understood that maintenance hadn’t caused the accident.²⁸ The pilot acknowledged that the helicopter had been running fine when he took off, and his crash had nothing to do with maintenance; he had lost his horizon.²⁹ Alzola and the chief pilot, Ron Fergie, adamantly opposed to any such release,³⁰ although the pilot himself wasn’t opposed. Alzola went so far as to tell Van, in response to Van’s complaint that he and his family were taking heat for the accident: “Well, its [sic] your job,”³¹ and told Gordon Roberts, who at the time of the crash directed the Life Flight program: “It’s Mark’s job and that he needs to suck it up”³² as if Van should expect to be unfairly blamed. The hospital’s spokesperson contacted Alzola about Alzola releasing the clarification Van wanted, but Alzola informed her that: the “FAA told me I couldn’t release information while the accident was under investigation.”³³

Van initially accepted Alzola’s statement that controlling law blocked any further clarification by the hospital. He eventually asked Alzola who at the FAA had told Alzola to release no information, because when government investigators questioned Van about the crash, no government official had suggested to Van that he should refrain from making statements about the investigation.³⁴ Alzola then admitted to Van, “Well, nobody really told me. That’s just—that’s just FAA policy.”³⁵

²⁶ Tr. 429.

²⁷ Tr. 1593–94. *See generally* Tr. 982.

²⁸ Tr. 1240.

²⁹ Tr. 1234 -1235, 1237–38.

³⁰ Tr. 1236, 1239.

³¹ Tr. 58. Alzola agrees he said something of the kind to Van. Tr. at 638.

³² Tr. 1236.

³³ Tr. 68.

³⁴ Gordon Roberts, the director of Life Flight who was interviewed as part of the government’s crash investigation, confirmed that no government investigator counseled him to refrain from public statements. Tr. 1240.

³⁵ Tr. 69. Alzola’s testimony doesn’t directly contradict this; he agreed he told Van that FAA regulations blocked the air carrier from releasing information on an accident while it was under investigation. Tr. 580.

No FAA policy forbids an air carrier from releasing information during an FAA or NTSB investigation.³⁶ An air carrier's risk management or legal departments decide what information to release; they typically decline to do so for reasons of their own.³⁷ Van was upset that Alzola had misrepresented governing law in an effort avoid having the hospital give a further public statement that Alzola feared might raise suspicion that a brother pilot could be responsible for the crash.³⁸ Doing so effectively scapegoated Van.³⁹ Van filed a grievance with Portneuf about what Alzola had done,⁴⁰ although nothing came of it.⁴¹ Alzola's misrepresentation made Van less willing to accept Alzola's pronouncements about what FAA regulations require, with good reason.

III. Section III. Elements of a Complaint Under the AIR 21 Act

The Secretary's regulation that implements the anti-discrimination provision found in § 519 of AIR 21⁴² 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:

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.⁴³

³⁶ Tr. 1748.

³⁷ Tr. 1748.

³⁸ Roberts made clear that Alzola "definitely did not want the pilot to be blamed for anything." Tr.1236. The same was true of Fergie. Tr. 1235.

³⁹ Tr. 69.

⁴⁰ Ex. 245.

⁴¹ Ex. 3.

⁴² Codified as 49 U.S.C. § 42121(a).

⁴³ 29 C.F.R. § 1979.102(b)(1) (2009).

The proof of employment discrimination is analyzed using a pattern the Energy Reorganization Act⁴⁴ pioneered. The Administrative Review Board applies a two part test to determine when a remedy is available. Van succeeds at the first step if he “demonstrates”⁴⁵ (*i.e.*, proves by a preponderance of the evidence) 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”⁴⁶ in Portneuf’s decision to fire him.⁴⁷ At the second step Portneuf 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.”⁴⁸ Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”⁴⁹ Portneuf told Van at the time that he was being fired for an “inability to maintain positive interpersonal relationships with your colleagues and foster a positive team environment.”⁵⁰ Disbelieving the reasons Portneuf has given as its explanation for the firing justifies an inference that it intentionally retaliated against Van for two reasons. Under general principles of evidence, a party’s dishonesty about a material fact can be treated as affirmative evidence of guilt.⁵¹ 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.⁵²

Portneuf’s air carrier certificate from the FAA makes it an employer AIR 21 covers. Van 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;

⁴⁴ 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).

⁴⁵ 29 C.F.R. § 1979.109(a).

⁴⁶ 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. at 250 (where the Court phrases the test in terms of sex discrimination rather than whistleblower discrimination).

⁴⁷ 49 U.S.C.A. § 42121(b)(2)(B)(iii).

⁴⁸ 49 U.S.C.A. § 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);

⁴⁹ *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.

⁵⁰ Ex. 21 (the termination letter Portneuf wrote); *see also* Tr. 231.

⁵¹ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146–48 (2000).

⁵² *Reeves*, 530 U.S. at 146-148; *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004).

2. Portneuf knew of the protected activity;
3. Portneuf subjected him to an adverse action (which termination certainly is); and
4. His protected activity was a contributing factor to his termination.⁵³

Section IV discusses the proof that has led me to conclude that Van succeeds at this first step, and is entitled to relief unless Portneuf shows by clear and convincing evidence that it would have fired him even in the absence of any protected behavior. Portneuf's effort to do so, discussed in Part V, comes up short.

IV. Van Demonstrated He is Entitled to Employment Protection

One of Van's four protected activities was raising complaints about the Life Flight program's ongoing failure to treat accumulations of ice, snow, and frost on the air ambulance as seriously as it should. Two specific incidents raised the issue; the first was a flight that took off with ice on the main rotor blades of the air ambulance around Halloween of 2004, in violation of FAA regulations. The pair of incidents that winter (the second occurred in early February 2005, but involved a pilot's failure to deice the air ambulance at the beginning of his shift, not an actual flight with ice on control surfaces) also raised doubts about the effectiveness of the Life Flight program's cold weather operations policy. The second protected activity was Van's attempt to bring these matters to the attention of the Life Flight staff as a whole, without limiting them to certain managers. The third protected activity arose from a harassment complaint Van made. Van's concern over the issues of ice, snow, and frost led the pilot who had flown at Halloween with ice on the rotor blades to confront Van at the helipad in an angry and threatening manner. Van complained about this intimidation to Life Flight's managers and to Portneuf's Human Resources office. The fourth protected activity was the challenge to Fergie's honesty Van made at a Life Flight Leadership Meeting on March 24, 2005, for having minimized the Halloween incident as nothing more than frost on the rotor blades. All were matters Van raised in his amended complaint.

Portneuf knew about each of these protected activities, and they never lost their protected character. Firing Van is an adverse action that the Act can remedy. Portneuf fired him soon after he raised the protected matters, under circumstances lead me to infer intentional discrimination. The facts discussed in Part V of this decision, which considers the reasons Portneuf's offered for the termination, bolster the conclusion of retaliation.

⁵³ *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).

A. Van's Protected Activities

1. The Ongoing Problems with Ice, Snow, and Frost

Van's complaints about ice, snow, and frost on the air ambulance related specifically and directly to an FAA regulation that forbids its operation with ice, snow, or frost on any rotor blade or the control surfaces: 14 C.F.R. § 135.227(a).⁵⁴

October 30 or 31, 2004 when he arrived in the morning, part-time mechanic Gary Stoltz found ice and snow on the air ambulance. After he had deiced two of the four main rotor blades, he turned the two remaining blades into the sun. He went to look for the day pilot, Barry Neilsen, to tell him the aircraft was out of service and to ask if there were any other matters that required Stoltz' attention. He could not find Neilsen, so he left a cell phone message for him. When Stoltz arrived back at the helipad Neilsen had taken off on a mission, more probably than not with ice still on the main rotor blades.⁵⁵ Stoltz informed Van of the incident the next day.⁵⁶

Shortly after the flight with the icy rotor blades (in November 2004) Alzola began to create a new cold weather operations policy for Life Flight.⁵⁷ On December 3, 2004 Van emailed the chief pilot, Ron Fergie, five pages of recommendations for that cold weather policy, many of which related to problems that led to Neilsen's Halloween flight with ice on the rotors. Van specifically suggested that the Life Flight dispatch staff, which already was monitoring temperature, notify the pilots of weather changes during their shifts that could lead to ice and snow on the aircraft.⁵⁸

⁵⁴ Under that FAA regulation "(a) *No pilot may take off an aircraft that has frost, ice, or snow adhering to any rotor blade, propeller, windshield, wing, stabilizing or control surface, to a powerplant installation, or to an airspeed, altimeter, rate of climb, or flight attitude instrument system,*" except in special situations that do not apply here. (emphasis supplied). Life Flight's Director of Operations, Gary Alzola, acknowledged that "it is a violation to fly a helicopter with ice on, on the rotor blades . . ." Tr. at 602. See also the testimony of Portneuf's expert witness Wisecup at Tr. 1691 (the rules are very clear that you can't fly with ice, snow, or frost adhering to the control surfaces); 1720 (if there is snow and ice on the aircraft, it is not safe to fly, it is unairworthy); and 1738 (the pilot could have no snow, or ice, or frost when he takes off).

⁵⁵ Tr. at 168. The air ambulance's hour meter failed to function properly early in that flight, but worked fine later. Stoltz attributed the problem to ice on the switch, because nothing was wrong when the aircraft returned. See Ex 14. This additional evidence of the presence of ice on the flight adds to my conclusion Neilsen took off with ice on the rotors, notwithstanding Portneuf's countervailing proof that no damage was found from ice flung from the rotor blades, nor did the crew report unusual vibration when the aircraft lifted off. See Tr. 601-02.

⁵⁶ Tr. at 168.

⁵⁷ Tr. at 169.

⁵⁸ Tr. at 170-73, 1008-09; Ex. 32; Ex. 220.

Van also talked to Fergie about the Halloween ice-on-rotor flight around that time, five to six weeks after it occurred.⁵⁹ Van had been reluctant to raise it with Alzola. Since Alzola's flight schedule was switching from days to nights, he talked to Fergie instead.⁶⁰ On the same day, Fergie spoke to Stoltz to get more details.⁶¹ Sometime later Van followed up with Fergie by phone and found out Fergie thought the Halloween incident was "nothing."⁶²

At a safety meeting Fergie called on January 17, 2005 that Van and Holmes attend, Holmes asked about the cold weather policy. Fergie said it had been taken care of.⁶³

The evening of January 31, 2005, Fergie saw Chad Waller on the helipad, who was coming on duty for the night shift, as Fergie was returning from a flight on the day shift. As they put blade covers on the rotor blades during a wet snow, Waller wiped the rotor blades down before he put a blade cover on.⁶⁴ Fergie took a slipshod approach, telling Waller "we don't need to do that, the blade covers will knock the snow off."⁶⁵ This could cause ice to form beneath the cover (as it did that night) and could also cause the covers to freeze to the blades.⁶⁶

The next morning, February 1, 2005, at 8:45 a.m. Van arrived at the helipad, where he found ice and snow on the air ambulance beneath the blade covers, which took him 45 minutes to remove, using a 440,000 BTU kerosene heater to melt the ice and snow off the blades.⁶⁷ The day pilot, Fergie, already should have dealt with the ice when Fergie did his inspection when he came on duty at 7:00 a.m.⁶⁸ Van contacted dispatch and took the aircraft out of service to deal with the ice.⁶⁹ When Fergie returned to the helipad, Van challenged Fergie, asking why he had put the blade covers over snow.⁷⁰ At 11:53 a.m. that morning Van emailed Alzola and Holmes about this most recent ice-on-blades incident.⁷¹ By 2:45 p.m. Holmes

⁵⁹ Tr. at 2246-47.

⁶⁰ Tr. at 168.

⁶¹ Tr. at 2253.

⁶² Tr. at 169.

⁶³ Tr. at 183-84.

⁶⁴ Tr. at 1607.

⁶⁵ Tr. at 1608; *see also* 174.

⁶⁶ Tr. at 173-74.

⁶⁷ Tr. at 174, 178-79; Ex. 15; Ex. 259.

⁶⁸ Tr. at 175.

⁶⁹ Tr. at 174.

⁷⁰ Tr. at 174.

⁷¹ Ex. 15.

emailed Van to let him know she is “taking this seriously” and offered both excuses and possible suggestions about what might be added to the newly adopted cold weather policy to avoid future problems.⁷² Holmes said Fergie returned without a crew and had no one to assist with de-icing; which was misleading to the point of inaccuracy. There may have been no other crew aboard the air ambulance when Fergie returned, but Fergie wasn’t dealing with the air ambulance by himself. Waller helped Fergie, who dissuaded Waller from properly wiping the wet snow from the blades before the covers were put in place.

More than two weeks later, on February 17, 2005, Alzola followed up on Van’s February 1 email; Holmes, pilots Fergie, Waller, Neilsen, and Ford also received that message.⁷³ Alzola explained he wanted to take the opportunity to talk to the pilots about the incident first, and then tried to pull rank on Van, saying: “We appreciate advice and information from the mechanics and crew member in regard to any condition or situation that may affect aircraft airworthiness. However, only the P[ilot] I[n] C[ommand] has the responsibility and authority to determine aircraft airworthiness. Please consult with the pilot and explain your concerns. If necessary, he will take the aircraft out of service.”⁷⁴

Alzola’s response was an unpleasant overreaction, especially because it said only the pilot in command could determine aircraft airworthiness.⁷⁵ Van emailed a response the following Monday, February 21, 2005, and copied Holmes.⁷⁶ In this email he referred to the icy rotor blade flight on Halloween as a similar incident.⁷⁷

Van’s complaints about the ongoing shortcomings in Life Flight’s compliance with the FAA regulation that forbade takeoffs with ice on rotor blades or control surfaces or the air ambulance were protected.⁷⁸

2. Van’s Efforts to Inform the Life Flight Team About the Issues of Ice, Snow, and Frost

Van emailed Holmes on February 23, 2005, 9:05 a.m., apparently “declining” the invitation to the February 28 “Ice on Blade Discussion and Resolution” closed safety committee meeting.⁷⁹ Van contended the “Ice on Blade” issue “belongs to the

⁷² Ex. 16.

⁷³ Ex. 16.

⁷⁴ Ex. 16.

⁷⁵ Tr. at 174–75, 180; Ex. 16; Ex. 17; Ex. 218.

⁷⁶ Tr. at 182–83; Ex. 17; Ex. 218.

⁷⁷ Tr. at 182–83; Ex. 17; Ex. 218.

⁷⁸ See Van’s Amended Complaint, 19 ¶¶ L, M and N, 20 ¶ O.

⁷⁹ Ex. 217 at PMCFD020. It’s possible Holmes may have declined Van’s suggestion of the meeting instead, but the information in the subject line isn’t entirely illuminating).

team” and wants to invite “Tom [the chief flight nurse], Dr. Sandy [the flight physician], Ann McCarty [the senior dispatcher,] and anyone else interested”⁸⁰

The meeting went forward with only Holmes, Alzola, Fergie and Van there. They amended Life Flight’s cold weather policy again, in the way Van had advocated, to require the pilots wipe the blades down before installing blade covers.⁸¹ During the discussion Van brought up the five-pages of suggestions he’d sent to Alzola on December 3, 2004.⁸² Alzola remained adamant that only a pilot could take the aircraft out of service, and Van again expressed desire to have an open forum to discuss with the entire leadership team the policy that only the pilot could take the aircraft out of service.⁸³ Alzola refused, saying flying with ice on the blades was between the pilots and the FAA.⁸⁴ During that meeting Fergie claimed that the Halloween incident didn’t involve a flight with ice on the rotor blades, it was “just frost.”⁸⁵ Fergie’s effort to minimize what had occurred led Van to ask Stoltz to write a memo explaining what took place, which Stoltz did.⁸⁶ But Fergie’s distinction is not meaningful, for the FAA regulation also forbids flying with “frost . . . adhering to any rotor blade.”⁸⁷

The other members of the program Van wanted to involve had a direct reason to know about the ongoing problem with ice, snow, and frost on the air ambulance as part of air medical resource management. The personal safety of the medical staff was at risk if a pilot violated the FAA prohibition on flying with ice, snow, or frost on a control surface. More importantly, however, all were decision makers with regard to flights. Portneuf followed the industry standard procedure of “Four to go, one to say no.” This meant that if any member of an individual flight team felt uncomfortable with an aspect of a flight that was offered to the Portneuf program (for example, if someone thought the weather they would be flying into was too dangerous), the members of that flight team would discuss the concern, and if everyone wasn’t comfortable, the flight would be declined. Each of the flight team components (the pilots, nurses, paramedics, and communications/dispatch specialists) had the right to veto a flight.⁸⁸ That would extend to making sure the

⁸⁰ Ex. 217.

⁸¹ Tr. at 191. The amendment to the policy is reflected in Ex. 216, on March 1, 2004.

⁸² Tr. at 172.

⁸³ Tr. at 186.

⁸⁴ Tr. at 189.

⁸⁵ Tr. at 191.

⁸⁶ Tr. at 191. Stoltz wrote that memo, Ex. 14, on March 3, 2005.

⁸⁷ 14 C.F.R. § 135.227(a).

⁸⁸ According to the expert testimony of James Wisecup:

It started out “Three” being the Pilot, the Nurse, and the Paramedic, or the Pilot, the Nurse, the Nurse. It’s been expanded, and then a lot

air ambulance did not take off unless its rotors and control surfaces were free from ice, snow, and frost as the FAA regulations demand.

Alzola had overstated the pilot's authority when he asserted in his email that only the pilot in command may take an aircraft out of service.⁸⁹ The pilot in command's authority is asymmetric. If everybody says "yes" to a flight but the pilot says "no," then under the FAA regulation the answer is "no," and the pilot's professional judgment cannot be questioned by management.⁹⁰ But he isn't the sole decision maker.

It also would have made sense to have someone from dispatch at the February 28, 2005 meeting, because one of Van's proposals was to have the dispatch staff, that had a TV camera monitoring the air ambulance 24 hours a day, notify the pilot on duty of changing weather conditions, such as snow or ice, that would bear on the air ambulance's readiness to fly.⁹¹

There is a further reason it was odd that the amendment to the cold weather policy wasn't taken up at a full meeting of the safety committee. Fergie started the safety committee in 1999 or 2000,⁹² shortly after he was hired at Portneuf. There had been no existing safety committee, the program needed one, so he formed a committee "made up of somebody from every aspect of what we do."⁹³ Despite this insistence that all aspects of the Life Flight team were represented, Fergie explained that Van was "invited" to the meetings, but his name wasn't on the list (*i.e.*, he wasn't a named member of the committee).⁹⁴ Van attended meetings because they were open to anyone on the Life Flight team. Everyone knew that everyone was invited, according to Fergie.⁹⁵ Despite Van's absence from the official committee list, Fergie didn't think Van was specifically excepted or exempted from

of places say, "Four to go, and one to say no." And then they want to include the Communications Specialist. And pretty soon it's just—it's basically because everybody's got a veto power [over a given flight].

Tr. 1815; *see also* Tr. 1814.

⁸⁹ The FAA regulation at 14 C.F.R. § 91.7(b) says: "(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur."

⁹⁰ Tr. 1817.

⁹¹ Tr. 172.

⁹² Tr. at 2259.

⁹³ *Id.* at 2259–60 (direct quote at 2260).

⁹⁴ *Id.* at 2262.

⁹⁵ *Id.*

the committee.⁹⁶ He also couldn't recall if Van attended meetings early in the committee's existence.⁹⁷

This is curious. Fergie said the committee had people from all areas of Life Flight, which necessarily would include maintenance. Yet Van wasn't a named committee member, despite being the only regular, full-time maintenance employee, which suggests maintenance wasn't actually represented on the committee. Portneuf (perhaps acting through Fergie to chose or name committee members, although how someone was appointed isn't clear) added Dave Perkins to the committee when he was hired, which—assuming Fergie meant when Perkins was hired full-time—was not until November 2004. This suggests some desire to not hear safety concerns and complaints from Van, who was vocal and aggressive about pursuing them (possibly more vocal and aggressive than other Life Flight members) even before the disastrous 2001 crash. This also tends to support Van's contentions that everyone in the Life Flight program should be aware of safety issues and have a say. If the meetings were actually open to everyone in the program and everyone was welcome, there was no reason for consternation when Van wanted the flight nurses, paramedics and communications staff to know about his concerns. The supposedly open nature of the safety committee contrasts sharply with Portneuf's attempts to restrict Van's safety complaints to safety meetings, and its discomfort and displeasure when he emailed other Life Flight staff about his safety concerns.

His efforts to communicate his safety concerns broadly within the Life Flight program was protected.⁹⁸

3. Van Objects after Neilsen Intimidates and Harasses Van at the Helipad

Before the closed safety committee meeting to amend the cold weather policy, Fergie had apparently shared Van's earlier email about the Halloween icy rotor blade flight with Neilsen.⁹⁹ On Friday, February 25, 2005 at about 11:35 a.m. Neilsen accosted Van angrily at the helipad, asking Van "Are your trying to make the program go down the crapper? I'm tired of all these emails flying around."¹⁰⁰ When Van said he didn't know what Neilsen was talking about, Neilsen stomped off, slammed the helipad gate and told Van in a loud voice: "Well, you're going to find out."¹⁰¹

⁹⁶ *Id.* at 2263.

⁹⁷ *Id.*

⁹⁸ *See* Van's Amended Complaint, 20 ¶ Q.

⁹⁹ Tr. at 193–94.

¹⁰⁰ Tr. at 193

¹⁰¹ Tr. at 193.

Van felt threatened.¹⁰² By 12:11 p.m. Van emailed Holmes about how the confrontation distressed him.¹⁰³ The following Monday Holmes responded to Van's harassment complaint and asked if he wanted to forward the issue to Alzola, or if she should handle it. Holmes stated "I think this type of behavior is unacceptable. I am sorry this happened to you."¹⁰⁴ Van asked Alzola "later" if he could do anything about the confrontation / harassment issue.¹⁰⁵ Neither Holmes nor Alzola ever did anything to address the issue with Neilsen.¹⁰⁶ The AIR 21 regulations forbid an air carrier from intimidating or threatening an employee for making complaints about violation of air safety regulations.¹⁰⁷ Portneuf didn't cause the intimidation by Neilsen, but once Van brought it to the air carrier's notice, it was obliged to put a stop to it.

Van brought the matter to Audrey Fletcher of Portneuf's Human Resources Department during a conversation on Portneuf's sky bridge on March 24, 2005 in and asked if she knew about it.¹⁰⁸ Fletcher didn't want to discuss such a sensitive issue in a public place, so she asked him to send her an email detailing the incident, which Van did.¹⁰⁹ Van explained he'd talked to Alzola about the harassment, and Alzola didn't think Neilsen would talk to Van "on his own."¹¹⁰ Van asked Fletcher to arrange a meeting with Neilsen to clear the air, and indicated he wanted to "go over some related safety issues with HR before the meeting."¹¹¹

Fletcher replied to Van saying "I am sorry to hear of this incident".¹¹² She asked if Van knew what Neilsen meant by "you will find out" and asked who else from the Life Flight program should be present.¹¹³ Van told Fletcher he didn't know what Neilsen meant, but that Holmes had said the behavior was "unacceptable"

¹⁰² Tr. at 193-95.

¹⁰³ Tr. at 193-95; Ex. 166.

¹⁰⁴ Ex. 166 at PMC000653.

¹⁰⁵ Tr. at 196.

¹⁰⁶ Tr. at 196.

¹⁰⁷ 29 C.F.R. § 1979.102(b).

¹⁰⁸ Tr. at 2680.

¹⁰⁹ Tr. at 2680.

¹¹⁰ Ex. 189 at PMC001382.

¹¹¹ Ex. 189 at PMC001382.

¹¹² Ex. 189 at PMC001382.

¹¹³ Ex. 189 at PMC001382.

during the February 28 meeting.¹¹⁴ Van wanted to talk to Neilsen to put the harassment “behind him” and make sure Neilsen didn’t harbor “ill feelings.”¹¹⁵

On March 25, 2005, at 9:57 a.m. Van emailed Fletcher a memo that described Neilsen’s harassment and its context, including the Halloween ice-on-blades flight.¹¹⁶

Van’s complaint about being harassed for bringing up the Halloween flight in the context of ongoing problems with cold weather operations that winter was protected. Fletcher eventually convened a meeting on April 1, 2005 that included Holmes, Neilsen, Alzola and Van to address the harassment. The matters discussed there in Fletcher’s attempt to put a stop to the harassment, and Van’s safety concerns that came up in that context were protected.

Van’s complaint about the harassment by Neilsen was protected activity.¹¹⁷

4. The March 24 Life Flight Leadership Meeting and its Fallout

At Life Flight’s Thursday, March 24, 2005, Leadership Meeting, Van wanted to bring up how Fergie handled the Halloween icy blade flight issue—specifically how Fergie “alter[ed] safety witness information”¹¹⁸ by saying Stoltz told him it was only frost, on the air ambulance when Stoltz really had told Fergie there had been snow and ice, but Fergie didn’t attend that meeting.¹¹⁹ Holmes “cut him off” and said there would be a special safety meeting to discuss the issue.¹²⁰ That same day after the leadership meeting there was a Life Flight safety committee meeting at which Fergie gave a “safety speech” that particularly irked Van given the apparent hypocrisy in the speech’s content.¹²¹

The following day, Friday March 25, 2005, at 1:57 p.m., Alzola emailed Holmes to “express [his] concern and opinion about an incident that occurred during [the] leadership meeting on 3/24/05.”¹²² The incident was Van’s “tangent” on how his safety concerns aren’t being properly addressed and complaining that “he is not

¹¹⁴ Ex. 189 at PMC001382.

¹¹⁵ Ex. 189 at PMC001382; *see also* Ex. 522 at PMC000126; Ex. 215.

¹¹⁶ Ex. 15.

¹¹⁷ *See* Van’s Amended Complaint, 20 ¶ P.

¹¹⁸ Tr. at 216–17.

¹¹⁹ Tr. at 192.

¹²⁰ Tr. at 191–92.

¹²¹ Tr. at 192, 216–17.

¹²² Ex. 185 at PMC001371.

allowed to talk about them as he sees fit.”¹²³ Alzola related this to the meeting “about two weeks ago” (the February 28 meeting that amended the cold weather policy) where Alzola felt Van’s issues were discussed for two hours, and Van just wasn’t happy with their solutions and resolution.¹²⁴ Alzola felt it wasn’t appropriate to bring up at the meeting and was “another attempt on his part to undermine our team trust and the morale of the program.”¹²⁵ He complained about Van’s confrontational attitude and the “unhealthy environment” it fostered.¹²⁶ Then he insulted mechanics as being “home in bed with their families” while pilots were up “making safety happen.”¹²⁷ Less than two hours later, at 3:33 p.m., Holmes thanked Alzola for expressing his concerns and added ominously “I will be addressing this situation.”¹²⁸

The following Monday, March 28, 2005, at 9:48 a.m. Van began to email other Life Flight staff a memo that outlined the safety concerns he wanted to address at the special safety meeting Holmes had said she would call.¹²⁹ The first email went to Alzola, Fergie, and Holmes.¹³⁰ Van expressed concern about accountability, “track ability,” and openness of safety issues, concurrently expressing concern about “pilot management” issues, notably related to “cover-ups” and lack of sanctions.¹³¹ He also suggested sanctions and recommendations about leadership requirements to ensure accountability, safety, and “operational readiness.”¹³² At 10:28 a.m. Van sent the safety memo to Ann McCarty (the head of Life Flight dispatch) and said “I would like you present if there is ever a meeting!”¹³³ By 11:11 a.m. Van sent the safety memo to Laura Vice (a member of the medical flight staff) and asked her to voice her opinions at the meeting.¹³⁴

At around noon (12:04 p.m.) Fergie emailed Alzola and Fletcher his “thoughts as requested.”¹³⁵ Fergie said in his attached memo “My concern is not Mark’s ability

¹²³ Ex. 185.

¹²⁴ Ex. 185 at PMC001371.

¹²⁵ Ex. 185 at PMC001371.

¹²⁶ Ex. 185 at PMC001371.

¹²⁷ Ex. 185 at PMC001371.

¹²⁸ Ex. 185 at PMC001371.

¹²⁹ Ex. 518; Ex. 519.

¹³⁰ Ex. 518.

¹³¹ Ex. 519 at PMC000120.

¹³² Ex. 519 at PMC000120.

¹³³ Ex. 214.

¹³⁴ Ex. 212.

¹³⁵ Ex. 184 at PMC001305.

to perform maintenance functions.”¹³⁶ He went on to describe his concern as “Mark’s continuous intrusion into other aspects of our flight program.”¹³⁷ Fergie’s statement obviously was solicited by Holmes and Alzola, most likely before Van sent his email to other staff requesting further input—the timing is too close for them to have requested Mr. Fergie’s comments only in response to Van’s email. Given Alzola’s Friday email (and Holmes’s ominous response) it appears they requested Fergie’s thoughts because they didn’t like what Van raised at the March 24, 2005, Leadership Meeting: Van’s opposition to Fergie’s efforts to minimize what Stoltz had said about the Halloween ice-on-blades flight. By the time of that leadership meeting Van had verified through the memo Stoltz wrote on March 5, 2005 exactly what had happened. That was Van’s supposed “intrusion” into the “flight program.”

Fergie also expressed the desire to see Van supervised directly by the Director of Operations (Alzola), said the situation had been “exasperated” when Van was allowed to report directly to the Program Director, and said the “move should be reversed immediately.”¹³⁸

Van’s efforts at the March 25, 2005 Leadership Meeting to raise the issue of how Fergie was inappropriately trying to downplay what Stoltz had told Fergie about the Halloween ice-on-rotor blades flight was protected activity.¹³⁹

B. Van is Fired Shortly After his Protected Activities

When Fletcher wrote to Holmes on March 29, 2005, attaching her recommended edits to Holmes’ response to Van, Fletcher also indicated “I am still waiting to speak with Dale concerning this issue.”¹⁴⁰ Dale Mapes was the head of the Human Resources, whose assent would be required to take a severe personnel action, such as firing Van. Holmes sent her response (as Fletcher had revised it) to Van on March 30, 2005. In it Holmes reversed herself, saying she didn’t believe an additional safety meeting was necessary.¹⁴¹ The very next day, March 31, 2005, Holmes signed Van’s merit raise¹⁴² based on the favorable personnel evaluation

¹³⁶ Ex. 184 at PMC001362.

¹³⁷ Ex. 184 at PMC001262.

¹³⁸ Ex. 184 at PMC001362.

¹³⁹ *See* Van’s Amended Complaint, 20 ¶¶ R, S.

¹⁴⁰ Ex. 200 at PMC001565.

¹⁴¹ The memo is found at Ex. 280 at Ex. 24 at 2–3 (as part of an exhibit to a deposition). *See also* Ex. 188; Tr. at 222.

¹⁴² Ex. 160 at PMC000508.

Holmes had given Van on January 14, 2005.¹⁴³ On April 1, 2005 Van's raise was changed in payroll / HR (effective as of March 20, 2005).¹⁴⁴

Van forwarded Holmes's response about there being no need for a safety meeting to Fletcher saying he wanted to discuss the "ongoing situation" with HR "privately" because he couldn't bring up safety violations or issues in meetings, situations were covered up, and he'd been "intimidated and threatened" all with no accountability.¹⁴⁵

Fletcher convened a meeting for April 1, 2005 to deal with the incident where Barry Neilsen had harassed Van.¹⁴⁶ Van sought the meeting to try to "get back to a working relationship" with Neilsen.¹⁴⁷ Held in the Human Resources suite, Fletcher, Van, Neilsen, Alzola, and Holmes attended.¹⁴⁸ The meeting, which is discussed in greater detail in Part V of this decision, was contentious. Van thought Fletcher allowed Neilsen to say whatever he wanted, and shift the blame to Van.¹⁴⁹ When Fletcher asked Van why he was raising these safety concerns, Van replied that he didn't want to see another accident. This steamed Alzola, who promptly stormed out of the meeting.¹⁵⁰ Holmes said she had a plan—they would vote on safety and then there would be no more discussion; the meeting ended.¹⁵¹ After Alzola left, Holmes, Fletcher and Van had a brief discussion in which Fletcher asked how Van thought the program could function with that level of dysfunction.¹⁵² According to Fletcher the April 1 meeting was an "epiphany" about the level of dysfunction in the Life Flight program.¹⁵³ Fletcher says she decided to interview other Life Flight staff to get a better handle on the situation.¹⁵⁴ She also reported on the meeting to Dale Mapes, who she told about the meeting before it took place.¹⁵⁵

After that meeting to address the harassment, Van focused on two things: a detailed inspection of the air ambulance that was required because it had completed

¹⁴³ Tr. at 2900.

¹⁴⁴ Ex. 160 at PMC000508.

¹⁴⁵ Ex. 518.

¹⁴⁶ Tr. at 223–24.

¹⁴⁷ Tr. 224.

¹⁴⁸ Tr. at 224.

¹⁴⁹ Tr. at 225–26.

¹⁵⁰ Tr. at 227, 644–45, 694–97.

¹⁵¹ Tr. at 227–28.

¹⁵² Tr. at 2687.

¹⁵³ Tr. at 2687.

¹⁵⁴ Tr. at 2697.

¹⁵⁵ Tr. at 2698.

400 flight hours, and efforts to obtain certification of changes he made to the air ambulance what would permit the pilots to use night vision goggles.¹⁵⁶

On April 20, 2005, while Van was at home after working on the air ambulance, he was fired via a telephone call from Dale Mapes, an action Portneuf confirmed with a letter.¹⁵⁷ It goes without saying that termination is an adverse employment action. Portneuf ostensibly fired him due to what Fletcher said she learned in her enquiries after the April 1, 2005 meeting to deal with Neilsen's harassment of Van.

Van's Protected Activities Contributed to the Firing

Several factors lead me to infer that the four protected activities contributed to Portneuf's decision to fire Van. He had received a good performance appraisal on January 14, 2005. His pay raise was processed on April 1, 2005. His efforts to point out the ongoing problems during the winter of 2004–2005 in complying with the FAA regulation that forbade flying with ice, snow, or frost on the rotor blades or the control surfaces of the air ambulance when it flew was a sore point with both Alzola and Fergie. Alzola and Fergie especially resented that Van had dared to challenge many things Fergie had done: 1) the slipshod way he installed the blade covers the night of January 31, 2005; 2) the way Fergie tried to misrepresent what had happened that night (implying that he had to install the blade covers himself with no crew assistance); 3) Fergie's failure to deice the air ambulance when he came on duty at 7:00 a.m. the next morning (February 1, 2005); and 4) how Fergie repeatedly attempted to minimize and misrepresent what Greg Stoltz had told Fergie about the Halloween incident where Neilsen took off with ice on the rotor blades of the air ambulance.

Alzola disliked Van's failure to accede to Alzola's expansive view of the authority of the pilot in command. He also chaffed at Van's insistence that Alzola wasn't investigating aggressively these deficiencies in Portneuf's the cold weather operations and holding pilots responsible, but merely accepting Fergie's version of events. Alzola's complaint to Holmes about Van right after the March 24, 2005 Leadership Meeting drew Holmes' ominous reply that she would be "addressing this situation." Fletcher's statement days later (on March 29, 2005) that "I am still waiting to speak with Dale concerning this issue" leads me to infer that Van's termination was already in the works just after the March 24 the Leadership Meeting.

Neilsen had harassed Van on the helipad on February 25, 2005, in retaliation for the way Van drew a connection between Neilsen's Halloween flight with ice on the rotor blades and Fergie's failure to deice the air ambulance when Fergie came

¹⁵⁶ Tr. 229, 235.

¹⁵⁷ Tr. 230–31.

on duty the morning of February 1, 2005. The April 1, 2005 meeting Fletcher convened to address that harassment led to hard feelings a fortnight before Portneuf fired Van.

Portneuf insists there is no temporal proximity between Van's protected activity and his termination because Van's complaints about the cold weather policy were resolved earlier in 2005 and he wasn't actually terminated until April 20, 2005.¹⁵⁸ The evidence persuades me Portneuf initiated the steps to terminate Van almost immediately after the March 24, 2005, Leadership Meeting; his termination was essentially complete but for Hermanson's approval. The temporal proximity was so strong as to be immediate. But even if the termination was a product of Fletcher's inquiries after the April 1, 2005 meeting to address Neilsen's harassment, it was still very close in time to the firing, and supports the inference that the protected activities contributed to Van's firing.

Portneuf also argues temporal proximity between protected activity and adverse employment action is not necessarily dispositive.¹⁵⁹ Where an intervening event could itself have lead to the adverse action, the inference of causation is less likely.¹⁶⁰ Portneuf has attempted to re-characterize the content of both the March 24 and April 1, 2005, meetings to say they involved no protected activity, but instead displayed Van's unfounded, distrustful, disruptive, and dysfunctional behavior. I reject that view. No intervening event disrupts or diminishes the inference.

Based on all these factors, I find that Van's protected activities contributed to Portneuf's decision to fire him.

C. Portneuf Knew of Van's Protected Activities

Portneuf also insists that it didn't know about Van's protected activities. It argues Van "is not able to establish that [Portneuf] knew that he engaged in protected activities, as the vast majority of his complaints dealt with Pilot management issues and surrounded his concerns that pilots be disciplined for what Mr. Van believed to be transgressions."¹⁶¹ This is simply wrong. As discussed earlier in this Section, the "Pilot management issues" Portneuf refers to were actually protected safety complaints. Portneuf's failure to appreciate the protected nature of

¹⁵⁸ Portneuf Medical Center's Post-Hearing Brief, 63–64.

¹⁵⁹ *Barker v. Ameristar Airlines, Inc.*, ALJ No. 2004-AIR-00012, ARB No. 05-058, slip op. at 7 (ARB Dec. 31, 2007).

¹⁶⁰ *Keener v. Duke Energy Corp.*, ALJ No. 2003-ERA-00012, ARB No. 04-091, slip op. at 11 (ARB July 31, 2006).

¹⁶¹ Portneuf Medical Center's Post-Hearing Brief, 62.

Van's complaints doesn't insulate it from liability.¹⁶² AIR 21 does not require air carriers to have a reasonable belief that a complainant's activity is protected. The complainant is the party who needs to have such a reasonable belief. The air carrier must have had "any knowledge" of the protected activity.¹⁶³ Knowledge includes "constructive knowledge,"¹⁶⁴ and when someone with knowledge of a protected activity "contribute[s] heavily" to an employer's final decision to fire a whistleblower, the required knowledge is attributed to the employer, even if the final decision maker (here Hermanson) had no knowledge.¹⁶⁵

Van repeatedly tied his complaints to air safety. He raised these issues in meetings at which Holmes and sometimes also Fletcher were present. When Fletcher wasn't present, Holmes filled her in via email to discuss what had happened. Van also personally emailed several of his complaints and concerns directly to Holmes and Fletcher.¹⁶⁶ By Fletcher's own sworn admission "the decision to terminate [Van] was a joint decision by Dale Mapes, vice president of human resources, based upon my recommendation, and Pam Holmes."¹⁶⁷ Therefore, Portneuf had actual knowledge of Van's protected activities.

D. Van's Activities Never Lost Their Protected Character

Portneuf claims that the safety concerns Van raised had been resolved, so that when he raised them again those later reports lost their protected character.¹⁶⁸ AIR 21 protected Van whenever he provided Portneuf—the holder of the air carrier certificate—information relating to what he reasonably believed were violations of a statute or of "any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier

¹⁶² See *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-00003, slip op. at 14–15 (ARB Sept. 29, 1998) (rejecting the respondent's argument that a failure to perceive the environmental nature of the complainant's complaint somehow insulated it from liability). Similar to AIR 21, the environmental whistleblower protection laws do not require a complainant to tie a complaint to specific regulations, nor do they require an employer to have a reasonable belief that a claimant's activity was protected. *Id.* at 15.

¹⁶³ 49 U.S.C. § 42121(a)(1) and (2).

¹⁶⁴ *Frazier v. Merit Systems Protection Board*, 672 F. 2d 150, 166 (D.C. Cir. 1982); *Larry v. Detroit Edison Co.*, ALJ No. 1986-ERA-00032, slip op. at 7 (ALJ Oct. 17, 1986).

¹⁶⁵ *E.g., Thompson v. TVA*, ALJ No. 1989-ERA-00014, at 5 (Sec'y of Labor July 19, 1993).

¹⁶⁶ See *infra* Part V.B.

¹⁶⁷ Ex. 597 at 17 ¶ 32.

¹⁶⁸ Portneuf's Post-Hearing Brief at 65–66 identifies two specific complaints, concerns, or disclosures about "what pilots were doing (and when), and whether they would be disciplined" it claims lost protected status. They were the overflight of airworthiness directives and the 20-hour duty day Mr. Fergie had on the Fourth of July in 2004. But the complaints at issue at the time of Van's termination were recurring circumstances that risked flights with ice, snow, or frost on control surfaces of the helicopter.

safety.”¹⁶⁹ He needn’t show any actual violation (although he did). When evidence proves the whistleblower had no reasonable basis to believe there was anything to blow the whistle about, or even worse, fabricated or didn’t believe that the incident he reported had happened, those disclosures aren’t protected.¹⁷⁰

Applying AIR 21 and a variety of other whistleblower protection statutes, the Administrative Review Board has held that when the concern underlying an otherwise protected disclosure has been resolved, a whistleblower may lose the reasonable belief that he is raising a valid safety matter. The cases that find protection was lost rely on case-specific findings that the employee could no longer reasonably believe that he was providing information about a safety violation. But Van had valid reason to believe that Neilsen (and therefore Portneuf) violated the FAA’s prohibition on flying with ice on the air ambulance’s rotors around Halloween of 2004. After the incident, Portneuf adopted its cold weather policy. The ice Van found on the air ambulance at 8:45 a.m. on February 25, 2005, well after Fergie, the pilot who came on duty at 7:00 a.m., should have dealt with it, gave him specific reason to believe the recent cold weather policy wasn’t being followed rigorously, and that failure would lead the hospital to violate the FAA safety regulation again. It made sense to relate the older Halloween incident to the early February incident of ice remaining on the air ambulance. The cases that find protection was lost, which are discussed below, are distinguishable on their facts.

Malmanger v. Air Evac EMS, Inc., is the Board’s controlling decision on this topic in the AIR 21 context.¹⁷¹ A mechanic for a regional air ambulance service alleged his protected activity was informing his employer’s CEO and Board of Directors of three different safety concerns shortly before his performance appraisal

¹⁶⁹ 29 C.F.R. § 1979.102(b)(1); *see also*, 49 U.S.C.A. § 42121(a), (b); *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-00031, slip op. at 5 (ARB Mar. 14, 2008) (holding that to constitute protected activity under AIR21, a complaint must relate to a regulation or order pertaining to air safety, be specific, and relate to a situation the complainant reasonably believed took place).

¹⁷⁰ *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-00008, slip op. at 8 (ARB July 2, 2009) (upholding the ALJ’s determination the complainant lacked a reasonable belief safety concerns existed because he knew they had been resolved months or years before); *see also Williams v. U.S. Dep’t of Labor*, 157 Fed. App’x 564, 571 (4th Cir. 2005) (unpublished) (finding the complainant lacked a reasonable belief an environmental safety concern persisted because the complainant knew the employer had investigated and remedied the underlying lead and asbestos contamination, but persisted in further activity as if the contamination still existed); *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-00063, slip op. 9 (ARB June 30, 2008) (finding no protected activity under the STAA because the complainant had no reasonable belief trucking safety concerns persisted after the employer had repaired them); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-00020, slip op. at 1 (ARB Nov. 12, 1996) (approving an ALJ’s recommended decision and order that concluded the STAA complainant’s remaining concerns and refusal to service an account as assigned were unreasonable when the employer had addressed and remedied all safety concerns the complainant raised).

¹⁷¹ ARB No. 08-071, ALJ No. 2007-AIR-00008, slip op. at 1 (ARB July 2, 2009).

was due: an engine that had been “overtemped” when the CEO’s friend had taken a company helicopter on a “joyride” several years before; a tail rotor the mechanic had believed was out-of-limits although his supervisor disagreed; and the possibility that a helicopter had been left in-service, in violation of regulations, while its oil tank was leaking.¹⁷² The ALJ concluded, and the Board agreed, that the mechanic “did not make any of his allegations in good faith and that *he did not have a reasonable belief* that [the employer] violated an order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.”¹⁷³ “Whether a complainant’s belief is reasonable depends on the knowledge available to a reasonable person in the circumstances with the employee’s training and experience.”¹⁷⁴

The ALJ and the Board concluded the mechanic made his disclosures strategically but insincerely, in an effort to shield himself from an impending performance evaluation he expected would be unfavorable. The Board detailed the proof demonstrating the mechanic could not have reasonably believed at the time he raised the issues that they represented safety violations. The “overtemping” incident happened just once, many years before, and the complainant himself had signed off on the maintenance that fixed the problem; he indisputably knew that issue long ago had been resolved.¹⁷⁵ Although the mechanic and his supervisor disagreed about which manual to consult to determine if the helicopter’s tail rotor was out-of-limits, the mechanic preempted any possible safety violation when he disregarded his supervisor’s insistence that the tail rotor was within limits and repaired it according to the more stringent manual, an action for which he suffered no adverse employment action.¹⁷⁶ Finally, his complaints about the oil tank leak were based on overhearing one side of a telephone conversation in which his supervisor mentioned leak limits for oil tanks.¹⁷⁷ But he later discussed the issue with his supervisor, who explained the tank was being replaced as soon as possible, and the mechanic knew the tank in fact had been replaced by the time he raised the issue with management.¹⁷⁸

At least one Court of Appeals has agreed with this type of analysis. In an unpublished decision, *Williams v. U.S. Department of Labor*,¹⁷⁹ the Fourth Circuit

¹⁷² *Id.* at 7.

¹⁷³ *Id.* at 7–8 (emphasis added).

¹⁷⁴ *Id.* at 8 (citing *Stockdill v. Catalytic Indus. Maint. Co., Inc.*, No. 1990-ERA-043 (Sec’y Jan. 24, 1996)).

¹⁷⁵ *Id.* at 9.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ 157 Fed. App’x 564, 571 (4th Cir. 2005) (unpublished).

upheld the Board’s decision in a case brought under several environmental whistleblower protection statutes; it found a teacher had no reasonable belief there were unsafe lead levels in a public school’s drinking water when she distributed a letter to parents in which she claimed students were being exposed to dangerous lead levels.¹⁸⁰ The teacher had previously complained to school officials and the state occupational health agency (among others) about suspected lead and asbestos contamination in four area schools.¹⁸¹ The ALJ, Board, and Fourth Circuit agreed that her initial activities were protected.¹⁸² The school district and state agency then investigated, tested the school for those contaminants, and turned off contaminated water fountains.¹⁸³ The Fourth Circuit concluded “[o]nce her concerns were addressed, however, it was no longer reasonable for her to continue claiming that these schools were unsafe[,] and her activities lost their character as protected activity.”¹⁸⁴

Direct steps an employer takes to mitigate, address, or resolve a safety concern don’t transform a disclosure from a protected to an unprotected activity. The employer’s actions instead affect the decision whether it was objectively reasonable for the complainant to believe the safety violation was ongoing. A complainant who has reasonable lingering concerns or who is unaware that a safety issue has been resolved still engages in protected activity when he or she raises violations of law. This can be seen in comments of the dissenting judge in *Williams*; the chronology suggested to him that the teacher didn’t know the results of the latest water quality studies. Without that information, the teacher reasonably believed the school’s drinking water continued to be lead-contaminated when she distributed her letter to parents.¹⁸⁵ If this interpretation of the timeline were correct, the teacher’s activity of sending the letter would have been protected.¹⁸⁶

Similarly, when an employer addresses fewer than all of the safety violations an employee has reported, later reports about unresolved safety complaints remain protected, and the employer may need to differentiate between the protected and unprotected activities in its rebuttal. *Carter v. Marten Transport, Ltd.*, a Surface Transportation Assistance Act (STAA) case, addresses this issue. The truck driver repeatedly complained about mechanical problems, defective safety equipment, and

¹⁸⁰ *Id.* at 570.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Williams*, 157 Fed. App’x at 572–73 (Gregory, J., dissenting).

¹⁸⁶ *Id.*

other safety concerns in his assigned truck.¹⁸⁷ He persisted in complaining about several safety issues, including a damaged fire extinguisher and a soiled bunk mattress days after the employer replaced them.¹⁸⁸ The Board agreed with the ALJ that the complainant driver “could not have *reasonably believed* that his continued complaints about these resolved safety issues related to an actual or potential motor vehicle safety violation.”¹⁸⁹ But he continued to complain about unresolved safety issues up through the day he was fired, and thus continued to engage in protected activity.¹⁹⁰

The employer in *Carter* admitted the “excessive complaints” about truck “functionality” factored into its decision to terminate him.¹⁹¹ The ALJ found this was direct evidence the driver was fired because of his protected activity.¹⁹² On appeal, the employer asserted its reference to “excessive complaints” meant specifically those unprotected complaints about resolved safety concerns, but the Board rejected the argument because the employer hadn’t distinguished between the complainant’s protected and unprotected activities.¹⁹³

Portneuf identified two of Van’s activities it says lost their protected character, but then seeks to go further, implying that all of Van’s “concerns had been addressed over and over again” and they weren’t related to safety in the first place, but were “subjective and unreasonable concerns about what the pilots were doing (and when), and whether they would be disciplined.”¹⁹⁴ Proof refutes this argument. Nielsen wasn’t harassing Van about the times he had pointed out that a pilot had overflow an airworthiness directives, or about Fergie’s 2003 20-hour duty day when Nielsen accosted Van on the helipad. What enraged Nielsen was that Van had raised once more the safety issue of ice on the rotors of the air ambulance when it flew. The complaints about the first incident around Halloween 2004 (where Stlotz believed Nielsen had taken off with ice on the rotor blades) related directly to a violation of an FAA regulation. The incident also bore on the adoption of the cold weather policy in December 2004 to help avert those sorts of violations. Then later that winter, in early February 2005, Van found ice on the air ambulance at 8:45 A.M.—well after Fergie came on duty at 7:00 A.M.—an indication that not all pilots were following the new cold weather policy. His concern specifically and directly

¹⁸⁷ *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-00063, slip op. 9 (ARB June 30, 2008).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Id.* at 9–10.

¹⁹¹ *Id.* at 12.

¹⁹² *Id.*

¹⁹³ *Id.* at 12–13.

¹⁹⁴ Respondent’s Post-Hearing Brief, 66.

implicated air safety and recent, ongoing shortcomings by some (not all) pilots. The Halloween incident remained relevant two ways: it showed the safety issue persisted, and it refuted Fergie's statement in February 2005 that there had been nothing more than frost on the rotor blades when Nielsen took off in October 2004.¹⁹⁵ It is exactly the sort of disclosure AIR 21 protects.

From the tone of Portneuf's assertion, one can surmise it was referring to Van's statements and emails relating to the cold weather policy and responsibility for aircraft de-icing; the February 25, 2005, harassment incident; and Van's repeated requests for a safety meeting open to all Life Flight staff. Portneuf also takes issue with Van's statements about Fergie at the March 24, 2005, Leadership Meeting and seems to be tying these statements to the argument that any statements Van made that would have otherwise been protected had surely lost their character because they involved issues that had been long-resolved.

To the contrary, the record shows Van was raising Fergie's misrepresentation about the Halloween ice-on-blades incident at the first possible opportunity. He wasn't able to verify that Stoltz had indeed told Fergie there was "ice and snow" and not "frost" on the rotor blades in the Halloween ice-on-blades incident until March 5, 2005, five days after the February 28 meeting where Fergie made the statement. The March 24 Leadership Meeting was the next meeting after Van verified Fergie's previous statements were wrong, and Van's first opportunity to raise the issue, so it certainly hadn't been addressed at that point. Since Holmes "cut off" Van's discussion of safety issues (and then said she would hold a special safety meeting to address them later), this issue also wasn't resolved when Van discussed it in his March 28 memorandum to Life Flight staff. Van had a reasonable belief at all times, as required by the Act, that Fergie's dishonesty, as it applied to interfering with the investigation and reporting of safety violations, was unaddressed and unresolved.

To the extent Van raised any of the "previously resolved" safety issues in the March 24 meeting or March 28 memorandum, he was raising them in the context of Fergie's misrepresentation of what Stoltz's had said about the Halloween ice-on-blades flight, a misrepresentation that had just happened. The misrepresentation was not an isolated incident, but the latest of several omissions and misrepresentations Fergie had made relating to safety violations.

At the time Van made his statements about Fergie (what Portneuf calls "pilot management issues") at the March 24 Leadership Meeting and in his March 28 memo, he knew of at least four other instances (in addition to Fergie's latest

¹⁹⁵ Fergie raised a distinction without a regulatory difference. Ice, snow, and frost all are forbidden, on the control surfaces of a flying helicopter, but ice would be marginally worse since it not only interferes with lift (as frost would), but also had the potential to injure people or damage property as chunks of ice were flung from the rotating blades.

misrepresentation) where Fergie had dissembled or minimized the severity of a safety violation and in doing so interfered with or prevented the investigation or reporting of an air safety violation.

First, after Fergie's 20-hour duty day on July 4, 2003, and subsequent return to duty with less than the ten required hours of rest, he altered flight duty records.¹⁹⁶ Waller spotted this alteration and told Van about it.¹⁹⁷ Fergie admitted he probably altered his records, but claimed he did so because the record was illegible or because he realized he'd made an error and the pilot duty log didn't match the manifest, and he was trying to ensure both were correct and corresponded with one another.¹⁹⁸ Van knew Fergie falsified this record and believed that and the failure to get 10 hours rest were violations of air safety regulations.¹⁹⁹ Despite Fergie's admission that he'd violated the 10-hour rest period and expected to get "take the hit from the FAA" for it, Fergie never got in trouble for this incident and it apparently wasn't reported to the FAA.²⁰⁰ Van had a reasonable belief Fergie had intentionally altered duty records to conceal this air safety violation.

Next, in September 2003, Fergie allegedly "buzzed" Van's house by flying lower than FAA regulations allowed. Van recalled first hearing a "whispering" sound while eating his breakfast at 6:45 a.m.²⁰¹ He wondered if it was the helicopter, but concluded it mustn't be because he would normally hear the helicopter coming for miles.²⁰² Suddenly, he heard an extremely loud noise and raced to one of his picture windows overlooking the city to see what was happening.²⁰³ Van observed the Life Flight air ambulance flying unstably at an altitude of approximately 150 feet directly over the subdivision roughly one-sixteenth to one-eighth of a mile down the

¹⁹⁶ See Tr. at 1770–75 (discussion with expert); see also Tr. at 2304 (Fergie admitting he'd left without 10 hours of rest and admitting he may have changed the records, which were obviously altered, but couldn't specifically recall). Even after altering the records they still showed Fergie as having received less than ten hours rest before coming back on duty. See Tr. at 1770–75, 2306. It's not clear precisely when Fergie altered these records, but this certainly suggests the excessively long on-duty time and lack of rest impaired his judgment.

¹⁹⁷ Tr. at 1602.

¹⁹⁸ Tr. at 2266. However, Fergie admitted that after the change the records were still incorrect. Tr. at 2306.

¹⁹⁹ See Tr. at 1602, 1773.

²⁰⁰ Tr. at 1605–06. Fergie testified he thought the FAA was well aware of the situation, at least that Fergie had failed to get 10 hours rest, but he didn't recall self-reporting. Tr. at 2266. Alzola did recall giving Fergie a "verbal counseling" relating to Fergie's excessive duty time, but not specifically about altering his duty logs. Tr. at 2492–93.

²⁰¹ Tr. at 127.

²⁰² Tr. at 127.

²⁰³ Tr. at 128.

street from his house.²⁰⁴ Van called dispatch and learned Fergie was the pilot.²⁰⁵ Van concluded the helicopter must have “stayed really low to the ground so the noise signature was going out over . . . [his] house” so he didn’t hear its approach, and then “pulled maximum pitch to create the most havoc he possibly could at 6:45 o’clock a.m.”²⁰⁶ Van believed Fergie buzzed his house in retaliation for Van complaining about Fergie’s July 4, 2003, 20-hour duty day.²⁰⁷

Alzola doubted Fergie could have intentionally flown low over Van’s house, since Fergie didn’t know where Van lived at the time.²⁰⁸ However, he was concerned enough about Van’s report of Fergie’s unsafe, low flight to investigate it.²⁰⁹ When Alzola followed up on Van’s complaint, Fergie agreed he was flying low, but not illegally low, and estimated the air ambulance was at about 500 feet,²¹⁰ or 200 feet higher than the minimum altitude²¹¹ and so hadn’t violated any FAA regulation.²¹² Crediting Fergie’s recollection over Van’s, Alzola concluded Fergie had flown “a little bit lower than he needed to be” and counseled Fergie to “use better judgment”²¹³ even though flying that low may be legal.²¹⁴ He recommended that Fergie fly around rather than over homes if Fergie had to fly that low.²¹⁵

Yet because Alzola couldn’t verify that Fergie had flown below 300 feet and violated a FAA regulation, Alzola felt he could take no further action against

²⁰⁴ Tr. at 128.

²⁰⁵ Tr. at 128.

²⁰⁶ Tr. at 128.

²⁰⁷ Tr. at 128.

²⁰⁸ Tr. at 587. Alzola also thought it would not have been “logical” for Fergie, if he were to fly low over Van’s house in retaliation, to do it with a patient and crew onboard. Tr. at 587.

²⁰⁹ Tr. at 584–85.

²¹⁰ Tr. at 2248 (“[W]hen you get over a built up area, 300 feet is as low as you can legally keep it. I was at last [sic] that high, probably 500 feet.”)

²¹¹ The applicable regulation says: “Except when necessary for takeoff and landing, no person may operate under VFR . . . [a] helicopter over a congested area at an altitude less than 300 feet above the surface.” 14 C.F.R. § 135.203 (b).

²¹² Tr. at 585.

²¹³ Tr. at 585.

²¹⁴ Tr. at 586. Alzola later claimed he wasn’t certain if he specifically told Fergie he could have used better judgment, but was fairly sure he had told Fergie he could have flown at a higher altitude. Tr. at 2493.

²¹⁵ Tr. at 586.

Fergie.²¹⁶ This upset Van, who had seen Fergie flying well under the 300-foot minimum, thus violating a FAA regulation, and suffering no consequences.²¹⁷

While I don't find evidence to support Van's theory that Fergie intentionally "buzzed" his house, I do credit Van's estimation of the air ambulance's altitude. Van is an experienced helicopter mechanic who is familiar with helicopter operating altitudes and had an unobstructed view of the aircraft from a minimal distance. By comparison, Fergie had no specific recollection of how high he had flown, and demonstrated a more relaxed attitude about flying altitude in general.²¹⁸ The flight crew on board were not paying attention to the altitude because their attention was consumed with the "very busy" patient they were transporting;²¹⁹ thus, there is no other evidence to refute Van's observation. Thus, Van's complaint that Fergie had violated an FAA regulation was justified, as was Van's ongoing concern that Fergie would misrepresent what he had done.

Then, on May 17, 2004, Fergie overflew an airworthiness directive relating to the 25-hour inspection on the air ambulance's tail rotor, an air safety violation.²²⁰ Van observed Fergie leaving the helipad immediately after the overflight and knew (assuming Fergie was completing his required pre- and post-flight duties) Fergie knew (or should have known) he had violated the FAA regulation.²²¹ Van even raised the issue with Alzola immediately after the overflight happened,²²² but despite this neither Fergie nor Alzola still hadn't self-reported the violation when another pilot had an overflight the three weeks later.²²³ Only after Van's prodding did Portneuf report either overflight. Van saw the similarity between Fergie's behavior here—which was either oblivious and unconcerned or deceitful through silence—and his misrepresentation of the Halloween ice-on-blades flight, which also went unreported until almost a year after the fact.

Finally, Van knew Fergie had misrepresented information about the February 1 blade-cover incident to Alzola as evidenced by Alzola's and Van's emails

²¹⁶ Tr. at 586.

²¹⁷ Tr. at 128, 586.

²¹⁸ See Ex. 182 at PMC001264.

²¹⁹ Tr. at 1418–20.

²²⁰ Tr. at 1485–86, 1490, 2321; see also Ex. 31.

²²¹ See Tr. at 153–54; see also Tr. at 1584 (Waller testifying that he could have avoided a similar overflight by checking the paperwork).

²²² Tr. at 153–54. Alzola testified that he thought Van didn't come to him until sometime after they had a second overflight a few weeks later. Tr. at 590. However, Van made a contemporaneous report to Len Higgins, the FAA representative, stating he had notified Alzola of the overflight immediately after it happened. Ex. 27. I credit Van's version of events since it corresponds with his contemporaneous statement.

²²³ Ex. 570 (showing Alzola didn't self-disclose the events until June 24, 2004).

exchanged on February 17 and 21, 2005.²²⁴ This misrepresentation interfered with the collective efforts to amend the Cold weather policy, and showed Fergie once again minimizing his role in creating an unsafe situation while trying to shift blame to others.

Van knew of all these events when he raised Fergie's dishonesty and its impact on safety at the March 24 meeting and in March 28 memo. Knowledge of these events and their contribution to the delay and avoidance of reporting air safety violations contributed to Van's reasonable belief that Fergie's misrepresentations posed an ongoing problem for air safety compliance at Portneuf. Even Portneuf's own expert witness Wisecup agrees it is reasonable to bring up old safety issues if they are part of a pattern of violations or safety incidents.²²⁵ While Portneuf is correct in asserting Van's acts of raising these safety complaints *in the past* were too temporally remote to serve as protected activity for this complaint, his discussion of these events in 2005 as they related to a pattern of safety violations ongoing in 2005 was protected under AIR 21 and hadn't lost its protected character just because the events themselves were temporally distant and allegedly resolved.

E. Van's Behavior did not Deprive him of the Protection of the Act

Portneuf argues that Van could be terminated for the manner in which he raised his safety concerns, relying on decisions such as *Formella v U.S. Dep't of Labor*.²²⁶ There 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.²²⁷ The court of appeal's 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. He first questioned why he had been assigned a different truck than one he usually drove. It had been returned to the leasing company, unfortunately without anyone detaching the CB radio antenna that Formella had placed on that truck. A few minutes later, he returned to say the Department of Transportation (DOT) permits were missing, which were promptly provided. Fifteen minutes later came the raucous confrontation for which he was fired. He claimed his assigned truck's high beams 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. The administrative law judge found that Formella

²²⁴ See discussion *infra* Part V.

²²⁵ Tr. at 1689 ("If it was an ongoing problem, I would say yes."), 1760–61.

²²⁶ ___ F.3d ___, 2010, WL 5019973 (7th Cir. 2010).

²²⁷ *Id.*, at *1.

“storm[ed] into the dispatch office, yelling, antagonizing, and provoking his superiors, by questioning their capabilities, and repeatedly asking if he was fired.”²²⁸ 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.”²²⁹ He did all this sitting on the edge of his seat.

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.” 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.²³⁰ 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.”²³¹ Looking at all the 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.²³²

Van did nothing of the sort. He never raised his voice, or caused an uproar that led anyone to run to see what was causing a commotion.

Portneuf laments that Van raised the issues of snow and ice on the rotor blades and adherence to the cold weather policy “in a divisive manner.”²³³ His dogged determination to see that pilots followed the FAA regulations that forbid flights with ice, snow, or frost on rotor blades and that Life Flight’s cold weather policy was both observed and improved may have gotten under the skin of some pilots. Neilsen obviously was upset that his flight in Halloween 2004 bookended

²²⁸ *Id.*, at *5.

²²⁹ *Id.* at *3.

²³⁰ *Id.*, at *8.

²³¹ *Id.* at *9.

²³² *Id.* at *10.

²³³ Portneuf’s Briefing on *Formella v. US Dep’t of Labor* at 6.

Fergie's failure to deice the aircraft the morning of February 1, 2005, when the way Fergie had installed the blade covers led to ice beneath them. But both events illustrated an ongoing problem. Fergie surely would be upset that his shortcomings were being brought to light. It would make him look bad to other team members. Learning that all was not as it should be might well distress other members of the Life Flight staff. Pilots might feel unfairly attacked. Those raw feelings do not serve as a basis for the employer to turn on a whistleblower.

Fletcher testified that Van was not fired for raising safety concerns but because "of his inability to work as part of a team, to work cohesively with other people with resolving issues, with constructively confronting problems. It [Van's termination] had nothing to do with the fact that he raised safety concerns"²³⁴ Based on the record as a whole, I reject that characterization of the termination. In the context of this case, standing up to some of the pilots meant feathers were going to be ruffled. Van did nothing so out-of-line as to deprive him of the protection of the AIR 21 statute.

V. Portneuf Has Not Shown it Would Have Fired Van Absent his Protected Activity

The previous Part showed Van is entitled to relief at step one. He engaged in protected activities that Portneuf new about. They never lost their protected character, because Van had a reasonable belief (both subjectively and objectively) that the issues he raised were either themselves unresolved or were related to recent, unresolved safety issues that together formed an ongoing pattern of safety problems. His April 20, 2005, termination is an adverse employment action that is so closely related in time to the protected activities that I found the firing actually was retaliatory.

Portneuf may still avoid liability if it demonstrates by clear and convincing evidence it "would have" taken the same action absent the discriminatory motive.²³⁵ This Part examines the reasons Portneuf proffered for firing Van and finds Portneuf has not met its burden.

Section A, recounts Portneuf's story.

Section B builds on many of the same facts that demonstrated Van's protected activities and showed why he is presumptively entitled to relief at step one. This Section demonstrates why Fletcher's testimony doesn't square with the contemporaneous exhibits, and rejects it. Disbelieving Portneuf's explanation, coupled with proof that Portneuf's story contains elements that aren't true, in itself is an adequate reason to find Portneuf failed to prove by clear and convincing

²³⁴ Tr. at 2742.

²³⁵ See discussion and sources cited *supra* note 48.

evidence that it would have fired him for reasons unrelated to Van's protected activity, and to infer from the rejection of its justification that retaliation is the reason for the termination.²³⁶ On that ground alone, Portneuf cannot avoid an order granting Van relief. Even without that inference, the evidence affirmatively "demonstrates"²³⁷ that Portneuf (in the persons of Holmes, Fletcher, and Mapes) actually decided to fire him shortly after the leadership meeting on March 24, and its reasons then actually were retaliatory. Portneuf didn't like Van challenging Fergie's misrepresentations about the Halloween incident (or previous incidents of dissembling) or his efforts to let the medical and dispatch / communications staff know they should be on the lookout for ice, snow, and frost on the air ambulance.

Section C briefly discusses the other reasons Portneuf has raised for firing Van and shows why Portneuf hasn't established by clear and convincing evidence that it would have fired Van on any of these grounds. The animosity between the parties led them both to raise at trial every petty slight or grievance they had with one another as far back as memory ran. The affirmative finding of invidious retaliation and the mendacity of Fletcher's explanation for a termination decision that Holmes, Fletcher, and Mapes had reached well before the April 1 meeting Fletcher convened to address the harassment by Neilsen make it unnecessary to

²³⁶ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146–48 (2000). In *Reeves* the Court clarified the holding of *St. Mary's Honors Center v. Hicks*, 509 U.S. 502 (1993), finding *St. Mary's Honors Center* does not hold that "a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain . . . a finding of intentional discrimination." *Reeves*, 530 U.S. at 146. Instead it is simply not enough to *disbelieve* a defendant; an adjudicator must *believe* the plaintiff. *Reeves*, 530 U.S. at 147 (quoting *St. Mary's Honors Center*, 509 U.S. at 511). Instead, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 147. The *Reeves* Court went on to explain:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. *See* [*St. Mary's Honors Center*, 509 U.S.] at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

Reeves, 530 U.S. at 147 (quoting *St. Mary's Honor's Center*, 509 U.S. at 517 and *Wright v. West*, 505 U. S. 277, 296 (1992)).

²³⁷ 29 C.F.R. § 1979.104.

address all the other incidents Van or Portneuf mentioned at hearing that were not part of Fletcher's explanation for why Van was fired.²³⁸

A. Portneuf's Unconvincing Explanation for Firing Van

Portneuf claims it fired Van because of his "inability to maintain positive interpersonal relations with . . . colleagues" and foster a positive team environment."²³⁹ It paints a picture of Van as a troubled employee, haunted by the November 2001 Life Flight crash, obsessed with controlling all aspects of the Life Flight program. Despite numerous attempts over the years by Portneuf Human Resources and Life Flight administrators to help Van improve his behavior and interpersonal relations, Van resisted. His behavior and interpersonal relationships continued to deteriorate, spreading beyond just a few pilots and administrators to encompass the entire Life Flight team, until his poor interpersonal relationships threatened the safety and cohesion of the Life Flight team. Portneuf says it wasn't Van's safety complaints that prompted his termination, but his inability to trust co-workers, especially pilots and managers; the hostile, intemperate, often unprofessional manner in which he raised issues; and the uncomfortable, divisive, and unsafe work environment his behavior and interpersonal actions engendered that left Portneuf with no choice but to terminate Van's employment. This would be a valid basis for its action, if only it were true. The contemporaneous evidence, paints a very different picture, exposing the close tie between Van's protected activity and Portneuf's decision to fire him. Portneuf's version of events (not my findings of what actually happened) follows in this Section.

Audrey Fletcher, a former senior Portneuf Human Resources staff member and a major decision maker in his termination, explained the events that led to Van's termination. She identified a series of key incidents involving Van, beginning in mid-2002 and continuing through early 2005, that paved the way to his termination. These incidents, she says, culminated in an April 1, 2005, Human Resources meeting at which she, Van, the Life Flight Operations Director (Gary Alzola), Director of Emergency Services (Pam Holmes), and one Life Flight pilot

²³⁸ For example, Portneuf's experts testified they would have fired a maintenance director who wrote Van's Maintenance Policy Letter number 12. Tr. at 1511-14 (Expert William Patterson testifying "I seriously doubt that that would have been highly accepted by anyone else in the management teams of Portneuf"), 1548 (Expert Paterson affirming *he* would fire a mechanic on the basis of that letter alone); *see also* Ex. 634 at 3-4 (Wisecup expressing concern about Maintenance Policy Letter number 12 and finding it shows the degree of Van's distrust of management and would have been "unethical" if followed"). Portneuf didn't know of this policy letter when it fired Van, so it played no role in the decision Fletcher, Mapes and Holmes reached. Fletcher didn't testify that if she or managers at Portneuf had know of that policy letter, Portneuf would have fired Van. Additionally, Portneuf failed to raise this as an affirmative defense, so it cannot curtail damages on that ground either. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361-63 (1995). Portneuf chose not to make any argument about damages, banking that it would prevail on liability.

²³⁹ Ex. 21.

(Barry Neilsen) were present. The meeting was arranged to deal with Van's objection to the harassment and threats he believed Neilsen has made against him at the helipad. As she described it, as the meeting grew hostile and emotionally charged, Fletcher was struck by the level of distrust and lack of team cohesion between Van and the other Life Flight staff. She became concerned for the continued viability of the program, and felt compelled to dig deeper into Van's interactions with the Life Flight staff, especially since she had begun to hear elsewhere that Van's interpersonal problems extended beyond pilots and a few administrators.

The April 1, 2005, harassment meeting prompted Fletcher to investigate. She interviewed all pilots and mechanics in the program and also received comments from members of the Life Flight medical team and other medical staff at Portneuf, although she didn't interview them. Fletcher insists this interview process revealed deep rifts within the Life Flight staff, rifts Van's actions and interpersonal interactions caused. Her interviews with Greg Stoltz and David Perkins (the other Life Flight mechanics), and Chad Waller and Jim Ford (Life Flight pilots), along with comments she received from the flight crew and hospital physicians were particularly influential and persuasive. As her investigation progressed, she began to believe the Life Flight program was in serious jeopardy due to unsafe and untenable levels of distrust within the program.

After careful deliberation Fletcher came to the unhappy conclusion that the only possible solution was to fire Van, since all previous efforts to improve his interpersonal style had failed, and his conflicts now spread across the entire program. Her decision made, Fletcher then consulted with her most senior manager in the Human Relations department, Dale Mapes, who concurred with her recommendation, and informed Holmes, the Director of Emergency Services (which included the Life Flight program), who was saddened by the decision, but agreed that it was the only feasible course of action. Mr. Mapes then brought the recommendation to Pat Hermanson, as Portneuf's policy for employee terminations required. Mr. Hermanson ultimately concurred and Van's employment was terminated shortly thereafter.

This version of events diverges from what the contemporaneous evidence shows: that Van's protected activity was a contributing factor in Portneuf's decision to terminate his employment.²⁴⁰ Portneuf's version of events is primarily supported by non-contemporaneous documents and witness testimony. It also relies on Fletcher's contemporaneous hand-written notes from her April 2005 investigation, although these notes do not squarely support Portneuf's case. I will discuss the non-contemporaneous documents and testimony in more detail. Then I will discuss whether Portneuf's has proved by clear and convincing evidence they would have fired Van absent his safety complaints.

²⁴⁰ See *infra* Part V.B.

Fletcher prepared a non-contemporaneous “memory jogger” detailing the meetings and events she believed had led to Van’s termination.²⁴¹ This document was admitted as Exhibit 562 and was prepared in anticipation of the OSHA investigator’s visit.²⁴² Fletcher’s document included her recollections of five events she believed led to the Complainant’s termination. First was an August 2002 meeting between her and Van in which they discussed Van’s desire that Portneuf release the FAA report about the 2001 air ambulance crash.²⁴³ Van was adamant that the hospital had set him up to take the blame for the crash and was upset that the hospital hadn’t publicized the report when it became available or made an earlier statement.²⁴⁴

Next, Fletcher recounted a November 1, 2002, meeting between the Complainant, Alzola,²⁴⁵ and Diane Kirse—who then was the Director of the Emergency Department²⁴⁶—that Kirse asked Fletcher to “sit in on.”²⁴⁷ At the meeting, Van expressed his belief Alzola had lied to him regarding FAA regulations about release of non-official reports about air crashes.²⁴⁸ Based on her testimony at trial, it appears Fletcher misunderstood the precise nature of Van’s complaint.²⁴⁹

²⁴¹ Tr. at 2580. Fletcher also prepared a five-page document entitled “Mark Van Notes from File,” but didn’t recall if she prepared it before or after Van’s termination. Tr. at 2756; Ex. 123. She compiled the list to help her clarify the chronology of “complaints and issues raised,” and while she did not know if she relied on the document when deciding to recommend Van’s termination, she confirmed she relied on the underlying handwritten file notes. Tr. at 2756, 2759. The document was composed from a file Fletcher kept separate from Van’s HR file (a practice she commonly followed for other employees with whom she interacted) in which she stored handwritten notes and memoranda of her conversations and meetings; however, at least some notes in this file were unavailable by the time of trial. *Id.* at 2750–55. However, she verified that the list was incomplete and many of the dates and details contained therein were erroneous. *Id.* at 2757, 2762–67.

²⁴² *Id.* at 2580.

²⁴³ Ex. 552 at PMC000240. Fletcher recalled this was her first meeting with Van since the November 2001 crash besides a brief conversation in Portneuf’s basement sometime in 2002. Tr. at 2774. However, Van sent her an email in January 2002, complaining that others were harassing him and blaming him for the crash (the same complaints he had in the August 2002 meeting). Tr. at 2774–75; Ex. 253. Fletcher didn’t recall receiving the email or discussing it with Van, although she briefly discussed related topics during their brief basement meeting. Tr. at 2775–76.

²⁴⁴ *Id.* at PMC000240–42.

²⁴⁵ Fletcher’s compiled document “Mark Van Notes From File” doesn’t show Alzola attended, but the “memory jogger” Sequence of Events says he was there. *Compare* Ex. 123 at PMC000049 *with* Ex. 552 at PMC000242. Fletcher testified the latter is correct, as it is the more detailed document. Tr. at 2770. She “may have omitted Alzola’s name from the ‘Mark Van notes from file’ . It may just have been an omission.” Tr. at 2770.

²⁴⁶ Tr. at 2581.

²⁴⁷ Ex. 552 at PMC000242.

²⁴⁸ *Id.*

²⁴⁹ *See* Tr. at 2584. Fletcher suggested that Van was upset because Alzola had lied to him about FAA regulations permitting release of information about the causes of a crash before an official report,

Alzola denied making the statement but recalled saying that he thought the FAA should decide what information was released and apologized for any misunderstanding or harm that resulted from Van's misunderstanding.²⁵⁰ Van said he would have to think about accepting the apology.²⁵¹ Van also disputed Alzola's ability to fairly evaluate him and wanted someone else to evaluate his job performance.²⁵² By the end of the meeting, Van ostensibly agreed Alzola would evaluate him with the proviso he could raise any concerns about the resulting evaluation with Kirse; however, later that week he complained to the hospital's CEO, Pat Hermanson, that Alzola shouldn't evaluate him.²⁵³

The next meeting on the list took place on November 15, 2002, between Fletcher and Van.²⁵⁴ Van was upset with how Kirse had addressed him in the November 1 meeting and still felt Alzola had lied to him regarding FAA regulations.²⁵⁵ He also expressed concerns that the hospital was trying to cover up the 2001 crash and was "out to get him," noting that he'd drafted an email explaining the events of the crash shortly after it happened and sent the email to Pam Holmes with the request that she forward it on to others, only to later find out she didn't forward it to anyone.²⁵⁶ Fletcher later recounted Holmes had declined to distribute the email because it contained graphic details of the air ambulance crash that she believed should be kept on a need-to-know basis.²⁵⁷ Fletcher recommended Van pursue counseling through the hospital's Employee Assistance Program (EAP)—something she'd recommended to him in the past²⁵⁸—because his "preoccupation and distraction with other events" might soon begin to affect his ability to do his job.²⁵⁹ She thought he was almost obsessed with the crash and was

and this wasn't true. Tr. at 2584. In fact, Van was upset because Alzola had told him it was an FAA regulation that the hospital couldn't say anything about the causes of a crash before a formal report, and Van wanted Portneuf to issue a release that corrected the impression releases Portneuf had given that a maintenance problem caused the crash, or at least acknowledge that the pilot injured in the crash had accepted responsibility and blame. *See* Ex. 245 (Van's grievance against Alzola); Tr. at 46–47 (early conversation between pilot and Van regarding crash); Tr. at 115 (press release). Van later found out that no such FAA regulation existed, and he believed Alzola had lied to him to avoid releasing information that would have stopped the blame and harassment he was receiving from the wider community. *See* Ex. 245 (grievance).

²⁵⁰ Tr. at 2587; Ex. 552 at PMC000245.

²⁵¹ Tr. at 2588.

²⁵² Ex. 552 at PMC000242–43.

²⁵³ *Id.* at PMC00043.

²⁵⁴ Ex. 552 at PMC00043.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Tr. at 2591.

²⁵⁸ *see Id.* at 2573–80.

²⁵⁹ Ex. 552 at PMC000244.

having trouble moving on, so she suggested he visit Bill Hazle, M.D., a psychiatrist on staff with PMC.²⁶⁰

Fletcher next recounted a meeting between herself, Van, Holmes, and Pam Niece on July 24, 2003.²⁶¹ Van had sent emails to Cindy Richardson, the Vice President of Patient Services, regarding a statement Holmes made to him in a meeting on February 7, 2003, suggesting she believed Van was responsible for the 2001 crash.²⁶² Fletcher didn't recall that incident happening in particular.²⁶³ Van insisted Alzola had also suggested he was responsible for the 2001 crash, but Niece was satisfied there was no previously unknown information to verify this or any of Van's other concerns.²⁶⁴ The meeting progressed from there into a rehashing of Van's previously stated complaints, with Niece trying to get him to accept that Portneuf hadn't tried to cover up anything about the crash and accept that his complaints had "been taken seriously, dealt with appropriately[,] and the necessary action taken."²⁶⁵ Niece again suggested Van consider counseling and explained that Portneuf now had a new Release of Information Policy for use in future disasters, which would limit the information released.²⁶⁶ Despite the series of meetings in 2002 and 2003, Fletcher believed she, Marilyn Speirn (the hospital's communications officer), Kirse, Holmes, and Hermanson had all attempted to resolve Van's issues to no avail.²⁶⁷

²⁶⁰ Tr. at 2595, 2597; Ex. 552 at PMC000244.

²⁶¹ Ex. 552 at PMC00044.

²⁶² Ex. 552 at PMC00044. Although it isn't included in her "memory jogger" document, when testifying Fletcher discussed a February 19, 2003, memo from Holmes to Van. Ex. 568 at PMC000338–39; *see also* Tr. at 2613–14. Van had submitted "documentation" to Holmes, Niece, and Richardson on February 6, 2003, in which he complained that Alzola had "intentionally 'hurt [Van] and [his] family' by not allowing release of information concerning the helicopter crash." Ex. 568 at PMC000338. Fletcher explained Van hadn't filed the formal grievance process outlined in Portneuf's employee handbook, although he did submit his complaint in writing. Tr. at 2614–15. Van wanted Alzola to be disciplined for lying to him about what FAA regulations required and for the resulting emotional distress. *Id.* The memo indicates Van met with Holmes, Niece, and Richardson sometime thereafter to discuss the complaint. Ex. 568 at PMC000338. This suggests there very well may have been a meeting between Van and Holmes on February 7, 2003. Fletcher was "asked to look at" the memo before Holmes sent it to Van, but did not have a detailed discussion about the contents or result of the meeting it memorialized. Tr. at 2616.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at PMC000245–46.

²⁶⁶ Ex. 552 at PMC000245. Niece also exchanged emails with Richardson, Holmes, and Fletcher as well as Hermanson in which she indicated she planned to investigate the possibility of a "Fitness for Duty evaluation" for Van because of her concerns regarding his lack of trust for Portneuf and his "inability to accept past situations." Ex. 554 at PMC000212.

²⁶⁷ *Id.* at PMC000246.

After this meeting, Niece and Richardson (the Vice Presidents of Human Resources and Patient Services, respectively) took over the task of trying to get Van to follow through with resolutions, and Fletcher wasn't involved in Van's case again until approximately April of 2005, when Van approached her.²⁶⁸ As a result, Fletcher was only peripherally involved in the interim.²⁶⁹ During this period, there was another meeting on September 19, 2003. After this meeting, Holmes addressed a written summary of the meeting to Van that expressed her expectations about his behavior, including that he not bring up issues Portneuf management had decided were resolved.²⁷⁰ She asked Fletcher to review the memo before she sent it to Van.²⁷¹ In the memo Holmes expressed her concern that Van was raising safety issues in a "threatening" manner and wasn't following the proper chain of command for making his complaints and inquiries.²⁷² The letter specifically stated it was not part of Van's personnel folder, something Fletcher couldn't explain at trial.²⁷³ I infer from the text of the document that it was never intended to discipline Van.

The final incident Fletcher listed was an "April 2005" meeting between herself, Holmes, Alzola, Barry Neilsen, and Van; she believed this meeting was her next interaction with Van after the July 24, 2003, meeting.²⁷⁴ Fletcher convened the meeting at Van's request to address harassment at the helipad when Neilsen had threatened Van.²⁷⁵

Fletcher recalled the meeting began with a discussion of the helipad incident. Fletcher told Neilsen his behavior was "ill-advised," and Neilsen ultimately "apologized to [Van] if [Van] had found his behavior threatening."²⁷⁶ Van said he would think about whether he could accept this equivocal "apology" of Neilsen's.²⁷⁷ The meeting soon digressed into a discussion of the safety concerns Van had raised about Life Flight's cold weather policy.²⁷⁸

²⁶⁸ Tr. at 2608–09.

²⁶⁹ *Id.* at 2609.

²⁷⁰ Ex. 539 at PMC000193–94.

²⁷¹ Tr. at 2620.

²⁷² Ex. 539 at PMC000193–94.

²⁷³ Tr. at 2624–27; *see also* Ex. 539 at PMC000194.

²⁷⁴ Ex. 552 at PMC000246. Although the exact date isn't listed, it is clear from Fletcher's description of events this meeting was the April 1, 2005, HR meeting. *See* Tr. at 192, 223–28.

²⁷⁵ *Id.*; *see also* Tr. at 2631–32; Ex. 189 at PMC001382; Ex. 522 at PMC000126.

²⁷⁶ Ex. 552 at PMC000247.

²⁷⁷ Ex. 552 at PMC000247.

²⁷⁸ *Id.*

Fletcher repeatedly stressed how it wasn't the safety concerns Van raised, but the manner in which he raised them, that caused the problem.²⁷⁹ This "manner" also included Van's non-verbal behavior (muttering under his breath, smirking, leaning away from the rest of the table, saying "ahh" to other people's comments, etc.), which she thought "was very disrespectful to what people were saying,"²⁸⁰ but something she never actually documented in any of her contemporaneous meeting minutes or notes. Also, most of the concerns Van raised were "operational" issues and not "safety" issues as far as Portneuf administrators viewed the FAA rules.²⁸¹ Fletcher recalled that she and the other managers involved (including Holmes and Alzola) were particularly concerned Van couldn't seem to accept solutions devised by anyone other than himself, while simultaneously being inappropriately interested in whether pilots were being disciplined.²⁸² Van expressed with increasing frustration that no one else at Portneuf took safety issues to heart.²⁸³ Alzola took offense to Van's statement and stormed out of the meeting.²⁸⁴

When Fletcher asked Van how he expected the team to function, he responded by saying he had a right to raise safety issues, and shortly thereafter Fletcher adjourned the meeting.²⁸⁵ She agreed that it was Van's responsibility as chief mechanic to raise safety issues, but insisted "[h]e ha[d] to do it, but do it the right way."²⁸⁶ Van had a similar response more or less any time someone raised the issue of his behavior, attitude, or repetition in raising already-resolved safety issues.²⁸⁷

After the April 1, 2005, meeting, Fletcher decided she needed to interview other Life Flight members to get a better assessment of the situation.²⁸⁸ She had previously heard that the "problem" with Van extended farther than the pilots; notably, she was aware Mortimer, the chief flight nurse, raised concerns through Holmes.²⁸⁹ Holmes had informed Fletcher that Van was raising "old issues" in meetings when the issues were not on the meeting agenda and it was disrupting Life Flight's focus and that "some physicians" (they weren't named) were raising

²⁷⁹ Ex. 562 at PMC000248.

²⁸⁰ Tr. at 2688.

²⁸¹ *Id.*

²⁸² Ex. 562 at PMC000247-48.

²⁸³ *Id.* at PMC000248.

²⁸⁴ Tr. at 2685-86.

²⁸⁵ Tr. at 2685, 2687.

²⁸⁶ *Id.* at 2696.

²⁸⁷ *Id.* at 2697.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 2699.

concerns about the program.²⁹⁰ Fletcher didn't interview any physician on the medical staff, however.²⁹¹

Fletcher first met with pilot Chad Waller on April 4, 2005; he couldn't make the meeting she had scheduled with the rest of the pilots later in the week.²⁹² He had no personal concerns with Van and knew him outside of work, but believed Van's behavior had "caused [a] serious rift" and was jeopardizing the program fearing the "friction" would eventually become unsafe due to flight crew uncertainty.²⁹³ Fletcher indicated he also believed Van couldn't accept any safety measures not of his own design and thought there was a possibility Van might overlook other issues because of his focus on "pilot vs. mechanic" conflicts.²⁹⁴

Fletcher then met with the rest of the Life Flight pilots (Barry Neilsen, Jim Ford, Ron Fergie, and Gary Alzola), on April 7, 2005.²⁹⁵ She recorded Barry Neilsen as saying "[s]ince [the] 01 crash[,] pilots have worked really hard to ensure medical staff feel safe [with] pilots. M[ark] V[an] through his actions is destroying this rapport—he's raising "safety issues" that are not safety concerns at all but processes or practices." Neilsen went on to say "Gary Alzola has superb reputation in this field—he would not cover up safety issues—integrity never in doubt. Can't have unnecessary undeserved distraction from Mark Van—focus must be on flying safely."²⁹⁶

Another pilot at this meeting, Ford, contrasted Portneuf's other full-time mechanic's work style with Van's, noting the other mechanic, Perkins, made an effort to form relationships with the pilots while Van made no effort to do so.²⁹⁷ However, Ford stated he had no personal problems with Van.²⁹⁸ He did note Van seemed unreceptive to help with maintenance from pilots and indicated that he'd seen another organization where maintenance didn't report to operations, and that organization had a huge break down in communications.²⁹⁹

Alzola told Fletcher the flight crew was now commenting on Van's emails about safety, implying Van was putting words in their mouths about safety

²⁹⁰ *Id.* at 2700–01.

²⁹¹ *Id.* at 2730.

²⁹² Ex. 182 at PMC001252.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at PMC001263–66.

²⁹⁶ *Id.* at PMC001265.

²⁹⁷ *Id.* at PMC001266.

²⁹⁸ *Id.* at PMC001265.

²⁹⁹ *Id.*

complaints of concerns he alleged in emails.³⁰⁰ Alzola saw Van as wanting to be “more involved in pilot business” following the 2001 crash.³⁰¹ He also believed Van wanted to be unsupervised and involved in “operations” and would continue to pursue any issues that weren’t resolved to his liking.³⁰² Alzola expressed concern that Van was emailing the flight nurses and saying “unsafe practices are taking place.”³⁰³

Fergie instead complained that the “[t]eam shouldn’t have to be looking at [the] altimeter” in reference to the alleged house-buzzing incident.³⁰⁴ He also told Fletcher that Van was responsible for the Agusta representative leaving and had created an unsafe atmosphere in which everyone was “looking over their shoulders.”³⁰⁵ There is no indication from her notes that Fletcher ever confirmed Fergie’s story about the Agusta representative. Fletcher elaborated in her testimony that the pilots meant they were worried about losing track of time while flying because they were fixated on what “safety” issue Van would next raise and the anxiety was wearing on them to the point they were losing sleep.³⁰⁶ Alzola was particularly “ticked off” with the hospital administration for failing to resolve these issues despite Van’s behavior having originated around the time of the 2001 crash.³⁰⁷

It appears that at least some of the pilots and Fletcher believed that procedural and policy issues were operations and distinct from safety.³⁰⁸ Notably, Alzola implied Van’s continued “threats” to “go to the FAA” had caused so much stress and anxiety that Alzola could no longer do his job “properly.”³⁰⁹

Next, on April 14, 2005, Fletcher talked via a cell-phone teleconference with Greg Stoltz, the Life Flight mechanic who worked weekends and relief for Van.³¹⁰

³⁰⁰ *Id.*

³⁰¹ *Id.* at PMC001263.

³⁰² *Id.* at PMC001263–64.

³⁰³ *Id.* at PMC001264.

³⁰⁴ *Id.* This despite the fact that Alzola counseled him about his low flight over the developed area of Pocatello on his approach to the hospital (Tr. at 585–86), something an FAA regulation at 14 C.F.R. § 135.203(b) governs.

³⁰⁵ Ex. 182 at PMC001264.

³⁰⁶ Tr. at 2707.

³⁰⁷ Tr. at 2708.

³⁰⁸ Ex. 182 at PMC001265.

³⁰⁹ *Id.* at PMC001264. Protection from retribution by managers miffed when their program’s violations of regulations or safety standards have been (or may be) reported to the FAA is the essence of AIR 21, however.

³¹⁰ *Id.* at PMC001253, PMC001254; *see also* Tr. at 2715.

She specifically asked Stoltz about the Halloween 2004 ice-on-blades incident with Neilsen.³¹¹ After arriving at work, he inspected the air ambulance, removed ice from two of its four rotor blades and turned the other two blades into the sun, went down to the mechanic's office to call Neilsen, and let Neilsen know he was taking the air ambulance out of service until the ice was off the rotor blades.³¹² The ice on the blades was thick enough that it would have required scraping with a blade to remove if it had been on a vehicle windshield.³¹³ When he returned to the helipad, Barry was taking off in the helipad; only 15 to 20 minutes had passed, which wasn't enough time for the ice to have melted.³¹⁴ As a result, he mentioned this to Van, who asked him to document it.³¹⁵ Stoltz also discussed the incident with Alzola and Fergie.³¹⁶ He explained that normally he wouldn't have raised an issue with Neilsen taking off, but was upset that Neilsen did so without listening to the voicemail he left.³¹⁷ Throughout the process, Stoltz felt that everyone reacted appropriately, and he would have no problems raising safety issues again in the future.³¹⁸ Stoltz did note that Fergie and Neilsen were less "meticulous" than the other pilots, although he didn't think they were lazy or unsafe.³¹⁹ Fletcher recalled him saying he thought there might have been "rule infractions" involving the pilots but "[h]e didn't believe that they blatantly broke the rules."³²⁰

Stoltz believed the de-icing problem had been addressed. The air ambulance was now always prepped for flight by the mechanics and pilots working together; however, the new air ambulance was much more sensitive to cold weather than the previous craft.³²¹ He had no personal problems getting along with pilots and "recognized" the "P[ilot] I[n] C[ommand] ha[d] the ultimate decision regarding airworthiness [sic]" and since the ice-on-blades incident, the pilots had been more conscientious.³²² While the program wasn't unsafe before, in his opinion, but the

³¹¹ Ex. 182 at PMC001253.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at PMC001254.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ Tr. at 2719.

³²¹ Ex. 182 at PMC001254.

³²² *Id.* at PMC001254-55.

aircraft wasn't kept in a "constant state of readiness [sic]" so takeoff was often delayed.³²³

He had a good working relationship with Van with lots of mutual reliance, but Van was very "hard headed" and had "really dug in his heels about what he determines to be 'safety issues'" since the 2001 crash.³²⁴ Stoltz believed Van would have more success in broaching these concerns if he tried "a more diplomatic & less aggressive / abrupt approach."³²⁵ Van expressed to him that Alzola protects the other pilots and pushes issues too far by saying safety concerns are really just Van wanting everything done to his satisfaction, but Stoltz hadn't ever observed this behavior himself.³²⁶ This lack of observation isn't particularly probative, since Stoltz had very little contact with the pilots and frequently provided relief for Van, meaning his on-the-job contact with Van was also limited.

In Stoltz' opinion, some of Van's "safety issues" were really "just Mark being Mark" and with his forcefulness about issues making others angry with him.³²⁷ He added the medical flight crew wasn't able to determine safety issues, and the pilots had engaged in some irresponsible safety behavior such as leaving the cowling open, flying without the fuel cap, etc., but he didn't have evidence of those issues happening in the last two years.³²⁸ Fletcher testified that she "didn't know that they [other Life Flight mechanics] had their own concerns" about Van.³²⁹ As a result, Stoltz's "comments were more significant."³³⁰

Fletcher then interviewed Dave Perkins, the other full-time life flight mechanic, on April 15, 2005, at 10:30 a.m.³³¹ Fletcher noted Perkins didn't have his 1A license yet. He hadn't experienced any "safety" problems, and explained that while Van had told him a little bit of background, he was largely trying to "keep [Perkins] out of it."³³² He hadn't observed any safety problems since November 2004 (when he began as a full-time mechanic),³³³ and the pilots were using rotor blade

³²³ *Id.* at PMC001255.

³²⁴ *Id.* at PMC001255, PMC001256.

³²⁵ *Id.* at PMC001255.

³²⁶ *Id.*

³²⁷ *Id.* at PMC001256.

³²⁸ *Id.* at PMC001256.

³²⁹ Tr. at 2715.

³³⁰ *Id.*

³³¹ *Id.* at PMC001257

³³² *Id.*

³³³ *See* Tr. at 168, 2390.

covers and seemed responsible for the air ambulance.³³⁴ However, he did feel the working atmosphere at PMC was that he was a “lowly mech” compared to the pilots.³³⁵ He felt very comfortable with Waller, but the other pilots were “difficult to get to know,” possibly due to their personalities.³³⁶ Despite these personality issues he felt all the pilots listened to his concerns.³³⁷

While Portneuf lacked the team environment and unity with which he was familiar, he also believed Van had “put up with a lot” over the twenty years he’d worked there often being forced to do operational work like blade de-icing—a pilot’s job—as well as genuine maintenance.³³⁸ He did have a sense of ingrained issues creating a divide between Van and the pilots, but suggested the FAA inspector come to the next safety meeting in order to offer an opinion.³³⁹ He also opined that everyone in the program—including Van and the pilots—were good at their jobs, noting he’d learned a lot from Van.³⁴⁰ He also suggested getting a data recorder for the air ambulance as a way to see “if parameters have been exceeded” as well as providing “advance warning” of other problems.³⁴¹ While the division between Van and some of the pilots affected the friendliness of the work environment, it wasn’t affecting the program.³⁴²

When asked about the “ice on blades” issue, as Fletcher called it, he believed a minor issue had been amplified.³⁴³ If everyone involved had acted more professionally it could have been easily resolved.³⁴⁴

Later that day, Fletcher met with Alzola again to follow up on past safety issues raised by Stoltz. He confirmed that Neilsen and Fergie were less “meticulous” pilots, but denied they were unsafe, and admitted Neilsen had been written up for the cowling incident in 2003.³⁴⁵ Neilsen left the cowling unsecured during flight, rendering it bent and damaged.³⁴⁶ Neilsen admitted his fault.³⁴⁷ Alzola further

³³⁴ Ex. 182 at PMC001257.

³³⁵ *Id.* at PMC001258.

³³⁶ *Id.* at PMC001259–60.

³³⁷ *Id.* at PMC001260.

³³⁸ *Id.* at PMC001258.

³³⁹ *Id.* at PMC001259.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at PMC001260.

³⁴³ *Id.* at PMC001259.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at PMC001250.

³⁴⁶ *Id.* at PMC001251.

explained that the crew had gotten a little “out of control” in their efforts to reduce liftoff time with removing heaters, taking of covers, etc., but all staff were now trained, and the pilot inspects the air ambulance to ensure the it is airworthy before liftoff.³⁴⁸

He explained that there were no on-the-ground eyewitnesses to the “buzzing” incident, which Pam Neice had investigated, and the flight crew on that flight had required a low altitude to assist the head injury patient they were transporting, so there was no evidence Fergie violated the PIPs.³⁴⁹ The problem never occurred again, so he believed no FAA regulations had been violated, and Fergie had agreed to watch his altitude in the future.³⁵⁰

Alzola explained that twice in the last year pilots had overflowed airworthiness directives.³⁵¹ Van wrote up the incidents, and Alzola spoke with both pilots and self-reported to the FAA.³⁵² Neither violation was willful, in Alzola’s opinion, because Fergie had misjudged time and overflowed the directive by between one and six minutes, while Waller had assumed the required maintenance had been performed prior to his takeoff.³⁵³

Upon completion of her investigation Fletcher concluded the only option was to terminate Van’s employment.³⁵⁴ A major reason why she concluded the Life Flight program couldn’t go forward as it stood was because she discovered the problem was much broader than just Van and a couple of pilots, but instead involved all the pilots, the mechanics, and the flight crew.³⁵⁵ She would have recommended him for another mechanic position within the hospital had there been one, but there was not. She then took this up with Mapes who ultimately took up the issue with Hermanson who, under the hospital’s procedures, had final say on a decision to terminate an employee.³⁵⁶ Ultimately, Hermanson approved, and Mapes gave Fletcher the go-ahead to proceed.³⁵⁷ Fletcher informed Holmes of the

³⁴⁷Ex. 182 at PMC001251.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at PMC001250.

³⁵⁰ *Id.* at PMC001251.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* at 2733.

³⁵⁵ *See id.* at 2731–33.

³⁵⁶ *Id.* at 2733–37.

³⁵⁷ *Id.* at 2736, 2738. Exhibit 123 (“Mark Van Notes From File”) indicates it was at an April 19, 2005, meeting with Mr. Mapes at which the “[d]ecision [was] made to terminate [Van’s] employment due to unreasonable behavior.” Ex. 123 at PMC000054. However, the date of that meeting may be

recommendation to terminate Van, and Holmes agreed with the decision.³⁵⁸ At that point someone (it's not clear who) instructed Holmes to request Van schedule a meeting with Holmes, Fletcher, and Mapes to explain the rationale behind the termination.³⁵⁹ Van declined the meeting; Mapes terminated him by telephone call later that day.³⁶⁰ Van was "terminated because of his inability to work as part of the team, to work cohesively with other people, with resolving issues, with constructively confronting problems," according to Fletcher.³⁶¹

The events on April 20, 2005, were further documented in a surviving set of meeting notes, some drafted by Fletcher, others apparently drafted by Pam Holmes.³⁶² At 2:15 p.m. Holmes contacted Van and asked him to meet with the author, Dale Mapes, and Audrey Fletcher at 3:00 p.m.³⁶³ Van refused saying he wanted to meet with Ms. Fletcher before he went to any more meetings.³⁶⁴ Van felt the way others had "ganged up" on him at the last meeting (about the harassment by Neilsen), prevented him from getting his point across. He refused to come in for the meeting and asked to have Fletcher call him.³⁶⁵

After Van "refused" Holmes' request to attend a meeting, Mapes and Holmes and Fletcher had a conference call with Van.³⁶⁶ Mapes called Van who again explained how unfair he felt the last meeting had been.³⁶⁷ He wanted to raise new safety issues, but felt he couldn't because Holmes had a "knee jerk" reaction every time he mentioned something involving Fergie.³⁶⁸ They discussed the "major issue" of Van's trust problems with Gary Alzola relating to the FAA and not releasing information about the 2001 crash.³⁶⁹ Mapes then asked Van to step down to which

erroneous (*see* Tr. at 2767), and it isn't clear who other than Mapes attended that meeting. Ex. 123 at PMC000054. It is possible Hermanson approved Van's termination at a meeting with Mapes on April 19, 2005.

³⁵⁸ *Id.* at 2738–39.

³⁵⁹ *Id.* at 2738–39.

³⁶⁰ *Id.* at 2740.

³⁶¹ *Id.* at 2741.

³⁶² *See* Ex. 182 at PMC001246–48; Ex-597 at PMC001248.

³⁶³ Ex. 182 at PMC001246.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ Ex. 597 at PMC001248.

³⁶⁷ C. Ex. 182 at PMC001246.

³⁶⁸ Ex. 182 at PMC001246.

³⁶⁹ *Id.*

Van replied, “All I am trying to do is keep people safe; this is wrong.”³⁷⁰ Mapes said they were at an impasse and explained the separation agreement, which he promised to send to Van.³⁷¹ Van said he wanted to come in and talk (presumably to Fletcher) the next day.³⁷² Instead, Mapes told Van he needed to stay away and could contact security if he “needed” to retrieve his belongings.³⁷³

In summary Portneuf says it fired Van not because of his safety complaints, but because of this longstanding pattern of poor interpersonal behavior and demonstrated lack of trust between Van and the rest of the Life Flight program that came to a head at an April 1, 2005, Human Resources meeting. At that meeting Audrey Fletcher was shocked to discover the discord and hostility within Life Flight was much more severe than Portneuf management had previously believed. This prompted a thorough investigation into the Life Flight program and Van’s interactions with his co-workers. As a result of this investigation, Fletcher discovered the problem was much broader than just Van and a couple of pilots but instead involved all the pilots, the mechanics, and the flight crew. She eventually arrived at the reluctant conclusion the Life Flight program couldn’t go forward as it stood. Portneuf staff had tried repeatedly over the years to help Van with his trust issues, interpersonal problems, and fixation on perceived safety issues (that weren’t really safety issues) no avail. Taking that history into context, Fletcher concluded the only solution was to terminate Van’s employment. She then conferred with her superiors in the chain of command, first Mapes, and later Hermanson, who eventually agreed with her recommendation. She shared her conclusions with Holmes, Van’s supervisor, who wasn’t happy about the decision, but ultimately agreed it was for the best. With the Portneuf management in agreement, Portneuf then terminated Van’s employment.³⁷⁴ But that’s not really true.

As the following sections demonstrate, the contemporaneous records—including emails, memoranda, and meeting notes—taken together with witness testimony paint a dramatically different picture. The decision to terminate Van didn’t come at the conclusion of a thorough investigation in which the comments of

³⁷⁰ *Id.*

³⁷¹ *Id.* at PMC001247.

³⁷² *Id.* at PMC001247.

³⁷³ Ex. 182 at PMC001247. Fletcher’s notes describe the same events similarly, with somewhat different coloring of the conversation. Van explained that he wanted to follow up with Fletcher regarding the “unfairness” of the previous meeting at which people were “allowed to say ‘terrible’ . . . things to him.” Ex. 587 at PMC001248. He felt the pilots and Holmes had hurled accusations at him and the meeting had lacked the necessary degree of civility. *Id.* He also discussed the past safety incidents and what he perceived as cover-ups that fueled his trust issues with Holmes and the pilots. *Id.* When Van was done talking Mapes told him he was severed due to his trust and communications problems and failure to accept resolution of issues. Fletcher specifically noted Van’s termination was not related to his “raising of safety concerns.” *Id.*

³⁷⁴ *See* Tr. at 2731–35.

flight crew members, mechanics, and pilots alike led Fletcher to believe there was only one possible solution. Instead, the decision to terminate Van came almost immediately after the March 24, 2005, Life Flight leadership meeting—a meeting in which it appears Van raised specific air safety complaints. This was the penultimate meeting in a string of meetings in which Van engaged in protected activity related to Life Flight’s cold weather policy. Fletcher didn’t receive or consider the vast majority of feedback from the flight crew, mechanics, and pilots until after both she and Mapes had decided to terminate Van, and the feedback didn’t show what Fletcher said it did.

B. The Contemporaneous Evidence Shows Portneuf’s Story Isn’t True and Portneuf’s Decision was Motivated by Invidious Discrimination

Numerous events and interactions throughout Van’s tenure as Portneuf’s Life Flight Director of Maintenance colored his relationship within Portneuf. In the opinions of both Parties, these events contributed to Van’s ultimate termination. The sequence of events that directly led to Van’s termination began in late October 2004 with the first of a series of safety incidents involving Life Flight’s cold weather policy. Much of this analysis unfortunately, but necessarily, repeats the facts that already were discussed in Part IV, but with some augmentation and differences in emphasis.

1. The Cold Weather Policy and Portneuf’s Initial Response

On October 30th or 31st, Greg Stoltz, then a part-time, occasional relief mechanic, came into work and found ice and snow on the air ambulance including on its four main rotor blades.³⁷⁵ The blade covers hadn’t been installed.³⁷⁶ The pilot on duty that day, Neilsen, should have cleaned off the snow during preflight at the start of his shift. The snow and ice was still there. Stoltz began de-icing the blades while doing his daily inspection.³⁷⁷ Stoltz had “mostly cleaned off” two blades and had turned the remaining blades into the sun to assist the de-icing, when he went downstairs to the mechanic’s office to call Neilsen to see if there were any other issues with the air ambulance beyond icing.³⁷⁸ He was away from the helipad for no more than 20 minutes and left a message for Neilsen, but was unable to reach

³⁷⁵ Tr. at 1617, 1636.

³⁷⁶ Ex. 14.

³⁷⁷ Tr. at 1636; Ex. 14.

³⁷⁸ Ex. 14.

him.³⁷⁹ When he returned to the helipad to finish de-icing the blades, he discovered Neilsen taking off, likely with ice still on the main rotor blades.³⁸⁰

When the air ambulance returned, Stoltz discovered the hour meter hadn't worked during the first leg of the flight, which he attributed to "all the snow and rain the night before"³⁸¹ freezing and forming ice on or in the switch, a condition which might not have been apparent during Neilsen's preflight inspection.³⁸² The presence of ice on the switch during flight supports my conclusion it was more likely than not there was still ice on the rotor blades of the air ambulance when Neilsen took off.

On November 1, 2004 (approximately the next day), Stoltz told Van about the incident.³⁸³ Van was reluctant to bring it up with Alzola because of how safety complaints had been handled in the past.³⁸⁴ Alzola was also switching from days to nights, and was then off for a week, so after "hemm[ing] and haw[ing]" Van broached the issue with Fergie a "few" weeks after the incident.³⁸⁵ Fergie, who had been the pilot on duty the night before Neilsen's ice-on-blades flight hadn't installed the blade covers because "[t]he blades were wet and the covers would freeze on the blades" if installed.³⁸⁶ On the same day, Fergie spoke to Stoltz to get more details.³⁸⁷ Stoltz told Fergie of his concerns, especially that ice might have still been on the blades and flung into the parking lot or onto the aircraft causing damage.³⁸⁸ Fergie agreed to discuss the issue "with all the pilots" at the next safety meeting.³⁸⁹ Van followed up with Fergie shortly thereafter to inquire about the results of Fergie's inquiry, but Fergie said the event was "nothing."³⁹⁰

³⁷⁹ Tr. at 1637–38; Ex. 14.

³⁸⁰ Tr. at 168; Ex. 14.

³⁸¹ Ex. 14.

³⁸² Tr. at 1638–39.

³⁸³ Tr. at 168.

³⁸⁴ Tr. at 168.

³⁸⁵ Tr. at 168; Ex. 14. The exact date of this conversation isn't clear. Stoltz's memo called it a "few" weeks after the ice on blades flight. Ex. 14. Fergie thought it was five or six weeks because he recalled talking to Van about Neilsen's Halloween ice on blades flight sometime in December 2004. Tr. at 2257.

³⁸⁶ Ex. 218.

³⁸⁷ Tr. at 2253.

³⁸⁸ Ex. 14.

³⁸⁹ Ex. 14.

³⁹⁰ Tr. at 169.

At roughly the same time in November 2004, Alzola began work on a new cold weather operations policy for Life Flight.³⁹¹ Van prepared recommendations for the cold weather policy, many of which attempted to address the problems that led to Neilsen's Halloween ice-on-blades flight, including suggesting that dispatch monitor the helicopter.³⁹² Van emailed these suggestions to Fergie in a five-page attachment on December 3, 2004, at 10:35 a.m.³⁹³

On January 14, 2005, Van received a neutral-to-favorable performance evaluation that found no performance deficiencies.³⁹⁴ Just days later, on January 17, 2005, Van asked about the cold weather policy at the Life Flight Safety Committee Meeting, which he and Pam Holmes attended.³⁹⁵ At the meeting Holmes inquired about the cold weather policy, and Fergie (the Life Flight Safety Officer who had called the meeting) said the policy updates had been addressed.³⁹⁶

But less than two weeks later over the night of January 31 to February 1, 2005, another de-icing incident occurred, involving Fergie. During the pilot shift change on the night of January 31, 2005, while it was beginning to snow, Waller was wiping off blades with a towel to clean them before pulling on the blade covers.³⁹⁷ Fergie told Waller that wasn't needed and told him to just pull the blade covers on and it would knock the snow off.³⁹⁸ Waller and Fergie then put on heaters and the rest of the covers.³⁹⁹ Waller hadn't tried this technique before and didn't know if it would work.⁴⁰⁰

The next morning, February 1, 2005, when Van came onto the helipad at 8:45 a.m. to do his daily inspection he found ice and snow all over the aircraft, including stuck to the blades under the blade covers, which had not been removed.⁴⁰¹ He

³⁹¹ Tr. at 169.

³⁹² Tr. at 170–73.

³⁹³ Ex. 32; Ex. 220; *see also* Tr. at 2337 (confirming Exhibit 32 is the five-page memo Van submitted).

³⁹⁴ Ex. 95 (Van's copy); Ex. 151 (OSHA's copy); Ex. 567 (Portneuf's copy). He received mostly 3s, some 3.5s and 4s, and a small handful of 2.5s, but he had no "Performance Deficiency that prevents this Employee from fulfilling his or her assigned duties," and required no Plan for Improvement. Ex. 567 at PMC000330.

³⁹⁵ Tr. at 183–84.

³⁹⁶ Tr. at 183–84.

³⁹⁷ Tr. at 1589.

³⁹⁸ Tr. at 1589.

³⁹⁹ Tr. at 1589.

⁴⁰⁰ Tr. at 1589–90. Waller further testified that it didn't work as far as he knew, and blade-covering procedures were discussed at a later team meeting. Tr. at 1589–90.

⁴⁰¹ Tr. at 174; Ex. 15; Ex. 259. Fergie testified Portneuf's policy is to remove blade covers at shift change unless it is currently (or is forecast to continue) snowing, icing, raining. Tr. at 2341.

called dispatch to take the air ambulance out of service⁴⁰² and proceeded to de-ice it, which took 45 minutes.⁴⁰³ While Van was deicing the air ambulance, Fergie walked onto the helipad and had a confrontation with Van, who was upset because Fergie should already have de-iced the aircraft during his preflight when he came on duty that morning.⁴⁰⁴

After he de-iced the aircraft, Van wrote a memorandum detailing what had happened, and why he was concerned.⁴⁰⁵ Van was particularly concerned because the blade covers had been installed with ice and snow under them before the start of the night shift, and “[i]f the night pilot had a flight[] and removed the blade covers in the dark[,] he could easily have overlooked the snow and ice . . .” that was on the blades hidden under the covers.⁴⁰⁶ This could have caused several unsafe conditions (including out-of-balance rotor blades, altered lift characteristics, and chunks of ice flung about) and it was the second time “this year” that he’d found ice under the blade covers, which alarmed him because that hadn’t happened in the past.⁴⁰⁷ Van also described a procedure through which the blade covers could be installed, even in heavy snow, and even if only one individual was on duty to install them, without ice forming underneath the covers.⁴⁰⁸ He emailed the memo to Holmes and Alzola at 11:53 a.m.⁴⁰⁹

Holmes replied that day at 2:45 p.m. to say she was “taking this seriously.”⁴¹⁰ Holmes stated Fergie, who was the day pilot on January 31, had returned without a crew and had “no other crew members to assist” with de-icing.⁴¹¹ Van had specifically described how an individual working alone could avoid trapping snow under the blade covers, and Holmes acknowledged this, but noted it was “hard to achieve this with a one person show.” She suggested “[p]erhaps we need to suggest that in situations like this, they [pilots] call the mechanic to assist.”⁴¹² However she opted to leave the resolution up to Van and Alzola.⁴¹³

⁴⁰² Ex. 15; Ex. 219.

⁴⁰³ Tr. at 174, 178.

⁴⁰⁴ See Tr. at 102.

⁴⁰⁵ Ex.15; Ex. 219.

⁴⁰⁶ Ex. 15; Ex. 219. If that had happened it would have been a *per se* violation of the FARs, and precisely the same violation involved in Neilsen’s Halloween ice-on-blades flight.

⁴⁰⁷ Ex. 15; Ex. 219.

⁴⁰⁸ Ex. 15; Ex. 219.

⁴⁰⁹ Ex. 219.

⁴¹⁰ Ex. 16.

⁴¹¹ Ex. 16.

⁴¹² Ex. 16.

⁴¹³ Ex. 16.

Alzola didn't reply for more than two weeks, in part because he "wanted to talk to the pilots first."⁴¹⁴ He finally responded via email at 6:05 p.m. on February 17, 2005; the email was sent to Holmes, Van, Fergie, Waller, Neilsen, and Ford.⁴¹⁵ He knew Waller had been there when Fergie landed (i.e., there had been others to assist and Fergie wasn't a "one person show" that night), and "Ron [Fergie] admitted that they should have done a better job of trying to dry the blades as they were installing the covers."⁴¹⁶ Alzola gave no indication he understood that Fergie had actually stopped Waller from doing exactly that (drying the blades before putting on the blade covers), which suggests Fergie wasn't entirely forthcoming with his role in the situation and may have deflected some responsibility to Waller. Fergie claimed he was trying to "get the covers on in a timely manner since it was snowing heavily."⁴¹⁷ Alzola confirmed that "we" (possibly meaning pilots or perhaps Life Flight as a whole) would do what was "practical" to minimize situations where whether cold weather issues took the air ambulance out of service.⁴¹⁸

Alzola's email went on to say:

We appreciate advice and information from the mechanics and crew member [sic] in regard to any condition or situation that may affect aircraft airworthiness. However, only the PIC has the responsibility and authority to determine aircraft airworthiness. Please consult with the pilot and explain your concerns. If necessary, he will take the aircraft out of service.⁴¹⁹

Alzola's last statement didn't comport with Van's understanding of air safety regulations, and prompted a rather heated response.

The following Monday, February 21, 2005, at 10:04 a.m., Van replied to Alzola's email and copied Holmes.⁴²⁰ In this email he related the February 1 incident to Neilsen's Halloween ice-on-blades flight, which he described as "the beginning."⁴²¹ Van pointed out that Fergie's decision to not install blade covers the night before had "set up" the Halloween ice-on-blades flight.⁴²² He explained how

⁴¹⁴ Ex. 16.

⁴¹⁵ Ex. 16.

⁴¹⁶ Ex. 16.

⁴¹⁷ Ex. 16.

⁴¹⁸ Ex. 16.

⁴¹⁹ Ex. 16 (emphasis original).

⁴²⁰ Ex. 218.

⁴²¹ Ex. 218.

⁴²² Ex. 218; Tr. at 182–83.

this “prodded him into action” which led to the five pages of suggestions he submitted for consideration in developing the cold weather policy.⁴²³ He wanted to bring up the suggestions at a “Safety or Life Flight meeting,” but Holmes convinced him to wait until the January meeting, at which Fergie had claimed the cold weather policy was resolved.⁴²⁴

Van also relayed that Waller had told him about starting to wipe down the blades only to have Fergie stop him.⁴²⁵ Van felt the situation could be easily avoided if the pilots put in a little more effort; he also took issue with Alzola’s representation that only the PIC could take the aircraft out of service, calling Alzola’s statement “pure fallacy” and indicating Maintenance would continue to follow their own policy considering taking an aircraft out of service and consulting with pilots.⁴²⁶ Van asked for “assurances that this situation will be rectified” or to have a meeting involving the “affected parties” to discuss the recommendations he’d made about the cold weather policy. He closed with an explanation of his lack of confidence the situation had been resolved and why: Fergie “stated in the safety meeting that the cold weather cover issue had been taken care of. Training pilots to install covers over wet snow covered blades does not instill confidence that this issue is behind us.”⁴²⁷

Holmes then sent out invitations to a special “Ice on Blade Discussion and Resolution” meeting scheduled for February 28, 2005, at 8:00 a.m.⁴²⁸ Van initially declined the meeting⁴²⁹ because members of the flight crew and communications team weren’t invited and he felt they should be.⁴³⁰

2. Harassment and Misrepresentations Enter the Picture

That Friday, February 25, 2005, at 11:35 a.m., three days before the scheduled meeting to resolve the cold weather policy issues, Neilsen harassed Van on the helipad.⁴³¹ Neilsen, visibly angry, apparently about Van’s statements about the Halloween ice-on-blade flight,⁴³² asked Van if he was “trying to make the

⁴²³ Ex. 218.

⁴²⁴ Ex. 218.

⁴²⁵ Ex. 218.

⁴²⁶ Ex. 218; Tr. at 174–75.

⁴²⁷ Ex. 218.

⁴²⁸ Ex. 217 at PMCFD020.

⁴²⁹ Ex. 217 at PMCFD020. It’s not clear when Holmes sent the invitation, but Van declined at 9:05 a.m. on February 23, 2005. Ex. 217 at PMCFD020.

⁴³⁰ Ex. 217 at PMCFD020. Van wrote the “Ice on Blade” issue belonged “to the team.” Ex. 217 at PMCFD020.

⁴³¹ Tr. at 193–95.

⁴³² Tr. at 194.

program go down the crapper?”⁴³³ Van felt threatened and intimidated and his heart started racing.⁴³⁴ Neilsen also said he was “tired of all of these e-mails [sic] flying around,” which confused Van (who hadn’t sent Neilsen any emails).⁴³⁵ Neilsen finally turned and “he stomped off and he slammed the gate” on the helipad; when Van asked him what he was talking about, Neilsen “bellow[ed], ‘Well, you’re going to find out.’”⁴³⁶ Shaken, Van emailed Holmes at 12:11 p.m. complaining about this intimidation, explaining what happened, and how it made him feel.⁴³⁷ The harassment was a response to Van’s protected complaints about Neilsen flying with ice on the rotor blades.

The following Monday, February 28, 2005, at 8:00 a.m.⁴³⁸ Van, Alzola, Fergie, and Holmes attended the special Ice on Blades safety meeting.⁴³⁹ Van objected to the “clandestine” nature of the meeting,⁴⁴⁰ but brought up his five-page suggestion document he’d sent to Alzola on December 3, 2004, and reiterated his concerns about the two ice-on-blades incidents.⁴⁴¹ Fergie implied Van was blowing things out of proportion and insisted Stoltz had told him “it was just frost.”⁴⁴² This led to further discussion of the Halloween incident because Van remembered Stoltz had told him there was ice and snow on the blades, and he believed Stoltz had relayed the same information to Fergie.⁴⁴³ Van felt Fergie was being “very dishonest” and downplaying the severity of the Halloween incident.⁴⁴⁴

Alzola again insisted only a pilot could take the helicopter out of service.⁴⁴⁵ Since this didn’t correspond with Van’s understanding of FAA regulations, he expressed desire to have an open forum to discuss with the entire leadership team

⁴³³ Tr. at 193. Neilsen admitted to the altercation and to making a similar statement (although he disputed the exact words); I credit Van’s recollection. *See* Tr. at 2639 (Fletcher testifying Neilsen claimed his exact words were “[a]re you trying to put this program into the ground?”)

⁴³⁴ Tr. at 193; Ex. 66.

⁴³⁵ Tr. at 194.

⁴³⁶ Tr. at 193. Van later heard from Audrey Fletcher (it isn’t clear when) that Fergie had apparently shared with Neilsen an email Van authored about the Halloween ice-on-blade flight. Tr. at 193–94.

⁴³⁷ Tr. at 193–95; Ex. 166.

⁴³⁸ *See* Ex. 217.

⁴³⁹ Tr. at 102.

⁴⁴⁰ Tr. at 190.

⁴⁴¹ Tr. at 172.

⁴⁴² Tr. at 191.

⁴⁴³ Tr. at 191.

⁴⁴⁴ Tr. at 191.

⁴⁴⁵ Tr. at 91–92.

the policy that only the pilot could take the aircraft out of service.⁴⁴⁶ Alzola refused, saying flying with ice on the blades was “between the FAA and the pilots.”⁴⁴⁷ Ultimately, they adopted a stronger policy on wiping down the rotor blades before the blade covers would be installed, although Van still had doubts about its effectiveness.⁴⁴⁸

Later that day, at 1:07 p.m., Holmes responded to Van’s harassment complaint, stating “I think this type of behavior is unacceptable. I am sorry this happened to you.”⁴⁴⁹ She went on to ask if he wanted to forward the issue to Alzola or have her handle it.⁴⁵⁰ Sometime “later” (the timing isn’t clear), Van asked Alzola if he could do anything about Neilsen’s harassment.⁴⁵¹ Neither Alzola nor Holmes ever addressed the issue, however.⁴⁵² Van didn’t feel comfortable approaching Neilsen directly, explaining “on 2/28/05, I was told that I was upsetting the pilots to the point where they were dangerous—too dangerous to fly, so why would I go talk to Barry Nielson [sic] about a very upsetting event and turn it into a chaos.”⁴⁵³

On March 1, 2005, Alzola emailed Van, Fergie, and Holmes the cold weather policy as updated following the February 28 meeting.⁴⁵⁴

Meanwhile, Van followed up with Stoltz to find out what Stoltz had told Fergie regarding Neilsen’s Halloween ice-on-blade flight. Stoltz wrote up what had happened, and in his memo of March 5, 2005, confirmed just what Van had thought—Stoltz told Fergie there was ice and snow on the rotor blades, not “just frost.”⁴⁵⁵ Van didn’t tell Stoltz what to write; Stoltz testified Van asked him “to write a letter of what [he] recalled.”⁴⁵⁶ Van hadn’t intimidated or forced Stoltz to write up what had taken place.⁴⁵⁷

⁴⁴⁶ Tr. at 186.

⁴⁴⁷ Tr. at 189. Despite Alzola’s that maintenance had no authority to take the aircraft out of service, he later drafted an updated version of Policy Letter 10, which in effect codified a method for mechanics to do just that and signal to pilots that the air ambulance required further work or had a problem that needed to be addressed before it could fly. Ex. 204; *see also* Tr. at 91–92.

⁴⁴⁸ Tr. at 172, 191.

⁴⁴⁹ Ex. 166 at PMC000653.

⁴⁵⁰ Ex. 166 at PMC000653.

⁴⁵¹ Tr. at 196.

⁴⁵² Tr. at 196.

⁴⁵³ Tr. at 353.

⁴⁵⁴ Ex. 216.

⁴⁵⁵ Ex. 14.

⁴⁵⁶ Tr. at 1635.

⁴⁵⁷ Tr. at 1635.

By March 24, 2005, neither Holmes nor Alzola had addressed Van's harassment complaint. Van ran into Fletcher on Portneuf's sky bridge that morning, brought up the intimidation, and asked her if she knew about it.⁴⁵⁸ Fletcher didn't want to discuss such a sensitive issue in public, so she asked the Complainant to send her an email detailing the incident.⁴⁵⁹ Van emailed her as requested at 9:06 a.m., detailing the harassment.⁴⁶⁰ He further explained that in a meeting with Alzola, Fergie, and Holmes, he was told he was "upsetting the pilots with [his] safety issues and that it is making them unsafe to fly."⁴⁶¹ Van explained he'd talked to Alzola about the harassment, and Alzola didn't think Neilsen would talk to Van "on his own."⁴⁶² Van remembered that Neilsen had said he was "tired of all the emails flying around," which confused Van because he hadn't emailed Neilsen, but had sent a "report" to Alzola about the Fergie's February 1 ice incident.⁴⁶³ He then asked Fletcher for a Human Resources (HR) meeting with Neilsen to clear the air.⁴⁶⁴ He also wanted to "go over some related safety issues with HR before the meeting."⁴⁶⁵

Fletcher and Van corresponded about the harassment complaint throughout the day. Fletcher replied at 10:18 a.m., saying she was sorry to hear of the harassment; she also asked if Van knew what Neilsen meant by "you will find out," and wanted to know who else from the Life Flight program should be present at the meeting.⁴⁶⁶

Van replied at 11:29 that morning explaining he didn't know what Neilsen meant, but Holmes had said the behavior was "Unacceptable" at the February 28 meeting.⁴⁶⁷ Van wanted to talk to Barry Neilsen to put the harassment "behind him" and make sure Neilsen didn't harbor "ill feelings."⁴⁶⁸ He didn't indicate wanting anyone else present.

3. Portneuf Decides to Terminate Van's Employment

⁴⁵⁸ Tr. at 2680.

⁴⁵⁹ Tr. at 2680.

⁴⁶⁰ Ex. 189.

⁴⁶¹ Ex. 189. Van was most likely referring to the February 28, 2005, cold weather policy meeting, since Van, Holmes, Fergie, and Alzola attended that meeting.

⁴⁶² Ex. 189 at PMC001382.

⁴⁶³ Ex-189 at PMC001382.

⁴⁶⁴ Ex-189 at PMC001382.

⁴⁶⁵ Ex. 189 at PMC001382.

⁴⁶⁶ Ex. 189 at PMC001382.

⁴⁶⁷ Ex. 189 at PMC001382.

⁴⁶⁸ Ex. 189 at PMC001382; *see also* Ex. 522 at PMC000126; Ex. 215.

Sometime the same day (March 24, 2005), Life Flight had a Leadership Meeting followed by a Safety Committee Meeting. Van started to bring up how Fergie handled the Halloween icy blade flight issue, specifically his concerns about Fergie “altering safety witness information.”⁴⁶⁹ That issue hadn’t been addressed at the February 28 meeting, because Van couldn’t verify what Stoltz had told Fergie until several days later. He said he was hesitant to discuss the issue when Fergie wasn’t present.⁴⁷⁰ Holmes then “cut [him] off” before he could discuss much more and said they would have a special safety meeting to discuss the issue.⁴⁷¹ He also expressed distress that he wasn’t allowed to raise safety concerns outside of safety meetings and frustration that his concerns weren’t being taken seriously.⁴⁷² Later the same day Van attended the Life Flight safety meeting, which Fergie also attended. Fergie gave his usual “safety speech” at that meeting, which particularly irked Van given the apparent hypocrisy.⁴⁷³

The following morning, a Friday, Van followed up on his harassment complaint again by emailing Fletcher a memo describing Neilsen’s harassment and its context (including the Halloween 2004 ice-on-blade flight.⁴⁷⁴ In his memo he also explained he wanted to know “who worked Barry [Neilsen] up to cause this conflict” since he hadn’t sent any emails about the underlying ice-on-blades incidents to Neilsen.⁴⁷⁵ Van also prepared a list of questions to ask Fletcher and Fergie in preparation for the HR meeting Fletcher was scheduling.⁴⁷⁶

Later that day (March 25) at 1:57 p.m., Alzola emailed Holmes to “express [his] concern and opinion about an incident that occurred during [the] leadership meeting on 3/24/05.”⁴⁷⁷ The incident was what Alzola described as Van’s “tangent” about his safety concerns not being properly addressed and complaint that “he is not allowed to talk about them as he sees fit.”⁴⁷⁸ Alzola related this to the meeting

⁴⁶⁹ Tr. at 216–17.

⁴⁷⁰ Tr. at 192.

⁴⁷¹ Tr. at 191–92. Holmes recalled saying “we’ll get another meeting together to—to talk about it later on[,] but not right now.” Tr. at 2053. She thought Van was trying to discredit the results of the February 28 meeting. Tr. at 2053; *see also* Portneuf Medical Center’s Post-Hearing Brief, 33 (discussing Holmes’s testimony).

⁴⁷² *See* Tr. at 2731.

⁴⁷³ Tr. at 192, 216–17.

⁴⁷⁴ Ex. 215.

⁴⁷⁵ Ex. 215. Van’s memo indicates it was accompanied by copies of three emails—his February 1 email about finding ice and snow under the blade covers, Alzola’s February 17 response, and Van’s February 21 reply—these were the only emails “flying around” regarding the ice-on-blades problems and therefore germane to contextualizing Van’s harassment complaint.

⁴⁷⁶ *See* Ex. 21.

⁴⁷⁷ Ex. 185 at PMC001371.

⁴⁷⁸ Ex. 185.

“about two weeks ago”⁴⁷⁹ where Alzola felt Van’s issues were discussed for two hours, but Van just wasn’t happy with their solutions and resolution.⁴⁸⁰ Alzola thought the topic wasn’t appropriate for a leadership meeting and was “another attempt on [Van’s] part to undermine our team trust and the morale of the program.”⁴⁸¹ He complained about Van’s confrontational attitude and the “unhealthy environment” it fostered, and added mechanics were “home in bed with their families” while pilots were up “making safety happen.”⁴⁸²

Holmes replied to Alzola’s email, thanking him for expressing his concerns, and ominously added “I will be addressing this situation.”⁴⁸³

The following Monday, March 28, 2005, at 9:48 a.m., Van began distributing a memo describing the safety concerns he wanted to address at the special safety meeting Holmes had announced at the March 24 Leadership Meeting.⁴⁸⁴ He sent the first email to Alzola, Fergie, and Holmes.⁴⁸⁵ In the accompanying memo he expressed concern about accountability, “track ability,” and openness of safety issues, concurrently expressing concern about “pilot management” issues, notably related to “cover-ups” and lack of sanctions.⁴⁸⁶ He also suggested establishing sanctions for safety violations and made recommendations about leadership requirements to ensure accountability, safety, and “operational readiness.”⁴⁸⁷ He sent the same attachment to Ann McCarty, who headed Life Flight’s communications group, at 10:28 a.m., indicating “I would like you present if there is ever a meeting!” and followed that with another email to Laura Vice on the flight crew at 11:11 a.m.⁴⁸⁸ He asked Vice to voice her opinions at the meeting.⁴⁸⁹ Van apparently sent the memo to and requested feedback from all or most of his co-workers in the Life Flight program.

While Van was sending out his safety memos, Fergie emailed Alzola and Fletcher with his “thoughts as requested” regarding Van.⁴⁹⁰ Fergie said his “concern

⁴⁷⁹ Alzola may have been referring to the February 28 cold weather policy meeting; the record doesn’t indicate another meeting Van and Alzola had attended in the interim.

⁴⁸⁰ Ex. 185 at PMC001371.

⁴⁸¹ Ex. 185 at PMC001371.

⁴⁸² Ex. 185 at PMC001371.

⁴⁸³ Ex. 185 at PMC001371.

⁴⁸⁴ Ex. 518; Ex. 519.

⁴⁸⁵ Ex. 518.

⁴⁸⁶ Ex. 519 at PMC000120.

⁴⁸⁷ Ex. 519 at PMC000120.

⁴⁸⁸ Ex. 214.

⁴⁸⁹ Ex. 212.

⁴⁹⁰ Ex. 184 at PMC001362.

is not [Van's] ability to perform maintenance functions."⁴⁹¹ He went on to describe his concern as Van's "continuous intrusion into other aspects of our flight program."⁴⁹²

Fergie's statement had been solicited by Holmes and Alzola, most likely before Van sent his safety memo to other staff requesting further input. With less than three hours between the time Van sent the first email (to Holmes, Fergie, and Alzola) and the time Fergie replied to Holmes and Fergie's request with a full-page memo, I find it unlikely Holmes and Alzola requested Fergie's comments in response to Van's email. Given Alzola's email the previous Friday and Holmes's response that she was "addressing this situation," it appears their request stemmed from Van's safety complaints at the March 24, 2005, leadership meeting.

Fergie also expressed desire to see Van be supervised by the Operations Director, said the situation had been "exasperated" [sic] when Van was allowed to report directly to the Program Director (Holmes), and said the "move should be reversed immediately."⁴⁹³

The next morning, March 29, 2005, at 9:37 a.m., Holmes emailed Fletcher a draft "response letter" to Van's March 28 email proposing topics for the special safety meeting.⁴⁹⁴ She also told Fletcher she had received a call from flight nurse Mark Romero⁴⁹⁵ in which Romero said he'd received Van's safety memo, which made him feel "torn," was "disturbing," and needed to "stop," and added he felt Van was "digging a hole."⁴⁹⁶

Fletcher replied at 12:43 p.m. with her recommended edits on the "response letter" response and indicated "I am still waiting to speak with Dale [Mapes, her manager within the Human Resources Department] concerning this issue."⁴⁹⁷ Although Fletcher didn't explicitly state the purpose of her conversation with Mapes, Fletcher's testimony at trial sheds light on it. Under Portneuf's procedures if she or Holmes wanted to fire Van, they would first have to take the matter to Dale Mapes. If Mapes agreed, he would then propose the firing to Hermanson (and

⁴⁹¹ Ex. 184 at PMC001362. Fergie took a different tune at trial. Tr. at 2279 (Fergie testifying "And so that [Van's complaints], in itself, became a safety issue when I'm on duty that I'm having a hard time sleeping because I'm worried about all of this other stuff.")

⁴⁹² Ex. 184 at PMC001262.

⁴⁹³ Ex. 184 at PMC001362. Fergie didn't receive discipline or reprimand for statements of this type, but as Part V.C.3 of this decision will discuss that kind of statement is one of the factors Portneuf cites as a reason for firing Van. *See also* Ex. 576 at PMC000453.

⁴⁹⁴ Ex. 200.

⁴⁹⁵ Tr. at 1410.

⁴⁹⁶ Ex. 200 at PMC001565.

⁴⁹⁷ Ex. 200 at PMC001565.

possibly to whomever was filling the position of V.P. of Patient Services, if anyone was in the position at that time), who had to approve before Van could be fired.⁴⁹⁸ It appears Fletcher had already decided to fire Van and was waiting to meet with Mapes to get his blessing. The temporal proximity strongly suggests Van's safety complaints—in particular, his March 24 complaint that Fergie was misrepresenting information and minimizing the severity of safety incidents, directly motivated this decision.

The next morning, March 30, 2005, at 8:59 a.m., Holmes sent her revised response to Van (copying Catherine Luchsinger⁴⁹⁹ and Fletcher on the email) and informed Van she no longer believed an additional safety meeting was necessary.⁵⁰⁰ She stated Portneuf had disciplinary measures in place to address safety violations, but that it wasn't Van's business to know what those sanctions were, if there were any, or if an individual was found to have violated a safety rule.⁵⁰¹ Holmes also stated, "Portneuf Medical Center does not tolerate aggressive behavior. Further, the leadership of Life Flight encourages staff to feel free to bring forth any safety related concerns without feeling retribution will follow."⁵⁰² Despite this assurance, Portneuf had still not addressed Van's harassment complaint, then over a month old.

With further irony, Holmes added that Van had "personal trust issues" and that she was receiving calls from Life Flight team members who felt Van was trying to "pull them into a situation" that was a trust issue between Van and the pilots, and concluded in her "perception," Van's "issues are not safety related, but are in fact, related to pilot management practices" and his "inability to foster a positive working relationship with the pilots and other team members is in itself a safety concern."⁵⁰³ Van was instructed to bring other safety issues to Holmes' attention, and to "promote a positive working relationship with all team members with the focus on safety and professionalism."⁵⁰⁴

While Holmes may not have perceived Van's safety complaints—both at the March 24 Leadership Meeting and in his March 28 memo, as safety complaints, or

⁴⁹⁸ *Id.* at 2733–37.

⁴⁹⁹ Luchsinger was Holmes's immediate supervisor. Tr. at 2073–74.

⁵⁰⁰ Ex. 188; *see also* Tr. at 222; Ex. 280 at Ex. 24, pp.2–3 (attached memo).

⁵⁰¹ Ex. 280 at Ex. 24, pp.2–3. "When disciplinary action occurs as a result of any performance deviations, this remains confidential and specific action is not shared." Ex. 280 at Ex. 24, p. 2. She also insisted safety issues were automatically tracked and monitored for trends, addressed immediately, and "taken to the next level of management for resolution" if not immediately resolved in a post-flight debrief. Ex. 280 at Ex. 24, p. 2.

⁵⁰² Ex. 280 at Ex. 24, p. 3.

⁵⁰³ Ex. 280 at Ex. 24, p. 3.

⁵⁰⁴ Ex. 280 at Ex. 24, p. 3.

wanted to hear that the Chief Pilot was repeatedly lying and minimizing safety violations and concerns (as discussed in Part IV, Sections A.4 and D *supra*), they were safety complaints that AIR 21 protects. This ominous memo, which Holmes authored and Fletcher edited, is itself a form of the “retribution” Portneuf encourages employees not to fear, and strongly connects Van’s protected safety complaints to his termination.

At 10:12 a.m., Van forwarded Holmes’s response about not needing a safety meeting to Fletcher (not knowing she had helped edit it), saying he wanted to discuss the “ongoing situation” with HR “privately” because he felt he couldn’t bring up safety violations or issues in meetings, situations were covered up, and he’d been harassed all with no accountability.⁵⁰⁵ An hour later, at 11:12 a.m., Van forwarded Holmes’s email to Fletcher again, this time with the memo attached.⁵⁰⁶

Despite Holmes’s comments, the next day, March 31, 2005, she signed off on Van’s pay raise.⁵⁰⁷ This was a merit raise based on Van’s January 14, 2005, evaluation.⁵⁰⁸ Payroll reflected Van’s raise on April 1.⁵⁰⁹

Fletcher called Van, Neilsen, Alzola, and Holmes to a meeting on Friday April 1, 2005, ostensibly to talk about Van’s harassment complaint.⁵¹⁰ Although Holmes’s email had said she didn’t believe a special safety meeting would be necessary, Van asked about it again; Holmes definitively replied there wouldn’t be a special safety meeting.⁵¹¹ They did, however, discuss the February 25 harassment incident.⁵¹² He set up the meeting with Fletcher to try to “get back to a working relationship” with Neilsen; Neilsen, Alzola, and Holmes also attended.⁵¹³ The meeting was contentious, heated, and emotional; Van felt Fletcher allowed Neilsen to say whatever he wanted and shifted blame for the heated nature of the meeting

⁵⁰⁵ Ex. 518.

⁵⁰⁶ Ex. 188 at PMC001374.

⁵⁰⁷ Ex. 160 at PMC000508.

⁵⁰⁸ Tr. at 2900.

⁵⁰⁹ Ex. 160 at PMC000508.

⁵¹⁰ As discussed *supra*, Van had also told Fletcher he wished to address the unresolved and ongoing safety concerns especially as these related to his harassment complaint. Holmes believed it was actually Alzola who prompted Fletcher to finally call the meeting. Tr. at 2072–73. Fletcher did not mention this in her testimony.

⁵¹¹ Tr. at 192.

⁵¹² Tr. at 223–24.

⁵¹³ Tr. at 224. Van hadn’t asked Fletcher to invite Alzola and Holmes and was quite surprised and ultimately distressed to find them in attendance. Tr. at 244 (“I didn’t know they were going to be there. I don’t know if I really had concerns right away, but as the meeting progressed, it seemed apparent that—that they had an agenda . . .”).

to Van.⁵¹⁴ When Van tried to explain the context of his original complaints about Neilsen’s Halloween ice-on-blades flight, Holmes, Alzola, and Fletcher would tell him it was old business that had been addressed and shut down any meaningful dialogue on the subject.⁵¹⁵

Despite the meeting’s alleged purpose—to address Neilsen’s harassment of Van—the meeting actually resulted in Van receiving additional harassment. When Van asked Neilsen why he was mad, Fletcher interrupted and said “Barry Nielson [sic] had every right to be mad at you,”⁵¹⁶ to which Neilsen added he didn’t like being called negligent.⁵¹⁷ When Van asked how Neilsen knew there was no ice on the blades on Halloween, he recalled Neilsen responding, “[w]ell, let me tell you so that even—even you can understand.”⁵¹⁸ Neilsen said he was so tall he could just grab a blade, pull it down, and look to see if it had any ice on it.⁵¹⁹

Fletcher tried to get Van to recognize his role and responsibility in upsetting the pilots and causing friction within the Life Flight program. She asked Van if he understood “how his behavior contributed to the problem, did he understand what—why Gary Alzola felt his comments were so insulting, you know, why Gary would have had the reaction that he did after Mark had said, ‘I’m the only one concerned with safety concerns.’”⁵²⁰ Van “reiterated that he felt he had a right to raise these concerns,” but Fletcher felt all these concerns had been addressed.⁵²¹

Fletcher and Holmes recalled Neilsen eventually apologizing and Van either refusing or saying “he’d have to think about it,” which Fletcher said was Van’s stock

⁵¹⁴ Tr. at 225–26.

⁵¹⁵ Tr. at 224.

⁵¹⁶ Tr. at 225.

⁵¹⁷ Tr. at 225. Van thought Neilsen was negligent when he didn’t complete a pre-flight inspection for two hours after coming on duty, leaving ice on the rotor blades which Stoltz found and tried to clean off. Tr. at 226. Fletcher said the word “negligent” was inappropriate, but didn’t make any further effort to curtail or constrain the conversation. Holmes didn’t specifically recall if the word “negligent” came up. Tr. at 2076.

⁵¹⁸ Tr. at 226.

⁵¹⁹ Tr. at 226. Van also recalled Neilsen saying “mechanics were just pilot helpers,” which caused Van great distress and undoubtedly contributed to his feelings that his safety issues weren’t being seriously considered. Tr. at 226.

⁵²⁰ Tr. at 2689.

⁵²¹ Tr. at 2689 (“It never—Your Honor, it never was the raising of safety concerns. And many of the concerns that Mark addressed, there were solutions put to. The blades and the blade covers, when that whole issue came up, mechanics and pilots worked together to dry off the blades before the covers were put on.”). Van actually recalled Holmes as prompting him to discuss the safety issues, which he was reluctant to do because he was unprepared since he had been hoping to discuss them in a separate safety meeting and wanted to focus on addressing Neilsen’s harassment. Tr. at 225–26. Holmes didn’t testify on this point.

response to anything that required compromise.⁵²² Fletcher and Holmes found this rude. Neilsen, however, didn't recall apologizing, something Neilsen likely would have remembered if it occurred. At most he may have said he was sorry if what he did had distressed Van, a non-apology that turned the matter back on Van. I find it more likely than not that Neilsen never acknowledged having done anything wrong, something more consistent with the mood of the meeting that Fletcher, Van, and Holmes described.⁵²³ When Van, frustrated, said he felt like he was the only one in the program who took his concerns seriously, Alzola stormed out of the meeting.⁵²⁴ Holmes responded by saying she had a plan—they would vote on safety and then there would be no more discussion. The meeting soon ended.⁵²⁵ After Alzola left, Holmes, Fletcher, and Van had a brief discussion in which Fletcher asked how Van thought the program could function with that level of dysfunction.⁵²⁶ According to Fletcher this meeting was an “epiphany” regarding just how dysfunctional the Life Flight program had become.⁵²⁷ At this point Fletcher decided to interview other Life Flight team members to get a better handle on the situation.⁵²⁸ She also reported on the meeting to Dale Mapes, who she notified about the meeting before it took place.⁵²⁹

Late in the same day of this stormy meeting about Neilsen's harassment of Van—at 5:16 p.m.—the chief flight nurse Tom Mortimer emailed Holmes at Fergie's prompting.⁵³⁰ His email was entitled “On going battles.”⁵³¹ Mortimer attached a one-paragraph memorandum saying he thought the safety issues Van raised, or his comments about them, at the March 24, 2005, Leadership Meeting were “inappropriate” and an attempt to discredit pilots in front of the crew that was eroding the trust necessary for the team.⁵³²

⁵²² Tr. at 2074–75, 2588, 2641.

⁵²³ See Tr. at 2449 (“But—and I—I didn't remember that I apologized to him until it had come up and Audrey had it in her notes.”); see also 2450, 2478 (confirming that at the time of his deposition Neilsen didn't remember apologizing at all).

⁵²⁴ Tr. at 227.

⁵²⁵ Tr. at 227–28.

⁵²⁶ Tr. at 2687.

⁵²⁷ Tr. at 2687.

⁵²⁸ Tr. at 2697.

⁵²⁹ Tr. at 2698.

⁵³⁰ Ex. 187 at PMC001373. Mortimer wrote “I have been talking to Ron [Fergie] this afternoon[,] and I am pretty disturbed by what I am hearing.” Ex. 187 at PMC001373. Based on Mortimer's email it appears his concerns stemmed primarily from Fergie's statements, not his own independent observations and conclusions.

⁵³¹ Ex. 187.

⁵³² Ex. 515 at PMC000109.

The following Monday, April 4, 2005, at 11:20 a.m., Fletcher met with pilot Chad Waller, the first meeting in her “investigation” supposedly prompted by her “epiphany” at the April 1 meeting.⁵³³ Fletcher’s handwritten meeting notes show Waller expressing (when asked) that flight crews were beginning to question who was right and who was wrong (between Van’s complaints and the pilots’ assurances that everything was safe), and asking “[a]t what point does this become unsafe?”⁵³⁴ He also said Van sometimes had trouble accepting solutions not of his own design, and suggested there was the potential Van’s focus on pilot safety could jeopardizing the program by “overlooking other issues.”⁵³⁵ However, it’s not clear if this was Waller’s unprompted personal opinion or a response to or acknowledgment of Fletcher’s questions. Despite these potential problems, Waller said he had no personal concerns about Van or his abilities as a mechanic.⁵³⁶

While meeting, at 11:25 a.m., Holmes forwarded Mortimer’s April 1 email and memo to Fletcher saying, “I think it is imperative that a decision is made regarding this on-going difference. I am wondering if we need to get Dale and Pat involved. This absolutely needs to be put to rest. Thanks. Pam.”⁵³⁷ Given the context and Mortimer’s forwarded email, “this on-going difference” clearly refers to Van’s disagreements with certain pilots and his safety concerns about Fergie raised at the March 24 Leadership Meeting.

In response, at 12:05 p.m., only 40 minutes later, and presumably shortly after concluding her 11:20 a.m. meeting with Waller, Fletcher replied with the following:

I have spoken with Dale [Mapes] regarding this situation and have made my recommendation for next step action. Dale is in agreement with this decision and we are taking the appropriate steps. However, these things do take time and in the interim I feel it is important to meet with the rest of the pilots to hear first hand their expectations. Please be assured that we are processing this action as fast as possible.⁵³⁸

Fletcher testified that she eventually concluded termination was the only way to solve Van’s personality conflicts and trust issues after hearing how widespread others’ concerns were, and she acquired this information through

⁵³³ Ex. 182 at PMC001252; *see also* Tr. at 2687.

⁵³⁴ Ex. 182 at PMC001252.

⁵³⁵ Ex. 182 at PMC001252.

⁵³⁶ Ex. 182 at PMC001252.

⁵³⁷ Ex. 187 at PMC001373.

⁵³⁸ Ex. 187 at PMC001373.

Mortimer's email and memo and interviews with the pilots and mechanics.⁵³⁹ Since numerous attempts at addressing his concerns and encouraging him to get help had failed, termination was the only option.⁵⁴⁰ Because Portneuf's procedures didn't allow Fletcher to affect Van's termination directly, she then brought her recommendation to Mapes, who ultimately agreed with her recommendation.⁵⁴¹ Per Portneuf's policy, Mapes had to then bring the recommendation to Hermanson and possibly to whomever was filling the position of V.P. of Patient Services (if anyone was in the position at that time).⁵⁴² Hermanson eventually agreed with the recommendation, and Portneuf terminated Van.⁵⁴³

Taken in conjunction with her trial testimony regarding the process necessary to terminate a Portneuf employee, Fletcher's April 4, 2005, email strongly suggests her decision to terminate Van was not the result of extensive deliberation influenced by the results of her interviews with pilots and maintenance staff, and the concerns of the Life Flight staff.⁵⁴⁴ This email shows that by April 4, 2005, at 12:05 p.m., Fletcher had already decided to recommend Van's termination, approached Mapes with her recommendation, and gained Mapes' agreement, and Mapes was already pursuing approval of the recommendation with Hermanson.⁵⁴⁵

While Fletcher doesn't say what her recommendation or "this action" is, these terms themselves in conjunction with the process described (she first made a recommendation, brought it to Mapes, who agreed, and brought it to Hermanson) certainly sounds like exactly the process she described when terminating Van.⁵⁴⁶ In addition, Fletcher didn't mention any previous recommendation about Van and

⁵³⁹ Tr. at 2699–2701.

⁵⁴⁰ Tr. at 2731–34; *see also* Tr. at 2711–30 (discussing investigation).

⁵⁴¹ Tr. at 2733–35.

⁵⁴² Tr. at 2735–37.

⁵⁴³ Tr. at 2738.

⁵⁴⁴ Ex. 187 at PMC001373.

⁵⁴⁵ Ex. 187 at PMC001373.

⁵⁴⁶ It is possible that Fletcher's statement about Mapes being "in agreement with this decision and we are taking the appropriate steps" (Ex. 187 at PMC001373) was referring to Mapes agreeing with Fletcher's decision to conduct an investigation into the breadth of discord in the Life Flight program and Van's role in that discord. Fletcher testified that she had also consulted with Mapes after the April 1 meeting regarding conducting an investigation and he had concurred and approved this action. Tr. at 2702. However, that explanation doesn't make any sense either. If, in her April 4, 2005, email exchange with Holmes, Fletcher was really saying Mapes had just agreed that she should interview people in the program, she wouldn't have talked about talking to the pilots in the "interim" "to hear first hand their *expectations*." Ex. 187 at PMC001373 (emphasis added). Talking to the pilots presumably would have been part of the investigation, so if her communication with Mapes was about the investigation, she wouldn't refer to interviews as happening in the "interim." Furthermore, if the idea about the investigation stemmed from the April 1 meeting, Fletcher wouldn't have been "still waiting" to talk to Mapes on March 29. Ex. 200 at PMC001565.

related interaction with Mapes and Hermanson following the April 1, 2005, meeting, and the record contains no indications or implications that such an interim recommendation existed. This leads me to conclude Holmes was strongly suggesting Portneuf should terminate Van and Fletcher replied indicating she had already made the recommendation and had Mapes support, thus clearing the first hurdle in Portneuf's procedure. By April 4, 2005, Van's termination was a *fait accompli* waiting only for Hermanson to sign off on it—a process Fletcher was trying to expedite.

Considering Mortimer sent his email at 5:16 p.m. on Friday, April 1, 2005,⁵⁴⁷ more likely than not Fletcher did not see or hear of this email prior to Holmes forwarding it. Therefore, Fletcher couldn't have considered Waller's statement when making the decision to terminate Van, especially since her March 29 email exchange with Holmes shows she had reached her decision to terminate Van and was waiting to meet with Mapes to get his concurrence days before Mortimer even authored the email. This is in direct contradiction to Portneuf's stated reasons for terminating Van. Fletcher testified:

I'd never spoken with any of the other mechanics. I'd never spoken with Chad Waller, never spoken with Jim Ford before. So in making the decision that I ultimately did [to terminate Van's employment], it was really primarily based on the information that those people shared with me, not that—Gary Alzola, Ron Fergie, Barry Neilsen's information contributed[,] but they weren't a principle part of it quite frankly.⁵⁴⁸

At this point, Fletcher had just interviewed Waller and just received Mortimer's email. As her message indicates she had not yet heard from any of the other pilots "first hand," and had clearly not interviewed the other mechanics.⁵⁴⁹

In fact, it appears Romero's second-hand statement about feeling disturbed by Van's safety email is the only statement from someone other than Holmes,

⁵⁴⁷ Ex. 187 at PMC001373.

⁵⁴⁸ Tr. at 2711. This testimony is itself partially in tension with Fletcher's earlier sworn affidavit in which she stated she came to the conclusion Portneuf would have to fire Van shortly after her beginning her investigation. Ex. 597 at 16–17. If this were the case, then she wouldn't have been able to consider the testimony of either mechanic in her decision since she didn't investigate Stoltz until April 14 and Perkins until April 15. *See* discussion *infra*. This shifting account and explanation itself suggests Portneuf's stated reasons for terminating Van's employment are pretextual.

⁵⁴⁹ *See* discussion *infra* this section showing Fletcher interviewed mechanics Stoltz and Perkins on April 14 and 15; *see also* Ex. 182 (detailing the interviews).

Alzola, Fergie, and Neilsen⁵⁵⁰ that Fletcher had reviewed prior to deciding to terminate Van.⁵⁵¹ Since upon receiving Romero's statement Fletcher indicated she was "*still* waiting"⁵⁵² to hear from Mapes, that strongly suggests (and I infer) Fletcher had already decided to terminate Van and was waiting to hear if Mapes agreed with her proposal at the time she received Romero's statement. This also suggests she and Holmes had already discussed terminating Van prior to that point. Although no record of such a conversation appears in the record, Holmes's Friday, March 25, email to Alzola⁵⁵³ invites the conclusion she began pursuing Van's termination at that time. Thus, Van's behavior at the April 1 meeting and the results of her ensuing investigation could not, and did not, play a role in Van's termination. This clearly establishes Portneuf's story as pretext and shows the decision to terminate Van more likely than not stemmed directly from the safety-related complaints he raised at the March 24, 2005, Leadership Meeting and in the months and weeks preceding it.

Holmes replied to Fletcher's revealing email at 1:45 p.m., saying, "I can appreciate this" and explaining the pilots would be meeting later in the week and offering further assistance to Fletcher.⁵⁵⁴ This suggests (and I infer) Holmes supported Van's impending termination and actively tried to fire Van as quickly as possible. This is a far cry from Fletcher's testimony (discussed in Part V.A. *supra*) that Fletcher first came to the conclusion the only solution was to terminate Van before discussing it with Holmes, and while Holmes ultimately agreed in the decision, it was with reluctance and disappointment that there wasn't more they could do for Van. This is closer to Fletcher's affidavit in which she stated the decision to fire Van was reached jointly by Holmes and Mapes (acting on Fletcher's recommendation),⁵⁵⁵ but underscores the inconsistencies in Portneuf's shifting account.

4. Portneuf Conducts an "Investigation" While Waiting for the Approval of Van's Termination

⁵⁵⁰ Fletcher acknowledged these individuals had ongoing conflicts with Van over safety and other issues and she said their statements were less influential in the decision to terminate Van. *See* discussion *supra* note 548.

⁵⁵¹ *See* Ex. 200.

⁵⁵² Ex. 200 (emphasis added). Portneuf has not presented any other reason why Fletcher would be waiting to talk to Mapes about Van at that time. Of course, Portneuf also claimed it came to its decision to terminate Van's employment much later as I will discuss in more detail in Part V.

⁵⁵³ *See* Ex. 185. Fletcher testified she wasn't certain if the April 1, 2005, HR meeting (discussed *infra*) had already been set at the time the Complainant sent this email as "there was often a two or three day lag just to coordinate everybody's schedules." Tr. at 2682. (However, since it was more than three days since Mr. Van's original conversation and email on March 24 and 25, presumably the meeting would have been calendared even accounting for the scheduling coordination lag.)

⁵⁵⁴ Ex. 187 at PMC001373.

⁵⁵⁵ *See* Ex. 597 at 17 ¶ 32.

The next day, April 5, 2005, Van emailed the updated version of Policy Letter 10 to Alzola and McCarty.⁵⁵⁶ This was the compromise policy on the airworthiness policy that resulted from debate at the February 28 special safety meeting. It provides means for mechanics to let pilots know of a problem with or continuing work on the aircraft so that the PIC can make an informed decision in declaring the aircraft unairworthy.⁵⁵⁷ In effect, it provides a way for mechanics to take the air ambulance out of service, consistent with Van's interpretation of FAA regulations.⁵⁵⁸

That Friday, April 7, 2005, at 8:00 a.m., Fletcher met with pilots Jim Ford, Neilsen, Fergie, and Alzola to discuss their concerns about and perceptions of Van.⁵⁵⁹ Fletcher testified that her discussion with Ford, like her discussions with Waller, Perkins, and Stoltz, bore heavily on her ultimate decision to fire Van, yet clearly this conversation didn't take place until long after she had decided to fire Van and secured Mapes' approval. The pilots' comments about Van (discussed *supra* Part V.A. and *infra* Part V.C.) also weren't nearly as damning as Fletcher described.

The same morning at 9:47 a.m., Van emailed Ms. Fletcher indicating he wanted to take her up on her offer to talk about what happened at the April 1, 2005, meeting; however, since he was busy with a large maintenance project, he wanted to meet with her at a later date.⁵⁶⁰ Fletcher didn't respond.⁵⁶¹ Van may have prepared Exhibit 20 in preparation for his anticipated response from Fletcher, but the record isn't clear. In that document Van expressed concerns about the additional harassment he received at the April 1, 2005, meeting.⁵⁶² Van never got to discuss these concerns, and that harassment was never addressed.

Later that afternoon at 2:55 p.m., Alzola emailed Fletcher with background information about FAA federal air regulations and Portneuf's status and duties as a Part 135 certificate holder.⁵⁶³ This suggests Fletcher may have been taking her investigation seriously, or at least wanted to have a firmer understanding of the regulations that pertain to air safety complaints. Fletcher replied at 3:40 p.m., with "two other requests": that Alzola "add to the document below your⁵⁶⁴ practice for

⁵⁵⁶ Ex. 213.

⁵⁵⁷ Ex. 213.

⁵⁵⁸ Ex. 213.

⁵⁵⁹ Ex. 182 at PMC001263-65.

⁵⁶⁰ Ex. 186; *see also* Tr. at 228-29.

⁵⁶¹ Tr. at 229.

⁵⁶² *See* Ex. 20.

⁵⁶³ Ex. 566 at PMC000322-23.

⁵⁶⁴ It's not clear if "your" was supposed to refer to the pilots' practice or Life Flight's practice as a whole.

dealing with safety issues that are raised, and how often safety inspections of the aircraft are conducted.”⁵⁶⁵

Alzola responded the next morning at 9:04 a.m., explaining safety issues that occur in flight were discussed as they occur and immediately after the mission during the flight debriefing.⁵⁶⁶ “[I]f corrections are made on the spot and all parties are satisfied, no further action is taken,” Alzola added.⁵⁶⁷ He further explained that safety concerns incapable of immediate resolution would be documented on a debriefing form and forwarded to the safety officer (Ron Fergie) who then determined who needs to address the issue while conferring with the program manager, aviation manager, communications center manager, or the safety committee.⁵⁶⁸ Other issues would be addressed by the appropriate manager and safety officer then taken to the safety committee for resolution if necessary.⁵⁶⁹ At no point did Alzola mention maintenance’s role in resolving safety issues. He confirmed “safety inspections” were done as part of the pre-flight inspection at shift change (by the pilot on duty), after a flight as part of the post flight inspection (also by the pilot), and once-daily by maintenance.⁵⁷⁰

Fletcher never made any attempt to verify with the mechanics or other flight departments if this was their understanding of the procedure, even though Van, as Director of Maintenance, was ostensibly Alzola’s equal in the Life Flight hierarchy. She never asked anyone if the policy as Alzola described it was actually carried out in practice. This suggests (consistent with the finding that at this point Van’s termination was at this point just waiting for Hermanson’s signature) the investigation was *pro forma*, not genuine. In this instance, Fletcher sought to gather documentation that paid lip service to safety in Portneuf’s Life Flight program, but made no attempt to investigate all sides of the issue or to follow up on anything that didn’t support Van’s termination.

The next steps in Fletcher’s investigation were a series of interviews on April 14 and 15, 2005. At 4:40 p.m. on the 14th, she met with Stoltz telephonically specifically to discuss Van.⁵⁷¹ Stoltz commented that Fergie and Neilsen weren’t good or bad pilots just “different in some respects than other pilots [and] **maybe not as overall conscientious**[,] but not unsafe either. [They d]o not blatantly break

⁵⁶⁵ Ex. 566 at PMC000322.

⁵⁶⁶ Ex. 566 at PMC000322.

⁵⁶⁷ Ex. 566 at PMC000322.

⁵⁶⁸ Ex. 566 at PMC000332.

⁵⁶⁹ Ex. 566 at PMC000332.

⁵⁷⁰ Ex. 566 at PMC000332.

⁵⁷¹ Ex. 182 at PMC001253–56.

rules.”⁵⁷² Stoltz also said that Van was good at his job.⁵⁷³ Stoltz specifically mentioned the de-icing issue as having been the “biggest sore spot,” but that issue appeared to be resolved with pilots and maintenance working together.⁵⁷⁴

The next morning at 10:30 a.m., Fletcher interviewed Perkins, who was hired as a full-time mechanic in November 2004. He found Portneuf a different, less supportive environment than his old employer, but was learning a lot from Van.⁵⁷⁵ When asked about his interactions with the pilots, he responded he was getting along well with Waller, but found the other pilots harder to approach.⁵⁷⁶ Perhaps most importantly, Perkins said the supposed rift between Van and the pilots wasn’t affecting the program; it just made for a less friendly work environment.⁵⁷⁷

Fletcher followed up with Alzola at 2:30 p.m. on April 15, 2005. They discussed other safety issues raised in meetings with pilots and mechanics. Alzola stressed that Waller and Fergie’s overflights weren’t “willful.”⁵⁷⁸ He also explained that Life Flight used to have more problems with icing because the crew was overzealous about cutting down liftoff time and removed heaters too soon, which led to problems, but this had since been resolved.⁵⁷⁹ Asking Alzola regarding Stoltz’s comment about Fergie and Neilsen, Alzola said “neither were [sic] unsafe just **not as meticulous** as other pilots.”⁵⁸⁰ This interview appears to have been the last in Fletcher’s investigation.

On the morning of April 18, 2005, Holmes forwarded Fletcher her March 25 email exchange with Alzola⁵⁸¹ and the March 28 email and memo from Fergie (which she and Alzola had prompted).⁵⁸² It appears this is the first time Fletcher saw either of these documents.

The next morning, April 19, 2005, at 10:07 a.m., Van again emailed Fletcher asking her to call him at her earliest convenience so they could work out a time to discuss his concerns from the April 1 meeting.⁵⁸³ Fletcher still hadn’t responded to

⁵⁷² Ex. 182 at PMC0001255 (emphasis added).

⁵⁷³ Ex. 182 at PMC001256.

⁵⁷⁴ Ex. 182 at PMC001254.

⁵⁷⁵ Ex. 182 at PMC001257–59.

⁵⁷⁶ Ex. 182 at PMC001259–60.

⁵⁷⁷ Ex. 182 at PMC001260.

⁵⁷⁸ Ex. 182 at PMC001251.

⁵⁷⁹ Ex. 182 at PMC001251.

⁵⁸⁰ Ex. 182 at PMC001250 (emphasis added).

⁵⁸¹ Ex. 185 at PMC001371.

⁵⁸² Ex.184 at PMC001305.

⁵⁸³ Ex. 211.

his April 7 email, so Van took the opportunity to follow up again now that he had time. He had completed the 400-hour inspection on the helicopter and was nearing completion with the preparatory work on the night-vision goggle certification.⁵⁸⁴

Sometime on April 19, Dale Mapes finally met with Hermanson, who approved Van's termination.⁵⁸⁵ The next afternoon at 2:15 p.m. Holmes called Van and asked him to come in for an HR meeting at 3:00 p.m.,⁵⁸⁶ but Van was already at home for the day.⁵⁸⁷ He explained he didn't want to have to come back in for a meeting, wanted the opportunity to set up a meeting date because he had an agenda of what he wanted to discuss, and he wanted to be prepared.⁵⁸⁸ This included Holmes, Fletcher, Alzola, and Neilsen "ganging up" on him at the April 1 meeting, which he felt was very unfair.⁵⁸⁹ Holmes never told him he had to come in or attend.⁵⁹⁰ He confirmed he wouldn't come in, he was home relaxing, and asked if she could email him and give him an agenda to talk about it.⁵⁹¹

Van's statements about further harassment prompted Fletcher to email Holmes at 2:46 p.m. to ask her to "write up" her account of what happened at the "last meeting in HR" (presumably the April 1, 2005, meeting) in light of Van's comments.⁵⁹²

Finally at 3:20 p.m. or 3:30 p.m.,⁵⁹³ Dale Mapes, the Vice President of Human Resources, called and terminated Van, reading him the termination letter over the phone.⁵⁹⁴ Fletcher and Holmes were on conference call with Mapes and Van and heard this conversation.⁵⁹⁵ In Van's mind, the call opened with Mapes telling him what a horrible job he'd done in his time working for Portneuf.⁵⁹⁶ Portneuf then

⁵⁸⁴ Tr. at 229.

⁵⁸⁵ Ex. 123 at PMC000054(The "[d]ecision [was] made to terminate [Van's] employment due to unreasonable behavior.").

⁵⁸⁶ Ex. 182 at PMC001246.

⁵⁸⁷ Tr. at 229.

⁵⁸⁸ Tr. at 230.

⁵⁸⁹ Ex. 182 at PMC001246.

⁵⁹⁰ Tr. at 230. It's clear from Van's testimony, which is strongly corroborated by Holmes's notes, that this was stated as a request, not an order. *See* Tr. at 230; Ex. 182 at PMC 001246. However, even if it were an order, Portneuf has never suggested it had the right to terminate Van because he refused to come in to work for what would have been his termination meeting.

⁵⁹¹ Tr. at 230.

⁵⁹² Ex. 201 at PMC001566.

⁵⁹³ *Compare* Ex. 182 at PMC001246 (Holmes's notes) *with* Ex. 182 at PMC001248 (Fletcher's notes).

⁵⁹⁴ Tr. at 230.

⁵⁹⁵ Ex. 182 at PMC001246; Ex. 182 at PMC001248.

⁵⁹⁶ Tr. at 230.

mailed Van a termination letter signed by Holmes and Mapes, citing his “inability to maintain positive interpersonal relations with your colleagues and foster a positive team environment” as the reason for Van’s termination.⁵⁹⁷

5. The Evidence Demonstrates Portneuf’s Stated Reasons for Terminating Van Were Retaliatory

In addition to an inference of retaliation based on the timing of an adverse action relative to a complainant’s protected activity (discussed in Part IV.B *supra*), adjudicators have found circumstantial evidence to establish discriminatory motive in whistleblower cases when numerous other conditions are true. These include: absence of warning before termination,⁵⁹⁸ pay increase shortly before termination,⁵⁹⁹ failure to prove allegations,⁶⁰⁰ contradictions or shifting explanations in an employer’s purported reasons for adverse action,⁶⁰¹ proof that the purported explanation isn’t true or believable,⁶⁰² reference to whistleblower as a “troublemaker,”⁶⁰³ antagonism or hostility towards protected conduct,⁶⁰⁴ a pattern of such antagonism,⁶⁰⁵ and evidence the whistleblower’s fears were correct

⁵⁹⁷ Ex. 21.

⁵⁹⁸ *Haney v. North American Car Corp.*, ALJ No. 1981-SWD-00001, slip op. at 17 (ALJ Aug. 10, 1981).

⁵⁹⁹ *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).

⁶⁰⁰ *Lewis Grocer 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).

⁶⁰¹ *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)).

⁶⁰² *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.”).

⁶⁰³ *Stone & Webster v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997).

⁶⁰⁴ *Lewis Grocer Co.*, 874 F.2d at 1012.

⁶⁰⁵ *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).

(especially if the magnitude of the problem identified was great).⁶⁰⁶ In the instant case, all of these factors are present.

As this sequence of events demonstrates, Van received no warning prior to his termination, and he had never received any formal discipline prior to being terminated on April 20, 2005. In fact after the April 1 HR meeting, Fletcher apparently invited Van to talk to her if he had additional concerns about the resolution (or lack thereof) of his harassment complaint.⁶⁰⁷ Holmes signed off on Van's merit-based pay increase on March 31, three weeks before his termination. Portneuf claims Van's behavior created significant disruptions in its dealings with third parties, namely that Van was so difficult to work with that he caused a technical representative from Agusta, the helicopter manufacturer, to walk off the job and refuse to work with Van. Yet Portneuf has utterly failed to prove this allegation (as I discuss in more detail in Part V.C, *infra*), and based on the evidence in the record, I find it more likely than not the incident didn't happen. Throughout its testimony and brief, Portneuf refers to Van as a "difficult" employee who engaged in "inappropriate" behavior, butting in with opinions and demands where he didn't belong.⁶⁰⁸ However, the evidence shows Van was concerned, proactive, and tenacious about addressing safety violations and patterns of unsafe behavior, and wanted to see these issues resolved and disclosed to those affected. Portneuf also responded with thinly veiled threats and insults in its March 30, 2005, memorandum to Van.⁶⁰⁹ This was the not an isolated incident, but the last in a long pattern of hostile memoranda and emails sent to Van in response to both his safety complaints and grievances filed against other employees.

Finally, as I discussed in Part IV, Van's protected complaints concerned safety violations that actually occurred. I found it more likely than not that Neilsen did fly with ice on the rotor blades, in violation of FAA regulations at Halloween 2004. Similarly, the evidence shows Fergie misrepresented and diminished the Stoltz's statements about that violation, and these misstatements led to the Halloween 2004 ice-on-blades flight not being thoroughly investigated or reported to the FAA⁶¹⁰ and interfered with Portneuf's attempts to resolve its cold weather policy problems. This lie was one in a pattern of many that Van reported to Portneuf,

⁶⁰⁶ *Seater v. Southern Calif. Edison Co.*, ALJ No. 1995-ERA-00013, ARB No. 96-013, at 4 (ARB Sept. 27, 1996).

⁶⁰⁷ Tr. at 228 (Van's recollection of Fletcher asking him to come to her if he had any additional concerns about the meeting). While Fletcher didn't specifically confirm this statement, she did testify that this sort of concern was one Portneuf employees typically talked to her about, and she did convene the April 1 meeting

⁶⁰⁸ *E.g.*, Portneuf Medical Center's Post-Hearing Brief, 27, 33, 65.

⁶⁰⁹ *See* Ex. 280 at Ex. 24, pp. 2-3.

⁶¹⁰ The FAA finally received and investigated a complaint about the Halloween ice-on-blades incident in the fall of 2005. Ex. 500. With the information available to the FAA at the time, it couldn't prove a violation had occurred. Ex. 635 at 2.

which pointed towards a serious problem within the Life Flight program—Life Flight’s chief pilot and safety officer was lying about and dismissing air safety concerns.

Taken together, these facts demonstrate that Van’s protected safety complaints were not only a contributing factor in his termination, but the primary reason Portneuf decided to fire him. As I will discuss in the next section, although Portneuf has presented a few additional rationales for which it contests it would have fired Van anyway, Portneuf has not met its burden of showing by clear and convincing evidence that it would have terminated Van absent his protected activity. Thus, Portneuf cannot escape liability under AIR 21.

C. Portneuf Has Failed to Prove it Would Have Fired Van for Its Other Proffered Reasons

As I explained in Part IV and Part V.B, Portneuf’s story of why it fired Van was pretextual. The reasons it gave to justify his termination, such as complaining about “pilot management issues” and trying to “embarrass” pilots in front of the flight crew, were actually invidious discrimination in disguise. Portneuf did articulate a few other grounds under which it could have fired Van, but as I will discuss, it hasn’t proven it would have fired him for any of these reasons.

1. Discord Within the Life Flight Program

First and foremost, Portneuf contends that Van’s personality and behavior were so disruptive to the Life Flight program that it had no choice but to fire him due to the discord he sowed. The evidence shows there was tension and dysfunctionality within Life Flight, but it wasn’t as widespread or severe as Portneuf contends. Furthermore, Van’s actions in sharing his safety concerns with the rest of the Life Flight team was consistent with Portneuf’s policy (and certainly not contrary to policy).

Mortimer, the chief flight nurse, did express concerns that Life Flight team members felt torn and prompted to pick sides after Van made comments in the Leadership Meeting, and suggested he was speaking on behalf of the rest of the flight crew.⁶¹¹ But Mortimer’s comments were prompted by information he got second-hand from Fergie. Romero was the only other flight crew member who commented negatively about Van’s statements, and even he admitted he felt “torn” by the issues Van was raising.⁶¹² Fletcher didn’t interview anyone on the flight crew, and since neither Mortimer nor Romero named anyone else who was upset, it’s not clear how widespread was this feeling of being pulled into the debate between maintenance and pilots. Holmes claimed physicians were expressing

⁶¹¹ Ex. 515.

⁶¹² Tr. at 1415.

concern about the Life Flight program, but again she didn't identify particular individuals, no one came forward with a complaint, and Fletcher didn't interview any of the physicians.

Furthermore, Van's discussion of safety concerns with members of all aspects of the Life Flight team comported with Portneuf's policy. Fergie testified the safety committee "was made up of somebody from every aspect of what we do,"⁶¹³ and safety meetings were open to anyone on the team, everyone knew that, and everyone was invited, according to Mr. Fergie.⁶¹⁴ According to Stoltz, it is Portneuf's current policy to discuss safety issues and policy development with the broader group.⁶¹⁵ That alone makes it very doubtful Portneuf would fire Van for acting in accordance with policy.

When prompted, Waller and Ford did express some concern about Van's lack of trust, but this wasn't information they volunteered, and neither filed a safety complaint, grievance, or proactively communicated these concerns with Fletcher or other Portneuf administrators in any way. Fletcher interviewed them specifically soliciting their feedback about their concerns about Van, so the statements are somewhat biased. As discussed earlier in this Part, Waller affirmatively indicated he had no problems with Van, while Ford's only problem with Van was feeling somewhat slighted that Van wouldn't accept his help as a trained mechanic because he was a pilot. This undercuts Fletcher's claim that other pilots had serious safety concerns. If they had concerns, they certainly didn't feel the need to bring them forward. Ford was interviewed in a joint meeting with three people who had well-established conflicts with Van (Fergie, Neilsen, and Alzola). Fletcher could hardly expect to get an unbiased, unfiltered, assessment from Ford under the circumstances.

The same is true of the supposed concerns of Perkins and Stoltz, the other Life Flight mechanics. Their supposed issues only came forward at Fletcher's prompting. Both mechanics indicated they were aware of the friction between Van and certain pilots (Fergie and Neilsen) and the Director of Operations, Alzola. Perkins himself found the atmosphere to be less friendly than his past job, but he didn't tie this to Van. The mechanics then offered their thoughts on why that friction existed. Both Perkins and Stoltz were clear in saying they had no problems with Van. In fact, his only real fault with Van's behavior was that Van was very "professional" with pilots and didn't seek to interact with them on a personal level.⁶¹⁶ Perkins did compare Portneuf to his previous employer, saying Portneuf was had a less supportive environment than his previous employer, but his

⁶¹³ *Id.* at 2259–60 (quotation at 2260).

⁶¹⁴ Tr. at 2262.

⁶¹⁵ Tr. at 1625.

⁶¹⁶ Ex. 182 at PMC001258–59.

observations didn't point fingers at Van as the culprit. More importantly, Perkins had only been working at Portneuf full time since late November 2004, after the Cold weather policy problems had begun to snowball.⁶¹⁷ Although he'd worked for Portneuf in the past and spent some time as a fill-in mechanic, he hadn't spent any considerable time working with the Life Flight team in many years. As a result, Perkins' perception of the situation was colored by the ongoing safety dispute that led to Van's termination.

Portneuf insists its disciplinary policy wasn't progressive, so one shouldn't be shocked Van was terminated without prior disciplinary history.⁶¹⁸ Yet Fletcher suggested Van's behavior in the first four months of 2005 was the straw that broke the camel's back, and Portneuf had tried everything it could to get Van to improve his behavior, to no avail. She explained "I had been so heavily involved in all of this for years, and I tried all different measures"⁶¹⁹ Yet no such history of "trying everything" exists.

As demonstrated in Parts IV and V.B *supra*, Van was hardly the only Portneuf employee contributing to the atmosphere. Alzola had a widespread reputation of being condescending to others in the department.⁶²⁰ Neilsen harassed Van on the helipad and made derogatory comments in the human resources meeting.⁶²¹ Perkins found the pilots other than Waller to be "more difficult to get to know" because of their personalities.⁶²²

While relations between Van and certain pilots were strained and emotions were quite heated at the April 1 Human Resources meeting, this doesn't comport with the picture of an irretrievably fractured, dangerously nonfunctional department that Fletcher and Holmes described. None of the others contributing to

⁶¹⁷ Ex. 182 at PMC001257.

⁶¹⁸ Fletcher testified disciplinary procedures were strongly suggested guidelines, not mandatory, and she had seen employees who were terminated without oral or written warnings first. Tr. at 2564, 2566. Sometimes employees are dismissed because of their "intellectual quotation [sic] and . . . emotional quotation [sic]" or IQEQ deficiencies despite good technical skill or aptitude. Tr. at 2567.

⁶¹⁹ Tr. at 2688-89.

⁶²⁰ Tr. at 1014-15 (McCarty testifying the pilots were condescending and Alzola was the most condescending of all), 1150 (Greg Vickers, who oversees the trauma program, testifying Alzola was condescending at times), 1453 (Mortimer testifying while he wouldn't call Alzola "condescending," Alzola got impatient with medical staff), 2143 (Holmes testifying she found Alzola to be condescending "at times").

⁶²¹ See discussion *supra* Part IV.A.3 and V.B. Van also recalled Neilsen saying mechanics were "just pilot helpers" at the April 1 HR meeting. Tr. at 226. Holmes went so far as to say she didn't find these comments condescending or inappropriate because "[t]hat's how they spoke to each other." Tr. at 2418. If that was indeed normal behavior within Life Flight, it's difficult to see how Van can be singled out for somehow destroying the team atmosphere of the program.

⁶²² Ex. 182 at PMC001260.

the tense atmosphere were disciplined for their hostility, let alone terminated for it. Therefore, Portneuf can't establish it would have fired Van for causing discord within Life Flight on this ground.

2. Van as a Safety Risk

Portneuf also asserts it had to fire Van because his obsession with pilot behavior was making him unsafe or somehow forcing others to be unsafe by making them worry whether he would find a safety risk lurking in their work.

Contrary to this assertion, the record shows Van was a meticulous mechanic. Shortly before Van's termination was finalized, Fergie wrote, "My concern is not Mark's ability to perform maintenance functions."⁶²³ Perkins stated he "learn[ed] a lot technically"⁶²⁴ from Van. Waller said he had "no personal concerns" about Van.⁶²⁵ Even the helicopter vendor's technical representative said Van was "was very, very thorough," with the leadership, persistence, and tenacity necessary for a good helicopter mechanic.⁶²⁶

At one point, Niece and Hermanson expressed concerns about Van's "stability" and whether that posed a safety threat to Life Flight; however, they never took any steps to change his work duties, nor took any other action to suggest this fear was genuine or serious.⁶²⁷

Fergie testified that worrying about Van's obsession "in itself, became a safety issue when I'm on duty that I'm having a hard time sleeping because I'm worried about all of this other stuff."⁶²⁸ Fergie may have been losing sleep worrying

⁶²³ Ex. 184 at PMC001362.

⁶²⁴ Ex. 182 at PMC001259.

⁶²⁵ Ex. 182 at PMC001252.

⁶²⁶ Tr. at 865-66.

⁶²⁷ Ex. 141. Niece wrote:

I told [Hermanson] I was uncomfortable with Mark and his behavior and not certain of his stability

Pat [Hermanson] supported our position at this point[,] but thought if [Van] doesn't turn around that we will need to do a mandatory recommendation to EAP [a counseling program] or proceed with further disciplinary action. He felt we are all responsible for the safety of the Life Flight team and we cannot condone this behavior.

Ex. 141 at PMC000236. Van's "behavior" was complaining about Alzola's misstatement that FAA regulations prohibiting the hospital from releasing information about the November 2001 crash, and the emotional distress Van and his family suffered as a result. *See* Ex. 245.

⁶²⁸ Tr. at 2279.

about safety and Fergie's lack of sleep might have been dangerous for the safety of the Life Flight program. However, that is not Van's fault for bringing complaints about air safety violations that he had a reasonable belief took place. Waller, Ford, Stoltz, and Perkins affirmatively expressed they had no fear of bringing forward safety complaints, yet none of them brought a safety complaint against Van, which suggests they didn't consider him a safety risk or feel that his focus was making others unsafe.

Portneuf had no problem with Van performing the 400 flight-hour inspection on the air ambulance just a week before it fired him, nor with his modification work so the aircraft could be flown using night vision goggles in the final days of his employment. Its actions are wholly inconsistent with a sincere belief that Van posed a safety risk. Therefore, Portneuf can't establish it would have fired Van for this reason.

3. Van's Requests for Co-Worker Job Consequences

Portneuf also stresses that Van's requests for Alzola's removal as Director of Operations and requests for Fergie and Neilsen to be disciplined were unacceptable and inappropriate and themselves grounds to terminate Van.

Van had made similar suggestions over the years relating to consequences for safety violators, yet Portneuf never took any action. Van also asked for Alzola's removal from the Director of Operations position due to his "corruption" and deception in conjunction with Alzola allegedly lying to Van about FAA or NTSB requirements relating to the release of crash information.⁶²⁹ Fletcher discussed the grievances Van filed against Alzola and Holmes in her testimony. Although there was an email from Pam Niece to Pam Holmes regarding Hermanson's suggestions that Van should receive possible disciplinary action for comments about Alzola's continued employment in his grievance,⁶³⁰ none were taken,⁶³¹ nor could they be taken under Portneuf's own policy that ensured employees that disciplinary action cannot flow from a grievance filed in good faith.⁶³²

⁶²⁹ See Ex. 245.

⁶³⁰ Tr. at 2785-91; Ex. 245 (grievance); Ex. 3 (response letter); Ex. 141 (email); Ex. 568 (copy of response letter).

⁶³¹ Ex. 3; Ex. 568.

⁶³² Ex. 582 at PMC000908 ("Complaints made in good faith should not jeopardize the employees [sic] job status, security or working conditions. In addition, any complaint request should not become part of the employee's permanent file."); see also Tr. at 2891 (Fletcher testifying if employees "go through the formal grievance process, if it's legitimate, if it's just, if there's honest [sic] in what they're saying, there shouldn't be disciplinary action as a result of a grievance that was filed," and acknowledging this is a promise of the grievance process).

The record shows other employees made suggestions about their co-workers' employment and consequences without being disciplined or warned, let alone fired. For example, Fergie wrote in a memo "I think this problem [referring to the situation with Van] was exasperated [sic] a few years ago when a previous manager allowed [Van] to be supervised directly by the Program Director" rather than the Director of Operations."⁶³³ "This move should be reversed immediately."⁶³⁴

Therefore Portneuf can't prove it would have fired Van on this ground absent his safety complaints.

4. Van's Interactions with Third Parties

Last, but not least, Portneuf contests Van's distrust, hostility, and disrespect extended to third parties, namely air ambulance manufacturer Agusta,⁶³⁵ and contends Van caused such problems for Portneuf on this front that it had to fire him. Portneuf noted an incident where its corporate attorney, Russ White, issued Van a cease and desist letter regarding negotiations for the COMP (maintenance) contract on the Agusta helicopter, allegedly because Van was causing so much friction in negotiations Agusta was refusing to deal with him, and an incident where Van's abrasive hostility upset Agusta's technical representative so much, the representative walked off the job.

Gregg Schilling worked with Van when he was assigned as the technical rep for the sale of the Agusta helicopter Portneuf purchased.⁶³⁶ Schilling wasn't involved in contract negotiations for the purchase of the helicopter or negotiations for the COMP contract.⁶³⁷ Nor was he aware of the details of Van's involvement in COMP negotiations.⁶³⁸ He stepped in with customer service once Portneuf had purchased the air ambulance and it arrived on site in Pocatello.⁶³⁹ However, he understood Van was involved heavily in the negotiations for the COMP agreement,

⁶³³ Ex. 184 at PMC001362

⁶³⁴ Ex. 184 at PMC001362.

⁶³⁵ *See* Portneuf Medical Center's Post-Hearing Brief, 68.

⁶³⁶ Tr. at 857.

⁶³⁷ Tr. at 858-59, 868.

⁶³⁸ Tr. at 869.

⁶³⁹ Tr. at 859. Most of the sale contract negotiations would have been handled by the Program Manager, Tom Gallagher, and probably Bob Gleeland (phonetic), who was the main sales representative at the time, as well as others including Ron Cooper and Jim Minouge. Tr. at 859-60. Minouge was Schilling's supervisor at the time and probably would have provided Portneuf with the information for the COMP contract and transmitted the final copy for signature. Tr. at 869. To the extent Schilling's affidavit in support of the Complainant's Opposition to Respondent's Motion for Summary Adjudication suggests Schilling was involved in the negotiations, it was a misunderstanding. Tr. at 877.

and Schilling never heard any indication the Agusta representatives negotiating that contract had any problems with Van.⁶⁴⁰

Schilling met Van for the first time in Pocatello, when Schilling traveled there to assist with delivery and start-up of the helicopter, sometime in 2003.⁶⁴¹ He met and interacted with Van on many occasions throughout the first six months Portneuf owned the helicopter because it's "standard policy and customer service for the tech reps to respond immediately to customers when they call."⁶⁴² Schilling would head to Pocatello for scheduled maintenance and other issues as requested and was the primary person to service Portneuf's account.⁶⁴³

Schilling saw Van as a "very focused, intense individual," but he never had trouble getting along with Van.⁶⁴⁴ Contrary to Portneuf's claims, he never walked off the job or refused to work with Van and was unaware of any Agusta representative who refused to work with Van.⁶⁴⁵ He also believed Mr. Van was "in love with" the helicopter and never had any impression Van wanted a different helicopter,⁶⁴⁶ and confirmed Van didn't cause any problems in dealings between Portneuf and Agusta.⁶⁴⁷

Instead, Schilling was "very impressed" with Van's abilities as a mechanic and clear record keeping, which was not an easy task given the complex, time-sensitive nature of helicopter maintenance.⁶⁴⁸ He testified, "Mark Van is one of the best that I've ever seen [with regard to record keeping] because of his focus and . . . his intense personality."⁶⁴⁹ He also observed Van had the "leadership quality" necessary for a maintenance supervisor to have.⁶⁵⁰ Similarly, while he found Van to

⁶⁴⁰ Tr. at 882.

⁶⁴¹ Tr. at 861.

⁶⁴² Tr. at 861-62.

⁶⁴³ Tr. at 862. While it's possible that other Agusta tech reps, including Allan Burton, might have visited Portneuf during that six-month period, it is unlikely they would have gone more than once or twice because Portneuf was in Schilling's territory. Tr. at 862. Others would only be assigned if Schilling was unavailable. Tr. at 862. He was "explicitly involved with Portneuf as their [sic] tech rep 99 percent of the time." Tr. at 879.

⁶⁴⁴ Tr. at 863.

⁶⁴⁵ Tr. at 863. Stoltz recalled Schilling walking off the job because "[h]e was frustrated with whatever Mark was talking to him about," which might have involved a motorcycle. Tr. at 1654. Schilling himself doesn't recall this event; I find it did not happen.

⁶⁴⁶ Tr. at 875.

⁶⁴⁷ Tr. at 880.

⁶⁴⁸ Tr. at 863.

⁶⁴⁹ Tr. at 864.

⁶⁵⁰ Tr. at 864.

be demanding, he didn't have trouble working with him.⁶⁵¹ The more he worked with Van, Schilling grew to realize Van "was very, very thorough," persistent, and proactive, which he respected and thought was necessary for a helicopter mechanic.⁶⁵² Schilling sought out individuals with those qualities for work in his hanger and felt Van's "personality was an advantage with the way he worked on that helicopter."⁶⁵³

As it turns out, Van did express concern over Portneuf's purchase of the Agusta helicopter.⁶⁵⁴ Portneuf's attorney apparently did ask Van to cease and desist his involvement in the COMP contract negotiations (Van was very concerned regarding Portneuf's ability to comply with the terms of the contract as written without defaulting).⁶⁵⁵ However, Portneuf was unable to prove that the cease and desist letter was motivated by Agusta's (i.e., third party) complaints, and Portneuf certainly didn't feel the need to discipline Van for his comments at any time between late 2003, when the contract was negotiated, and April 20, 2005, when Van was terminated. The evidence shows the allegation about a tech rep walking off the job due to Van's unreasonableness and difficulty is an unfounded and disproven allegation promulgated by Fergie, perpetuated by Alzola, and adopted by Holmes and Fletcher.⁶⁵⁶ Therefore, Portneuf hasn't proved it would have fired Van on this ground.

In conclusion, Portneuf has not demonstrated any reason it would have fired Van besides invidious discrimination motivated by Van's protected air safety complaints. As Schilling testified, he was "very surprised" and "shocked" when he found out Portneuf had terminated Van's employment, explaining "you don't let people like that go."⁶⁵⁷

VI. Appropriate Affirmative Action to Abate the Violation

The relief for employment discrimination the AIR 21 regulations prescribe is "affirmative action to abate the violation"⁶⁵⁸ that has three elements:

- "where appropriate," reinstatement to the former position with the all the "terms, conditions, and privileges" of that position;

⁶⁵¹ Tr. at 865.

⁶⁵² Tr. at 865-66.

⁶⁵³ Tr. at 865-66.

⁶⁵⁴ *See, e.g.*, Ex. 512.

⁶⁵⁵ Tr. at 2677-79.

⁶⁵⁶ Ex. 182 at PMC001264; Tr. at 2709-10. Fletcher never investigated the allegation. Tr. at 2710.

⁶⁵⁷ Tr. at 866.

⁶⁵⁸ 29 C.F.R. § 1979.109(b), implementing 49 U.S.C. § 42121(b)(3)(B).

- back pay; and
- compensatory damages.⁶⁵⁹

Portneuf chose not to address aspects of the monetary and non-monetary relief that might be granted to Van, other than to assert in one sentence that “reinstatement would completely destroy Portneuf Medical Center’s Life Flight Program.”⁶⁶⁰ Without analysis or argument from Portneuf, I rely primarily on the expert evidence Van offered from Gregory G. Green, Ph.D. to compute the lost earnings (back pay) and other economic damages. Van has proven entitlement to non-economic compensatory damages for emotional distress. But the evidence shows reinstatement is inappropriate here; instead Protneuf must expunge the derogatory information in Van’s personnel file that relates to the termination, and pay front pay for two years.

A. Back Pay

Van began to receive pay increase less than three weeks⁶⁶¹ before Portneuf fired him, due to the good performance evaluation Life Flight’s Director Holmes gave him on January 14, 2005.⁶⁶² He then earned \$36.84 per hour for a 40-hour work week, or approximately \$76,627 per year (before overtime or benefits).⁶⁶³ He is entitled to back pay from April 20, 2005 to the date of this decision, reduced by what he earned elsewhere.

Not long after the termination, one of the co-owners of the nearby Avcenter, Inc.⁶⁶⁴ in Pocatello hired Van—initially as a mechanic, and ultimately as a special projects manager,⁶⁶⁵ at lower wages than Portneuf had paid. Van began at \$17 per hour, but soon got a raise to \$18 per hour, about half what he used to earn.⁶⁶⁶ By about July 2007, when the co-owner of the Avcenter learned Van was seeking higher paying work, he raised Van’s pay to \$24 per hour, the hourly wage he still earned at the time of trial.⁶⁶⁷ Van believes “agents of Portneuf Medical Center”⁶⁶⁸

⁶⁵⁹ 29 C.F.R. § 1979.109(b), implementing 49 U.S.C. § 42121(b)(3)(B).

⁶⁶⁰ Portneuf Medical Center’s Post-hearing Brief, at 66.

⁶⁶¹ Ex. 160, PMC 000508; *see* the final line showing the change was made on April 1, 2005.

⁶⁶² Ex. 567 at PMC 000324.

⁶⁶³ Tr. 234. Van was off slightly in his estimate that the pay increase brought him to \$36.33 per hour.

⁶⁶⁴ Tr. 232–33.

⁶⁶⁵ Ex. 71 at 2 (under the heading “Occupations and Earnings”); Tr. 237.

⁶⁶⁶ Tr. 236.

⁶⁶⁷ Tr. 236–37.

⁶⁶⁸ Tr. 250.

told the Avcenter's Director of Maintenance⁶⁶⁹ Portneuf did not want Van to work on the fixed-wing⁶⁷⁰ King Air airplanes Portneuf occasionally leased from the Avcenter because the agents thought Van couldn't concentrate on his job.⁶⁷¹ The Avcenter's managers, according to Van, refused to comply with the request.⁶⁷² Van also believes that people at Portneuf whose names he did not know tried to have the Avcenter's owner fire him.⁶⁷³ There was no such testimony from the owner of the Avcenter or any of its managers. Van remains employed there.

The expert witness, Dr. Green, computed the loss of salary and benefits over the entirety of Van's working life (which he estimated at another 10.73 years),⁶⁷⁴ added the equivalent of interest over that period by converting his past earnings to 2010 dollars, and then effectively reduced that lump sum to its present value.⁶⁷⁵ That may be an appropriate way of determining tort damages for personal injury, but it is not the measure of economic damages under AIR 21. The \$600,00 to \$625,000 Dr. Green computed as the damages Van sustained for income loss will not be awarded.⁶⁷⁶ But many aspects of Dr. Green's report remain helpful.

Dr. Green took Van's past earnings for calendar years 2001 to 2004 at Portneuf,⁶⁷⁷ and applied an appropriate inflation factor to each year to convert them into 2010 dollars. He added those four years of adjusted earnings together and divided the resulting sum by four to set the annual value in 2010 dollars of the job Van lost at \$90,816.⁶⁷⁸

Van's earnings at the Avcenter were computed to mitigate that earnings loss, using his W-2 earnings for calendar years 2007, 2008, and 2009 that were increased by an inflation factor for each of the years to convert them to 2010 dollars.⁶⁷⁹ The

⁶⁶⁹ Tr. 333-334. The Avcenter's Director of Maintenance also was the co-owner who had hired Van and raised Van's pay.

⁶⁷⁰ The transcript at Tr. 232 garbles "fixed-wing" into "fixing" and "King Airs" into "king areas." Cf., Tr. 250.

⁶⁷¹ Tr. 250.

⁶⁷² Tr. 250.

⁶⁷³ Tr. 250.

⁶⁷⁴ Ex. 71 at internal pg. 1, under the heading "Summary of Analysis."

⁶⁷⁵ Ex. 71; Tr. 889 to 903.

⁶⁷⁶ Ex. 71 at internal pg. 1, based on its Table 1, at internal pg. 12.

⁶⁷⁷ Van's cash earnings in 2001 were \$71,048; in 2002 were \$73,479; in 2003 were \$76,668 and in 2004 were \$81,916 according to Ex. 71, Table 2 "Money Earnings Base for Lost Employment" at internal page 13.

⁶⁷⁸ Ex. 71, Table 2, titled "Money Earnings Base for Lost Employment," at internal pg. 13.

⁶⁷⁹ Van's W-2 earnings in 2007 were \$43,258; in 2008 were \$43,257; and in 2009 were \$44,217. After the appropriate inflation factor was added for each year to increase these to earnings in 2010 dollars, the present value of Van's money earnings in 2007 was \$45,654; in 2008 was \$43,965, and in 2009

value of Van's average earnings in mitigation at the Avcenter, when so converted, was \$44,907. He also had additional mileage costs to drive to the Avcenter, of about \$45 per week using IRS mileage allowances, or \$2,250 per year (assuming he took two weeks off).⁶⁸⁰

The \$45,846 difference between annual value in 2010 dollars of the job Van lost (\$90,816) and the value of Van's average earnings in mitigation (\$44,907) represents the annual value in 2010 dollars of Van's lost hourly wages. In the five full years since the firing he had lost \$229,230⁶⁸¹ in today's value through April 20, 2010; and he lost another \$3,820.50 in each of the ten months from April 21, 2010 to February 2, 2011, for an additional \$38,205. Van's hourly wage losses from the termination therefore total \$267,435. The mileage of \$2,250 per year would add another \$11,250 for the five years through April 20, 2010, and \$1,800 for the ten months to February 2, 2011, for a total of \$13,050.⁶⁸²

Hourly wages were not all Van lost—he also lost the value of fringe benefits that included “life insurance, disability insurance, tuition reimbursement for career development and 401(k) plan contributions.”⁶⁸³ Dr. Green estimated they had a value of 12.6% of the value of Van's lost earnings at Portneuf, while the fringe benefits Van earned in the mitigation work he obtained at the Avcenter had a value of only 10% of the value of his mitigation earnings.⁶⁸⁴ The difference of 2.6% must be added to his wage loss. The loss of fringe benefits in 2010 dollars is an additional loss of \$6,953.31.⁶⁸⁵

Van's combined lost wages and fringe benefits from the day he was fired through January 20, 2011, equal \$287,438.31.⁶⁸⁶

Interest begins to accrue on the amount after the date of this order at the rate set in 26 U.S.C. § 6621(a)(2), compounded quarterly.⁶⁸⁷

was 45,101. The average of the annual offsetting earnings therefore was \$44,907 in 2010 dollars. Ex. 71 Table 4, “Money Earnings Base for Mitigative Employment,” at internal pg. 15.

⁶⁸⁰ Tr. 903.

⁶⁸¹ $\$45,846 \times 5 = \$229,230$.

⁶⁸² The record closed in 2010. Parties, thus, didn't provide 2011 wage data. As a result, although a portion of this includes 2011 dollars, I am using 2010 data.

⁶⁸³ Ex. 71 at 2 (under the heading “Occupation and Earnings”).

⁶⁸⁴ Ex. 71 at 6.

⁶⁸⁵ $\$267,435 \times 2.6\% = \$6,953.31$.

⁶⁸⁶ $\$267,435 + \$13,050 + \$6,953.31 = \$287,438.31$.

⁶⁸⁷ *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp. d/b/a Bearden Trucking*, ARB No. 04-014, OALJ No. 03-STA-36, slip op. p. 10, (ARB June 30, 2005); *Doyle v. Hydro Nuclear Servs.*, ARB Nos.

B. Compensatory Damages

Damages for emotional distress are part of the remedy according to the statute and the implementing regulation.⁶⁸⁸ I credit Van's testimony that the termination caused him personal humiliation,⁶⁸⁹ marital difficulties,⁶⁹⁰ difficulties in his relationship with his daughter,⁶⁹¹ mental anguish,⁶⁹² and emotional distress. I accept that Van felt humiliated by the loss of a relatively prestigious job he had held for a long period as a Director of Maintenance at Portneuf to becoming a line mechanic at the Avcenter handling special projects.

He sought assistance in dealing with his symptoms of anxiety, insomnia and ruminating thoughts over ten office visits from Kayne Kishiyama, M.D.⁶⁹³ Dr. Kishiyama offered supportive counseling and prescribed anti-anxiety medication and a trial of anti-depressants.⁶⁹⁴ His college-age son witnessed the depression after the termination.⁶⁹⁵ Dr. Kishiyama feared that involving himself in the litigation would impair his therapeutic relationship with Van, so he declined to write a report.⁶⁹⁶

Van also saw a therapist, Michael Stevens, who prepared two reports that summarized the treatment Van received for his mental distress, both from Stevens' review of Dr. Kishiyama's medical records and from several interviews he arranged with Van over six or eight months to prepare the report and to be able to testify at trial.⁶⁹⁷ Stevens, who formed no therapeutic relationship with Van in the process of

99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-19 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

⁶⁸⁸ 29 C.F.R. § 1979.109(b).

⁶⁸⁹ Tr. 249, 251.

⁶⁹⁰ Tr. 249, 251.

⁶⁹¹ Tr. 253.

⁶⁹² Tr. 249.

⁶⁹³ The records of Dr. Kishiyama are appended as internal exhibit 36 to Van's deposition, which both parties offered in evidence at trial, Van as Ex. 280 and Portneuf as Ex. 594.

⁶⁹⁴ Ex. 693; Tr. 1304.

⁶⁹⁵ Tr. 432.

⁶⁹⁶ Tr. 1312.

⁶⁹⁷ Ex. 63 and Ex. 64; Tr. 1293.

preparing the report on Van's behalf,⁶⁹⁸ concluded that the termination caused Van anxiety and depression that was still present the last time Stevens met with Van.⁶⁹⁹

Neither party offered indicia of appropriate compensatory damage awards that the Administrative Review Board has suggested: what courts or juries have awarded for violation of state or federal anti-discrimination statutes or analogous tort actions, such as violations of privacy rights.⁷⁰⁰ More than ten years ago the Administrative Review Board generally receded from the view that compensatory damage awards in earlier cases litigated before the Secretary should set the compensatory damage award. Repeatedly looking to earlier awards results in compensatory awards "frozen in time," ignores inflation, and sets artificially low compensation that fails to enforce that statutory mandate that the "victims of unlawful discrimination be compensated for the fair value of their loss."⁷⁰¹

Van requests a compensatory damage award of \$700,000.⁷⁰² No explanation is offered for why this amount is appropriate, as opposed to one an order of magnitude smaller (\$70,000) or several times larger (in the millions of dollars). Bereft of proof of judicial awards made in Article III federal courts or in state courts in analogous cases, I look to cases decided within the Department of Labor on the Secretary's behalf.

The largest award I found was made in a nuclear industry whistleblower matter, of \$250,000.⁷⁰³ The senior executive who was victimized felt humiliated and suffered emotional stress from his termination. Lay and expert evidence in that case showed he had held high-level positions in the nuclear power industry where he earned over \$100,000 annually in the 1980s. Eight years of unemployment and underemployment forced him to borrow money from friends and family, to take a comparatively menial job as a file clerk to cover living expenses, left him unable to find any work within the nuclear community, and badly damaged any chances of future promotion and future salary increases. He suffered a loss of professional reputation and likely would face significant hostility and lack of professional respect on a return to work. The trial judge reviewed other much lower contemporary

⁶⁹⁸ Tr. 1312.

⁶⁹⁹ Tr. 1327.

⁷⁰⁰ *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, OALJ No. 1994-TSC-3, Decision and Order on Damages, slip op. at 5 (ARB Oct. 25, 1999).

⁷⁰¹ *Leveille, supra*, Decision and Order on Damages, slip op. at 5 (ARB Oct. 25, 1999).

⁷⁰² Tr. 250; Complainant's closing Brief at 47.

⁷⁰³ *Hobby v. Ga. Power Co.*, ARB No. 98- 166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), *aff'd*, *Ga. Power Co. v. U.S. Dep't of Labor*, Case No. No. 01-10916 (11th Cir. Sept 30, 2002) (unpublished) (affirming the trial judge's award to the complainant of \$250,000 in compensatory damages for emotional distress, humiliation, and loss of reputation).

awards for compensatory damages, but concluded “that the situation here merits such a high award.”⁷⁰⁴

Yet in a successful AIR 21 matter decided 2004, the trial judge awarded and the Administrative Review Board affirmed a compensatory damage award of \$50,000 to a pilot who struggled to support his wife and two infant children while he looked for new full-time employment after he was terminated.⁷⁰⁵ More recently, the Board affirmed an award of \$100,000 the trial judge made to a pilot under AIR 21 for emotional harm and damage to the pilot’s reputation, where he and his wife were in and out of therapy together and individually after the termination, were in family counseling, and a physician had prescribed the pilot psychotropic medication for depression and anxiety.⁷⁰⁶

Considering these other awards, I set the appropriate compensation for non-economic damages at \$100,000. This award focuses on Van’s loss. Compensatory damages are “those [damages] necessary to make the wronged party whole and no more.”⁷⁰⁷ They aren’t meant to punish the employer for whistleblower discrimination in the way exemplary or punitive damages would. AIR 21 doesn’t authorize those sorts of damages.

C. Reinstatement

Reinstatement constitutes an important aspect of the remedy for employment discrimination, first because it vindicates the rights of the worker who engaged in protected activity, and second because the return of a fired worker to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective.⁷⁰⁸ Yet at times it may not be feasible “due to ongoing antagonism between the discriminated person and an employer.”⁷⁰⁹

⁷⁰⁴ *Hobby, supra*, ALJ No. 1990-ERA-30 Recommended Decision and Order on Remand, slip op. at 69 (September 17, 1998).

⁷⁰⁵ *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010 (ARB Dec. 30, 2004), aff’d, *Vieques Air Link, Inc., v. U.S. Dep’t of Labor*, No. 05-1278 (1st Cir. 2006).

⁷⁰⁶ *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009).

⁷⁰⁷ *Hedden v. Conam Inspection Co.*, Recommended Decision and Order 82-ERA-3 slip op. at 7-8 (Jan. 22, 1982).

⁷⁰⁸ *Hobby, supra*, Final Decision and Order on Damages, ARB slip op. at 8 (Feb. 9, 2001).

⁷⁰⁹ *Johnson v. Old Dominion Security*, 86-CAA-00003, Final Decision and Order, slip op. at 25 (Sec’y May 29, 1991); see also *Traxler v. Multnomah County*, 596 F.3d 1007, 1012 (9th Cir. 2010); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984).

Van cannot be reinstated for several reasons. Taken as a whole they show the impossibility of “an amicable and productive”⁷¹⁰ working relationship between Van and Portneuf, for reasons that transcend the normal tension between parties in litigation. Two of them come from ill-conceived emails Van sent to Portneuf managers and employees after his termination. Van testified that he could return to work,⁷¹¹ but other facts in the record demonstrate Van harbors a deeply seated conviction he won’t be treated fairly if he returned.

Van’s email philippic to the chief executive of Portneuf, Pat Hermanson, sent on January 28, 2009, after Hermanson announced his impending departure includes the subject line “This is what you fostered.” It reads:

Good riddance

If your Doctorate is in hospital implosion you should receive your degree for time served.

Degrees aren’t worth anything if you have masters in human resources.

Some day you will receive the LEGACY you deserve.

Well at least you won’t have to spray anymore perfume on the turds. see attachment⁷¹²

At trial Van acknowledged that although the email purported to be from a Dale Larsen, he had written it,⁷¹³ as Hermanson, immediately recognized from its content. The “turds” Van referred to were “the Life Flight people who caused my termination.”⁷¹⁴ When asked why he used the pseudonym, Van testified the name D. Larson was “just a fictitious name I made up so I could be anonymous and not have you ask me questions in court.”⁷¹⁵

Around the same time Van had seen an article in a local newspaper, the Idaho State Journal, which included a large photo of Barry Neilsen, the pilot who had flown at Halloween with the ice on the rotors and who had accosted Van on the

⁷¹⁰ *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24, slip op. at 18 (Dep. Sec’y Feb. 14, 1996).

⁷¹¹ Tr. 248-249.

⁷¹² Ex. 628; Tr. 279, 507.

⁷¹³ Tr. 505.

⁷¹⁴ Tr. 507.

⁷¹⁵ Tr. 503.

helipad. It showed Neilsen removing a sock from the air ambulance's main rotor. Van altered the headline of the photo to read "PMC's Life Flight Deicing Boy Barry Neilsen." Again using the pseudonym Dale Larsen that fooled no one, he sent emails to a large number of Portneuf employees⁷¹⁶ with the subject line "Your boy comes through for you," to which the article with the changed headline was attached.⁷¹⁷ To others at PMC, however, he sent a generally similar email with the subject line, "Awesome," and the body of the message read:

What a Dumbass⁷¹⁸

Van believes the current Director of Operations of Life Flight, Ron Fergie, intentionally buzzed his home before the termination as retribution for safety complaints. Fergie had flown too low⁷¹⁹ in a residential area, but it had nothing to do with retribution. The low flight approach to the helipad went over Van's home because the medical team wanted to avoid additional damage to the patient who had a head injury. The injury could have been worsened by the pressure differential a high flight would have caused.

Portions of Van's trial testimony that already have been discussed show he believes that people at Portneuf tried to blackball him from employment as a mechanic at the Avcenter, or to limit his duties there. Those beliefs don't constitute proof that has persuaded me by a preponderance of evidence that Portneuf engaged in that sort of ongoing retaliation. He specifically asked during his testimony that Portneuf "be ordered to take no discriminatory action against me after I am reinstated" and not to "intimidate, demean, retaliate or force me from my position," and that if reinstated, the hospital be required to "treat him with respect."⁷²⁰ His amended complaint evidences real doubts he could work there, asking as it does for anticipatory protection. In it he asks that Portneuf "be ordered to pay front pay to [him] to his retirement in the event it chooses to *again* terminate [his at-will employment] for no valid reason."⁷²¹ This sort of animosity he continues to harbor, when Pam Holmes remains Life Flight's Program Director, Ron Fergie remains its Director of Operations, and Barry Neilsen remains a pilot, would be an open

⁷¹⁶ Those who received one or the other variation of the photo included flight nurses Lance Taysom and Tom Mortimer, pilots Gary Alzola and Ron Fergie, Life Flight's head dispatcher Ann McCarthy, Van's replacement Greg Stoltz. All were witnesses in this case. Tr. 504-506.

⁷¹⁷ Ex. 627.

⁷¹⁸ Ex 626.

⁷¹⁹ I credit Van's testimony that he saw the air ambulance fly at just 150 feet of altitude over his residential neighborhood (Tr. 128), a violation of FAA regulations that set a minimum altitude of 300 feet. Alzola counseled Fergie, who piloted that flight, about demonstrating poor judgment in that low flight. Tr. 586, see generally Tr. 585-586, 2492.

⁷²⁰ Tr. 251; a similar request is found in his Amended Complaint at ¶88.

⁷²¹ Amended Complaint at ¶89 (emphasis added).

invitation to ongoing disputes for whatever he perceived as slights of any kind. A normal working relationship between these parties won't happen.

D. Front Pay

Front pay is disfavored compared to reinstatement, but is available when excessive hostility exists between the parties.⁷²² Generally limited to a few years, the length and amount of a front pay award is a fact-specific inquiry⁷²³ that courts have characterized as “intelligent guesswork.”⁷²⁴ The Ninth Circuit (which has potential jurisdiction over this claim) has upheld front pay awards lasting as long as eleven years under certain factual circumstances.⁷²⁵ The Fifth Circuit developed a six-factor framework to analyze whether to award front pay, and if so for how long, in *Reneau v. Wayne Griffin & Sons, Inc.*⁷²⁶ The framework examines: (1) the length of prior employment; (2) the permanency of the position held; (3) the nature of the work; (4) the age and physical condition of the employee; (5) possible consolidation of jobs; and (6) myriad other nondiscriminatory factors which could validly affect the employer/employee relationship. Although the Ninth Circuit has not formally adopted it, several district courts in the Ninth Circuit have used the framework recently to determine front pay awards.⁷²⁷

Applying the *Reneau* factors here, the parties had a long relationship, in which Van held a permanent position as a senior helicopter mechanic. The discrimination did not occur shortly before retirement after long service, where due to age, infirmity, or the lack of up-to-date skills, Van would have a very difficult time finding alternate employment, disadvantages that might be ameliorated with an extended period of front pay. He has found similar, less remunerative work in the same geographic area. Consolidation of jobs plays no role here. The intense hostility between the parties already has been discussed. The back pay award already covers five years, so the front pay award ought to cover a relatively brief time of no more than two more years.

Front pay is reduced by a Complainant's actual earnings.⁷²⁸ Another two years would mean an additional \$45,846 for each of two years in wage loss

⁷²² *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986).

⁷²³ *See Boehm v. American Broadcasting Co., Inc.*, 929 F.2d 482, 488 (9th Cir. 1991); *Cassino v. Reichhold*, 817 F.2d 1338 (9th Cir. 1987).

⁷²⁴ *Downey v. Strain*, 510 F.3d 534, 544 (5th Cir. 2007); *Sellers v. Delgado Coll.*, 781 F.2d 503, 505 (5th Cir. 1986).

⁷²⁵ *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999).

⁷²⁶ 945 F.2d 869, 871 (5th Cir. 1991).

⁷²⁷ *See Sanders v. City of Newport*, 602 F. Supp. 2d 1195, 1202 (D. Ore. 2009).

⁷²⁸ *Cassino v. Reichhold*, 817 F.2d 1338 (9th Cir. 1987).

(\$91,692), plus 2.6% in fringe benefits of \$1,192 per year (\$2,384), plus mileage at \$2,250 (\$4,500). The total due for front pay is \$98,576.⁷²⁹

E. Expunging Personnel File

To remove the stain of the Portneuf's discriminatory actions from Van's permanent work history, Portneuf must expunge from Van's personnel file all negative, derogatory information that pertains to the firing.⁷³⁰

F. Publication

The overarching principle that others at the work site should know that AIR 21 whistleblower claims can be effective relief can be partially honored by requiring Portneuf to deliver a copy of the decision directly to Life Flight pilots, medical flight staff, mechanics, and dispatchers. Portneuf also will be ordered to prominently post copies of the decision at every location where it posts other notices to employees related to employment law (*e.g.*, wage and hour, civil rights in employment, age discrimination). Portneuf must take all reasonable steps to ensure that no copy of the decision is altered or defaced during the 60 days the decision is posted.

Order

1. Portneuf Medical Center must deliver a copy of this decision and order directly to Life Flight pilots, medical flight staff, mechanics, and dispatchers within 7 days. Portneuf also must prominently post copies of this decision at every location where it posts other notices to employees that relate to employment law (*e.g.*, wage and hour, civil rights in employment, age discrimination, and family medical leave). It must be posted for no fewer than 60 days; Portneuf must take all reasonable steps to ensure that no copy of the decision is altered or defaced.
2. Portneuf Medical Center must expunge from Van's personnel file all negative, derogatory information that pertains to the firing.
3. Portneuf Medical Center must pay to the Complainant Mark Van:
 - a. Lost compensation (including back pay and fringe benefits) in the amount of \$287,438.31.

⁷²⁹ \$91,692 + \$2,384 + \$4,500 = \$98,576.

⁷³⁰ *Dutile v. Tighe Trucking Inc.*, 93-STA-31, Final Decision and Order of the Secretary, at paragraph 5 of the relief ordered (Sec'y Oct. 31, 1994); see also *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 863-64 (7th Cir. 2001).

- b. Compensatory damages (non-economic damages) in the amount of \$100,000.
 - c. Front pay in the amount of \$98,576.
 - d. Interest on these amounts as of the date of this order at the rate described in 26 U.S.C. § 6621(a)(2), compounded quarterly.
 - e. Costs and expenses, including attorney's fees and expert witness fees reasonably incurred in connection with bringing the complaint.
4. A petition for attorney's fees, expert witness fees and litigation costs and expenses that comports with Local Civil Rule 54.2(b)(1) to (6) of the U.S. District Court for the District of Idaho must be filed within 21 days from the date of this order. Portneuf Medical Center must file its objections within 14 days after that fee petition is served. The parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections within 14 days after objections are served. Both parties are charged with the duty to arrange the meeting and to negotiate in good faith. Van's counsel must file a report within 7 days thereafter stating which objections have been resolved, which have been narrowed, and which remain unresolved. The report also may reply to any unresolved objections.

So Ordered.

A

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, 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).