

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 08 February 2005**

Case No. 2004-AIR-13

In the Matter of

DAVY MERRITT,  
Complainant,

v.

ALLEGHENY AIRLINES, INC.,  
Respondent.

Appearances:

Matthew J. Fusco, Esq.  
For the Complainant

Peter J. Petesch, Esq.  
Ellen C. Ham, Esq.  
For the Respondent

Before: MICHAEL P. LESNIAK  
Administrative Law Judge

**DECISION AND ORDER GRANTING RELIEF**

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (hereinafter "AIR 21" or "the Act"), as implemented by 29 C.F.R. Part 1979 (2003). This statutory provision, in part, prohibits an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a). This claim was brought by Davy Merritt ("Merritt", "Captain Merritt" or "Complainant") against Allegheny Airlines, Inc. ("Respondent" or "Allegheny").

## FACTUAL BACKGROUND

Captain Davy Merritt was a pilot for Allegheny Airlines and was terminated by letter dated June 6, 2003. Merritt filed a complaint under AIR 21 on June 9, 2003, alleging retaliation for his protected activity. I held a trial in this matter in Harrisburg, Pennsylvania from June 16–18, 2004, at which all parties presented evidence and argument. At the close of the trial, I set September 1, 2004 as the final date for the parties to file closing briefs; thereafter, I allowed the filing of supplemental briefs. The record in this claim closed on February 1, 2005.

As the evidence below will explain fully, Respondent claims that it terminated Captain Merritt for two disciplinary incidents that occurred during the month of May, 2003. In the twenty-four month period prior to Merritt's termination, Allegheny had disciplined him for two incidents: one for unprofessional conduct toward a flight dispatcher in 2002, the other for failure to appear for a scheduled flight in October 2002. The first incident led to a verbal warning, the second to a written warning. This case primarily concerns the two May 2003 incidents, which Respondent claims led to Merritt's June 2003 discharge under Allegheny's progressive discipline policy.

For clarity, I will initially set forth the two incidents in question, each of which took place in May, 2003. The first incident occurred on May 12, 2003, when Merritt was scheduled to pilot a flight from Syracuse, New York to LaGuardia Airport, beginning at 6:10 a.m. Captain Merritt was to pilot two flights to follow, one from LaGuardia to Syracuse and the other from Syracuse back to LaGuardia; Merritt's work day was scheduled to end at 11:14 a.m. Shortly after Merritt arrived for work that morning, Allegheny's crew-scheduling department contacted him to say it was assigning him an "extension" (an extra flight) to his work day. In that conversation and in several that followed during the morning, Merritt stated that he would fly his scheduled flights but that he would not accept the extension, as he anticipated being too tired to pilot the extra flight. Those conversations culminated in a supervisor's directive that Merritt see a physician in the LaGuardia area once his scheduled day had ended at 11:14 a.m.. Captain Merritt refused to follow that directive but flew his regular assignments on May 12, 2003, as well as on the following three days.

The second incident in question took place on May 19, 2003. On that day, Allegheny's crew-scheduling department discovered that Merritt's aircraft had not "pushed back" from the gate as of the time Merritt recorded. In fact, Allegheny had a recorded telephone conversation with Merritt that occurred at 1:01 p.m., despite the fact that Merritt reported 12:57 p.m. as the aircraft's push-back time. On its own initiative, crew scheduling sent a report of the irregularity to Allegheny operations.

In Allegheny's ensuing investigation into the May 19 incident, it concluded that Merritt had deliberately falsified the push-back time report. Ultimately, Allegheny determined that Merritt was insubordinate in refusing to see a physician on May 12, 2003 and that Merritt falsified his push-back time on May 19, 2003. Following its progressive discipline policy, Allegheny terminated Merritt by letter dated June 6, 2003.

## APPLICABLE LAW AND ISSUES FOR ADJUDICATION

AIR 21 protects employees who provide information (to their carrier employer or to the FAA) related to any alleged, objectively reasonable perceived violation of federal laws or

standards “relating to air carrier safety.” *Fader v Transportation Security Administration*, 2004-AIR-27, 4 (ALJ June 17, 2004), citing *Taylor v. Express One International*, 2001-AIR-2, 26 (ALJ February 15, 2002). “[P]rotected complaints must be specific in relating to a given practice, condition, directive or event, which the complainant must reasonably, and objectively rather than merely subjectively, believe to be a violation related to air carrier safety.” *Fader*, 2004-AIR-27 at 4; see also *Peck v. Safe Air International*, ARB 02-28, 2001-AIR-3 (ARB January 30, 2004); *Parshley v. America West Airlines*, 2002-AIR-10 (ALJ August 5, 2002). Merely raising the mantra of “safety” — a term used, and expected to be used, by every flight crew member every day — is not “protected activity” under AIR 21. See *Stoneking v. Avbase Aviation*, 2002-AIR-7 at 11 (ALJ March 17, 2003) (“[t]he whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern.”); *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997).

The Act and its implementing regulations require that a whistleblower discrimination decision resolve specific issues. Claimant must first make a *prima facie* showing, by a preponderance of the evidence, that:

1. Respondent is an air carrier subject to AIR 21;
2. Complainant engaged in activities protected by AIR 21;
3. Respondent actually or constructively knew of, or suspected, such activity;
4. Complainant suffered an unfavorable personnel action;
5. Complainant's activity was a contributing factor in the unfavorable personnel action.

49 U.S.C. § 42121(b)(2)(B)(i) and (iii) (2003); 29 C.F.R. § 1979.104(a), (b)(1)–(2) (2003); see also *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101–02 (10th Cir. 1999). Once Complainant has established the *prima facie* elements of his claim, the burden shifts to the Respondent to demonstrate by clear and convincing evidence that it would have taken the unfavorable personnel action irrespective of Complainant's having engaged in protected activity. *Trimmer*, 174 F.3d at 1102.

If I find that discrimination has indeed occurred, then I must decide what relief, if any, is appropriate. Twenty-nine C.F.R. §1979.109(b) (2003) states that appropriate relief may include:

[R]einstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

The parties stipulated at the hearing that they are both subject to the provisions of AIR 21 and that Captain Merritt was subject to an adverse employment action when he was terminated from his employment on June 6, 2003. TR 6. The parties further stipulated: (1) that Complainant's employment was governed in part by the Air Line Pilots Association Collective Bargaining Agreement (“CBA”) and by the Respondent's Flight Operations Manual; (2) that on May 19, 2003, Complainant was assigned and accepted an extension to his original route flight schedule for that date, which was in compliance with both the CBA and with federal aviation

regulations; (3) that, on May 19, 2003, Complainant reported an out time of 12:57 p.m. to the Respondent for Flight No. 3575; and (4) that the pilot of an airplane has the final say on that plane's safety. TR 6, 55, 62.

The above considered, I conclude that the issues before me for adjudication are:

1. Whether Complainant engaged in protected activity within the definition of the Act.
2. Whether Respondent actually or constructively knew of, or suspected, the protected activity.
3. Whether the protected activity was a contributing factor to the Respondent imposing the unfavorable personnel action on the Complainant.
4. Whether the Respondent has demonstrated, by clear and convincing evidence, that it would have taken the same unfavorable personnel action regardless of Complainant's having engaged in the protected activity.
5. Whether Complainant is entitled to relief and, if so, what relief is appropriate.

## EVIDENCE

### Testimony of Captain Davy George Merritt

#### *Direct Examination*

Captain Merritt testified that he is a licensed airline pilot and that he first went to work for Allegheny Airlines in July 1988. TR 21. He recounted that he was hired as a first officer and, after eighteen months in that position, he became a captain. Merritt stated that he is a member of the Air Line Pilots Association ("ALPA"). TR 22. Captain Merritt explained that he previously held an office with the ALPA: he started as an information committee member, then became a grievance person for the Local Council and Council 91, then became Vice Chairman of Council 91 for one year, then was elected to Chairman for three years, then was transferred to Council 95. TR 23. Because of the transfer, Merritt explained, he had to give up his chairmanship, but he then became the grievance representative for Council 95. Merritt testified that, during the course of his employment and work as a union representative, he became familiar with the CBA, the Airman's Information Manual, the Federal Aviation Regulations, and Respondent's Flight Operations Manual. The Flight Operations Manual states the Respondent's rules and regulations for operating within FAA constraints. TR 24.

Captain Merritt stated that he resides in Caledonia, New York, which is about ninety miles from his base in Syracuse. TR 25. Captain Merritt explained that the airline expression "deadhead" means a crew member who is still on duty but is required by Respondent to ride in the back of the flight to his next assignment. TR 28. Merritt further explained that the crew member is paid one-half of the flying-time rate. About once every other month, Captain Merritt recalled, he was assigned to a flight as a deadhead but then had to fly rather than simply ride in the back of the airplane. TR 29. He elaborated that, in such cases, he did not know in advance whether he would remain a deadhead or whether he would actually have to fly. TR 30.

Merritt next explained the term “extension.” An extension is an airline’s requirement that a pilot must fly for them in addition to the pilot’s scheduled flying time. TR 30. Captain Merritt stated that, under the CBA, the maximum number of actual flying hours per day is eight and the maximum number of duty hours during the day is fourteen. Captain Merritt said that a pilot is not paid for duty time when he is not flying. TR 31. Instead, the pilot is paid for when the aircraft moves from block to block, i.e., leaves one terminal and then arrives at another.

On all of the flights at issue in this claim, Captain Merritt had with him a first officer. Merritt explained that pilots and first officers share responsibilities; for example, the captain will fly one leg and the first officer will fly the next. TR 32.

Captain Merritt testified that on May 12, 2003, he was to fly from Syracuse to LaGuardia, then LaGuardia to Syracuse, then Syracuse back to LaGuardia. On this day, he was assigned an extension. Merritt further explained that a week later, on May 19, 2003, he was to fly from Syracuse to LaGuardia, from LaGuardia to Syracuse, and finally from Syracuse to LaGuardia, but he was given an extension from LaGuardia to Norfolk, Virginia, and from Norfolk back to LaGuardia. TR 33. Merritt stated that this was added to his schedule on the morning of May 19. He further explained that the May 19 flight from LaGuardia to Norfolk was scheduled for one hour and forty-five minutes; the leg from LaGuardia to Norfolk was scheduled as one hour and forty-nine minutes. Merritt calculated that, as he is paid by the minute at ninety cents per minute, these two additional flights equaled about two hundred fourteen minutes, or about \$200.00 in earnings for the extension. Regarding the discrepancy about his time out on May 19, 2003, Merritt noted that the discrepancy is about four or five minutes, which would be worth about \$3.60 to \$4.50 to Captain Merritt. TR 34, 35.

Captain Merritt recounted the incidents of May 12, 2003. The day before, he recalled, was Mother’s Day; he took his aunt, his mother and mother-in-law to dinner and he relaxed. Merritt stated that he went to bed on May 11, 2003 at 9:00 p.m. but he did not fall asleep. TR 35. He was congested and anxious; he testified that he believes he fell asleep about midnight. Merritt explained that, because his flight for May 12, 2003 from Syracuse was scheduled for a 6:10 a.m. departure, he had to be there at 5:25 a.m., requiring him to get out of bed at 3:00 a.m. to make the ninety-minute drive. Merritt testified that he arrived at Syracuse Airport on time and received a call from Sheri in crew scheduling. TR 36. Merritt recalled that Sheri said that there was a change in his schedule; she explained how long it was going to be, and he responded that he could not accept it because he had only had three hours of sleep the night before and it would not be safe for him to fly the extension. Captain Merritt said that Sheri responded that she must assign the extension to him; when Merritt reiterated that he could not accept it, Sheri said she would have to contact the on-duty manager (ODM). Captain Merritt remembered saying that he wanted to deal with it when he reached LaGuardia, but Sheri initially said they had to deal with it then; later, when she came back to the phone, she said to call her from LaGuardia rather than delay the Syracuse flight. TR 37. At that point, Merritt recalled, he flew to LaGuardia, leaving and arriving on time. He testified that he felt fine to fly. From LaGuardia, Merritt said, he phoned Sheri back and she transferred him to the ODM, Scott Seders. Captain Merritt testified that he explained his situation to Mr. Seders, who questioned how Merritt could know at that time that he would not be safe to fly at 1:00 p.m. Merritt recalled answering that he knew himself, that he was extremely tired, and that he was flying with a downgraded captain who could fly on the leg down. Merritt testified that he told Seders he was good to go at that time but would be unsafe to continue flying after 1:00 p.m. TR 38.

Merritt recounted that Seders told him that he still could not understand why Merritt could say at this hour that he would be too tired to fly at 1:00 p.m.; Seders said Merritt should call back and speak to the chief pilot. After his scheduled flight from LaGuardia back to Syracuse, Merritt testified, he called Sheri again. He recalled no problems on the flight from LaGuardia to Syracuse. TR 39. Sheri transferred him to Kevin Roth, who was Captain Merritt's supervisor and assistant chief pilot. Captain Merritt testified that he explained to Roth that he had not had enough sleep the night before. Merritt stated that, like Seders, Roth also claimed not to understand how someone could say that he was going to be too tired to fly at 1:00 p.m. when it was only 9:00 in the morning. Captain Merritt said he told Roth that he knew himself, that he was tired then, and that it would just get worse, although he was safe to fly now. According to Merritt, Roth told him that he would check with his boss, Pike Johnston, who was the director of operations. TR 40, 41. When Roth came back on the line, Merritt testified, he said that Pike Johnston said Merritt would either fly the extension or check himself into a hospital in Queens for exhaustion, once he returned to LaGuardia. Captain Merritt stated that he told Roth that he was going to do neither. Captain Merritt said he did not need to go to a hospital in LaGuardia where he had no familiarity with hospitals, that he just needed more sleep. TR 41. In response, Merritt testified, Roth said that they had an understanding from an FAA ruling that he could not say now that he was going to be too sick to fly four hours later. The source of this ruling was Chuck Martin, principal operating inspector for the FAA. Captain Merritt then testified that he called Mr. Martin and spoke with him. TR 42, 43. Merritt testified that, after his conversation with Martin, Captain Merritt felt that Allegheny was incorrect and he called Allegheny back to tell them that. TR 44. During that phone call, Merritt stated, Roth told him that the directive to check himself into a hospital came from Pike Johnston. TR 45. When Captain Merritt returned to LaGuardia, Roth once again instructed him either to fly the extension or to check himself into a hospital for exhaustion. TR 46. Captain Merritt did not know the location of any hospital in Queens. TR 47. Captain Merritt testified that he suggested to Roth that he go to his own doctor in Rochester, that there was a flight leaving about thirty minutes later and that he could probably see his doctor in Rochester quicker than he could find a hospital in Queens. Merritt stated that Roth, who said he would check with Pike Johnston, thereafter got back to Captain Merritt and said that seeing his own doctor was unacceptable. At this point, Captain Merritt testified, he had finished his regular schedule; the extension was the next flight that he was supposed to fly. However, Merritt stated that he did not feel fit to fly the extension, so Mr. Roth instructed him to go to the hotel and wait for him to call. TR 48. Captain Merritt further testified that Roth did not call him at the hotel, so he went to bed. Captain Merritt flew the next day, Tuesday, May 13, 2003. He also flew Wednesday, May 14 and Thursday, May 15. TR 49.

In his testimony, Captain Merritt referred to the Airman's Information Manual, which he noted mentions fatigue on the second page of the document. TR 51. The manual elaborates that lack of sleep is linked with acute fatigue and that the remedy is adequate rest and sleep. TR 52.

Merritt then related his account of the events of May 19, 2003. On that day, Captain Merritt's schedule was to fly from Syracuse to LaGuardia, from LaGuardia to Syracuse, from Syracuse back to LaGuardia, and then an overnight stay at a hotel near the LaGuardia airport. Merritt testified that he received a phone call from crew scheduling that morning, informing him of an extension. TR 55. The extension, Merritt said, was to fly from LaGuardia to Norfolk and back from Norfolk to LaGuardia. Neither of these flights, he clarified, was assigned to him as a deadhead. Captain Merritt accepted the extension. Because the flight to Norfolk was at 12:59 p.m., Merritt had to report for the flight at 12:44 p.m. TR 56. During the hour-and-a-half

layover, Merritt stated, he checked into the Wyndham Garden Hotel, which is directly across the street from the US Air terminal. TR 57. Merritt testified that, after checking in, he returned to the terminal and walked to his aircraft. At that time, Merritt learned from the boarding agent that he was to contact crew scheduling. Captain Merritt stated that, upon conversing with the boarding agent, he and she decided that she would call crew scheduling, leaving Captain Merritt to join his crew members already on board the plane. Merritt then noted that he verified his crew members and the boarding agent signed off on the paperwork. TR 61. Captain Merritt testified that he eventually received permission from ramp control to push back, but before push back, he saw a gate agent coming down the jet way, waving for Captain Merritt to stop. TR 69. The gate agent then came on board the aircraft. TR 70. Merritt said that the gate agent informed him that he had to call crew scheduling. At this point, Merritt explained, he had a plane full of people, and he argued with the gate agent as to whether he had to call crew scheduling then, or whether the issue could wait until he got to Norfolk. Captain Merritt testified that he eventually told the gate agent to get off his plane, that he would call from Norfolk. However, Merritt said, the gate agent insisted that she was not supposed to leave the aircraft until he called crew scheduling, so Merritt did. He testified that crew scheduling simply wanted to know if he was there. TR 71.

Merritt explained that “calling the out time” means the first officer noting the time that the plane pushes back from the terminal. This takes place before the engine starts. TR 72. Captain Merritt had never flown before with this particular first officer, David Rush. An FAA-mandated rule about calling the out time is that, if the plane has not taken off within fifteen minutes of its scheduled or updated out time, then the crew must contact operations about the change. TR 73.

Captain Merritt testified that, once he telephoned crew scheduling and had a short conversation with them, he hung up and continued the push back. Captain Merritt testified that he asked the first officer if he had called in their times and was answered no, that Rush had had some problems with captains in the past and he did not call times. Merritt stated that he called in the out time of 12:57 p.m. himself, about ten minutes after 1:00 p.m. Captain Merritt explained that he did this because he did not want to exceed the fifteen-minute emergency rule. Merritt clarified that 12:57 was the actual time he pushed off, although there was subsequently a delay because of the gate agent coming onto the plane. Merritt further stated that he read the 12:57 time from either his watch or the clock on the plane, as the piece of equipment that would automatically have recorded the out time was not working on this aircraft. TR 75.

Captain Merritt testified that, on May 22, 2003, he attended a meeting with company representatives regarding the May 12 incident. Also present at the meeting were Kevin Roth (the assistant chief pilot), Pike Johnston, and Rick O’Leary, Captain Merritt’s union representative. By Merritt’s account, Roth told him that the meeting concerned Merritt’s refusal to take his extension or see a doctor on May 12. Merritt reported that, as a result of the meeting, he was returned to flying status and was not given any kind of reprimand. TR 76.

Another meeting took place on May 30, 2003, about the incident of May 19. Captain Merritt stated that the meeting was attended by Rick O’Leary, Kevin Roth and Seth Naugler (the chief pilot at the time). On this occasion, Merritt recalled, he was asked about what had occurred on May 19 and about abusing the gate agent. He was told that there had been a complaint that he was abusive to the agent. TR 77. Captain Merritt stated that he denied abusing the gate agent, but then was accused of showing up late to the aircraft. Merritt maintained that he had not arrived late; after that, Merritt said, they discussed the push-back time. TR 78.

Prior to May 12, 2003, Captain Merritt testified, he had never before refused an extension. He further claimed that, when extensions were voluntary, he flew them on a regular basis. TR 84. Merritt explained that the maximum number of hours in a year that a pilot can fly is one thousand hours, and he has reached the maximum more than once. TR 85.

Finally, Merritt stated that, after he received his termination letter (CX 5), he filed a union grievance as well as contacting OSHA. TR 85.

### *Cross-Examination*

On cross-examination, the Respondent introduced Employer's Exhibit ("EX") 1, which is a transcript of the recorded conversation between Captain Merritt and Sheri in scheduling at 5:50 a.m. on May 12, 2003. Captain Merritt testified after reviewing the transcript that he could not find any place in the transcript where he told Sheri that he had only had three hours of sleep. Merritt did point out the passage quoting him as saying, "I don't know if I got enough rest last night." TR 99. Captain Merritt further noted that he told Sheri that in seven hours he would be too tired to fly — that he was projecting fatigue later on. TR 102. Further, Merritt testified, when he called Scott Seders from LaGuardia, he told Mr. Seders the same thing: that he would be too tired to fly. However, Merritt recalled that the question was left unresolved and that he said he would call again once he got back to Syracuse. TR 106. Captain Merritt then stated that when he called from Syracuse, he spoke with Kevin Roth and told him that, while he was okay to fly then, he would be too tired to fly the extension. TR 109. Captain Merritt specifically recalled telling Kevin Roth that he had only had three hours of sleep the night before. TR 110. Captain Merritt admitted that he refused Kevin Roth's request that he see a doctor or check himself into a hospital while at LaGuardia. TR 114. Captain Merritt stated that he did not believe he needed to see a doctor, although he agreed upon questioning that the conventional wisdom is to obey a directive from management, then take any grievance actions later. Merritt explained that this was his understanding from ALPA. TR 118. Captain Merritt testified that Kevin Roth or Allegheny is somehow punishing him for making the call to Chuck Martin, the principal operating inspector with the FAA. TR 123. Merritt stated that Martin told him that he would write down Merritt's safety complaint. TR 125. In addition, Captain Merritt noted that Chuck Martin's notes were dated May 13, 2003 and that Martin said he took his notes contemporaneously as things happened. TR 126. The morning of May 12, 2003, after speaking with Martin around 9:55 a.m., Merritt called Kevin Roth back and told him that he had spoken with Martin. By Merritt's account, Roth still gave him the ultimatum to either fly the extension or go to the hospital and be evaluated. TR 128. Captain Merritt testified that he never did see a doctor that day, nor did he see one at any time that week. TR 128.

Responding to questions about the incidents of May 19, 2003, Merritt testified that he went to the crew hotel after he arrived at LaGuardia at 11:14 a.m. TR 144. He stated that he had wanted to drop off his bags and listen to the radio. After doing that, Merritt said, he went back to the airport to the eatery, not knowing that Allegheny was looking for him. Captain Merritt explained that he first learned of this when he arrived at the plane and his first officer told him. TR 145. When Captain Merritt entered the aircraft at around 12:40 p.m., he and the first officer went through the checklist together. TR 146. Merritt explained that push back had already begun and the door was closing when the gate agent boarded and told Merritt to call crew scheduling. TR 149, 152–53. Eventually, Captain Merritt admitted, he told this agent to "get the

hell off my plane.” It was Captain Merritt’s recollection that the gate agent disembarked and did not stay on the plane while he called scheduling. TR 154. Captain Merritt testified that he did not tell the first officer to call in the time at 12:57 p.m., nor did the first officer tell Merritt that he was uncomfortable calling in that time. TR 157.

Captain Merritt agreed that the events of May 12 and 19, 2003 were not the first disciplinary incidents on his record for the prior twenty-four months. He admitted that he did not have a spotless record going into May 2003. Merritt acknowledged that he had received a verbal warning (of which there is a record) for calling a dispatcher a “moron.” TR 162. Then, on October 22, 2003, Merritt received a written warning letter (RX 6) for failing to report for duty. TR 165.

Merritt testified that, subsequent to his termination from Allegheny, his only employment has been driving a bread truck. TR 173.

#### *Re-Direct Examination*

On re-direct, Captain Merritt testified that when he spoke to Kevin Roth on May 12, 2003 while in Syracuse and then again in LaGuardia, Roth never told Merritt that he was relieved of flying the extension. Further, Merritt stated that Roth never told him which doctor to go to at LaGuardia, nor did he tell him at which clinic or hospital to seek medical review. TR 184. Captain Merritt testified that he had sick leave available as of May 12, 2003; had he accepted the extension to Montreal and back and then called in sick at the end of his regular shift, he would have been paid for the extension even though he called off sick. He did not get paid after he refused the extension at 6:00 a.m.

Captain Merritt stated that his last day of work was May 22, 2003. TR 185. He reported that he had earned \$75,000.00 his last full year of employment. After he was terminated, his medical benefits, dental plan and free flying with the company were terminated. Captain Merritt testified that he is now paying for his own health care provider and for his own dental visits. TR 186.

#### Testimony of Richard O’Leary

Richard O’Leary testified that he is a pilot for Allegheny Airlines, that he first went to work for Allegheny in April 1992, and that he is a member of the ALPA. Beginning in 1996, while on furlough, he helped author text for a furloughed pilots’ information hotline. O’Leary testified that he has been Vice-President and, later, Chairman of the Grievance Committee. For three years, O’Leary stated, he was part of the Allegheny System Board of Adjustment for arbitrations as a System Board member for Maryland pilots. In addition, he became Chairman of the Allegheny Master Executive Council. O’Leary further stated that he is currently a delegate to the Harrisburg Region Central Labor Council (FOCIO). TR 189. In his work with the Grievance Committee, O’Leary explained, he oversaw pilot complaints, contractual issues and discipline cases.

O’Leary testified that he handled the discipline of Davy Merritt and attended the meetings the company held to investigate the May 12, 2003 incident. O’Leary also attended the meeting the company held to investigate the May 19, 2003 incident. Finally, O’Leary attended

the termination meeting for Merritt in July 2003<sup>1</sup>. During the July termination meeting, O’Leary recalled, there was a discussion of Merritt’s prediction that he would be too fatigued to fly the extension on May 12, 2003. TR 190. O’Leary also remembered discussion concerning the company’s request that Merritt be medically evaluated. O’Leary himself is not aware of any doctors or emergency room located at LaGuardia Airport. TR 191.

O’Leary explained that, in the ALPA/Allegheny Airline CBA, the company commits to applying progressive discipline. TR 191–192. That progression, by O’Leary’s understanding, is generally a verbal warning, written warning, possibly a suspension and then termination. In the case of Captain Merritt, O’Leary noted, he was not given a suspension. TR 192. O’Leary examined the termination letter dated June 6, 2003 (CX-5) and testified that as he told Captains Johnston and Roth, Allegheny had never imposed discipline on the infraction of May 12, 2003. This failure, O’Leary opined, never gave Captain Merritt a chance to modify his behavior of May 12, 2003. When the incident of May 19, 2003 occurred, Allegheny combined those two purported infractions to form a determination. Captain O’Leary testified that he verbally objected to Allegheny not giving Merritt a chance to modify his behavior before terminating him. TR 199, 200. O’Leary stated his belief that Allegheny would not have terminated Merritt based upon the May 19, 2003 incident alone. Instead, O’Leary opined, Respondent combined its disciplinary considerations of the May 12 and May 19 incidents and only then decided upon terminating Merritt. TR 201.

Captain O’Leary then reviewed CX-8, which is the disciplinary record for another Allegheny employee. The Exhibit shows that this employee was found to make frequent and repeated use of inappropriate foul and offensive language. Incidents included the employee alleging in an offensive and defamatory manner that a member of Allegheny management received a promotion in exchange for sexual activity, making statements indicating that this individual wished to harm members of the Allegheny management team, making a derogatory and offensive comment about an obese passenger, mistreating a fellow worker, and failing to use good judgment to expedite the departure of a ferry flight. The employee received a letter of discipline and, in order to continue his employment, he had to sign what Allegheny calls a “last chance” letter, indicating that the Respondent could terminate him at will if he committed a further infraction of any kind. The employee received a suspension, time served. O’Leary compared this employee’s disciplinary action to Merritt’s, noting that in Captain Merritt’s case there was no offer of a suspension or last chance agreement. TR 203, 204.

Captain O’Leary next reviewed CX-9, which is the disciplinary record of yet another Allegheny employee. This employee was accused of misrepresenting a system malfunction on the aircraft; he falsified the record, which is a safety-related incident. TR 206. The employee was suspended without pay or benefits for forty-five days, plus he was required to attend remedial training. Comparing the disciplinary actions against the CX-9 employee with those taken against Captain Merritt, O’Leary noted that Captain Merritt was not offered remedial training. TR 207.

O’Leary then reviewed CX-10, a third and final record of discipline against an Allegheny employee. This employee arrived late for work and misrepresented to the company his actual time of arrival. He was accused of falsifying the out time. This individual received a twenty-one

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<sup>1</sup> Although the record is unclear, I believe that the July 2003 meeting may have been a union grievance proceeding.

day suspension and he had to sign a letter of commitment, in which he agreed to comply with all company rules and regulations or either voluntarily resign or be terminated. TR 208. Comparing the records contained in CX-10 with the action taken against Captain Merritt, O'Leary noted that Captain Merritt was not offered the opportunity to sign a letter of commitment.

On cross-examination, O'Leary testified that with respect to the individual who was the subject of CX-10, the letter does not reference any prior offenses within the prior twenty-four months. TR 214.

After reviewing RX-2 and RX-3, O'Leary noted that after 1999, Respondent indicated a sensitivity to falsifying out times.

Captain O'Leary stated that he had represented Captain Merritt in Merritt's disciplinary proceeding. O'Leary did not recall whether he asked the decisionmakers for a "last chance" agreement for Merritt; however, O'Leary testified that he told them that he did not believe the case warranted termination. TR 218–20.

Responding to a question about Merritt's May 12, 2003 incident, O'Leary stated his opinion that a verbal warning would have been sufficient discipline; a suspension would have been the strongest disciplinary action he would have agreed with. O'Leary agreed that he had testified upon direct examination that Pike Johnston told him that Respondent would not have considered termination but for the incident of May 19, 2003.

O'Leary testified that, as a captain, he receives medical examinations from the FAA every six months. In the interim, the person responsible for certifying someone for flight is the pilot command or the aviator himself. O'Leary opined that, as a person knows himself best, Captain Merritt was absolutely right to notify Allegheny that he would be fatigued later in the day. O'Leary believed that Merritt's was the action of a cooperative employee, telling Respondent so that no delays would result from his inability to fly. O'Leary stated his belief that Merritt should not have been disciplined for his determination as a professional airline pilot that he would not be fit to fly later in the day. TR 229.

O'Leary agreed that, if the airline asks a person to see a doctor and that person says no, then the employee might be committing insubordination. Conventional wisdom, O'Leary agreed, says when there is a safety issue, employees should obey first and file any grievance later. TR 231. O'Leary's meeting with Allegheny regarding the events of May 12, 2003 took place after the May 19 event. TR 232.

Captain O'Leary testified that in comparing Captain Merritt's disciplinary treatment with that of other pilots, based on O'Leary's experience of about twenty grievances over the last five years, Captain Merritt was treated differently. TR 236, 237. O'Leary opined that Respondent should not have terminated Captain Merritt because termination was too severe a response.

With regard to the May 19, 2003 incident, O'Leary noted, there was no standard timepiece by which to compare the conflicting recorded times. O'Leary recalled asking during the course of the hearing with Captain Johnston and Captain Roth what the standard was—the pilot's watch, the cockpit watch, the computer dispatch? He said that the response was that they did not have a standard. TR 238.

With regard to the May 12, 2003 incident, O'Leary noted that if the pilot anticipated that he was going to be tired, if his sleep was interrupted and if he was trying to be a good soldier,

then he could still have waited and called off sick. O'Leary interpreted Merritt's actions as trying to "help out" Allegheny by giving them notice. TR 240. In O'Leary's opinion, the company should have taken Captain Merritt's word that he was going to be too tired to fly the extension. TR 241. However, O'Leary confirmed that he is not a doctor and could not from a medical standpoint list the possible causes for pilot fatigue. TR 241.

### Testimony of Kevin Roth

Kevin Roth testified that he is chief pilot for Allegheny Airlines, which is a supervisory position over the pilot group. He became chief pilot in November, 2003, having been an assistant chief pilot since January 2003. TR 249. Roth recounted that he has been employed by Respondent for fifteen years and has worked his way up through the ranks, starting out as a first officer and then becoming a pilot. Roth still flies on occasion. Captain Roth stated that he is familiar with the CBA between Allegheny and ALPA. TR 250.

Captain Roth testified that he has to submit to a medical examination every six months.

Roth recalled that he has known Merritt for as long as he has been with Allegheny. Roth reported that he has never had any problem getting along with Captain Merritt. Roth explained that scheduling flights for pilots seldom runs as planned; when somebody calls in sick or does not appear for a trip, it is the job of crew schedulers to find a replacement. TR 252. The schedulers, Captain Roth clarified, are located in Harrisburg and they communicate with the pilots via telephone. These conversations are recorded in the ordinary course of business. TR 253. Roth noted that the CBA allows pilots' schedules to be extended. TR 253.

Roth explained "mandatory extensions," which are legs that fall within a pilot's scheduled duty period. Scheduling can call a pilot and ask him to perform those legs up to two hours before his scheduled start time or up to four hours after his scheduled release time. TR 254. Pilots are paid for the full time that they fly, including the legs if they have been extended to fly. TR 255. Roth stated that sometimes, regardless of the extra money, a pilot does not want to fly an extension, although Captain Roth never had such a problem with Captain Merritt prior to the incident of May 12, 2003. TR 256. If scheduling is unable to fill a flight, Captain Roth explained, then flights are cancelled; this is a disruption to Allegheny's passengers and it impacts the carrier because revenue is lost. Once a flight has been cancelled, the revenue is lost and the company has to absorb the cost of re-accommodating the passengers. TR 257.

On May 12, 2003, Captain Roth was assistant chief pilot. When he arrived at work at about 8:00 a.m., operations duty manager Scott Seders told him about a situation involving Captain Merritt. TR 258. Both Roth and Seders reported to the same boss, Forrest ("Pike") Johnston. TR 259. Roth recalled that Seders told him that Merritt was refusing to fly an extension later in the day because he was going to be too tired. In addition, Roth noted that Merritt was continuing to fly but anticipated fatigue later on in the day.

Roth testified that it is unusual for any employee to predict his own fitness in the future. Roth remembered dealing with such a situation once before, when a pilot called in and said he was going to be sick at the next down line station. Later, the pilot admitted that he was not really sick, that he was just upset and frustrated because he had been asked to do an extension. Roth recalled that the pilot was disciplined for this incident, but that he was not asked to get a medical

examination. Roth explained that this was because the pilot reported in sick, but it quickly became apparent that this was a false claim. TR 260.

While Roth was dealing with Captain Merritt on May 12, Pike Johnston was in the office and knew what was happening. Roth remembered that he and Johnston were waiting for Merritt to call back so that Roth could talk to him when he got to the next station. TR 261. Roth recalled having two conversations that morning with Captain Merritt. During the first conversation, by Roth's recollection, Captain Merritt stated that he would not accept an extension later in the day because he was going to be too tired, although Merritt said he was good to fly his scheduled day. TR 262. Roth testified that Captain Merritt did not tell him that he had had only three hours of sleep the night before. Neither did Merritt tell Roth that he had been stopped by the police for running a red light that morning. Captain Roth testified that, had he known that Captain Merritt had only three hours of sleep and that he "slept through a red light," then Roth would have suspected current and not impending fatigue and would have asked Captain Merritt whether he should be off his regularly scheduled flights that day. TR 263. In Captain Roth's opinion, a person is either tired now or not, either sick now or not. When pilots call in with fatigue or sickness, Captain Roth explained, he takes them off the schedule and replaces them; they are never disciplined. TR 264.

Roth remembered that during his first conversation with Captain Merritt, Pike Johnston walked into Roth's office; Johnston said that because Merritt was unwilling to fly the trip, they would want him to see a physician when he got to LaGuardia. Roth relayed Johnston's decision to Captain Merritt. Captain Roth stated that he did not tell Merritt to check himself into a hospital for exhaustion. TR 265. In response, Merritt told Roth that he was not going to a doctor at LaGuardia. Roth then recalled telling Merritt to call again when he got to LaGuardia, as they were obviously not getting anywhere with the first conversation. Merritt said that he would. Roth testified that Merritt was not given an ultimatum to either fly the extension or see a doctor. TR 266. After the first conversation, Roth remembered, he alerted the scheduling crew that Merritt was not going to be flying the extension, that they needed another pilot to cover it. Scheduling extended another captain's schedule to cover the leg from LaGuardia to Montreal. Roth stated that the LaGuardia-to-Montreal trip was covered at 10:45 a.m. After that trip was covered, Roth testified, he had his second conversation of the morning with Captain Merritt at about 11:20 or 11:25 a.m. TR 267.

Captain Roth characterized the second conversation between himself and Merritt as more of the same. Merritt reiterated that he was too tired to fly the extension; Roth responded that he understood and that they wanted him to be evaluated by a physician to make sure that Merritt would be okay for the next day. Roth testified that he did not tell Merritt to see any particular physician. At the time, Roth testified, he assumed that Merritt would probably have to go to an emergency room to see a physician. Roth stated that he was unaware at the time of any other options; he did not know that there was sometimes an air medical examiner at Hangar Seven at LaGuardia. He discovered that fact at a later time.

At that point in the conversation, Roth recalled Merritt saying that he was not going to see a doctor at LaGuardia. Merritt did offer to catch a flight back to Rochester to see his family physician, an option Roth said he discussed with Pike Johnston. As Roth remembered the conversation with Johnston, they concluded that Merritt returning to Rochester would have taken him out of position for the next day, so they decided that he should see a physician at LaGuardia

to keep him “in the loop.” Roth testified that Merritt said he was not going to do that, period. Because Captain Merritt was clear about his refusal, this is when the conversation ended.

Roth recalled that, on one previous occasion, he had directed a pilot to either a first-care center or an emergency room to see a physician. In that case, Roth explained, scheduling had called a pilot while he was on a reserve day and the pilot said he was sick. This took place after hours, so no doctor’s office would have been open. Captain Roth believed that when he asked Captain Merritt to get a medical evaluation, he was making a reasonable request. TR 271.

Roth continued his account of the events of May 12, 2003. After hanging up with Merritt, Roth talked things over with Pike Johnston; they agreed that they would make an effort to get Merritt into the office to sit down and have a conversation about the event. Roth clarified that he and Johnston wanted to see Merritt about his refusal to see a doctor at LaGuardia. Merritt flew the next day, although in retrospect, Roth testified that he probably should not have permitted Merritt to fly; he opined that he should have pulled Merritt from the schedule for insubordination immediately. Captain Roth’s explanation for not doing this was that, at the time, he was a new supervisor and it did not occur to him to take this action. Roth noted that he had no reason to believe that Merritt was possibly unsafe to fly, as Merritt did not call in sick. If a pilot feels unfit to fly, Roth explained, then the pilot’s obligation is to take himself off line. TR 273. Pilots are obligated to do this by both Allegheny and the FAA.

Captain Roth testified that, on May 12, 2003, Captain Merritt did not say in either of their two conversations that he had contacted the FAA. Roth stated that such an action would not have mattered to him anyway, as pilots are not disciplined for contacting the FAA. In the ordinary course of business, according to Roth, it is not unusual for him or Pike Johnston to be contacted by the FAA. TR 274. Roth guessed that the FAA speaks to Pike Johnston more frequently than to him, perhaps on almost a daily basis. Johnston’s usual contacts with the FAA are with Chuck Martin or Kathy Martin. TR 275.

Ultimately, Roth testified, a meeting took place with Captain Merritt on May 22, 2003 in Harrisburg, Pennsylvania. TR 276. Present at the meeting were Pike Johnston, Captain Merritt, Rick O’Leary and Roth. Roth identified the document at RX-7 as his notes from the May 22 meeting. TR 277.

Roth recalled that, when Merritt first arrived at the meeting, he seemed to have questions about why he was there at all. Merritt was informed that he had been brought in for insubordination, for refusing to go to the hospital or to a doctor at LaGuardia. Roth remembered trying purposely to stay away from the topic of Merritt’s refusal to fly the extension. That was no longer an issue, a fact that Roth said Pike Johnston explained to Captain Merritt at the meeting. TR 279, 280. By Roth’s account, Captain Merritt gave no real reason for refusing to see a doctor at LaGuardia, except to say several times that it was a ridiculous request. At the end of the meeting, Roth testified, they told Merritt that they would finish their investigation, would come to a conclusion, and would be in touch with him.

Captain Roth testified that, after the meeting, the participants were inclined to give Merritt a suspension, as that was the next step in the disciplinary process for him. However, Roth said, Merritt was not given a suspension because yet another disciplinary issue came up. TR 280.

On May 19, 2003, Roth received the irregularity report that is in evidence at RX-9. This report was from a crew scheduler, who said that (1) scheduling had had trouble locating Merritt at LaGuardia for his flight, (2) the scheduler was concerned that their communications had caused a delay, (3) the scheduler had then checked Merritt's times and noticed that Captain Merritt had not only signed himself out on time, but a few minutes early, and (4) the scheduler, having been on the phone with him, felt that that was irregular. TR 281. Captain Roth explained that, at first reading the irregularity report, it appeared to him that Merritt was late for an assignment and also falsified an out time from LaGuardia. TR 282, 283. Roth elaborated that the irregularity report shows that Captain Merritt called his time for that flight as 12:57 p.m., even though he was on the telephone call with the crew scheduler at 13:02 and he was not on board or at the gate as late as 12:55 p.m.

Captain Roth testified that he investigated the incident further. TR 283. Roth stated that First Officer David Rush said that Merritt was on the plane on time for the LaGuardia flight. TR 284. Captain Roth said that when he first talked to Dave Rush, Rush said that Merritt had arrived very close to departure time. However, Roth recalled, when he started asking more detailed questions and it became apparent to Rush that this was a disciplinary matter, Rush instead stated that Merritt was there more like twenty minutes prior to departure. TR 286. Captain Roth explained that "push-back time" starts when the plane is literally pushed back from the gate; however, Roth agreed that push back could have started, then been stopped for a few minutes, and then restarted. This, Roth explained, could account for a four-minute discrepancy. TR 287.

Roth recalled that he then asked First Officer Rush whether the plane was still at the gate when he made his call-in time at 13:01; Rush said that the plane was still sitting at the gate. TR 288. Roth testified that, by First Officer Rush's account, Merritt told Rush a time to call and Rush responded that he was uncomfortable with that time because it was incorrect, and because it was his impression that times were being checked. TR 289.

Captain Roth testified that he considers it improper to report an inaccurate out time. He explained that it skews Department of Transportation statistics and also gives a false picture of what is going on at a particular station. If there is a problem at a station and there are delays, then Allegheny needs to know about them so that the problems can be fixed. Roth further stated that out times affect a pilot's paycheck, a couple of minutes here or there, and although the individual amounts are small, a large number of incidents can substantially impact a pilot's pay. TR 291.

Regarding the incident of May 19, 2003, Captain Merritt was not disciplined for being late to his plane. Captain Roth explained that Allegheny never made a determination to this effect, because the issue was unimportant compared with the significant issue of Merritt's possible falsification of times. TR 294.

Roth testified that he never instructed anyone in scheduling to carefully scrutinize Captain Merritt. Roth stated that Merritt was not being treated any differently than any other Allegheny pilots.

"Push back," Captain Roth explained, is an operation in which a tug is hooked up to the airplane with a tow bar, then the tug pushes the airplane back away from the terminal. This occurs when there is not enough space for the airplane to pull out under its own power. TR 295. The airplane door, Roth testified, is supposed to be secured for push back; having the door open

while the plane is moving is a safety hazard, and someone could be hurt. TR 296. Roth agreed that a push back can be interrupted; for example, push back can be stopped if last-minute bags show up. TR 298.

On May 30, 2003, a meeting occurred to get Captain Merritt's version of events for the May 19, 2003 incident. Roth recalled that this meeting occurred in Harrisburg; present were Roth, Seth Naugler, Rick O'Leary and Dave Merritt. Roth identified RX-8 as his notes from the May 30 meeting. TR 301. Based upon Captain Roth's investigation, the only fact he could substantiate was that Merritt was still at the gate at 13:02 when he was talking on the ATSCALL. TR 302. Captain Roth testified that Allegheny now had two disciplinary events to consider: the May 12 event, which warranted a suspension, and the May 19 incident that, following progressive discipline would have resulted in Merritt's termination. In the opinion of the decisionmakers, according to Captain Roth, they were following proper progressive discipline by terminating Merritt at that point. Roth stated that those involved in the decision were himself, Seth Naugler, Pike Johnston, and Michael Scrobola (Vice President of Flight Operations). TR 309. Michelle Foose also had input. Among those individuals, by Roth's recollection, no one disagreed. TR 303.

Captain Roth testified that he did not know that Merritt had called the FAA until quite a while after Merritt was terminated. TR 305. Upon reviewing CX-3, Captain Roth agreed that apparently Pike Johnston did know as of May 13, 2003 that Merritt had contacted the FAA. TR 310.

On cross-examination, Captain Roth testified that one of the reasons he wanted Merritt to be checked out by a doctor on May 12, 2003 was because he wanted to be sure that Merritt was okay to continue his trip the next day. However, Captain Roth admitted that he did not contact Merritt on Tuesday, May 13 to find out anything about his medical condition. TR 316. Nor did he contact Merritt on May 14 or May 15, 2003. TR 317. Captain Roth stated that there are pilots who frequently call off sick, in fact that there is a "sick list" of such pilots. These pilots use forty-eight hours of sick time in six months. Captain Roth did not believe that Merritt was on the sick list. TR 319, 320.

#### Testimony of Michael Scrobola

Scrobola testified that he is employed by Allegheny Airlines but that he is currently on special assignment with Mid-Atlantic Airways. Scrobola recounted that started with Allegheny in 1982, became a first officer, and then became a captain in 1985. He went on to become chief pilot and then Director of Operations and, in April 2003, Vice-President of Flight Operations. During the events in question of May 2003, Scrobola confirmed, he was Vice-President of Flight Operations. TR 342.

Scrobola is familiar with the Allegheny/ALPA CBA. TR 342. Upon reviewing RX-12, Scrobola noted that Section 15(b) allows an airline with cause to question the fitness of a pilot to require the pilot to submit to a physical examination. TR 344. Scrobola explained that there are various reasons why the company would require a pilot to submit to a physical; for example, there may be a safety concern or a question of potential abuse of sick leave.

With regard to Captain Merritt, Scrobola stated that on May 12, 2003, he was made aware that Captain Merritt was ordered to see a doctor in the LaGuardia area. This did not seem

odd to Scrobola, because at 6:00 a.m., Merritt was indicating that he was going to be fatigued seven hours later; Scrobola regarded this as highly unusual. He compared such a statement to saying, "I am going to be sick two days from now." TR 347. Scrobola did not consider it retaliatory to request that Captain Merritt see a doctor. Asked about Captain Merritt's termination, Scrobola recalled that he had had an overview of the situation, had been kept up-to-date, and had supported the recommendation to terminate Merritt. TR 348. Regarding the incident of May 19, Scrobola was convinced that Captain Merritt had falsified an out time; he testified that falsification of push back times is very serious. TR 349. Scrobola recalled that he was consulted on the incident of May 12 but did not recommend discharge. TR 352.

Scrobola testified that he had no knowledge that Captain Merritt spoke with the FAA regarding the May 12, 2003 incident, but that he does not feel threatened by a pilot talking to the FAA. Regarding May 12, 2003, Scrobola testified that Merritt's refusal to take the extension had no bearing on his decision. Ultimately, he said, it came down to Captain Merritt not going to the doctor. Scrobola testified that Allegheny looked at Merritt's corrective discipline within the prior twenty-four months and all of it was taken into consideration, along with his career with the airline. The decisionmakers took seriously that Merritt had been with the airline for fifteen years. TR 353. Scrobola testified that he has never disciplined a pilot for calling in fatigue. TR 354.

On cross-examination, Scrobola testified that he did not know why Merritt's May 12 refusal to fly an extension was mentioned in the termination letter. Scrobola was not aware of Captain Merritt ever having refused an extension prior to May 12, 2003. TR 355. Scrobola testified that the following individuals were involved in the decision to terminate Captain Merritt: the chief pilot, the director of operations, Michelle Foose from HR and himself. TR 357. Scrobola believed the termination letter came from human resources. In reviewing the termination letter, Scrobola was not disturbed that it mentioned Captain Merritt's refusal to do the assignment of May 12, 2003; he reiterated that this was not why Captain Merritt was terminated.

Scrobola testified that he spoke with each person in the decisionmaking group; however, the senior man of the group was the Director of Operations, Forrest "Pike" Johnston. TR 359, 360. It was Pike's decision to terminate, with the support of the chief pilot, and Scrobola typically follows Johnston's recommendations. TR 360.

#### Testimony of Forrest Johnston

Forrest Johnston testified that he has been Director of Operations for Allegheny Airlines for the past two years, that he was hired in 1980 as a captain, and that most people call him Pike. TR 364-365. As Director of Operations, Johnston has oversight of the pilots, the in-flight department, the training departments and system control, which consists of crew scheduling and dispatch. TR 365. Captain Johnston stated that he has been a pilot since 1975 and that he was Chief Pilot prior to his position as Director of Operations. Captain Johnston's responsibilities, he explained, include disciplinary matters and rule enforcement.

Captain Johnston testified that he was aware of the incident in which Merritt called a scheduler or dispatcher a moron; he was also familiar with the disciplinary action taken, having taken part in the disciplinary decision. Johnston stated that he was also aware of an incident in

October 2002 involving Captain Merritt's failure to report for duty. TR 366. That incident, Johnston recalled, resulted in a written warning for Merritt. Captain Johnston testified that calling the dispatcher a moron was not out of character for Captain Merritt. According to Johnston, Captain Merritt can sometimes be a little quick tempered and it is not unusual for people to make rash statements in the moment. TR 368.

Captain Johnston testified that he participated in the discussions concerning Captain Merritt's termination. Regarding Captain Johnston's decision to terminate Captain Merritt, he stated that he only took into account the name-calling incident, the October 2002 failure to report for duty, the refusal to follow the directive to see a physician, and the falsification of the out time. Nothing else was taken into consideration. TR 370.

Concerning the out-time incident of May 19, 2003, Johnston stated that that was the first time Captain Merritt had been investigated for this type of incident. Being investigated for falsification of out time, Johnston explained, is a fairly rare situation. TR 371. After the investigation was completed, Captain Johnston believed that Captain Merritt had falsified the out time on May 19.

With regard to the incident of May 12, 2003, Captain Johnston remembered that he was at work that morning. Captain Roth advised him that Captain Merritt was refusing an extension very early in the morning. The extension was not until that afternoon, and Captain Johnston recalled finding Captain Merritt's early-morning refusal strange. TR 372. No one advised Captain Johnston that Captain Merritt had not slept well the night before or had only had three hours of sleep. Captain Johnston opined that if a person feels fatigued, he is fatigued, and if he does not, then he should be working and meeting his obligations. Johnston did not understand how Captain Merritt could predict that seven hours later he would be too tired to fly the extension. At that time, Captain Johnston recalled, he recommended that Captain Merritt go to a doctor when he finished work that day. He was concerned that there could be an underlying problem, an ongoing issue that they were unaware of. Johnston expounded that Allegheny has an obligation to run a safe airline, and that part of the managers' duty is to be sure that nobody is flying an aircraft who is unfit to do so. Johnston further explained that Allegheny needed to consider the impact upon the schedule for the following day. TR 373. That Captain Merritt flew the following day, Captain Johnston explained, was because only the pilot knows whether he is sick. A sick pilot must remove himself; it is his obligation.

Captain Johnston testified that he did not specifically recommend that Captain Merritt check himself into a hospital for exhaustion on May 12, 2003. Instead, Johnston explained, Captain Merritt was told at 9:00 a.m. to see a doctor. Captain Johnston stated that he was not trying to pressure Captain Merritt into flying the extension by causing him to see a doctor. TR 374. Captain Johnston did not talk to Captain Merritt that day; he was communicating to Captain Merritt through Captain Kevin Roth.

Regarding the decision to terminate Captain Merritt, Captain Johnston testified that he did not care that Captain Merritt had refused to fly an extension. What mattered to Captain Johnston — and what was conveyed to Captain Merritt at a meeting with him — was his refusal to see a doctor. TR 375, 376. This meeting, Johnston recalled, took place after May 19, 2003. At the time of the May 12 incident, Captain Johnston had not made up his mind what to do with Captain Merritt. But for the falsification of out-time incident on May 19, Captain Johnston said, he would not have terminated Captain Merritt over his refusal to see a doctor. Instead,

Allegheny probably would have followed progressive discipline and suspended Merritt for a few days.

In reviewing CX-5, Johnston noted that there is a reference in the letter to Captain Merritt's refusal to fly the extension. Johnston stated that the reference is there to establish all that occurred on May 12, 2003, including why Merritt was ordered to see a doctor. TR 377.

As part of his duties as Director of Operations, Johnston testified, he interfaces with the FAA, usually talking to Charles Martin. Johnston estimated that he talks to Martin several times a week, concerning all different matters. TR 377. Captain Johnston stated that he did not care that Martin asked him questions about Captain Merritt. TR 378. Captain Johnston testified that he has never disciplined a pilot for making a fatigue call and that pilots contact the FAA all the time. TR 379.

Captain Johnston stated that he did not instruct Captain Roth to have Merritt go to any particular doctor, hospital or health care facility while at LaGuardia Airport. TR 381. In hindsight, Johnston testified, it would have been more reasonable for Captain Merritt to have gone home and then been checked out by a doctor, as opposed to riding around a strange borough of New York looking for a medical facility. TR 384. Captain Johnston was not aware that Captain Merritt had ever refused to fly an extension prior to May 12, 2003. TR 385. Captain Johnston admitted that Captain Merritt was still claiming at 11:14 a.m., when Captain Roth had a second conversation with Captain Merritt, and after Merritt had landed, that he was too tired to fly the extension. TR 386.

#### Testimony of David Parry

David Parry testified that he works in system control for Allegheny and that he has been with the company for four years, assigned to dispatch crew scheduling, crew planning and payroll. TR 388. Approximately thirty-five employees report to him. Prior to this proceeding, Mr. Parry stated, he did not know Captain Merritt personally, although he was aware of Merritt as an employee of the company. TR 395. Parry testified that based on the information that has been available to him, he is convinced that Captain Merritt falsified his push off time on May 19, 2003. For Parry, the most significant evidence is the timing of the tapes that he pulled; Captain Merritt was still in communication with crew scheduling after he claimed he had already departed. Parry noted that the tapes show that Captain Merritt was talking to Michael Frost, the crew scheduler, at 13:01 hours. TR 399. As far as Mr. Parry can recall, he has never been asked to conduct an investigation on anybody other than Captain Merritt regarding push off time. TR 402.

#### Stipulated Testimony of Captain Keith Daugherty

The parties stipulated as follows: that if Captain Keith Daugherty appeared at trial, he would testify that he is an Allegheny Airlines pilot and that he was in the food court at LaGuardia Airport on May 19, 2003. He would testify that he met Captain Merritt at the food court after Captain Merritt came back from the hotel and was headed towards the crew room. Daugherty would testify that the paging system does not work in the food court. He would testify that they spoke briefly about the incidents of May 12, 2003 and that Captain Merritt then left, headed toward the crew admitting gates in plenty of time to be at his plane on time. Merritt

was supposed to be there at 12:44 p.m. Captain Daugherty would testify that he was talking with Captain Merritt from about 12:20 p.m. until 12:30 p.m. TR 403, 404.

### Testimony of Ajoy-Deep Velappan

Mr. Velappan testified that he works for Allegheny Airlines as a flight attendant and flight instructor/check attendant. TR 426. As part of his responsibilities, Mr. Velappan boards passengers about twenty minutes prior to departure time. TR 428. Referring to his logbook to refresh his memory, Mr. Velappan testified that his first flight on May 19, 2003 originated from LaGuardia Airport. TR 431. The captain was Davy Merritt and the first officer was Dave Rush. Departure time was for 12:59 p.m. Reporting time was 12:14 p.m. Velappan stated that nothing was unusual except they did not have a captain on board. Velappan recalled that First Officer Rush told him not to board passengers until they had a captain on board, that crew scheduling was trying to track the captain down. TR 432. Velappan did not recall what time Captain Merritt came aboard, but he was sure that Merritt was not on board twenty minutes prior to departure time. TR 433. Velappan testified that, after the passengers have been settled down, the crew is supposed to close the door five minutes before departure/push-back time. Velappan tries to stick to the rule. TR 436. Before the aircraft is actually pushed back, Velappan explained, the aircraft door must be closed. On May 19, 2003, Velappan recalled, push back did not happen at the scheduled departure time, but instead happened after the scheduled departure time. TR 437. Velappan did not recall whether push back was stopped at any point. TR 438. As far as why they were late leaving LaGuardia, Velappan testified that he thought they were waiting for the push-back crew and that there might have been some traffic on the ground. Velappan explained that LaGuardia Airport is always crowded, so there was a good chance that all these factors contributed to the flight being late. Velappan could not say at what time the plane actually pushed back, but it was not 12:59 p.m. TR 441. Once the door on that flight was shut, Velappan testified, it was not reopened. TR 442.

On cross examination, Velappan testified that as a flight attendant he does not have to be familiar with the flight operations manual. His flight attendant manual does not have a definition as to what constitutes a push back. TR 445.

### Complainant's Exhibits (CX)

CX-1 was identified for the record as Complainant's Electronic Pay Sheet, which covers the month of May, 2003.

CX-2 was identified as a chapter from the Airman's Information Manual. The second page of the document mentions fatigue and draws a distinction between two types of fatigue: chronic (long term) and acute (short term). The document states that acute fatigue is prevented by adequate rest and sleep as well as by regular exercise and proper nutrition.

CX-3 was identified by FAA employee Chuck Martin during his deposition as the complaint form he filled out, based upon the phone call from Captain Davy Merritt.

CX-5 is a letter from Forrest J. Johnston, Director of Operations, to Captain Davy Merritt dated June 6, 2003. It states that Allegheny concluded from its investigation into the events of May 12 and 19, 2003 that Captain Merritt failed to conform to company policies and procedures.

It also states that Captain Merritt was insubordinate and that his continued misconduct demonstrated a lack of commitment to the company and to future employment. Further, the letter states that Captain Merritt had been repeatedly warned in the past for violations of company policies/procedures. It states that Captain Merritt did not appear to have taken to heart the serious nature of his misconduct and the impact that it has had upon the Respondent's operation. It states that, after careful review, Allegheny had determined that it was necessary to terminate Captain Merritt's employment, effective immediately.

In the body of the letter, it states that on April 22, 2002, a verbal warning was issued to address Merritt's misconduct, i.e., unprofessional conduct directed towards a dispatcher and unprofessional conduct over the radio with Burlington station personnel. The letter further states that on October 22, 2002, Captain Merritt was not present at his published report time as required by the Flight Operations Manual. A letter of written of warning was issued for this incident on October 31, 2002.<sup>2</sup>

The letter of June 6, 2003 further states that on May 12, 2003, Captain Merritt refused a duty assignment issued to him by scheduling personnel. Also, Captain Merritt refused when a pilot supervisor advised him of the duty assignment. The letter further states that on May 12, 2003, Captain Merritt refused a directive by his supervisor to obtain an evaluation from a physician to determine his ability to continue his assignment. Finally, the letter of June 6 states that on May 19, 2003, Captain Merritt falsely reported the "out time" for his flight and failed to comply with published policies/procedures during push back operations.

CX-6 is a statement given to the Labor Department by Captain Davy Merritt on August 14, 2003.

CX-7 is a "pairing print report" that shows Captain Merritt's scheduled flights for May 12 and 13, 2003. The report shows the assignment of an extension flight 3978, LaGuardia to Montreal, at 12:59 until 2:55 p.m., and then deadhead on 3978 Montreal to LaGuardia at 3:30 p.m., arriving at LaGuardia at 5:25 p.m. TR 89. The report shows that Captain Merritt's work day normally would have ended at approximately 11:14 a.m. and, had he accepted the extension, his work day would have ended at 5:25 p.m.

CX-8, CX-9 and CX-10 concern disciplinary actions against other Allegheny pilots. Complainant's counsel indicated that the exhibits were introduced to show that Captain Merritt was treated differently than other pilots on disciplinary matters. TR 194, 205, 208.

### Respondent's Exhibits (RX)

RX-1 is the transcript of a telephone conversation between Captain Merritt and Sheri Stegiman with crew scheduling on May 12, 2003, starting at approximately 6:00 a.m. I note that after Ms. Stegiman told Captain Merritt that he was needed to fly an extra leg that day and finish work at 5:25 p.m., Captain Merritt told her that he did not know whether he could accept the assignment. He stated that he did not know if he "got enough rest last night." The transcript indicates that Captain Merritt was to complete work at 11:00 a.m., but that he was being

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<sup>2</sup> The June 6, 2003 termination letter misstated that warning letter as having been issued in 2003. During my conference with the parties' attorneys on December 22, 2004, they agreed that the date of the written warning letter was October 31, 2002 and not on October 31, 2003 as stated in the June 6 termination letter.

scheduled for a flight to Montreal at 12:59 p.m. and then a deadhead back to LaGuardia to finish work at 5:25 p.m. I note that Merritt was not refusing to fly at the time of the conversation, but that he was refusing to fly at 1:00 that afternoon. Merritt asked Stegiman whether the matter could be dealt with between the time of the conversation and 1:00 p.m. Stegiman told Merritt at the conclusion of the conversation that when Merritt got to LaGuardia they would deal with it, and that she would advise ODM in the meanwhile.

RX-2 and RX-3 are memorandums on Allegheny letterhead to all pilots and all flight crew members, dated February 2001 and February 2002, respectively. These memos, which Captain Merritt during the hearing acknowledged having received, indicate that all out times must be reported accurately, that Allegheny continues to receive complaints regarding inaccurate times being reported to the stations, and that therefore Allegheny was initiating a program of randomly monitoring flight times. RX-3 states that management personnel will record actual out, off, on, and in times for Allegheny flights and compare them to the times reported to operations.

RX-4 is part of the Allegheny Flight Operations Manual and indicates among other things that federal aviation regulations bar falsification of any report times, including falsely reporting out times.

RX-5 is a letter written by Forrest Johnston to Captain Davy Merritt on April 22, 2002. The stated purpose of the letter is to confirm their discussions of that same date concerning an event that occurred on April 1, 2002. The investigation of that incident showed that Captain Merritt conducted himself improperly, that he did not show professionalism. Captain Merritt acknowledged in his testimony that he received RX-5 on April 22, 2002. TR 162. The incident in question was that of Merritt calling a dispatcher a moron.

RX-6 is a letter dated October 31, 2002 from David Brenning, Chief Systems Pilot, to Captain Merritt. Merritt received this letter after he failed to report for duty on October 22, 2002. The letter served notice on Captain Merritt that a written warning had been issued. Further compliance violations, according to the letter, could possibly result in progressive disciplinary action.

RX-7, according to Kevin Roth, is an accurate depiction of what was said at the meeting with Captain Merritt on May 22, 2003. In attendance at that meeting were Merritt, Roth, Rick O'Leary, and Pike Johnston. This memo indicates that Merritt was called in because of his refusal to go to the hospital at LaGuardia to be evaluated by a doctor when asked to do so by a supervisor. Captain Merritt is noted in the memo to have said that he did not refuse to go to the doctor, that he offered to see his family doctor in Rochester. He was told that they decided they wanted him to see a doctor in LaGuardia, where he was at the time. Merritt responded that there was no reason for him to see a doctor at all, as he was not ill. He said he refused the extension to his trip because he did not have enough sleep the night before and he knew he would be too tired to fly further than LaGuardia. Pike Johnston is noted to have reminded Merritt that he was not in the office because he refused to fly the leg from LaGuardia to Montreal. Johnston further reminded Merritt that he was in the office because he had refused to go to a doctor when asked to by a supervisor. Johnston said that they needed him to go to a doctor in LaGuardia so that they could verify whether he was too sick to continue his trip the next day.

RX-8, according to witness Kevin Roth, is a fair and accurate depiction of what was said at a meeting with Merritt, Roth, Rick O'Leary, and Seth Naugler on May 30, 2003. TR 301.

This memorandum discusses whether Captain Merritt was courteous with an LGA agent and whether his reported out time on May 19, 2003 was accurate.

RX-9 and RX-10 are “irregularity reports” concerning events that took place on May 19, 2003 concerning falsification of out times by Captain Merritt.

RX-11 is a crew scheduling transcript for May 19, 2003, with Michael Frost as the crew scheduler. This transcript is relevant to Captain Merritt’s whereabouts on May 19, 2003 before getting on the aircraft at 1:01 p.m. at LaGuardia. There is also a conversation between Frost and a person named Rhonda at 1:02 p.m., in which Rhonda accuses Captain Merritt of pushing her around.

RX-12 is an agreement between Allegheny and airline pilots in the service of Allegheny Airlines, Inc., which covers the period May 1, 1999 through April 30, 2003. Mr. Scrobola identified this exhibit and agreed that under Section 15(b), if the company has cause to question the fitness of a pilot, it may require the pilot to submit to a physical examination. TR 344.

RX-13 is the transcript of a deposition of Donald D. Rush, taken May 17, 2004. Mr. Rush testified that he is a first officer for Allegheny, where he has been employed for about three and a half years. Rush testified that on May 19, 2003, he had a flight scheduled from LaGuardia Airport to Norfolk, Virginia. He testified that the departure time of the flight was 12:59 p.m. He previously had given a statement that the captain arrived between fifteen and twenty minutes before the scheduled departure. Before May 19, 2003, he had never met Captain Merritt and had never flown with him before. At some point, the gate attendant came on board the aircraft, but push back had not commenced. Instead, Rush stated, the gate attendant came on board just as they were preparing to push back. Rush was reasonably certain that neither he nor Captain Merritt had called ramp control to get clearance. The door was still open and it would have been Rush’s job, traditionally, to call ramp control. The gate attendant told Merritt that he needed to contact the company. Rush stated that Captain Merritt called the out time.

As they were taxiing out, Rush stated, Merritt asked Rush if he had called in the time and Rush answered no. Merritt specified a time, but because it was notably earlier than the departure time, Rush told Merritt that he was uncomfortable with such an earlier number. Merritt said, okay, he would call it. RX 13 at 16. Ten to fifteen minutes before go time would have been pretty uncomfortable for Rush and that, he stated, is what sticks in his mind, although he could not remember precisely what the time discrepancy was. He seriously doubted that it was more than fifteen minutes early, but he was guessing. Rush noted that if Merritt called in the out time as 12:57 p.m. and they were moving by 1:02 or 1:03 p.m., then the discrepancy is five or six minutes. Rush said he was uncomfortable with captains who have called inaccurate times, be it five minutes or even less. Rush was not certain that Captain Merritt was in the cockpit fifteen minutes prior to the 12:59 p.m. scheduled departure.

RX-14 was identified by witness David Parry as a picture of two machines. The black box on the bottom is the digital audio recorder that the telephone lines are connected to. The machine on the top is a cassette recorder that he would transfer the digital recordings from, onto the cassette recorder which is located on the top.

RX-15 is an Allegheny Airlines Employee Handbook.

## Joint Exhibits (JX)

JX-1 is a telephonic deposition of Charles Martin, which occurred on June 10, 2004. Mr. Martin testified as follows: that he is principal operations inspector for Allegheny and that he is employed by the Federal Aviation Administration. His duties are to oversee Allegheny Airlines, ensuring that Allegheny operates within the scope of the FAA regulations. Martin has authority to take complaints with regard to safety issues. Martin testified that he typically writes down the date on the complaint worksheet the same date that he is contacted, unless the complaint was left on his voice mail. JX-1 at 15. Other than what was written on the complaint worksheet, Martin stated, he did not have an independent recollection of what Captain Merritt told him. *Id.* at 22. Martin did not recall anything outside of his statement. *Id.* at 25. Martin stated that he typically speaks with Pike Johnston several times a week. *Id.* at 26. Regarding the complaint taken by Martin, the worksheet indicates that the matter was closed on the same date it was opened. *Id.* at 28.

JX-2 consists of records that FAA investigator Church Martin sent to Complainant's attorney on June 10, 2004. Included in the records are various statements made by Captain Merritt and other individuals with Allegheny.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above considered, I make the following Findings of Fact and Conclusions of Law:

1. Following its progressive discipline policy, Respondent, through various individuals, terminated Captain Davy Merritt's employment on or about June 6, 2003. *See* TR 301–303, 308, 352–354, 357, 370; *see also* CX-5.
  2. The individuals participating in the decision to terminate Captain Merritt were Assistant Chief Pilot Kevin Roth, Director of Operations Forrest Johnston, Chief Pilot Seth Naugler, Vice-President of Flight Operations Michael Scrobola and Human Resources Director Michelle Foose. TR 303. However, the final decision to terminate Merritt rested with Scrobola. TR 348, 360.
  3. I find no evidence that the decision and/or rationale to terminate Captain Merritt was based upon retaliation for protected activity with one exception: the incident of May 12, 2003. The termination letter mentions May 12, 2003 twice as follows:
    - “On May 12, 2003, you refused a duty assignment issued to you by Scheduling personnel. Also, you refused when a pilot supervisor advised you of the duty assignment.”
    - “On May 12, 2003, you refused a directive by your supervisor to obtain an evaluation from a physician to determine your ability to continue your assignment.”
- CX-5.
4. Defense witnesses testified that, contrary to what was contained in the letter of termination, Captain Merritt's refusal to fly on May 12, 2003 was not considered in their

decision to terminate him. *See, e.g.*, TR 352, 353. Respondent's witnesses said that the relevant action was only Merritt's refusal to see a doctor. TR 353.

5. Regardless of whether Captain Merritt's refusal to accept the extension to fly on May 12, 2003 was considered, I find that Respondent's insistence that Merritt see a physician on that day was retaliatory, and therefore unlawful, and should not have been considered by Michael Scrobola and other members of the aforesaid group in its decision to terminate Merritt.

#### Events of May 12, 2003

6. I find that on May 12, 2003, at approximately 6:00 a.m., Captain Merritt informed Sheri Stegiman in crew scheduling that he did not know whether he could fly an extra leg that day and finish work at 5:22 p.m. Captain Merritt told Ms. Stegiman that he did not know if he "got enough rest last night." Captain Merritt was refusing to fly at 1:00 p.m. because he did not know whether he had had enough rest. RX-1.
7. Several more conversations were to follow:
  - a. Merritt (at LaGuardia) spoke with on-duty manager Scott Siders after Merritt completed his first flight the morning of May 12. TR 38.
  - b. Merritt (at Syracuse) spoke with Assistant Chief Pilot Kevin Roth after Merritt flew his second flight. TR 40, 41. Merritt told Roth that he was not accepting the extension later in the day because he was going to be too tired. TR 262. Roth told Merritt that they (presumably Roth and Johnston) wanted him to see a physician when he got to LaGuardia. TR 265. Roth told Merritt to call him back when he got to LaGuardia. TR 266.
  - c. Merritt (at LaGuardia) spoke with Roth again. It was more of the same. Merritt reiterated that he was too tired to fly the extension. Roth told Merritt they wanted him to see a physician to be evaluated to make sure that he would be okay for the next day. Roth did not tell Merritt to see a particular doctor, but assumed he would have to go to an emergency room to see a physician. TR 267–268.
8. The content of these conversations were the same, i.e., Merritt explaining that he was okay to fly his regular shift, but too tired to fly the extension beginning at 1:00 p.m. and Seders and/or Roth asking Merritt how he could anticipate being fatigued later in the day. TR 260. Clearly, despite there being a conflict in the testimony about whether Merritt told anyone he had only had three hours of sleep, all the witnesses agree that Merritt said he was okay to fly his regular shift, but would be too tired or fatigued to fly the extension.
9. The Airman's Information Manual, published by the Federal Aviation Administration, Chapter 8, Section 1 entitled "Fitness for Flight" states in pertinent part:
  - a. Fatigue continues to be one of the most treacherous hazards to flight safety, as it may not be apparent to a pilot until serious errors are made. Fatigue is best described as either acute (short-term) or chronic (long-term).

- b. A normal occurrence of everyday living, acute fatigue is the tiredness felt after long periods of physical and mental strain, including strenuous muscular effort, immobility, heavy workload, strong emotional pressure, monotony, and lack of sleep. Consequently, coordination and alertness, so vital to safe pilot performance, can be reduced. *Acute fatigue is prevented by adequate rest and sleep*, as well as by regular exercise and proper nutrition.

TR 49–51, CX-2 (emphasis added).

10. I further find that Captain Merritt engaged in protected activity when he informed Sheri Stegiman, Scott Siders and Kevin Roth that he could not fly the extension on May 12, 2003 because he did not get enough rest during the night and he would be too tired to fly. I find that this was a safety issue within the meaning of the section of the Airman’s Information Manual recited above. I find that Captain Merritt’s statements on the morning of May 12, 2003 were protected conduct within the meaning of the Act.
11. Allegheny argues that Merritt’s projection of being too tired in seven hours did not point out any kind of violation of FAA safety regulation or standards. Respondent argues that there was no objectively reasonable perception of a violation of Federal Aviation Regulations or FAA safety standards, that Merritt’s May 12 statement that he “would be” too tired to fly later was not protected activity within the meaning of AIR 21. *See* Respondent’s brief dated September 10, 2004 at p. 29 *et seq.*; Respondent’s supplemental brief dated February 1, 2005.
12. I disagree with Respondent’s analysis of Complainant’s conduct. What Allegheny fails to note is that at approximately 7:30 a.m. on the morning of May 12, Merritt told on-duty manager Scott Seders that he did not feel safe to continue flying after 1:00 p.m.; Merritt told Kevin Roth at 9:00 a.m. that he was tired, that “I’ll just get worse,” and that he would be too tired to fly at 1:00 p.m.; Merritt spoke with Roth again at approximately 11:20 a.m., reiterating his concerns. TR 38, 40, 318, 386. Despite the Respondent’s acknowledgement that the pilot of an airplane has the final say on safety, Merritt was told by Roth to see a physician when he got to LaGuardia. *See* TR 55, 62; *see also* TR 273, 229. Merritt was not told to see a particular doctor; Roth assumed he would have to go to an emergency room somewhere. TR 267. Roth testified:

It was really more of the same. Davy called and reiterated that he was too tired to fly the extension. I told him we already understood that, that we just wanted him to see a physician to be evaluated to make sure that he would be okay for the next day.

TR 268.

13. I find that as late as 11:20 a.m., Merritt told Roth he would be too tired to fly the extension, that he had been saying it all morning, and that Roth and Johnston understood him. TR 386. I find that Merritt engaged in protected activity the morning of May 12, 2003, that Johnston did not believe Merritt was being truthful and that Johnston’s insistence that Merritt see a physician in Queens, New York, a location unfamiliar to Merritt, showed animus on Johnston’s part. TR 383–84. Further, I find that the very nature of Merritt’s protected activity (telling schedulers and his supervisor that he would

be too tired to fly safely) also demonstrates that Respondent was both actually and constructively aware of the protected activity.

14. During the hearing, Johnston admitted that in hindsight, his order to Merritt to see a doctor at LaGuardia was an unreasonable request.<sup>3</sup> TR 384.
15. I find that Johnston's immediate response — for Merritt to see a doctor at LaGuardia upon learning that Merritt was reporting he was too tired to fly the extension on May 12, 2003 — to be retaliation for protected activity and, therefore, unlawful under the Act. I find further that Allegheny, through the aforementioned decisionmaking group that terminated Merritt, should not have considered the events of May 12, 2003 in any way when arriving at its decision. I further find that Respondent has failed to demonstrate by clear and convincing evidence that it would have fired Merritt regardless of his protected activity on May 12, 2003.
16. I find that the reasons Respondent has given, to wit, concern that Merritt may have had an “underlying problem” or “an ongoing issue that they were unaware of,” are pretextual, as they do not reflect the truth of the situation. TR 373.
17. Roth testified:

Q: Okay. Now these events occurred on Monday, the 12th, and he had a flight schedule on Tuesday, the 13th correct?

A: Correct.

Q: You didn't ever contact him on Tuesday, the 13th to find out anything about his medical condition, did you?

A: No.

Q: And he had a flight schedule for Wednesday, the 14th, and you didn't — is that correct?

A: That's correct.

Q: And you didn't contact him in any way on the 14th to find out about his medical condition to see if he was healthy to fly?

A: No.

Q: And he had a flight scheduled on the 15th?

A: That's correct.

Q: And you didn't contact him in any manner to find out whether he was medically fit to fly.

A: No, I did not.

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<sup>3</sup> I note that, in documents submitted post-hearing, Respondent included a section of a treatise entitled *Discipline and Discharge in Arbitration*, published by the American Bar Association's Committee on ADR in Labor and Employment Law. Within that section, the treatise notes that an employee's refusal to perform a requested action can properly be termed “insubordination” only if the requested action was “reasonable.” DISCIPLINE AND DISCHARGE IN ARBITRATION 156–57 (Norman Brand et al eds., 1998) (emphasis added). Respondent's own witness, Johnston, agreed that his order to Merritt to get a medical evaluation at LaGuardia was unreasonable; as a result, by Respondent's own argument, Merritt's refusal to comply was not insubordination.

TR 316, 317.

That Merritt was permitted to fly May 13, 14, and 15 despite his refusal to see a doctor on May 12 belies Johnston's stated reasons for ordering Merritt to see a physician on May 12, 2003. In sum, Johnston's decision to order Merritt see a doctor on May 12 was retaliation for Merritt stating that he would not fly the extension due to fatigue. Johnston ordered Merritt to see a doctor when it was clear that all Merritt needed was rest. Johnston's reason given, concern about an underlying problem, was untruthful.

#### The Telephone Call to Inspector Chuck Martin, FAA

18. Merritt testified that he called Inspector Martin on May 12, 2003, after one of his conversations with Roth. TR 42, 43. However, according to the complaint worksheet prepared by Martin, Captain Merritt called him on May 13, 2003. CX-3. Martin's deposition was taken June 10, 2004. He testified that although he had no independent recollection of the call from Merritt, he typically writes up the complaint by hand as he is talking to the individual who is making the complaint. JX-1 at 15, 16.
19. I find that Merritt has failed to show by a preponderance of the evidence that he called Martin on May 12, 2003 and, therefore, Merritt has failed to show a nexus between his call to Martin and the order to see a doctor. In fact, Merritt was told to see a doctor even before Merritt claims to have called Martin, and before he told Roth he called Martin. TR 42, 43 and 44.
20. I therefore find that, although Merritt's telephone call to Mr. Martin was protected conduct under the Act, it played no role in Respondent's decision to terminate Merritt.

#### The Events of May 19, 2003

21. The final reason Respondent has given for Merritt's termination was that on May 19, 2003, Merritt falsely reported the "out time" for his flight and failed to comply with published policy/procedures during push back operations. CX-5.
22. Merritt argues that Allegheny Airlines typically treated inaccuracies in out time — for anything less than ten or fifteen minutes — as inconsequential. Complainant also notes that Respondent acknowledged that it was rare for a pilot to be investigated for having inaccurately reported an out time. *See* Complainant's Brief at 25; *see also* Forrest Johnston's testimony at TR 371.
23. Although Complainant may be correct, I find that Merritt has failed to make any showing that there is a causal nexus between his protected activity (his telephone call to Mr. Martin at the FAA, as well as his refusal to fly the extension on May 12 due to fatigue) and Allegheny's investigation of the May 19 incident. Further, I find that Complainant has shown no other protected activity related to the May 19 incident.
24. I find completely credible the testimony of David Parry and the stipulated testimony of Captain Keith Daugherty and also the testimony of Michael Scrobola on the subject of the push-back time. TR 349, 388–404. I also find completely credible Forrest Johnston's testimony that he interfaces with the FAA frequently and that Merritt talking to Martin

was of no consequence. TR 377–379. Further, I find completely credible Michael Scrobola’s testimony that Allegheny had a “partnership” with the FAA and that he did not feel threatened by a pilot talking to the FAA. TR 352.

25. In sum, regarding the incident of May 19, 2003, Captain Merritt has failed to show that activity protected by the Act led to Respondent’s investigation into the “push back” time discrepancy. I find that the individuals responsible for terminating Merritt gave credible, legitimate reasons for their investigation of the push back time. Further, I reiterate my finding that Respondent’s employees perceived no threat in a pilot calling the FAA and would not have retaliated for that reason.

### ORDER

**IT IS HEREBY ORDERED** that:

1. Respondent shall immediately reinstate Captain Merritt to his former position as a pilot, with full seniority (as if his employment had never been terminated).
2. Respondent shall reimburse Captain Merritt for any and all back pay and for loss of benefits and/or expenses incurred by Captain Merritt (e.g., for health insurance, dental expenses or other remedial measures taken by Captain Merritt due to loss of employment benefits from Respondent) together with interest on said sum at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621. Back pay, medical insurance and expenses and interest thereon will be offset by any monies Captain Merritt earned during his unemployment, by unemployment compensation from any source, and by sums already paid by Respondent.
3. Respondent shall reimburse Captain Merritt reasonable costs and attorney’s fees in prosecuting this claim. Thirty days is hereby allowed to Complainant's counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon Respondent must accompany the application. Respondent has ten days following receipt of such application within which to file any objections. It is requested that the petition for services and costs clearly state (1) counsel's hourly rate and supporting argument or documentation therefor, and (2) a clear itemization of the complexity and type of services rendered.
4. Respondent shall purge Captain Merritt’s personnel file of all references to the events of May 12, 2003, i.e., his engaging in protected activity and the discipline emanating therefrom. Such references shall not be used against Complainant in the event he applies for any future employment opportunities with Respondent, or in providing a reference concerning Complainant to any other potential employers.

**A**

MICHAEL P. LESNIAK  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21,