Issue Date: 12 April 2011

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

ALJ NO.: 2010-AIR-00004

In the Matter of:

SCOTT SHACTMAN
Complainant

v.

HELICOPTERS, INC.
Respondent

Before: Colleen A. Geraghty, Administrative Law Judge

APPEARANCES:

Jeffrey C. McLucas, Esq., McLucas & West, P.C., Boston, MA, for the Complainant

Kenneth M. Bello, Esq., Alexandra D. Thaler, Esq., Bello, Black & Welsh, LLP, Boston, MA, for the Respondent

DECISION AND ORDER DISMISSING COMPLAINT

I. Statement of the Case

This case arises from a claim for whistleblower protection filed by Scott Shactman ("Shactman" or "Complainant") against his employer, Helicopters, Inc. ("Helicopters" or "Respondent"), under the employee protection provisions of section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21" or the "Act"), 49 U.S.C. § 42121 (2006). After an investigation, the Occupational Safety and Health Administration ("OSHA") found the Complainant's allegations to be without merit. The Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ") pursuant to 29 C.F.R. § 1979.106 (2010).

A hearing was held before the undersigned Administrative Law Judge in Boston, Massachusetts on May 5-7 and May 19, 2010, at which time all parties were afforded the

opportunity to present evidence and oral argument. Both parties appeared at the hearing represented by counsel. The Hearing Transcript is referred to herein as "HT". Shactman, Chris Donovan ("Donovan"), Michael Falzone ("Falzone"), Steve Boatwright ("Boatwright"), Jeff Lieber ("Lieber"), Dave Adams ("Adams"), Robin Russell ("Russell"), Kirt Kendrick ("Kendrick"), and Nick Christakos ("Christakos") testified at the hearing. Documentary evidence was admitted as Complainant's Exhibits ("CX")[1] CX 1- 5, CX 7- 8, CX 11- 17, CX 19-20, CX 22-25 (HT 10, 13-14, 156, 163, 584, 589, 983-86, 988, 1100) and Respondent's Exhibits ("RX") RX 1-32., RX 34-52 (HT 14, 173, 176, 261, 311, 346, 466, 698, 760, 763, 786, 941, 1147).[2] On September 8, 2010, Respondent submitted its post-trial brief ("Resp. Br."), and on September 10, 2010, the Complainant's post-trial brief ("Compl. Br.") was received. The record is now closed.

II. Issues

The issues in dispute are as follows: (1) whether the Complainant engaged in protected activity; (2) whether protected activity was a contributing factor in Respondent's decision to terminate Shactman; and (3) whether Helicopters would have terminated the Complainant for cause irrespective of the existence of protected activity by the Complainant.

III. Summary of Decision

The Complainant failed to establish that he engaged in protected activity under the AIR 21 statute. Even assuming Complainant had established protected activity, he failed to prove that any protected activity contributed to the adverse action.

IV. Stipulations

The parties submitted a Joint Pre-Trial Stipulation ("Stip.") of Facts based upon my Order denying summary decision.[3] In addition to the Joint Pre-Trial Stipulations, at the hearing the parties agreed that the Act is applicable to the instant case. HT 7. The stipulated facts are as follows:

1) Helicopters is a Missouri company headquartered in St. Louis, Missouri. Stip. ¶ 1; CX-13 ¶ 3. The company provides helicopters, pilots, and photojournalists to television and radio stations throughout the United States for news gathering and reporting purposes. Stip. ¶ 1; CX-13 ¶ 3.

---

[1] Complainant's exhibits CX-6 and CX-18 were identified but excluded. HT 162, 587. Complainant's Exhibits CX-9, and CX-10 were identified, but were never offered in the course of the hearing, and were not admitted. HT 9-11.

[2] Following the hearing, on May 26, 2010, Respondent filed an objection to a request made by the Complainant at trial that a letter written by Respondent's counsel to OSHA be admitted into the record as admissions by a party. On July 16, 2010, I issued an order denying admission of the contested letter.

[3] On April 12, 2010, I issued an Order denying Respondent's motion for summary decision. Although Helicopters agreed to all of the Stipulated Facts in the Joint Pre-trial Stipulation, the parties' Joint Pre-trial Stipulation indicated Complainant did not agree with portions of some of the paragraphs which were taken from my Order Denying Respondent's Motion for Summary Decision. Stip at 1. I have excluded from the Stipulated Facts herein those portions of my summary decision factual findings to which Complainant identified objections in the parties' Joint Pre-trial Stipulations. Where necessary, I have added citations to the hearing record.

2) Jeff Lieber is the General Manager of Helicopters and his office is at the St. Louis Downtown Airport in Cahokia, Ilinois. Stip. ¶ 2; HT 671; CX-13 ¶ 2, 4. As general manager, Lieber is responsible for overall supervision of operations and employees of Helicopters. Stip. ¶ 2; HT 672-73; CX-13 ¶ 4. Nick Christakos, Helicopters's chief pilot, reports to Lieber and has supervisory responsibility over the company's pilots. Stip. ¶ 2; CX-13 ¶ 4.

3) On October 1, 2007, Helicopters purchased an A-Star helicopter as well as other assets from Helinet, Inc. ("Helinet"), located in Boston, MA. Stip. ¶ 3; HT 704-05; CX-13 ¶ 8. As part of the acquisition, Helicopters hired Helinet's existing staff, including Shactman as a photojournalist; and Chris Donovan and Kirk Kendrick who were hired as full-time pilots for the morning or afternoon shifts. Stip. ¶ 3; HT 706; CX-13 ¶ 8.

4) At the same time, Helicopters took over service to Helinet's only customer WFXT TV, Channel 25 ("WFXT"), and the TV station became Helicopters's only client out of the company's Norwood, MA operation. Stip. ¶ 4; CX-13 ¶ 9; HT 672.

5) Although Helicopters provided service to WFXT, during the period of Shactman's employment there was no contract between Helicopters and the TV station. Stip. ¶ 5; HT 707-08; CX-13 ¶ 9. It took over a year from the time Helicopters acquired Helinet to negotiate the contract which was signed on August 5, 2008. *Id*.

6) On October 4, 2007, shortly after taking over from Helinet, Lieber sent an e-mail to Helicopters's new employees at Norwood, directing them to the company's employment-related documents located in the company's online library. Stip. ¶ 6; HT 220-23, 708-09; RX-25; CX-13 ¶ 10. In particular, Lieber's e-mail noted the pilot and photojournalist job descriptions and the Employee Handbook. Stip. ¶ 6; HT 708-09; RX-25; RX-1; RX-2; CX-13 ¶ 10. The position description for the photojournalist job describes duties in general terms and specifies hours of work, including a requirement to be "on call each evening and every other weekend." Stip. ¶ 6; HT 207, 715; RX-2; CX-13 ¶ 10. The Employee Handbook also provides that during assigned duty shifts company pilots and photojournalists "are expected to be with the customer, in the office, or with the aircraft." Stip. ¶ 6; RX-1 at 8; CX-13 ¶ 10.

7) Shactman was employed by Respondent as a photojournalist from October 1, 2007, until he was terminated on May 12, 2008. Stip. ¶ 7; HT 8, 146-47, 750; RX-3; CX-13 ¶ 38.

8) On or about January 4, 2008, Kendrick, one of Helicopters's pilots at the Norwood operation, gave notice that he had obtained other employment. Stip. ¶ 8; HT 715; CX-13 ¶ 11.

9) Helicopters's chief pilot, Christakos, hired Michael Falzone in early 2008 to replace Kendrick. Stip. ¶ 9; HT 715; CX-14 ¶ 6; CX-16.

10) On or about February 24, 2008, Donovan resigned his position as pilot for Helicopters at Norwood. Stip. ¶ 10; HT 715; CX-14 ¶ 7.

11) During the period Chistakos was looking for replacements for Kendrick and soon thereafter Donovan, Donovan suggested that Christakos hire his friend Steve Boatwright as replacement pilot, and he also suggested Mark Smith. HT 369-71; 926.

12) Once Christakos learned that Boatwright did not have experience piloting the A-Star helicopter or sufficient hours, he informed Donovan he would not hire Boatwright. Stip. ¶ 12; HT 926-27; CX-14 ¶ 8.

13) Christakos hired Dave Adams to replace Donovan. Stip. ¶ 13; CX-14 ¶ 9; RX-7 at 3.

14) When Christakos hired Adams to the full-time position Donovan had vacated, Adams was already employed as a back-up pilot for Helicopters working out of the company's operation in Beverly, MA. Stip. ¶ 14; HT 766; CX-14 ¶ 9; CX-15 ¶¶ 4-6.

15) Before hiring a pilot, Christakos stated he reviews the prospective pilot's experience, including knowledge of the aircraft the company uses at the location the company is hiring for, the number of flight hours a pilot has in general and on the specific aircraft, the pilot's certifications, and then Christakos either has the pilot come to him in St. Louis or he goes to the prospective job location to further assess the candidate including conducting a flight test. Stip. ¶ 15; HT 921-23; CX-14 ¶ 3.

16) Christakos' predecessor did a test flight with Adams in Beverly, MA prior to Helicopters hiring Adams in the back-up pilot position in Beverly, MA in 2007. Stip. ¶ 16; HT 924; CX-14 ¶ 3; CX-15 ¶ 10.

17) Adams had experience flying the A-Star helicopter. He also had high accident free flight hours, and an Airline Transport Pilot ("ATP") Certificate. The ATP rating is the highest pilot rating. Stip. ¶ 17; HT 929; RX-26a-b; CX-14 ¶ 9; CX-15 ¶ 9.

18) During the period Christakos was considering Adams for the full-time position at Norwood, Shactman called both Christakos and Lieber stating he had heard that Adams was not a safe pilot, had trouble in the past, and did not perform pre-flight procedures or walk-arounds. Stip. ¶ 18; HT 91-92, 930-31; CX-14 ¶ 10; CX-13 ¶ 15; RX-7; RX-9 at 2; CX-16 ¶11.

19) Shactman was assigned to fly with Adams on March 10, 2008, Adams' first day as a full-time employee for Helicopters at Norwood. Stip. ¶ 19; HT 98; RX-7 at 3. On that first day, Shactman e-mailed Lieber to report that Adams departed the ramp area twice with the horn isolation light lit, flew without his seatbelt, failed to perform hydraulic checks before take-off, started the helicopter with the collective unlocked and did not use a checklist. Stip. ¶ 19; HT 99-101, 107-08, 718-19; RX-16; CX-13 ¶ 16; CX-14 ¶ 11; RX-7 at 3; RX-9 at 3; RX 17a-b.

20) The next day, Christakos held a telephone conference with Shactman, and the two pilots at the Norwood operation, Adams and Falzone. Stip. ¶ 20; HT 110-13; CX-14 ¶ 12; RX-7 at 4; RX-9 at 4. During the telephone conference, Shactman reiterated his concerns with Adams's alleged actions and inactions piloting the helicopter the previous day. Stip. ¶ 20; HT 110-13; CX-14 ¶ 12; RX-7 at 4. As a result of the conference call,

Christakos asked Falzone to update the pilot's checklist and directed both pilots to utilize the checklist to ensure that proper protocol was followed. Stip. ¶ 20; HT 110-13, 944-46, 999-1000; CX-14 ¶ 12; CX-16 ¶ 14.

21) On or about March 18, 2008, Shactman sent another e-mail to Christakos and Lieber complaining that Adams had started the helicopter with the collective unlocked and he reported this caused the helicopter to shake. Stip. ¶ 21; HT 115-17; RX-15; RX-43; CX-14 ¶ 13; CX-13 ¶ 18; RX-9 at 3.

22) A second conference call was held to address Shactman's concerns on or about March 19, 2008. Stip. ¶ 22; HT 120-23; RX-15; CX-14 ¶ 13; CX-13 ¶¶ 18-20; CX-16 ¶¶ 15-16; RX-7 at 4. Shactman, Adams, Falzone, and Christakos participated in this conference call. Lieber joined the call about halfway through. Christakos asked Shactman specific details regarding his concerns, such as to describe the position of the collective. Stip. ¶ 22; HT 120-21; RX-15 at 2; CX-14 ¶ 13; CX-13 ¶ 19. The company officials and Shactman's co-workers indicated that there may be a mechanical issue with the collective, that the helicopter was scheduled for regular service, and the collective was going to be repaired or replaced. Stip. ¶ 22; RX-15 at 2; CX-13 ¶ 19; CX-16 ¶ 13; RX-14 at 58-59; RX-17a-b. Adams again denied that he had performed improperly. Stip. ¶ 22; HT 120; RX-15 at 2.

23) By having Complainant fly only with Falzone during the investigation of his concerns, Falzone was required to work every evening shift, when the regular schedule had the two pilots rotating between the morning and afternoon shifts. Stip. ¶ 23; HT 729; CX-13 ¶ 20; CX-16 ¶ 18.

24) Shactman was notified of the company's decision that Adams was cleared to fly in early April. Stip. ¶ 27; HT 822-23; RX-7 at 4; RX-9 at 5. Shactman was informed that he would be expected to fly with Adams. *Id.*

25) Shactman filed a complaint with the Federal Aviation Administration ("FAA") on April 9, 2008, complaining that he was being forced to fly with a pilot he deemed unsafe. Stip. ¶ 28.[4]

26) Shactman informed both Russell and Lieber on April 11, 2008 that he had filed a complaint with the FAA. Stip. ¶ 29.

27) The FAA did not respond directly to Shactman in April 2008. Stip. ¶ 32; CX-13; RX-28; RX-9 at 6.

28) On April 14, 2008, Lieber sent Shactman an e-mail message indicating he had received information that Shactman was not staying at his duty station during his shift. Stip. ¶ 34, HT 743; RX-18; CX-13 ¶ 35, RX-18; CX-15 ¶21-22. Lieber reiterated the requirement that Shactman remain with the helicopter or in the office at the airport during his shift duty hours. Stip. ¶ 34; HT 743; RX-18; CX-13 ¶ 35; RX-18.

[4] My Order Denying Summary Decision found the FAA complaint was filed on April 11, 2008. However, the parties agree the FAA complaint was filed on April 9, 2008. CL Br. at 21; R. Br. at 25 n. 19.

V. Summary of the Testimony

A. Shactman's Testimony

Shactman graduated from Northeastern University with a bachelor of science in journalism in 2005 and is 26 years old. HT 41, 43. After graduating, he worked for Fox-25 WFXT TV Station as a studio technician. HT 44. While at WFXT he learned the station used a helicopter company Helinet Aviation for aerial shots and reporting. HT 44-45. A co-worker, who was the full-time camera operator for Helinet Aviation, at its Norwood, MA facility, suggested Complainant might be interested in being a back-up camera man. HT 45. Shactman was interested and he became a backup camera operator for Helinet in May of 2006. HT 45-47. Shactman was hired to work full-time for Helinet in May 2007. HT 47. When Helicopters acquired Helinet's Norwood operation in October 2007, Shactman became an employee of Helicopters as did Helinet's pilots, Donovan and Kendrick. HT 47, 53. Complainant is not a pilot. HT 46; RX-49, at 257.

1. February 28-29 and March 3, 2008 telephone calls to Lieber and Christakos

As noted above, Kendrick left his position as a full-time pilot with Helicopters in January 2008 and Donovan gave his notice shortly thereafter in February 2008. HT 82-83. Shactman was aware that Donovan was trying to get their mutual friend, Boatwright, a job flying for Helicopters when Kendrick resigned, and again as Donovan's own replacement. HT 77-78, 313. On February 28, when Shactman learned one of the pilots under consideration to replace Donovan was Adams, he had phone communications with Donovan and then he called Christakos, Helicopters chief pilot, but did not reach him. HT 90, 227-233.[5] After placing the call to Christakos, Complainant then called Boatwright. HT 227-234; RX -48. The next day, Friday, February 29, Complainant exchanged text messages with Donovan before his 2:00 p.m. shift began. HT 235. While he was initially equivocal, he eventually acknowledged that Adams was at least one of the topics covered in his communications with Donovan. HT 233-238. Complainant reached Lieber at Helicopters later that afternoon and expressed his concerns about Adams being hired as a pilot—concerns he said he developed as a result of Donovan, Kendrick and Boatwright telling him things about Adams. HT 68-71, 87-92, 241-49, 270.[6] Specifically, Complainant told Lieber the story Donovan relayed to him about Adams "allegedly" "destroying" a helicopter engine. HT 69, 91-92. Shactman also raised concerns about Adams flying in bad weather, and not conducting pre-flight inspections. HT 69,72; RX-49, at 141-48.[7] Shactman told Lieber Adams was an unsafe pilot and should not be hired. HT 240. Shactman was aware that Helicopters had already vetted Adams because Adams was working as a back-up pilot for them in Beverly, MA. HT 240. Lieber told Shactman they would look into his concerns, and Christakos would be in touch with him. HT 91-93. Shactman then relayed his

[5] Before he ever reached Lieber or Christakos, Shactman learned from Kendrick that Kendrick had recommended Adams to Christakos when Christakos asked Kendrick's opinion. HT 88-90.

[6] At the hearing, Shactman testified that he observed Adams take off without performing a pre-flight. HT 72.

[7] Shactman agreed that he never checked to see whether Adams was restricted by any authority to fly because of weather. RX-49, at 142.

conversation with Lieber to Donovan. HT 236-238. The next work day, Monday March 3, Shactman exchanged texts and phone calls with Donovan and texts with Boatwright before his shift began. HT 241; RX-48. Christakos called Shactman later that afternoon and Shactman told him the same three concerns regarding Adams that he had communicated to Lieber. HT 91-93, 241, 243-44.[8] Christakos told Shactman he would look into his concerns and asked Shactman to send him a list of individuals who would support his concerns about Adams. HT 91-93, 244, 247-48; RX-49, 244 .

Shactman testified that even though Helicopters officials told him they would look into his concerns, as soon as he got off the phone with Lieber on March 3, and without informing Christakos or Lieber, he called FOX-25 WFXT ("WFXT") TV station, the company's client in the Boston area. HT 91, 249-50, 253-54; RX-48. Shactman told the TV Station that Adams was an unsafe pilot based upon the same information he had just communicated to Lieber and Christakos. HT 251. Shactman explained his call to the TV station by saying he "felt it was the right thing to do: tell the customer about what was going on with something that they pay a lot of money for and has their name all over it." RX-49, at 227-28; HT 250-52. Shactman conceded he knew when he called the TV station that there was no written contract yet between Helicopters and WFXT, and that everyone was concerned about how solid the customer relationship was. HT 252-53. He also understood that he could "potentially" lose his job if there was no contract. RX-49, at 94. Yet he denied that calling WFXT regarding Adams' safety as a pilot was a serious action. HT 250-52. Shactman maintained that he went to WFXT about Adams because he was concerned for his safety, the safety of Meehan, the station on-air person who flew the morning shift, and everyone's safety. HT 254-55.

On March 6, 2008, Shactman sent an e-mail to Christakos with names of Donovan, Mark Musgrove, and Phil Boiie, to contact regarding Adams piloting practices. HT 156-58, 316.[9] A couple of days later Shactman learned from Falzone that Adams was at Eurocopter school getting his factory course on the helicopter. HT 94-95, 98, 316. Shactman testified that he was "taken aback" by the fact that Christakos had already hired Adams when he said he was going to contact the people whose names Shactman had given. HT 317-18. Shactman did not have any further communication with Christakos between the day he e-mailed him the list of individuals he believed could confirm his concerns regarding Adams and March 10, 2008, the day Adams began working at Helicopters. HT 95-96.

2. March 10, 2008 e-mail to Lieber

When Shactman arrived at the airport on March 10, 2008, he went to the office, where he got a call from Falzone saying the TV station wanted to fly. HT 99. Shactman got in his car and drove to the hanger located approximately a mile away on the other side of the airport. HT 99. When he arrived at the hanger, the aircraft was running and Falzone was in the passenger seat and Adams was in the pilot's seat. HT 99. Falzone got out of the passenger seat and Shactman climbed in with Adams. HT 99. Shactman flew with Adams, and later that first day called

[8] Shactman conceded that he told Christakos that Donovan was the source of his concern regarding Adams' engine failure experience. HT 1140-42.

[9] Shactman admitted he had never flown with Boiie, but said he had heard him making comments about Adams. HT 333-35.

Donovan, who was no longer an employee of Helicopters, to ask him whether some of the actions Adams had performed during the flights were unsafe. HT 104-05. Thereafter, Shactman then sent an e-mail to Lieber complaining about actions Adams had taken during the flights that day. Shactman's e-mail read as follows:

> Jeff,
>
> Today was my first day flying with Dave and unfortunately it didn't take long for me to see the concerns I had about him come to fruition. I flew with Dave on 3 flights today and observed the following:
>
> 1st Flight
>
> Dave departed the ramp with the Horn light illuminated, he noticed it after a few seconds and re-engaged it.
>
> 2nd Flight
>
> Dave had started the helicopter before I drove up. As I was walking towards the aircraft I felt a much stronger downdraft than I'm normally accustomed to. When I opened the door to the aircraft, I immediately noticed that the collective was not in the locked position, it was probably just about halfway up. During the flight, I reached down to turn on my noise cancellation box and noticed a seat buckle on the floor. I looked over at Dave and saw he was not strapped into his seat, he flew the entire flight without being strapped in.
>
> 3rd Flight
>
> I was already in the helicopter before Dave arrived for this flight. He did no walk around prior to climbing in. He did not use the aircraft checklist for start up, nor did he do either of the 2 hydraulics tests I'm accustomed to pilots performing before departing. He also started the aircraft with the collective unlocked again. Dave also took off with the horn light illuminated again, and didn't notice it until I pointed it out to him just as we were clearing the runways.
>
> I understand Dave has little to no AStar time. However, I find it absurd that a pilot who, has low time in an aircraft and just finished the factory course for it, wouldn't take the time to follow the procedures for it…especially on his first day flying with someone who has raised concerns about his safety and decision making. Even though I didn't agree with the decision to hire Dave, I felt as though I owed to the company and to Dave to prove me wrong. With his actions today, he did everything but that, and only made me wonder what other shortcuts are to come in the future.
>
> I love my job here, but I will not put my life in the hands of someone who makes me uncomfortable and does not demonstrate that safety is his first priority.

RX-14, 1. Shactman admitted that he drafted a version of this e-mail and sent it to Donovan to read before he sent it to Lieber, because he trusted Donovan. HT 223-24, 255-56; RX-14. Shactman's failure to go directly to Adams about the concerns listed in the e-mail, prior to sending the e-mail, even though he understood he was making serious allegations which could cost Adams his job and his career, is surprising. HT 256-58. Shactman testified that he had never seen other pilots operating that aircraft have the same problems with the collective as Adams did. HT 325. At Shactman's deposition, he stated he was not aware of any FAA rule that requires a hydraulic test on each flight of the day, but testified that "everyone except for Mr. Adams" did one. RX-49, at 240-42. He also testified that he is not aware of an FAA rule that requires pre-flight walk-arounds but knew "only . . . what [he] saw from other pilots." RX-49, at 248. Shactman received an e-mail response from Lieber stating:

> Scott:
>
> I'm sorry to hear that things did not go well. You are always welcome to voice your concerns, and Nick [Christakos] will look into the situations you described first thing tomorrow morning.
>
> We will get the answers you deserve.
>
> Jeff

RX-14, at 2.

In response to Shactman's e-mail to Lieber, Christakos called him directly the next day, March 11, 2008, to discuss his concerns. Christakos told Shactman that his complaint that Adams did not have AStar time was wrong, and that Adams did have AStar time and an ATP certificate. HT 269-71. Christakos also told him he had spoken with both Falzone and Adams and that Adams denied he was not wearing his seatbelt, indicated difficulty with the lock on the collective, but did acknowledge that he had taken off with the horn light on. HT 108-109. Christakos asked Shactman to participate in a conference call with the other Norwood employees and later that day Christakos held a conference call with Adams, Falzone, and Shactman. HT 109.[10] Shactman testified that during the conference call, Christakos indicated that safety was absolutely critical, and communication between a pilot and photojournalist is an important part of safety. HT 303. Christakos went over the issues Shactman identified in his e-mail. HT 110. Although Adams denied not wearing his seatbelt, Shactman testified that Christakos pointed out the importance of wearing a seatbelt and directed Adams to wear it. HT 110. Christakos instructed Falzone to go out and watch Adams do a pre-flight inspection and a walkaround to make sure he was doing it correctly, and to update the pre-flight checklist. HT 112, 304.

---

[10] Shactman's telephone records indicate that before the March 11 conference call and throughout the day there were numerous communications between himself and Donovan and one with Boatwright. HT 278-80. He grudgingly acknowledge only that it was "possible" that some of these communications related to the subject matter of his complaint about Adams and the conference call Christakos held with all the Norwood employees to discuss and resolve the issues complained of. HT 278-280; RX 48. It strains credulity to assume that Adams was not a topic of Complainant's numerous communications with Donovan throughout the day on March 11, 2008.

With regard to the hydraulics test and horn light, Complainant understood that in doing the hydraulic test during the pre-flight, a horn will sound. HT 49, 187-88. He agreed that many pilots will turn the horn off while they complete the pre-flight because it is very loud and when the horn is turned off the horn light is lit. HT 49, 187-88; RX-49 236-241.[11] When the pilot pushes the horn button back on, after completing the pre-flight, the horn light goes out. Shactman recalled Falzone saying he did not do a hydraulics test on every flight, but Shactman felt this was not consistent with what he had observed Falzone doing when he flew with Falzone. HT 112. As for the collective lock, Falzone stated that there was an issue with the collective lock and that the collective falls out of the lock. HT 110-11; RX-49 at 256. Christakos said "the collective is going to be looked at . . . it's going to go for service and if it needs to be repaired or replaced it will be." HT 275; RX-49, at 254-56. Shactman also testified that Christakos asked him that "if the collective is fixed" and Adams "uses the [pre-flight] checklist and follows it, would you still be uncomfortable flying," to which Shactman responded: "if he uses a checklist and he's safe, if he follows procedures, no problem." HT 275.

Complainant acknowledged that if Donovan told him something, then it was good enough, because he "trusted" Donovan. HT 270-71. He said that the fact that Donovan was wrong about Adams' flight time in the A-Star, did not give him "pause about any other information" Donovan gave him regarding Adams. HT 271.

Shactman testified that during the first conference call, Christakos did not tell him that he had spoken with Mark Musgrove or Phil Boiie, the individuals whose names Shactman had provided to Christakos regarding the concerns about Adams. HT 316. Shactman was aware that Christakos called and left a voicemail with Musgrove. HT 333-34.

3. March 18, 2008 e-mail to Christakos

Between March 11, 2008 and March 18, 2008, Shactman flew some additional flights with Adams, but not every day. HT 122. Shactman admitted that during this period, Adams was using the pre-flight checklist, doing a walk-around, and performing a hydraulic test, and there were no other issues until March 18, 2008. HT 276. On March 18, 2008, Shactman said there was another problem with the collective. HT 276. Shactman acknowledged that the second incident with the collective occurred before the company had sent the helicopter out for scheduled maintenance. HT 276-77. Shactman sent an e-mail to Christakos and Lieber about what he had seen in his flight with Adams on that day. HT 117-18. The e-mail read as follows:

> Nick,
>
> Just wanted to make you aware of another incident with Dave that occurred earlier today. Dave again started the helicopter with the collective unlocked today. I only noticed this when upon starting, the helicopter was rocking back and forth on the skids pretty violently, obviously a lot more than it normally does. After the flight I called Mike Falzone and told him of this to which he said he was going to speak to Dave.

[11] See also Donovan testimony at HT 393-95.

> Dave has been using the checklist whenever I've flown with him, including today. However, after our discussion last week, I was surprised by his actions today.
>
> Feel free to call with any questions.

RX-43; RX-15, at 1. Shactman testified that he sent this e-mail while on duty, from his apartment, around the time he went to get dinner. HT 117, 278.

The following day, March 19, 2008, Christakos called Shactman in response to the second e-mail complaining about Adams. HT 119. Shactman testified that Christakos was "combative," and hinted for the first time, that he thought Shactman was funneling Donovan's complaints about Adams to Helicopters. HT 119, 284. Shactman agreed that during this call Christakos told him that he had spoken with McKenna and Tuttle, pilots for two other TV stations working out of Beverly, MA. HT 127, 284-285; RX 15. Christakos told him that he specifically asked them whether they or any of their camera operators had any concerns regarding Adams' piloting and they all answered no. HT 285. Christakos also told Shactman that he spoke with Meehan, the TV station employee, who flies as photojournalist on the morning show/shift and he did not have any concerns with Adams. HT 285; RX-15. Shactman testified that he never confirmed this with Meehan. HT 285-86. He also testified that this information did not matter to him. HT 286.

Christakos asked Shactman to participate in a second conference call with the other Norwood employees to discuss his most recent concern as to the collective lock. RX- 15. Later that day Shactman, Adams, Falzone, and Christakos had another conference call. HT 120. Lieber joined the call late. HT 120. The group discussed the issue Shactman raised in his second e-mail complaint, that Adams was taking off with the collective unlocked. HT 120, 287. Shactman testified that Christakos started the conference call by going through the e-mail and Adams explained that he had control of the collective but "could not get it to stay in" because "there was something wrong with" it. HT 120. As he had in the first call, Falzone, indicated he had had some issues with the collective lock. Shactman said he did not believe Falzone's statements about the collective lock. HT 272. At that point, Christakos put the call on hold while he went out to a helicopter at his location and tried putting the collective in the position that Shactman described observing on the flight with Adams the preceding day. HT 121. Shactman testified that Christakos returned to the call and said it was impossible for the collective to be in the position Shactman described, as the aircraft would be flying. HT 121. Shactman testified that he did not believe what Christakos was explaining regarding what was going on with the collective. HT 284. Shactman agreed the conversation became heated, he called Adams a "liar," and Adams returned the charge. HT 121, 271.

Shactman testified that when Lieber joined the conference call, Christakos described what had gone on in the call up to that point. HT 287. Shactman reiterated that he was uncomfortable flying with Adams, and stated that Adams "needs to go" or words to that effect. HT 287-88. Shactman agreed that Lieber told him at that point that he had spoken with Koontz, the Helicopters' employee who had actually gone out and flown with Adams when he was being considered as a back-up pilot for Helicopters, and that Koontz said Adams was safe. HT 288-89. Shactman made it clear that he was not going to go back to flying with Adams. HT 290. Lieber told them all that for a period of time Shactman would fly exclusively with Falzone and Adams

would fly the morning shift. HT 122, 289. Shactman initially testified that during the conference call neither Lieber nor Falzone indicated how long Shactman would fly exclusively with Falzone. HT 123, 216. After March 19, Shactman did not have any further communication with Christakos. HT 126.

Later that day Shactman testified that Lieber called him to inquire why he was "slamming doors" on his way out of the office after the conference call. HT 124. Shactman stated that Lieber "said he didn't underst[and] . . . why I was so angry since I had gotten what I wanted." HT 124. Shactman testified that he denied that he was slamming doors, and he reiterated to Lieber his "concern[s] about my safety and that nobody was telling me to say anything about Dave Adams, these were things that I witnessed and that I felt were unsafe, that I felt that my safety was in jeopardy." HT 124. Shactman testified that during this call with Lieber, Lieber told him the arrangement for him to fly only with Falzone would last for "a month or two," and then "after that time if there were no issues with Mr. Adams that the pilots would return to rotating shifts . . . . So Mr. Adams would revert to flying the afternoon shift with me for a month and then go back to Mr. Falzone, so on and so forth." HT 128. Shactman recalled that Lieber indicated that if "I felt I still could not fly with Mr. Adams that I should move on from the company, find another line of work." HT 128. Shactman testified that he clearly communicated that he would not fly with Adams no matter what Helicopters did; there was nothing it could do—regarding switching shifts to fly with Falzone, servicing the collective, or anything else—to convince him otherwise; and that he did not change his mind during his employment. HT 194, 290, 332. Further, Shactman again told Lieber in their post-conference call telephone conversation that Adams needed to be fired. HT 288. From March 19, 2008, until his termination, Shactman flew exclusively with Falzone. HT 127-28; RX-49, at 279.

4. Communications with Russell

Following the March 19, 2008 conference call, Shactman testified he received a call from Russell, the lead photojournalist, later that week asking about a missed flight on March 18. Russell wanted to know why he had not answered his phone when Adams called him that evening. HT 128. Shactman recalled he told her that on March 18, 2008, after he sent the e-mail complaint to Christakos from his apartment, he returned to the airport "between 7:30 and 8:00," and went to Boatwright's office, "sat in there until 10:00 at night, left, went down to the gym that I went to, which was like a two- or three-minute ride from the airport, went into the gym, worked out." HT 118. Shactman left his cell phone in his car. HT 118. He testified that when he got out of the gym there was a voicemail and missed calls from Adams saying that "the station wanted to fly." HT 118. Shactman testified that he received the missed call after 10:00 when his shift was over. HT 118. He stated that since it was already late when he retrieved his phone messages and he assumed the station canceled the flight, he sent Adams a text explaining that he was at the

gym, and apologizing. HT 118. In explaining his failure to respond to Adams' call that the TV Station wanted to fly, Shactman told Russell:

> It was my understanding that my shift ended at 10:00 and I was not compensated for every [sic] being on call. I was never really told - - I was never told any guidelines for being on call. So I didn't understand why - - what the issue was.

HT 129-30. Shactman reported it took him five minutes to get to the gym and he did not leave the gym before 11:00 p.m. HT 180. Shactman indicated he typically exercises at the gym for an hour to an hour and one-half, but does not remember how long he worked out that night. HT 178. However, he testified that he had no reason to believe that the phone record indicating the time of his text to Adams as 10:49 p.m. was incorrect. HT 184-85.[12] Shactman said that after his call with Russell to discuss the missed flight, he did not receive any verbal or written reprimand from Russell, Lieber, or Christakos concerning the missed flight. HT 130.

On April 7, 2008, Russell called Shactman and said "that there had been no incidents with Dave Adams and that they felt he was okay to fly and that he was going to be returned to flying with me on the afternoon shift." HT 130. Shactman testified that Russell did not say anything about an inquiry or investigation that was conducted with respect to Adams. HT 130. Shactman said she explained to him that she was attempting to find out if he was going to accept flying with Adams or whether he was going to "move on from the company." HT 131. Shactman testified that he responded that he would get back to her; he did not say that he would or would not fly with Adams. HT 132. Shactman did not have any conversation with Lieber regarding switching back to flying with Adams, and the switch never occurred. HT 131. Shactman asserted that he did not get back to anyone at Helicopters, one way or another, because he "felt . . . they just were not believing me, not taking me seriously." HT 1138.

5. April 9, 2008 FAA Complaint

Shactman filed a written complaint with the FAA on April 9, 2008. HT 133-34, 292. He said that before Russell called him to say that Helicopters expected him to go back to flying with Adams, he "had no draft or any intention or idea of going to the FAA." RX-49, at 289. He stated that he filed the complaint because "I felt that Dave Adams was an unsafe pilot, and I felt that he was endangering myself, general public, other people I worked with, the aircraft. And I was unsatisfied with the response from the company." HT 150. Also, in a conversation with Falzone, Shactman said that he filed the FAA complaint "to protect my job," among other reasons. RX-49, at 313. Shactman admitted that once again he sent two drafts of the complaint letter to Donovan to get his comments before he filed the complaint with the FAA. HT 292. Shactman's complaint to the FAA read as follows:

> To Whom It May Concern:
>
> My name is Scott Shactman, I'm a camera operator for Helicopters and fly in the Fox 25 News helicopter, N25OFB.

[12] His testimony and the telephone records leave no doubt that Shactman left the worksite for the gym well before his shift ended at 10:00 p.m. on March 18, 2008.

In the past few weeks, I've raised safety concerns about a pilot, David Adams, who was recently hired. Through other people familiar with this pilot, I had concerns about him prior to him being officially hired. I brought these concerns to the attention of Helicopters, Inc.'s Chief Rotorcraft Pilot, Nick Christakos, and the company's President, Jeff Lieber. They appreciated my input but still felt that Dave would work out fine. Since I had never flown with him, I decided it was only fair to give him a chance.

On Dave's first day, there were several incidents that bothered me. He departed the ramp area twice with the horn isolation light lit (N25OFB is an AStar 350B2), he flew an entire flight without his seat belt on, he failed to perform hydraulic checks before taking off, he started the helicopter with the collective unlocked, and he was not using the aircraft's checklist. This was unsettling to me because, as I mentioned before, I had heard and seen things that made me question Dave's ability to be a safe pilot, now I saw it firsthand. I emailed Jeff Lieber about what happened. Nick Christakos contacted me the next day to get my side of the story and asked if I would participate in a conference call with himself, Dave, the other full time pilot, Mike Falzone, and myself. During the call we went over the incidents I brought up in my email. Dave denied not wearing his seat belt, claimed the collective lock was not working properly, and said he only took off with the horn light on once. At the end of the call, I agreed to give Dave another chance as long as he follows the proper procedures and shows that safety is a concern.

Dave was using the aircraft checklist and there were no incidents for about a week. However, a little more than a week later Dave again started the helicopter with the collective unlocked, which caused the helicopter to start rocking all over the dolly. I didn't notice that it was unlocked until the helicopter started rocking, Dave promptly put the collective in the lock at this time. After the flight I contacted the other pilot, Mike Falzone and told him what happened, he said he was going to speak to Dave. I'm not sure if he did or not, but I decided it would still be best to let both Nick Christakos and Jeff Lieber know what happened, so that night I sent them an email.

The next day I received a call from Nick. We had an animated conversation in which he asked why I had a problem with Dave and inferred that I was simply out to get him. He also inferred that a former pilot who I worked with, Chris Donovan, was feeding me information to try and get Dave in trouble. He then requested that we have another conference call. During the call Dave again claimed that the collective lock in the helicopter was not working properly, saying that the collective falls out of the lock when the hydraulic pressure builds up. He also denied the helicopter was rocking on the dolly and said I was a liar. Jeff Lieber eventually joined the call, and it was suggested that if once the collective lock was fixed, if I would be comfortable flying with Dave. I said no, and that I felt that the problem was not the helicopter but the pilot, and that I had never seen anyone have any problems with the collective lock in the past. It was decided that

for the time being, Dave would fly the morning shift, and Mike Falzone would fly the afternoon shift, which I work.

Later that day I received a call on my cell phone from Jeff Lieber. He asked me why I was upset since I had gotten what I wanted (I had walked out of conference call after it ended without saying anything to anyone, feeling I needed to cool down a bit). We discussed the events that led up to me not wanting to fly with Dave, and I also voiced my displeasure of how it was being handled. At the end of the call, Jeff said that we would go forward with me flying with Mike in the afternoon and Dave flying the morning shift for a month or two, then the company would evaluate how Dave was doing and if I felt that I still could not fly with Dave, then maybe I should move on from the company. Shocked at this, I only managed to laugh.

The other day I received a call from Robin Russell, who is the company's Lead Photojournalist. She informed me that the company has decided to switch the pilot's shifts again beginning May 1st, and that they would rotate shifts on a monthly basis. She then wanted to know how I felt about that, I said obviously I wasn't happy. She then said that they need to know if I was going to continue with the company or move on if I was still not okay flying with Dave. I told her that I would get back to her.

I have documented all phone calls and conference calls that I've had with anyone from Helicopters, Inc., including all the incidents I've had with Dave with specific dates and times, and also summarizing what was discussed during those conversations. At this time I feel as though my job is being threatened because I am refusing to fly with a pilot that I have serious concerns about. Any guidance that could be provided to me at this time would be greatly appreciated, thank you for your time.

Scott Shactman

RX-17 Exh. A-B.

On April 11, 2008, Shactman notified Lieber and Russell by e-mail that he had filed a complaint with the FAA. HT 134, 292. This was the first time that Shactman notified anyone at Helicopters of his FAA complaint. HT 292.

On April 14, 2008, Shactman received an e-mail from Lieber telling him that Lieber had received information that Shactman was not staying at his duty station. HT 135-36. Lieber's e-mail informed him that he was required to remain on Helicopters' property regularly from 6:00 p.m. until the end of his shift at 10:00 p.m. HT 293-94. Shactman acknowledged that he had been leaving half-way through his shift at 6:00 p.m. HT 293.

On April 28, 2008, Lieber e-mailed Shactman a copy of the letter Helicopters received from the FAA dismissing Shactman's complaint. HT 295. Lieber's e-mail message stated

"Please see the attached letter from the FAA." RX-28; HT 145. The attached FAA's letter stated:

> On 11 April, 2008 FAA Eastern offices forwarded to my attention a safety complaint lodged by an employee of Helicopters, Inc., Mr. Scott Shactman against one of your pilots, Mr. David Adams. This complaint alleged unsafe practices by Mr. Adams and indicated that Mr. Shactman was refusing to fly with Mr. Adams over safety concerns.
>
> After talking to Nick Christakos, I believe that Helicopters Inc. has taken the appropriate steps in resolving this issue and that further inquiry into this matter by this office is unwarranted. . . .
>
> This matter is considered closed pending further complaints.

RX-28, at 2. Shactman stated that no one from Helicopters management or the FAA came to speak with him regarding his FAA complaint or any investigation of Adams. HT 143-44, 147; RX-28, at 2. Shactman also said that Lieber did not call to discuss the FAA response. HT 145. Shactman acknowledged that he had several phone calls with Russell on April 28 and 29, but said he did not recall discussing the FAA with her at all. HT 295-298.[13]

6. Second Missed Flight - May 5, 2008

On May 2, 2008, Shactman called backup photographers to cover for him on his May 5, 2008 shift when he had a doctor's appointment. HT 140-41. He told Falzone to inform the TV station that he was going to be late on May 5, 2008, because he was not able to get anyone to cover his shift while he went to his doctor's appointment. HT 141. On the way back from his appointment on May 5, 2008, Falzone called him to ask when he was returning to the airport because the TV station wanted to know. HT 142. Shactman testified that the call was after 2 p.m. and he returned to the airport at approximately 3 p.m. HT 142. Shactman missed the call for a flight from the TV station. HT 142. He sent Russell an e-mail on May 5, 2008, explaining what happened, that he was late because he had a medical appointment. HT 142-43.

Shactman testified that between April 7, 2008, when Russell called to tell him the company had determined Adams was safe, and to inquire whether he intended to return to flying with Adams in the company's pilot rotation, and the date of his discharge he did not have any further telephone conversations with Russell or Lieber. HT 143. He said the next communication that he received from Helicopters management was on May 13, 2008, when

[13] Shactman's testimony that he does not recall any conversation with Russell in which she asked whether he was aware of the FAA's conclusion regarding his complaint and whether he would return to flying with Adams is not credible. HT 295-99. Shactman received an e-mail from Lieber with the FAA's letter closing out his complaint on April 28, he has not provided any other explanation for, or subject-matter of, his telephone conversations with Russell over those two days, and Russell testified credibly that she discussed the FAA findings and whether Shactman would return to flying with Adams in the phone calls over April 28-29, 2008. HT 826-27; RX 40.

Lieber called to tell him he was terminated. HT 146.[14] Shactman said that Lieber told him that Helicopters could terminate Shactman's employment at any time as he was an at will employee, that the customer and coworkers were not happy with him, and he referenced the two missed flights. HT 147-148; RX31.

7. Helicopters' Personel Policies

In terms of the hours Helicopters was available for the TV station and the on-call requirements for its employees, Shactman testified that he understood that a call could come from the station "at any time," but it would not necessarily be honored. HT 198. He testified that he was supposed to be on call two weekends per month. HT 198. Shactman claimed that although his October 2007 e-mail to Lieber read, "I understand that working weekends and always being available is part of this job," HT 199, he meant the following: "Being available, yes. If you're construing it to be available to fly, I could expose it to different scenarios." HT 200; RX-3. At his deposition he testified that he "was never told any guidelines about being on-call during the week." RX-49, at 117-18.

Shactman testified that he reviewed the photojournalist handbook, and read sections of it. HT 202; RX-49, at 117-20. In pertinent part, the handbook stated the following:

> The official duty time for the company pilots and photojournalists, crew members, is based on a nine-hour day, which includes one hour lunch, five days per week, Monday through Friday. . . . During this core time, crew members are expected to be with a customer in the office or with the aircraft. Crew members are typically on call every weeknight and every other weekend. . . . Photojournalists are required to be available and ready to fly during these periods on a standby basis.

HT 203, 207; RX-1, at 8. Shactman understood that this section of the handbook was applicable to his job. HT 207. Shactman admitted that he left work at 6:00 p.m. on most nights. HT 204. He also testified that he never informed or asked Lieber or Russell about leaving at 6:00 p.m. each night. HT 204-05.

Shactman claimed that he had no knowledge of what Lieber or Christakos did as a part of a review or investigation of his complaints regarding Adams. HT 290. However, he agreed that he knew from the conversation on March 19, 2008, that they had spoken to people about Adams, and that the collective was going in for maintenance and that there was an issue with it. HT 291.

Shactman testified that during January, February, and March 2008 he was aware that Donovan was seeking to have Boatwright get a job as a pilot with Helicopters. HT 312. He was also aware that Donovan recommended that Helicopters hire Mark Smith. HT 313.

[14] This testimony by Shactman is inconsistent with his later testimony that he spoke with Russell on April 28th and 29th and with the telephone records which establish an exchange of calls between his phone number and Russell's on those dates. HT 295-99.

B. Testimony of Chris Donovan

Donovan has been a helicopter pilot since 1986, and has experience flying the AStar helicopter. HT 349, 352, 363. He has obtained certification as an Airline Transport Pilot and is a flight instructor and instrument flight instructor in helicopters. HT 351. He began to work for Helicopters in October 2007, after it acquired Helinet's operations in Norwood. . HT 351-52. Donovan gave his notice to Helicopters in February 2008 and began working for another employer, Boston MedFlight, in March 2008. HT 360. According to Donovan, Helicopters provided 24/7 service but Helicopters employees need not be ready to fly any time of the day; there were times when staff didn't make the story, and it was in some cases a best case if a call could be answered. HT 412.

Donovan met Shactman when Shactman began to work as a backup cameraman for Helinet. HT 353. When Shactman began as the full-time cameraman for Helinet (and later Helicopters) they became friends and socialized outside of the workplace. HT 353-54, 386. Donovan continued to communicate with Shactman after Donovan left Helicopters. HT 387.

Donovan said that when he worked for Helicopters, he regularly went home during his scheduled shift hours. HT 357-58, 413-14. Donovan testified that during the afternoon shift, he would generally leave at 6:00 p.m. HT 413-14, 477. Donovan also knew that Shactman left during his shift to go to Best Buy, to Shactman's Norwood apartment, and to Boatwright's office. HT 431. Donovan testified that leaving early was the continuation of a practice that began under Helinet. HT 414. When Helicopters took over, Donovan never told Lieber or Christakos that he was leaving early, stating "they never asked." HT 414, 476-77. Donovan denied that he was trying to deceive Lieber or Christakos. HT 477.

Prior to his work for Helicopters and Helinet, Donovan met Adams when the two worked for Wiggins Helicopters, and Donovan was a part-time pilot at Wiggins. HT 372. Donovan said he took off on occasion from the same ramp as Adams and saw Adams fly all the time. HT 379. Donovan also had occasion to share the same airspace with Adams and to fly out of the same or adjacent hangars. HT 378-79. Donovan has never been friends with Adams and he has only interacted with Adams at the Norwood airport. HT 373-74. Donovan claimed he does not dislike Adams. HT 456. However, he admitted he viewed Adams as a "weirdo." HT 457. Donovan said that Adams exhibited behavior that he considered "strange." HT 483-84, 458-59.

In Donovan's opinion, Adams was not a good pilot. HT 379. Donovan said he observed Adams fly in weather that he thought was unsafe. HT 379. Donovan claimed Adams told him about an incident in which he had an engine problem while over Boston and Adams flew the aircraft to Norwood, rather than landing the aircraft immediately. HT 380. Donovan stated he later observed the damaged helicopter that had been flown by Adams and the helicopter had oil on it, the engine had no oil, and he also observed pieces that broke off of the engine. HT 380, 440. In addition, Donovan said he observed Adams fly without doing a pre-flight at all or without doing a thorough preflight. HT 378. When Donovan would have multiple flights during the same shift, he said he would do a full pre-flight prior to flying the aircraft and then an

abbreviated procedure for through-flights that includes many, but not all, of the tasks in the full pre-flight procedure. HT 390-91.

Donovan indicated he had discussions with several people about Adams. While at Wiggins, Donovan told Mike Peavey, the chief pilot at Wiggins, about concerns he had with Adams. HT 421. Donovan acknowledged that Wiggins did not fire Adams. HT 421. While at Helicopters, Donovan told Shactman that he thought Adams was an unsafe and dangerous pilot. HT 376, 381. Donovan relayed the story about Adams experiencing an engine failure that had occurred while Donovan was at Wiggins. HT 380. Donovan told Shactman that Adams had no AStar time, even though he conceded that he did not verify whether Adams had AStar time. HT 468-69. Donovan also talked to Christakos about Adams when Helicopters was considering Adams as his replacement. HT 384. Donovan had recommended his friend Boatwright to Christakos as his top recommendation for his replacement. HT 427. Donovan told Christakos the same story about Adams experiencing engine failure over Boston that he told Shactman. HT 384. Donovan recommended to Christakos that he not hire Adams and told Christakos that Adams was unsafe. HT 385. In discussions with Kendrick about Adams, Donovan maintained Kendrick told Donovan that he knew about the incident with the failed engine, that he did not want to fly with Adams, and that he felt Adams was unsafe. HT 482. Donovan reported Shactman was present when these conversations between him and Kendrick took place. HT 483. In addition, Donovan had discussions about Adams with Boatwright. HT 478-79. Donovan stated Boatwright told him that Adams was an inattentive pilot. HT 480. Donovan testified that Shactman was frequently in Boatwright and Donovan's presence, and overheard the conversations between them. HT 481.

After flying with Adams on his first day as full-time pilot at Helicopters, Shactman told Donovan that he had some problems with Adams and that Adams had done some things that scared him. HT 388. Donovan recalled Complainant told him that Adams did not wear his seat belt and did not have the collective on the helicopter locked. HT 388. Donovan did not recall having any problems with the collective or the collective lock during his time as a pilot with Helicopters. HT 388. Donovan continued to communicate with Shactman after Donovan left Helicopters and prior to Shactman's termination. HT 404. In these conversations, Donovan suggested to Shactman that he discuss his concerns about Adams with Adams, Falzone, and the chief pilot. HT 405-06, 425. Donovan does not recall telling Shactman to contact the FAA. HT 408. Donovan said he never told Shactman anything he believed to be untrue. HT 408. Donovan was combative and evasive in responding to questions regarding whether Complainant had given him copies of his various complaints about Adams to review before he gave them to Helicopters and with questions regarding whether Shactman told him about what transpired in the two conference calls Helicopters held occurred after getting Shactman's two e-mail complaints. HT 433-442.

Donovan acknowledge that he had a dispute with Helicopters after his employment with the company ended. HT 461.[15] In the context of this claim, Donovan called Jeff and Steve Lieber liars. HT 462, 465; RX-50. Donovan admitted he has never met or talked to Steve Lieber. HT 462.

[15] Donovan filed a claim against Helicopters claiming entitlement to vacation pay. HT 461.

C. Testimony of Michael Falzone

Falzone is a professional pilot with a commercial pilot's certificate for helicopter, an instrument rating for helicopter, and a flight instructor's certificate for helicopter. HT 488. Falzone stated that in evaluating whether to accept the full-time position with Helicopters he was aware that the company did not have a contract with the TV station. HT 648. Falzone accepted a full-time pilot position with Helicopters at the Norwood location in January 2008. HT 489, 493. He had previously been hired as a backup for Helicopters but had never actually been called on to perform backup duties. HT 489. Falzone worked the afternoon shift and Donovan worked the morning shift even though Falzone understood, when he was hired, that the pilots rotated between the morning and afternoon/night shifts. HT 493-95.[16] Falzone usually flew with Shactman. HT 495. When Falzone worked with Shactman, they would generally push the helicopter in the hangar around 6:00 p.m. and Shactman would leave the airport. HT 505. Falzone did not know where Shactman went and never told anyone because he "didn't want to be the snitch." HT 505-06, 526. Falzone would depart the airport at 10 p.m. HT 506. Falzone does not recall if there were ever any flights after 10 p.m. during the time he worked with Shactman. HT 506.

At some point, Falzone reviewed the Helicopters Employee Handbook. HT 499. He testified that the handbook stated there is a nine hour shift for pilots and photojournalists. HT 500. However, Falzone's scheduled afternoon shift was from 2 p.m. to 10 p.m. HT. 501. Falzone's understanding of the schedule was based upon what he and Donovan had done from the beginning of his employment. HT 501. Falzone testified that he was supposed to be on call every weeknight and every other weekend.[17] HT 501-04.

When Donovan announced he had obtained other employment, Falzone discussed Donovan's replacement with Christakos. HT 496. He mentioned both Mark Smith and Adams as potential replacements. HT 496. At one point, Shactman talked to Falzone about his concerns with Adams, informing Falzone that he had heard that Adams was an unsafe pilot who did not do a pre-flight. HT 497. Falzone recalled that Shactman told him that the sources of his information about Adams were Donovan, Musgrove, Kendrick, and Boatwright. HT 497. Falzone suggested to Shactman that he raise his concerns with the company. HT 498.

Christakos contacted Falzone and asked what he thought of Adams. At the time he received this call from Christakos, he had only been on one flight with Adams that lasted one hour. HT 497-98. Falzone told Christakos that he lacked familiarity with Adams and had nothing good or bad to say about him. HT 498-99.

---

[16] Falzone testified that on his first day at Helicopters Donovan, the other pilot at the time, was rude and unwelcoming and refused to rotate pilot shifts. HT 520-21. Falzone stated he eventually complained to Christakos. HT 521. Falzone's testimony is supported by Shactman's statements that Donovan was not treating Falzone fairly and that Donovan can be "a very difficult, obnoxious person to deal with." RX 46, 286-7.

[17] At the hearing, Falzone corrected his deposition testimony in which he only mentioned being on call every other weekend. HT 501-02.

When Adams started full-time at Helicopters, Falzone worked the morning shift from 5 a.m. to 2 p.m. and Adams worked the evening shift. HT 506-7. Falzone reported that Adams' showed up early on his first day and asked Falzone to do a pre-flight with him and a short flight, which Falzone did. HT 652-53. During the brief flight "pick-ups and set-downs," the TV station called and said they wanted to fly, so Falzone and Adams returned to the ramp. HT 653. In the meantime, Falzone called Shactman who was coming on shift to tell him the station wanted to fly. HT 653.

On March 11, 2008, the day after Adams began at Helicopters, Falzone, Shactman, and Adams participated in a conference call initiated by Christakos. HT 507. The conference call was to discuss complaints Shactman made about Adams based upon their flights the previous day. HT 507. Falzone testified that one of the topics during that first conference call was whether Adams wore a seatbelt during one of the March 10, 2008 flights, and left the horn light associated with hydraulic checks on. HT 524. Falzone also recalled that Christakos directed him "to go outside and to observe Mr. Adams in terms of a preflight inspection and starting up the helicopter," and Falzone did so. HT 516.[18] Falzone testified that in the first conference call Shactman made it clear that if Adams did not act in a safe manner, it "wasn't going to fly." HT 508.

A second conference call with the same parties was held on March 19, 2008. HT 514. Falzone testified that he could not recall whether the collective issue was discussed at the first and second conference calls or just the second call. HT 521-22. Falzone testified that during one of the calls he explained to the group that he had experienced at least one instance when the collective came out of its lock. HT 522. Falzone experienced the issue before Adams started at Helicopters. HT 522. Falzone testified that he never reported the problem, verbally or in writing, to Christakos because in his mind, "it wasn't a problem." HT 523. Falzone explained that he had experienced similar issues with different helicopters flying for different companies in the past, and he said it is something that caught his attention, even though "[i]t wasn't urgent." HT 553. Falzone testified that during the week that Adams and Shactman flew together, Adams never said anything to Falzone about an issue with the collective when they crossed paths and changed shifts. HT 525-26. In trying to allay Shactman's concern about the collective during the second conference call on March 19, Falzone told Shactman:

> I said, the helicopter [collective] is going to get fixed, and once it comes back with the new locking mechanism will you fly with Dave [Adams] because that's your cripe is that the lock was messed up and it would come unlocked. So he said that the collective was out and it was violent rocking of the helicopter. So that was his complaint as far as the collective.
>
> And he said, no, this is ridiculous. And that's when I said . . . . I don't know what to do - - I don't know what else to say. So then I said, look, I'll fly with you for however long anybody tells me to.

[18] Falzone acknowledged that his affidavit to OSHA stated Christakos asked him to fly with Adams to observe him, but he testified that Christakos did not ask him to fly with Adams, and that he did not. CX-17, at 2; HT 516-17.

> He's a good camera guy, he knows what he's doing, and then have Dave [Adams] fly with Doug [Meehan], if there aren't any complaints from Doug [Meehan] - - Doug [Meehan] has been doing it for a long time - - then so be it, and that will aid the company, that should alleviate his fears. And he said no. He said, I'm not flying with Dave [Adams], no matter what steps were taken, that he would not fly with Dave [Adams].

HT 549-50. Falzone said he was willing to fly with Shactman for a month, three months, six months or up to a year. HT 519, 552. He explained that he was trying to be a team player and offer solutions, stating he wanted the accusations about Adams to be proved one way or the other, so he suggested Adams should fly with Meehan who was an employee of the TV station, a third-party. HT 654-55. At the same time, he thought Shactman was a good photojournalist and he wanted to relieve his fears. HT 655. Falzone testified that he offered this despite the fact that he wanted to switch to working the morning shift when he first started. HT 520-21. He testified that his relationship with Shactman deteriorated after the March 19 conference call. HT 650, 655-56, 667.

Falzone learned that Shactman filed an FAA complaint from Christakos in April 2008. HT 541. Christakos had asked him to compose a letter outlining the events since Adams was hired. HT 541-42. At one point, Falzone and Shactman had a discussion about the FAA complaint and Falzone asked Shactman whether he had been mentioned in the complaint letter to the FAA. HT 543-44. Shactman denied that he mentioned Falzone in the FAA complaint, but would not let Falzone see the document. HT 543-44. Falzone admitted that he went onto Shactman's computer and copied a file because he "was paranoid" stating he was "witness to everything he's doing to Dave [Adams]. He's trying to ruin his reputation, his career…" HT 544. He stated that in hindsight "I shouldn't have done it." But by that time "I didn't believe Scott, I didn't trust Scott, I didn't know if I was the next guy with a target on my back, is he going to make stuff up about me? So that was my thought process there . . . ." HT 544-45. Falzone indicated that he did not communicate anything about what he discovered on Shactman's computer to anyone at Helicopters because it "was strictly for my personal knowledge." HT 547.

On Friday, May 2, 2008, Falzone recalled that Shactman told him he had a doctor's appointment on the following Monday, and might be late for his shift. HT 528-29. Falzone asked Shactman whether he had a backup photojournalist, Shactman replied he did not, but that he was working on it. HT 529. The next work day, Monday, May 5, Falzone called the TV station at 1:50 p.m., as was his normal practice at the beginning of each shift, to say the weather was good, the helicopter was ready, and he also informed the station that Shactman was going to be late. HT 530, 660-61. Due to Shactman's tardiness, Helicopters missed a flight for the TV station that afternoon. HT 531. Falzone received an e-mail from the station expressing displeasure over the missed flight scheduled for 2:20 p.m. HT 531-32; RX-19. Falzone testified that in an effort to respond to the customer's "angry" e-mail, and in the context of the absence of a contract between the TV station and Helicopters, he responded to the station's e-mail saying that he took responsibility for the lapse in coverage, and it would not happen again, and he forwarded the e-mail chain on to Tom Wagner, Helicopters Vice President for customer relations.. HT 532-34; RX-37. Falzone followed up with a separate e-mail to Wagner asking for guidance on how he might handle a similar situation should it arise in the future. Falzone's e-

mail noted he and Shactman were co-workers and he was not an authority figure for Shactman. RX-30. Wagner replied by e-mail that all employees were to notify the home office in St. Louis when they are not going to be at work. RX-30.

D. Testimony of Steve Boatwright

Boatwright is a commercial pilot in airplanes with an instructor rating and an Airline Transport Pilot in helicopters with instructor rating and instrument instructor rating. HT 610. Boatwright owns a flight school called Blue Hill Helicopters that is located in Norwood, MA. HT 610-11; RX-21. Boatwright was friends with Shactman and Donovan. HT 622, 635. Both Shactman and Donovan had keys to Boatwright's office. HT 625. Donovan was also identified and listed on the website for Boatwright's flight school. HT 623. Boatwright said this representation of Donovan on his flight school website was just a "marketing tool" and he admitted that Donovan was not an instructor or a pilot for Blue Hill Helicopters. HT 623-25.

Adams attended Boatwright's flight school in late summer 2007. HT 615. During Adams' training period, Boatwright personally observed Adams fly a helicopter and provided some of Adams' training. HT 615. The check ride for Adams to complete his training at Blue Hill Helicopters for the ATP rating was completed by Joe Brigham, a highly experienced pilot. HT 627-28. After Adams successfully completed his training at Boatwright's school, Boatwright did not again personally observe Adams fly a helicopter. HT 616.

Boatwright denied making any comments to Shactman about Adams' ability to fly an AStar. HT 617-18. Boatwright denied ever telling Shactman that Adams was an unsafe pilot. HT 619. Boatwright said he did not communicate with Shactman, Donovan, or Helicopters about Adams' performance of pre-flight walkarounds. HT 620. Boatwright maintained he only communicated his assessment of Adams to Adams and to other instructors at his flight school. HT 620-21. Boatwright said he communicated to Adams that he thought Adams was not organized and was a little heavy on the power. HT 621. Boatwright said he did have a conversation with Shactman regarding concerns that Shactman had with Adams, specifically, the wearing of a seatbelt and locking down the collective. HT 618-19. Shactman asked if it was a legal requirement to wear a seat belt and Boatwright told him it was. HT 618. Shactman asked if a collective should be locked down during start-up and Boatwright told him that the operating manual says that the collective should be down and locked when the helicopter is started. HT 618. Boatwright denied having a conversation with either Donovan or Shactman regarding Helicopters' hiring Adams. HT 616-617.

Boatwright said he paid his own expenses to attend Eurocopter training in the Fall of 2007 to increase his marketability to fly the AStar helicopter and to increase his chances to gain employment with Helicopters. HT 612. He said Donovan and Kendrick both encouraged him to take the Eurocopter course. HT 613. He had several conversations on an on-going basis with Donovan about the possibility of being hired by Helicopters. HT 613, 633. In fact Boatwright contacted Helicopters at various points regarding employment opportunities. HT 612. However, he stated he realized he did not have the experience Helicopters required. HT 612, 632.

On April 1, 2009, Boatwright sent an e-mail to Christakos distancing himself from the current dispute in which Shactman and Donovan had a part. HT 634; RX-20. He explained he

sent the e-mail because he did not want to be involved in Helicopters' dispute with Shactman. HT 634. Boatwright did not want his friendship with Donovan or Shactman to jeopardize any future employment opportunities with Helicopters. HT 635.

E. Testimony of Jeff Lieber

Lieber testified that he has been the general manager of Helicopters since July 24, 2002, and his brother owns 100% of the company. HT 671-73. He serves as a human resources manager, among his several other duties, and approves photojournalist hiring, with Robin Russell's help. HT 673-74.

Lieber stressed that safety is important to Helicopters and the company takes many safety precautions that it is not required to take. HT 699. Helicopters has a director of safety whose sole job "is to travel around the country, inspect the bases, talk to the pilots, talk to the customers, inspect the equipment, make sure everything is to our standards," and is in charge of the hazard reports. HT 699. Leiber stated that the company expends significant money on training to ensure its pilots are trained and operating safely. HT 700. It does some of the training at its own ground school and Christakos, the chief pilot, is responsible for that aspect. HT 700-01.

Additionally, Lieber explained that there are two sets of FAA regulations, Part 91 and Part 135. HT 701-02. He testified that Part 135 is for air carriers and Part 91 is also flying for hire, taking off and landing in different locations. HT 701-02. He testified that although Helicopters only needs to follow the Part 91 regulations for most of their operations, they follow Part 135 regulations, which is a higher standard in some respects. HT 702-03.

Helicopters acquired some of Helinet's assets and agreed to take over Helinet's existing Norwood, MA operation including the employees in October 2007. HT 705-10, 869; RX-25 at 2. When it assumed Helinet's Norwood operation there were three employees, Shactman, and the two pilots, Donovan and Kendrick. HT 706-07.[19] At the time Helicopters took over the Helinet Norwood operation, Helicopters was already operating out of Beverly, MA, just north of Boston. HT 705-06. Helicopters sent a memo to the former Helinet employees to introduce Helicopters and who they were. HT 708; RX-36; RX-37. Additionally, Lieber sent an e-mail addressed "To Former Helinet Employees," notifying the "new" Helicopters employees of the company website login and all of the information available to the employees on the company website, including personnel and safety documents as well as the Employee Handbook. HT 708-10; RX-25. Lieber testified that the Employee Handbook , RX-1, and the Photojournalist job description, RX-2, were online at the time they brought the employees from Helinet on board. HT 714-15.

Lieber also spoke with each of the Norwood employees about Helicopters employment policies. HT 710. Lieber specifically recalled talking with the Shactman by phone to address his questions regarding the duty hours, lunch break, non-normal duty hour pay, and exempt or non-exempt status. HT 710-12. Lieber told Shactman that Helicopters' policy was that he was "Salary and . . . required to be on call every other weekend as part of your salary." HT 713. Lieber explained to Shactman that on the other two weekends the photojournalist is off, but "if

[19] The TV Station employed Doug Meehan, a photojournalist and on-air personality. HT 706-07. Meehan worked with Helicopters employees as he was the photojournalist on the day shift stories flying with Helicopters' pilots.

you want to make extra money, you can work your weekends off and we'll pay you the $100.00 that we would pay the backup." HT 713. Regarding weeknight evenings, Lieber explained that "[o]n call for evenings is a situation where it's we don't pay to be on call, per se, on weeknights. That's part of the salary. But, if you are called in, you get the $100.00 call-in and the $50.00 a flight hour." HT 713-14; RX-3. Lieber maintained that Shactman was aware that he needed to be available as Shactman's e-mail to Leiber acknowledged "I understand that working weekends and always being available is a part of this job, and a part that in no way I mind." HT 713-14; RX-3, at 2. Later Lieber again explained the on-call requirement, testifying that the photojournalists are on call 24 hours a day for "[s]even days a week." HT 866. Shactman was "only required to work every other weekend." HT 867. Therefore, "every other Saturday and Sunday he was afforded the day off as part of his base salary without having to carry a cell phone and be on call. Every other time, he was expected to carry his cell phone and be on call if the station were to call and request service." HT 867.

Lieber testified that the company uses the same standard in terms of qualifications for hiring a back-up pilot as it does when hiring for a full-time pilot because "[t]hey are flying the aircraft, so they have to meet the same standard." HT 716-17. He noted that Adams was a part-time pilot for Helicopters in its Beverly operation before he came on as a full-time pilot in the Norwood operation. HT 717.

Lieber received an e-mail from Shactman on March 10, 2008, Adams' first day on the job, alleging problems with Adams' flying. HT 716-17; RX-16. Lieber responded by e-mail to Shactman stating he was sorry to hear of the alleged issues and that he needed to figure out what was going on. HT 719. Lieber went to Christakos, the Chief Pilot, and told him to immediately look at the issues Shactman raised. HT 719. Lieber testified that he told Christakos that if a pilot was not wearing a seat belt that was a serious issue. HT 720. Lieber agreed that there was no way to confirm whether or not Adams was wearing his seat belt, after the fact. HT 871.

Lieber testified that he was copied on another e-mail from Shactman on March 18, 2008 regarding an incident with Adams starting the helicopter with the collective unlocked allegedly causing it to rock back and forth on the pad. HT 721-22; RX-43. Leiber contacted Christakos who had also received the e-mail to have him follow-up. HT 722-23. The next day Lieber was summoned by Chistakos to join in a conference call Chistokos was on with Shactman, Adams, and Falzone because it was getting "heated." HT 723. Lieber stated that Christokos was telling the Norwood employees the company was working to determine what occurred, what might be the cause and how to fix it. HT 723. Lieber testified that during the call Shactman said he didn't care, it didn't matter to him what the company was doing, he was not flying with Adams as he didn't feel safe and Adams should be fired. HT 723-24, 893-94. Lieber explained to the group that in response to Shactman's concerns he had called Chuck Koontz, who had been the director of training when Adams was initially hired as a backup pilot for the company. HT 734. He asked Koontz his opinion of Adams's flying abilities and safety as Koontz had tested Adams for Helicopters. HT 734. Lieber stated that Koontz had nothing unusual to say about Adams, said he did pre-flight inspections, and was "good to go." HT 735.

Lieber recalled Shactman said that he wanted Leiber to "move Dave [Adams] on," to which Lieber responded that there was no solid proof the things reported are occurring, the issues might not be flight-related but rather process-related, and that it is unreasonable to fire Adams

based simply on Shactman's view. HT 724-25. Lieber found Shactman's statements during the conference call that Adams should be fired, to be very strong, especially as progress had been made in resolving Shactman's issues. HT 894. Lieber realized he had to defuse the situation because no progress was being made in the discussion, he had Shactman unhappy, and Adams was incredibly reserved. HT 725. Recognizing that the company had a he said-she said situation he asked Shactman if he was comfortable flying with Falzone, to which Shactman responded affirmatively. HT 725. Leiber then assigned Shactman to fly with Falzone until Helicopters got more information and worked through the issue. HT 725. Lieber recalled Shactman responded "the company could do what you want but I'm not flying with Adams," to which Lieber said "let's just get you going with Falzone and we will continue to work on this." HT 725. Lieber could not remember specifically how long that schedule would be in place, but he testified it was weeks, not days. HT 726-27.

Shortly after the second conference call ended, Lieber received a call from Falzone in which Falzone reported that after the meeting Shactman "got up and he was not a happy camper, and basically said Dave's [Adams] got to go, and slammed the door shut, and was angry." HT 727-28. Lieber called Shactman to talk with him and let him know he could not loose his cool, Shactman denied he did anything but leave the room following the conference call. HT 728. Lieber reiterated his interest in having all of them try and work together as a team and see if they can get the issues resolved. Lieber stated Shactman told Lieber he wasn't interested in resolving it, Adams had to go, he wasn't going to fly with Adams no matter what the company found. HT 728. Lieber told Shactman "that's a very rigid and unrealistic response. I said, you know, you don't give me any options, there's no option here." HT 728. Lieber told Shactman he could not fly indefinitely with Falzone as the pilots are hired with the understanding that the shifts rotated and it was unfair to require Falzone to fly only the afternoon shift permanently. HT 728-29. Lieber testified that he told Shactman "if we get to the end of this, if we look at all of this and we determine that Dave is safe to fly, then, you know, you're going to need to make a decision, you know, because at some point in time you're going to have to go with him if we say he's good to go." HT 729. Lieber told Shactman that if the company looked at all this and determined Adams was safe to fly, then Shactman was "going to have to make a decision to fly or to move on." HT 728, 872-73.

Lieber recalled that a couple of days after his telephone call with Shactman, he learned that Shactman failed to respond to a TV station call for a flight on March 18, 2008. HT 729-30. Prior to learning of the missed station call, Lieber did not know that Shactman was not at work during his full shift. HT 731-32. Lieber testified that he has no way of knowing whether a pilot or photojournalist is at work because he is at a different location, and he has to trust them. HT 731. Lieber directed Russell, to call Shactman to find what happened regarding the missed flight, and Lieber called Adams to get his perspective on the incident. HT 730. Lieber said that Russell called him after speaking with Shactman and told him that Shactman told her he was at the gym and did not know that he was supposed to be on call during the week. HT 730, 733-34; RX-34. Lieber testified that he was not happy hearing Shactman's explanation, because he and Shactman had already discussed the on-call policy and Shactman had the Employee Handbook. HT 730-31. At his request, Russell sent Lieber an e-mail on March 24 confirming what she had just told him regarding her conversation with Shactman on the missed flight. HT 816; RX-34.

After learning of the missed flight and hearing the explanation Shactman gave Russell, Lieber called Falzone to ask him whether the Complainant was remaining at work until his shift ended at 10:00 p.m. HT 741-42. Falzone told him Shactman was leaving around 6:00 p.m. HT 741-42.

According to Lieber, Christakos was talking with him throughout this period discussing the issues Shactman raised, what has been done to handle the issues, and told him "I think …[Adams] is - - it's working out okay." HT 736. Lieber said the company decided to return to rotating shifts on or about April 7, 2008. HT 736-37. Lieber asked Russell to call Shactman to tell him that the investigation was completed, Adams was cleared to fly, that the company was going back to rotating shifts, and ask whether Shactman was going to go back to flying with Adams on a rotating shift basis. HT 737, 874. Russell reported back to Lieber that Shactman "didn't want to go back to rotating shifts." HT 737. Lieber explained this created a "tough spot" as he had Adams who was checking out, and Shactman saying "tough." HT 738. Lieber testified the company decided to stick with his previous statement to Shactman that if the company decided Adams was safe and Shactman still declined to fly with him, Shactman would have to make a choice to fly on the rotating schedule or move on. HT 738.

Putting the information he had received suggesting Shactman was not remaining at the airport for his full shift together, Lieber discussed the possibility that Shactman was leaving early with Russell, and directed Russell to make sure that Shactman was not leaving early. HT 735-36, 742. Lieber then received an e-mail from Russell on April 10, 2008 stating she had tried to reach Shactman that afternoon but got his voice-mail and that she would try him again the next day. RX-35. Lieber's e-mail reply to Russell was that Shactman was "real close to getting canned…." HT 736; RX 35.

On April 11, 2008, Lieber received an e-mail from Shactman informing Lieber that he had filed a complaint with the FAA on April 9, 2008. HT 739; RX 17A. Shactman's e-mail did not include a copy of the FAA complaint. HT 739, 743-45; RX-17B. Lieber was not aware of the FAA complaint on April 10, 2008, when Russell sent him the e-mail indicating she was unable to reach Shactman during his shift. HT 740-41**.** Lieber testified that once the company learned of the FAA complaint the company decided to see what the FAA can find and "decided we're not going to terminate him while the FAA is doing their investigation." HT 740.

A couple of days later, Lieber followed up on his concern Shactman was not remaining at work for the duration of his shift. He sent Shactman an e-mail on April 14, 2008, indicating the Company was receiving word that he was not remaining at his duty station during his shift, and reminding him he was required to remain either with the helicopter or in the office. Lieber's e-mail stated "let this e-mail serve as your written notice to comply with this work requirement in the future." HT 473, RX-18. Lieber testified that he did not call Shactman to discuss the issue, but he sent the same letter by certified mail to his home address. HT 875. Lieber testified that the FAA complaint had no bearing on sending the warning. HT 876-77. Lieber said that between March 19, 2008, when he spoke with Shactman after the conference call that same day and the day Shactman was fired, he did not speak with Shactman over the telephone because his "efforts to try to have open communication with Mr. Shactman . . . were unsuccessful." HT 876.

Lieber knew that Chistakos was working with the FAA to address the complaint Shactman filed. HT 742. At some point thereafter, Lieber learned from Christakos that the Principal Operations Inspector at the FAA who was investigating Shactman's complaint, had called Christakos to tell him that Helicopters did everything that they needed to do correctly, and Helicopters should be receiving a letter to that effect soon. HT 742-43. Lieber received the letter from the FAA indicating that further inquiry of the complaint was unwarranted on April 28, 2008 and that same day he sent Shactman an e-mail attaching the FAA letter. HT 745; RX-28. The e-mail was dated April 28, 2008, and the FAA letter was dated April 21, 2008. RX-28. Lieber asked Russell to call Shactman to see how he felt about what the FAA had to say. HT 746. Lieber testified that Russell reported back to him, and said that Shactman was "indifferent" to the FAA's response. HT 747.

Lieber learned Shactman missed a second flight on May 5, 2008 when he was copied on a series of e-mails which began with an e-mail complaint from the TV station to Falzone regarding the missed flight for a breaking story. HT 747; RX-30. Lieber indicated that at that point, he decided that Shactman needed to move on from the company, "without any more delay." HT 748. Lieber said the second missed flight on May 5, 2008 was "the last straw," the TV station was "at their wits' end," and Helicopters could not "jeopardize this contract." HT 749-50. Lieber concluded the Company was "going to need to make an immediate decision to make a chance, whether we have somebody there or not. So . . . we're going to have to fly somebody up there to cover that program." HT 749-50. Lieber called Shactman on May 13, 2008 to tell him his employment was being terminated. HT 750. Lieber stated Russell did not communicate this decision to Complainant because "[s]he doesn't do terminations." HT 750. Lieber told Shactman his employment was being terminated. HT 750. When Shactman wanted to know why, Lieber replied "he wasn't performing the job to the expectations of the company. He wasn't where he needed to be when he needed to be, he wasn't getting along with his coworkers, and he generally had a defiant attitude. He wasn't a team player." HT 751. Regarding Shactman's "defiant attitude," Lieber explained that this "[a]bsolutely" did not mean that he was unhappy that Shactman had made complaints or went to the FAA—Lieber testified that it was "a non-factor." HT 751. Lieber testified that he "felt like the communication had broke down after our discussion on the 19th after the second conference call. And at that point it was like it's difficult - - I don't know what to communicate to this person." HT 751-52. Lieber indicated that upon Shactman's request, he put the stated reasons for the termination in a letter. HT 752, 882-95; RX-31. The termination letter articulated the following reasons:

> Several job performance issues lead to your termination, in particular: you failed to respond to a page or call while on stand-by status; you failed to remain at your workstation or with the aircraft during duty time delaying our response time; you failed to secure a back-up photojournalist to cover your shift when on sick leave for a doctor's appointment, leaving the program uncovered and missing a story and you had a confrontational attitude and poor working relationship with your co-workers.

RX-31. Lieber said that the first reason given related to the March 18, 2008 missed call, and the second reason was for the May 5, 2008 missed call—which was the "last straw"—and the "poor working relationship" was a "catch-all" which included his not getting along with co-workers and unwillingness to rotate with the pilots. HT 751, 890-95.

Lieber reported that Helicopters had terminated other employees for the following safety-related reasons: photojournalist's complaint of a pilot losing control of the aircraft as it rotated a few times before regaining control; a pilot losing control at a higher altitude and over-torquing the aircraft; pilot not being able to perform approaches, maneuvers, and landings appropriately; pilot being distracted from inappropriate issues outside of work, even though a good pilot; pilot failing to go through certain items on the start-up, over-tempting the aircraft on start-up, popping floats on the landing pad after warnings not to do so; corroborated complaint by a photojournalist of a pilot entering a cloud deck; a pilot being careless in his concern for equipment and overall safety of the operation, lackadaisical approach towards handling the helicopter, and damaging the helicopter. HT 676-96. Lieber also indicated that pilots and non-pilots had been terminated for non-safety-related reasons, such as: a pilot's overall demeanor, temper, and attitude; a photojournalist's tardiness and lackadaisical attitude; and a photojournalist's lackadaisical attitude towards the schedules, rules, and responsibilities to stay at the work site. HT 696-98.

F. Testimony of Dave Adams

Adams lives in Holbrook, MA. HT 764. He has been a helicopter pilot for twenty years, and he holds an airline pilot transportation certificate (ATP), he is a helicopter flight instructor, and has airplane single-engine instrument privileges. HT 764. In the last ten years, Adams had worked for several companies flying helicopters. HT 765. He flew charters, transported people and equipment to oil rigs in the Gulf of Mexico, and flew on television station contracts. HT 765.

Adams first flew for Helicopters in May 2004 for a period of six months to cover a contract during the time the original pilot was ill. HT 766. He was hired by Helicopters a second time as a part-time pilot at the Beverly, MA operation in the Fall of 2007. HT 766-67. He received training and took a flight test with Chuck Koontz, Helicopters' chief pilot at the time. HT 766. As of October 2007, Adams had approximately 400 hours of AStar time. HT 766. Adams spoke with Christakos about the full-time position at Norwood and was hired. HT 769-70.

Prior to Adams' start and prior to his attending EuroStar training, Christakos called him to ask if knew Shactman. Adams said he did not, and recalled that Christakos told him that Shactman did not want him to work at Helicopters. HT 771. Adams recalled that Christakos inquired about an incident that occurred when Adams was flying for Wiggins Airways. HT 771-72. Adams told Christakos that an engine chip light came on in-flight when he was "essentially" at a reporting point "a few miles away" from the airport in Norwood. HT 772. Adams testified that he continued on and landed at the airport. HT 773. The protocol was to "[l]and immediately," and he testified that he followed the protocol. HT 773. When asked how far he was from Norwood, Adams testified that "[t]he Industrial Park is probably - - well, from the actual physical runway, it's less than a quarter of the mile. From the center of the runway complex, maybe half a mile." HT 773. He denied telling anyone, including Donovan, that he was over Boston at the time, and he was "[p]ositive" that he was not over Boston. HT 773.

Adams reported early on his first day as a full-time pilot with Helicopters at the Norwood operation. HT 774-75. He had made arrangements with Falzone to go over the pre-flight inspection, and to take a brief flight to re-familiarize himself with the particular helicopter he would be flying, before his shift began. HT 774-75. The two pilots conducted a detailed pre-

flight and walk-around, and then went on a brief flight so Adams could get the feel of the aircraft. HT 773-75, 778. He testified that the TV station called Helicopters while Adams and Falzone were in the air, so Falzone called Shactman to be ready to go when they returned from the flight. HT 774-78. Adams testified that when they returned to the ramp, Shactman got in the helicopter and did not say hello or ask where they were going—"[h]e never really said a word. He just got in and closed the door. I had to ask him if the door was closed, if it was ready to go, and he just nodded his head. He didn't say anything." HT 776. Adams testified that Shactman's body language was "rigid," he refused to look at Adams, and did not speak other than to respond to a direct question or statement from Adams. HT 777-78.

Adams said that he had done a detailed pre-flight inspection with Falzone before they went up for their brief flight at the beginning of his first shift. HT 778. Adams said he was "positive" that he was wearing a seatbelt on his first day at Helicopters. HT 778-79. With respect to the horn that sounds when the blades are rotating too slowly, Adams explained that if the rotor blades are turning too slowly it could cause a stall. The warning horn comes on if the rotor blades reach a certain minimum RPM. Because the horn is very loud, he said that some pilots turn the horn off when doing the hydraulic check starting up and turn it back on just prior to lift off. HT 779-80. He could not remember whether he turned the horn back on prior to lift off the first day with Shactman, but he testified that he usually turns it back on. HT 779-80. Adams said that the collective was in the locked position. HT 780.

Adams first became aware that Shactman had complained about him after their flights on his first day, when Christakos called to tell him he had received a complaint. HT 780. Adams said that Shactman never talked with him directly about his concerns. HT 780-81. The next day, March 11, 2008, Adams was present along with Falzone and Shactman at the Norwood office and participated in a conference call that Chistakos initiated to address the issues Shactman raised in his e-mail complaint. HT 781. Adams recalled that during this first conference call Christakos was trying to find ways to resolve Shactman's complaints. Adams stated that he answered questions and they reviewed the fact that he and Falzone had done a pre-flight before his shift began the day before. HT 782. Christakos directed Falzone to review the pre-flight inspection with Adams. HT 782. Adams testified that during the first conference call, Christakos indicated that he could be terminated if there were issues found with respect to Shactman's complaints. HT 808. For the rest of that week, Adams flew flights with both Shactman and with Meehan, the other photo journalist and on-air reporter for the TV station who flew the morning shift. HT 782-85. Adams said Shactman's demeanor of rigid body language and non-communication continued. HT 787. Adams said Shactman never discussed any of his concerns with Adams directly in the week between the first and second complaint. HT 787.

Adams learned of Shactman's second March 18 complaint in another call from Christakos. HT 787. Christakos then held a second conference call the following day, March 19 with Adams, Shactman and Falzone. *Id*. The focus of the second complaint and conference call was the collective. HT 787. Adams denied Shactman's statement the helicopter shook back and forth. Adams indicated that Christakos asked Shactman to describe what happened and the position of the collective. HT 788. Adams stated that Christakos then went out to an AStar aircraft at his location and tried to recreate the alleged condition Shactman reported, but was unable to do so. HT 788. During this call Shactman called Adams a liar and Adams couldn't remember but stated "maybe" he called Shactman a liar HT 788-89. Adams acknowledged that

he was surprised by the accusations which he termed "unfounded," stating he had never been accused of things like this in all his experience. HT 789. Adams agreed that Shactman said he would not fly with him and that he should be fired. HT 789-90. Adams said he felt under attack and was forced to defend himself against something he did not do. HT 790. At the end of this second conference call, Lieber, who had joined the call at some point, decided that Falzone would fly with Shactman and Adams would fly with Meehan, but "[t]here was no length of time discussed." HT 791.

On the evening of March 18, Adams was in the hanger at the airport, when he received a call from the station at approximately 9:54 p.m. wanting a flight. HT 791-92, 795-96. He testified that the hanger is approximately 5,000 feet from the office, and he had to drive between the two. HT 800-01. When he got to the office, Shactman was not there. HT 801-02. He testified that his first call to Shactman was at 10:06 p.m., which was after the shift ends. HT 798-801. Adams called Shactman's cell phone three times and left a voice-mail message. HT 792. Shactman did not respond until later that evening, missing the TV station's call for a flight. HT 793.

Adams said that these events have been difficult, explaining that he is employed in a small industry, most people know one another, and it is a difficult and lengthy process to establish one's reputation and he feared these events would impede future employment options for him. HT 794.

G. Testimony of Robin Russell

Russell lives in and works out of Florida. HT 814. She became lead photojournalist at Helicopters near the end of 2007. HT 814-15. She described that the lead photojournalist position is a supervisor position helping as a middleman with the company. HT 814. Prior to becoming lead photojournalist, Russell had worked as a photojournalist for Helicopters for approximately eight years. HT 814.

On March 21, 2008, Russell called Shactman at Lieber's instruction in response to a complaint from the TV station that Shactman was unavailable for a flight on the evening of March 18, 2008. HT 816; RX-34. Russell wanted to hear Shactman's view of what happened regarding the missed flight on March 18th. HT 817; RX-34. Shactman told Russell that he was on a different side of the airport from the pilot when the call came in, that he had gone to the gym after his 10 p.m. shift had ended, and that he didn't respond to the call until later on. HT 818; RX-34. Shactman claimed he was not aware that he was supposed to be on call after his shift ended. HT 819; RX-34. Russell told Shactman that everyone was supposed to be on call after their shift during the week as part of their salary and that it was in the Employee Handbook. HT 820, 833. She explained that it was his responsibility to cover the flight call and service the customer and the expectation was to return to the airport and take the flight. Russell told Shactman that he was supposed to be on call after his shift. HT 819. According to Russell, under Helicopters' policy, Shactman should have been on call from the conclusion of his 10 p.m. shift until the start of the 5 a.m. shift the next morning. HT 833. Russell called Lieber to relay her conversation with Shactman and, at Lieber's request, she sent an e-mail summary of her March 21 conversation with Shactman to Lieber and Christakos on March 24, 2008. HT 820;

RX-34.[20] Russell was not aware that Shactman had raised safety concerns about Adams when she spoke with him on March 21. She first learned of such complaints a few days after March 21, when Lieber told her Shactman was raising some concerns regarding Adams and they were investigating. HT 821. On cross-examination, Russell acknowledged she never saw a written document outlining Shactman's on-call hours. HT 836-37.

On April 7, 2008, Lieber asked Russell to call Shactman to see what his position was on flying with Adams, as the company had decided Adams "was clear to fly." HT 822, 839. Later that day, Russell called Shactman and told him she had received a call from Lieber and informed him that Helicopters had reevaluated Adams and "found that he was fine to return to rotation." HT 823. Russell asked Shactman if he had changed his mind about flying with Adams and Shactman said "no, I will not fly with Mr. Adams." HT 823. Russell does not recall Shactman saying he would get back to her. HT 840, 843.

Russell did not play any role in the investigation of Shactman's safety concerns. HT 821, 827. It was her understanding on the date of the April 7 call to Shactman that the safety investigation had concluded. HT 839.

On April 10, 2008, Russell again called Shactman at Lieber's request to make sure Shactman was on his shift as Lieber had concerns the Complainant may be leaving early. HT 824-25; RX-35. When Russell called Shactman, she got his voice-mail and left a message asking Shactman to call back. HT 825. Russell did not hear back from Shactman and e-mailed Lieber to inform him that she had not heard back from Shactman. HT 825; RX-35. She acknowledged she did not check what the flight times were in Norwood before she reported to Lieber that she had not heard back from Shactman. HT 843-44. Russell recalled Lieber was concerned about leaving the customer unstaffed. HT 825. The two of them discussed the possibility of bringing in different photojournalists should Shactman be terminated. HT 825. Russell started to call back-up photojournalists to see if they were available to fill in if they were needed. HT 825-26.

On April 28 and April 29, Russell and Shactman exchanged a series of phone calls. HT 826; RX-40. Lieber had asked Russell to call Shactman to let him know that the FAA had dismissed his charges and to see if Shactman had changed his mind about flying with Adams. HT 826-27. Over the course of the April 28 and April 29, 2008 phone calls, Russell informed Shactman that the FAA had found Adams able to return to the rotation, the company was going to put Adams back into the pilot rotation, and asked Shactman if he had changed his mind about flying with Adams due to the FAA findings. HT 827. Russell reported that Shactman was unhappy and said that he would not fly with Adams. HT 827. Russell told Shactman she would report back to Lieber and let him know Shactman's decision. HT 827.

At the time of these April 28 and April 29 calls, Russell understood that there had been no final decision to terminate Shactman—in other words, "[i]t was put on hold." HT 847. Russell testified that she did not know specifically when it was decided that Shactman was to be terminated, however, she knew "it was after the FAA finding and Mr. Shactman would not fly with Mr. Adams." HT 847.

[20] She re-sent this e-mail to Lieber and Christakos on April 11, 2008 on Lieber's request. HT 820.

H. Testimony of Kirt Kendrick

Kendrick is a pilot for Grant Telecommunications, and has been flying since 1983. HT 899-900. He has an ATP fixed-wing pilot certificate and commercial instrument pilot certificate for helicopters. HT 900.

He worked for Helicopters until January of 2008 along with Donovan, Shactman and Meehan. HT 901.[21] Kendrick knew Adams because he flew in the same area as Adams, covering news stories. HT 902. Kendrick testified that he never had any problems with Adams's safety or flying practices, but testified that Donovan had issues with Adams' safety. HT 903. Kendrick testified that he never communicated to anyone that he had safety problems with Adams or ever tried to avoid him in the air. HT 905. Kendrick did state that he had issues with Mark Smith's flying practices—in particular, Smith darted in and out of the flying space they would both be in—so Kendrick would go to a higher altitude so there would be no issue. HT 904. Kendrick testified that Donovan also expressed his opinions that Smith was unsafe. HT 906.

Kendrick recalled that Shactman had a conversation with him in which Shactman stated he did not want Adams to work for Helicopters and would rather have Mark Smith. HT 905. Kendrick testified that he told Shactman that was "too bad" because he thought Adams was a better pilot. HT 905.

From October 2007 to mid-January 2008, Kendrick was working full time for both Helicopters and for another company where he was flying fixed-wing planes. HT 911-13. Because he had the two jobs, he acknowledged that at times Donovan would cover his shift at Helicopters. HT 912-13. He agreed Helicopters was not aware of his second job or of his arrangement with Donovan to cover the Helicopters shift. HT 912.

I. Testimony of Nick Christakos

Christakos is Helicopters' chief pilot and director of pilot training. HT 918. He has commercial helicopter and airplane ratings, and 14,000 hours of flight time. HT 918. He has been flying for over 30 years. HT 918-19. Christakos worked for Helicopters at two different times, the first time for six years and most recently, for the past eight years. HT 919. During the first period of employment, he was a line pilot. HT 919. During the current period, he has held the positions of a line pilot, assistant chief pilot, chief pilot, and director of training. HT 919. As the chief pilot, he assists with safety, checks on the pilots for hiring and firing, and makes sure pilot needs are met. HT 919. With regard to safety, he evaluates pilots when Helicopters hires them, and also ensures that they fly safely and handle the equipment safely. HT 920.

Christakos testified when Helicopters is looking to hire a pilot, he calls people he knows in that geographic location, and asks if they know any candidates. If he gets names, he contacts the individuals and asks for resumes. He noted Helicopters does not hire pilots with low flight times. HT 922. In evaluating a potential hire, he reviews resumes, talks to the candidate, determines what training they have or may need. HT 922. Helicopters will bring the prospective

[21] After he left full-time employment with Helicopters in January 2008, he remained a back-up pilot for the company. HT 1074.

pilot to headquarters in St. Louis to train them on the ground with computerized training, and one-on-one training for knowing the aircraft flight manual, pre-flight, the actual flight, and emergency procedures. HT 922-23. At the end of the training, pilots are given a check-ride, which is a flight test. HT 923. Christakos testified that Koontz, the Helicopters trainer at the time, checked out Adams which included going through his records, ground training, and background checks, when Helicopters was considering him for the back-up pilot position in Beverly, MA. HT 924. He explained that Adams was already working for Helicopters part-time in Beverly, and that when he looked to fill full-time pilot positions, he would frequently hire Helicopters' part-time pilots for full-time positions that came open. HT 928.

Christakos testified that in trying to find a replacement for Kendrick when he resigned in January 2008, Donovan suggested that Helicopters hire Boatwright or Falzone. HT 926. Christakos recalled that when Donovan himself resigned a little later, he again recommended Boatwright as his replacement. HT 926. Christakos testified that he told Donovan multiple times that Boatwright was not qualified for the position because he did not meet Helicopters minimum flight time requirement. HT 926.[22] In discussing possible replacement pilots with Christakos, Donovan was critical of Adams, telling Christakos he didn't do pre-flights, flew in weather and had not handled an engine trouble incident properly. HT 956-57, 1066. Christakos viewed Adams was a strong candidate because he was already working for the company, and he had been through the company's ground school. HT 928. Christakos testified that Helicopters uses the same vetting process when hiring back-up and full-time pilots. HT 928.

Christakos checked Adams' records, called Koontz to ask about his check-ride with Adams, called other pilots that knew Adams such as McKenna and Tuttle to see if they had any problems with his flying or generally. HT 929. Christakos also testified that he checked Adams' resume for AStar time, which he had, and saw that Adams had been checked in Helicopters's "JetRanger" and "Bell Helicopters." HT 929. Further, Christakos sent Adams to Eurocopter school before he began as a full-time pilot for Helicopters. HT 934.

Christakos testified that during the process of replacing Donovan on March 3, 2008, he learned from Lieber that Shactman was raising concerns about Adams prior to his being hired. HT 930-931. He called Shactman and Shactman raised the same three concerns, Donovan had raised regarding Adams when he was leaving: Shactman said Adams had had an engine problem, he took off in weather, and he did not do pre-flight inspections. HT 930-31, 956-57, 1066. Christakos viewed the weather concern a non-issue because all companies had different minimums which they can fly in different situations, and the decision as to whether to fly depends on factors such as which direction the flight was going, where the adverse weather was located, and the particular aircraft. HT 931, 1101. Christakos discounted the allegation that Adams did not do pre-flights because "[e]very pilot does a preflight differently. And just to say that you see a guy that doesn't do preflights, jumps in, goes, I discount that." HT 931-32. As far as the last issue about the engine failure, Christakos called Adams to ask about it. HT 932. Adams told Christakos he was not over Boston when the incident occurred, but rather, he was a few miles from the airport, so he went to the airport, landed immediately, and got everyone there

[22] He explained this did not mean that Boatwright was not a good pilot or that something was wrong. It simply meant he did not possess sufficient flight time to meet the Helicopters company requirements. HT 926.

safely. HT 932-33. Christakos testified that Adams did the same thing he would have done in the situation, and the issues were taken care of in his mind. HT 933. Christakos agreed that he did not try to obtain documents relating to the engine failure incident at Wiggins and he did not talk to the owner of the aircraft about what had transpired with respect to the engine. HT 1057-58.

On March 6, 2008, Christakos and Shactman had another phone conversation regarding the names of individuals Shactman gave him regarding Adams. HT 1054-55. Christakos did not tell Shactman that Adams was at the Eurostar factory course by that time. HT 1055.[23] Shactman provided Christakos the names of three individuals Donvan, Musgrove and Boiie to contact regarding his concerns with Adams as a pilot. HT 956-60, 1054-55. Christakos attempted to speak with Musgrove but they never connected, he did not speak with Boiie because he did not know him or his qualifications. HT 958-60. Christakos did speak with both Donovan and Kendrick who had given him conflicting comments about Adams. HT 958-60, 1007. He also spoke with Kevin Tuttle and John McKenna, pilots he knew in the Boston area as they worked for Helicopters at its Beverly operation. HT 958-60, 1007.

On March 10, 2008, Lieber forwarded to Christakos an e-mail he received that day from Shactman which made several complaints against Adams based upon Shactman's flights that day. Lieber instructed Chistakos to look into Shactman's concerns. HT 935. Chistakos first called to talk to each of the Norwood employees. HT 994-97. He asked Shactman about the complaint, asked Falzone whether he has had a problem with Adams, and called Tuttle again. HT 936. When he spoke with Shactman prior to the conference call Shactman told him that Adams did not have any AStar time. HT 945. Christakos corrected Shactman, telling him that Adams had more than 400 hours of AStar time. HT 945. Then, Christakos called Adams to get his side of the story. HT 936. They talked about each issue in the complaint—the seat belt, the light, preflight procedure, and the collective. HT 996. Christakos acknowledged that each of these were potential safety issues. HT 1059. Christakos called Shactman back to report what he found out from Adams. HT 998. Following that, Christakos initiated a conference call with Shactman, Falzone, and Adams to discuss each of the items in Shactman's complaint. HT 936-40.

Christakos recalled that during the March 11 conference call, the pre-flight and the hydraulic test issues were discussed. HT 946. Christakos directed Falzone to come up with a new pre-flight checklist that was easier to follow; he "had [Falzone] go out with Dave [Adams] and do a preflight and go through the start-up procedure." HT 999-1000. Christakos instructed both pilots to do the checklist for every flight, even though Adams had denied not doing a pre-flight procedure. HT 947, 999-1000. Christakos explained that the hydraulic test issue is a gray area, some people check hydraulics every day, and some do it before each flight. HT 946, 999-1000. Christakos directed Falzone and Adams to check the hydraulics before each flight. HT 946, 999-1000. Christakos believed that Shactman was receptive to the discussion in the conference call. HT 947.

[23] Christakos was unaware at that point that Shactman had called the TV Station, the company's client, to complain about Helicopters hiring Adams. HT 930-31, 992.

As for the collective lock issue, Christakos noted that it is a known issue with the AStar. HT 940. There was an alert service bulletin ("ASB") on the collective lock for the AStar helicopter. HT 940. The ASB, approved on September 25, 2003, notifies pilots and maintenance of the following:

> During the preflight hydraulic test with the collective lever locked in the low pitch position, with the rotors spinning, the collective lever got unlocked from the low pitch position and moved upward to the high pitched position. This led to untimely takeoff of the aircraft, which then overturned and was seriously damaged. The unlocking is imputed to excessive wear on the lock. ….

RX-45. Christakos explained that when the hydraulics come on, the collective goes down a bit and can pop out of the lock, so pilots guard the collective. HT 940, 997. Christakos discussed the collective issue with the group during the conference call. HT 941-44. When he heard about the collective issue Christakos checked with Jule Boyer, Helicopters's maintenance person, who said that he was aware of the issue with the collective lock, maintenance had checked it at the last scheduled maintenance and said that the "lever in this particular aircraft is in tolerance, which means it's not so far out that it has to be replaced, but it is a little bit loose." HT 674, 942, 1021; RX 44 (006). But it was an issue Helicopters maintenance would address at the next scheduled 100-hour maintenance, and if it needed to be replaced, it would be. HT 942, 1021-22. Christakos testified that the communication to the group was that the collective was in tolerance, but there is a notice circulating among pilots and maintenance crews explaining that there was a problem with the collective on that model of helicotper, and either way, this was going to be checked and sent off to be fixed at the next 100 hour maintenance. HT 1021-22. Christakos described Shactman's reaction to Christakos' explanation of the preexisting problems with the collective as follows:

> The first time, it was, okay, let's move on. The second time when he didn't accept my explanation of what may be happening or where his collective was, it was more I don't believe you, I don't trust your - - I don't believe your judgment or whatever . . . .

HT 963, 1022-23.

At the end of the first call Christakos stressed to the group that they were a team, communication between the photojournalist and the pilot was important for safety and if they took the actions that he directed, "and everything was going good, nobody would have any problem with Dave Adams, that he was safe to fly." HT 1002-03. Christakos acknowledged that he also indicated that a pilot could be fired or receive additional training for safety issues. HT 1059-60.

On March 18, 2008, Christakos received a second e-mail from Shactman complaining that Adams started the helicopter with the collective unlocked causing the aircraft to rock violently on the pad. HT 950. He called Shactman to talk about it, and then he arranged a second conference call the next day. HT 950. Christakos testified that during the second conference call, Shactman acknowledged that Adams was doing hydraulic checks, using the checklist, completing a pre-flight, and wearing a seatbelt, all items he had complained about in his first e-

mail to Lieber on March 10. HT 1009. Christakos testified that the issues from the previous week had been taken care of "[e]verybody is doing what I asked them to do." HT 951. Christakos told Shactman that he "called people and everything is - - he's looking good, he's - - you know, I called my people that I knew and trusted and tried to get a hold of people that - - he had sent me names and I tried to get a hold of them." HT 1006. Christakos was not successful in reaching two of the individuals Shactman had suggested he call, but believed he had spoken with enough people to conclude Adams was a safe pilot. HT 1006. He also spoke with Adams' former employer Peavey, the chief pilot at Wiggins, who indicated Adams was a good pilot. HT 964-65.[24] Christakos testified that when he told Shactman about his conversations with others regarding Adams, Shactman said "it didn't much matter." HT 1007-08. Shactman had the same response when he again explained the issue with the collective. HT 1014-15.

The focus of the second conference call on March 19 was the collective and the helicopter rocking on the platform. HT 1009. Christakos explained that the collective would not make the helicopter rock back and forth, but just up and down. HT 951. He explained that the cyclic, which makes the helicopter go in whatever direction you want it to go, might cause the rocking because it might have been a little bit forward. HT 951. Christakos testified that when the helicopter rocks for him, the problem is typically that the cyclic is forward a bit, and to correct the rocking, he puts it back in the center—or neutral. HT 952. When Christakos explained this in the conference call, Shactman "didn't believe it, it was all about the collective," for him. HT 1012. Christakos said they again discussed the fact that the collective lock was within tolerances, but there is an ABS bulletin and they will check it again during scheduled maintenance. HT 1022. To further address Shactman's concern regarding the collective, Christakos testified that he went out to an AStar at his location where he tried to replicate the position that the collective was in. HT 954-55. Once he got back into the office and the call, he told Shactman that if the collective was in the position Shactman described, then the helicopter would be flying. HT 954-55. Christakos testified that Shactman did not agree with that conclusion, without expressing the rational or basis for his disbelief, he kept insisting the problem was Adams. HT 1014, 1022-23. Christakos noted he was again in a he said-she said situation with Shactman saying one thing happened and Adams denying the allegation. HT 954. At that point, the conversation got heated with allegations of "liar" going back and forth and Christakos summoned Lieber to join the call. HT 954-55. Christakos recalled that Shactman was saying Adams should be fired. Christakos said Falzone suggested he fly with Shactman for a while and let Adams fly with Meehan and see how things work out in an effort to work as a team. HT 955-56. Christakos recalled Lieber thought Falzone's suggestion was a good one and he directed Falzone to fly with Shactman and Adams would fly with Meehan for a period of time. HT 956.

Christakos began looking into or investigating Shactman's concerns before the first telephone conference, and it "was something that continued after March 19, 2008 . . . all the way through April 6 of 2008." HT 1061. He explained that after the March 19, 2008 phone conference, his "investigation . . . is into a monitoring mode of what's going on." HT 961, 1023-24. He monitored Adams by calling and talking with Adams, he talked a few times with Meehan

[24] Later during the FAA investigation, and at the FAA's request, Christakos asked Peavey to put the comments he had made previously to Christakos regarding Adams piloting ability in writing. HT 965-66, 1028. Peavey did so and Chistakos gave his letter to the FAA. HT 966, 1028; RX-32.

the other photojournalist flying exclusively with Adams during this period. HT 961, 1023-24. Meehan told him there were no issues with Adams. HT 961, 1023-24. He also spoke with Falzone to see if anything out of the ordinary was occurring. HT 961, 1023-24. Christakos noted that problems in Boston [Norwood] "go away" with the change in pilots. HT 961. His assessment was that he "could not find anything that substantiated what Scott [Shactman] was saying. And we did take those steps to improve the issues that were there." HT 962.

After a period of time monitoring Adams in which there were no incidents, Christakos reached the conclusion that Adams was a safe pilot, and he communicated that to Lieber. HT 1024. He said Shactman's refusal to fly with Adams regardless of the Company's actions created a "problem" for Helicopters. HT 1030. Christokos explained "this is a two pilot operation here. We need the ability to swap pilots." HT 1030. He did not call to tell Shactman the Company had decided Adams was okay to fly, because by the end of the second conference call "it was clear that Mr. Shactman wasn't hearing or listening or even concerned what we had to say, and more than likely whatever we did didn't much matter." HT 1024. He viewed Shactman's position at the end of the second conference call unreasonable as the Company had addressed all of his concerns and the collective lock was scheduled for repair. Christakos testified he did not visit the Norwood location during this period because the concerns did not have anything to do with safety while flying in the air. HT 1025-26.

On cross examination, Christakos acknowledged that in his letter the FAA investigator, Danny Little, on April 11, 2008, he represented that Shactman had been "in a helicopter for less than 6 months." RX-33A, at 2; HT 1046-48. Christakos testified that at that time he did not know that Shactman had been in a helicopter longer than six months. HT 1047-48.

VI. Parties' Contentions

Shactman contends that he engaged in protected activity when he raised concerns "relating to the reputation for safety (or lack thereof) of the helicopter pilot, [Adams] and the actual safety practices of the pilot as observed and experienced by the Complainant both before and during the pilot's employment with Helicopters." Compl. Br. at 8. He asserts he is not required to identify any specific FAA regulation, rule or code as the basis for his complaint; only that he raised legitimate and genuinely held beliefs that there were safety issues at Helicopters. Compl. Br. at 7-9. Shactman argues that Helicopters failed to take his safety concerns seriously, did not adequately investigate his complaints and failed to inform him of the results of any investigation. Compl. Br. at 10-15. Shactman maintains that once he made his complaint to the FAA, the company then contacted individuals who gave supportive statements about Adams and the company began to document performance issues and it fired him for making his internal complaints to the company and to the FAA. Compl. Br. 8, 13. Complainant argues that this establishes the discriminatory nature of Helicopter's actions. Compl. Br. 9, 16.

Helicopters argues that the Complainant failed to establish he engaged in protected activity because his initial complaints were not made in good faith, and even if they were, his complaints lost their protected status over time because Helicopters addressed and resolved all of his concerns. Resp. Br. 41-51. Helicopters contends, that even assuming Shactman engaged in protected activity, any protected activity was not a contributing factor in the Company's decision

to discharge him. Resp. Br. 51-58. Finally, Helicopters argues that it would have taken the same adverse action absent any protected activity. Resp. Br. at 58.

VII. Conclusions of Law

A. Credibility Determinations

I have considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative, and available evidence and have attempted to analyze and assess its cumulative impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51 (7th Cir. 1971). The Court stated:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe… Credible testimony is that which meets the test of plausibility.

Id. at 52.

In weighing the testimony of witnesses, I have considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony was supported or contradicted by other credible evidence. *Ass't Sec'y & Mailloux v. R. & B Transp., L.L.C.,* ARB No. 07-084, ALJ No. 2006-STA-012, PDF at 9 (ARB June 16, 2009). It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14 at n.5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. *Chen v. Dana-Farber Cancer Institute*, ARB No. 09-058, ALJ No. 2006-ERA-9 PDF at 8-9 (Mar. 31, 2011). In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic and probability and plausibility and the demeanor of each witness.

B. Legal Standard and Burdens of Proof Under AIR 21

AIR21 prohibits an air carrier, or contractor or subcontractor of 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 an employer or the federal government "information relating to any violation or alleged violation of any FAA

order, regulation, or standard or any other provision of federal law relating to air carrier safety…." 49 U.S.C. § 42121(a); 29 C.F.R. §§ 1979.100, 1979.102(a); *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 PDF at 6 (ARB Jan. 31, 2007); *see also Vieques Air Link, Inc. v. United States Dept. of Labor*, 437 F.3d 102, 107 (1st Cir. 2006) (*citing* 49 U.S.C. § 42121(a)); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 PDF at 1 (ARB Jan. 31, 2006).

To establish a violation of AIR21, a complainant must prove: (1) that he engaged in protected activity; (2) that the employer was aware of the protected activity; (3) that he was subjected to an unfavorable personnel action ("adverse action"); and (4) that the protected activity was a "contributing factor" in the adverse action. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 PDF at 7; *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-35 PDF at 5 (ARB June 29, 2006); *Brune*, ARB No. 04-037 at 13; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 PDF at 6-7, 9 (ARB Jan. 30, 2004).

The Department of Labor's Administrative Review Board ("ARB") has approved the Title VII burden-shifting framework for use in AIR21 cases "where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence." *Brune*, ARB No. 04-037 PDF at 14; *Peck*, ARB No. 02-028 PDF at 10. If the complainant shows an initial inference of discrimination—that the protected activity was a contributing factor in an adverse employment action—the respondent may produce legitimate non-discriminatory reasons for taking the adverse action. *Brune*, ARB No. 04-037 PDF at 14 ("The ALJ (and ARB) may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action.") (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). If the respondent articulates legitimate reasons, the complainant may prove that they are pretext. *Id.* The complainant prevails, in light of this framework, if the complainant proves by a preponderance of the evidence that the respondent has discriminated and therefore, has violated AIR21. *Id.*[25]

The burden of proof shifts to the employer only if the complainant has proven discrimination by a preponderance of the evidence. *Id.* at 14. Thereafter, the employer may avoid liability under AIR21 if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 PDF at 7; *Clark v. Pace Airlines*, ARB No. 04-150, ALJ No. 2003-AIR-28 PDF at 11 (ARB Nov. 30, 2006); *Rooks*, ARB No. 04-092 PDF at 5; *Brune*, ARB No. 04-037 PDF at 14.[26]

---

[25] "Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune*, ARB No. 04-037 PDF at 13, (*citing Black's Law Dict.* at 1201 (7th ed. 1999) (internal quotation marks omitted)).

[26] "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." *Brune*, ARB No. 04-037 PDF at 14 n.37, (*citing Black's Law Dict.* at 577 (internal quotation marks omitted)).

C. AIR Coverage

Helicopters does not dispute that Shactman was an employee covered by the AIR21 Act. HT 7. Nor is there any dispute that the Act applies to the claim. HT 7.

D. Protected Activity

Under AIR21, an employee of an air carrier has engaged in protected activity when two elements are present:

> (1) the information that the complainant provides must involve a purported violation of an FAA regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation and the complaint must be specific in relation to a given practice, condition, directive or event;
>
> (2) the complainant's belief that a violation occurred must be objectively reasonable.

Hindsman v. Delta Air Lines, Inc., ARB No. 09-023 PDF, ALJ No. 2008-AIR-13 at 5 (ARB June 30, 2010); *see also Simpson v. United Parcel Serv.*, ARB No. 06-065 PDF, ALJ No. 2005-AIR-00081 at 5 (ARB Mar. 14, 2008); *Rooks*, ARB No. 04-092, PDF at 6; *Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3 PDF at 9 (ARB July 31, 2006) *citing Peck*, ARB No. 02-028, slip op. at 13; *Florek v. Eastern Air Central Inc.*, ARB No.07-113, ALJ No. 2006-AIR-009, slip op. at 5 (ARB May 21, 2009); 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b)(1)-(4).[27] "[A] complainant need not prove an actual violation, but need only establish a reasonable belief that his . . . safety concern was valid." *Rooks*, ARB No. 04-092 at 6 (*citing Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173 PDF, ALJ No. 95-CAA-12, slip op. at 4-5 (ARB Apr. 8, 1997)). Furthermore, "once an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation." *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8 PDF at 8 (ARB July 2, 2009) (citations omitted). If a complainant no longer reasonably believes that a violation has or will occur, then he or she cannot be said to have engaged in protected activity. *Hindsman*, ARB No. 09-023 at 5-6; *See also*, *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998).

In the instant case, Shactman made four sets of complaints. Shactman characterizes his initial complaint made to Helicopters before Adams began working full-time for the company as being "related to the reputation for safety (or lack thereof) of …pilot Adams." Compl. Br. at 8. The next two complaints were e-mails to Helicopters regarding Shactman's observations while flying with Adams. The fourth complaint was the complaint to the FAA. In determining

[27] Shactman quotes *Black's Law Dictionary* for the term "relate" as meaning "'[t]o stand in some relation; to have bearing or concern; to pertain . . . .' *Black's Law Dictionary* 1288 (6th ed., West 1990)." Compl. Br. at 5. To the extent Shactman also argues that he "is not and was not required to identify any specific FAA regulation, rule or code as the basis for his complaint; only that he raised legitimate and genuinely held beliefs that there were safety issues at Helicopters," he misconstrues the AIR 21 statute and the controlling precedent. Compl. Br. at 8

whether the Shactman engaged in protected activity, I must evaluate whether his complaints alleged a violation of an FAA order, regulation, or standard relating to air carrier safety with sufficient specificity as to the given practice or event and whether the Complainant's belief that a violation of air carrier safety requirements existed was objectively reasonable under the circumstances.

1. Complaints Regarding Adams' Reputation for Safety - Calls to Helicopters Officials Lieber and Christakos Prior to Adams' Hiring

When Shactman learned Adams was being considered as a replacement pilot for Donovan he telephoned Lieber and Christakos to express concerns that he had heard Adams was an unsafe pilot and he stated Adams should not be hired. Specifically, Shactman told them that based upon what he had heard from Donovan and/or claimed to have observed, Adams had flown in bad weather; did not land immediately after an engine warning light popped up while flying over Boston which resulted in the alleged destruction of the helicopter engine; and did not conduct pre-flight inspections.

Shactman stated that when he relayed the incident he heard from Donovan where Adams is alleged to have "destroyed" the engine of a helicopter to Lieber, "Lieber actually said that's a story that he had heard from somebody at the company." HT 91. Although Shactman does not point to any "violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)" with regard to this complaint, other pilots who testified including Adams stated that the protocol for the situation Adams faced, was to "[l]and immediately," suggesting there was a potential safety hazard resulting from the mechanical issue. HT 773, 932-33.[28]

Complainant said he had personally observed Adams fail to do pre-flight inspections and fly in weather during the summer of 2007 when Adams was working for another company out of a hanger next to Helinet's (Helicopters) hanger. Pre-flight procedures are addressed in 14 C.F.R. § 91.103. Shactman gave inconsistent accounts of having personally observed Adams failing to do pre-flight inspections which ranged from not "ever" doing a pre-flight to not performing a pre-flight on "one" occasion. HT 72, 217-219; RX 49, 146-151. Shactman admitted Adams was not working in the same hanger as Shactman when he made these observations. Shactman conceded that the only time he saw Adams go through the steps of walking into the hanger from the outside, opening the door, pulling out the helicopter, and starting it, Adams was out of sight, inside the hanger for a short period—as Shactman put it, for "not any significant time." RX-49, 149-50. He conceded that on the one occasion he saw Adams walk into the hanger and shortly thereafter pull the helicopter out and go, he did not know whether that was Adams' first flight that day. I find Shactman had, at best, a limited view and opportunity to see whether Adams did a pre-flight inspection on one occasion. For these reasons, Shactman's testimony that he had first-hand knowledge of Adams failing to do a pre-flight, prior to Adams being hired, is simply not credible.

[28] Shactman has not referred to or cited an FAA order, regulation, or standard related to air carrier safety associated with any of the complaints he made about Adams either to Helicopters or to the FAA. In an effort to give his complaints consideration, I have attempted to identify potentially relevant FAA orders, regulations, or standards or Helicopter policy which might be associated with or related to Shactman's specific complaints.

As for Shactman's personal observation of Adams flying in weather, at his deposition Shactman said he saw Adams "take off with weather in the area which was preventing us from accepting any flights from WFXT." RX-49, at 142. Although Shactman does not reference any regulations, orders, or standards, there exist regulations restricting when pilots may take off and land in weather, depending on the instruments and aircraft. *See, e.g.*, 14 C.F.R. §§ 91.155, 121.649, 135.219 (2010) (indicating takeoff and landing weather minimums for different flight categories); HT 701-02 (Lieber testifying that Helicopters follows Part 91 or Part 135 regulations). Shactman's complaint regarding Adams flying in weather may relate, in a liberal sense, to at least one of these regulations. Shactman admitted that on the day he observed Adams take off in weather, he did not check to see whether flying was prohibited then, he was not aware of any FAA regulations prohibiting flight under the circumstances, he could not say that Adams was the only one in the air, and further, he could not remember how many times or the dates that Adams flew in weather, and his station WFXT did not fly.[29] Shactman's vague and incomplete knowledge of the circumstances under which Adams flew in weather and his company did not, as well as his lack of knowledge of any FAA orders, regulations or standards that applied on the dates Adams flew in weather, are factors which undermine the reasonableness of this complaint to the extent it is premised upon his claimed personal first-hand knowledge.

The evidence establishes that Donovan's repeated efforts to have Helicopters hire his friend, Boatwright, as a pilot, as well as his personal dislike of Adams colored his actions and his statements to Shactman.[30] I credit Shactman's statement that Boatwright told him Adams was a "disorganized" pilot over Boatwright's denial that he conveyed this opinion to Shactman.[31] So

---

[29]When asked at his deposition about how many occasions on which it occurred that Adams was flying at a time that WFXT was not flying, Shactman testified as follows:

> It's hard for me to say how many times. I mean, he flew that helicopter, you know, on, you know, many occasions. I wasn't always there when he was flying. You know, I'd say two or three times. But that's an estimate. . . . This is the summer of 2007, I believe. . . . I don't remember the specific dates. I mean, some of it could have been the summer. Some in the fall. Some right before he was hired by Helicopters, Incorporated. I can't pinpoint every single flight that I witnessed Adams performing.

RX-49, 142-44.

[30] Donovan told Shactman Adams lacked AStar time, without bothering to ascertain whether this information was correct. As it turned out, the information was wrong. Donovan's opinion that Adams was weird was based upon his views regarding what he thought he understood about Adams' personal life. Additionally, Donovan's demeanor at hearing was sarcastic, arrogant and combative. His responses to questions regarding whether or not Shactman provided him copies of the two e-mail complaints, as well as the FAA complaint for comment prior to sending them to Helicopters and the FAA, and whether he was communicating with the Shactman about the events both before and after the two conference calls Helicopters held in an effort to respond to the Shactman's complaints, were equivocal. Finally, it is undisputed that Donovan is hostile to Helicopters. For these reasons, I do not find him a persuasive witness.

[31] Boatwright testified he did not make any comments to Shactman about Adams' piloting abilities. He said spoke only to Adams himself, when Adams was taking a training course at his flight school, and that he told Adams he was "not organized." Shactman has testified Boatwright told him Adams was "disorganized." Shactman's use of essentially the same word to describe what Boatwright told him about Adams, as Boatwright used to describe what he claimed to have conveyed only to Adams, supports the inference that Boatwright did tell Complainant he thought Adams was disorganized.

Shactman heard comments from both Donovan and Boatwright, pilot friends of his, about Adams' piloting ability.[32] At the same time, however, Shactman was aware that Donovan was trying to assist Boatwright in obtaining a pilot job with Helicopters during this period. Additionally, Complainant's telephone call to the TV Station, the Company's only customer, telling the station Adams was unsafe and should not be hired, immediately after Lieber and Christakos agreed to look into his concerns, calls into question the good faith and reasonableness of his asserted belief that Adams was an unsafe pilot, and suggests instead that he was motivated by a desire to assist in efforts to secure Boatwright a job. Although this is a close question, given Complainant's young age, lack of knowledge, training, or experience as either a pilot or aircraft mechanic, Donovan's statements to him regarding Adams' alleged piloting reputation and operational deficiencies, coupled with his friendship and trust in Donovan, a seasoned pilot, and his reliance on Boatwright's statement about Adams, I find that at the time Shactman made his reputational complaints against Adams, they were initially reasonable, made in good faith and protected.

2. March 10, 2008 E-mail to Lieber

Shactman raised a second series of complaints in an e-mail to Lieber on March 10, 2008 based upon what he observed on each of the three flights he flew with Adams on that day. The issues Shactman raised were that: a) Adams "departed the ramp with the Horn light illuminated" on two separate occasions, and reengaging it thereafter; b) on the ground, Adams had the collective "just about halfway up" not in the locked position; c) Adams flying the entire second flight without a seatbelt; d) Adams not conducting a walk-around, not using the checklist, and not performing two hydraulics tests Shactman is accustomed to;[33] and e) Adams having "little to no AStar time." RX-14, at 1. I will consider each complaint in turn in determining whether Complainant engaged in protected activity with regard to this e-mail.

a. Complaint that Adams Left the Horn Light Illuminated, and Reengaged It

Shactman asserted that on the first flight Adams departed the ramp with the horn light illuminated and noticed it in a few seconds and turned the horn back on. On the third flight Shactman said Adams again left the horn light illuminated (horn off) and did not notice until Shactman pointed it out as they cleared the runway. Although Shactman does not refer to any violation of an order, regulation, or standard related to the horn light--whether it must be on or off-- there is no dispute that the hydraulic test is one element completed by pilots at least once a day. Adams himself explained the significance of horn light in warning horn light. I find that

---

[32] I credit Kendrick's testimony that he did not tell Shactman that Adams was unsafe over Shactman's contrary testimony. Kendrick stated he had concerns regarding another pilot, Smith, and that he tried to stay out of that pilot's airspace when helicopters from different companies were covering a story. If Kendrick had expressed this concern in reference to Adams, one would reasonably have expected Shactman to tell Christakos about Kendrick's statements, when Shactman expressed his concerns about Adams prior to Helicopters hiring Adams. Shactman mistakenly attributed Kendrick's staying out of the same airspace as another pilot as being associated with Adams, rather than Smith.

[33] The hydraulics test issue is related to the horn light issue. HT 49, 187-88.

Shactman's belief that the horn light should not be illuminated while taking off was reasonable and constitutes protected activity when he initially made the complaint.

b. Complaint that Adams had the collective "just about halfway up" not in the locked position

Shactman also raised the concern that the collective was not locked at start-up. He believed the collective was to be in the locked position at start-up. Shactman did not associate the collective issue with an FAA order, regulation or standard related to air carrier safety. However, Helicopters does not seriously dispute that the collective is a mechanical component of the aircraft and should be locked on take-off. Therefore, Shactman's belief that if it is not locked on take-off there could be a safety concern was reasonable at the time. Accordingly, Shactman's complaint regarding the collective being unlocked was reasonable at the time he sent the e-mail complaint.

c. Complaint Adams flew the entire flight without a seatbelt

Shactman complained that Adams did not wear his seat belt for the duration of the second flight on March 10. Seatbelt use in an aircraft relates to a violation of an FAA order, regulation, or standard. *See* 14 C.F.R. § 91.107.[34] Shactman reasonably believed that failing to do so violated air carrier regulations and presented a safety hazard. Therefore, this complaint constitutes protected activity.

d. Complaint Adams did not conduct a pre-flight walk-around or use the checklist

Shactman asserted that on the third flight, Adams did not do a pre-flight including a walkaround, nor did he use the checklist for pre-flight inspections. Although he has not identified an FAA order, regulation, or standard to which his complaints about the lack of a pre-flight inspection relate, I note that pre-flight actions are addressed in 14 C.F.R.§ 91.103. Additionally, Helicopters has clearly identified pre-flight and start-up procedures and presumably such procedures are intended to ensure the proper operation of the aircraft and the safety of the crew. RX-38. While there is a disagreement as to whether a pre-flight must be performed before every flight if there are multiple flights close in time, as was the case on March 10, at the time Shactman made his complaint his belief that the pre-flight was required was reasonable. Therefore, when he made this complaint Shactman engaged in protected activity.

e. Complaint that Adams had "little to no AStar time"

Shactman acknowledged that he had no first-hand knowledge of Adams' experience flying the AStar helicopter when he complained Adams lacked experience. His concern regarding Adams alleged lack of time in the AStar came from what Donovan told him. Shactman has not referenced any violation of an FAA order, regulation, or standard relating to a requirement that a pilot has a certain amount of AStar flying time, which undercuts the reasonableness of this stated complaint. However, giving Shactman the benefit of doubt, his

[34] Respondent acknowledges seatbelt use is required. Resp. Br. at 38 n. 36.

reliance on Donovan's statement, at this point in time, was reasonable as he trusted Donovan and he did not yet have contrary information on Adams' AStar time.

3. March 18, 2008 E-mail to Christakos

Shactman's third complaint was raised in an e-mail to Christakos on March 18, 2008. The only issue Shactman raised was that Adams "started the helicopter with the collective unlocked," and as a result, it rocked back and forth on the skids pretty violently, "a lot more than it normally does." RX-15, at 1; RX-43. When he sent the second e-mail complaint related to the collective lock, Shactman knew there was an issue with the lock and that it would be addressed. Shactman testified that he sent the e-mail on March 18, 2008, not knowing whether Helicopters had sent the helicopter in for maintenance of the collective lock. HT 276. Under these circumstances, I find that he had a good faith, reasonable belief in a hazard when he complained about Adams' actions with the collective lock a second time.

4. Did Complaints To Helicopters Remain Objectively Reasonable Over Time In the Face of the Company's Response

Having determined that Shactman's complaint regarding Adams' reputation for safety before he was hired and the e-mail complaints of March 10th and 18th were reasonable when initially made, the question is whether in the face of Helicopters' actions in response, those complaints continued to be objectively reasonable after March 19th. The Administrative Review Board has held that activity which was initially protected may lose its protected status at a later point if a complainant re-raises a previous and fully-addressed complaint. "[O]nce an employee's concerns are addressed and resolved, it is no longer reasonable for the employee to continue claiming a safety violation, and activities initially protected lose their character as protected activity." *Malmanger*, ARB No. 08-071 PDF at 8 (citations omitted).

Immediately following the March 10 e-mail complaints, Christakos spoke with each of the three Norwood staff members (Shactman, Adams and Falzone) individually, he held a conference call with all of them, reiterated the need for the Norwood staff to communicate with one another, and he took action with regard to each of the Shactman's complaints. Specifically, he directed the pilots to perform a hydraulic test before each flight and reengage the horn light, he discussed the issue with the collective lock as did the pilots. Christakos told all of them there was a service bulletin on the collective lock and it would be looked at. Christakos instructed the two pilots to revise the pre-flight checklist, and to use the checklist to perform a pre-flight inspection before each flight. He also ordered that seatbelts be worn at all times. In addition, he informed Shactman that his complaint that Adams lacked AStar time was unwarranted because Adams had significant AStar time. Shactman admitted that on the subsequent flights he flew with Adams in the week after the March 11 conference call, Adams was following all procedures and there were no additional issues.[35]

[35] Shactman has admitted that by March 11 he knew from talking with Christakos that the information he got from Donovan that Adams lacked AStar experience was incorrect. One would expect that a reasonable person might begin to question other information Donovan conveyed with respect to Adams' piloting experience and abilities.

In response to Shactman's March 18 e-mail complaint which addressed only his assertion Adams started the aircraft with the collective unlocked, Christakos held a second conference call which Lieber later joined, with the Norwood staff. Christakos again discussed the issue with the collective lock, explained he had checked with the company mechanic and the lock was within tolerance on this helicopter but it would be looked at again and repaired or replaced, if necessary, at the next scheduled service. During this conference call, Shactman simply refused to accept the Company's explanation with regard to the collective lock and continued to insist the issue was not a mechanical issue, but instead, was an issue of Adams' piloting. The Complainant offered no new information or evidence to support his opinion. Shactman's continued refusal to accept that the collective lock was a mechanical issue rather than what he viewed as a pilot competence issue, ceased to be objectively reasonable given his lack of technical training and experience in these areas and in the face of the Company's detailed explanation and plan to repair or replace the collective lock, if necessary.

In addition to addressing the collective lock issue during this conference call, Christakos and Lieber attempted to address Shactman's reputational concerns that Adams was unsafe. Christakos told Shactman of Adams' experience as a pilot and the training he had completed. Shactman knew that Adams was already working for Helicopters as a back-up pilot in Beverly when he was hired full-time for Norwood. Christakos informed Shactman that he had spoken with two pilots, Tuttle and McKenna, working for other Boston TV stations out of Beverly as to whether they or their cameramen had concerns regarding Adams' flying capabilities, and both responded that they did not. Christakos also told Shactman that he had talked with Meehan, the day shift photojournalist and TV Station on-air personality, who had flown with Adams the same week and he did not have any issues with Adams' piloting abilities.[36] Additionally, Lieber told Shactman that he had spoken with Koontz, the Helicopters official who vetted Adams, and did a test flight with him in Beverly when Adams was hired as a back-up pilot for the company, and that Koontz indicated no issues with Adams' abilities.[37]

These actions by Helicopters establish that the Company took Shactman's complaints seriously, followed-up on the complaints and communicated the actions it took in response to his concerns regarding Adams' reputation and training as a pilot.[38] Helicopters considered the

---

[36] Shactman never sought out Meehan to ask him about Adams' piloting practices, nor did he ever discuss his concerns regarding Adams with Meehan, even though Meehan was flying with Adams, and presumably subject to the same "unsafe" piloting of concern to Shactman. The Complainant's failure to talk with Meehan about Adams' piloting at **any** point is inexplicable, both because Meehan had flown with Adams several times and could have confirmed or eliminated Shactman's concerns, and because Shactman claimed his concern for Meehan's safety was a factor which motivated his telephone call to the TV Station to tell the station Adams was unsafe and should not be hired by Helicopters.

[37] Shactman claims that Helicopters did not take his concerns about Adams' reputation seriously because Christakos did not tell him on March 3, 2008 that Adams was already at training when they discussed the names of individuals Shactman provided to support his concerns. Acknowledging that this may initially have suggested to Shactman that his concerns in that regard were not being taken seriously, Helicopters conference calls on March 11th and 19th in which the company expressly informed Shactman of the numerous actions and individuals contacted in response to his complaints about Adams' reputation, demonstrate that the Company was taking his reputational concerns about Adams seriously.

[38] Shactman's contention that because Helicopters did not talk with two additional individuals he listed as having made comments about Adams, the company failed to investigate his concerns, is without merit. By the time Adams

information it obtained by talking with others familiar with Adams' piloting practices, reviewed his training records and experience, and determined Adams possessed the experience, training and qualifications to fly. Shactman's response to this information from Helicopters was that it did not matter to him and he persisted in his assertion that Adams was an unsafe pilot. Throughout the second conference call on March 19, Shactman made repeated statements that Adams ought to be fired, he refused to fly with Adams, and he unequivocally told Helicopters management that he would not fly with Adams regardless of any additional actions the company took in an effort to respond to his complaints. I find that once Helicopters explained the actions it took in response to Shactman's reputational concerns as to Adams' piloting ability and practices, as well as the company's corrective action addressing the March 10th and March 18th e-mail complaints, and in the absence of any additional information or evidence from Shactman to support his complaints, his continued assertion, after the March 19 conference call, that Adams was an unsafe pilot and his refusal to fly with him ceased to be reasonable and his complaints which were initially protected lost their character as protected activity.

Having fully addressed Shactman's complaints, and in the face of his persistence in insisting that Adams was unsafe, ought to be fired, and his repeated statements that he would not fly with Adams, made during the March 19 conference call, Helicopters made one last attempt to respond to Shactman's concerns. It directed that Shactman would fly only with Falzone for a period of time and that Adams would fly with Meehan, the morning photojournalist, for a period of time. It is undisputed that Helicopters told Shactman, and he understood, that if after a period of no further incidents with Adams, Helicopters decided to return to a pilot rotation, and he continued to refuse to fly with Adams, he would have to make a decision as to whether to fly with Adams or move on from the company.[39] After monitoring Adams for three weeks during which there were no incidents and no complaints from either Meehan who was flying with Adams, or Falzone Helicopters' other pilot at Norwood, Helicopters informed Shactman there had been no further incidents with Adams and they would return to pilot rotations. I find the Company kept its commitment to evaluate Adams over a period of time, it informed Shactman there had been no other incidents and it would return to pilot rotations. Shactman expressed his displeasure with the Company's decision, he continued to refuse to fly with Adams, and he never altered his position. Shactman's contention that the company never investigated his concerns after the second conference call on March 19 is disingenuous and it ignores all of the actions Helicopters took and communicated to him up through March 19. As noted, by that point, the issues identified in the two e-mail complaints had been resolved and a plan was in place for the collective lock issue, Shactman was informed of the actions the Company took, as well as the

---

was hired Shactman was aware that Christakos had spoken with both Donovan and Kendrick and he knew the two pilots had given Christakos conflicting information with regard to Adams piloting capabilities. The fact that the Company did not talk with the two other individuals Shactman suggested, does not mean the Company did not pursue Shactman's complaints/concerns regarding Adams' reputation.

[39] Nor is Shactman's criticism of the Company's action because Helicopters did not send a management official from its home office in St. Louis to Norwood to investigate his complaints persuasive. Helicopters adequately investigated Shactman's complaints. As for the e-mail complaints of March 10th and March 18th, Helicopters found itself in a he said-she said position where the only two eye-witnesses to the alleged events were making conflicting statements as to what had occurred. Helicopters took specific actions, detailed above, which fully addressed the e-mail complaints. With regard to the complaints involving Adams' reputation, Helicopters took appropriate action and communicated those actions to Complainant.

information the Company obtained, in looking into his concern about Adams' piloting practices and experience. After the March 19th call, Shactman knew the plan of action was that if no incidents occurred, Adams would be cleared, and the Company would return to the pilot rotation schedule. Thus, Helicopters fully explained and communicated to Shactman that if there were no further incidents with Adams in the weeks after March 19th, Helicopters would return to a pilot rotation, and he would have to fly with Adams as part of the rotation schedule. For these reasons, I find that by March 19th, and certainly by April 7th when Helicopters informed Shactman no incidents had occurred, and gave him another opportunity to indicate he would return to flying with Adams, Helicopters had properly considered, investigated, and addressed all the concerns raised by Shactman.

I find that Shactman's continued refusal to fly in the pilot rotation scheme with Adams after April 7, 2008, knowing that there had been a period in which it is undisputed that there were no issues with Adams' piloting procedures and practices, was unreasonable. In sum, Helicopters had provided Shactman information and taken specific actions by March 19 and, at the latest by April 7, which a reasonable person with Shactman's training, education, and experience would accept as adequate to resolve the complainants he raised to Helicopters. Shactman's continued assertion of his claim Adams was an unsafe pilot was no longer reasonable and protected activity.

5. April 9, 2008 Letter to the FAA

Shactman filed his FAA complaint on April 9, two days after Helicopters told him there had been no further issues with Adams over a three week period and the Company intended to return to rotating pilots. The FAA complaint raised the same issues he had previously raised to Helicopters. RX-17 Exh. A-B. By the time he filed the FAA complaint on April 9, 2008, Helicopters had already addressed these same complaints. Indeed, by March 18th Shactman himself had acknowledged that the complaints related to the horn light, seatbelt, hydraulics check, and pre-flight inspection had all been resolved, and there were no longer issues with the exception of the collective lock. Shactman was aware of the Company's actions and intended plan with regard to the collective lock. By the end of the second conference call on March 19, Shactman was unmistakably aware that the collective had a known issue, that it was within the limits provided by the ASB, and nonetheless, it would be looked at, and if necessary, repaired or replaced at the next scheduled 100-hour service. He also knew of the numerous steps Helicopters had taken, and the individuals consulted in checking on his concerns that Adams was an unsafe pilot. Shactman is not a pilot or an aircraft mechanic. At the time he filed his complaint with the FAA, the items detailed in the FAA complaint had all been addressed and resolved by Helicopters with the exception of the collective lock issue and Shactman was aware of the company's plan to address that issue. By April 7th, he knew that there had been no further issues with Adams, that Adams was cleared by Helicopters, and that he was expected to return to flying with Adams. Under these circumstances, Shactman did not have a good faith reasonable belief that a violation of an FAA order, regulation, or standard or other federal law relating to air carrier safety existed or would occur when he filed his FAA complaint. Rather, Shactman made the complaint to the FAA to avoid or delay what he anticipated would be an adverse employment action.

Assuming, arguendo, that the evidence supports Shactman's belief of conduct sufficient to constitute protected activity, I will proceed to analyze whether Shactman has established that protected activity was a contributing factor in his discharge.

E. Whether Respondent Had Knowledge of the Protected Activity

The Complainant must show that the Respondent had knowledge of his protected activity. The ARB has stated that "[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity. *Peck*, ARB No. 02-028 PDF at 14 (*citing Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996); 49 U.S.C. § 42121(a)). An employee must "actually express his concerns." *Rougas*, ARB No. 04-139 at 9-10 (citations omitted).

This element was not disputed in this case. Therefore, Shactman has established that Helicopters had knowledge of the protected activity.

F. Adverse Action

Helicopters terminated Shactman on May 12, 2008. HT 8, 146-47, 750; RX-31; CX-13 ¶ 38. Termination of employment is adverse action under AIR21. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b). Accordingly, the Complainant has established that he suffered adverse action.

G. Whether the Protected Activity was a Contributing Factor in the Complainant's Termination

The complainant must prove by a preponderance of the evidence that his protected activity was a "contributing factor" which motivated the respondent to take the adverse employment action against him. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 PDF at 7; *Clark*, ARB No. 04-150 PDF at 11, 12; *Rooks*, ARB No. 04-092 PDF at 5; *Brune*, ARB No. 04-037 PDF at 13. "Unless a complainant proves that the employer fired him in part because of his protected activity, it is unnecessary to proceed to determine whether the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity." *Peck*, ARB No. 02-028 at 9-10 (holding that the same approach governs for both ERA and AIR21 cases) (*citing Kester v. Carolina Power & Light Co*., ARB No. 02-007 PDF, ALJ No. 2000-ERA-31 at 8 (ARB Sept. 30, 2003)). The complainant "need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent." *Clark*, ARB No. 04-150 PDF at 12 (citations omitted).

1. Respondent's Proffered Reasons for Discharge

Lieber's letter terminating Shactman's employment with Helicopters provided the following reasons for the discharge:

> Several job performance issues lead to your termination, in particular: you failed to respond to a page or call while on stand-by status; you failed to remain at your workstation or with the aircraft during duty time delaying our response time; you failed to secure a back-up photojournalist to cover your shift when on sick leave for a doctor's appointment, leaving the program uncovered and missing a story and you had a confrontational attitude and poor working relationship with your co-workers.

RX-31. HT 882-95. I find that these proffered reasons constitute "facially nondiscriminatory reasons for" terminating Shactman. *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11 PDF at 8 (ARB May 26, 2010) (internal quotations omitted).

2. Pretext As Circumstantial Evidence of Intentional Discrimination

As Helicopters has produced facially legitimate nondiscriminatory reasons for terminating Shactman, the Complainant has the chance to prove that Helicopters' proffered reasons are not credible but rather constitute pretext. *Reeves Sanderson Plumbing Products, Inc.* 530 U.S. 133, 143 (2000) (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511) (1993); *see also*, *Florek*, ARB No. 07-113, ALJ No. 2006-AIR-0009, PDF at 7-8 (ARB May 21, 2009) (*citing Reeves*, 530 U.S. at 147-48); *Clemmons*, ARB No. 08-067 PDF at 8. Shactman contends that Helicopters' stated reasons for terminating him constituted pretext arguing, that he was terminated "within a handful of days following….the filing of the FAA …complaint," Compl Br. at 17-18, "[t]he so-called 'missed flights' are phantom issues that formed no legitimate basis to terminate the Complainant's employment." Compl. Br., at 16, and that "[t]here was no compelling business reason that ever existed that required the Complainant to fly with Adams rather than Falzone," Compl. Br. at 14.

i. Temporal Proximity

Shactman argues that the temporal proximity between his complaints (protected activity) and his termination give rise to an inference of unlawful employment discrimination. Helicopters contends that Shactman's complaints played no role in his discharge and that the discharge was for legitimate business reasons including missing flights, leaving the airport while on shift, and continuing to refuse to fly with Adams even after the Company had resolved the issues.

"Retaliatory motive may be inferred when an adverse action closely follows protected activity." *Clark*, ARB No. 04-150 PDF at 12 (*citing Keener v. Duke Energy Corp*., ARB No. 04-091, ALJ No. 2003-ERA-12 PDF at 11 (ARB July 31, 2006); *Kester*, ARB No. 02-007 PDF at 10). Temporal proximity between the two creates an inference of an illegal motivation, but "is not always dispositive." *Robinson v. NW Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-22 PDF at 9 (ARB Nov. 30, 2005) (*citing Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 1996-ERA-00034 & 1996-ERA-00038 slip op. at 6-7 (ARB Mar. 30 2001); *Svendsen v. Air Methods, Inc.*, ARB No. 03-074, ALJ No. 2002-AIR-16 PDF at 8 (ARB Aug.

26, 2004)); *see also Peck*, ARB No. 02-028 PDF at 16; *Vieques*, 437 F.3d at 109;, *Thomas v. Arizona Pub. Serv. Co.*, 89-ERA-00019 (Sec'y Sept. 17, 1993).[40]

Here, Shactman's complaints to Helicopters and the FAA occurred between February 28, 2008 and April 9, 2008. His termination on May 12, 2008, was less than three months after he began making complaints. Looking solely at the timeline, one might infer that Shactman's complaints contributed to his discharge. However, where "an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, ALJ No. 2004-AIR-00012 PDF at 7 (ARB Dec. 31, 2007) (*citing Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-00019, slip op. at 6-7 (ARB Apr. 28, 2006)). Therefore, the legitimacy of a respondent's articulated reason for the discharge is a factor to be examined in the course of determining whether a complainant has proven by a preponderance of the evidence that protected activity contributed to the termination. *Barker*, ARB No. 05-058 PDF at 7; *see Peck*, ARB No. 02-028 PDF at 16; *Brune*, ARB No. 04-037 PDF at 14. Additionally, "if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation" arising from the temporal proximity "is compromised." *Clark*, ARB No. 04-150 at 12-13 (*citing Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 1997-WPC-1, slip op. at 8 (ARB July 31, 2001)).

ii. Disparate Treatment

Disparate treatment of employees who engage in similar conduct may be proof of retaliatory intent. *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990). Shactman's assertion that he was warned or treated differently that other employees involved in the missed flights is contrary to the evidence presented. It is undisputed that on March 18, 2008, Helicopters received a call from the station at 9:54 p.m. wanting to fly to cover a breaking story. Adams received the call on his cell phone and he was in the hanger at the time. He immediately drove to the office and placed a call to Shactman's cell phone at 10:06 p.m. just minutes after Complainant's shift ended. Shactman did not respond to the call until he left the gym later that evening, meaning a flight was missed.[41] Shactman was aware of the company policy, which explicitly provided "[c]rewmembers are typically on-call every weeknight and every other weekend. . . . Photojournalists are required to be available and ready to fly during these periods on a standby basis." RX-1, at 8; HT 203, 207. Shactman's effort to excuse his failure to respond, especially since the request came in just minutes after the end of his shift, is simply not credible. He failed to comply with the company's policy. Shactman's attempt to discredit this stated reason for his discharge by arguing that Adams was also involved in the missed flight, and yet Adams was not warned or disciplined, is wholly lacking in merit. Adams was at the worksite,

[40] AIR21 was modeled on the Energy Reorganization Act, 42 U.S.C. § 5851, *et seq*. *See Peck*, ARB No. 02-028 at 9.

[41] Additionally, the documentary evidence (phone records) as well as Shactman's testimony that he regularly works out for an hour to one and one-half hours is persuasive evidence that he left the airport well before the end of his 10:00 p.m. shift on March 18th.

he took the call from the TV station, he contacted Shactman and he was ready to fly.[42] The flight was missed because Shactman did not comply with the on-call policy. Adams was not warned because he did not violate any company policy. Shactman has failed to establish disparate treatment based upon similar conduct, and I find the missed flight on March 18th was a legitimate reason for terminating Complainant's services.

As for Helicopters' reliance on the missed flight on May 5, Shactman argues first that it is evidence of discrimination because Shactman was treated differently than Falzone who was also involved. Secondly, Shactman contends that Respondent's reliance on the May 5 missed flight as a reason for his firing is evidence of pretext because the e-mail traffic between Lieber and Russell establishes that Respondent had decided to fire Shactman by April 24.[43] The documentary evidence shows that the Company decided to discharge Shactman and was working on getting a replacement as of April 24, 2008. CX 12 at 342. An April 29 e-mail reflects the Company's belief that a permanent replacement would begin on May 19, they would terminate Shactman soon, and might need someone to cover Shactman's position until the permanent replacement started. CX 12 – 339. The May 5 missed flight, which generated an angry response from the TV Station, simply functioned as a catalyst in accelerating the implementation of the Company's decision to fire Shactman.[44]

iii. Addressing Performance Issues

Shactman also attempts to discredit the Company's stated reason for terminating his employment as pretext, by asserting the Company did not document performance issues until after he filed the FAA complaint. The evidence does not support Shactman's assertion. After learning about the March 18 missed flight a few days after it occurred, Lieber began to suspect Shactman was leaving work early. He asked Falzone and learned Shactman was frequently leaving at 6:00 p.m. He instructed Russell to make sure Shactman was not leaving early. When Russell e-mailed Leiber April 10, and told him she was unable to reach Shactman during his shift, his e-mail reply less than an hour later stated: "He's supposed to be on shift! He's real close to getting canned right here and now." RX-35. Lieber did not learn of the FAA complaint until April 11, and he had already begun to address and document performance issues. Lieber's

[42] The Employee Handbook clearly states that employees may be "with the customer, in the office, or with the aircraft." RX-1, at 8. Adams was in the hanger at the worksite.

[43] By that point, Shactman had made it clear to Company officials that he did not intend to fly with Adams regardless of any action Helicopters took, he told Russell he was not happy with the Company's decision that Adams was safe and that he would have to return to flying with him on the normal pilot rotation, and the Company knew the FAA had cleared it of any wrongdoing with regard to Shactman's complaints.

[44] Had the May 5 missed flight been a factor, I note that Helicopters' attendance policy clearly provides that an employee is to contact the home office when they are not going to be at work. Shactman did not follow this policy when he knew he would be later for his shift. Falzone was not Shactman's supervisor and under company policy he had no responsibility for reporting that Shactman would not be at work. Falzone's accepting responsibility for the missed flight in response to the TV Stations's anger at missing the flight, was an obvious effort to appease the Company's only customer. The difference between Falzone and Shactman as far as this missed flight is concerned, is that once again Shactman violated company policy whereas Falzone did not.

subsequent April 14 e-mail warning to Shactman followed the conversation with Russell in which Shactman claimed not to understand his responsibility under the weekday on-call policy. Moreover, the filing of an FAA complaint, does not make an employer's warning to an employee for contemporaneous performance issues unrelated to the contents of an FAA complaint, discriminatory. Shactman has failed to establish that Helicopters did not address or document performance issues until after the FAA complaint was filed.

3. Poor Working Relationships

Finally, there is ample record evidence of Shactman's confrontational attitude and poor working relationship with co-workers. The Helicopters staff in Norwood consists of three individuals, two pilots and Shactman. Shactman refused to accept statements by Falzone, Adams and Christakos during the two conference calls that there was an issue with the collective lock, he insisted the only resolution of his complaints was firing Adams, he discounted information Christakos and Lieber provided to him as to actions they had undertaken in addressing his concern regarding Adams' reputation for safety as a pilot, and he steadfastly continued to refuse to fly with Adams even after his complaints were adequately addressed. The Company's standard practice operated on a rotating pilot shift, meaning the pilots rotated between working the morning and afternoon shifts. Helicopters' Norwood location was small, the rotating pilot staff gave the Company operational flexibility and it improved job satisfaction among the pilots as it provided varied flying opportunities. It was not Shactman's safety complaints that factored into the decision to terminate his employment, rather it was his continued refusal to return to flying with Adams in the pilot rotation scheme, once those complaints had been resolved.

I have found that the missed flight on March 18th, the failure to remain at his duty station for the duration of his shift, and his confrontational and poor working relationships were all legitimate business reasons for his discharge. Shactman has failed to establish that these stated reasons for discharging him were pretext. Therefore, Shactman has not met his burden of showing that his complaints were a contributing factor in his discharge.[45]

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, the complaint is **DISMISSED**.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

[45] As I found Complainant failed to establish that he engaged in protected activity or that any protected activity was a contributing factor in his discharge, it is unnecessary for me to consider whether Helicopters established by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).