

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 30 November 2016**

Case No.: 2013-AIR-00011

In the Matter of:

WILLIAM DAVID FIELDING,  
Complainant,

v.

LANDMARK AVIATION,  
Respondent.

APPEARANCES: Joseph Michael Lamonaca  
Attorney for the Complainant

Jonathan W. Yarbrough  
Attorney for the Respondent

BEFORE: ALAN L. BERGSTROM  
Administrative Law Judge

**DECISION AND ORDER -- DISMISSING COMPLAINT**

This matter arises from a complaint filed under the provisions of Section 42121 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR-21), 49 USC §42141 as implemented by federal regulations set forth in 29 CFR Part 1979, and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978. The Complainant filed a complaint on January 10, 2010, alleging that Respondents retaliated against him in violation of AIR-21 by terminating his employment on November 30, 2009. The complaint was investigated and on March 5, 2013, the Regional Supervisory Investigator, Occupational Safety and Health Administration, Atlanta Regional Office, dismissed the complaint by finding that there was no reasonable cause to believe the Respondent violated AIR-21. On March 19, 2013, the Complainant filed objections to the Secretary's decision and requested a hearing before an Administrative Law Judge.

By Order of June 4, 2014, Respondent's "Motion for Summary Decision" was denied.

A formal hearing was held on November 18 and 19, 2014, in Newport News, Virginia, at which time the parties were afforded full opportunity to present evidence and argument as provided by

AIR-21 and applicable regulations. At the commencement of the formal hearing, official notice was taken of the Federal regulations set forth in the 2009 version of 14 CFR Part 91, "General Operating and Flight Rules" and the 2009 version of 14 CFR Part 135, "Operations Requirements: Commuter and On-Demand Operations and Rules Governing Persons Onboard Such Aircraft".

At the hearing, Administrative Law Judge exhibit 1 through 11; Complainant exhibits 1, 6, 8, 10, 11, 13, 14, and 17; and Respondent's exhibits 1 through 12 were admitted without objection (TR<sup>1</sup> 5, 12-17, 218). CX 3, 4, 5, 7, page 1 of CX 12, 15, 16, 18 were admitted over Respondent's objection (TR 12, 13, 16, 28, 45, 53-54, 229). Respondent's objections to CX 9, and CX 12 pages 2 through 6 were sustained (TR 12, 16, 53-54) and the documents were not considered. CX 2 was admitted for the limited purpose of dates and events personally observed by Complainant (TR 61)

The findings of fact and conclusions which follow reflect the complete review of the entire record, the argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

### STIPULATIONS

The parties orally stipulated to, and this Administrative Law Judge finds, the following as facts in this case (JX 1, TR 6-8):

1. The Complainant was hired by Landmark Aviation May 2008.
2. The Complainant completed Part 135 Competency Checks satisfactorily on June 6, 2008, November 28, 2008 and June 2, 2009.
3. Both Complainant and K.R. Starling completed a training course together at CAE SimuFlite on November 1, 2008.
4. On June 10, 2009 Landmark Aviation performed a "Performance Evaluation" on Complainant, a copy of this document will be admissible at trial without further authentication.
5. Landmark Aviation possesses no written records that Complainant was unprofessional to any employee, including K. Starling.
6. Landmark Aviation possesses no written record that Complainant had "poor interpersonal skills."
7. Any order, regulation, or standard of the Federal Aviation Authority Administration or any other provision of Federal law relating to air carrier safety will be admissible at trial without any further authentication.
8. On January 29, 2010, Landmark Aviation filed their Answer to Complainant's AIR-21 Complaint and attached thereto their only Exhibit "A" being the September 17, 2009 email from Landmark Aviation Check Airman, R. Ellsworth, to Landmark Aviation's Chief Pilot, A. Traylor.

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<sup>1</sup> The following exhibit notation applies: JX - joint exhibit; ALJX - Administrative Law Judge exhibit; CX - Complainant exhibit; RX - Respondent exhibit; TR - transcript page

9. An email sent on September 17, 2009 from Landmark Aviation Check Airman, R. Ellsworth, to Landmark Aviation's Chief Pilot, A. Traylor, may be admissible at trial upon proper authentication.
10. An email string sent on October 22, 2009 to and from T. Howerton, Secretary/Treasurer of International Veneer Corporation (IVC), and R. Olson, Business Development and Charter & Management Director for Landmark Aviation, may be admissible at trial upon proper authentication.
11. An email sent on August 12, 2009 from A. Traylor, Landmark Aviation's Chief Pilot, to Complainant, with a copy to R. Woodside, may be admissible at trial upon proper authentication.
12. To the extent that this information is relevant, Complainant may testify that he served honorably in the North Carolina National Guard.
13. By letter dated November 30, 2009, Complainant was terminated from Landmark Aviation.
14. The Complainant was informed at the time of his termination that he would be eligible for re-hire should an opportunity become available.
15. The Complainant was aware of eight or nine jobs that Landmark Aviation advertised following Complainant's termination.
16. The Complainant did not apply for any jobs with Landmark Aviation following his termination.
17. There are no air traffic control records of a Landmark pilot deviation, nor records of any incidents or accidents involving Landmark's and/or Complainant's operations of the BE-400 aircraft.
18. There is no evidence that the use of the half-bank turn resulted in a potential or actual hazard to persons or property of another, was created, or was caused to be made by Landmark Aviation or K. Starling.
19. Landmark does not address a pilot's use of half-bank as it is considered a pilot "technique" rather than a required or prohibited procedure by the FAA.
20. Respondent, Landmark Aviation, operates an air charter operation and is an air carrier within the meaning of 49 U.S.C. §42121 and 49 U.S.C. §40102(a)(2).
21. Complainant was employed by Respondent as a pilot and was an employee within the meaning of 49 U.S.C. §42121.
22. The provisions of 49 U.S.C. §42121 (AIR-21) apply in this case.
23. International Veneer Corporation was the owner of a specific BeachJet BE-400A aircraft in 2009, tail number 61VC.
24. International Veneer Corporation is not a named respondent in this case.
25. International Veneer Corporation and Respondent entered into an operational contract whereby Respondent was to provide flight crews for operation of the specific BeachJet BE-400A aircraft during charter operations and Respondent was to have operational control during flight operations of the specific BeachJet BE-400A aircraft.

## **ISSUES**

The issues remaining to be resolved are (TR 8-9):

1. Did the Complainant engage in activity protected under AIR-21 as alleged in the complaint, during the period from May 2009 through November 30, 2009, concerning aircraft safety involving use of half-bank turns during take-off climbs and in the Terminal Control Area, turning off navigation lights, and violating speed crossing restrictions repeatedly ?
2. If so, was the protected activity a contributing factor for the alleged adverse employment action?
3. If so, did the Respondent establish a clear and convincing basis for the alleged adverse employment action unrelated to the alleged protected activity ?
4. If AIR-21 was violated, is the Complainant entitled to appropriate relief under AIR-21, such as reinstatement, back pay, front pay, restoration of employee benefits, seniority, interest, attorney fees and legal costs?

## **PARTY POSITIONS**

### *Complainant's Position:*

Complainant's counsel submits that the Complainant was hired by Respondent as a pilot in June 2008 and performed his duties as an exemplary employee through the June 10, 2009 performance review period. He submits that the Complainant began voicing major safety and regulatory concerns concerning pilot K. Starling to Respondent and its check airman and chief pilot after July 22, 2009 that resulted in Complainant's employment termination on November 30, 2009. He argues that the reasons for terminating Complainant's employment "were created entirely by [K.] Starling in retribution for [Complainant] reporting Mr. Starling's serious pilot deficiencies.

Complainant's counsel submits that the reasons now presented by Respondent for terminating Complainant's employment were post-event fabricated pretext reasons. He argues that the alleged negative issues with Complainant were all contrived issues based on K. Starling's reports and were non-existent prior to the filing of the AIR-21 complaint.

Complainant's counsel submits that the complaints presented by Complainant were documented in the September 2009 e-mails and testimony of check airman R. Ellsworth and chief pilot A. Taylor. He submits that K. Starling admitted to violating FAA regulations, was the source of cockpit tension, and operated the aircraft in an unsafe manner, particularly in the decent, approach, terminal and landing phase of operations. He submits that T. Howerton of IVC received all his negative information involving the Complainant from K. Starling and not from personal observation; including the BB&T customer fall incident. He submits that all the negative information involving the Complainant given by K. Starling was false and contrived in retribution for Complainant reporting K. Starling to Respondent's check airman and chief pilot. He also argues that all information R. Olson received was based on an incorrect e-mail on who controlled the pilots flying the IVC aircraft and statement of events fabricated by K. Starling.

Complainant's counsel argues that the use of half-bank turns may be considered an option or technique; but the half-bank turn must be only used within the parameters of the aircraft system limitations and aircraft flight operations manual. He submits that K. Starling's use of the half-

bank turn was outside the scope of the BeechJet 400A aircraft systems limitations and flight operations manual and thus were unsafe and were FAA regulatory violations. He sites to specific instances where half-bank turns are not permitted; i.e.: below 18,000 feet and in instrument approaches.

Complainant's counsel submits that the Complainant has established a prima facie case that protected activity under AIR-21 was a contributing factor to the Complainant's termination on November 30, 2009. He seeks \$515,949 in back pay, \$120,481 in front pay, an appropriate award of compensatory and special damages, attorney fees, interest under 26 U.S.C. §6621(a)(2) compounded quarterly, and expungement of Complainant's personnel file and PRIA.

*Employer's Position:*

Employer's counsel submits that the Complainant did not engage in protected activity under AIR-21 as alleged in his complainant that K. Starling's flying techniques of using half-bank turns during take-off and climbs in the terminal area, turning off navigation lights and violating speed crossing restrictions violated a practice, condition, directive or event related to aircraft safety or to violations of FAA orders, regulations, or standards. He notes that the Parties stipulated that the use of half-bank turns did not result in potential or actual hazards to persons or property, the use of half-bank turns is expressly sanctioned by the FAA for use in approaches<sup>2</sup> and is within the discretion of the pilot and do not constitute an unsafe procedure<sup>3</sup>. He submits that a reasonable person with the Complainant's training and experience would not believe the use of the half-bank turn under the circumstances used constituted unsafe operation of the aircraft or violated FAA regulations, thus the Complainant's alleged belief was not objectively reasonable. He draws attention to the check airman flights of K. Starling during the first few weeks of flying the BeechJet 400A for IVC where there was no mention of violating FAA regulations affecting airline safety.

Respondent's counsel submits that there is no evidence that navigations lights were turned off in violation of FAA regulations or in a manner to endanger aircraft safety. He argues that the Complainant's alleged overspeeding of the BeechJet 400A was never raised with Respondent and was the Complainant's own critical analysis of K. Starling's manner of flight to be smooth with the throttles.

Respondent's counsel submits that the Complainant and K. Starling began flying the IVC BeechJet 400A in May 2009, with K. Starling as pilot-in-command and the Complainant as co-pilot and that the arrangement was not a good fit because the Complainant was very unreceptive to any critique regarding his rough handling of controls and abrupt directional changes in aircraft direction, and was generally argumentative, defensive and confrontational. He submits that the Complainant's failure to report for charter flights within the two hours allotted on-call pilots, complaints about the number of charters to fly, lack of customer service to a BB&T charter client, BB&T's notice that it would not use Respondent's charter services if Complainant was the pilot-in-command, and IVC's recommendation that Complainant be removed as a pilot of

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<sup>2</sup> Citing "Air Traffic Organization Policy", Order JO 7110.65U, February 9, 2012, Section 5-10-3 (RX 6)

<sup>3</sup> Citing "Instrument Procedures Handbook", Chapter 4, Approach, p. 4-51, U.S. Department of Transportation, Federal Aviation Administration, Flight Standards Service (RX 9)

their BeechJet 400A, was clear and convincing evidence that Complainant was removed for reasons not involving protected activity. He also argues that IVC, the owners of the BeechJet 400A being flown by the Complainant, expressed their desire to have Complainant removed from their aircraft directly to Respondent's Director of Business Development, who made the decision to remove the Complainant from the aircraft without discussing use of half-bank turns or other safety related matters with K. Fielding, Respondent's check flight airman or chief pilot.

Respondent submits that the Complainant's employment was terminated by C. Speidel who had no knowledge of the Complainant's alleged protected activity but was aware IVC did not want the Complainant flying their aircraft, a "lack of chemistry in the cockpit" between the Complainant and K. Starling as pilot-in-charge, and lack of other available pilot openings with Respondent at that time. He submits that the Complainant was advised by C. Speidel at the termination meeting that the Complainant was eligible for re-hire if a pilot position became available in the future. He argues that the Complainant admits that there were eight or nine openings to fly for Respondent and that the Complainant did not apply for any of the advertised openings.

Respondent argues that the Complainant has failed to establish a prima facie case that the alleged protected activity contributed to the adverse employment action and that the Complainant's employment was terminated for reasons unrelated to AIR-21 protected activity.

### **SUMMARY OF RELEVANT EVIDENCE**

#### *November 30, 2009 Separation Agreement (CX 3)*

This exhibit has been referred to as the termination letter by both Parties, though it is titled a "Separation Agreement." The Vice President of Human Resources for Respondent signed the agreement on November 30, 2009. The Complainant signed the agreement on December 16, 2009. The exhibit provided, in pertinent part –

"This letter will confirm the terms and conditions concerning your separation of employment effective November 30, 2009 from Landmark Aviation ... In conjunction with the termination, you are being offered this Separation Agreement ... Your acceptance of the Separation Agreement entitles you to the Severance Pay identified below and must be indicated by initialing each page and by signing on page three (3) of this letter. If accepted, this agreement must be returned to [Human Resources] not less than twenty-one (21) days following delivery of the letter.

Severance Pay Assuming you sign this Separation Agreement and in recognition of your service to the Company, you will receive a severance payment equal to one week's pay for each year of service to the Company up to a maximum of 15 weeks. The minimum severance payment will be two week's pay, minus normal wage deductions with the exception of 401(k). Based on your hire date of June 1, 2008, your severance pay will be \$2,692.31. ...

Employee Benefits ... You will be paid for any earned, but unused vacation balance ... Any health benefits you may have elected ... will continue through November 30, 2009. You will receive documents by mail describing certain COBRA benefits that may be available to you. If you elect to continue your health insurance through COBRA, it will be your responsibility to pay the required premiums, as directed in the COBRA document. ... It is the Company's position that severance pay is not pay in lieu of notice and that you will be immediately eligible to apply for unemployment benefits, if eligible, at the end of the required waiting period. ...

Confidential Information You warrant that ... Relinquished all uncompleted assignments in a cooperative and orderly manner, as request by the Company; Did not remove from the Company's premises and to return, if in your possession, all company property or documents, files or other paper or electronic media pertinent to the Company's business; and, Will keep in strictest confidence all secret, confidential and propriety information of the Company.

Consideration Period You acknowledge and understand that you have twenty-one (21) days after you receive this agreement, as required by the Older Worker Benefit Protection Act, to decide whether to sign this Agreement and be bound by its terms. ... By executing this agreement, you will be acknowledging that you considered its terms for twenty-one (21) days, or waived your right to do so, and were advised in writing to seek legal counsel.

Revocation Period In the event you agree to its terms and execute this agreement, you may nevertheless revoke it within seven (7) days thereafter. Thus, if you subsequently change your mind, you have the option and the right to revoke this agreement, but you must do so within seven (7) days after signing it. The agreement will not become effective until the seven (7) day revocation period has expired. Of course, if this agreement is revoked, you will not receive the severance payment. ...

Confidentiality of Agreement Accept as may be required by law, you agree not to directly or indirectly publish, disseminate, disclose, or cause or permit to be published, disseminated, or disclosed to any individual or entity other than your attorneys, any information relating to the existence or contents of this Agreement, or the circumstances and discussions that led up to it, including, without limitation, the fact or amount of payments provided herein. ...”

*Testimony of Complainant (TR 35-127, 218-229)*

The Complainant testified that he is unmarried and lives in Raleigh, North Carolina. He started flying at about age 18 when introduced to flying by his parents who were both military aviators. He pursued civil aviation, built his time, studied aviation management at a community college, got a job flying in the Caribbean, and then a job with the airline. He testified that CX 6 is his resume and that it accurately reflects his aviation career and employment history.

The Complainant testified that he was on leave from the airline when he saw a job posting with the Respondent for a King Air C90 job in Charleston around May 2008, applied for the job, and was hired by Respondent by June 2008. He stated he began flying the King Air out of Charleston with T. Williamson and when the owner of the aircraft took it to another company, he and Williamson went with the aircraft to the other company. He testified that after a few weeks with the other company he resigned and contacted A. Traylor about returning to Respondent's company and was offered a job in Raleigh flying a BeechJet with K. Starling.

The Complainant testified that he flew with K. Starling 90% of the time from October 2008 to November 2009. When K. Starling was not available other pilots flew with him. He stated that there were two BeechJet aircraft in Raleigh. IVC owned 61VC in which K. Starling was pilot-in-charge. Respondent owned 492P that it was actively trying to sell and in which the Complainant originally was hired to pilot. He identified CX 1 as his performance evaluation for the period ending June 2009 that was presented to him by A. Traylor and K. Starling.

The Complainant testified that there were no problems until 492P was sold and he flew with K. Starling 99% of the time on IVC's BeechJet. IVC had named K. Starling as the pilot-in-chief. The pilot-in-chief is in charge, "it's their airplane, their controls, they're in the right seat, they're working the regulators and we flip-flop every other leg." He stated that when IVC sent a memo out naming K. Starling as pilot-in-charge of 61VC "and it was from that day on is when he was trying to get me to fly the way he was flying and that's when everything started."

The Complainant testified that K. Starling would over speed the aircraft in decent during cross-wind restriction because he did not want the passengers to hear any salient adjustments or engine spooling. He stated the over-speed warning would be set off and K. Starling would pull the over-speed breaker silencer and stay within 200-300 feet of the assigned altitude and that ATC never said anything about it.

The Complainant testified that he did not have a problem with using half-bank while flying but that when autopilot is engaged he has a problem with half-bank turns. He testified that the autopilot is programmed to fly the specific aircraft's approach, arrival and departure profile and when engaged the autopilot flies exactly as programmed to perform within the profile of the route. "When you override any section of the autopilot, it makes the plane incapable of following that route. So it swings wider, descends slower. You do not override the autopilot. So that was my concern, either hand fly it or let the autopilot fly it." He stated that when he was flying a leg, K. Starling would override the autopilot and turn the half-bank on, he would turn it off, K. Starling would turn it back on, and he would turn it back off.

The Complainant testified that "low speed, crosswind restrictions, speed restrictions, these were my main concerns." He stated he notified A. Traylor in June 2009 of his concerns that he "would like to be able to resolve with [K. Starling] first before bringing it to anybody else since seeing how he and I were both co-captains, both professionals, and we both have APC's, we should be able to resolve it as professionals." He stated he talked to K. Starling who "was adamant that he was doing nothing wrong and that he was going to fly the plane the way he wanted to as long as he was PIC [pilot-in-charge]." He reported that when queried by A. Traylor

in July and August if everything was okay, he would say “well no, we’re still working on some issues” without again stating what the issues were. He testified that CX 12, page 1<sup>4</sup>, was an e-mail sent to him by A. Traylor after he had talked to A. Traylor about his concerns with K. Starling. He considered the e-mail to mean standard rate turns were used in holdings, access, trackings, departures, approaches, and arrivals. He stated he did not consider it safe to do a standard rate turn with the half-bank engaged.

The Complainant testified that after he told A. Traylor about his concerns with K. Starling’s over-speed and half-bank turns, he flew for two weeks in July 2009 with R. Ellison and K. Starling flew for two weeks with D. Nelson. During that time he discussed with R. Ellsworth procedures and his flying procedure issues with K. Starling. Then, after the two weeks, he flew with D. Nelson and K. Starling flew with R. Ellsworth. The Complainant testified that he agreed with the comments made by R. Ellsworth in CE 4.

The Complainant testified that C. Speidel asked him to meet at the Greensboro Airport office the morning of November 30, 2009 and he did so. He stated that at the meeting he was told he was being terminated for lack of chemistry in the cockpit and that “IVC said it was lack of chemistry in the cockpit and they wanted to go another route. He testified he met with A. Traylor a week later to turn in aircraft keys and ID where he was told “Landmark didn’t agree with [the termination; but] it was their [IVC’s] plane. Just they didn’t agree with it.” He stated that D. Nelson wrote a letter of recommendation for him.

The Complainant testified that CX 11 lists the 29 aviation companies/organizations and 10 non-aviation companies to which he applied for jobs during the January 2010 to March 2013 timeframe. He reported that he did not receive any comments from the companies or a favorable job offer. He testified that he currently works full-time for Mesa Airlines, Mesa Air Group, as CRJ900 first officer making approximately \$27,000.00 gross per year.

The Complainant testified that he never reached back to Landmark for any employment opportunities. He stated it was his “understanding that when they had another aircraft available they would bring me back” but he was never contacted by Landmark.

The Complainant testified that CX 8 contained his W-2 earning statements from 2008 through 2013 and copies of his federal tax returns for 2008 through 2012. He stated he prepared CX 9, page 3, to reflect what he would have received in pay and benefits from Landmark had he continued to work for them, less the income received in 2013 and 2014 from other work. He stated that the column “insurance” was the cost of insurance to him and that he thought Landmark paid some of that amount while working for them. He reported that the column “per diem” was based on his assumption that he would be flying two weeks a month. The Complainant testified that his credit rating was damaged because he wasn’t working and couldn’t pay bills. He stated he was concerned about his professional reputation because people know about the whistleblower case and it’s embarrassing people know about the termination. He reported that nothing was verbalized or told to him directly that the termination damaged his job search, so damage to his job searching cannot be proved. He reported that there was some matching by Respondent to his 401(k) and IRA contributions; but he did not know the amount.

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<sup>4</sup> The e-mail topic is “Standard Rate of Turn”.

He stated he took all of the retirement funds out to cover living expenses while unemployed. He testified that he borrowed money routinely from his parents to stay afloat, and amount listed in CX 9, page 4, as “estimated at \$100,000.00.” He identified CX 13 as a promissory note to his mother for the first \$50,000.00 borrowed from his parents and that he owes his parents an amount “probably pushing [\$90,000.00], maybe a hundred.” He testified he sold the motorcycle he owned on April 4, 2013, to pay for bills and “lost probably thirty-five hundred, four thousand dollars on that.” He testified that he had decided to sale a rental home in Lexington, South Carolina, while working for Respondent in Raleigh, North Carolina and that the sale closed three days after his employment was terminated. He testified that he had paid \$64,380.50 in attorney fees as of April 2014 from work earnings and credit cards.

On cross-examination, the Complainant testified that he began flying professionally for a living around 2003. He stated that his assignments with the National Guard involved repair of helicopters and that he did not fly helicopters or work on the King Air aircraft at the airfield. He stated that from June 2008 to October 2008 he flew a King Air C90, tail number 843RM, owned by a D. Rice-Marko that was chartered through the Respondent. He reported that when D. Rice-Marko took the aircraft to another charter company in October 2008, he left Respondent’s employment and went with the aircraft to the new company. He stated that if he had stayed with Respondent when aircraft 843RM left he would possibly have been without a plane to fly for Respondent. The Complainant testified that he returned to Respondent’s employment as a co-pilot for BeechJet 400A, tail number 492P, later in October 2008. He stated he was a co-pilot with K. Starling and not pilot-in-charge. He reported that 492P was owned by Respondent’s sales department and that they were trying to sell the aircraft. The aircraft was used as a charter for IVC and was sold around June 2009.

The Complainant testified that he was interviewed by H.T. Howerton of IVC in April 2009 for a position to fly an IVC owned BeechJet 400 under a contract between IVC and Respondent. He reported that K. Starling had been employed by Respondent longer than he had been; K. Starling was considered the chief pilot of the IVC owned BeechJet 400A, 61VC “according to IVC ... but not on the certificate”; K. Starling was paid more that he was; K. Starling had primary client relationship with IVC and would then communicate to him about IVC matters; and K. Starling did the bulk of the paperwork as pilot-in-charge. He reported that he split up from K. Starling and went to other BeechJet 400s under a contract with Signet in May 2009. One aircraft was 339SM managed by R. Ellsworth, the other was 492P until he delivered it to Louisville, Kentucky after it was sold in June 2009. He reported flying charter passengers seven days a week.

The Complainant testified that the half-bank turn is a pilot technique and that another word for technique is manner, style or method. He stated he could not cite to any FAA rule, regulation or order that prohibited the use of a half-bank turn. He stated that the aircraft manufacturer provides manuals for the operation of the aircraft which are approved by the FAA and if the aircraft manual states not to override the autopilot system and a pilot does override the autopilot system, he considered that “breaking the regulations because the FAA approves all those manuals.”

The Complainant testified that he did not know about the R. Ellsworth e-mail to A. Traylor in CX 4 while he was employed by Respondent. He testified that he did not tell A. Traylor his concerns were with K. Starling at the beginning but later “actually told him” the concerns were with K. Starling “when it got to the point I realized that [working it out with K. Starling] was not going to happen.” He stated he did not know if A. Traylor had conversations with K. Starling or C. Speidel, or R. Olson, about his concerns. He reported he did not know if A. Traylor had a role in his employment termination. He stated that after his initial conversations with R. Ellsworth about the use of half-bank turns by K. Starling in June or July 2009, he had no further conversations with R. Ellsworth involving the use of half-bank turns. He reported that if asked by A. Traylor asked about his flying, he would reply “same ole, same ole.” He stated that R. Ellsworth and A. Traylor were the only people at Landmark to whom he ever talked to about his concerns regarding K. Starling’s use of the half-bank turn and his flying.

The Complainant testified that he received an e-mail from A. Traylor August 12, 2009 regarding an issue with a BB&T charter flight he had flown with R. Woodside as co-pilot; K. Starling was not on that flight. He stated he was the pilot-in-command of the flight and he was aware that BB&T had lodged a complaint about the flight and raised customer service issues about the flight. He stated he was aware that BB&T was a large charter customer of Respondent but was not aware if BB&T had subsequently pulled the bulk of their charter business from Respondent. He stated he was also not aware that IVC sold aircraft 61VC and that K. Starling’s employment as a pilot and the co-pilot who followed him on aircraft 61CV were also terminated in December 2009 as a result of the sale of aircraft 61VC.

The Complainant testified that he was aware BB&T had complained about one of the passengers falling after drop-off. He stated he met with A. Traylor and discussed the whole incident. He testified that he watched the passenger, through his window, be escorted from the aircraft to the hanger and the passenger walking into the hanger and getting in his car.

The Complainant testified that C. Speidel had told him “if there was another airplane, he’d put me in right then.” He stated that he was aware that Respondent “had an air ambulance operation down in Charlotte they were a pilot short on.”

The Complainant testified that he filed an FAA whistleblower complaint before he filed the Air-21 complaint. He stated he was interviewed by J. Jennings of the FAA Flight Standards District Office around February 7, 2010 and probably told J. Jennings that he had no knowledge of any regulatory requirements on the use of standard rate turns. He explained “I let the autopilot fly the plane the way it’s supposed to and use the standard rate turns ... the autopilot system engages and disengages the half-bank when it needs it or does not need it. It’s the autopilot.”

The Complainant testified that he had no knowledge of what the Respondent may have said to any potential aviation employer listed in CX 4. He stated he is familiar with the Pilot Records Improvement Act (PRIA) and that a potential employer must get a PRIA release from the pilot concerned before obtaining performance records from a prior employer and that no information may be provided under PRIA without the pilot’s written consent. He testified that he had not provided a PRIA release to any of the companies listed in CX 4 or other companies. He stated

he was unaware of any company who might have rejected his application for work due to information from Respondent.

The Complainant testified that while working for Respondent his base salary was \$70,000.00; his flight incentive was \$30.00 per hour; and daily per diem for hotel, travel and meals while traveling in an amount between \$50.00 or \$55.00 per day. He testified that he did not know how much of his health insurance cost was paid by Respondent. He stated that he did not know if any Landmark pilots received a 12% increase in base salary in 2010 and he did not know what his pay rate would have been with Respondent in 2010. He stated that he had no evidence that Respondent gave any of its pilots a 5% cost of living increase between 2010 and 2014 and that he assigned a 5% cost-of-living increase to his damages computation in CX 9, page 3, out of thin air. The Complainant testified that he received \$25,390.00 in unemployment compensation in 2010 and \$25,250.00 in unemployment compensation in 2011, as indicated in CX 8, but did not indicate that as income in his damages computation in CX 9. He also acknowledged that he reported \$18,862.61 as his income on the 2013 federal tax return but only indicted \$16,000.00 as income for 2013 in his damages computation in CX 9. The Complainant testified that he is a member of the Airline Pilots Association and that a new union contract has been negotiated and put out for a vote, but he had yet to receive his e-mail to vote on the new agreement.

The Complainant testified that he did not obtain a credit report post-dating his employment termination by Respondent; did not supply any documentation that he has been turned down for credit; and did not provide the amendment made to the promissory note agreement he has with his mother (CX 13); and did not provide any documentation as to his Discover Credit Card debt as of the termination date or currently. He reported that the balance on the Discover Credit Card was probably \$400.00 to \$500.00 when he left Respondent's employment. The Complainant testified that his State Employees Credit Union line of credit balance was about \$1,000.00 on November 30, 2009 and is currently about \$10,000.00. He stated he did not use the credit union line of credit for moving expenses to Concord in 2013; did not use the line of credit to buy or lease a vehicle; but did use the line of credit for food, gas and living necessities. He stated he sold his 2006 Yamaha R6 in April 2013 for \$4,500.00 (CX 14). He reported that he bought the motorcycle for right at \$11,000.00 due to accessories, thought he could have sold it for \$2,000.00 more when deposed in November 2013, and the suggested retail price when he sold the motorcycle was \$4,490.00. He explained he thought it was worth more because of the accessories that NADA and Kelly Blue Book did not consider but motorcycle enthusiasts do consider. He testified that he scrapped his BMW 525 around May or June 2010. He stated that if he had continued working for Respondent he would have repaired the BMW and still have the motorcycle in his garage. He reported that he has not bought another car since 2010 and continues to drive his jeep. He testified that he decided to sale his house in South Carolina before November 30, 2009; accepted a contract of sale for the house before November 30, 2009; and went ahead and completed the sale.

The Complainant testified that he had a 401(k) account while employed by Respondent and that he moved it to Allstate a few months after his employment ended. He did not know if Respondent contributed to the 401(k) account or how much his contribution was. He acknowledged he took a distribution of \$8,500.00 from the 401(k) account in 2011 and a

\$6,500.00 distribution from the 401(k) account in 2012. He did not have documentation as to any penalties that were paid on the 2011 and 2012 distributions.

The Complainant testified that he did not have any conversations with R. Ellsworth in September, October or November 2009 about half-bank turns. He stated he could not recall having conversations with A. Traylor concerning half-bank turns in September, October or November 2009.

On redirect examination, the Complainant testified in his opinion that the pilot operating manual for the BeechJet 400A was approved by the FAA and are regulatory under Part 135 and that he believed operating manual comments related to use of half-bank when autopilot was engaged was regulatory; which is what he brought to the attention of A. Traylor and R. Ellsworth. He stated his belief that Respondent held the certificate for the BeechJet 400A and not IVC and that Respondent had operational control of the aircraft and not IVC. He testified that on the certificate he and K. Starling “were co-captains, equals.” He stated he had flown twice with K. Starling in a King Air before flying together in the BeechJet 400.

On re-cross examination, the Complainant testified that he did not know who A. Traylor or R. Ellsworth may have spoken to regarding K. Starling over speeding the aircraft or overriding the autopilot. He stated he reported his concerns “to the first person in my chain-of-command, the chief pilot. Where he took it from there, I have no idea.” He stated he did not know who made the decision to terminate his employment “other than [C.] Speidel told me, saying that it was IVC.” He testified that he had no idea where the paragraph contents of the e-mail in CX 12 came from. He identified the pages in CX 5 as material he photocopied from a book by CAE SimuFlite that they use to train a particular company and that he did not share the photocopies with K. Starling.

On questions from this presiding Judge, the Complainant testified that when C. Speidel notified him of his termination on November 30, 2009 and said he was terminated for lack of chemistry in the cockpit and they wanted to go another route, he assumed IVC was the “they” who wanted to go another route. He also testified that the tax forms contained in CX 11 were filed electronically.

When called in rebuttal, the Complainant testified that he had over 4,000 hours in the King Air aircraft. He stated that he and E. Wise flew Coach “K” on June 8, 9, 13 and 14, 2009. One trip was from Raleigh to Chicago Midway and back. The other trip was from Raleigh/Durham to Greensboro and back. He stated both trips were nonevents. He did not recall an event involving banking with Coach “K”. He denied ever having a hula doll. The Complainant testified to the event involving BB&T that he was flying from Richmond with R. Woodside; he was in the left seat; and he shut the plane down after landing. Then R. “Woodside got up and opened the door and escorted the passenger to the hanger and got back into the airplane and we departed ... I sat there and watched the gentleman walk all the way to his car, open the door and get in. Never once saw him fall. ... no umbrella [was used] because it was not raining. It was clear at that moment.” He testified that he may use a cell telephone before the engines are started for business purposes; “but as far as flying, once the engine started’ he does not use his only cell telephone. He identified CX 15 as a copy of his cell phone records.

On re-cross examination the Complainant acknowledged that customer service is a very important part of the charter program. He identified RX 2 as the e-mail from A. Traylor to him and R. Woodside involving the BB&T complaint. He stated that CX 15 was for the period from August 4, 2009 to September 3, 2009 for phone calls and for select days between August 3, 2009 and September 3, 2009 for text messaging. The dates for text messaging did not include the days he was flying on August 3, 4, 6, 11 and 13, 2009 or other days he flew in BeechJet 400A, 61VC.

*November 14, 2013 deposition of Complainant (RX 3)*

The Complainant testified in deposition that he had just moved into an apartment in Concord, North Carolina having moved from Charlotte, North Carolina. He stated he graduated for high school and attended Guilford Tech “and then Liberty University” recently where he studied religion on-line about two years ago. He reported that he did not obtain a bachelor’s degree.

The Complainant testified that he has not spoken with anyone from Landmark Aviation since he gave A. Traylor his i.d. and keys to the aircraft. He reported he worked for Landmark from around February or March 2008 to December 1 or 2, 2009. He reported October 2008 to November 30, 2009 was when he was with BeechJet aircraft and that he flew another plane for Landmark before the BeechJet. The Complainant identified his employment application and acknowledged his signature as June 3, 2008. He reported that he was flying for Mesa Air Group before Landmark and went on a personal leave of absence from Mesa Air Group on March 31, 2008 to think about whether he wanted to move to the northeast to be junior pilot assigned to JFK from Orlando. Prior to Mesa Air Group he was a pilot for a year for Package Express and before that he was a customer service representative for six years with U.S. Airways. He stated he has had his pilot’s license for about 25 years but never really wanted to fly to make a living; though he started flying for a living in 2003.

The Complainant testified that he began with Landmark Aviation flying a King Air C90GTi based in Charleston and owned by D. Rice-Marco. He flew as captain and PIC with a co-pilot/first officer. As PIC his duties were to “just manage the airplane. Kept up with ... all the maintenance logs, paperwork, worked with the maintenance people in Winston, made sure it was stocked, clean, fueled. Just made sure that it was ready to go 24/7.” The King Air was flown also for charter flights.

The Complainant testified that after D. Rice-Marco terminated her contract with Landmark Aviation, he flew the BeechJet owned by Landmark Sales Department where he flew with K. Starling as co-captains. He testified that he was equal with K. Starling as co-captains but that K. Starling was paid \$5,000.00 a year more to keep up with the paperwork. He stated that it is an incorrect understanding that K. Starling was the pilot-in-command (PIC) and he was second to K. Starling. He stated that they would split flying alternate legs 90% of the time during a charter; the other 10% of the time they would be in different BeechJets. He testified that the pilot in the left seat was the PIC and the pilot in the right seat was the co-pilot who worked the radios, talks to ATC, backs me up. “If I ask him to set the heading mode, he’ll set the heading mode. With the autopilot on, that frees that up to where the flying pilot makes those changes.”

The Complainant testified that IVC owned the aircraft, “but as far as a primary customer, we just chartered whoever chartered the plane.” He reported that when BeechJet 492P was sold by Landmark Sales Department, the only BeechJet left was 61VC. He stated that when 492P was available, he flew 492P and K. Starling flew 61VC. He last flew 492P when he delivered it to new owners in Louisville, Kentucky in June 2009. He reported that IVC’s BeechJet 61VC was put on Landmark’s certificate around June 2009.

The Complainant testified that when he flew charter for Sentient “we were gone seven days in a row, and we pretty much flew every day.” The Sentient flying was June to November and “we did it at least once – one week a month, sometimes two” in IVC’s BeechJet 61VC. He reported that BeechJet 61VC sat 8 passengers. With Mesa Air Group, he flew a 19-seat Beech 1900 and a 50-passenger Embraer 145.

The Complainant testified that he felt his employment was terminated because of K. Starling’s “lack of professionalism as far as flying the airplane ... concerns I had over his safety.” He reported that he had flown a couple of times with K. Starling in the King Air owned by D. Rice-Marco before a co-pilot was hired for that aircraft. He had no safety concerns over K. Starling flying the King Air. He stated “Personally, [K. Starling] and I always got along great. I never had a problem with him.” He stated that when they began flying BeechJet 61VC together he “absolutely” considered K. Starling a friend; had no personal disagreements over anything, would go out and eat together when flying together; “would discuss things, but they weren’t arguments ... we were always sending each other e-mails on, you know, political jokes and gaffs, and, yeah, we talked guns. We hung out. I mean I considered him a friend ... he came down to my boat ... helped me move into my house that I was renting up there ... we went out to eat ... we went scuba diving together ... we were friends.”

The Complainant testified that he had the same concerns about K. Starling’s flying in BeechJet 492P that he had in BeechJet 61VC; “it was the half-bank, speed restrictions, crossing restrictions, landing long and flat, over speeding the airplane.” He said his concern about half-bank turns was “running into another airplane on a parallel ILS approach.” He testified that “I can’t recite the exact regulation and number of the wording [concerning half-bank turns], but it does say that you fly the airplane in accordance to the manufacturer’s book. And the book specifically states when the autopilot is engaged, you do not override the autopilot system. The autopilot is set to engage and disengage the half-bank when needed, so when you reach down and turn the half-bank on or off, you are overriding the autopilot system, going straight against the Federal aviation regulation that says you follow the manufacturer’s book. When I would take off and I would call for the autopilot on at 400 feet in the air on takeoff, [K. Starling] would turn the autopilot on; then he would reach down and manually engage the half-bank mode. [K. Starling would do this] about every time I was flying, every time I was the PIC ... in 61VC ... I would tell him not to do that. I would turn it back off and ask him not to do it [and] he would turn it back on ... once we got up to, I think through 17,400, somewhere around there, the computer automatically turns it on.” K. Starling said the half-bank was “for passenger comfort. Passengers in the back don’t like feeling the airplane bank.” He stated that using a half-bank turn instead of a standard turn makes the turn a little bit wider than using autopilot without half-bank mode engaged. He reported that ATC called on several occasions telling them to “expedite your turn.” One time was into Raleigh from Richmond where he was PIC when K. Starling was

turning half-bank on and he was turning it off in the arrival corridor. He stated K. Starling used half-bank mode all the time. He reported that during landing they keep the planes “in-trail” at a distance of two to three miles, and that a half-bank mode is not going to affect you following somebody.

The Complainant testified that “IVC named [K. Starling] the chief pilot for their company, but we were still employed by Landmark, so we were still co-captains for Landmark.” He stated that you can’t interfere with the flight controls of the flying pilot. He reported that “technically the autopilot turns [half-bank mode] off when you’re coming through 17,000 feet. The computer says I don’t need it. It’s not on. The computer, the autopilot turns it off.” He stated he was unaware of any passenger complaints over comfort levels while he was flying.

The Complainant testified that he did not know if his concerns over K. Starling using half-bank turn was what led to his termination and that he did not know who terminated his employment. He testified that C. Speidel as Director of Operations for Landmark communicated the termination to him and “his exact words, IVC does not want you to fly their airplane ‘cause they’re not happy with the chemistry in the cockpit.” He stated he did not talk to IVC about the chemistry in the cockpit and never discussed his concerns about K. Starling with IVC. He reported flying IVC personnel approximately eight times. He reported “I always tried to keep the cockpit a very calm and relaxed place ... that’s not the place to really discuss anything or to have issues.” He denied that K. Starling ever express any concerns about his flying ability as a pilot, or about his flying technique, or about flying the plane like a big bus as opposed to a plane with eight executives onboard, or not paying attention in the right seat, or texting or talking on a cell phone during takeoff or landings.

The Complainant testified that he discussed the half-bank issue with his supervisor A. Traylor in July 2009 and “asked him if he had anything, if the company had any anything about the proper use of half-bank and just told him my concerns.” He stated A. Traylor “knew who we always flew with [so] he knew who I was talking about” but he didn’t acknowledge we were talking about K. Starling. He reported A. Traylor’s response was “well we don’t have that in writing because, you know, it’s a standard. You follow the manufacturer’s procedures of the airplane ... it’s just understood that that’s what you do ... he sent me an e-mail explaining when ... you’re supposed to use standard rate turns, and it validated my concerns.” He did not know if A. Traylor sent a similar e-mail to K. Starling or talked to K. Starling about using half-bank. He testified being told by A. Traylor that he had no involvement in the Complainant’s termination of employment and that he did not agree with the decision to terminated the Complainant.

The Complainant testified that he also talked about the use of half-bank turn with R. Ellsworth in the July/August 2009 timeframe and that R. Ellsworth said that he would be flying with K. Starling again and would observe him. He reported that R. Ellsworth flew “like three weeks’ worth” of flights with K. Starling during the Sentient charter trips and “basically substantiated all my concerns.” He reported R. Ellsworth discussed the use of half-bank with K. Starling during the flights. He reported that he did not have any discussion with A. Traylor or R. Ellsworth after early September 2009 concerning use of half-bank by K. Starling. He expected a sit down meeting to be arranged with K. Starling, R. Ellsworth and A. Traylor; but that never happened.

The Complainant testified that the BB&T incident involved “the gentleman we were flying. He was one of the VPs for BB&T. He slipped inside their hanger walking to his car and somehow that was our fault ? ... I don’t know what he slipped on; I was in the airplane taxiing out.” The Complainant stated “We’d just pull up in front of [the hanger] ... then you get out and walk into the hanger. I was told that he slipped in the hanger and hit his head and injured himself ... it had been raining; it wasn’t raining then.” He stated that the BB&T dispatcher who runs the little BB&T office at the airport, Angie, “called Landmark raising sand about the whole deal.” He reported that he did not know if the BB&T incident had anything to do with his employment termination. He reported the co-pilot on that flight was R. Woodside and that the incident went away the next day.

The Complainant testified that speed restrictions referred to the aircraft speed that was directed by the ATC at a certain point. Such as, if the ATCs “give you the combination ... cross Sandhills at 10,000 and 250, they want you to be at that fix at 10,000 feet and 250, not crossing it at 11,800 feet and 270 knots slowing to [250 knots].” He asserted that there is a specific FAA order or regulation that addresses speed restriction because “when ATC tells you to be in a certain fix and certain altitude and speed ... you have to do what they tell you to do. You’re in their airspace. [Unless] if you have to declare an emergency and have to deviate or maybe if they keep you up to high.” He reported crossing-restrictions to require crossing a fixed location at specific speed and altitude and that Jeppesen is a private company that provides “all approach plates for all airlines and the charter companies” and that Landmark Aviation uses them. He described the approach plate into Charlotte, North Carolina and identified several fixed positions and the altitude and speed that was to be observed when crossing the fixed position. He reported that if a pilot does not follow speed and crossing restriction the ATC would direct the pilot “you need to call this number when you get on the ground” to talk to “the ATC supervisor on duty at that time.” He reported that neither he nor K. Starling received such direction to call the ATC supervisor upon landing.

The Complainant testified that “long and fast” referred to not landing in the touch-down zone in the first third of a runway. He stated “everybody tries to make a smooth landing, but you do it in the zones that you’re supposed to be doing it in.” He reported that on a flight with K. Starling, him and R. Ellsworth as check pilot, there was an incident where “one of the struts was stuck so the brakes wouldn’t work ... I had to deploy the emergency brakes” on landing and if K. Starling had touched down in the proper zone the aircraft would not have come close to running out of runway. He testified that “when you have airplanes lined up every two miles to land, they want you on the runway and off ... once they clear you to land, they can’t clear anybody else to land, so as long as you’re taking up that whole runway, dragging it out and doing all that, you’re messing up the whole flow ... you touch down; you slow down; you get off the runway ... [the tower personnel] don’t complain about using [the runway] up ... they’ll just tell you expedite getting off the runway.”

The Complainant testified that he reported concerns about speed restrictions to R. Ellsworth and that R. Ellsworth’s “letter that he wrote [CX 4] is pretty much everything that I had, everything that I talked to [A. Traylor] about.” He stated that he discussed the concerns with K. Starling who would respond “I’ll fly the plane the way I want do. Passengers don’t want to feel a big descent. They don’t want to hear the throttles ... the power setting adjustments.”

The Complainant testified that he could not recall if he was informed he could reapply for employment with Landmark, "I was told if they had another airplane, they would put me back to work." He reported he did not seek reemployment with Landmark and he did not have to inquire if there was another aircraft to fly because "I can go on their website and find it. Yeah, they had eight or nine jobs around this area that they advertised while this whole thing's been going on ... they had one up in Virginia, I think one or two here in Winston; I think one down in Florida. Yeah, they had opportunity if that's what they really wanted to do."

The Complainant testified that he has been employed full time with Mesa Air Group as a first officer on a CRJ900 since April 2013. He reported he flies four days a week and makes \$1,700.00 a month before taxes and insurance." He reported he is guaranteed 78.5 hours of flight time a month and receives \$1.50 per hour as per diem. He reported his annual salary as \$24,700.00. He reported that he is a member of the pilot's union and that the pay, life insurance, and health insurance was arranged under a collective bargaining agreement. There is no retirement or pension plan. He stated that MESA paid for his flight safety and training to be checked out on the aircraft when he started work for MESA. He stated that he did not incur any expenses to maintain his ability to fly an aircraft.

The Complainant testified that his pay at Landmark was \$70,000.00 per year plus \$30.00 per flight hour. He reported that he cashed out an IRA in the approximate amount of \$21,000 but did not remember the exact amount and did not remember the amount of penalty imposed for early withdrawal. He reported he also tapped into his line of credit with Interstate Employees Credit Union for expenses to survive and the balance was closer to \$9,000.00 now. He stated he signed a promissory note for an interest free loan of \$50,000.00 from his parents in July 2010 to avoid bankruptcy and has not made any repayment on the loan. He stated he sold a motorcycle he used when the weather was nice for \$4,500.00 but "I could have probably gotten about \$6,500.00 for it." On alleged damage to credit, the Complainant stated that when you go from "making roughly 70, 80 grand a year ... [and] all of a sudden, it's yanked away ... credit will start to deteriorate a bit there." He stated his thought somebody's professional reputation would be damaged, "as far as getting a flying job," if letters are sent out saying "I was difficult and complicated and argumentative in the cockpit" ... but that he was unaware of any Landmark employee doing such a thing with any prospective employer.

The Complainant testified that he tried to start a business for sheetrock and painting with his cousin "who's been doing it for 25 years" but "it's too hard to compete with illegals." He also tried a boat washing business for eight or nine months on Lake Norman. He reported he had interviews to fly for Jet Logistics and Imagine Air for flying positions but was not hired.

The Complainant testified that he typed-up the timeline of events "right after all this went down" not as the events were occurring. He stated he did not know what K. Starling may have done on getting IVC to terminate my employment around September 2009.

The Complainant testified that he had met H. Howerton a few times; did not know what information H. Howerton may have had about the employment termination; and never had any

discussions with H. Howerton about flying IVC aircraft 61VC. He denied ever acting unprofessional towards K. Starling.

*Testimony of R.D. Ellsworth (TR 24-32)*

R. Ellsworth testified that since 2009 he has been a regular pilot check airman with Respondent. He stated that he sent an e-mail to Respondent's chief pilot, A. Traylor, on September 17, 2009, (CX 4). He testified that he did not write an e-mail concerning the Complainant to anyone.

On cross-examination, R. Ellsworth testified that the September 17, 2009 e-mail was internal and sent only to A. Traylor. He did not send a copy to the Complainant or anyone else. He stated that he knew the Complainant's employment had been terminated, but did not know the exact date. He testified that he was not the Complainant's supervisor, was not asked by anyone to provide information about the Complainant, and did not have any role in the Complainant's termination.

On examination by this presiding Judge, R. Ellsworth testified that the e-mail was in response to A. Taylor's request to provide his thoughts about K. Starling from his experience with K. Starling during several earlier check rides and flights together. He was asked for his thoughts because A. Traylor was aware of difficulties K. Starling and the Complainant had working with each other. There were procedural issues about flying the aircraft between the two pilots. He reported that A. Traylor did not make a similar request concerning the Complainant.

*September 17, 2009 e-mail from R. Ellsworth to A. Traylor (CX 4)*

This exhibit is the e-mail sent by R. check airman Ellsworth to chief pilot A. Traylor on September 17, 2009 in which he summarized his prior experience flying with K. Starling.

“Observations: I have given Capt. Starling two line checks and also served as first officer on two separate weeks of charters. Capt. Starling is new to the BeechJet as of the first of 2009 with the majority of his time in King Airs and a small amount of time in a Citation. Capt. Starling is a very conscious pilot who thoroughly plans his flights. He performs his duty's (sic) in an outstanding fashion and is very respected. There is no doubt in his ability to fly the BeechJet. He has unfortunately developed some habits that must be addressed ...

CRM [Crew Resource Management]: Capt. Starling's flying background as I understand it, has involved a lot of single pilot operations. He has personally managed and piloted most of the aircraft he has flown. When the aircraft required two pilots, there seems to have been a variety of other pilots. I believe he has not had a good opportunity to jell with another crew member. Consequently, at times he tries to take on most if not all the flight deck workload. This environment was

pointed out on both of his line checks. I would recommend on his next visit to Sim or ground school, a short course in CRM is in order. In his defense, he may not have received a thorough training on CRM.

Power Settings: In short, lack of timely and appropriate Eng thrust settings. As mentioned Capt. Starling is a very conscious (sic) pilot, he takes his passenger comfort level almost to the extreme. His mind set is that he does not want the passengers to realize there has been any power adjustments at all. The problem is apparent in all aspect of flight, particularly in the decent, terminal and landing phase. In his decent his reluctance to reduce the power in a timely manner, he often activates the over speed warning and having done so he is still not taking the appropriate action of reducing the power and or using the speed brakes to reduce the aircraft speed in fear the passengers may notice this change. His response is to make very slow incremental power changes which leave him in the over speed state longer that should be accepted. This scenario plays out in the terminal and landing phase as well. He general (sic) will achieve the appropriate Ref speed for landing but once again is reluctant to pull power off for landing resulting in very long landings which is a safety concern in itself. My concern is what would he do with an RA from TACAS which requires quick power reduction and maneuverings of the aircraft.

½ Bank mode: Capt. Starling is trying to achieve the smoothest flight possible for his passengers by constantly using the ½ bank mode on autopilot. The problem is that ATC expects standard rate turns below flight lever 180, not half. This is most apparent in the terminal and approach phase. Giving his reluctance to reduce power and air speed in the approach phase this only makes the situation worse. My recommendation is not to use this feature at all.

Review: Capt. Starling overall is an excellent pilot with many hours of experience. I think he has tried unsuccessfully to transfer some of his techniques from the King Air to the BeechJet. As I have pointed out to him ‘you no longer have big props out there to slow you down.’ CRM is something that must be constantly reviewed by all crews. Capt. Starling just needs to focus on this. As far as passenger comfort is concerned he needs to realize you must fly the plane first. Proper and timely power adjustments are not unusual but expected. Even the occasional use of speed brakes is not unusual. Lowing (sic) landing gear creates much greater noise and turbulence.”

*Testimony of K.G. Starling, III (TR 175-217)*

K. Starling testified that he is currently employed with Lee Aviation Services in North Carolina and continues to serve as fire chief of a local fire department. He stated he began employment with Piedmont Aviation in the late 1990’s and it later became Landmark Aviation around 2000. He stated his employment with Landmark Aviation ended December 31, 2009 “because the aircraft I was assigned to [tail number 61VC] was being sold by its owners, IVC.” At the time employment ended there were no other pilot seats available for him so when he received better

offers he chose not to go back to Landmark Aviation. He stated that Landmark had called him about returning but he chose to stay where he was.

K. Starling testified that when he flew for Landmark he had the titles of lead pilot, aircraft manager and pilot-in-charge (PIC). He stated he was the PIC on all flights he flew. He reported that where there are two pilots in an aircraft, either can be flying, but there is still only one PIC.

K. Starling testified that he has 35 years of flying experience with 12,000 hours in aircraft and a little over 700 hours in helicopters. Less than 200 hours were in single engine aircraft. He reported that he is a certified advance ground instructor but didn't go the ground instructor route. He stated he was a Proline 21 instructor for Landmark, teaching new avionics systems that pilots needed to be qualified on. He reported that he did initial flights with the Complainant when he came to Landmark to fly a privately owned King Air C90 out of Charleston, South Carolina. He reported flying with the Complainant to acclimate him to the King Air C90 and training the Complainant and the other assigned co-pilot on that King Air in the Proline 21 avionic system.

K. Starling testified Landmark Sales Division owned a BeechJet 400 and approached him about flying it on charters. He was part of the process in interviewing prospective co-pilots for the aircraft. He reported knowing the Complainant from SimuFlite work. The Complainant was already a Landmark employee so he was transferred to the BeechJet and began flying with him as co-pilot in November 2008. He stated they flew the Landmark owned BeechJet about six months before the IVC BeechJet was brought onboard.

K. Starling testified that he met with IVC representatives in the May/April 2009 timeframe when the IVC aircraft was put on Landmark's Part 135 certificate. He became the PIC and the Complainant became the co-pilot on IVC's aircraft 61VC, with both he and the Complainant captain qualified. He stated that at that time there were several Landmark pilots qualified in the BeechJet 400.

K. Starling testified that there became a compatibility issue between him and the Complainant. "Flying was not that big an issue, we could work through that." He described the need to be compatible because of the closeness generated by seven to ten day charter "drops" where the pilot and the copilot go everywhere together and eat together. He explained that they "had a whole lot of differences in our lifestyles ... it was not a good fit ...it was more or less the personality." He reported that the Complainant "is kind of an argumentative guy. He likes to discuss, the way he put it, anything. That was kind of the problem – religion, anything controversial, politics, gun control, whatever topic he could talk about that was controversial, he likes that ... if he thought he had a different opinion on a topic, he would continue with it."

K. Starling testified that he and the Complainant had discussions about using half-bank turns. "It started just aircraft handling in general. [The Complainant] was just rough on the controls ... Just not a smooth pilot. I wouldn't say nothing unsafe about it, but you can always improve and be better. Especially flying charter, which are high-end customers that are paying the premium price so therefor ... sometimes they are a little bit more demanding. They're not your average airline passenger. So I was trying to incorporate that safety is first and of course anything you can do to make the experience better." He reported the Complainant's rough handling was

present in abrupt heading changes and altitude descents where the Complainant would roll the autopilot pitch control down and “it would kind-of lift you out of your seat if you were looking out the other direction, caught you off-guard because you’re weightless for a second. So things like that, nothing extreme, just things that needed improved upon.” He testified that the Complainant was not receptive to any type of critique.

K. Starling testified that there was one instance where they were flying longtime charter passenger Coach “K” from Duke University and the Complainant “was a little high and fast” coming into Raleigh and asked permission to do “S” turns to loose altitude instead of making a straight line to the runway. He reported that several of the “S” turns were aggressive and after landing Coach “K” asked about all the turns on landing. He reported the Complainant explained that there was an aircraft on the runway that he was giving time to get out of the way. He stated Coach “K” never flew with them again, but did not know the reason he stopped flying with them. He stated that Coach “K” did not file a complaint and he did not think there had been a problem until later when the realized Coach “K” hadn’t flown with them for several months. It was then he reported the incident with Coach “K”.

K. Starling testified that the Complainant discussed half-bank turns with him several times and the Complainant brought it up to several other pilots. He testified that he is unaware of any FAA order or standard prohibiting the use of half-bank turns, “other than ... [the] only place it’s depicted is when you’re referring to a holding pattern, which requires a standard rate turn.” He stated that “it’s been my experience, especially in a high density area ... that you need to make turns as quickly as possible so we would never use the half-bank in any terminal operations or approach operations.” He stated that when flying with the Complainant, air traffic control (ATC) never cautioned against any sort of half-bank maneuver or instructed not to use it. He reported that the radius of a turn depended on aircraft speed and aircraft bank and that the ATC could not tell what bank an aircraft was in but would give you a new course to steer if you were not at the point on the ground that the ATC wanted you to be.

K. Starling testified that BeechJet 61VC had a half-bank switch in the cockpit and that there may have been occasions where he turned the half-bank on and the Complainant turned it off; but there was never any repeated on-off, on-off, on-off. I would not have allowed some of the stuff I read [involving interaction with the Complainant in the cockpit] , that would not have happened.” He testified that he was unaware of any calls from an ATC saying he was over-speeding. He stated ground speed depended on which way the wind was blowing and aircraft speed. He stated that pilots try not to over-speed the aircraft, “but it happens to all of us.”

K. Starling testified that “the half-bank being another one of those that I consider a pilot technique, if you can fly it smoothly. If you can take the heading flow and if you can turn it slow enough, you don’t need the half-bank. There was the problem, [the Complainant] would just take the controls and just spin them. To go from an autopilot on that BeechJet is not that smooth. You would go from wings level if you were given a right turn, [the Complainant] would spin the autopilot ... and the aircraft would immediately head into a 25 or 30 degree bank. So if you were hand-flying it, I’m sure most people could do it a lot smoother than that. That’s all I was trying to get the point across in the half-bank discussions. Pitch discussions the same thing, they would make pitch changes more gradual.”

K. Starling testified that he and the Complainant went to SimuFlite together for the BeechJet 400 type rating and that ‘as soon as we received the type rating, as far as the FAA was concerned, we were fully qualified when we came out of the simulator and had never walked up to a real airplane we were qualified to fly. He stated that for the first seven-day block for charter flights he flew with R. Ellsworth and the Complainant flew with D. Nelson; “that’s just to get use to the aircraft, what really happens in the plane, how it feels, that sort of thing. So during [the timeframe covered in CX 4] I was actually learning the aircraft. [R. Ellsworth] and I had a lot of these discussions. He had a lot of techniques, lot of just little tidbits of information that were great that I tried to be receptive to like he said in the e-mail. But this was initially. You have to realize this is the first flight we took in the airplane after his first evaluation. This was not after years of flying. Yes, it was a little harder to slow down. It didn’t slow down as good as the other airplanes ... there are several other things that he mentioned in there that I tried to improve upon.”

K. Starling testified that he was aware of the incident involving the Complainant and the BB&T complaint over customer service. He testified that he was on vacation with his family in Disney World when it occurred and he learned afterward what had happened. He testified that BB&T had two aircraft of their own as well as their own dispatcher, whose “job is to coordinate the pickup of all board members and whatever we’re doing at that particular time.” He stated his understanding that the dispatcher had asked the Complainant on a late returning flight to open a hanger door and help the board member get his car out of the hanger, to which the Complainant refused. The dispatcher came back after hours, waited for the aircraft and opened the hanger door. It had been raining and the flight crew “only shut down one engine to get out pretty quick and [the Complainant] didn’t have an umbrella for the passenger, which we normally try to do ... when it’s raining. The passenger ran out of the airplane and ran into the hanger where the floor was wet and slipped on the floor.” He testified that the dispatcher “had the authority and she made the decision that if [the Complainant] was the PIC on any other flights of Landmark, that they would not use them. I think she made it known in an e-mail, phone call or something.” He testified he did not solicit any of the BB&T complaint about the Complainant, though he discuss it with H. Howerton and that “we were going to be losing charters due to that” which would affect IVC and Landmark.

K. Starling testified that he would discuss the flights with H. Howerton sometimes before and sometime following flights. He stated he provided an individual report every month with a list of all the flights flown, how many hours we had to use to reconcile against the kind of work that Landmark was sending IVC.

K. Starling testified that there were concerns with the Complainant’s work schedule of being on-call for charters. He stated that “we did a lot of organ transplant charters where the Duke [University] Carolina medical team would call us to fly out, retrieve donors and fly them back ... I get a call 1 AM or 2AM ‘how quick can you get to the airport, we’ve got a patient on the table.’ [The Complainant had issues with quick responses.” He stated that the company’s standard response time when on-call for a charter was a “pretty strict standard” of two hours but that the Complainant “wanted a four-hour notice or more sometimes” for responding while on call. If the Complainant was going to Wilmington to work on his boat, he would ask the dispatcher that they

not give him any shorter than four hour notice. He testified "I found out later because the dispatcher would go, I had a charter for you but you couldn't take it. I'd go, well couldn't we take it, you didn't call me. Well, because [the Complainant] told me he wanted an extended call out. Issues like that just continued to get worse ... I told the dispatchers that was not acceptable, if we had a trip, to call us and we'll do the best to make it work. [The Complainant] was committed to this aircraft. If he wanted the day off, he could take the day off through the proper channels; but if he was on duty, call us for the trip." He reported he discussed the scheduling concerns with H. Howerton and Landmark.

K. Starling testified he advised H. Howerton that he was managing the situation with the Complainant and there were no safety concerns, pro se, so he advised H. Howerton that "it would be fine to wait until the one-year anniversary [of Complainant's simulator training] because it's extremely expensive to go to simulator school ... \$18,000.00 to \$25,000.00. So rather than lose your investment in [the Complainant] and retrain another guy for that period of time, I said let's just wait until the end of the year cycle when we get ready to go back to simulator school to make the changes, and that's what happened."

K. Starling testified that he did not create any documentation about the issues with the Complainant; "even after Landmark told me they made a decision to talk to [the Complainant], they wanted me to write up a summary of what happened and so forth, of issues I had with [the Complainant], I told them I hated to do that. I didn't want to put anything in his file that was a detriment to him getting another job to find something else [where] he was compatible, and I chose not to do that. Like I said, I wish I had now."

K. Starling testified that "no operational issues had any bearing on [the decision to terminate Complainant's employment]. It was more of a personal conflict of maturity level, of lifestyle, of general attitude, of work ethics. Those are the factors that made it where it was not a good situation ... it had gotten to the point where [flying] was not enjoyable."

On cross examination K. Starling testified that he suggested to H. Howerton that the change in co-pilot be made at the one-year mark versus now. He reported that he was not the Complainant's supervisor but that when they were flying, he was the PIC and when they were on the ground he was the lead pilot. He reported that A. Traylor was his direct supervisor as Chief Pilot and was probably the Complainant's direct supervisor also. He testified that his discussions with A. Traylor about the Complainant involved the stressful environment it was creating, the Complainant being argumentative and wanting to discuss politics and religion and other things that were controversial, and the maturity level difference between he and the Complainant. He testified that the Complainant "was very argumentative ... personal issues that we were having I would have left off that [performance evaluation]. If I did say anything [when the performance evaluation was presented to the Complainant] it would have been about the flying skills, the job we were doing." He stated he never brought any of his issues with the Complainant to R. Ellsworth.

K. Starling testified that he saw the September 17, 2009 e-mail from R. Ellsworth to A. Traylor the day before he was called to testify at the formal hearing. He stated that A. Traylor had "said you need to watch your speed and work on your CRM. I said okay." He stated that the

evaluation by R. Ellsworth in the September 17, 2009 e-mail was an evaluation made based on his initial flight in the BeechJet 400 around November 2008 and that he agreed that there were some things he needed to work on. He reported that he worked on CRM by taking a CRM course with seven or eight other pilots, including the Complainant. He agreed that over-speed is part of the aircraft system limitations of BeechJets that are in the FAA approved aircraft flight manuals. He stated “it would appear so” when asked “if you over-speed the aircraft in violation of system limitations ... [you are] in violation of a federal aviation regulation.”

K. Starling testified that “the smoothness, the coordination was the problem [with the Complainant’s flying]. It was not a safety issue, but it was a problem” and that he had brought it to the attention of IVC. He stated that “you do not use the half-bank during any approach.” He stated that he did not witness the incident with the Complainant and the BB&T passenger at the hanger and only had “the information that BB&T gave me; and then I questioned [the Complainant] and the information he gave me.” He stated “that is true” that “Landmark had all the say in the pilots and piloting of the flights.”

On re-cross examination, K. Starling testified that he had no reason to doubt the information provided by BB&T and that the Complainant had over-speed events in the aircraft on occasion. He stated he was unaware of any safety issues that were raised by either himself or the Complainant regarding over-speeding. He stated that “I’m not sure where to find it in the regs or aircraft manual, but it’s general knowledge you don’t use half-bank on any approach, FMS or otherwise.

On examination by this presiding Judge, K. Starling testified that he, the Complainant and another pilot went through a three week simulator course in November 2008 and then he and the Complainant flew BeechJet 492P for about less than six months. It was in 492P that he and the Complainant flew flights with R. Ellsworth and his co-pilot. He testified that after flights in aircraft 61VC he would do the paperwork for the flight and send it to the dispatchers who would distribute it to the different regions that needed the pilot data. He reported that he was the one to schedule maintenance of the aircraft around scheduled charter flight schedules. He stated he normally filed the flight plan and that usually whoever was flying the first leg of a charter or got to the aircraft first would do the preflight check of the aircraft. He reported that when he took a day off or the Complainant took a day off, another pilot would fly in aircraft 61VC, but he couldn’t say he flew with R. Ellsworth in aircraft 61VC. He stated he did not recall having any discussions about the Complainant’s future with H. Howerton after H. Howerton sent October 22, 2009 e-mail concerning the BB&T event to R. Olson (RX 1).

K. Starling testified on re-cross examination that he could not recall a specific date when he told H. Howerton that there had to be a change in co-pilots, though it was several months after initially discussing difficulties with the Complainant and that things just progressed “to the point where I can’t fix this.”

*August 12, 2009 e-mail from A. Traylor to Complainant (RX 2)*

This exhibit is a copy of the 6:03 AM, August 12, 2009 e-mail from A. Traylor to the Complainant and R. Woodside stating –

“You need to call me as soon as you get this. I received a message that your passenger fell in the BB&T hanger after the drop off yesterday. The query came from J. Hopkins so EVERYONE knows about this already. Rich, if you are not flying you probably need to come to the office. Call me.”

*Testimony of H.T. Howerton (TR 133-149)*

H. Howerton testified that he is the Chief Financial Officer and Secretary/Treasurer for IVC and has been with IVC since April 1992. He stated that in 2009 IVC owned a Hawker that was required by Raytheon and that “Hawker” and “BeechJet” became synonymous. He stated that in March 2009, IVC and Landmark Aviation entered into a charter management agreement for aircraft 61VC owned by IVC. Prior to the contract with Landmark Aviation the aircraft had been housed in Mecklenburg County and flown by IVC pilots. He reported the IVC pilots did not wish to be employed by Landmark Aviation and their employment with IVC was terminated.

H. Howerton testified that under the charter management agreement Landmark was to employ the pilots that they provided to aircraft 61VC. He stated that IVC filtered a number of candidates for the pilot position in April 2009 and met with the Complainant and K. Starling who were recommended by Landmark. The Complainant and K. Starling were selected as the pilots for IVC’s aircraft 61VC, with K. Starling as pilot-in-command. He reported that IVC is based in South Hill, Virginia; but the aircraft is housed in Raleigh because that is where the charter demand is located. Landmark had requested that the aircraft be relocated from Mecklenburg County to Raleigh/Durham. He testified that under the charter management agreement IVC shared in charter revenue.

H. Howerton testified that he “had a very positive relationship with [K.] Starling. He was very professional. ... Very good customer serviceability. He understood the importance of our being able to charter the plane and he was very customer service oriented.” He testified “In the very beginning we had a good relationship with [the Complainant]. There became a time where I started hearing that he was dissatisfied. He had been complaining to Mr. Starling about the frequency of charters; and later on we became aware of some incidents where some of the chartering customers had complained about [the Complainant].”

H. Howerton identified RX 1 as e-mail exchange with his Landmark point of contact, R. Olson, about concerns regarding the Complainant. He testified that he had received a telephone call from K. Starling stating that the Complainant had offended a group from BB&T during the course of a charter and he was concerned that we would lose BB&T as a customer if the Complainant was kept as a pilot for IVC’s aircraft. BB&T was “one of our major chartering clients.” He stated he then had conversations with R. Olson and he “felt like that with [the Complainant’s] attitude that it would be in the best interest of both Landmark and IVC if we replaced him.” He reported that he was aware of the name A. T aylor and may have met him in a group setting; but he never spoke to him directly. He stated that Landmark managed the aircraft so they had control over the aircraft according to the FAA and “so any changes to the pilots had to go through Landmark. IVC could not make the decision on its own. We simply relate to Landmark our feelings concerning the pilots.” He stated that Landmark never ever

voiced concerns for or about K. Starling's performance. He reported IVC sold aircraft 61VC in December 2011. He stated that after IVC sold aircraft 61VC K. Starling did not fly for IVC, but he did get subsequent employment with another group.

H. Howerton testified that it was his understanding that BB&T was a charter customer of Landmark and BB&T frequently used the IVC aircraft 61VC.

On cross examination H. Howerton testified that he personally witnessed the Complainant's flying and had no issues with his flying ability. He stated that the concerns about the Complainant flying IVC's aircraft on charters initially came from K. Starling, but that he also discussed the concerns with R. Olson. He stated he discussed the BB&T customer service complaint with K. Starling and with R. Olson. He stated that he had weekly conversations with K. Starling about chartering, the aircraft schedule, and how things were going. He stated that there came a point where the Complainant came up in conversation over complaints about the number of charters, the time it took the Complainant to be part of the plane crew, and the nights away from Raleigh/Durham.

H. Howerton testified as to RX 1 that "FAA requirements were that Landmark ultimately would employ the pilots. We were told by [R. Olson of] Landmark that [for] any pilots that they would employ, that International Veneer or IVC in effect would sign off agreeing that those pilots would be acceptable to us." He stated that IVC "would probably fly the plane 50 percent of the time and it would be chartered 50 percent of the time, so the pilots were not only important to us as far as chartering but they were important to us because we were the plane's owners. [K.] Starling was as professional as any pilot I've ever been around. So, in the course of this e-mail [RX 1, K. Starling] is very important to us and we support him 100 percent, that is a true statement because we wanted to keep [K.] Starling. He was as good a pilot we'd ever been around. ... We supported the view if [K.] Starling said there were issues with [the complainant], then we accepted his view that there were issues with [the Complainant]." He reported that other than a subsequent conversation with Landmark, he had no personal observation to believe the Complainant was not a professional pilot or did not fly professionally.

On questions by this presiding Judge, H. Howerton testified that his Landmark contacts concerning the IVC aircraft was with K. Starling and R. Olson. Landmark had operational control of the aircraft and was responsible for all maintenance. "We received, at the end of each month, an accounting of the plane, the charters they undertook, the maintenance expenses [and] any and all expenditures of revenue ... but day-to-day, we would receive no formal information from Landmark on the plane. It was up to them to do whatever was necessary to make sure the plane was operational and safe."

*Testimony of R. Olson (TR 149-175)*

R. Olson testified that he has worked for Respondent for seven years and is now the Director of Aircraft Management Division. In 2009 he was the Director of Business Development for Landmark Aviation, Aircraft Management Division. As Director for Business Development his purpose was to identify, engage and sign contracts to bring airplanes into Landmark's management program. In March 2009 he worked with IVC to identify an aircraft and enter into

a management agreement with the plane based in Raleigh/Durham. The aircraft was a Hawker 400XP, tail number 61VC.

R. Olson testified that in a chartering/management agreement, “Landmark provides management services as well as charter programs for individuals or companies or corporations. In this particular case we identified an aircraft at a regional that had a very heavy presence of charter. In this case IVC had an opportunity where they had an under-utilized asset, they weren’t flying the airplane as much as they anticipated, so Landmark Aviation had a program to continue to operate the plane, give them preferred placing based on our network and our leveraged discounts, as well as provide a program to charter their aircraft and provide them with revenue or profits from the costs of this operation.” He reported that during the negotiation phase IVC decided Landmark would provide pilots for the aircraft moving forward; “we provided candidates for IVC. They made the decision with our recommendation who to base on that airplane.” K. Staling was based on the aircraft as lead and the Complainant was based on the aircraft as a pilot. He stated both were qualified, “but a lead is identified based on tenure as well as experience on the aircraft. The lead would be the individual more experienced in the aircraft both in time and type of airplane, as well as experience in charter operations, sometimes more experience with the company.”

R. Olson testified that the IVC aircraft was moved to Raleigh/Durham so it would see greater charter use. He stated that BB&T and Duke University had been clients of Landmark for a number of years and would fly the aircraft. He testified that he subsequently learned of service failures regarding customer service issues with BB&T when the Complainant was pilot-in-charge. He discussed the BB&T customer service issues with H. Howerton who was concerned about the ability to keep charters and revenue offsets with the airplane and suggested that Landmark should be concerned as well. He discussed the option of removing the Complainant as a pilot on the IVC aircraft. He stated that the Complainant was subsequently removed from the aircraft.

R. Olson testified that he had no conversations with the Complainant regarding half-bank turns or over speeding; nor did he have such discussions with R. Ellsworth, A. Traylor or H. Howerton.

R. Olson testified that the BB&T complaint involved the Complainant leaving “an APU on during a boarding of the aircraft which is not something that we typically do in terms of ... customer experience ... it’s loud and it’s not needed and I believe [the Complainant] made the decision to keep it on just based on sheer convenience ... he was the lead pilot on the operation. ... There was another instance [involving] the standard courtesy in terms of parking the airplane ... closer to a hanger. While it was raining, I think one of the clients slipped which could have been prevented by bringing out an umbrella or being more cautious, again, the customer service experience that we typically provide for all our clients.” He reported that APU is an auxiliary power unit that keeps the aircraft powered so that when you go to start the airplane the systems are up and running.

R. Olson testified that customer service “can make or break our business. Our aircraft management of charters is a very, very fragile business. There are a lot of elements to what we

do that is uncontrollable ... [such as] weather ... maintenance ... customer complaints, but what we can control is our customer service and that is the real focus and it's the distinguishing factor between a commercial airline and a corporate airline. Specifically, when you're dealing with multi-billion assets, if you don't have airplanes to manage you don't have charter clients. You don't have charter clients, you don't have airplanes to manage, so it's very important."

R. Olson testified that once IVC sold the airplane to a new owner in the Northwest, it was not available for Landmark to fly. When the airplane was sold, there was no position for K. Starling so he did not continue as an employee of Landmark. The co-pilot who replaced the Complainant on the aircraft was also terminated with the sale of the aircraft.

R. Olson testified that during his seven years with Landmark the pilots never received a 5% cost-of-living increase in pay or any increase in pay, "There's no cost-of-living increase that's given." He reported that aircraft type, pilot aircraft rating and pilot experience is typically considered in setting pilot pay; as is geographic location and the Pro-Pilot Survey which lists pilot salary ranges for different types of aircraft.

On cross examination R. Olson testified that he was notified by the BB&T account executive or scheduler that there had been a customer service failure relating to the Complainant through the weekly management meetings and that there is a log for such events and that there is a pass-down report in this case. He stated that he was responsible for customer service in terms of client relations for Landmark and that the event causing the service failure would be an action item for the chief pilot or Director of operations. He stated he has not flown with the Complainant and did not discuss the Complainant's flying abilities with R. Ellsworth or read his September 17, 2009 e-mail to A. Traylor.

R. Olson testified that he discussed with H. Howerton IVC's desire to move forward. He testified that the management agreement with IVC gave Landmark operational control of the aircraft and that "Landmark staffs the airplane, pilots specifically assigned to that tail number ... at any point in our agreement ... should either Howerton or IVC want to pull the airplane from Landmark Aviation, they can do that and they can also hire those pilots directly. In terms of who controls the pilots, Landmark Aviation controls the pilots. If the owners are not happy, we don't hire those pilots on." He reported that he had discussions with H. Howerton to the effect that "Landmark would address the issues and provide solutions and options" for the customer service failure with BB&T concerning the Complainant and that "we're committed to a fair and realistic partnership." He stated that he never discussed the issues with the Complainant and that his "relationship was solely securing the changes of the owner through our management program."

R. Olson testified that the IVC charter scheduler would have passed on the information about the BB&T customer slipping in the hanger because it was wet from rain at the weekly meeting.

On re-direct examination R. Olson testified that he had no reason to believe that the BB&T complaint was a made up complaint or was somehow generated by K. Starling.

On questions from this presiding Judge, R. Olson testified that aircraft N492P was a 400 class aircraft that was sold a few months after Landmark Aviation entered into the management

contract with IVC. He stated his belief that Landmark Aviation owned aircraft N492P and that the Complainant may have flown in the aircraft. He reported that aircraft 339CM was a 400XP aircraft, which is also a type 400 aircraft, and that it was owned by an individual. R. Ellsworth was lead pilot on 339CM. He testified that the Complainant was replaced on aircraft 61CV by local pilot S. Davenport.

R. Olson testified that in the December 2009 timeframe there were no available openings to pilot type 400 aircraft with Landmark, other than the opening in 61VC filled by S. Davenport. He reported that Landmark Aviation does not own any aircraft, but since December 2009, the fleet managed by Landmark Aviation has grown from 25 aircraft to 75 aircraft, and that four or five of the aircraft throughout the United States are type 400 aircraft. He testified that pilot seats opened after December 2009. He stated that “sometimes a plane comes with pilots from a stand-alone operation; but, if we do need to staff an airplane, we put job postings on corporate. HR department in Texas handles that. As well as word of mouth, as well as internal communications for pilots that may be interested or know somebody that may be interested.” He stated it is correct to say Landmark Aviation has eight to ten 400 type qualified pilots on staff. He reported that in mid to late 2009 there were only two 400 type aircraft being managed and Landmark only had 4 400 pilots at that time.

On redirect examination R. Olson testified he was not aware if the Complainant had applied for any 400XP pilot openings after November 2009.

*October 22, 2009 e-mail between H.T. Howerton and R. Olson (RX 1)*

This exhibit is a copy of an October 22, 2009 e-mail from R. Olson to H. Howerton concerning the Complainant as the co-pilot for IVC aircraft 61VC and H. Howerton’s reply –

10:25 AM, October 22, 2009 – from R. Olson, “Subject: RE: Co-pilot”

“As always I appreciate the open communication we have established. I will work to ensure we resolve the issues using the best interests of IVC. There are many key factors that provide the success’s we have witnessed; [K. Starling] being one and IVC’s commitment to a fair and realistic partnership. I am committed to N61VC and IVC and I will provide to you a detailed plan of how we will address the co-pilot moving forward.”

10:25 AM, October 22, 2009 – from H.T. Howerton, “Subject: Re” Co-pilot”

“Thanks, I agree – the success has been largely due to our working together. We appreciate your continued assistance.”

10:59 AM, October 22, 2009 – from H.T. Howerton, “Subject: Co-pilot”

I think you are at a convention but I wanted to address our situation with our co-pilot.

[K. Starling] met yesterday with your chief pilot and head of operations to address problems with our co-pilot. [K. Starling] had expressed concern to us last week before his trip to the Bahamas. Yesterday he was told that he should not have come to us since he is employed by Landmark. While this may be technically true, [K. Starling] rightfully told them (from our standpoint) that he considers himself as employed by IVC. I agree; if or when we leave Landmark we would make every effort to keep [K. Starling]. We are very happy with Landmark and have no such plans so let's continue with the discussion.

[K. Starling] talks to me about every week or so to keep us abreast of how things are going. He has expressed concerns over the last two months of attitude problems with [the Complainant]. We have always encouraged him to try and work through it and keep Landmark abreast of any problems. It seems to be getting worse rather than better. [The Complainant] apparently offended a group from BB&T and they no longer want him on the plane. [K. Starling] says IVC lost a charter because of this. This, in itself, is a reason we want him out and Landmark should too. We are in this as a partnership and we certainly respect the position of Landmark. In turn, we were told going into this that IVC controlled the pilots. So while we understand there may be some complexities, our position is to support the view of the PIC, [K. Starling]. [K. Starling] is very important to us and we support him 100% and I am sure you appreciate this.

We are not dictating anything to Landmark and would like to discuss the best option. We understand the complications. But having said all of this, we will not accept a co-pilot's bad attitude if it jeopardizes charters. It is bad for both of us.

Give me a call if you want to discuss. As always, thanks for your continued help."

*IVC and Respondent "Aircraft Charter and Management Agreement" concerning BeechJet 400A, Tail number N61VC (RX 11)*

This exhibit is a copy of the contract between International Veneer Company, Inc. (IVC) as "Client" and Piedmont Hawthorne Aviation, LLC doing business as Landmark Aviation as "Manager" for aircraft N61VC. The contract was entered into by IVC and Landmark Aviation

on March 18, 2009 and set forth that aircraft N61VC was owned by, or under lease to, IVC which operated the aircraft for IVC's business and personal purposes and not in commercial service; that Landmark Aviation held a valid Air Carrier Certificate and was authorized to conduct "on-demand operations" in common carriage pursuant to 14 CFR Part 135; and that the agreement permitted Landmark "to operate the aircraft to conduct 'on-demand operations' in common carriage in accordance with the applicable requirements of 14 CFR Part 135 at times when the aircraft is not otherwise in use by [IVC]."

The contract defined "pilot in command" and "operational control" as set forth in Section 1.1 of the Federal Aeronautics Regulations (FAR); "on-demand operations" as set forth in FAR section 119.3; and the "operating base" as Raleigh/Durham, North Carolina airport (RDU). "Charter customer" was defined as any person or entity to whom Landmark Aviation provided on-demand charter air transportation under FAR Part 135.

The contract was for an initial term of one year with automatic one-year renewals; but could be terminated by IVC at any time upon 60 day's written notice to Landmark, upon which Landmark was permitted to remove the aircraft from charter operations to management only during the termination period.

Landmark was required to have the aircraft ready for departure at all times and dates IVC planned to use the aircraft and to provide the flight crew for IVC flights. IVC and Landmark agreed that providing Landmark with notice of planned use of the aircraft in less than two-hours for a flight by IVC "may impact the ability to complete the flight." Landmark was permitted to conduct operations for charter customers "if the charter trip does not interfere with a previously scheduled use of the aircraft by [IVC]" though provisions were made for charter customer flights to be canceled if IVC gave 72-hour notice of need for the aircraft. Landmark was required to provide for general aircraft maintenance, inspections, repairs, servicing, and FAR required upgrades; maintain all aircraft documents in a current and up-to-date manner; and permitted IVC to place the aircraft on Landmark's "Management Fleet Insurance Policy." The PIC and SIC (second-in-command) assigned to the aircraft were required to be trained at a Landmark approved training facility at least once a year at IVC's expense.

Landmark was granted "exclusive operational control over all Part 135 flights from the time the flight is initiated to the time it terminates, without exception. On Part 19 flights, [IVC] exercises operational control subject to [certain stated provisions.]" IVC agreed "that only pilots approved by [Landmark] may be used to crew the aircraft on Part 91 flights." Landmark was required to assign to each Part 135 flight a PIC and a SIC. Pilots assigned to the aircraft needed to be trained in operations contained in the General Operations Manual (GOM) and issued a personal copy of the aircraft GOM. The PIC was to provide aircraft flight data to Landmark at the conclusion of each flight; to notify Landmark of scheduled maintenance; to notify Landmark if conditions require a change in flight destination or flight cancellation or delay; to file the flight plan; to ensure the airworthiness of the aircraft prior to flight; and to fax or e-mail a copy of the completed trip paperwork to Landmark. The contract provided that "Once an aircraft has moved under its own power for the purposes of flight, operational control rests exclusively with the Pilot in Command who is expected to exercise his best judgement in the safe conduct of the flight."

The contract provided for an accounting of expenses and payments and use of deposits made by IVC. It also provided that Landmark “shall act as an independent contractor with respect to the provision and performance of services hereunder for the benefit of [IVC]. Nothing in this Agreement shall be deemed, construed, or interpreted as creating in any way any employer/employee relationship, associations, partnership, joint venture, or principal/agent relationship between [Landmark Aviation and IVC].”

*Excerpts, FAA Instrument Procedures Handbook (IPH) (RX 7, 9)*

These exhibits “discusses general planning and conduct of instrument approaches by professional pilots operating under Title 14 of the Code of Federal Regulations (14 CFR) Parts 91, 121, 125, and 135. ... The operations specifications (OpsSpecs), standard operating procedures (SOPs), and any other Federal Aviation Administration (FAA) approved documents for each commercial carrier are the final authorities for individual authorizations and limitations as they relate to instrument approaches.” IAP is an “instrument approach procedure.” SIAPs are “standard instrument approach procedures.”

IPH chapter on approaches provides that “The primary source of information for performance calculations for all operators, including Part 91, is the approved Aircraft Flight Manual (AFM) or Pilot’s Operating Handbook (POH) for the make and model of aircraft being operated. It is required to contain the manufacturer determined performance capabilities of the aircraft at each weight, altitude, and ambient temperature that are within the airplane’s listed limitations. Typically, the AFM for a large turbine powered airplane should contain information that allows flight crews to determine that the airplane will be capable of performing the following actions, considering the airplane’s landing weight and other pertinent environmental factors: land within the distance required by regulations; climb from the missed approach point (MAP) and maintain a specified climb gradient with one engine inoperable; [and] perform a go-around from the final stage of landing and maintain a specified climb gradient with all engines operating and the airplane in the landing configuration.” It sets forth five aircraft approach categories (A through E) for speed ranges during approach.<sup>5</sup> It provides that “An airplane is certified in only one approach category and although a faster approach may require higher category minimums [speeds] to be used, an airplane cannot be flown to the minimums [speeds] of a slower approach category. The certified approach category [of an aircraft] is permanent, and independent of the changing conditions of day-to-day operations. ... Pilots are responsible for determining if a higher approach category applies. If a faster approach speed is used that places the aircraft in a higher approach category, the minimums for the appropriate category must be used.”

IPH chapter on approaches states “ In general, an autopilot can be used to fly approaches even if the FMC [flight management computer] is inoperative ... Whether or not the FMC is available, use of the autopilot should be discussed during the approach briefing, especially regarding the use of the altitude pre-selector and auto-throttles, if equipped. The AFM for the specific airplane outlines procedures and limitations required for the use of the autopilot during an instrument approach in that aircraft. There are just as many different autopilot modes to climb or descend the airplane as there are terms for these modes. ... The pilot controls the airplane through the

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<sup>5</sup> Speed ranges per category are A: less than 91 knots; B: 91 to 121 knots; C: 121 to 141 knots; D: 141 to 166 knots; E: 166 knots or more.

autopilot by selecting pitch modes and/or roll modes, as well as associated auto-throttle modes. This panel, sometimes called a mode control panel, is normally accessible to both pilots. ... Most of these modes will be used at some point during an instrument approach using the autopilot. ... The minimum altitude at which the PF [pilot flying]<sup>6</sup> is authorized to disconnect the autopilot is airplane specific ... [though] the PF can disengage the autopilot at any time prior to reaching this altitude during a CAT I approach.”

IPH chapter on approaches indicates that an aircraft is flown on a “feeder route” to the initial approach fix (IAF) when entering an airport landing pattern under IAP. The Aircraft is then flow through initial approach segment to provide a method for aligning the aircraft with the intermediate or final approach segment of landing. The intermediate approach segment is designed primarily to position the aircraft for the final descent to the airport. The final approach segment ends at landing or at the MAP if the approach is missed and the aircraft aborts the landing. “Approach clearances are issued based on known traffic. The receipt of an approach clearance does not relieve the pilot of his/her responsibility to comply with applicable Parts of CFRs and notations on instrument approach charts, which impose on the pilot the responsibility to comply with or act on an instruction ...” It also provides that “when it is operationally beneficial, ATC may authorize pilots to conduct a visual approach to the airport in lieu of the published IAP.”

#### *CAE SimuFlite Select Training Material (CX 5)*

This exhibit consists of four pages of training material related to the BeechJet 400A aircraft autopilot feature. The training material discusses the use of autopilot during the approach phase of a flight. It reports that the half-bank mode in autopilot “reduces by one half the maximum commanded roll angle, including FMS steering commands and NAV captures. Overshoots may occur when using a non-FMS NAV source or when using an FMS NAV source without selecting AUTO LEG [on the autopilot]. The ½ BANK mode is automatically selected when the aircraft climbs through 18,500 feet. As the aircraft descends through 18,500 feet, the ½ BANK mode is automatically deselected. Half bank may be manually selected or deselected by selection of the ½ BANK mode select switch on the MSP. Approach mode capture clears the half bank mode.”

The pages marked as “Quick Reference – System Limitations; September 2001” indicate the autopilot is approved for CAT I ILS approaches only; the autopilot must be disengaged for take-off and landings; the autopilot is not to be operated during aircraft trim malfunction; the autopilot is not to be manually overridden in flight; the autopilot is not to be used below 200 feet above the terrain; a pilot must be seated at the controls with the seat belt and shoulder harness fastened during autopilot operations; an autopilot preflight check must be conducted and found satisfactory prior to each flight on which autopilot is to be used; both AHRS (altitude and heading reference system) are required for autopilot operation; ½ BANK mode is not to be used when conducting FMS based approaches; and, until “Kit P/N 128-3023” is installed, the use of speed breaks with autopilot engaged is prohibited.

#### *Standard Rate Turn (CX 12, page 1)*

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<sup>6</sup> “PM” refers to the pilot monitoring

The exhibit has been identified as an August 13, 2009 e-mail from A. Traylor to the Complainant. The contents of this exhibit are not identified as to source or authority and the exhibit contents are entitled to little weight.

The exhibit contents state –

“Standard Rate Turn. A standard rate turn is a turn in which an airplane completes a 360 degree turn in 2 minutes. This is done by have (sic) a turn of 3 degrees per second. If the airplane is moving faster than 250 knots then a standard rate turn is 1.5 degrees per second or a 360-degree turn in 4 minutes. Every airplane must be able to complete a standard rate turn in order to be certified. True airspeed is directly related to a standard rate turn. If you are traveling at a faster speed then you are going to need steeper bank in order to accomplish the 3-degree per second requirement. ... Standard rate turns are used as commonality in almost all instrument approaches and when pilots go to be instrument certified they must be able to perform a standard rate turn for the check pilot. Holding, intercepting, tracking, approaches, departures, and vectors are all accomplished using standard rate turns.”

*Executive VP and General Counsel January 29, 2010 Response to AIR-21 Complaint (CX 17)*

This exhibit is a copy of a letter sent by R.A. Allen, Jr., as Executive VP and General Counsel for Landmark Aviation, to the OSHA investigator assigned to the Complainant’s AIR-21 complaint. The exhibit states, in pertinent part –

“[The Complainant] was hired by Landmark Aviation in June 2008 as a pilot in Landmark’s Part 135 charter operation. His employment was at-will ... Landmark terminated [the Complainant’s] employment on November 30, 2009 without cause. Although termination was without cause, the decision was based on some incompatibility with another pilot and the unavailability within Landmark’s fleet of another suitable aircraft for [the Complainant]. [The Complainant] was offered severance per Landmark company policy. As is routine with most employers, the severance payment was to have been in exchange for a standard release of employment related claims. Obviously, [the Complainant] did not accept the severance offer. Nevertheless, his termination of employment remains without cause. In fact, as [the Complainant] states in his timeline submitted with his complaint, at the time of his termination he was advised he could be re-hired should suitable aircraft become available. Please see item 31 of the timeline. Such is not the position of an employer firing an employee for some improper reason. ...”

*Complainant’s December 21, 2009 Timeline of Events (CX 2)*

This exhibit was submitted by the Complainant with his original complaint to OSHA and was admitted at the hearing for the limited purpose as a recording the Complainant’s recall of past

events. The exhibit is cumulative with the Claimant's deposition and formal hearing testimony and evidence of record. The cumulative matters in CX 2 are not separately considered.

Complainant states in the exhibit that he flew Sentient flight with R. Ellsworth on May 8, 2009; May 20, 2009; and July 6, 2009. He stated "11 August 2009: I was PIC on a flight for BB&T and my co-pilot was [R.] Woodside. ... September 2009: Flew routine flights to include sentient flights. We were civil in the cockpit ... I had reached a point where I let [K. Starling] fly the passengers ... November 2009: Flew 2 BB&T flights, 2 for Direct Jet and one Sentient trip ... December 2009: I did not return the signed notice of termination ... When I talked to [A. Traylor] he indicated I was eligible for rehire if they get another airplane and I applied ... When I contacted [Human Resources in Texas] I was told that there was nothing in the file to indicate that I was not eligible for rehire ... January 17, 2010: I met with [A. Traylor] at Landmark in Winston Salem to return the key to the aircraft ..."

*Landmark Aviation June 15, 2011 Response to Question #7 of OSHA Investigator's Request for Information (CX 18, RX 12)*

This exhibit contains a response from Respondent's counsel to OSHA investigator W. Peterson that "In June 2010, Captain Starling participated in a 2-day CRM training session conducted by Flight Safety International. This class was also attended by other Landmark pilots and management personnel."

*Complainant's June 10, 2009 Performance Report (CX 1, 16)*

This exhibit is a performance evaluation of the Complainant as "Pilot-BE-400A, P135" for the two month period April 1, 2009 to May 30, 2009. The evaluation was due June 1, 2009 and was signed by A. Traylor on June 10, 2009. The previous evaluation was through March 30, 2009 and is not included in the exhibits submitted.

The Complainant was marked as "more than satisfactory" in all subgroups of job performance, job knowledge, working relations, and dependability. Specific comments entered were "[Complainant] holds himself to a high standard of professionalism. He has been flexible and accommodating to changing company plans. He has accepted trips on other aircraft in an effort to build his time in type more rapidly and to be able to Sentient trips ASAP. [Complainant] is consistent, conscientious and dependable. He generally has a positive attitude and easy to get along with. [Complainant] is not afraid to speak-up when he does not agree with something. I encourage him to continue doing a good job and practicing teamwork as he has over the past year."

By a December 16, 2009 e-mail the Complainant inquired of Human Services department as to when he might be receiving a copy of his performance evaluation "to have it included in my paperwork that I am submitting for another job." By return e-mail he was informed that Human Services department was "having difficulty locating your file" and would advise when it was located. No further identification of which performance evaluation sought was indicated.

*Complainant's resume (CX 6, 7)*

In this exhibit the Complainant indicates that he graduated from Guilford Technical Community College in 1993 with a major in aviation management and career pilot technology and was certified an instructor in ground school. He graduated from Liberty University in 2010 with a bachelor's degree in aeronautics.

The Complainant served in the U.S. Army National Guard from 1985 to 1993 as a helicopter mechanic and crew chief at the rank of E-5. He was a passenger service agent for US Airways, Inc. from 1997 to 2003. In 2003 the Complainant flew a Piper PA-31-310 twin piston, 9-seat, Navajo aircraft out of Tortolla, BVI as a pilot with Caribbean Wings. He left to fly a single piston, 6-seat, Piper PA-32-300 and a twin piston, 6-seat, Piper PA-34-300 Seneca II as a freight pilot for Package Express in 2003 and 2004. He flew for Air Midwest/Freedom Airlines/Mesa Airlines as first officer and pilot in a 19-seat, twin turboprop Beachcraft BE-190D and pilot and captain in a twin jet, 50-seat Embraer EMB-145 in 2004 to 2008.

The Complainant flew with Landmark Aviation from 2008 and 2009 as per testimony presented and with Mesa Airlines since 2013 as per testimony presented.

*Exhibits Relevant to Alleged Damages (CX 8, 11, 13, 14; RX 8, 10)*

(RX 8) On November 17, 2003 the Complainant signed an application for "AM/Mesa Airlines/Freedom Airlines" that was received by the airlines on December 29, 2003. The information in the 2003 application is consistent with testimony given and documentary evidence submitted.

(RX 10) The Complainant was offered a position as lead pilot on N856P, a 7-seat maximum, twin turboprop Beechcraft Kink Air C-90-GT based in Charleston, South Carolina. The base salary was \$55,000.00 with flight incentives of \$20.00 per hour for the first 120 hours; \$25.00 per hour for flight hours 121 to 240; \$30.00 per hour for flight hours 241 to 360; and incentive pay increasing \$5.00 per hour for every 120 hours above 360. The position reported to the Chief Pilot/Director of Operations within Landmark Aviation. A moving allowance of \$1,500.00 was offered with a start date of June 1, 2008 and indoctrination training beginning June 2, 2008.

By letter of October 24, 2008, the Complainant was offered the position of co-captain on N492P, a BeechJet 400 A based in Raleigh, North Carolina. The base pay was \$70,000.00 with flight incentive pay at the rate of \$30.00 per hour. The start date was October 27, 2008 with flight training on or about November 11, 2008. Reasonable moving expenses as authorized by the Chief Pilot would be covered by the aircraft owner. The offer was "contingent on completion of one-year Training Agreement."

(CX 8) This exhibit includes copies of the Complainant's W-2s and Federal Income Tax Returns for the years 2008 through 2013. They reflect the following information –

Year	Income Source	Gross Income	Health Insurance Contribution	401(k) Contribution /Otherwise non-taxable	Other
2008	Freedom Airlines	\$25,120.35	\$538.51	\$1,911.38	
	Unidentified income	\$28,773.54			
					Rental/real estate loss - \$11,252.00
2009	Piedmont Hawthorne Aviation, LLC	\$74,907.13	\$1,026.08	\$8,707.30	
	Capital Gains	\$13,158.00			
					Rental/real estate loss - \$39,158.00
2010	Pension Distribution	\$8,500.00			
	Employment Security Commission of North Carolina	\$25,250.00			
2011	Pension Distribution	\$8,500.00			\$650.00 claimed IRA tax penalty
	Employment Security Commission of North Carolina	\$25,250.00			
					Gifts to Charity - \$1,225.00 cash; \$946.00 other than cash
					Unreimbursed employee expenses - \$5,538.00
					Attorney & Accounting Fees - \$9,552.00
2012	Lanterra Construction & Design, Inc.	\$8,050.00			Inferred as included in net business loss - \$3,113.00
	Pension Distribution	\$6,500.00			\$595.00 claimed IRA tax penalty
2013	Unknown	\$18,862.51	\$535.24	\$2,894.56	

(CX 11) This exhibit indicates that the Complainant noted he had applied for flying positions with approximately 20 companies and for non-flying positions with approximately 12 companies. The Complainant recorded “At the time I was terminated, it was just before my currency renewal. The job market was in shambles and many companies were furloughing pilots and/or not hiring and those that were hiring could select from a pool of pilots with currency. In many cases, I did not have the proper type rating in A/C, I was not current and after six months of no flight time, my application was not considered and I received no response at all. ... In March 2013, I was contacted by Mesa Airlines Training Department and was asked if I would return since they were now hiring. I returned effective 1 April 2013 as a new hire FO without seniority and am required to start over in my career field. ... most aviation companies and airlines will only interview/hire those pilots who are current, have flight time logged in the past 6 months and preferably in type. ... it was difficult to find employment as a pilot in my career field when airlines were furloughing and [being current] and recent flight time were/are essential for the very few positions that might be available.”

(CX 13) This exhibit was signed July 15, 2010, and “serves as documentation of a promise to pay to [N.H.F] ... the amount of \$50,000.00, payable on demand for a personal loan made to [the Complainant]. This is a no interest loan and no collateral is required.”

(CX 14) This exhibit indicates that the Complainant sold a 2006 Yamaha motorcycle, Model R6, with 1,400 miles, to one M. Tansey for \$4,500.00 on April 4, 2013.

## **STATUTORY AND REGULATORY FRAMEWORK**

The AIR-21, at 49 USC §42121, provides in pertinent part:

- (a) **DISCRIMINATION AGAINST AIRLINE EMPLOYEES** - No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –
  - (1) provided, caused to be provided, or is about to provide (with the knowledge of the employer) or caused to be provided to the employer or Federal Government information related to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
  - (2) has filed, caused to be filed, or is about to file (with the knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
  - (3) testified or is about to testify in any such proceeding or;
  - (4) assisted or participated or is about to assist or participate in such a proceeding.

(b)(2)(B) REQUIREMENTS -

(i) ...

(ii) ...

(iii) CRITERIA FOR DETERMINATION BY SECRETARY – The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) PROHIBITION - Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(d) NONAPPLICABILITY TO DELIBERATE VIOLATIONS - Subsection (a) shall not apply with respect to an employee of an air carrier, contractor, or subcontractor who, acting without direction from such air carrier, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement of this subtitle or any other law of the United States.

Implementing federal regulations applicable to AIR-21 at 29 CFR Part 1979 were revised effective March 21, 2003.<sup>7</sup> The regulations provide, in pertinent part:

§1979.102 Obligations and prohibited acts.

(a) No air carrier or contractor or subcontractor of an air carrier may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section.

(b) It is a violation of the [AIR-21] for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any employee because the employee has:

(1) provided, caused to be provided, or is about to provide (with the knowledge of the employer) or caused to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information related to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States;

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<sup>7</sup> 68 Fed. Reg. 14100-14111 (Mar. 21, 2003)

- (2) has filed, caused to be filed, or is about to file (with the knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code, or under any other law of the United States;
  - (3) testified or is about to testify in any such proceeding or;
  - (4) assisted or participated or is about to assist or participate in such a proceeding.
- (c) This part shall have no application to any employee of an air carrier, contractor, or subcontractor who, acting without direction from an air carrier, contractor, or subcontractor (or such person's agent) deliberately causes a violation of any requirement relating to air carrier safety under Subtitle VII Aviation Programs of Title 49 of the United States Code or any other law of the United States.

§1979.109 Decision and orders of the administrative law judge.

- (a) ... A determination that a violation has occurred may only be made if the complainant has demonstrated that the protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity.

To prove unlawful retaliation at a formal hearing under AIR-21, the Complainant must prove by a preponderance of the evidence (1) that he engaged in the described protected activity, (2) that the employer had knowledge of the described protected activity, (3) that he was subjected to an adverse personnel action amounting to discharge or discrimination with respect to compensation, terms, conditions, or privileges of employment, and (4) that the protected activity was a contributing factor in the adverse employment action. 49 U.S.C. §42121(b)(2)(B)(iii); *Palmer v. Canadian National Railway*, ARB Case No. 16-035, 2016 WL 6024269, ALJ Case No. 2014-FRS-00154 (ARB Sep. 30, 2016);<sup>8</sup> *Brune v. Horizon Air Industries, Inc.*, ARB Case No. 04-037, 2006 WL 282113, ALJ Case No. 2002-AIR-8 (ARB Jan. 31, 2006); *Continental Airlines, Inc. v. Administrative Review Board*, 638 Fed. Appx. 283 (5<sup>th</sup> Cir. 2016);

If the employee does not prove any one of the required elements by a preponderance of the evidence, the complaint warrants dismissal. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-

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<sup>8</sup> In *Palmer* the ARB reversed *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070, ALJ No. 2010-SOX-51 (ARB Oct. 9, 2014) and restated it had previously vacated *Powers v. Union Pacific Railroad Co.*, ARB Case No. 13-034, 2014 WL 5511088, ALJ No. 2010-FRS-30 (ARB Oct. 17, 2014), reissued *remand en banc*, 2015 WL 1876029 (ARB April 21, 2015), remand *vacated en banc*, 2016 WL 4238457 (ARB May 23, 2016). The ARB declared that it is legal error to follow the *Fordham* and *Powers* decisions.

041, 2005 WL 3263822, ALJ No. 2003-AIR-022 (ARB Nov. 30, 2005); *Leon v. Secureplane Technologies, Inc.*, ARB Case No. 11-069, ALJ Case No. 2008-AIR-012 (ARB Apr. 15, 2013) aff'd 595 Fed. Appx. 710 (9<sup>th</sup> Cir. 2015) unpub.

Protected activity is a contributing factor if “the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision.” *Sievers v. Alaska Airlines, Inc.*, ARB Case No. 05-109, 2008 WL 316012, ALJ Case No. 2004-AIR-028 (ARB Jan. 30, 2008) citing *Marano v. Dep’t of Justice*, 2 F3d 1137 (Fed. Cir. 1993) If the complainant’s alleged protected activity constitutes a deliberate violation of AIR-21 on the part of the complainant and was done without the direction of the air carrier (its contractor or subcontractor or agent), the whistleblower protections provisions of AIR-21 are inapplicable to the complainant. 49 U.S.C. §42121(d);

Additionally, relief under AIR-21 may not be ordered if the respondent air carrier (its contractor or subcontractor or agent) demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.<sup>9</sup> 49 U.S.C. §42121(b)(2)(B)(iv); *Palmer*, supra; *Formella v. U.S. Dept of Labor*, 628 F.3<sup>rd</sup> 381 (7<sup>th</sup> Cir. 2010) “‘Clear’ evidence means the respondent has presented evidence of unambiguous explanations for the adverse action in question. ‘Convincing’ evidence has been defined as evidence demonstrating that a proposed fact is ‘highly probable.’ ... ‘clear and convincing evidence’ [is] evidence that suggests a fact is ‘highly probable’ and immediately tilts’ the evidentiary scales in one direction.” *Speegle v. Stone & Webster Construction, Inc.*, ARB Case No. 13-074, 2014 WL 1870933, \*6 (Apr. 25, 2014) citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

During the formal hearing official notice was taken of the 2009 version of 14 CFR Part 91 “General Operating and Flight Rules” and the 2009 version of 14 CFR Part 135, “Operating Requirements: Commuter and On-Demand Operations and rules governing persons onboard such aircraft.” (TR 6) The relevant portions of these regulations provide –

#### 14 CFR Part 91 – General Operating and Flight Rules

##### §91.3 Responsibility and authority of the pilot in command.

- (a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.
- (b) In an inflight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.
- (c) ...

##### §91.13 Careless or reckless operation.

- (a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.
- (b) ...

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<sup>9</sup> Renamed the “same-action defense” by the ARB in *Palmer*, supra

§91.123 Compliance with ATC clearances and instructions.

- (a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or deviation is in response to a traffic alert and collision avoidance system resolution advisory. However, except in Class A airspace, a pilot may cancel an IFR flight plan if the operation is being conducted in VHR weather conditions. When a pilot is uncertain of an ATC clearance, that pilot shall immediately request clarification from ATC.
- (b) ...

§91.175 Takeoff and landing under IFR

- (a) Instrument approaches to civil airports. Unless otherwise authorized by the FAA, when it is necessary to use an instrument approach to a civil airport, each person operating an aircraft must use a standard instrument approach procedure prescribed in part 97 of this chapter for that airport. ...

14 CFR Part 135 – Operating Requirements: Commuter and On-demand Operations and Rules Governing Persons Onboard such Aircraft.

§135.1 Applicability.

- (a) This part prescribes rules governing –
  - (1) The commuter or on-demand operations of each person who holds or is required to hold an Air Charter Certificate or Operating Certificate under part 119 of this chapter
  - (2) ....

§135.3 Rule applicable to operations subject to this part.

- (a) Each person operating an aircraft in operations under this part shall –
  - (1) While operating inside the United States, comply with the applicable rules of this chapter; and
  - (2) While operating outside the United States ...

§135.4 Applicability of rules for eligible on-demand operations.

- (a) An “eligible on-demand operation” is an on-demand operation conducted under this part that meets the following requirements:
  - (1) Two-pilot crew. The flight crew must consist of at least two qualified pilots employed or contracted by the certificate holder.
  - (2) Flight crew experience. The crewmembers must have met the applicable requirements of part 61 of this chapter and have the following experience and ratings:
    - (i) Total flight time for all pilots:
      - (A) Pilot in command – a minimum of 1500 hours.
      - (B) Second in command – a minimum of 500 hours.

- (3) ...
- (4) Crew pairing. Either the pilot in command or the second in command must have at least 75 hours of flight time in that aircraft make or model and, if a type rating is required, for that type aircraft, either as pilot in command or second in command.

§135.21 Manual requirements.

- (a) Each certificate holder, other than one who uses only one pilot in the certificate holder's operations, shall prepare and keep current a manual setting forth the certificate holder's procedures and policies acceptable to the Administrator. This manual must be used by the certificate holder's flight, ground, and maintenance personnel in conducting its operations.
- (b) ...
- (c) ...
- (d) A copy of the manual, or appropriate portions of the manual (and changes and additions) shall be made available to maintenance, ground operations personnel by the certificate holder and furnished to –
  - (1) Its flight crewmembers; and
  - (2) Representative of the Administrator assigned to the certificate holder.

§135.77 Responsibility for operational control. Each certificate holder is responsible for operational control and shall list, in the manual required by §135.21, the name and title of each person authorized by it to exercise operational control.

§135.78 Instrument approach procedures and IFR landing minimums. No person may make an instrument approach at an airport except in accordance with IFR weather minimums and instrument approach procedures set forth in the certificate holder's operations specifications.

§135.93 Autopilot: Minimum altitudes for use.

- (a) Except as provided in paragraphs (b), (c), (d), and (e) of this section, no person may use an autopilot at an altitude above the terrain which is less than 500 feet or less than twice the maximum altitude loss specified in the approved Aircraft Flight Manual or equivalent for a malfunction of the autopilot, whichever is higher.
- (b) When using an instrument approach facility other than ILS, no person may use an autopilot at an altitude above the terrain that is less than 50 feet below the approved minimum descent altitude for that procedure, or less than twice the maximum altitude loss specified in the approved Aircraft Flight Manual or equivalent for a malfunction of the autopilot under approach conditions, whichever is higher.
- (c) For ILS approaches when reported weather conditions are .....

§135.99 Composition of flight crew.

- (a) No certificate holder may operate an aircraft with less than the minimum flight crew specified in the aircraft operating limitations or the Aircraft Flight Manual for that aircraft and required by this part for the kind of operation being conducted.
- (b) No certificate holder may operate an aircraft without a second in command if that aircraft has a passenger seating configuration, excluding any pilot seat, of ten seats or more.

§135.100 Flight crewmember duties.

- (a) No certificate holder shall require, nor may any flight crewmember perform, any duties during a critical phase of flight except those duties required for the safe operation of the aircraft. Duties such as company required calls made for such nonsafety related purposes as ordering galley supplies and confirming passenger connections, announcements made to passengers promoting the air carrier or pointing out sights of interest, and filling out company payroll and related records are not required for the safe operation of the aircraft.
- (b) No flight crewmember may engage in, nor may any pilot in command permit, any activity during a critical phase of flight which could distract any flight crewmember from the performance of his or her duties or which could interfere in any way with the proper conduct of those duties. Activities such as eating meals, engaging in nonessential conversations within the cockpit and nonessential communications between the cabin and the cockpit crews, and reading publications not related to the proper conduct of the flight are not required for the safe operation of the aircraft.
- (c) For the purposes of this section, critical phases of flight include all ground operations involving taxi, takeoff and landing, and all other flight operations conducted below 10,000 feet, except cruise flight.

§135.101 Second in command required under IFR. Except as provided in §135.105, no person may operate an aircraft carrying passengers under IFR unless there is a second in command in the aircraft.

§135.109 Pilot in command or second in command: Designation required.

- (a) Each certificate holder shall designate a –
  - (1) Pilot in command for each flight; and,
  - (2) Second in command for each flight requiring two pilots.
- (b) The pilot in command, as designated by the certificate holder, shall remain in command at all times during that flight.

§135.115 Manipulations of controls. No pilot in command may allow any person to manipulate the flight controls of an aircraft during flight conducted under this part, nor may any person manipulate the controls during such flight unless - that person is –

- (a) A pilot employed by the certificate holder and qualified in the aircraft; or,
- (b) An authorized safety representative of the Administrator who has the permission of the pilot in command, is qualified in the aircraft, and is checking flight operations.

§135.120 Prohibition on interference with crewmembers. No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part.

## DISCUSSION

On January 9, 2010, Complainant's counsel filed the complaint in this case (ALJX 1). The Complainant alleges he "was terminated by employer, Landmark Aviation, on November 30th, 2009, in retribution for his reporting a pilot he was flying with [K. Starling] to Landmark's Chief Pilot [A. Traylor], regarding [K. Starling's] piloting deficiencies, safety violations, Federal Aviation Regulation violations, and Landmark Aviation Part 135 Operational errors." At the formal hearing the Parties agreed to the issue of protected activity being framed as:

Did the Complainant engage in activity protected under AIR-21 as alleged in the complaint, during the period from May 2009 through November 30, 2009, concerning aircraft safety involving use of half-bank turns during take-off climbs and in the Terminal Control Area, turning off navigation lights, and violating speed crossing restrictions repeatedly ?

**I. The Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity under AIR-21 during the period of May to November 2009.**

In establishing that a complainant has engaged in "protected activity under Air 21 [there are] two elements: (1) the information the complainant provides must involve a purported violation of a regulation, order, or standard relating to air carrier safety, though the complainant need not prove an actual violation; and (2) the complainant's subjective belief that a violation occurred must be objectively reasonable." *Blount v. Northwest Airlines, Inc.*, ARB Case No. 09-120, 2011 WL 5374591, \*3, ALJ Case No. 2007-AIR-009 (ARB Oct. 24, 2011) citing *Sitts v. COMAIR, Inc.*, ARB No. 09-130, ALJ Case No. 2008-AIR-007, slip opinion at 9 (ARB May 31, 2011); *Florek v. Eastern Air Central, Inc.*, ARB Case No. 07-113, 2009 WL 1542296, ALJ Case No. 2006-AIR-009. "Generally, under whistleblower statutes, when a safety concern has been investigated and determined to be safe, and has been adequately explained to the employee, the employee's continuing safety concern is no longer protected." *Sitts*, id., at 2009 WL 1542296, \*10.

*a. The Complainant has established by a preponderance of the evidence that he reported to Respondent's Chief Pilot A. Traylor that K. Starling engaged in half-bank turns during take-off climbs and in the terminal control area.*

The Complainant testified that he discussed the use of half-bank turns with Chief Pilot A. Traylor in July 2009 and was told by A. Traylor that there was nothing in writing with the

company but that “you follow the manufacturer’s procedures of the airplane.” He testified that K. Starling’s name was not used in the conversation. CX 12, page 1 is an August 13, 2009, e-mail from Chief Pilot A. Traylor to the Complainant which defines a standard rate of turn.

The Complainant testified that he discussed the use of half-bank turns with Check Pilot R. Ellsworth in the July/August 2009 timeframe, before R. Ellsworth flew with K. Starling in the BeechJet 400. He testified that he did not discuss half-bank turns with either R. Ellsworth or Chief Pilot A. Traylor in September, October or November 2009.

R. Ellsworth testified that upon an inquiry from Chief Pilot A. Traylor<sup>10</sup> he reported to A. Traylor in a September 17, 2009 e-mail (CX 4) that he had previously flown with K. Starling on two line checks and for two weeks of charters. In the e-mail he indicated that K. Starling “is a very conscious pilot ... who performs his duties in an outstanding fashion and is very respected” but developed bad habits such as “constantly using the ½-bank mode on autopilot” to achieve the smoothest flight possible for his passengers even where standard rate turns are expected by air traffic control. He reported the use of ½-bank was “most apparent in the terminal and approach phase” and should not be used at all considering K. Starling’s “reluctance to reduce power and air speed in the approach phase” though K. Starling generally achieves reference speed for landing, some of which are long landings. R. Ellsworth testified that he was asked for his thoughts on K. Starling because A. Traylor was aware of difficulties the Complainant and K. Starling had working together involving procedural issues about flying the aircraft. R. Ellsworth testified that he was not the Complainant’s supervisor.

K. Starling testified that the statements made by R. Ellsworth in the September 17, 2009 e-mail were based on early acclamation flights with R. Ellsworth in the BeechJet 492P in the November 2008 timeframe, that he agreed he had to work on some things, that he tried to improve upon and use the information and techniques discussed with R. Ellsworth during the 2008 flights together. He testified the he addressed the CRM recommendation by attending training with 7 or 8 other pilots, including the Complainant. He testified that you do not use the ½-bank mode in any approach, FMS or otherwise. This is consistent with the CAE SimuFlite training material set forth in CX 5. He testified that a standard rate of turn is required in holding patterns and that “we would never use the half-bank in any terminal operations or approach operations.”

The Respondent Employer stated in a response to interrogatories that K. Starling attended 2 days of CMR training by Flight Safety International in June 2010 with other pilots and members of management (CX 18, RX 12). The response does not indicate if K. Starling had attended earlier CRM courses with the Complainant and other pilots prior to the Complainant’s employment termination, nor does it contradict K. Starling’s testimony that such earlier CRM training took place prior to June 2010.

K. Starling testified that he had discussions with the Complainant about aircraft handling in general at first and improving the Complainant’s rough handling of the aircraft in abrupt heading changes and altitude descents. He discussed half-bank turns with the Complainant as a means to provide the charter flight passengers a more comfortable flight experience and was aware that the Complainant discussed using half-bank turns with other pilots. He testified that the BeechJet

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<sup>10</sup> A. Traylor did not testify in this case.

61VC had a half-bank switch in the cockpit and there may have been occasions where he turned the half-bank on and the Complainant turned it off; but there was never any repeated turn on-off and on-off events and that would never have happened as the Complainant stated.

After deliberation on the credible evidence of record, including the two e-mails involving Chief Pilot A. Traylor, this presiding Judge finds that the Complainant reported to Chief Pilot A. Traylor in mid-August 2009, he had personal concerns for aircraft safety related to K. Starling using half-bank turns while flying the BeechJet 400.

*b. The Complainant failed to establish by a preponderance of the evidence that he reported to Respondent's Chief Pilot that K. Starling violated speed crossing restrictions repeatedly.*

The Complainant testified that speed crossing restriction involve ATC ordering an aircraft to cross a specific geographic point at a specified altitude and speed and that the same information is on the approach plates for different airports used by airlines and charter flights. He testified that is speed crossing restrictions are violated the ATC would direct the offending pilot to call a specific phone number when on the ground to talk to the ATC supervisor on duty. He also testified that neither he nor K. Starling ever received such an instruction from ATC. He testified that he reported violating speed restriction to R. Ellsworth; however neither R. Ellsworth's testimony nor his September 2009 e-mail to Chief Pilot A. Traylor support the Complainant's testimony of a complaint of violating speed crossing restrictions being made.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he reported violations of speed crossing restrictions to a Respondent supervisor, including Chief Pilot A. Traylor.

*c. The Complainant failed to establish by a preponderance of the evidence that he reported to Respondent's Chief Pilot that K. Starling turned off navigational lights in an inappropriate manner.*

There is no credible evidence of record indicating that K. Starling turned off navigational lights in an inappropriate manner. Accordingly, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence that he reported to a Respondent supervisor, including Chief Pilot A. Traylor, that K. Starling turned off navigational lights in an inappropriate manner adversely affecting the safety of aircraft flight.

*d. The Complainant failed to establish by a preponderance that he had a subjective belief that the use of half-bank turns by K. Starling during take-off climbs and in the terminal control area was unsafe operation of the BeechJet 400A, N61VC by K. Starling.*

This is the most difficult element to evaluate since it turns on the credibility of the Complainant and K. Starling. For reasons set forth below, this presiding Judge finds that the Complainant is not credible on this issue and that, while he and K. Starling repeatedly discussed the use of half-bank turns during flight as an aircraft handling technique to provide high level flight service to charter passengers and the Complainant repeatedly refused to use half-bank during course and

altitude adjustments when charter passengers were onboard the BeechJet 400A, the credible evidence of record does not establish that K. Starling used half-bank turns in the terminal control area or in a prohibited manner during take-off climbs as alleged in the AIR-21 complaint.

The Parties have stipulated that a pilot's use of the half-bank turn is considered a pilot technique rather than a required or prohibited procedure by the FAA. The Parties also stipulated that there is no evidence that the use of the half-bank turn by K. Starling resulted in a potential hazard to persons or property.

The credible testimony of record indicates that aircraft ground control never cautioned K. Starling or the Complainant against using the half-bank turn and never instructed them not to use the half-bank turn. The credible evidence of record also indicates that the half-bank turn was not used during the approach phase of landing by K. Starling or the Complainant. Additionally the aircraft training manual discusses use of the autopilot half-bank mode during the approach phase and how the half-bank mode is automatically selected as the aircraft climbs through 18,500 feet; is automatically deselected as the aircraft descends through 18,500 feet; and is cleared when the autopilot achieves approach mode capture.

The Complainant testified that when he was the pilot on take-offs he would call for the autopilot to be turned on after his altitude on take-off passed 400 feet<sup>11</sup> and that K. Starling would turn the autopilot on and engage the half-bank mode. He would then turn the half-bank mode off, K. Starling would turn the half-bank mode back on, and the off-on exchange would be repeated several times. K. Starling denied such events took place.

The Complainant testified that he did not discuss half-bank turns with Check Pilot R. Ellsworth or Chief Pilot A. Traylor after September 2009. He also testified that he had no problem with K. Starling's flying during the period after September 2009 because K. Starling would fly the legs where passengers were onboard and he would fly legs without passengers.

The Complainant repeatedly stressed and demonstrated by actions and testimony that he considered himself an equal of K. Starling when it came to operation of IVC's BeechJet 400, N61VC. However, Federal Aviation Regulations (FAR) involving charter flights specify that the charter flight certificate holder (Respondent) shall designate a Pilot in Command (PIC) and a second pilot as Second in Command (SIC) for each flight requiring two pilots and that the designated PIC "shall remain the pilot in command at all times during that flight." 14 CFR §135.109 For all operations involving IVC's BeechJet 400 N61VC, K. Starling was the designated PIC when onboard the aircraft.

The Complainant testified that K. Starling was a friend and that they got along great, notwithstanding his testimony that he argued with K. Starling over the use of half-bank while the Complainant was in the left pilot seat, the evidence that the Complainant directed flight operations not to call him for a charter flight without twice the contract response time, and lack of charter customer service concern by the Complainant. K. Starling testified that during the

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<sup>11</sup> FAR at 14 CFR §135.93 prohibits use of the autopilot below the altitude of 500' above the terrain or below twice the maximum altitude loss specified in the approved aircraft flight manual for a malfunction of the autopilot, whichever is greater.

period of IVC charters flight together the interpersonal relationship with the Complainant had deteriorated from the time they flew King Aircraft together in 2008 to where he did not want to fly or lay-over with the Complainant. K. Starling expressed concerns on many occasions about continued flying with the Complainant with the IVC supervisor of charter operations, H. Howerton, in the August/September 2009 timeframe, and subsequently recommended to H. Howerton that the Complainant be replaced by another pilot when the time came for requalification on simulators. From the evidence as a whole it appears the Complainant was attempting to pass off his interpersonal relationship with K. Starling in 2008 as still existing in the summer of 2009, when in fact the personal relationship between the pilots had deteriorated to the point there was “lack of chemistry” between the Complainant and PIC K. Starling involving layovers, loss of charter flights due to Complainant’s lengthy response time, lack of concern for charter passenger service.

The Complainant’s testimony involving the fall of a BB&T Director during an August 11, 2009 charter flight where the Complainant was the pilot was also self-serving and given in a dismissive manner to shift blame to an IVC employee for whom he had little regard, such that his personal credibility in this case was further eroded.

The Complainant testified that he was aware from the termination meeting that he could reapply to become a pilot for the Respondent should an opening become available. He also testified that he was aware of 8 to 9 pilot openings with Respondent in the North Carolina area, one in Virginia, and another in Florida but that he did not seek employment for any of those pilot positions with Respondent.

When the testimony of K. Starling, R. Ellsworth, H. Howerton, R. Olson, and the Complainant are considered as a whole with the documentary evidence and judicially noticed FARs, this presiding Judge finds that the testimony of the Complainant is not whole credible, while the testimony of K. Starling, R. Ellsworth, H. Howerton, and R. Olson are wholly credible.

After deliberation on the credible evidence of record, this presiding Judge finds that the Complainant failed to establish by a preponderance that he had a subjective belief that the use of half-bank turns by K. Starling during take-off climbs and in the terminal control area was unsafe operation of the BeechJet 400A, N61VC by K. Starling. This presiding Judge also finds that while the Complainant has failed to establish this required element by a preponderance of the evidence, the evidence of record fails to establish that the January 19, 2010 complaint was made in bad faith or was a bone fide frivolous complaint. Accordingly, the sanctions provided by 49 U.S.C. §42121(b)(3)(C) are not appropriate in this case.

*e. The Complainant failed to establish by a preponderance of the evidence that the belief the use of half-bank turns by K. Starling during take-off climbs and in the terminal control area was unsafe operation of the BeechJet 400A, N61VC, by K. Starling, was an objectively reasonable belief.*

As noted above, this presiding Judge finds that the alleged unsafe operation of the BeechJet 400A, N61VC, by K. Starling during take-off climbs and in the control area related to the use of half-bank turns did not occur as alleged in the AIR-21 complaint. Accordingly, the Complainant

has also failed to establish by a preponderance of the evidence that his alleged AIR-21 complaint involving use of half-bank turns by K. Starling in the terminal control area and take-off climbs so as to constitute unsafe operation of the BeechJet 400A, N61VC, was an objectively reasonable belief.

*f. The Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity under AIR-21 during the period of May to November 2009 that was a contributing factor in the terminations of Complainant's employment on November 30, 2009.*

In that the Complainant has failed to establish by a preponderance of the evidence that he engaged in protected activity as alleged in the January 10, 2010 complaint, the Complainant has also failed to establish that activity protected by the provisions of AIR-21 contributed to his November 30, 2009 termination of employment.

After deliberation on all the credible evidence of record, this presiding Judge finds that the Complainant has failed to establish by a preponderance of the evidence all the required elements of retaliation under AIR-21 and the complaint must be dismissed.

**II. The Respondent established by clear and convincing evidence that it would have terminated the Complainant's employment, notwithstanding his 2009 conversations with Chief Pilot A. Traylor involving K. Starling.**

Even though the burden of proving a defense has not shifted to the Respondent because the Complainant has failed to establish all the required elements of retaliation under AIR-21, the following is entered.

The credible evidence of record establishes that IVC owned a particular aircraft known as BeechJet 400XP, N61VC that was based in Mecklenburg County, North Carolina and flown by IVC pilots for IVC personnel and charter customers, one of the major charter clients being BB&T. In March 2009 IVC entered into a charter management agreement with Respondent through which IVC's BeechJet 400XP, N61VC, would be managed and flown by Respondent's employees out of Raleigh/Durham, North Carolina. IVC's pilots at the time of transition did not wish to become Respondent's employees. In April 2009 H. Howerton, the Chief Financial Officer and Secretary/Treasurer of IVC met with pilot applicants, including Respondent recommended K. Starling and the Complainant. IVC selected K. Starling as PIC and the Complainant as the second pilot for their BeechJet 400XP, N61VC, though IVC understood that Respondent had operational control of the aircraft and Respondent assigned flight crew.

Under Respondent's direction the BeechJet 400XP, NC61VC, was used to transport IVC personnel as scheduled as well as other clients. BB&T was a carryover charter client from IVC. Other charter flights involved medical flights transporting organs or patients and Duke University personnel. H. Howerton testified that IVC personnel used the aircraft about 50% of the time, with the remaining period being for charter flights. The agreement between IVT and Respondent provided for IVC charter scheduler to setup charter flights and notify the pilots of their need to fly BeechJet 400XP, N61VC. The normal response time for the pilots on call was two hours from the time the IVC charter scheduler contacted the pilots. Charter flights to

transport medical organs and/or patients routinely had shorter lead times than those charter flights involving known needs of IVC and BB&T personnel. Both H. Howerton and Respondent's Director of Business Development, R. Olsen, testified that maximizing aircraft availability for charter flights in order for IVC to offset the cost of owning and operating the aircraft and for Respondent to meet expenses of managing the aircraft at a profit to Respondent.

As part of the charter operation of BeechJet 400XP, N61VC, PIC K. Starling would have weekly meetings with H. Howerton of IVC. K. Starling would provide H. Howerton with flight information similar to that he provided Respondent, and would discuss the charter operation and issues addressed that week. The IVC charter scheduler would have similar weekly discussions with Respondent's R. Olsen.

During the summer of 2009 Complainant complained of the number/frequency of charter flights in BeechJet 400XP, N61VC, and directed the IVC charter scheduler not to call him to fly if the response time between contact and reporting to the aircraft was less than 4 hours. Because of the Complainant failing to respond to flights within the agreed 2 hour response period, several medical charter flights were lost to other non-IVC owned aircraft. Also during the summer of 2009 R. Olsen became aware through the IVC charter scheduler that the Complainant was not providing appropriate customer service to BB&T charter passengers while serving as PIC in the absence of K. Starling. In one incident the Complainant failed to secure all aircraft engines while disembarking BB&T charter passengers and in another incident a high-level BB&T charter passenger fell in the BB&T hanger after disembarking from the IVC aircraft the Complainant was flying. BB&T stopped using IVC for charter service when the Complainant was to fly, at least one potential BB&T charter flight was subsequently lost because of the Complainant's involvement. H. Howerton expressed concern to R. Olsen on how to replace the lost revenue or replace the Complainant as a pilot onboard BeechJet 400XP, N61VC.

In September 2009 through mid-October 2009, K. Starling first discussed the Complainant's poor attitude towards flying IVC charter flight with H. Howerton. H. Howerton was aware of the previous BB&T service issues involving the Complainant as well as the growing incompatibility between K. Starling and the Complainant. He reported to R. Olsen on October 22, 2009 that the co-pilot situation involving the Complainant had worsened needed to be addressed by Respondent since Respondent was responsible for the pilot aircraft assignments.

K. Starling met with Chief Pilot A. Traylor and Respondent's Director of Operations, C. Speidel before the mid-October 2009 Bermuda charter flight flown by the Complainant and K. Starling. The topic of discussions was the continuation of the Complainant as co-pilot for IVC's BeechJet 400XP, N61VC. K. Starling declined to put the expressed concerns in writing at that time. K. Starling had recommended earlier to H. Howerton that the Complainant be replaced as co-pilot of IVC's BeechJet 400XP, N61VC, at the end of the current flight period and not before the next annual flight simulator training sessions were due because of the cost of the annually required flight simulation training program.

R. Olsen made the decision to remove the Complainant from assignments to IVC's BeechJet 400XP, N61VC. He had no knowledge of the Complainant's allegations involving K. Starling and had no discussions with the Complainant or others involving concerns over the K. Starling's

flying. R. Olsen stated he considered K. Starling to be one of the key factors for the success of the IVC – Respondent charter management agreement. H. Howerton testified that K. Starling was highly respected and IVC wanted to keep K. Starling on as their pilot should the charter management agreement be terminated by either IVC or Respondent.

Director of Operations C. Speidel held the employment termination meeting with the Complainant on November 30, 2009. During that meeting the Complainant was told that IVC did not want him to fly their charter flights anymore; that he was being removed from BeechJet 400XP, N61VC; and that there were no available pilot positions with Respondent at that time. The Complainant was made aware that he could return to a pilot position with Respondent should one become available in the future. Beginning in 2010, numerous pilot openings with Respondent were known to the Complainant but the Complainant chose not to apply for any of the advertised pilot positions.

Respondent's pilot S. Davenport became co-pilot for BeechJet 400XP, N61VC as replacement for the Complainant. When IVC sold BeechJet 400XP, N61VC, the employment of both K. Starling and S. Davenport by Respondent was terminated.

After deliberation on the credible evidence of record this presiding Judge finds that Respondent has established by clear and convincing evidence that it did terminate the Complainant's employment on November 30, 2009 for reasons unrelated to safety concerns alleged by the Complainant in his January 19, 2010 AIR-21 complaint; and that the Respondent would have terminated the Complainant on November 30, 2009, even if he had never engaged in the reporting activity alleged as protected activity under AIR-21. Accordingly, the Complainant is not entitled to relief under AIR-21 even if he had established all the required initial elements of his AIR-21 complaint by a preponderance of the evidence.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After deliberation on the credible evidence of record and argument of the Parties, this presiding Judge enters the following Findings of Fact and Conclusions of Law –

1. The Complainant was hired by Landmark Aviation May 2008.
2. The Complainant completed Part 135 Competency Checks satisfactorily on June 6, 2008, November 28, 2008 and June 2, 2009.
3. Both Complainant and K.R. Starling completed a training course together at CAE SimuFlight on November 1, 2008.
4. On June 10, 2009 Landmark Aviation performed a "Performance Evaluation" on Complainant.
5. Landmark Aviation possesses no written records that Complainant was unprofessional to any employee, including K. Starling.
6. Landmark Aviation possesses no written record that Complainant had "poor interpersonal skills."
7. On January 29, 2010, Landmark Aviation filed their Answer to Complainant's AIR-21 Complaint and attached thereto their only Exhibit "A" being the September 17, 2009

email from Landmark Aviation Check Airman, R. Ellsworth, to Landmark Aviation's Chief Pilot, A. Traylor.

8. By letter dated November 30, 2009, Complainant was terminated from Landmark Aviation.
9. The Complainant was informed at the time of his termination that he would be eligible for re-hire should an opportunity become available.
10. The Complainant was aware of eight or nine jobs that Landmark Aviation advertised following Complainant's termination.
11. The Complainant did not apply for any jobs with Landmark Aviation following his termination.
12. There are no air traffic control records of a Landmark pilot deviation, nor records of any incidents or accidents involving Landmark's and/or Complainant's operations of the BE-400 aircraft.
13. There is no evidence that the use of the half-bank turn resulted in a potential or actual hazard to persons or property of another, was created, or was caused to be made by Landmark Aviation or K. Starling.
14. Landmark does not address a pilot's use of half-bank as it is considered a pilot "technique" rather than a required or prohibited procedure by the FAA.
15. Respondent, Landmark Aviation, operates an air charter operation and is an air carrier within the meaning of 49 U.S.C. §42121 and 49 U.S.C. §40102(a)(2).
16. Complainant was employed by Respondent as a pilot and was an employee within the meaning of 49 U.S.C. §42121.
17. The provisions of 49 U.S.C. §42121 (AIR-21) apply in this case.
18. International Veneer Corporation was the owner of a specific BeachJet BE-400A aircraft in 2009, tail number 61VC.
19. International Veneer Corporation is not a named respondent in this case.
20. International Veneer Corporation and Respondent entered into an operational contract whereby Respondent was to provide flight crews for operation of the specific BeachJet BE-400A aircraft during charter operations and Respondent was to have operational control during flight operations of the specific BeachJet BE-400A aircraft.
21. The Complainant has established by a preponderance of the evidence that he reported to Respondent's Chief Pilot A. Traylor that K. Starling engaged in half-bank turns during take-off climbs and in the terminal control area.
22. The Complainant failed to establish by a preponderance of the evidence that he reported to Respondent's Chief Pilot that K. Starling violated speed crossing restrictions repeatedly.
23. The Complainant failed to establish by a preponderance of the evidence that he reported to Respondent's Chief Pilot that K. Starling turned off navigational lights in an inappropriate manner.
24. The Complainant failed to establish by a preponderance that he had a subjective belief that the use of half-bank turns by K. Starling during take-off climbs and in the terminal control area was unsafe operation of the BeechJet 400A, N61VC by K. Starling.
25. The Complainant failed to establish by a preponderance of the evidence that the belief the use of half-bank turns by K. Starling during take-off climbs and in the terminal control area was unsafe operation of the BeechJet 400A, N61VC, by K. Starling, was an objectively reasonable belief.

26. The Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity under AIR-21 during the period of May to November 2009.
27. The Complainant failed to establish by a preponderance of the evidence that he engaged in protected activity under AIR-21 during the period of May to November 2009 that was a contributing factor in the termination of Complainant's employment on November 30, 2009.
28. The Respondent established by clear and convincing evidence that it did terminate, and would have terminated, the Complainant's employment, notwithstanding his 2009 conversations with Chief Pilot A. Traylor involving K. Starling.

### **ORDER**

It is hereby Ordered that the Complainant's **claim under AIR-21 is DENIED** and the **complaint filed on January 10, 2010 is DISMISSED.**

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia

**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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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). 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 filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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).

## STANDARD ABBREVIATIONS

AFM	Aircraft Flight Manual
AHRS	Altitude and Heading Reference System
ATC	Air Traffic Control
CAT I altitude)	instrument landing Category I flight conditions (2,000 feet visibility at 200 foot
CAT II altitude)	instrument landing Category II flight conditions (1,500 feet visibility at 100 foot
CAT III ground level)	instrument landing Category III flight conditions (700 feet visibility at
CRM	Crew Resource Management
FAA	Federal Aviation Administration
FAF	Final Approach Fix
FAR	Federal Aeronautics Regulations
FB	Fly-By
FMC	Flight Management Computer
FMS	Flight Management System
FO	Fly-Over
IAF	Initial Approach Fix
IAP	Instrument Approach Procedures
IFR	Instrument Flight Rules
ILS	Instrument Landing System
IMC	Instrument Meteorological Conditions
MAP	Missed Approach Point
MDA	Minimum Descent Altitude
MEA	Minimum Enroute Altitude
MEL	Minimum Equipment List
MFD	Multi-Function Display
MSA	Minimum Safe Altitude
NAV	Navigation
OpsSpecs	Operations Specifications
PF	Pilot Flying
PFD	Primary Flight Display
PIC	Pilot-In-Command
POH	Pilot's Operating Handbook
PM	Pilot Monitoring
PRIA	Pilot Records Improvement Act
PT	Procedure Turn

RVR	Runway Visual Range
SIAPS	Standard Instrument Approach Procedures
SIC	Second-In-Command
SOP	Standard Operating Procedure
VFR	Visual Flight Rules
VPA	Vertical Path Angle
WP	Way-Point